



Bundesministerium  
der Verteidigung



# LAW OF ARMED CONFLICT - MANUAL -

# **Joint Service Regulation (ZDv)**

## **15/2**

### **Law of Armed Conflict**

#### **– Manual –**

**May 2013**

**DSK AV230100262**

I hereby issue the Joint Service Regulation on

**Law of Armed Conflict**

**– Manual –**

**Joint Service Regulation (ZDv) 15/2**

Dr. Thomas de Maizière

This regulation supersedes Joint Service Regulation (ZDv) 15/2 'Humanitarian Law in Armed Conflicts – Manual' issued August 1992, which will be destroyed.

This Joint Service Regulation (ZDv) must be endorsed by 1 June 2016. Otherwise it will cease to have effect.

Proponent: **Directorate-General for Legal Affairs (R I 3)**

## Preliminary Remarks

1. This service regulation is a **manual** for military and civilian personnel at all command levels and covers the law of armed conflict. It describes the law of armed conflict from the point of view of the Federal Ministry of Defence at the time this regulation is issued and is an important basis for the instruction of military personnel in international law, which is prescribed in Section 33 of the Legal Status of Military Personnel Act, in courses, exercises and general military training. Future developments of the law and of pre-deployment training for specific operations will be taken into appropriate account by supplements and special information material.
2. The text of the manual is based on important documents of international law. Citations in the text refer to the annex of source documents. Numbers in **bold type** indicate the reference numbers of these texts. These are followed by numbers and letters indicating individual provisions.<sup>1</sup>
3. The publication entitled 'Documents on International Humanitarian Law' (Sankt Augustin: Academia Verlag, 2012; 2nd edition), which is published by the Federal Foreign Office, the German Red Cross and the Federal Ministry of Defence, is a comprehensive compilation of texts on the law of armed conflict in both German and English.
4. Proposals for amendments to this service regulation must use the form provided in the Bundeswehr form database and must be submitted to

Armed Forces Office  
Grp DvZentraleBw  
Kommerner Straße 188  
53879 Euskirchen

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<sup>1</sup> E.g. **16a** 46 = Article 46 of the (Hague) Regulations Concerning the Laws and Customs of War on Land.

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# Chapter 1

## Historical Development and Legal Basis

### I. Introduction

#### 1. General

**101.** The United Nations was founded, in the words of its Charter, ‘to save succeeding generations from the scourge of war.’ Modern international law does not grant nations a right to war. There is, on the contrary, a **duty to maintain peace**.

The threat or use of force is inconsistent with the aims of the United Nations, especially the maintenance of international peace and security (**34 1 no.1**). Member States, which have included Germany since 18 September 1973<sup>1</sup>, may not resort to it (**prohibition of the use of force, 34 2 no.4**). As a rule, member States may resort to force only

- to defend against an armed attack in the exercise of their inherent right of individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations, or
- as part of military sanctions in accordance with Chapter VII of the UN Charter, authorised by the United Nations Security Council in the event of a threat to the peace, breach of the peace, or act of aggression. In addition to the prohibition of the use of force there is a **commitment to the peaceful settlement of disputes (34 2 no.3)**.

Peacetime law (**34 2 no.4**, ‘general prohibition of the use of force’) is thus the rule, the law of armed conflict (LOAC) the exception.

**102.** **LOAC** is an evolution of the traditional law of war (*ius in bello*). The rules of LOAC must be applied in armed conflicts<sup>2</sup> even if these are not perceived by the Parties involved as wars in the traditional sense. The term ‘law of armed conflict’ is a reflection of this development. The rules of LOAC must be observed by Parties to a conflict and will be

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<sup>1</sup> Resolution 3050 adopted by the UN General Assembly on 18 September 1973.

<sup>2</sup> In order to ensure the applicability of pertinent provisions of international law to all international conflicts involving armed force irrespective of the existence of a ‘state of war’ (in the traditional sense, this typically required a declaration of war), the term ‘armed conflict’ has become the term of choice in codified international law after World War II.

applicable irrespective of an explicit declaration of war and regardless of which Party is responsible for the outbreak of the armed conflict.

## **2. The Purpose of the Law of Armed Conflict**

**103.** The purpose of LOAC is to limit the suffering caused by war. The fundamental principle underlying all provisions of LOAC is the balance of two competing interests: on the one hand the considerations of military necessity and on the other the protection of the principle of humanity in armed conflicts.

**104.** LOAC restricts the use of force in the fight against an adversary. It comprises the entire set of rules established to protect humans in armed conflicts. It contains provisions on the protection of the civilian population, the wounded, and prisoners of war (individual protection) and details the permissible methods and means of warfare. It determines both the relationship between the Parties to a conflict and their relationship with neutral States (law of neutrality). Certain provisions of LOAC refer to the relationship between the State and its citizens. Apart from rules that apply to all types of warfare, there are special laws of land, aerial, and naval warfare as well as rules for the protection of cultural property.

## **3. Relationship between the Law of Armed Conflict and International Protection of Human Rights in Armed Conflicts**

**105.** The question of the relationship between LOAC and the international protection of human rights in armed conflicts has not been finally settled. Opinions on this matter range from the complete separation of these two branches of law and thus the exclusive applicability of LOAC in armed conflicts, to convergence. Both LOAC and human rights law seek to protect the individual, yet under different circumstances and in different ways. While LOAC centres on the situation of armed conflicts, the international protection of human rights first and foremost aims at protecting the individual from government abuse in times of peace. Human rights and LOAC thus complement each other in many ways. The rules of LOAC are more specific, however, and for soldiers take priority in armed conflicts (*lex specialis* principle). This is also supported by the relevant opinions of the International Court of Justice (ICJ). Human rights standards that are applicable in an individual mission

according to specific multinational or national contexts<sup>1</sup> will be specified for each mission so that legal certainty is ensured for all soldiers of the Bundeswehr.

## II. Historical Development

**106.** Throughout the epochs, the development of LOAC has been influenced by religious concepts and philosophical ideas. Customary laws of war were among the first rules of international law to ever exist.

**107.** Some rules that imposed restrictions on warfare and the means and methods applied can be traced back to ancient times.

The **Sumerians** regarded war as a state governed by law that was started with a declaration of war and terminated by a peace treaty. War was subject to rules that for example guaranteed immunity to enemy negotiators.

**Hammurabi** (1728–1686 BC), King of **Babylon**, wrote the ‘Code of Hammurabi’ to protect the weak against oppression by the strong and ordered that hostages be released on payment of a ransom.

The **Hittite** laws also provided for a declaration of war and a conclusion of peace by treaty and stipulated that inhabitants of an city that had capitulated be spared. The war between Egypt and the Hittites in 1269 BC, for instance, was terminated by a peace treaty.

In the seventh century BC, Cyrus I, King of the **Persians**, ordered the wounded Chaldeans to be treated like his own wounded soldiers.

The **Indian** epic Mahabharata (c. 400 BC) and the Laws of Manu (AD) contain provisions that prohibit the killing of an adversary who is no longer capable of fighting and surrenders, forbid the use of certain weapons such as poisoned or burning arrows and regulate the protection of enemy property and prisoners of war.

In the wars between the Greek city-states, which considered each other as having equal rights, but also in Alexander the Great’s fight against the Persians, the **Greeks** respected the life and personal dignity of war victims as a primary principle. They spared the temples, embassies, priests and envoys of the opposing Party and exchanged prisoners of war. In warfare, for example the poisoning of wells was banned. The **Romans**, too, granted their

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<sup>1</sup> Examples of this are operation plans (OPLAN), Rules of Engagement (ROE) and orders or directives such as fragmentary orders (FRAGO), etc.).

prisoners of war the right to life. Greeks and Romans, however, distinguished between peoples they regarded as their cultural equals and those they considered to be barbarians.

**108. Islam** also recognised essential requirements of humanity. In his orders to his commanders, the first Caliph, Abu Bakr (c. 632), established the following: '(...) let not your victory be stained with the blood of women or children. Destroy no palm-trees, nor burn any fields of corn. Cut down no fruit trees, nor do any mischief to cattle, only such as you kill to eat.' Islamic warfare was often no less cruel than Christian warfare. Under the reign of leaders like Sultan **Saladin** in the twelfth century, however, the laws of war were faithfully observed. Saladin ordered the wounded of both sides to be treated outside Jerusalem and allowed members of the Order of St. John to provide patient care.

**109.** In the **Middle Ages**, feud and war were governed by strict customary laws. The principle of protecting women, children and the aged from hostilities can be traced back to the church father **Augustine**. The enforcement of respect for sacred sites (as part of the Peace of God) entailed a right of refuge in churches (church sanctuary) the observance of which was carefully monitored by the Church. **Knights** fought each other according to certain (unwritten) rules. Such rules of arms were sometimes enforced by arbiters or tribunals of knights. They applied only to knights, however. The enemy was usually regarded as an equal opponent who was to be defeated in an honourable fight. It was unlawful to start a war without a prior declaration.

**110.** Bushido, the medieval code of honour of the **Japanese** warrior class, contains the rule that humaneness must be shown even in battle and towards prisoners of war. In the seventeenth century the military tactician Sorai wrote that whoever killed a prisoner of war should be guilty of manslaughter, whether that prisoner had surrendered or fought 'to the last arrow'.

**111.** In the late Middle Ages, as a result of the decline of chivalry, the invention of firearms, and above all the emergence of **mercenary armies**, the ethics of war deteriorated again. Considerations of chivalry were unknown to these armies. What is more, they made no distinction between combatants and the civilian population. Mercenaries regarded war as a trade which they pursued for private gain.

**112.** At the beginning of the **modern era** the most inhuman methods of warfare were once more employed in **wars of religion**, particularly the Thirty Years' War. The **cruelties**

of this war in particular led to **jurisprudence** addressing the law of armed conflict and establishing a number of principles to be observed by belligerents. In his work '*De iure belli ac pacis*', published in 1625, **Hugo Grotius**, the father of modern international law, pointed out limits to the conduct of war.

**113.** A fundamental change in the attitude of States to warfare came only with the advent of the **Age of Enlightenment** in the eighteenth century. In 1762 **Jean-Jacques Rousseau** declared in his work '*Du contrat social*': 'War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they (...) become once more merely men, whose life no one has any right to take.' It follows from this doctrine, which was soon generally recognised, that military operations may only be directed against armed forces of the enemy, not against the civilian population, which does not take part in the hostilities. These ideas found their expression in several international treaties concluded at that time.

Example: The Treaty of Amity and Commerce concluded between Prussia and the United States on 10 September 1785, whose most important authors are said to have been King Frederick the Great and Benjamin Franklin, contained exemplary and forward-looking provisions, especially regarding the treatment of prisoners of war.

**114.** In the nineteenth century – following some temporary setbacks – humanitarian ideas continued to gain ground. They led to remarkable initiatives by individual persons as well as to the conclusion of numerous international treaties. These treaties imposed restrictions on the means of warfare and the methods of their use.

**115. Florence Nightingale** (born 12 May 1820 in Florence, died 13 August 1910 in London) alleviated the sufferings of the sick and wounded as a nurse in the Crimean War (1853–56). She later contributed greatly towards the renewal of the civil and military nursing systems of her country. In recognition of her life's work, Florence Nightingale was awarded many honours, including the Royal Red Cross (1883) and – as the first woman ever – the Order of Merit (1907).



(Florence Nightingale)

**116. Franz (Francis) Lieber** (a German-American, born 18 March 1798 in Berlin, died 2 October 1872 in New York), professor at the South Carolina College in Columbia, SC, from 1835–56 and from 1857 onwards at the Columbia College in New York, prepared the ‘Instructions for the Government of Armies of the United States in the Field’ or **Lieber Code** when participating in a committee established by the War Department of the United States in December 1862. Following only minor cuts and additions by the other committee members, the draft was approved by President Abraham Lincoln and published on 24 April 1863. The Lieber Code developed into the prototype of a whole series of military manuals used by the armed forces of other nations and had a major influence on the development of international law.



(Franz Lieber)

**117.** The Genevese merchant **Henry Dunant** (born 8 May 1828 in Geneva, died 30 October 1910 in Heiden, Switzerland) had witnessed the plight of 40,000 Austrian, French, and Italian soldiers wounded on the battlefield of **Solferino** in the Second Italian War of Independence in 1859. On his initiative, an appeal to help the wounded of Solferino was published in the *'Journal de Genève'* on 9 July 1859. In 1860/61, Dunant wrote the book 'A Memory of Solferino', 1,600 copies of which were published at his own expense. It became known all over the world. On his initiative, the foundations for the International Committee of the Red Cross (**ICRC**) were laid in Geneva in 1863. Dunant was awarded the Nobel Peace Prize in 1901 and received an honorary medical doctorate in 1903.



(Henry Dunant)

**118.** The **1864 Geneva Convention** for the Amelioration of the Condition of the Wounded in Armies in the Field defined the legal status of medical personnel. It stipulated that wounded enemy soldiers be collected and cared for in the same way as friendly forces. These rules were extended and improved by the **Geneva Convention of 1906**.

**119.** The **St. Petersburg Declaration of 1868** was the first convention to introduce restrictions on the means and methods of combat. It codified the customary principle that the use of weapons that cause unnecessary suffering is prohibited, which is still valid today.

**120.** On the initiative of Russian Tsar Alexander II, an international conference was held in Brussels in 1874 to discuss the Russian draft of a convention on the laws and customs of war. The **Brussels Declaration** approved by the conference on 27 August 1874 provided the first comprehensive codification of the laws and customs of war, but was not put into effect by the States. On the basis of a draft by the Swiss jurist

Gustave Moynier (born 21 September 1826 in Geneva, died 21 August 1910 in Geneva), who served as ICRC President from 1864 to 1910, the **Manual** of the Laws and Customs of War was issued by the Institute of International Law and adopted on 9 September 1880 in Oxford. The Oxford Manual of 1880 and the Brussels Declaration of 1874 are both among the principal foundations underlying the Hague Peace Conferences, which led to the **Regulations Concerning the Laws and Customs of War on Land** of 1899 (**37a**), which was revised in 1907 (**16a**).



(Gustave Moynier)

**121. World War I** (1914–18), which introduced new weapons and entailed an unexpected and unprecedented escalation of combat action, demonstrated how limited the existing laws were.

**122.** In 1923 the **Hague Rules of Aerial Warfare (14)** were prepared, as well as rules concerning the control of radio communication in times of war. Although these were never adopted as a convention, they were influential in the development of a common legal notion.

**123.** The 1925 Geneva Gas Protocol (**10**) prohibited the use of asphyxiating, poisonous or other gases and of bacteriological methods of warfare. By now it has become customary law and is supplemented by the Chemical Weapons Convention (**29**).

**124.** In 1929 the Convention for the Amelioration of the Condition of the **Wounded and Sick** in Armies in the Field (**38**) and the Convention relative to the Treatment of **Prisoners of War (39)** were signed in Geneva, both of which refined the terms of the Geneva Convention of 1906.

**125.** The most significant codifications of LOAC after World War II are the four Geneva Conventions of 12 August 1949 (**1–4**) and their Additional Protocols of 1977 and 2005 (**5–6a**). Further significant conventions concluded to date are in particular the Cultural Property Convention (**24**), the ENMOD Convention (**9**), the CCW Convention (**8**) and its Protocols (**8a-e**), the Chemical Weapons Convention (**29**), the Ottawa Convention on the Prohibition of Anti-personnel Mines (**32**), and the Convention on Cluster Munitions (**51**).

**126.** The first **rules of naval warfare** existed as early as the Middle Ages. These primarily concerned the right to search vessels and their cargo and the right of seizure and changed frequently over time. The treatment of vessels belonging to neutral States was not subject to uniform regulations and was often a matter of debate. The Hanseatic League used its almost complete naval supremacy to enforce embargoes in times of war, which was not only detrimental to the enemy, but also made it impossible for neutral States to exchange goods with it. The interest of neutral States in continuing their maritime trade activities in wartime was only going to prevail over the belligerents' interest of effectively cutting off the enemy from its ship-to-shore logistics if the neutral States were able to secure their position of power. In the eighteenth century, this led to the formation of alliances between neutral States and to the deployment of their naval forces to protect their right to free maritime trade.

**127.** The 1856 **Paris Declaration Respecting Maritime Law (25)** for the first time brought wider recognition to the protection of neutral maritime trade and put an end to the harmful practice of capture. Until then, capture had been an instrument of naval warfare. It was based on the possession of a valid letter of marque authorising its owner to take part in armed hostilities.

**128.** Since the Middle Ages, the granting of letters of marque by great powers to private ship-owners had been widespread practice, and even by the times of Henry VIII there were no warships at all in England that were maintained and equipped by the State. Instead, private persons placed their ships under the command of the royal grand admiral if required. Even under the reign of Queen Elizabeth I, privateers such as Sir Francis Drake were given vessels or money for equipment, which considerably facilitated privateering. Privateer vessels were probably last used in the second half of the nineteenth century, although some non-signatories to the 1856 Paris Declaration did not completely ban capture even later. Today, capture is prohibited by customary law.

**129.** In the past, sanctions in reaction to **violations of LOAC** have primarily been considered the task of competent national authorities. The internationalisation of criminal justice with regard to war crimes is an important recent development. There were calls for the establishment of an international criminal court as early as the nineteenth century. In 1872, **Gustave Moynier** submitted the first formal proposal for the creation of an international criminal court. In that age of nation States and at a time when sovereignty played such an important role, his proposal did not stand a chance, however.

**130.** Especially as a result of the crimes committed during World War II and under the impression of the work of the **International Military Tribunals of Nuremberg and Tokyo**, this idea was revived in the United Nations soon after its foundation. Towards the end of the 20<sup>th</sup> century, there was an increased willingness within the international community to reach friendly solutions at the negotiating table. Severe violations of LOAC in the former Yugoslavia and massacres in Rwanda led the United Nations Security Council to establish two ad hoc tribunals for the former Yugoslavia<sup>1</sup> (1993) and Rwanda<sup>2</sup> (1994) as an enforcement measure in accordance with Chapter VII of the Charter of the United Nations **(34)**. Their creation gave further impetus to the project of a permanent international criminal court. On 15 June 1998 the United Nations Secretary General opened a meeting of States in Rome on the establishment of an international criminal court. This meeting eventually produced the **Rome Statute of the International Criminal Court (ICC)** of 17 July 1998 **(33)**. On 1 July 2002 the Statute of the ICC entered into force. The ICC is a permanent institution based in The Hague (Netherlands). It operates on a complementary basis with the ICJ, which is responsible for settling disputes between States. Among other things, the establishment of the ICC aimed at closing gaps within the existing system regarding the implementation of LOAC. The ICC makes it possible to impose effective criminal sanctions on crimes such as **genocide, crimes against humanity, war crimes** and the **crime of aggression**. For the Court to have jurisdiction over the crime of aggression – an offence the elements of which were not defined until the 2010 Review Conference in Kampala – a confirmatory decision by the assembly of the Parties is required. Such a decision may be made after 1 January 2017 at the earliest and must achieve the majority required for an amendment to the Statute **(33 15 bis para.3, 15 ter para.3)**.

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<sup>1</sup> ICTY, International Criminal Tribunal for the Former Yugoslavia, The Hague (Netherlands).

<sup>2</sup> ICTR, International Criminal Tribunal for Rwanda, Arusha (Tanzania).

In Article 8 of the Rome Statute, violations of LOAC are broken down into 50 individual types of **war crimes** subject to severe penalties. The German **Code of Crimes against International Law (CCAIL)** of 26 June 2002 incorporates, among other things, the crimes defined in the Rome Statute into German substantive criminal law<sup>1</sup>.

**131.** More recent developments in the field of LOAC increasingly include the preparation of legally non-binding compilations of international law applicable in specific international humanitarian contexts by, in particular, universities, institutes, and also the ICRC. In legal instruction courses for soldiers and when using such publications for purposes of legal counselling, it should not be assumed that their contents automatically coincide with the positions of the German Government and/or the Federal Ministry of Defence. The following provides a list of legally non-binding studies and manuals to serve as examples:

- The San Remo Manual on International Law Applicable to Armed Conflicts at Sea published on 12 June 1994 by the International Institute of Humanitarian Law in San Remo aims to provide an up-to-date description of international law applicable to armed conflicts at sea. The Manual and its accompanying commentary contain a small number of provisions that may be regarded as new legal developments. Although it is not legally binding, it has been acknowledged increasingly as a reliable source of applicable legislation in national and international practice.
- In 2005 the ICRC published a comprehensive ‘Study on Customary International Humanitarian Law’. This study evaluates State practice based on national and international sources, material from the ICRC archive and results of expert consultations in order to extrapolate customary rules of LOAC. It is legally non-binding. It remains yet to be seen whether it will come to be regarded as a reliable compilation of customary international humanitarian law.
- The purpose of the ‘Montreux Document on Pertinent Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict’ adopted on 17 September 2008 gives an overview of the obligations under international law of private security and military companies deployed in armed conflicts and formulates recommendations of good practice to aid States involved in the deployment of such companies (i.e. States that commission these companies, States where such companies are deployed, and States in which such

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<sup>1</sup> Refer to Chapter 15 for more information on the CCAIL and the ICC.

companies are based or registered) in taking appropriate measures that allow them to fulfil their obligations under international law.

- Furthermore, in May 2009 the ICRC published an ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities’. This study is legally non-binding and contains recommendations and approaches that are helpful, in particular, in identifying by legal means persons in non-international armed conflicts that may lawfully be engaged in combat.
- On 15 May 2009 the Program on Humanitarian Policy and Conflict Research at Harvard University published the ‘HPCR Manual on International Law Applicable to Air and Missile Warfare’, which was prepared by a group of international experts. The aim of the HPCR Manual and its comprehensive accompanying commentary is to provide an up-to-date description of international law applicable to air and missile warfare. This manual is legally non-binding. It contains numerous provisions that constitute a definite development when compared to the 1923 Hague Rules of Aerial Warfare. Owing to the recency of its publication, there is no telling whether this manual will be recognised in national and international practice as a reliable description of applicable law.
- The Tallinn Manual on the International Law Applicable to Cyber Warfare was published in March 2013. It was prepared on the initiative of the NATO Cooperative Cyber Defence Centre of Excellence by a group of international experts. The authors’ aim is to describe in detail the applicability and application to cyber warfare of the current law of armed conflict and illustrate it with practical examples.

### III. Legal Basis

**132.** The **Hague Conventions** of 1907, which contain provisions particularly with regard to admissible methods and means of warfare, neutrality, and belligerent occupation, are binding not only on the contracting Parties. Their most important parts have been long recognised as customary law. The following documents are particularly relevant to LOAC:

- **Hague Convention (III)** Relative to the Opening of Hostilities **(15)**,
- **Hague Convention (IV)** Respecting the Laws and Customs of War on Land **(16)** and its Annex: **Regulations Concerning the Laws and Customs of War on Land (16a)**,

- **Hague Convention (V)** Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land **(17)**,
- **Hague Convention (VI)** Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities **(18)**,
- **Hague Convention (VII)** Relative to the Conversion of Merchant Ships into Warships **(19)**,
- **Hague Convention (VIII)** Relative to the Laying of Automatic Submarine Contact Mines **(20)**,
- **Hague Convention (IX)** Concerning Bombardment by Naval Forces in Time of War **(21)**,
- **Hague Convention (XI)** Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War **(22)** and
- **Hague Convention (XIII)** Concerning the Rights and Duties of Neutral Powers in Naval War **(23)**.

**133.** The four **Geneva Conventions** of 12 August 1949, which deal particularly with humanitarian aspects of international law in armed conflicts, are internationally binding<sup>1</sup> today and their content has been recognised as customary international law.

- **Geneva Convention (I)** for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field **(1)**,
- **Geneva Convention (II)** for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea **(2)**,
- **Geneva Convention (III)** Relative to the Treatment of Prisoners of War **(3)** and
- **Geneva Convention (IV)** Relative to the Protection of Civilian Persons in Time of War **(4)**.

**134.** In times of international armed conflicts, **Geneva Convention (IV)** protects all persons in the hands of/on the territory occupied by a Party to the conflict unless

- they are already protected under the three remaining 1949 Geneva Conventions,
- they are nationals of that Party to the conflict,
- they are nationals of a State on which the Convention is not binding, or

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<sup>1</sup> At present, 194 States are contracting Parties to these conventions.

- they are nationals of a neutral or co-belligerent State and their own State has normal diplomatic representation in the State in whose hands they are (4 4 paras.1, 2 and 4). The contracting Parties took the view that the special protection afforded by the Geneva Convention (IV) would not be required where the procedures of diplomatic protection continued to be available, that is, where there were relations between a Party to a conflict and neutral or co-belligerent (especially allied) States. In the relations between Parties to a conflict, however, in the majority of cases such diplomatic protection is not available.

Only certain provisions of the Geneva Convention (IV) (4 13–26) have a broader scope of application, protecting the entire population without distinction in order to mitigate conflict-related suffering (4 4 para.3, 13).

**135.** The **Additional Protocols** to the Geneva Conventions, namely

- the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (**Protocol I**), 8 June 1977 – **(5)**,
- the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (**Protocol II**), 8 June 1977 – **(6)**,
- the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (**Protocol III**), 8 December 2005 – **(6a)**,

represent a development of the 1949 Geneva Conventions and of parts of the Hague Regulations of 1907, which primarily deal with the rules of warfare.

**136.** The 1977 Additional Protocols to the Geneva Conventions are still a long way from being recognised worldwide, although they have been ratified by the majority of States. However, fundamental provisions laid down in these Protocols, such as those on methods and means of warfare and the protection of the civilian population against effects of hostilities, should also be regarded as **customary international law**.

**137.** With regard to provisions on attacks, Protocol I expressly states that such provisions apply to **any** act of violence against the adversary, whether in offence or in

defence, within the theatre of war (5 49 paras.1 and 2). They thus also apply in the national territory if it is under the control of the adversary.

**138.** The following list specifies further important treaties that deal with specific issues regarding the methods and means of warfare:

- **St. Petersburg Declaration** Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 29 November / 11 December 1868 – **(12)**,
- **Hague Declaration** (IV:3) Concerning Expanding Bullets (Dum-Dum Bullets), 29 July 1899 – **(13)**,
- **Hague Declaration** (IV:2) Concerning Asphyxiating Gases, 29 July 1899 – **(10a)**,
- Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925 – **Geneva Gas Protocol – (10)**,
- London Procès-Verbal relating to the Rules of **Submarine Warfare**, 6 November 1936 – **(27)**,
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972 – **Biological Weapons Convention – (11)**,
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 10 December 1976 – **ENMOD Convention – (9)**,
- 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, 10 October 1980, as amended on 21 December 2001 – **CCW Convention – (8)**. The rules concerning specific conventional weapons are laid down in the **related Protocols**, namely:
  - + the Protocol on Non-Detectable Fragments, 10 October 1980 – **Protocol I – (8a)**,
  - + the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 – **Protocol II – (8b)**,
  - + the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980 – **Protocol III – (8c)**,
  - + the Protocol on Blinding Laser Weapons, 13 October 1995 – **Protocol IV – (8d)** and
  - + the Protocol on Explosive Remnants of War, 28 November 2003 – **Protocol V – (8e)**.

The amended version of 21 December 2001, which entered into force in Germany on 26 July 2005, extended the scope of application of the Convention and its related Protocols to include non-international armed conflicts.

- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993 – **Chemical Weapons Convention – (29)**,
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 – **Ottawa Convention – (32)**,
- Convention on Cluster Munitions, 30 June 2008 – **Oslo Convention – (51)**.

**139.** The legal protection of certain other rights in armed conflicts was regulated in specific international treaties. The following treaties deal with the protection of cultural property:

- the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 – **Cultural Property Convention – (24)**,
- **Act implementing** the Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict – **(24a)**,
- Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 – **(24b)** and
- **Second Protocol** to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 – **(24c)**.

**140.** If a military operation is not expressly prohibited by international agreements or customary law, it does not automatically follow that it is permissible. The Martens clause, named after Friedrich Martens<sup>1</sup>, must be observed at all times.

(Friedrich Martens)

The **Martens clause** was included in the preambles to both the 1899 Hague Convention respecting the Laws and Customs of War on Land **(37)** and the 1907 Hague Convention (IV) and was confirmed in the 1977 Protocol I as follows:

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<sup>1</sup> Friedrich Martens (born 1845 in Pärnu, died 1909 in Saint Petersburg) served in the Russian Ministry of Foreign Affairs from 1868 to 1872, taught international law at the University of Saint Petersburg from 1872 to 1905 and was a delegate of Tsar Nicholas II at the Hague Peace Conferences (1899 to 1907).

'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from **established custom**, from the **principles of humanity** and from **dictates of public conscience**' (5 1 para.2, see also 6 Preamble para.4, 16 Preamble).

The Martens clause (5 1 para.2) is recognised as customary international law.

#### IV. Military Necessity and Humanity

**141.** According to the principle of military necessity, all military measures are permissible in armed conflict which are required for the successful execution of military operations in order to engage an enemy, provided that these measures are not forbidden by LOAC<sup>1</sup>.

**142.** LOAC is a compromise between military and humanitarian requirements. Its rules take account of both military necessity and the dictates of humanity. Considerations of military necessity can therefore not justify a departure from the rules of humanitarian law; to seek a military advantage using forbidden means is not permissible.

#### V. Commitment to International Law

**143.** The obligations of the Federal Republic of Germany under LOAC are binding not only on its government, but also on every individual. Grave breaches of LOAC applicable to international and non-international armed conflicts are punishable under the **Rome Statute of the International Criminal Court (33)** and the **German Code of Crimes against International Law (35)** (see also Chapter 15).

**144.** According to Article 25 of the German constitution, **the general rules of international law** form part of German federal law. They take precedence over ordinary law and directly create rights and obligations. These general rules of international law include

- provisions that have the nature of **compelling international law (*ius cogens*)**,

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<sup>1</sup> See NATO AAP-06 (2012) – military necessity: the principle whereby a belligerent has the right to apply any measures that are required to bring about the successful conclusion of a military operation and that are not forbidden by the laws of war.

- **customary international law** as well as
- **recognised general principles of law.**

**145.** By definition, *ius cogens* includes peremptory norms of international law which, owing to their fundamental importance, nations may not deviate from, not even by concluding international treaties. For example, the prohibition of genocide, the prohibition of slavery, and the prohibition of torture are generally recognised elements of compelling international law. The ICJ has issued no opinion so far on the inclusion of LOAC. However, it can be assumed that the fundamental rules of LOAC, such as most notably the prohibition of indiscriminate attacks, are part of *ius cogens*.

**146. Customary international law** is created through constant application by States on the basis of a shared legal conviction.

**147. Recognised general principles of law** include in particular those provisions of LOAC which demand conduct as derived from the principles of humanity and from dictates of public conscience (see **5** 1 para. 2, **6** Preamble para. 4).

**148.** The four Geneva Conventions and their Additional Protocols commit all contracting Parties to disseminating the text of the Conventions as widely as possible (**1** 47; **2** 48; **3** 127; **4** 144; **5** 83 para.1; **6** 19; **6a** 7). In particular, this is to be accomplished through **programmes of instruction** for the armed forces and by encouraging the civilian population to study the Conventions (**5** 83 para.1). Considering their responsibility in times of armed conflict, military and civilian authorities must be fully acquainted with the text of the Conventions and their Additional Protocols (**5** 83 para.2). In accordance with Section 33 para.2 of the Legal Status of Military Personnel Act<sup>1</sup>, all military personnel of the Bundeswehr must be instructed on their rights and duties under international law in peacetime and war. The States have undertaken to issue service regulations in accordance with LOAC (**16** 1, **37** 1).

**149.** All military personnel of the Bundeswehr receive **instruction in international law**. It will be given in the units by military **superiors** and **legal advisers** as well as, at the schools and academies of the armed forces, by **legal instructors** and **lecturers**. Responsibility for training the teaching staff rests with the Central Legal Training Institute

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<sup>1</sup> See Joint Service Regulation ZDv 14/5.

of the Bundeswehr at the Leadership Development and Civic Education Centre (*Zentrum Innere Führung*).

**150. Superiors** must ensure that their subordinates are aware of their rights and obligations under international law. In the performance of these tasks, they are supported by legal advisers (5 82). Superiors must prevent and where necessary stop violations of international law and report them to the competent authorities (5 87). The violation of these superior's duties in armed conflicts is subject to special penalties (see 33 28, 35 13–14).

**151. Superiors may issue lawful orders only.** In doing so, superiors must comply with in particular, the rules of international law (Section 10 para.4 of the Legal Status of Military Personnel Act). They will be held accountable for their orders (Section 10 para.5 of the Legal Status of Military Personnel Act).

**152.** It is the natural duty of all Bundeswehr soldiers to comply with the rules of LOAC. Compliance with this duty is always an integral part of military operations (**principle of congruity between the conduct of operations and the law**).

## VI. Tasks of Legal Advisers

**153. Legal advisers** are responsible for the following tasks in particular:

- providing consultations on all matters of LOAC, especially regarding the application of the Geneva Conventions, their Additional Protocols (5 82) and international criminal law,
- providing consultations on all matters of military law,
- checking military orders and directives for legal accuracy,
- providing legal instruction.

**154. Legal advisers** have unrestricted access to the military superiors to whom they are assigned and directly subordinated. These military superiors are only authorised to direct legal advisers in administrative matters, not in the assessment of legal matters. Legal advisers are subject to the professional supervision of their supervising legal advisers and, ultimately, of the Directorate-General for Legal Affairs of the Federal Ministry of Defence.

**155.** If a serious disciplinary offence has been committed, the disciplinary attorneys for the armed forces will conduct disciplinary investigations. The attorneys are responsible for filing charges for serious disciplinary offences with the Bundeswehr disciplinary and complaints courts. This may also include violations of LOAC, which may not only represent criminal acts, but can be of disciplinary relevance as well.

## Chapter 2

### Scope of Application of the Law of Armed Conflict

#### I. Armed Conflicts

**201.** The Law of Armed Conflict (LOAC) is applicable in armed conflicts. It distinguishes between international and non-international armed conflicts (1-4 2 para.1). This distinction affects the applicability of its regulations. Some provisions of LOAC, however, are applicable in **times of peace** as well, such as the provisions concerning the use of **distinctive emblems** (1 44 para.1) and the provisions on the dissemination of humanitarian law. In **armed conflicts**, the provisions of peacetime international law that govern the relations between the Parties will largely be superseded by LOAC. Where peacetime international law is not superseded by LOAC, however, it continues to be applicable, not only between the Parties to the conflict, but in particular between the Parties and neutral States.

**202.** The law of international armed conflict is applicable to conflicts in which armed force is used between two or more States. This also applies to all cases of partial or total military occupation of the territory of one Party to the conflict, even if this occupation meets with no armed resistance (1-4 2; 5 1para.3).

**203.** An **international armed conflict** triggering the applicability of LOAC exists if one State Party to a conflict uses **armed force** against another State. It is irrelevant, however, whether the Parties to the conflict consider themselves to be at war with each other, and how they denote this conflict.

**204.** The application of LOAC is not dependent on a formal **declaration of war**. Formal declarations of war (15 1) are rare these days, which can be explained by the fact that war is prohibited by international law.

Formal declarations of a state of war may be provided for in alliance treaties or national constitutions.

Example: In Germany, the Federal President can issue such a declaration if a state of defence has been determined (Art. 115a paras.1 and 5 of the German constitution).

**205.** Declarations of war can be unconditional or contain an ultimatum with a conditional declaration of war (**15 1**). Formal declarations of war are not required for exercising the right of individual or collective self-defence. Art. 51 of the UN Charter (**34**) prescribes, however, that measures taken in the exercise of this right of self-defence must be immediately reported to the UN Security Council.

**206.** The outbreak of an international armed conflict does not necessarily lead to a severance of diplomatic and consular relations, especially since such a severance would complicate any contact between the Parties to the conflict.

Example: During the Iran-Iraq War, which began in 1980, Iran and Iraq maintained diplomatic relations until 1987.

**207.** Armed conflicts in which peoples fight against **colonial domination** and alien **occupation** or against **racist regimes** in the exercise of their right of self-determination, as enshrined in the UN Charter (**34**) and in the non-binding 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States' in accordance with the UN Charter, may also be governed by the conventions on international armed conflicts (**5 1 para.4**). This requires that the non-State Party to the conflict declare its commitment to apply the rules of international treaties to this conflict (**5 1 para.4, 96 para.3**). Upon ratification of Protocol I, the Federal Republic of Germany declared that it interpreted the rules to mean that declarations of a non-State Party to a conflict only had binding force if all requirements (**5 1 para.4**) were met by that Party (**46**).

**208.** It is irrelevant to the validity of LOAC whether the States and governments involved in the conflict **recognise** each other (**1–2 13 no.3, 3 4 A no.3, 5 43 para.1**).

**209.** In a state of war or any other international armed conflict, the **law of neutrality** may be applied to the relations between Parties to the conflict and States not participating in the conflict (**15 2**).

**210.** A **non-international armed conflict** is a sustained, intense, violent confrontation, normally carried out on national territory, between the existing governmental authority and

an organised armed group as a non-governmental Party to the conflict, or among such armed, organised groups, even when a governmental authority no longer exists (33 8 para.2 lit.d and f; 6 1 para.2; 24 3, 4). Through mere internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, the threshold into non-international armed conflict is not crossed; in these situations LOAC is thus not applicable. LOAC sets **humanitarian minimum standards** in non-international armed conflicts. Article 3, which is common to all four Geneva Conventions (1–4 3), and Protocol II (6) contain **minimum protection standards**, which are complemented by customary international law. The minimum protection standards of the four 1949 Geneva Conventions for non-international armed conflicts (1–4 3) contain a minimum standard in times of international armed conflict as well, which complements the international treaty law and customary international law applicable at such times (see Chapter 13).

**211.** The applicability of LOAC does not depend on whether an armed conflict has been started in violation of a provision of international law, such as the **ban on wars of aggression**. States are bound by the rules of LOAC even if they have fallen victim to a military aggression that violates international law.

**212.** The rules of LOAC are not directly applicable to operations below the threshold of an armed conflict (see No. 210). Still, all Bundeswehr soldiers observe the minimum protection standards of LOAC, in particular with regard to the protection of the civilian population and of civilian objects during military operations, for example during peacekeeping operations authorised by the United Nations Security Council, even if the armed forces employed in these operations are not involved in armed activities in which military force is applied above the threshold of an armed conflict.<sup>1</sup> Additional obligations may exist as laid down in particular in national provisions as well as in Status of Mission Agreements or other agreements with the host nation.

**213.** The traditional concept of '**law of war**', which is still the main source of modern LOAC, must be strictly distinguished from regimes of national '**martial law**', which contains

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<sup>1</sup> The UN Secretary General has recommended that the Security Council emphasise the importance of compliance with LOAC and human rights law in the conduct of all peacekeeping operations and to urge Member States to issue corresponding directives to personnel involved in UN peacekeeping operations and in UN-approved operations conducted under national or regional command (Report S/1999/957 on the protection of civilians in armed conflicts, dated 8 Sept 1999). As regards the employment of UN forces on operations under UN command and control, the UN Secretary General has set out the fundamental principles and rules of LOAC applicable to UN forces in the bulletin on the Observance by United Nations Forces of International Humanitarian Law (ST/SGB/1999/13), dated 6 August 1999.

the relevant national emergency regulations applicable in times of international armed conflict (such as the declaration of a state of defence in accordance with Article 115a ff. of the German constitution).

## II. Military Operations and Attacks

**214.** For the protection of civilians and civilian objects, LOAC contains special regulations that apply to operations of war and attacks. Acts of a State that do not constitute operations of war by the definition below – even if that State is Party to an armed conflict – are not subject to these provisions. The commitment to other rules and regulations of LOAC and international law naturally remains unaffected.

The term '**operations of war**' refers to all acts committed by military means by one Party to a conflict against another Party, as well as to any threat or actual execution of military operations.

**215.** 'Attack' means acts of violence against the adversary, whether in offence or in defence (5 49 para.1).

## III. Localities and Zones under Special Protection

**216.** **Demilitarised zones** agreed between Parties to a conflict (5 60) and **neutralised zones** (4 15) as well as **hospital localities**, **hospital zones** and **safety zones** (1 23; 4 14) are excluded from the theatre of war, even if they belong to the territory of the Parties to the conflict.

**217.** **Non-defended localities** (16a 25; 5 59) are part of the theatre of war, but enjoy special protection.

**218.** In international law, a zone in which actual fighting takes place is designated as **theatre of war** (16a 39; 17 12), **battle zone** (4 15, 20; 5 33) or **area of operations** (16a 29). The following areas in particular may not be used as **areas of operation**:

- areas belonging to **neutral** States that are not Parties to the conflict,
- neutralised zones in armed conflicts and
- permanently neutralised zones.

**219.** Neutralised zones (4 15) in armed conflicts are areas within battle zones in which, owing to contractual agreements between the Parties to the conflict, no military operations may take place, even if the State whose jurisdiction they belong to is a Party to the conflict.

**220. Neutralised zones** in armed conflicts shall be distinguished from cases where the **permanent neutrality of specific zones** is agreed on, in consequence of which no military operations may be conducted in these zones. The obligations arising from such a contract on neutralisation are only binding on the contracting Parties, which do not have to correspond to the Parties to the conflict.

Examples:

- Protocol to the Treaty concerning the Permanent Neutrality and Operation of the **Panama Canal**<sup>1</sup> of 7 September 1977, which has been in force in Germany since 9 February 1988<sup>2</sup>,
- **Spitsbergen**<sup>3</sup> Treaty of 9 February 1920, which has again become applicable to Germany<sup>4</sup>,
- Convention relating to the Non-Fortification and Neutralisation of the **Åland Islands**<sup>5</sup>, 20 October 1921, which has again become applicable to Germany<sup>6</sup>,
- Constantinople Convention of the **Suez Canal**<sup>7</sup>, signed on 29 October 1888, which has again become applicable to Germany<sup>8</sup> and
- **Antarctic** Treaty of 1 December 1959<sup>9</sup>, which has been in force in Germany since 5 February 1979<sup>10</sup>.

#### IV. The End of Hostilities

**221.** The **end of active hostilities** by itself does not terminate an international armed conflict. **Hostilities can be stopped temporarily** or permanently, conditionally or

<sup>1</sup> German Federal Law Gazette 1988 II p. 300.

<sup>2</sup> German Federal Law Gazette 1988 II p. 293.

<sup>3</sup> German Reich Law Gazette 1925 II p. 763, 951.

<sup>4</sup> German Federal Law Gazette 1953 II p. 117.

<sup>5</sup> German Foreign Office Treaty Collection AA Vol. 29 A p. 374.

<sup>6</sup> German Federal Law Gazette 1953 II p. 117.

<sup>7</sup> German Foreign Office Treaty Collection AA Vol. 27 A p. 327.

<sup>8</sup> German Federal Law Gazette 1953 II p. 117.

<sup>9</sup> German Federal Law Gazette 1978 II p. 1517.

<sup>10</sup> German Federal Law Gazette 1979 II p. 420.

unconditionally, in general or locally, unilaterally or multilaterally. Even in case of an ongoing military occupation, the law of international armed conflict is applicable.

Example: After the de facto end of fighting in Europe in May 1945, the United States declared the official end of hostilities on 31 December 1946.

Applicability of some of the Conventions **(1–5)** within the territory of the Parties to a conflict, for instance, ceases with the general end of hostilities, whereas in the case of occupied territory, it only ends when the occupation is terminated. Persons whose final release, repatriation or re-establishment takes place at a later date continue to benefit until their final release, repatriation or re-establishment from the protection of the relevant conventions **(5 3)**.

**222.** The state of war<sup>1</sup> ends only with the **conclusion of peace**, unless the state of war is terminated in another way.

Example: No formal peace treaty was concluded with Germany after World War II. The end of the state of war with Germany was formally declared by France (9 July 1951), Britain (9 July 1951), the United States (24 October 1951), and the Soviet Union (25 January 1955). Similar declarations were made by Germany's other former adversaries.

### 1. Armistice and Suspension of Fire

**223.** An **armistice** agreement usually serves to widely suspend hostilities between the Parties to the conflict and to pave the way for peace negotiations. An armistice agreement is thus commonly characterised by the intention to provide an opportunity for preparing the end of an armed conflict.

Example: The 1918 armistice of Compiègne was a prerequisite for the start of negotiations, which finally led to the Treaty of Versailles in 1919.

An armistice may be local and temporary (**16a 36, 37**). After 1945 there have been several cases where an armistice was not followed by a peace treaty.

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<sup>1</sup> In order to ensure the applicability of pertinent provisions of international law to all inter-state conflicts involving armed force irrespective of the existence of a 'state of war' (in the traditional sense, this typically required a declaration of war), the term 'armed conflict' has become the term of choice in codified international law after World War II.

Example: In 1953, the Korean War was ended by an armistice signed at Panmunjom, with no peace treaty having been concluded since.

**224.** If it is assumed that the armistice is intended to result in a permanent end to hostilities, the prohibition of the use of force (**34 2 no.4**) laid down in the UN Charter must be observed during the period of transition as well. In contrast to what is stipulated in the Regulations concerning the Laws and Customs of War on Land (**16a 36**), the Parties to a conflict may not resume hostilities at any time unless the exercise of their right to self-defence (**34 51**) makes it absolutely necessary.

**225.** The terms of the armistice treaty must be observed rigorously by the Parties to a conflict. It is not permissible to carry out any military operations that give one Party an advantage over another. To what extent this applies to other measures taken during the armistice depends on the agreement concluded. If the agreement does not contain any further terms (**16a 39**), activities such as digging trenches, supplying ammunition, and bringing up reinforcements are permissible. At all events it is forbidden during an armistice to move forward forces that are in contact with the enemy or to employ reconnaissance patrols.

**226.** Any serious **violation of the armistice** by one of the Parties gives the other Party the right of denouncing it and even, in cases of urgency and if the right of self-defence applies (**34 51**), of recommencing hostilities immediately (**16a 40**).

**227.** A violation of the terms of the armistice by **private persons** acting on their own initiative whose conduct is not attributable to any of the conflict Parties does not entitle the injured Party to denounce the armistice but only to demand the punishment of the offenders and compensation for the losses sustained (**16a 41**).

**228.** The **area of application** of a **local armistice** must be defined as precisely as possible. If, for instance, wounded persons are recovered, it must be clear if and up to what line bombardments remain permissible in rear areas. Sometimes it will also be necessary to regulate the use of airspace and the passage of vessels.

**229.** An armistice must be **made public** unambiguously and as quickly as possible. Fighting must be suspended immediately after the announcement or on the agreed date (**16a 38**).

**230.** The terms of an armistice must not deviate from the provisions of the Geneva Conventions to the detriment of protected persons (1–3 6; 4 7).

**231.** A **suspension of fire** is defined as a temporary interruption of hostilities limited to a specific area, which is usually agreed upon between local commanders. It usually serves humanitarian purposes, in particular the search for and recovery of the wounded and shipwrecked, the provision of first aid to such persons, and the evacuation of civilians (1 15; 2 18; 4 17); it is not intended to lead to a termination of the armed conflict, however. The regulations governing armistices (16a 36–41) are applied correspondingly.

## 2. Capitulation

**232.** A **capitulation** is a unilateral declaration or multilateral agreement to permanently end all hostilities and generally has a submissive character for one side of the conflict.

There are conditional and unconditional capitulations. They must take into account the rules of military honour (16a 35 para.1). An unconditional capitulation means that the capitulating forces are not granted any special rights, such as a withdrawal with arms.

**233.** The capitulation may be a **total capitulation** applying to all armed forces of a State, or a **partial capitulation** limited to specific units or theatres of war.

**234.** It is not States that capitulate, but armed forces. Under customary international law, every military commander is entitled to declare or accept a capitulation **for his/her respective area of command**. Non-military issues cannot be solved in this manner, however. The capitulation and its acceptance are binding on the States involved in the conflict. Every State may, however, call its own military commanders to account if they have violated their duties.

**235.** The terms of a capitulation must be scrupulously observed by the Parties to the conflict (16a 35 para.2). Persons who breach the terms of the capitulation may be called to account by the adversary.

### 3. End of the Conflict and Conclusion of Peace

**236.** While a suspension of fire, an armistice or a capitulation may only lead to a suspension or temporary cessation of hostilities, it is the **conclusion of peace** that finalises the **end of the international armed conflict**.

**237.** Peace is generally concluded by a **peace treaty**.

Example: In 1979, Israel and Egypt concluded a peace treaty, Article 1 para.1 of which states: 'The state of war between the Parties will be terminated and peace will be established between them upon the exchange of instruments of ratification of this Treaty'.

A peace treaty may only be concluded by Heads of States or explicitly authorised **representatives of the government** of a State.

**238.** A peace treaty usually includes provisions on the following specific areas:

- final cessation of all hostilities,
- re-establishment of peaceful relations with the adversary,
- return to applicability of pre-war international treaties,
- settlement of disputes that led to the outbreak of the armed conflict,
- resolution of territorial issues,
- arms restrictions or disarmament duties,
- repatriation of prisoners of war and
- compensation for war losses.

## Chapter 3

### Combatants and Other Persons in Armed Conflicts

#### I. General

**301.** In international armed conflicts, the law of armed conflict (LOAC) distinguishes first and foremost between combatants and civilians. Only combatants are entitled by LOAC to participate directly in hostilities (5 43 para.2).

**302.** According to LOAC the combatant status only exists in **international armed conflicts**.

**303.** While combatants are permissible military objectives, and thus may be attacked, it is not allowed to attack civilians (5 48, 51 para.2). Civilians must to the maximum extent feasible be protected against the effects of hostilities (5 51, 57), unless and for such time as they take a direct part in hostilities. If the latter is the case, they lose their protection (5 51 para.3).

**304.** Therefore, combatants must always be **distinguishable** from the civilian population by their uniform or another permanent distinctive emblem recognisable at a distance (3 4 A no.2; 16a 1 no.2). Combatant and civilian status are also referred to as primary status.

**305.** Whereas combatants may not be punished for the mere participation in hostilities (immunity of combatants, 5 43 para.2), **civilians** who directly participate in hostilities must expect to be prosecuted for their actions<sup>1</sup>.

**306.** In the case of **capture** by an adverse Party to the conflict, LOAC stipulates that **combatants** in international armed conflicts be granted **prisoner-of-war status** (secondary status; 3 4 A no.1–6; 16a 3). It is also possible for other persons to be granted the prisoner-of-war status in case of capture, such as members of civilian components or

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<sup>1</sup> E.g. manslaughter, assault, damage to property damage, etc.

crews of merchant vessels as well as civil aircraft of one of the Parties; see also Nos. 335 ff. and Chapter 7.

<b>II. Armed Forces, Combatants and Combatant Status</b>
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### 1. Regular Armed Forces

**307.** The members of the armed forces of a Party to a conflict (with the exception of medical and religious personnel) are combatants, which means they have the right to participate directly in hostilities (**5 43 para.2**). The **armed forces** of a Party to a conflict consist – according to the broad understanding of Additional Protocol I to the Geneva Conventions – of all organised armed forces, groups and units that are under a command responsible to that Party for the conduct of its subordinates. This applies regardless of whether the government of a Party is recognised by the adverse Party (**5 43 para.1**). ‘Regular armed forces’ can also be the armed forces of such governments (**3 4 A no.3**). According to modern international law the term ‘armed forces’ in the wider sense (**5 43 para.1**) comprises, apart from regular armed forces, all formations that constitute the armed instrument of a Party to a conflict, regardless of whether these form part of the regular forces of a State or not (**3 4 A no.1–3 and 6**); **5 43, 50 para.1**).

**308.** Additional Protocol I (**5**) complements the provisions of the Regulations concerning the Laws and Customs of War on Land (**16a**) and of the Third Geneva Convention (**3**). The latter documents made a conceptual distinction between ‘regular armed forces’, that is members of the armed forces of a Party to the conflict, and members of militias as well as volunteer corps including organised resistance movements<sup>1</sup>.

**309.** Armed forces must be subject to an internal disciplinary system that enforces compliance with the rules of international law applicable to armed conflicts (**5 43 para.1**).

**310.** International law does not specify which persons belong to the regular forces of a Party to a conflict. It leaves this decision to national authorities and subsequently treats it as a legal fact.

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<sup>1</sup> As a result of lessons learned in World War II, these were in the 1949 Third Geneva Convention placed on the same footing as militias and volunteer corps, which were already governed by the Regulations concerning the Laws and Customs of War on Land.

**311.** In the Federal Republic of Germany, the organisational decision on who is a **member of the armed forces** within the meaning of international law was taken with the **Legal Status of Military Personnel Act (Soldatengesetz)**.<sup>1</sup>

**312.** All members of the armed forces of a Party to a conflict (other than medical and religious personnel) are considered combatants, and have the right to participate directly in hostilities (5 43 para.2).

## **2. Other Members of the Armed Forces**

**313.** Whenever a Party to a conflict incorporates a paramilitary or armed **law enforcement agency** into its armed forces it must notify the other Parties to the conflict (5 43 para.3); the combatant status of these personnel is thus guaranteed in accordance with international law. Currently, Germany is not making use of this option.<sup>2</sup>

**314.** Members of **militias** and **volunteer corps** that **form part of** the armed forces are combatants, too (3 4 A no.1). They must wear a permanent **distinctive sign** recognisable at a distance and carry their arms openly.

**315.** Moreover, combatants are members of **militias and volunteer corps**, including **organised resistance movements**, that do not form part of the (regular) armed forces but **belong to a Party to the conflict**, provided these militias and volunteer corps

- are commanded by a person responsible for his or her subordinates,
- have a fixed distinctive sign recognisable at a distance,
- carry their arms openly and
- are fighting in accordance with the laws and customs of war (3 4 A no.2).

**316.** Situations in which the law of international armed conflict is applicable include armed conflicts which peoples are fighting against colonial domination and alien occupation as well as against racist regimes in the exercise of their right of **self-**

<sup>1</sup> The term 'armed forces' as defined by international law must be distinguished from the term as defined by the law governing the organisation of the state. Soldiers who serve for example in the Federal Ministry of Defence (BMVg) or in subordinate Bundeswehr defence administration agencies are, in accordance with international law, considered to be members of the armed forces as well.

<sup>2</sup> Section 64 para.1 no.1 of the Federal Border Guard Act (*Bundesgrenzschutzgesetz*) of 18 August 1972 (German Federal Law Gazette 1972 I 1834) entitled 'Combatant Status' contained the following provision: 'Upon the outbreak of an armed conflict the Federal Border Guard Commands, all Federal Border Guard units and the Federal Border Guard School shall become part of the armed forces of the Federal Republic of Germany.' This provision was abolished in the amendment to the Act dated 19 October 1994 (German Federal Law Gazette 1994 I 2978).

**determination** (5 1 para.4). It thus follows that such peoples as Parties to a conflict also possess armed forces which are awarded the status of combatants in their struggle for the right of self-determination, provided they observe the following minimum rules: in such **struggles for liberation** and in **occupied territories** situations may occur in which, owing to the nature of the hostilities, combatants (especially guerrilla fighters) cannot distinguish themselves from the civilian population; they retain their status as combatants, however, provided that

- they carry their arms openly during all military operations and
- they carry their arms openly during such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they are to participate (5 44 para.3 sent.2).

According to the German understanding, the term ‘military deployment’ in this context refers to any movement towards the point from which an attack is to be launched (46).

These criteria are, as a rule (5 44 para.3 sent.2), only applicable in **occupied territories** and in **struggles for liberation** (5 1 para.4, 96 para.3). The Federal Republic of Germany – as many other States – has made a declaration to this effect upon ratification of the Additional Protocols (46).

**317.** Combatants are usually part of the armed forces, but in the case of a *levée en masse* they can also be found **outside** the armed forces. The *levée en masse* constitutes the only situation in international armed conflicts in which LOAC does not make the lawful direct participation of persons in hostilities subject to an authorisation by one Party to the conflict, but on the autonomous decision by these persons.

**318.** A *levée en masse* occurs when the inhabitants of a territory that has not yet been occupied, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to form armed forces. It forms part of the combatants, must carry arms openly and respect the laws and customs of war during hostilities (16a 2; 3 4 A no.6). A *levée en masse* is tactically bound to the area of the popular uprising and limited to the period of the invasion by the enemy.

### 3. Combatant Privilege and Immunity of Combatants

**319.** As regards international armed conflicts, LOAC provides for lawful and direct participation of persons in hostilities only when they are **authorised by a Party to the conflict**; such authorisation is the legal bond between the Party to a conflict and the body authorised by it to fight, namely the combatants. The authorisation to participate directly in hostilities is also referred to as **combatant privilege**.

**320.** Combatants are permitted to engage lawful military objectives in armed conflicts. This means the **authorisation** to injure or kill persons (adverse combatants and civilians who participate directly in hostilities without being entitled to do so, **5 51 para.3**) as well as to damage, neutralise or destroy objects classified as a military objective (**5 52 para.2 sent. 2**), see also Chapter 4, Nos. 407 ff.).

**321.** According to LOAC, only combatants are entitled to perform harmful acts. If their conduct remains within the limits defined by LOAC, it must be treated by all Parties to the conflict as **lawful**. Combatants may therefore not be punished for their mere participation in lawful military operations (combatant immunity). This also applies if the State, whose combatants they were, ceases to exist. Harmful acts directed against personnel and objects of the adversary and conducted on behalf of a subject of international law (a State) which are permissible in armed conflicts would be deemed a prohibited criminal offence in peacetime. Since such acts are permissible in armed conflicts, LOAC grants the acting organs of the State (combatants) impunity as long as they stay within the predefined legal framework. In particular, they may not commit serious violations of LOAC or war crimes, for example by causing excessive collateral damage among the civilian population during attacks on permissible military objectives (**5 51 para.5 lit.b; 57 para.2 lit.a iii**).

**322.** The combatant status must be distinguished from the **prisoner-of-war status**. In the case of capture by an adverse Party to a conflict, all combatants are, in principle, entitled to prisoner-of-war status (**5 44**); but not all persons who are entitled to prisoner-of-war status are or were combatants (**3 4**).

**323.** Violations of LOAC, however, do not deprive combatants of their right to be considered combatants (**5 44 para.2**). Violations of international law can be prosecuted under the laws of the country of origin, the Detaining Power or in accordance with

international criminal law. No sentence may be passed and no penalty may be executed except pursuant to a conviction. The conviction must be pronounced by a court respecting the generally recognised principles of regular judicial procedure (3 84; 5 75 para.4).

**324.** It is **presumed** that persons who take part in hostilities and fall into the power of an adverse Party are entitled to prisoner-of-war status, if

- they claim prisoner-of-war status,
- they appear to be entitled to such status or
- the Party to which they belong claims such status on their behalf by notification to the Detaining Power or to the Protecting Power (5 45 para.1).

**325.** If any **doubt** arises as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, are entitled to prisoner-of-war status, such persons continue to be treated as prisoners of war until such time as their status has been determined by a competent tribunal of the Detaining Power, such as a court (3 5 para.2); 5 45 para.1 sent.2).

**326.** A combatant who at the time of falling into the hands of the adversary does not comply even with the minimum rules listed under No. 316 forfeits both his combatant and his prisoner-of-war status (5 44 paras.2-4). He or she will, nevertheless, be given protection equivalent in all respects to that accorded to prisoners of war by the Third Convention and by Additional Protocol I. This applies even if such persons are tried for and convicted of offences they have committed.

Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack does not forfeit his or her rights to be considered a combatant and a prisoner of war by virtue of his or her prior activities (5 44 para.5).

**327.** Persons who **claim** to have combatant status may, in case of impending prosecution, seek clarification from a court. A person

- who has fallen into the power of an adverse Party,
- is not held as a prisoner of war and
- is to be tried by that Party for an offence arising out of the hostilities,

has the right to assert his or her entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. This adjudication should occur prior to the trial for the offence (5 45 para.2).

#### 4. Commando Units

**328.** The participation by combatants recognisable as such (by their uniform, insignia of State, etc.) in raids, acts of sabotage, and other attacks carried out by **commando units** in the adversary's hinterland or in forward areas is deemed a lawful military operation. Combatants who commit such acts wearing plain clothes or uniforms of the adversary may face punishment. They are, however, entitled to a regular judicial procedure (3 82 ff; 5 75 para.4). LOAC does not impose a general ban on **covert operations**.

#### 5. Persons *Hors de Combat*

**329.** The right of combatants to conduct hostilities is suspended if and for as long as LOAC grants them special **protection when it places them *hors de combat*** for certain reasons, in particular when they are injured, sick, shipwrecked or were forced to alight on water or captured. In such situations combatants are objectively unable to fight and must thus not be engaged. Nevertheless, wounded combatants are, in principle, allowed to continue to fight, as long as they are not incapacitated (*hors de combat*). Feigning the *hors de combat* status in order to gain an advantage in fighting the adversary constitutes a perfidious act and is hence unlawful.

#### 6. Children

**330.** States such as Germany which have ratified the Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (**40**) must take all feasible measures to ensure that

- persons who have not attained the age of 18 years are not recruited into their armed forces without or against their will and
- members of their armed forces who have not attained the age of 18 years do not participate directly in hostilities.

Germany stipulates a minimum age of 17 years for anyone beginning voluntary military service in its armed forces, subject to the approval of the legal guardians. Persons who

have not attained the age of 18 years may only join the armed forces in order to start military training. Participation in hostilities and military operations is not permissible.

**331.** States that have not ratified the Optional Protocol as well as non-governmental Parties to non-international armed conflicts are obligated to

- take all feasible measures to ensure that children that have not yet attained the age of 15 years do not take a direct part in hostilities;
- ensure that children who have not yet attained the age of 15 years are not drafted or recruited into the armed forces (5 77 para.2); 41 38 paras.2 and 3).

If persons who have attained the age of 15 years but not the age of 18 years are to be drafted into the armed forces, priority must be given to those who are oldest (5 77 para.2); 41 38 para.3).

Conscripting or enlisting children into the armed forces or using them to participate in hostilities is punishable as a war crime regardless of whether the conflict is of an international or non-international character (33 8 para.2 b xxvi, 8 para.2 e vii; 35 8 para.1 no.5). The International Criminal Court does not exercise jurisdiction over crimes committed by persons under the age of 18 (33 26). This does not preclude, however, that persons under the age of 18 are tried by a national court.

## 7. Armed Forces on UN Missions

**332.** The combatant status of members of armed forces will not be affected by their employment in international armed conflicts as part of **United Nations** missions.

<p style="text-align: center;"><b>III. Civilian Components, Crews of Merchant Vessels and Civil Aircraft</b></p>
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### 1. Civilian Components

**333.** Persons who accompany the armed forces without actually being members, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of soldiers are referred to as **civilian components**. They are not combatants but civilians (3 4 A no.4; 5 50 para.2) and thus not entitled to take part in hostilities. Even so, they are granted prisoner-

of-war status if captured by an adverse Party to the conflict. They must be authorised by the armed forces that they accompany to exercise their function, and, for that reason, must be provided with a corresponding identification card.

## **2. Private (Military and Security) Companies**

**334.** The term ‘private military and security companies’ is not legally defined. It is used to refer to a wide range of companies and activities. This is also illustrated by the Montreux Document (see Chapter 1, No. 131), which does not conclusively define military and security services but lists the following in particular:

- armed guarding and protection of persons and objects such as convoys, buildings and squares;
- maintenance and operation of weapon systems;
- guarding of prisoners;
- instruction and training of local armed forces and local security personnel.

In this way, the Montreux Document places activities of a civilian nature and activities of a military nature on the same level. It also contains a list of provisions of international law and recommendations in the form of ‘good practices’ that are relevant to the activities of private military and security companies during armed conflicts. The Montreux Document is a legally non-binding document. The German Government actively supported its development within the consultation process initiated by Switzerland and the International Committee of the Red Cross.

The term private military and security companies, however, should not be extended unduly by indiscriminately labelling every private company that renders simple contractual services a ‘military or security company’ merely on the grounds that a contractual service is provided to security forces or authorities.

The status of staff members of private companies under LOAC and the ensuing legal consequences depend on the concrete situation, taking into account all circumstances of the individual case, notably the type of conflict, the customer and the services rendered. In international armed conflicts either the combatant or the civilian status (including the civilian component status) may apply to company staff members. Usually, however, company staff members will be classified as civilians and combatant status will only apply in exceptional cases. If they are authorised to accompany armed forces but are not

actually members, they are to be deemed **civilian components (3 4 A no.4)**. Whenever companies work on behalf of customers other than the armed forces, be they other civilian government agencies, humanitarian organisations or non-governmental customers such as private companies, only the civilian status can apply to the staff members employed.

Private military and security companies must apply due diligence in adhering to the principles of the Montreux Document in order to avoid infringing the rights of others while safeguarding their customers' interests. In order to ensure that these principles are observed in a constitutional and responsible manner, the International Code of Conduct for Private Security Service Providers (ICoC) was developed in November 2010 to serve as a measure of self-commitment and self-regulation of the signatory companies. The companies that have signed this code of conduct undertake to adhere to relevant LOAC in their activities.

### **3. Crews of Merchant Vessels and Civil Aircraft**

**335.** If captured by an adverse Party to the conflict, crews of merchant vessels that are not part of the armed forces, including masters, pilots and apprentices, as well as crews of civil aircraft of a Party engaged in an international armed conflict have the right to claim **prisoner-of-war status** unless they would benefit from better treatment under other provisions of international law (3 4 A no.5).

**336.** While members of civilian components, of the crews as described above and of non-combatants belonging to armed forces are not entitled to directly participate in hostilities, they are allowed under international law to carry arms in order to defend themselves and others against attacks violating international law (right of self-defence).

## **IV. Medical and Religious Personnel**

**337. Medical and religious personnel are not combatants (5 43 para.2).** They must be **respected and protected in all circumstances (1 24; 2 36)**. Even though medical and religious personnel were already granted special protection by way of a 'neutrality status' in the First Geneva Convention of 22 August 1864 (Articles I–III), they were counted among non-combatants at the Brussels conference of 1874, initially for the purpose of securing them prisoner-of-war status in the case of capture. Finally, however, they were again excluded from the category of non-combatants and given 'neutrality status' during

hostilities as had been granted to them 10 years earlier to ensure the care of the sick and wounded. Although the results of this conference did not enter into force as an international treaty, the provision was confirmed in the Regulations Concerning the Laws and Customs of War on Land of 1907 (**16a** 21).

**338.** If captured, medical and religious personnel do not become prisoners of war and may only be **retained** as long as this is necessary for the care of the prisoners they are charged with. They must, however, receive at least the same legal protection and the benefits as granted by the Third Geneva Convention as a **minimum (3)** and must also be granted all facilities necessary to provide for the medical care of and religious ministrations to prisoners of war (**1** 28, 30; **2** 36, 37; **3** 33).

**339.** Working as part of the armed forces structure (as a chaplain or other public official who was not recruited) does not in itself result in a legal incorporation into the armed forces.<sup>1</sup>

## V. Persons Taking Part in Hostilities without Combatant Status

### 1. Irregulars

**340.** Persons without combatant status taking a direct part in hostilities are sometimes referred to as **irregulars**. Whereas combatants may not be punished for their mere participation in hostilities, civilians without combatant status who directly participate in hostilities must expect to be prosecuted for the offences they commit by doing so.

When and for such time as persons without combatant status take a direct part in hostilities they shall not enjoy the special protection afforded to civilians and thus constitute a legitimate military objective during that time (**5** 51 para.3).

Such persons are entitled, however, to certain fundamental guarantees, which include the right to humane treatment and to a regular trial (**5** 75 para.1).

**341.** Any person without combatant status who has directly taken part in hostilities and is not entitled to prisoner-of-war status, will, if he or she fulfils the nationality criteria (**4** 4), generally be treated as a protected person in accordance with the Fourth Geneva

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<sup>1</sup> In the Federal Republic of Germany, chaplains are not soldiers. They are thus not members of the armed forces as defined by international humanitarian law (**5** 43 para.1); see also Chapter 7, No. 701.

Convention, but may be deprived of certain rights for reasons of State security (4 5 para. 1).

If such a person is not entitled to treatment in accordance with the Fourth Geneva Convention, he or she will still be entitled to humane treatment and certain fundamental guarantees (5 45 para.3, 75; 1–4 3).

In occupied territory, any such person, unless he or she is held in custody as a spy, is also entitled to the rights of communication guaranteed by the Fourth Geneva Convention (5 45 para.3).

## 2. Mercenaries

**342.** A **mercenary** does not have the right to be a combatant or a prisoner of war (5 47 para.1). A mercenary is any person who meets all of the following prerequisites, thus anyone who

- is specially recruited locally or abroad in order to fight in an armed conflict,
- does, in fact, take a direct part in the hostilities,
- is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, 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,
- is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict,
- is not a member of the armed forces of a Party to the conflict and
- has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces (5 47 para.2).

**343.** The International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 (28), which entered into force on 20 September 2001, was signed by Germany on 20 December 1990, but has not yet been ratified. It explicitly leaves the regulations of LOAC regarding the status of combatants or prisoners of war unaffected (28 16). The Convention does not regulate the status of persons, but aims at creating various criminal offences with regard to the recruitment, use, financing and training of mercenaries.

### 3. 'Unlawful' Combatants

**344.** Occasionally, the terms '**unlawful, illegal, illegitimate or unprivileged combatants**' are used. These terms are frequently used for civilians that take a direct part in hostilities without being entitled to do so, or mercenaries. A special category such as this is not, however, recognised by LOAC. In international law, the term combatant refers only to persons who are **entitled and authorised** as agents of the State to take a direct part in hostilities as part of international armed conflicts. If, after capture by the adversary, the status of a person is unclear, his or her status must be determined by a competent authority of the Detaining Power ('competent tribunal') such as a court (see also No. 325).

## VI. Spies

**345.** Spies are persons who, clandestinely or on false pretences, gather or endeavour to gather information in territory controlled by an adversary, unless they are wearing the **uniform** of their armed forces when carrying out this activity. Members of the armed forces of a Party to the conflict recognisable as such who are conducting reconnaissance operations territory controlled by the adversary (e.g. reconnaissance patrols) are not considered to be engaging in espionage (**16a** 29 para.2); **5** 46 2).

**346.** Spies, even if they are members of their armed forces, are not entitled to prisoner-of-war status. If they fall into the hands of the enemy while engaging in espionage, they are liable to punishment unless they rejoined their armed forces prior to being captured (**16a** 29–31; **5** 46 para.1). International law itself does not prohibit espionage. It constitutes, however, a 'risky act' because, although it does not violate international law, it may result in the punishment of the spy.

**347.** If members of the armed forces are **residents** of the territory in which they are gathering information, they are not considered to be engaging in espionage, unless they are acting clandestinely or on false pretences. If the latter is the case, however, they will lose their right to be granted prisoner-of-war status and can be punished if they are captured while engaging in espionage (**16a** 29–31; **5** 46).

**348.** In no circumstances may spies be punished without prior conviction based on regular judicial procedure (**16a** 30; **5** 75 para.4).

## VII. Peculiarities of Aerial and Naval Warfare

**349.** Unlike military ground vehicles, manned military aircraft and vessels are required to bear **external markings** indicating their nationality and military nature. Members of armed forces who do not wear uniforms but who take part in hostilities in military aircraft or vessels marked accordingly to the rules, remain combatants. When falling into the hands of the enemy, they must prove their military status by producing an identity card.

## Chapter 4

### Means and Methods of Warfare

I. General Rules
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#### 1. General Provisions

**401.** Already the 1868 Saint Petersburg Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles (**12**) was based on the consideration of **alleviating as much as possible the calamities of war**. This declaration stipulates that, while it is legitimate to weaken the armed forces of the adversary during war, it is illegitimate to employ arms *‘which uselessly aggravate the sufferings of disabled men, or render their death inevitable.’*

The right of the Parties to an armed conflict to choose means and methods of warfare is not unlimited (**8** Preamble; **5** 35 para.1; **16a** 22).

Notably, it is prohibited to employ methods or means of warfare which are intended or are of a nature or may be expected to cause

- superfluous injury or unnecessary suffering (**12**; **16a** 23 para.1 lit.e; **5** 35 para.2),
- damage **indiscriminately** to military objectives and civilians or civilian objects (**5** 51 para.4 and 5) or
- widespread, long-term and severe damage to the natural environment (**5** 35 para.3, **55** para.1; **9**).

**402.** The employment of methods and means of warfare causes **superfluous injury** or **unnecessary suffering** if the expected impairment does not serve any military purpose or if injuries or suffering are caused by the effects of weapons or projectiles that are not necessary to neutralise the adversary forces.

**403.** The **prohibition of indiscriminate attacks** means that neither the civilian population as such nor individual civilians may be the object of attack and that they must be spared as far as possible. Parties to the conflict must direct their operations only **against military objectives**. Attacks against military objectives must be carried out under

the greatest possible **respect for the civilian population** and individual civilians (5 51 para.1; 6 13). Attacks which may affect the civilian population must be preceded by an effective **warning**, unless circumstances do not permit (16a 26; 5 57 para.2 lit.c). Attacks that do not distinguish between combatants or other persons directly participating in hostilities and the non-participating civilian population, or between civilian objects and military objectives, are thus prohibited (5 48, 51 para.4 and 5; 14 24 No.3).

Prohibited indiscriminate attacks are:

- attacks which are not directed at a specific military objective (5 51 para.4 lit.a),
- attacks which employ a method or means of combat which cannot be directed at a specific military objective (5 51 para.4 lit.b),
- attacks which employ a method or means of combat the intended effects of which cannot be limited to the military objective (5 51 para.4 lit.c),
- attacks by bombardment which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects, such as ‘area bombing’ (5 51 para.5 lit.a) and
- attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of these, which would be excessive in relation to the concrete and direct military advantage anticipated (principle of proportionality) (No. 405; 5 51 para.5 lit.b).

Indiscriminate attacks are punishable as war crimes (33 8 para.2 lit.b i, iv; 35 11 para.1 no.3).

**404.** The **principle of proportionality**<sup>1</sup> as endorsed in the law of armed conflict (LOAC) must be adhered to at all times (cf. No. 403, prohibition of indiscriminate attacks). This means that attacks on military objectives which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of these, which and would be excessive in relation to the concrete and direct military advantage anticipated are prohibited (5 51 para.5 lit.b, 5 para.2 lit.a iii, 57 para.2 lit.b). In accordance with a statement made by the Federal Republic of Germany upon the deposit of the instrument of ratification of the Additional Protocols, a military advantage is the advantage expected to result from the entire attack and not from the individual acts that constitute the

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<sup>1</sup> This principle of LOAC must be strictly distinguished from the general (national) principle of proportionality.

attack (46). This ensures the proper consideration and allocation of responsibility to the appropriate levels within the military hierarchy.

**405.** In the study, development, acquisition or adoption of a **weapon**, means or methods of warfare **new** to a State, the State is under an obligation to determine whether its employment is in compliance with the rules of international law. In particular, it must be determined whether its employment – in some or all circumstances – is in compliance with the rules of international treaty law and customary international law (5 36). For the German armed forces, this is determined by the Federal Ministry of Defence.

## 2. Military Objectives

**406. Attacks**, that is to say any acts of violence against the adversary, whether in offence or in defence (5 49 para.1), must be limited **only** to **military objectives** (5 48, 52 para.1).

**407. Military objectives** are adversary forces and objects that, 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 (5 52 para.2), **unless these objects enjoy special protection under international law**. The term ‘**military advantage**’ refers to the advantage that can be expected of an attack as a whole and not only of specific parts of the attack. If these conditions are met, the following objects specifically are considered military objectives:

- the armed forces and military installations of a Party to a conflict,
- military aircraft, land vehicles and warships,
- buildings and objects for combat service support and
- economic targets such as armaments factories, traffic installations, industrial plants or telecommunication facilities, which contribute effectively to military activities.

Even specific areas can be military objectives (46), provided all conditions are fulfilled (5 52 para.2).

**408. Civilian objects** must not be the object of attack or of reprisals (5 52 para.1). An unlawful attack against civilian objects that are protected as civilian objects by LOAC is punishable as a war crime (33 8 para.2 lit. b ix; 35 11 para.1 no.2). **Civilian objects are**

**all objects which are not military objectives** (5 52 para.1) such as buildings dedicated to religion, education, art, science and charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected and undefended towns, villages or dwellings.

**409.** An object that is normally dedicated to civilian purposes should, **in case of doubt**, be assumed not to be making an effective contribution to military action (5 52 para.3), and therefore be treated as a civilian object.

**410.** Airborne troops during a descent are military objectives (5 42 para.3), while a crew parachuting from an aircraft in distress must not be made the object of attack (5 42 para.1). A member of an aircrew parachuting from an aircraft in distress must be given an opportunity to surrender unless it is apparent that he or she is engaging in a hostile act (5 42 para.2).

**411.** An adversary who is recognised to be ***hors de combat*** may not be made the object of an attack. An attack must be stopped immediately if a person surrenders or is incapacitated by wounds (5 41 para.1). A person is *hors de combat* if he or she is in the power of an adverse Party, clearly expresses an intention to surrender, has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself or herself, provided that in any of these cases he or she abstains from any hostile act and does not attempt to escape.

### **3. Protection of the Civilian Population in Attacks**

**412.** The Parties to the conflict must take additional **precautions against the effects of attacks** (5 58) in order to protect the civilian population, individual civilians and civilian objects under their responsibility against dangers resulting from military operations. To the extent feasible, the civilian population, individual civilians and civilian objects must be removed from the vicinity of military objectives, and military objectives must not be located within or near densely populated areas (5 58). **Feasible** (5 41, 56–58, 78, 86) refers to anything *that is practicable or practically possible, considering all circumstances prevailing at a given time, including humanitarian and military considerations* (46).

**413.** The civilian population and individual civilians enjoy general protection against dangers arising from military operations (5 51 para.1; on the protection of the civilian population see Chapter 5).

**414. Civilians lose their special protection** and may become military objectives themselves **if and for such time as they take a direct part in hostilities** (5 51 para.3).

**415.** The presence or movements of civilians may not be used to render certain locations immune from military operations, in particular to shield military objects from attacks or to shield, favour or impede military operations. The Parties to the conflict must not direct the movements of civilians in order to attempt to shield military objectives from attacks or to shield military operations (4 28; 5 51 para.7). The misuse of protected persons as a **shield** for military objectives is a violation of international law and is punishable as a war crime (33 8 para.2 lit.b xxiii; 35 11 para.1 no.4). What is more, this does not mean that the military objective must not be attacked; such an attack may, however, be unlawful under the principle of proportionality as described by LOAC. Irrespective of this rule, a voluntary act by such civilians may under certain circumstances be deemed a direct participation in hostilities, resulting in a loss of protection (see also Chapter 5, No. 518).

**416.** With respect to attacks, every responsible military commander must take the following **precautions in attack** prior to engaging an objective (5 57):

- do everything feasible to verify on the basis of all information available at the time that the objective to be attacked is a military objective and that the attack is not prohibited by international law (5 57 para.2 lit.a i);
- choose the means and methods of attack with a view to avoiding, and in any event minimising, civilian collateral damage (5 57 para.2 lit.a ii);
- refrain from launching an attack that may be expected to cause civilian collateral damage that would be excessive in relation to the concrete and direct military advantage anticipated (5 57 para.2 a iii);
- give the civilian population advance **warning** of attacks that may affect it, unless circumstances do not permit (5 57 para.2 lit.c);
- when a choice is possible between several military objectives of equal importance, engage the objective an attack on which may be expected to cause the least collateral damage (5 57 para.3).

The decision to launch an attack must be taken on the basis of all information available at the time; it may not be assessed in retrospect based on the actual course of events (46).

**417.** An attack must be cancelled if it becomes apparent that the objective is not a military one, that it is subject to special protection or that the attack may be expected to cause civilian loss or damage that would be excessive in relation to the concrete and direct military advantage anticipated (5 57 para.2 lit.b).

#### **4. Non-defended Localities and Other Localities where Fighting is Prohibited**

**418.** As a rule, military operations of the Parties to a conflict may only be carried out in the theatre of war. Attacking localities outside the theatre of war or localities in the theatre of war where fighting is prohibited is punishable as a war crime (33 8 para.2 lit.b v; 35 11 para.1 no.2).

**419.** Non-defended localities are under special protection even though they are located within the theatre of war. Attacking or bombarding **non-defended localities** is prohibited (5 59 para.1; 16a 25).

**420.** A locality which is open for occupation is considered non-defended if it has been declared so by the competent authorities to the adversary and fulfils the following conditions:

- all combatants, as well as mobile weapons and mobile military equipment must have been evacuated,
- no hostile use may be made of fixed military installations and establishments,
- no acts of hostility may be committed by the authorities or by the population and
- no activities in support of military operations may be undertaken (5 59 para.2).

In addition the Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the aforementioned conditions (5 59 para.5).

**421.** A locality may not be considered defended on suspicion, unless the actions of the adversary substantiate such a suspicion.

**422.** If a Party violates these regulations, their non-defended localities lose their special protection. The general provisions for the protection of the civilian population and civilian objects continue to be applicable, however (5 59 para.7).

**423. Neutralized zones** (4 15), too, are areas within the theatre of war where no military operations may take place. No work of a military nature may be performed in neutralised zones agreed between Parties to a conflict. Neutralised zones are intended to protect wounded and sick combatants and non-combatants and civilians who are not participating in hostilities.

**424. No military operations may be performed outside the theatre of war.** It is thus prohibited to extend military operations to demilitarised zones. The conditions for establishing such zones correspond to those applying to non-defended localities (5 59 para.2; 60 para.3). Demilitarised zones are created by agreement between Parties to a conflict either in peacetime or during a conflict. It is prohibited for any Party to the conflict to attack or occupy such zones (5 60 para.1). If one of the Parties commits a material breach of its obligations, demilitarised zones lose their status (5 60 para.7) and thus their special protection. The general provisions for the protection of the civilian population and civilian objects, however, continue to be applicable (5 60 para.7).

**425. Hospital localities, hospital zones and safety zones** are also excluded from the theatre of war. It is prohibited to conduct military operations in hospital and safety zones, that is to say in zones intended to protect the wounded and sick who do not participate in hostilities from the effects of war (1 23; 4 14).

**426.** Furthermore, military operations on the **territory of neutral States**, that is, States not party to the conflict, are prohibited.

## 5. Other Prohibited Objectives

**427.** As a rule, it is also prohibited to attack:

- medical and religious personnel (5 12, 15),
- hospital ships (2 22);
- hospitals and their personnel (1 19; 4 18, 20);
- objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies for the specific purpose of denying them for their sustenance value to the civilian population (5 54 para.2; 6 14),
- coastal rescue craft and related fixed coastal installations (2 27),

- cultural objects and places of worship (5 53; 24),
- civil defence facilities (5 62),
- medical aircraft (1 36 para.1., 37 para.1; 2 39; 5 24 ff.; 14 17) and
- civil aircraft.

In addition, the Parties to a conflict may agree at any time to protect persons or objects that are not placed under general or special protection from the effects of military operations by other regulations (1, 2, 3 6; 4 7).

## 6. Protection of Works and Installations Containing Dangerous Forces

**428.** Works and installations containing dangerous forces, namely **dams, dykes and nuclear electrical generating stations**, may not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations may not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population (5 56 para.1).

**429.** The protection of works and installations containing dangerous forces and of military objectives located in their vicinity (5 56 para.1) ceases solely

- for a dam or a dyke if it is used for another than their normal purpose and in regular, significant and direct support of military operations,
- for a nuclear electrical generating station if it provides electric power in regular, significant and direct support of military operations, and
- for other military objectives located at or in the vicinity of these works and installations if they are used in regular, significant and direct support of military operations,

if such an attack is the **only** feasible way to terminate such support (5 56 para.2). If the protection ceases and any of the works, installations or military objectives mentioned above is attacked, all feasible precautions must be taken to avoid the release of dangerous forces.

**430.** A regular, significant and direct support of military operations (5 56 para.2 lit.a-c) may be the production of weapons, ammunition and military material as well as the supply

of electric power to military installations. The mere possibility of use by armed forces does not meet these criteria. The decision to launch an attack must be taken on the basis of all information available at the time.

**431.** Military objectives may not be located in the vicinity of works and installations containing dangerous forces unless it is necessary for the defence of these works. **Installations erected for the sole purpose of defending the protected works or installations** from attack may not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations (5 56 para.5).

**432.** Parties to a conflict remain obligated to take all precautions necessary to protect works and installations containing dangerous forces from the effects of an attack.

**433.** Works and installations containing dangerous forces may be marked with a special distinctive emblem consisting of three bright orange circles on a horizontal axis (5 56 para.7).

Fig.: International distinctive emblem for works and installations containing dangerous forces



## **7. Protection of the Environment**

**434.** Means and methods of warfare must be used with due consideration of environmental aspects. All feasible precautions must be taken to protect the natural environment; particularly the intentional damaging and destroying of the natural environment not justified by military necessity is prohibited. Attacks against the natural environment by way of reprisals are prohibited (5 55 para.2).

**435.** The **prohibition of environmental warfare** means that such methods and means of warfare are prohibited that are intended, or may be expected, to cause **widespread, long-term and severe damage to the natural environment** (5 35 para.3, 55 para.1; 9). Such damage to the natural environment significantly exceeds normal combat damage. Violations are punishable (33 8 para.2 lit.b v; 35 11 para.3). This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population (5 55 para.1).

**436.** The **Environmental Modifications Convention of 1976 (ENMOD Convention)** is aimed at **preventing the misuse of the environment** in wartime by **banning** the use of **environmental modification techniques** (e.g. large-scale employment of defoliating agents) that have widespread, long-lasting or severe effects as a means of warfare (9 I para.1). The prohibition of the use of environmental modification techniques in accordance with the ENMOD Convention must be distinguished from the prohibition of environmental warfare as described in No. 435. For the purposes of the Environmental Modifications Convention, legally non-binding interpretative declarations were adopted regarding the terms ‘widespread’, ‘long-lasting’ and ‘severe’, which are central to the implementation of the Convention. According to these declarations,

- ‘widespread’ means an area of several hundred square kilometres,
- ‘long-lasting’ means lasting some months or approximately one season, and
- ‘severe’ means a serious or significant disruption of, or damage to, human lives, natural and economic resources or other goods.

## II. Means of Warfare

### 1. General Principle

**437.** It is prohibited to employ weapons, ammunition, material and other ordnance that may cause superfluous injury or unnecessary suffering or that cannot be directed at a specific military objective and may thus inflict indiscriminate damage on civilians and civilian objects or cause widespread, long-lasting and severe damage to the natural environment (see Nos. 401, 434–436).

## 2. Certain Conventional Weapons

**438.** The employment of any projectile (particularly **explosive and incendiary projectiles**) **under 400 grams weight** that is either explosive or charged with fulminating or inflammable substances was prohibited by the St. Petersburg Declaration of 1868 for land and naval warfare (**12**), because it was expected that such projectiles would inflict disproportionately large wounds on soldiers which are not required to incapacitate them. Today, this ban has lost much of its significance. In customary law, it is limited to explosive and incendiary projectiles with a weight of significantly less than 400 grammes which are used for engaging individual persons only. The employment of explosive (infantry) projectiles against individual persons is thus prohibited.

**439.** The Hague Declaration of 1899 (**13**) **prohibited** the use of

- bullets that expand or flatten easily in the human body ('dum-dum bullets'), in particular
- bullets with a hard envelope that does not entirely cover the core, or
- bullets pierced with incisions.

The use of such bullets in the context of and in association with an armed conflict is punishable as a war crime (**33** 8 para.2 lit.b xix; **35** 12 para.1 no.3).

**440.** The use of

- shotguns,
- projectiles designed to burst open or deform upon entering the human body,
- projectiles that start to tumble in the human body or
- projectiles designed to cause shock waves leading to extensive tissue damage or even lethal shock,

is, as a rule, covered by the ban on causing superfluous injury or unnecessary suffering (**5** 35 para.2, 51 para.4 lit.c; **16a** 23(para.1 lit.e)).

**441.** It is also **prohibited** to use any weapon the primary effect of which is to injure by **fragments** which in the human body escape detection even by X-rays (**8a**). In particular, this covers fragments of plastic, glass, wood or other non-metal components. Weapons containing small amounts of materials such as plastic which may incidentally and unintentionally cause injuries are not covered by this ban.

**442.** The Convention on Cluster Munitions of 30 May 2008, also referred to as the **Oslo Convention (51)**, entered into force on 1 August 2010. The Convention prohibits the use, development, production, acquisition, stockpiling, retention or transfer of cluster munitions. Furthermore, the State Parties are forbidden to assist, encourage or induce anyone to engage in any activity prohibited to a State Party. This prohibition applies, mutatis mutandis, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft. In accordance with the Oslo Convention (**51 2 para.2**), 'cluster munition' means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms. The definitions of the Oslo Convention contain several exceptions to the term cluster munition of munitions with certain characteristics (**51 2 para.2 sent.2 lit.a-c i-v**;) so that, for example, point target munition does not qualify as cluster munition.

The Convention contains an interoperability clause, which explicitly States that the States Parties to the Convention, their military personnel or nationals may engage in military cooperation and/or operations with States not Party to this Convention even if the latter engage in activities prohibited to a State Party (**51 21**).

**443.** The Oslo Convention also contains the obligation to clear and destroy cluster munitions remnants and provide risk reduction education.

**444.** In accordance with the **Ottawa Convention (32)** of 1997, the use, development, production, acquisition, stockpiling, retention or transfer of **anti-personnel mines** is prohibited in all circumstances. The Parties to the Convention are also prohibited to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party. **Anti-personnel mine** means a mine designed to be exploded by the presence, proximity or contact of a person which will incapacitate, injure or kill one or more persons. **Anti-vehicle mines** are not banned by the Ottawa Convention. Mines designed to be detonated by the presence, proximity or contact of a vehicle (as opposed to a person) which are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.

**445.** The **Ottawa Convention (32)** contains a general ban on anti-personnel mines. Even after the conclusion of the Ottawa Convention, **Protocol II to the CCW Convention** on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices in its amended version of 1996 (the **Amended Mine Protocol (8b)**) continues to play an

important role. It contains provisions on types of landmines that are not covered by the Ottawa Convention such as anti-vehicle mines, and it includes States that have not yet signed that Convention.

**446.** Within the Amended Mine Protocol the following definitions apply:

- **Mine:** any munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle (**8b 2 para.1**).
- **Booby trap:** any device or material which is designed, constructed, or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act (**8b 2 para.2**).
- **Other devices:** manually emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage which are actuated manually, by remote control or automatically after a lapse of time (**8b 2 para.3**).

It is prohibited in all circumstances to use any mine, booby-trap or other device that is designed or of a nature to cause superfluous injury or unnecessary suffering (**8b 3 para.3**).

It is prohibited in all circumstances to direct such weapons, either in offense, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects (**8b 3 para.7**).

Such weapons may only be placed on, or directed against, a military objective (**8b 3 para.8 a**). A prohibited indiscriminate use of such weapons is furthermore any placement of such weapons which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (**8b 3 para.8 c**).

**447.** All **feasible precautions** such as fencing, signs, warning, monitoring or using alternatives for the use of such weapons must be taken to protect civilians from the effects of such weapons. **Effective advance warning** must be given of any emplacement, unless circumstances do not permit (**8b 3 paras.10 and 11**).

**448.** A **remotely delivered mine** is a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. As a rule, mines delivered from a land-based system from less than 500 meters are not considered to be 'remotely delivered'. Remotely-delivered mines may only be used if their location,

total number, type, date and time of laying and the self-destruction time period are recorded. In principle remotely-delivered mines must always be 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 it no longer serves the military purpose for which it was placed in position.

**449.** It is prohibited to use **booby-traps** or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material. It is prohibited in all circumstances to use booby-traps and other devices that are in any way attached to or associated with:

- internationally recognised protective emblems, signs or signals,
- sick, wounded or dead persons,
- burial or cremation sites or graves,
- medical facilities, medical equipment, medical supplies or medical transportation,
- children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing or education of children,
- food or drink,
- kitchen utensils or appliances except in military establishments,
- objects clearly of a religious nature,
- historic monuments, works of art or places of worship that constitute the cultural or spiritual heritage of peoples or
- animals or their carcasses (**8b 7 para.1**).

**450.** Booby-traps and other devices may be used in any city, town, village or other area containing a similar concentration of civilians only if

- in these areas combat between ground forces is taking place or appears to be imminent,
- they are placed in the close vicinity of a military objective or
- measures are taken to protect civilians from their effects (**8b 7 para.3**).

**451.** All information concerning the location of minefields, mines, booby-traps and other devices must be recorded. In order to ensure the protection of the civilian population and the clearance of the affected areas after the conflict has ended, this information must be retained and must be used without delay after the cessation of active hostilities or made

available to the responsible authorities by mutual agreement wherever possible (**8b** 9). Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained (**8b** 3 para.2, 5 para.2, 10).

**452.** Within the scope of its responsibilities, and with respect to any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations, and any mission established pursuant to Chapter VIII of the Charter of the United Nations (**34**) and performing its functions in the area of conflict, each State Party or Party to the conflict must, if so requested by the head of the mission,

- protect the force or mission from the effects of mines, booby-traps and other devices wherever possible,
- if necessary, remove or render harmless all mines, booby-traps and other devices in that area and
- make available to the head of the force or mission all information in its possession concerning minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission of the United Nations is performing its functions (**8b** 12 para.2).

**453. Incendiary weapons** are munitions that are primarily designed to set fire to materials or objects or to cause burn injury to persons through the action of flame, heat, or a combination of these. Among these are flame-throwers, fougasses (hand-held incendiary weapons containing liquid fuels), shells, rockets, grenades, mines, bombs and other containers of incendiary substances (**8c** 1 para.1 lit.a). Incendiary weapons do not include munitions

- that may have incidental incendiary effects such as illuminants, tracers, smoke or signalling systems (**8c** 1 para.1 lit.b i) and
- that are designed to combine penetration, blast or fragmentation effects with an additional incendiary effect (e.g. armour-piercing projectiles, fragmentation shells, explosive bombs). The incendiary effect may only be used against military objectives (**8c** 1 para.1 lit.b ii)).

**454.** The **civilian population** as such, individual civilians and civilian objects enjoy special protection (see Nos. 412 ff. and, for more details, Chapter 5 on the protection of the civilian population). Consequently they must not be, in any circumstances, the object of an attack by incendiary weapons (**8c 2 para.1**).

**455.** It is prohibited **in all circumstances** to make any military objective located within a concentration of civilians the object of attack by **air-delivered incendiary weapons** (**8c 2 para.2**). Attacks using incendiary bombs on military objectives located within the area of a city but not within a concentration of civilians (e.g. air defence positions in large city parks) are not covered by this prohibition (**8c 2 para.2**).

**456.** In all circumstances it is prohibited to make any military objective located within a concentration of civilians the object of attack by means of **incendiary weapons other than air-delivered incendiary weapons**, unless

- such military objective is clearly separated from the concentration of civilians and
- all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects (**8c 2 para.3**). Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations (**8c 1 para.5**).

**457.** A **concentration of civilians** is any concentration of civilians, be it permanent or temporary, such as inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads (**8c 1 para.2**). For the purposes of protection it is thus not significant that the area be a settlement area, but that the density of concentration of civilians be characteristic for inhabited areas as they usually exist in towns or villages.

**458.** It is also prohibited to use incendiary weapons against forests or other kinds of plant cover except when such natural elements are used by the adversary to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives (**8c 2 para.4**).

**459.** It is prohibited to employ **poison** and poisoned weapons (**16a** 23 para.1 lit.a). The employment of poison or poisoned weapons is punishable as a war crime (**33** 8 para.2 lit.b vxii and vxii); **35** 12 para.1 no.1).

**460.** It is prohibited to employ **laser weapons** specifically designed to cause, as their combat function, permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The legitimate military employment of laser systems is not covered by this ban even if it results in blinding as an incidental or collateral effect (**8d** 1, 3).

**461. Protocol V to the CCW Convention on Explosive Remnants of War (8e)** contains regulations on remedial measures (e.g. marking, clearance, removal and destruction measures) to reduce the risks posed by **explosive remnants of war** (e.g. unexploded ordnance and recovered ammunition). In the case of existing explosive remnants of war, however, the Contracting Parties are only called upon to cooperate in their removal. There is an obligation to **record and retain**, to the maximum extent possible and as far as practicable, information on the use or abandonment of explosive ordnance in order to facilitate rapid **marking and clearance, removal or destruction** of explosive remnants of war as well as risk education and the provision of relevant information to the civilian population. Furthermore, the operational reliability of ammunition is to be improved on a voluntary basis.

### **3. CBRN Agents**

#### **a) Nuclear Weapons**

**462.** Numerous multilateral and bilateral treaties already exist that prohibit the proliferation of **nuclear weapons**, restrict or prohibit the testing of nuclear weapons, prohibit the stationing of nuclear weapons, provide for nuclear-weapon-free zones, limit the extent of nuclear armament or are designed to prevent the outbreak of a nuclear war, in particular:

- Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968,
- Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of 5 August 1963,
- Outer Space Treaty of 27 January 1967,

- Treaty for the Prohibition of Nuclear Weapons in Latin America of 14 February 1967,
- Seabed Treaty of 11 February 1971,
- Strategic Arms Limitation Talks Agreement of 26 May 1972 (SALT I),
- South Pacific Nuclear Free Zone Treaty of 6 August 1985,
- Intermediate-Range Nuclear Forces Treaty (INF) of 8 December 1987,
- Strategic Arms Reduction Treaty (START) of 31 July 1991 with Protocol of 23 May 1992,
- Strategic Arms Reduction Treaty (START II) of 3 January 1993,
- Comprehensive Nuclear-Test-Ban Treaty of 24 September 1996,
- Strategic Offensive Reductions Treaty (SORT) of 24 May 2002 and
- Measures for the Further Reduction and Limitations of Strategic Offensive Arms, signed in Prague on 8 April 2010 by the United States of America and the Russian Federation.

**463.** The government of the Federal Republic of Germany and several other States are of the opinion that the new regulations introduced by the Additional Protocol I to the Geneva Conventions (5) apply only to conventional weapons. This does not rule out the possibility that other regulations, particularly of customary law, may apply to nuclear weapons.

**464.** The Federal Republic of Germany does not possess nuclear weapons. In accordance with Article I of Protocol III to the Treaty of Brussels (WEU Treaty) of 23 October 1954 (42) the Federal Republic of Germany undertakes that no nuclear weapons will be produced on its territory. In the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 the Federal Republic of Germany further undertakes not to receive nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices from any transferor whatsoever, directly or indirectly, not to produce or otherwise test nuclear weapons or other nuclear explosive devices, and not to grant or receive any assistance in the production of nuclear weapons or other nuclear explosive devices. This obligation was reaffirmed in the Two Plus Four Agreement of 12 September 1990 for a unified Germany (43 3). The German War Weapons Control Act (KrWaffKontrG) penalises any contravention of these provisions, with the exception of nuclear weapons under the control of NATO member States or nuclear weapons developed or produced on their request.

In its advisory opinion on nuclear weapons of 8 July 1996, prepared upon request by the UN General Assembly, the International Court of Justice in The Hague stated that while neither international treaty law nor applicable customary international law contain an explicit authorisation to use or threaten the use of nuclear weapons, the mentioned sources did not contain any bans either that specifically referred to nuclear weapons.

Using or threatening the use of nuclear weapons, however, by all means had to be done in compliance with the requirements of international law applicable in armed conflicts and in particular with the principles and rules of LOAC and the special obligations arising from treaties and other agreements explicitly dealing with nuclear weapons.

**465.** In accordance with the 2010 Strategic Concept of NATO, the Alliance will need to continue to practice nuclear deterrence as long as nuclear weapons may be used as a military means. In this sense, nuclear weapons are relevant to peace maintenance and conflict prevention. The government of the Federal Republic of Germany has thus declared on the occasion of the ratification of Additional Protocols I and II of 1977 to the Geneva Conventions of 1949 that in Germany's view the provisions introduced by Additional Protocol I on the employment of weapons were established with the intention of applying solely to conventional weapons, notwithstanding other rules of international law applicable to other types of weapons.

### **b) Chemical Weapons**

**466.** In accordance with Article I of Protocol III to the WEU Treaty of 23 October 1954 (**42**), the **Federal Republic of Germany has also undertaken not to produce chemical weapons** on its territory. On signing the Biological Weapons Convention on 10 April 1972, the Federal Republic of Germany further declared that, in line with its previous view, not only would it not produce, but neither develop nor acquire or stockpile under its own control chemical weapons. This decision was reaffirmed in the Two Plus Four Agreement of 12 September 1990 for a unified Germany (**43 3**); the possession of and control over chemical weapons were explicitly included in this agreement.

**467.** In accordance with the **Chemical Weapons Convention (CWC)** of 13 January 1993 (**29**) it is prohibited under any circumstances to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone, and to use chemical weapons (**29 I para.1 lit.a and c**). In order to ensure

compliance with the extensive prohibitions of the Convention, the Chemical Weapons Convention contains a detailed disarmament and control regime.

**468.** Even before the Chemical Weapons Convention entered into force, the use in war of asphyxiating, poisonous or other gases and of all analogous liquids, materials or devices was prohibited by international treaty law, most notably by the **Geneva Gas Protocol** of 1925 (**10**). However, the scope of the ban is limited by unilateral declarations of numerous States qualifying the binding nature of the Geneva Gas Protocol. They declared their obligation to be void as soon as the adversary or one of their allies violated the prohibitions laid down in the Protocol.

**469.** Chemical weapons as defined by the **Chemical Weapons Convention** are chemicals that, regardless of their origin or method of production, can cause death, temporary incapacitation or permanent harm to humans or animals through their chemical action on life processes (**29** II no.2).

**470.** The use of riot control agents<sup>1</sup> (e.g. irritants, pepper spray) is governed by the following provisions: on the one hand, Article I para.5 of the Chemical Weapons Convention bans State Parties from using riot control agents as a method of warfare. The use of irritants in armed conflicts to fight the adversary is thus prohibited. On the other hand, the CWC allows the use of such irritants for **law enforcement** purposes including domestic riot control purposes (**29** II no.9 d).

**471.** The provisions of the CWC were incorporated into national law through the German Chemical Weapons Convention Implementation Act (CWÜAG) of 2 August 1994 in its amended version of 11 October 2004 (**50**). Wherever German federal law creates a national legal framework that provides for stricter regulations on the use of irritants than the international Convention, this national legal framework has priority over the provisions under international law. The CWC Implementation Act provides for the use of riot control agents for law enforcement purposes, including by the Bundeswehr as part of operations permissible under the constitution (for operations within the scope of a system of mutual

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<sup>1</sup> According to Article II(7) riot control agents – such as irritants and pepper spray – are chemicals that can rapidly produce sensory irritation or disabling physical effects in humans which disappear within a short time following termination of exposure. Riot control agents may only contain substances that are not listed in the Chemical Weapons Convention as prohibited substances.

collective security (Article 24 para.2 of the German constitution), as well as during training for such operations.

**472.** It is prohibited in an armed conflict to poison drinking water installations, food stuffs and objects for the production of food stuffs (**5** 54 para.2; **6** 14). This ban does not refer to unintentional and insignificant secondary effects of otherwise permissible means of warfare.

**473.** Violations of bans concerning chemical weapons in Germany are punishable under the War Weapons Control Act and the Code of Crimes against International Law (**35** 12 para.1 no.2). Employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices is punishable as war crime (**33** 8 par.2 lit. b xviii).

### **c) Biological and Toxin Weapons**

**474.** The **prohibition of the use of biological weapons** is a part of customary international law. Particularly living organisms such as viruses, bacteria and microbes and the agents extracted from them (toxins) can be used as biological weapons.

**475.** The use of bacteriological means of warfare has been prohibited since the adoption of the Geneva Protocol in 1925 (**10**).

**476.** The development, production, acquisition and stockpiling of bacteriological (biological) and toxin weapons is prohibited (**11**). These prohibitions apply to both biotechnological and synthetic procedures serving other but peaceful purposes. They include genetic engineering procedures and genetically altered micro-organisms.<sup>1</sup>

**477.** The German War Weapons Control Act and the Code of Crimes against International Law (**35** 12 para.1 no.2) penalise violations of biological weapons bans.

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<sup>1</sup> In Article I of Protocol III to the WEU Treaty the Federal Republic of Germany undertakes not to manufacture biological weapons on its territory. This undertaking was reaffirmed in the **Two Plus Four Agreement** of 12 September 1990 for a united Germany (**43** 3).

### III. Methods of Warfare

#### 1. Ruses of War, Prohibition of Perfidy, Other Prohibitions

**478. Ruses of war** and the employment of measures necessary for obtaining information about an adverse Party and its territory are permissible (5 37 para.2, 16a 24). Ruses of war are acts which are intended to mislead an adversary or to induce him to act recklessly. Such acts must not, however, infringe any rules of LOAC and, in particular, must not be perfidious, i.e. they must not invite the confidence of an adversary with respect to protection under LOAC. Examples of ruses of war are: the use of camouflage, decoys, mock operations and misinformation.

**479.** The acquisition of information in **uniforms** of adversary forces is not prohibited under international law but may be subject to punishment by the adversary on grounds of espionage (5 39 para.3). Operating behind enemy lines in the uniform of the enemy or in civilian clothes without the intent to engage in espionage may make soldiers subject to legal prosecution for espionage by the adversary (5 39 para.3).

The **use** of an adversary's uniform may be permitted as a ruse of war, for example if the uniform is used only for remaining undetected while getting behind the adversary's lines. In such cases, however, the adversary's uniform must be taken off prior to the start of actual fighting. In particular, it is prohibited to wear the uniform of an adverse Party while engaging in attacks or in order to shield, protect or impede military operations (5 39 para.2).

**480.** On the other hand, it is forbidden to make **improper use** of the uniform of the adversary (16a 23 para.1 lit.f), such as using it in an attack. It is prohibited to make use of the national flag or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations (5 39 para.2).

**481. Perfidy** is prohibited and punishable as a war crime (5 37; 16a 23; 33 8 para.2 lit. b vii and e ix; 35 11 para.1 no.7). It is prohibited to kill, injure or capture an adversary by resort to **perfidy** (5 37 para.1 sent.1; 16a 23(para.1 lit.b). Acts inviting the adversary to believe that he or she is entitled to protection under the rules of international law

applicable in armed conflict constitute perfidy. Examples of perfidy (5 37 para.1 sent.2 and 3) are

- the feigning of an intent to negotiate under a flag of truce or of a surrender,
- the feigning of an incapacitation by wounds or sickness,
- the feigning of civilian, non-combatant status and
- the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

**482.** It is prohibited to make improper use of the flag of truce, the flags and military emblems, signs or uniforms of neutral or other States not Parties to the conflict, and the emblem of the United Nations as well as international distinctive emblems (5 38, 39; 16a 23 para.1 lit.f; 24 17).

**483.** It is also unlawful and punishable by law to utilise a person protected under LOAC as a **shield** to keep an adversary from conducting military operations against certain objectives (33 8 para.2 b xxiii; 35 11 para.1 no.4).

**484.** **Starvation** of the civilian population as a method of warfare is prohibited (5 54 para.1) and punishable as a war crime (33 8 para.2 lit.b xxv; 35 11 para.1 no.5).

**485.** It is prohibited to order that there shall be no survivors (no quarter in warfare). It is also prohibited to threaten an adversary with this or to conduct military operations on this basis (5 40; 16a 23(para.1 lit.b). To give no quarter in warfare is punishable as a war crime (33 8 para.2 lit.b xxii and e xx; 35 11 para.1 no.6).

## **2. Cyber Operations**

**486.** The applicable provisions of international law must be complied with when conducting cyber operations as part of an international or non-international armed conflict (for the legally non-binding ‘Tallinn Manual’, see Chapter 1, No. 131). Since the basic provisions of LOAC (1949 Geneva Convention, 1977 Additional Protocols) were laid down at a time when military cyber operations were only just emerging, no explicit rules for such cases were contained in these provisions. There may thus be problems of definition or interpretation in individual cases (e.g. definition of an attack, distinction between civilian and military objectives, determination of territories of the Parties to the conflict in cyberspace). In every individual case, the situation will thus have to be carefully assessed.

### 3. Military Information Activities

**487.** It is permissible to exert political and military **influence** by spreading – even false – information to undermine the adversary's will to resist and to influence their military discipline (e.g. calling on them to defect, to surrender or to mutiny). It is prohibited to instigate the adversary to commit violations of international law **or other general (major) crimes** (e.g. manslaughter, bomb attacks, robbery or rape).

### 4. Reprisals

**488.** In times of international armed conflicts, **reprisals** are coercive measures that are as such in violation of international law and that are conducted by armed forces against an adversary; such measures are justified in exceptional cases if a Party to a conflict conducts such measures **to end violations of international law committed by the adversary**. Reprisals are admissible only under very restrictive conditions (see No. 485). No German soldier is entitled to execute or order reprisals on his or her own accord. Because of their **political and military significance**, reprisals must be ordered at the highest political level, which in the Federal Republic of Germany corresponds to the **Federal Government**.

**489.** Reprisals are **not a means of retaliation** but a means of coercion under international law to enforce or re-establish the law; such means may be ordered only as a **last resort**, that is to say after a failed attempt to settle a dispute amicably and only after **prior threat to use this means**. Reprisals must not be **disproportionate** to the violation committed by the adversary. They must be based on considerations of **humanity**. Reprisals may not be conducted or must be terminated when the adverse Party to the conflict has ended its violations of international law. Measures conducted in secrecy or by deception are not reprisals because they cannot achieve the goal of coercion. If the preconditions for a reprisal are met, the soldiers executing it are not committing a violation of international law.

**490.** LOAC **explicitly prohibits** reprisals against

- the wounded, sick and shipwrecked, medical and religious personnel, medical facilities and material (**1 46; 2 47; 5 20**),
- prisoners of war (**3 13 para.3**),

- civilians (4 33 para.3, 5 51 para.6),
- civilian objects (5 52 para.1),
- private property of civilians in occupied territories and citizens of the adversary State on their own territory (4 33 para.3),
- objects indispensable to the survival of the civilian population (5 54 para.4),
- the natural environment (5 55 para.2),
- works and installations containing dangerous forces (5 56 para.4) and
- cultural property (5 52 para.1, 53 lit.c; 24 4 para.4).

Furthermore, LOAC prohibits the use of mines, booby-traps and other devices (see No. 413) as a means of reprisal against the civilian population as such or against individual civilians or civilian objects (8b 3 para.7).

#### IV. **Parlementaires and Protecting Powers**

**491.** A cessation of hostilities is usually preceded by **negotiations** with the adversary. In the area of operations, Parties to the conflict frequently use parlementaires for this purpose.

**492.** **Parlementaires** are persons authorised by one Party to a conflict to enter into negotiations with the adversary. Parlementaires and the persons accompanying them such as drivers or interpreters have a right to inviolability (16a 32). They identify themselves by carrying a white flag.

**493.** The military commanders to whom parlementaires are sent are not in all cases obligated to receive them (16a 33 para.1). When entering territory controlled by the adversary, parlementaires and the persons accompanying them may not be taken prisoner or otherwise detained. The **principle of inviolability** applies until they have safely returned to friendly territory. It does not require a cease-fire in the sector where parlementaires arrive. The parlementaires lose their right of inviolability if it is proved in an incontestable manner that they have taken advantage of their privileged position to provoke or commit an act of treason (16a 34).

**494.** **Parlementaires** may temporarily be detained if they have accidentally acquired **information** the disclosure of which to the adversary would jeopardize the success of a

current or impending operation of own forces. In this case, the parlementaires may be prevented from returning until the operation has been completed. In the meantime, they must be treated with all the respect demanded by their position and at least like prisoners of war.

**495.** If they abuse their status, parlementaires may be **temporarily detained** (16a 33 para.3). An **abuse** permitting the detention of parlementaires is constituted if the parlementaires conduct acts in violation of international law to the disadvantage of the adversary, particularly if they

- gather intelligence beyond the observations inevitably made in such a mission,
- conduct acts of sabotage,
- induce adversary soldiers to collaborate in collecting intelligence,
- call on adversary soldiers to refuse to do their duty,
- call on adversary soldiers to desert and
- organise acts of espionage in the territory of the adverse Party.

**496.** All necessary steps are permitted (e.g. blindfolding) to prevent parlementaires from taking advantage of their mission to obtain information (16a 33 para.2). Parlementaires are permitted to report everything they have observed.

**497.** Parlementaires are in most, but not necessarily all cases, **officers**. Their nationality is irrelevant. Defectors or prisoners of war have no parlementaire status and thus no right of inviolability.

**498.** Making **improper use of a flag of truce** constitutes a violation of international law (16a 23 lit.f; 5 37 para.1 lit.a, 38 para.1). Improper use would be, for instance, soldiers approaching an adversary position under the protection of the flag of truce in order to attack. If improper use of a flag of truce results in death or serious personal injury, this constitutes a **war crime** (33 8 para.2 lit. b vii).

**499.** Irrespective of their own diplomatic relations, Parties to a conflict are entitled to designate **Protecting Powers** for diplomatic communication (5 5 para.6). Protecting Powers as defined by the Vienna Convention on Diplomatic Relations of 1961 act on behalf of the State they represent and can thus take over a certain part of diplomatic communications. Protecting Powers as defined by the Geneva Conventions of 1949 and

Additional Protocol I thereto of 1977 are neutral States or other States not party to a conflict that monitor compliance with the Geneva Conventions and safeguard the rights and interests of the Parties to the conflict and their citizens (1-3 8; 4 9; 5 2 lit.c). Both types of Protecting Powers require the approval of all States involved. If Parties to a conflict cannot agree upon a Protecting Power, the International Committee of the Red Cross, in particular, may act as a **substitute** (5 5 para.4), provided the ICRC offers its services and the States that are Parties to the conflict agree with this proposal.

## Chapter 5

### Protection of the Civilian Population

#### I. General

**501.** The **civilian population** comprises all persons who are civilians (5 50 para.2). Under the law of armed conflict (LOAC), the term 'civilian' is defined in a negative manner by excluding certain categories of people who are not civilians (5 50 para.1 sent.1 in conjunction with 3 4 A paras.1-3 and 6; 5 43). Accordingly, civilians are people who belong **neither** to the armed forces in a broader sense **nor** to a *levée en masse*, in other words people who are not combatants. See Chapter 3 for details about the categories of people who are not part of the civilian population.

**502.** The civilian population and individual civilians enjoy general protection against dangers arising from military operations (5 51 para.1). The civilian population as such, as well as individual civilians, must not be the object of attack (5 51 para.2, 52 para.1). In particular terror attacks, i.e. acts or threats of violence the primary purpose of which is to spread terror among the civilian population, are prohibited (5 51 para.2 sent.2).

**503.** In **case of doubt**, a person must be considered a civilian (5 50 para.1 sent.2). The presence within the civilian population (5 50 para.2) of individuals who do not come within the definition of civilians does not deprive the population of its **civilian character** (5 50 para.3).

**504.** Civilians **not** taking a direct part in hostilities must be **respected** and **protected**. They must be treated humanely in all circumstances (5 75 para.1) and are **entitled to respect** for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs (4 27 para.1); **16a** 46 para.1). Private property must also be protected (**16a** 46 para.2). The civilian population as such and individual civilians must not be the object of attack and, in particular, they must be neither killed nor injured (5 51 para.2; 6 13 para.2).

**505.** If the civilian population of a Party to a conflict is inadequately provided with **essentials** such as food, medicinal products and clothing, relief actions by neutral States or humanitarian organisations must be permitted. Every State and in particular the adverse Party is obliged to grant such relief actions free passage subject to its right of control (4 23; 5 70). The Parties to a conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the conflict (4 27 para.4).

**506. Women** must be the object of special respect and protection. Any attack on the honour of **women**, in particular rape, forced prostitution and any other form of indecent assault, is prohibited (4 27 para.2; 5 76 para.1).

**507. Children** must be the object of special respect and protection. They must be provided with the care and aid they require, whether because of their age or for any other reason (4 24; 5 77 para.1).

**508.** Children under the age of fifteen who take a direct part in hostilities and fall into the power of an adverse Party must benefit from **special protection** (5 77 para.3; 6 4 para.3).

**509.** The contracting States of the Optional Protocol to the UN Convention on the Rights of the Child of 25 May 2000 recognise that persons under the age of eighteen are entitled to **special protection** (40 3 para.1).

**510.** Parties to a conflict may not use civilians as shields to render certain points or areas immune from military operations (4 28; 5 51 para.7). Parties to a conflict must not direct the movements of the civilian population in order to attempt to shield military objectives from attacks or to shield military operations (4 28; 5 51 para.7). The misuse of civilians as a **shield** is a violation of international law and is punishable as a war crime (33 8 para.2 lit.b xxiii; 35 11 para.1 no.4).

**511. Punishment for the conduct of third Parties** ('proxy punishment') and **collective punishment**; measures of **intimidation** and **terrorism** (4 33 para.1; 5 51 para.2; 6 4 para.2, 13 para.2); **reprisals** against the civilian population and their property (4 33 para.3); 5 20, 51 para.6; **pillage** (4 33 para.2; 16a 28, 47) and the **taking of hostages** (4 34) are prohibited.

**512.** Attacks on military objectives are prohibited if they 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 (principle of proportionality) (5 51 para.5 lit.b, see also Chapter 4, No. 404).

**513.** When an attack on a military objective is planned or decided on, all feasible **precautions** must be taken with a view to avoiding, and in any event minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects (5 57 para.2 lit.a ii, see Chapter 4).

**514.** Under international law, armed forces may be employed for the protection of **civilian objects**. This does not affect national laws on this matter. In an international armed conflict, the mere presence of armed forces endangers the object to be protected as soldiers are combatants and thus constitute military objectives. The use of soldiers to protect civilian objects should therefore be carefully considered.

**515. Hospital and safety zones and localities** may be established on the basis of mutual arrangements to protect wounded, sick, and aged persons, children under the age of fifteen, expectant mothers and mothers of children under the age of seven from the effects of war (4 14). Such zones and localities are exempt from war zones and may not serve any military purpose. Military objects must not be established within or in the vicinity of hospital and safety zones and localities.

Fig.: Distinctive emblems for hospital and safety zones



or



**516. Journalists** engaged in dangerous professional missions in areas of armed conflict are protected as civilians provided that they take no action adversely affecting their status as civilians (5 79 para.1).

If journalists are embedded in armed forces as **war correspondents**, their right to the status of a person accompanying, but not belonging to, the armed forces and of a prisoner of war remains unaffected (3 4 A para.4).

Journalists may obtain an **identity card** that confirms their status (5 79 para.3 and Annex II). This card must be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located.

**517.** Civilians may at any time **seek help** from a Protecting Power, from the International Committee of the Red Cross (ICRC) or from any other relief society (4 30 para.1). Representatives of the Protecting Powers and the ICRC are entitled to go to all places where protected persons are (4 143).

Each Party to a conflict must search for **missing persons** (5 33) and transmit all relevant information about the fate of civilians who are in its power (4 136), as well as of prisoners of war (3 122), wounded, sick, shipwrecked, and dead persons (1 16; 2 19). An **official information bureau** must be established for this purpose upon the outbreak of a conflict and in all cases of occupation (3 122-124; 4 136-141) which must cooperate with the Central Tracing Agency of the ICRC (3 123; 4 140). In accordance with Section 2(1)(4) of the German Red Cross Act,<sup>1</sup> the German Red Cross is a voluntary aid society and, as such, will assume the tasks of an official information bureau (3 122; 4 136).

**518.** Unlike combatants (combatant privilege, see Chapter 3), civilians are not entitled to take part in hostilities. They therefore may face punishment as a result of their mere participation in hostilities.

Civilians lose their special protection **when and for such time as they take a direct part in hostilities** (5 51 para.3; 6 13 para.3). Accordingly, civilians who perform concrete actions that constitute direct participation in hostilities (e.g. conducting military operations, transporting weapons and ammunition to combat units, operating weapon systems, transmitting target data that leads immediately to the engagement of a military objective,

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<sup>1</sup> Act on the German Red Cross and other voluntary aid societies as defined in the Geneva Conventions, 5 December 2008 (German Federal Law Gazette I, p. 2346).

etc.) can be engaged as military objectives while performing such actions. They are not entitled to prisoner of war status. They must nevertheless be treated humanely. In case of trial, they are entitled to fair and regular **trial** (4 5 paras.1-3, 64 ff.; 5 75).

## II. Civil Defence

**519. Civil defence** refers to vital humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters.

**520.** These **tasks** include warning the civilian population, the management of shelters, rescue, fire-fighting, medical treatment and care of the civilian population including NBC defence, decontamination and similar protective measures, provision of emergency accommodations and supplies, emergency assistance in the restoration and maintenance of order in distressed areas, emergency repair of indispensable public utilities, and other humanitarian measures as well as the planning and organisation necessary to carry out such tasks (5 61).

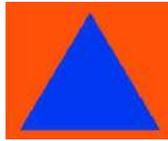
**521.** Civilian **civil defence organisations**, their personnel, their buildings, vehicles and other material as well as shelters for the civilian population must be particularly respected and protected (5 62-64, 52).

**522.** The protection to which civilian civil defence organisations are entitled under international law will cease if, despite having been warned, they commit or are used to commit acts harmful to the enemy (5 65 para.1). Cooperation with military authorities and the employment of some members of the armed forces in civilian civil defence organisations do not constitute acts harmful to the enemy. Civil defence tasks may incidentally benefit military victims (5 65 para.2 lit.c). Civilian civil defence organisations may be organised along military lines (5 65 para.4). Service in them may be compulsory (5 65 para.4). Their personnel may bear light individual weapons for the purpose of maintaining order or for self-defence (5 65 para.3).

**523.** Civilian civil defence organisations may continue their humanitarian activities in occupied territories (4 63; 5 63).

**524.** The international **distinctive sign of civil defence** is an equilateral **blue** triangle on an **orange** ground (5 66 para.4).

Fig.: International distinctive sign of civil defence



Civil defence personnel should be recognisable by this distinctive sign and by an identity card (5 66(3)). Relief societies may additionally use their traditional emblems.

**525.** Members of the armed forces and military units assigned to civil defence organisations must be **respected and protected**, provided that such personnel and such units do not participate directly in hostilities and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party (5 67 para.1 lit.e). Military personnel serving in civil defence organisations can be taken prisoners of war by an adverse Party. In occupied territories, they may be employed on civil defence tasks in so far as the need arises and only for the benefit of the civilian population in these territories. If such work is dangerous, they must volunteer for such tasks (5 67 para.2).

### III. Humanitarian Assistance

**526.** If the civilian population of any territory under the control of a Party to a conflict, other than occupied territory, is not adequately provided with essential supplies, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction must be undertaken, subject to the agreement of the Parties concerned in such relief actions (5 70 para.1). States through which relief supplies are moved may object to the transit for objective reasons only. Offers of such relief may not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority must be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who are to be accorded privileged treatment or special protection (5 70). For occupied areas, see No. 564 ff. All Parties to a conflict must protect relief consignments and facilitate their rapid distribution (5 70 para.4). Relief personnel must be respected and protected (5 71 para.2). Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the

transportation and distribution of relief consignments; the participation of such personnel is subject to the approval of the Party in whose territory they will carry out their duties. Each Party in receipt of relief consignments must, to the fullest extent practicable, assist the relief personnel in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted (5 71 paras.1 and 3). The Parties to a conflict and the States that allow the passage of relief consignments, equipment and personnel have intervention and control rights (5 70 paras.2 and 3).

## IV. Occupation

### 1. General

**527.** Territory is considered occupied when it is actually placed under the authority of the opposing armed forces (16a 42). The Occupying Power assumes responsibility for the occupied territory and its population (4 29, 47 ff.; 16a 43). The Occupying Power must be able to exercise its **occupational authority**. A force invading adversary territory can only establish occupational authority if it is capable of enforcing directions issued to the civilian population.

**528.** Occupied territory does not include **battle areas**, i.e. areas that are still contested and not subject to permanent occupational authority (areas of invasion, withdrawal areas).

**529.** Occupation (*occupatio bellica*) does not constitute the acquisition of one State's territory by another State. The establishment of occupational authority does not change the legal status of the territory in question.

**530.** International law recognises the right of the Occupying Power to exercise **jurisdiction** in the occupied territory. The sovereignty of the occupied State is suspended in the occupied territory as long as the Occupying Power exercises its regulatory power.

**531.** The Occupying Power is obliged to restore and ensure, as far as possible, public order and security (16a 43). It must regard itself **only as an administrator and usufructuary** of public buildings, real estate, forests and agricultural estates belonging to the adverse state and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct (16a 55).

**532.** **Civilians** are entitled, in all circumstances, to **respect** for their persons, their honour, their family rights, their manners and customs, and their religious convictions and practices. Their private property is protected (4 27 para.1; 5 48 ff, 75; 16a 46).

**533.** Adverse discrimination based upon race, nationality, language, sex, religion, belief, political opinion, social origin or on any other similar criteria is not permitted (4 27; 5 75 para.1).

**534.** Civilians must be protected against **acts of violence** (4 13, 27; 16a 46). These include in particular

- punishment for the conduct of third Parties ('proxy punishment) and collective punishment, as well as measures taken to **intimidate** or **terrorise** people (4 33 para.1; 5 51 para.2; 6 13 para.2),
- **reprisals** against the civilian population and its property (4 33 para.3; 5 20, 51 para.6),
- pillage (4 33 para.2; 16a 47) and
- the taking of hostages (4 34).

**535.** A military occupation results in a state of international armed conflict. This also applies if hostilities have in general come to a final end.

**536.** In the case of occupied territory, the application of the Fourth Geneva Convention ceases one year after the general close of military operations. However, the Occupying Power is obligated, beyond this period of one year, to the extent that it exercises the functions of government in such territory, by a number of provisions on the protection of the civilian population (4 6 para.3). Protected persons whose release, repatriation or re-establishment may take place after such dates continue to benefit by the Convention (4 6 para.4).

With regard to the contracting Parties to Additional Protocol I, it should be added that the application of the Geneva Conventions and Additional Protocol I (5) ceases, in the case of occupied territories, on the termination of the occupation, except for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons continue to benefit from the relevant provisions of the Geneva Conventions and Additional Protocol I until their final release, repatriation or re-establishment (5 3 lit.b).

**537.** Occupation ceases with the abandonment of direct and effective occupational authority; that authority may be abandoned whole or in part. Upon the complete abandonment of occupational authority, the State concerned regains full sovereignty of its domestic and foreign affairs.

## **2. Legal Status of the Population**

**538.** The legal status of the population may not be compromised by any agreement concluded between the authorities of the occupied territories and the Occupying Power or by any annexation of the whole or part of the occupied territory by the Occupying Power (4 47).

**539.** Protected persons may not renounce the rights secured to them by the Fourth Geneva Convention (4 8).

**540.** An Occupying Power may not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand (4 49 para.5).

**541.** **Transfers of protected persons** within and to areas outside an occupied territory as well as in areas outside an occupied territory are prohibited regardless of their motive (4 49 para.1, 5 85 para.4 lit.a, 33 8 para.2 lit.b viii). Evacuations are only permitted if the security of the population or imperative military reasons so demand (4 49 para.2). An Occupying Power may not transfer parts of its own civilian population into the territory it occupies (4 49 para.6, 5 85 para.4 lit.a, 33 8 para.2 lit.b viii).

**542.** A temporary **evacuation** of a given area is permitted if the security of the population or imperative military reasons so demand. An **evacuation** of persons to areas outside the bounds of the occupied territory is permitted only in case of extreme emergency (4 49 para.2). If an evacuation is necessary, the Occupying Power must provide, to the greatest practicable extent, sufficient accommodation and supplies. Members of the same **family** must not be **separated** (4 49 para.3).

**543.** For imperative reasons of **security**, the Occupying Power may subject protected persons, and also certain civilians, to assigned residence or to internment (4 78 para.1).

### 3. Rights and Duties of the Occupying Power

**544.** The national laws of the occupied territory remain, in principle, in force. The Occupying Power may repeal or suspend laws which served the purpose of warfare in the territory now occupied or which constitute a threat to security or an obstacle to the application of international humanitarian law (4 64; 16a 43).

**545.** An Occupying Power may subject the population of an occupied territory to **provisions** which are essential

- to fulfil its obligations under the Fourth Geneva Convention,
- to maintain the orderly government of the territory,
- to ensure the security of the Occupying Power and its establishments and lines of communication and
- to maintain public order (4 64 para.2; 16a 43).

**546.** The **administration** of the occupied territory must be given the opportunity to carry on its activities. The **jurisdiction** of the occupied territory remains in force. If it is not capable of functioning, it must be replaced by the Occupying Power.

**547.** The Occupying Power may establish **administrative bodies of its own** if military necessity or the obligation to maintain public order so demand (4 64 para.2).

**548.** The legal status of **judges** and **public officials** may not be altered. It is prohibited to take measures of coercion against them should they abstain from fulfilling their functions for reasons of conscience (4 54 para.1). Public officials may be removed from their posts (4 54 para.2), especially in order to maintain public order, to comply with international law, or to guarantee the security of the Occupying Power.

### 4. Use of Civilian Resources by the Occupying Power

**549.** An Occupying Power may, in accordance with existing laws, collect **taxes, dues and tolls**. The revenue generated must be used to defray the expenses of the administration (16a 48). Any **other money contributions** may only be levied to meet the needs of the occupational forces or to cover administrative costs (16a 49).

**550.** Extra charges (**contributions**) may only be collected under a written order issued by a commander-in-chief. For every contribution a receipt must be given to the contributors (**16a 51**).

**551.** The commander of the locality occupied may demand **requisitions** in kind and services from municipalities or inhabitants of the occupied territory for the needs of the occupational forces (**16a 52** paras.1 and 2). Such requisitions must be in proportion to the resources of the country. It is prohibited to force inhabitants to take part in military operations against their own country (**16a 52** para.1).

**552.** Requisitions must as far as possible be paid for in cash. If this is not possible, a **receipt** be given. Payment of the amount due must be made as soon as possible (**16a 52** para.3).

**553. Movable property belonging to the State** which may be used for military operations may become **booty of war** (**16a 53** para.1). Upon seizure it becomes, without any compensation, the property of the Occupying State. Booty of war includes e.g. cash, means of transport, arms, and supplies of food (**16a 53** para.1). The latter may be requisitioned only if the requirements of the civilian population have been taken into account (**4 55** para.2). The requirements of the civilian population must be satisfied first (**4 55** para.1).

**554. Movable private property** which may be used for military operations and **immovable property of the State** may be seized but not confiscated (**16a 53** para.2, 55). A title to such property may not pass to the Occupying State; the Occupying State administers, in accordance with the rules of usufruct, public buildings, real estate, forests and agricultural estates belonging to the hostile State and situated in the occupied country. It must safeguard the capital of these properties (**16a 55**). Upon termination of the occupation, seized items and property must be restored.

**555.** All private property must be protected from destruction and permanent seizure (**16a 23** para.1 lit.g, 46 para.2). This does not apply to articles seized for the purpose of consumption. It is prohibited to declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of a hostile Party (**16a 23** para.1 lit.h).

**556.** The property of municipalities and that of institutions dedicated to religion, charity, education, and the arts and sciences must be treated as private property even when it is State property (**16a** 56 para. 1).

**557. Civilian hospitals** may be requisitioned only temporarily and only in cases of urgent necessity. The care and treatment of patients must be ensured (**4** 57 para.1). The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the civilian population (**4** 57 para.2; **5** 14 para.2).

**558.** All seizure of, destruction or wilful damage done to **cultural property** is forbidden (**16a** 56; **24** 5). The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a territory by a foreign Power will be regarded as illicit<sup>1</sup>.

**559.** The Occupying Power may not compel members of the civilian population to **serve** in its armed forces (**4** 51 para.1). **Pressure** and **propaganda** which aim at securing voluntary enlistment into the armed forces of the Occupying Power are also prohibited (**4** 51 para.1).

**560.** No physical or moral coercion may be exercised against protected persons, the civilian population or third Parties in order to obtain general (**4** 31) and military (**16a** 44) **information**.

**561.** The Occupying Power may compel civilians over eighteen years of age to perform **work** necessary for the needs of the occupational forces or for the public utility services, or for the feeding, sheltering, clothing, transportation and health of the population. They may not be compelled to perform work which would involve them in the obligation of taking part in military operations (**4** 51 para.2; **16a** 52) or lead to a mobilisation of workers in an organisation of a military or semi-military character (**4** 51 para.4).

**562.** Civilians who must perform work for the Occupying Power should keep, so far as possible, their usual places of employment. The Occupying Power must not modify the existing **working conditions** (e.g. wages, working hours, occupational safety) (**4** 51 para.3).

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<sup>1</sup> See Article 11 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970.

**563.** It is prohibited to compel protected persons to work outside the occupied territory (4 51 para.3).

### **5. Humanitarian Relief and Supplies in an Occupied Territory**

**564.** The Occupying Power has the duty of ensuring the necessary food and medical supplies of the civilian population to the fullest extent of the means available to it. Resources of the occupied territory must be exploited first. If necessary, indispensable supplies must be brought in by the Occupying Power (4 55 para.1; 5 69 para.1).

**565.** The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupational forces and the administration personnel, and then only if the requirements of the civilian population have been taken into account. In addition, arrangements must be made to ensure that fair value is paid for any requisitioned goods (4 55 para.2).

**566.** If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power must agree to **relief schemes** by other States or by humanitarian organisations on behalf of the population, notwithstanding any necessary approval and monitoring procedures (4 59; 5 69-71). It must facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organisations such as the ICRC, consist in particular of the provision of consignments of foodstuffs, medical supplies and clothing. All contracting Parties must permit the free passage of these consignments and must guarantee their protection. A Power granting free passage to consignments on their way to territory occupied by an adverse Party to a conflict has, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power (4 59).

**567.** The Occupying Power has the duty of ensuring and maintaining, with the cooperation of the authorities of the occupied territory, the **medical care** of the civilian population as well as public health and hygiene. Preventive measures must be taken to combat the spread of contagious diseases and epidemics. The Occupying Power must not requisition civilian medical units, their equipment, their materiel or the services of their

personnel so long as these resources are necessary for the provision of adequate medical services for the civilian population (4 56 para.1; 5 14 paras.1 and 2).

**568.** The national **Red Cross and Red Crescent societies** are permitted to pursue their humanitarian activities in an occupied territory in accordance with the principles of the international Red Cross and Red Crescent movements, as defined by the International Red Cross and Red Crescent Conferences. Other **relief societies** are permitted to continue their humanitarian activities under similar conditions (4 63).

## 6. Jurisdiction

**569.** **National laws** governing the prosecution of criminal offences remain in force. The Occupying Power may repeal or suspend penal laws if they constitute a threat to its security or an obstacle to the application of the Fourth Geneva Convention (4 64 para.1).

**570.** For these reasons and, in particular, for maintaining the orderly government of the territory, an Occupying Power may enact penal provisions of its own (4 64 para.2). These penal provisions come into force when they have been published in the language of the inhabitants of the occupied territory and must not be retroactive (4 65).

**571.** Courts of the Occupying Power may not prosecute criminal offences committed prior to the occupation unless such offences constitute **violations of international humanitarian law** (4 70 para.1).

**572.** Breaches of the penal provisions of the occupied territory should continue to be prosecuted by the **courts of the occupied territory**. If these courts are unable to function, jurisdiction shall pass over to military courts of the Occupying Power as a general rule. Breaches of penal provisions promulgated by the Occupying Power may be prosecuted by non-political and properly constituted **military courts** of the Occupying Power (4 66).

**573.** Trials in courts in occupied territories must be conducted in accordance with the principles of the rule of law (4 67, 69-75; 5 75).

**574.** The Occupying Power must punish **minor offences** with internment or imprisonment only (4 68 para.1). In the case of **serious offences** (espionage, serious acts of sabotage against the military installations of the Occupying Power, intentional offences causing death), the death penalty is permitted only if such offences were **punishable by**

**death before the occupation began** (4 68 para.2; 5 76 para.3, 77 para.5). These regulations have, however, been restricted in modern international law.

**575.** The international community has made **concerted efforts to abolish the death penalty in all circumstances**. Several recent international treaties are aiming at the complete abolition of the death penalty even in international armed conflicts:

- the Second Optional Protocol of 15 December 1989 to the International Covenant on Civil and Political Rights (**44**),
- Protocol No. 13 of 3 May 2002 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (**45**) and
- the Protocol of 8 June 1990 to the American Convention on Human Rights of 22 November 1969 to Abolish the Death Penalty.

The Parties to these treaties are obliged to abolish the death penalty and may not execute anyone under their national jurisdiction. They are also prohibited from conducting executions in wartime, in particular as an Occupying Power.

The Second Optional Protocol of 15 December 1989, however, authorises States to make a reservation at the time of ratification or accession which provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. The Protocol of 8 June 1990 to the American Convention on Human Rights also allows such a reservation for the death penalty in wartime for extremely serious crimes of a military nature.

On the other hand, the signatories of Protocol No. 13 of 3 May 2002, which include Germany, have **abolished the death penalty in all circumstances**. No one under the jurisdiction of these States may be sentenced to death or executed.

**576.** Nationals of the Occupying Power who, before the occupation, have sought refuge in the territory of the occupied State may not be prosecuted for this reason. Offences

- committed after the outbreak of hostilities or
- under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace

may, however, be prosecuted (**4 70 para.2**).

**577.** Remanded and sentenced prisoners must be accommodated in humane conditions. **Sentences must be served** in the occupied territory (4 76 para.1). Prisoners have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross (4 76 para.6).

**578.** All persons who have been accused of offences or convicted by the courts in occupied territory must be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory (4 77).

#### V. Aliens in the Territory of a Party to the Conflict

**579.** Every civilian person has the right to leave a territory unless his or her departure is contrary to the national interests of the State (4 35 para.1). Departure must be carried out under humane conditions (4 36). If a person is refused permission to leave, he or she is entitled to have the refusal **reconsidered** by an appropriate court or an administrative board designated for that purpose (4 35 para.2).

**580.** Aliens remaining in the territory of a Party to a conflict must in principle be treated the same as they would be treated in peacetime.

**581.** This includes

- the right to medical care and to freedom of religion and
- the right to leave areas exposed to the dangers of war.

Aliens are entitled to these rights to the same extent as are the nationals of the country of residence (4 38).

**582.** Aliens should be granted the opportunity to **find paid employment**. They enjoy the same advantages as nationals of the country of residence (4 39). Aliens may be compelled to work only under the same conditions as nationals (4 40 para.1).

**583.** The **internment** or placing in **assigned residence** of aliens may be ordered only if reasons of security make it absolutely necessary (4 42 para.1) or if it is not possible to control these persons sufficiently (4 41 para.1). It must be possible to have these measures reconsidered by an appropriate court or an administrative board (4 43 para.1).

**584.** **Refugees** and **stateless persons** must always be treated as protected persons (4 44; 5 73).

**585.** Persons protected pursuant to the Fourth Geneva Convention may be handed over to a contracting Party if they do not suffer disadvantages because of their political opinions or religious beliefs and if the application of the Convention is ensured (4 45).

**586.** Restrictive measures taken regarding aliens must be cancelled as soon as possible after the close of hostilities (4 46).

## VI. Internment

**587.** The freedom of civilians may under certain circumstances be restricted by way of internment. The **internment of civilians** is permitted

- if it is necessary in a specific situation for imperative reasons of security (4 41-43, 78 para.1) or
- as a penal measure for civilian persons (4 68).

Decisions regarding internment must be made according to a regular procedure and must be subject to periodical review (4 43, 78 para.2).

**588.** The **treatment** of internees corresponds to the treatment of prisoners of war (4 79-141). Representatives of the Protecting Power and delegates of the ICRC may visit internees in their camps at any time and interview them individually and without witnesses (4 143).

**589.** The **place of internment** must be put under the authority of a responsible officer or of a public official from the civil administration of the Detaining State (4 99 para.1). The Detaining State should, as far as possible, accommodate the internees according to their nationality, language and customs (4 82 para.1). It must ensure that members of the same family are lodged in the same place of internment. Separation of a temporary nature may be necessitated for reasons of employment or health or for the purposes of enforcement of penal or disciplinary measures (4 82 para.2).

**590.** Internees must always be accommodated and administered separately from prisoners of war and from persons detained for other reasons (4 84).

**591.** Internees must be treated humanely. In particular, harassment, punishment drills, military drills and the reduction of food rations are prohibited (4 100). Contact with the outside world must be facilitated (4 105-116).

**592.** Internees are **not obliged to work** (4 95 para.1). Internees may be employed for work at their places of internment and for activities serving their own interests (4 95 para.3). Voluntary work performed by internees must not be connected to military operations.

**593.** Internees who commit offences will be subject to the laws in force in the territory in which they are detained (4 117 para.1).

**594.** The Parties to a conflict must endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence or to facilitate their repatriation (4 134).

<p style="text-align: center;"><b>VII. Human Rights in Occupied or Otherwise Controlled Territories</b></p>
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**595.** The Occupying Power or any other State otherwise exercising territorial authority in occupied or controlled territories must protect the human rights, pursuant to the principles mentioned in Chapter 1, No. 105, of all persons under its jurisdiction.

**596.** Examples of human rights laid down in international conventions:

- **Right to life.** Every human being has the inherent right to life (30 2; 31 6). The death penalty has been abolished in a number of countries.
- **Prohibition of torture.** No one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment (30 3; 31 7). In particular, no one may be subjected to medical or scientific experimentation without his free consent.
- **Principle of equality.** All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law must prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (30 14; 31 26).

- Prohibition of slavery. Everyone has the right to recognition everywhere as a person before the law. No one may be held in slavery or servitude. Slavery and the slave-trade in all their forms are prohibited (30 4; 31 8, 16).
- **Liberty and security of person.** Everyone has the right to liberty and security of person (30 5; 31 9). No one may be subjected to arbitrary arrest or detention (31 9). All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person (31 10). No one may be subjected to unlawful attacks on his honour and his reputation (31 17).
- **Freedom of thought, conscience and religion.** Everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to have or adopt a religion or belief of one's choice, and the freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching (30 9; 31 18).
- **Right to a fair trial.** In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by a competent, independent and impartial tribunal established by law. The judgement rendered must be made public (30 6; 31 14).
- **Presumption of innocence.** Everyone charged with a criminal offence must be presumed innocent until proved guilty according to law (30 6; 31 14).
- **No punishment without law.** No one may be held guilty of any criminal offence which did not constitute a criminal offence under national or international law at the time when it was committed (30 7).

## Chapter 6

### Protection of the Wounded, Sick and Shipwrecked

I. General
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**601.** 'Wounded' and 'sick' means persons, whether members of armed forces 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. The protection of wounded and sick ceases as soon as they carry out acts of hostility. Maternity cases, new-born babies, the infirm, and expectant mothers must be given treatment equivalent to the wounded and sick (5 8 lit.a).

**602.** 'Shipwrecked' means persons, whether members of the armed forces 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 that they continue to refrain from any act of hostility, continue to be considered shipwrecked during their rescue until they acquire another status pursuant to the Geneva Conventions of 1949 or Additional Protocol I of 1977 (2 13; 5 8 lit.b), e.g. the status of a prisoner of war. The protection of shipwrecked people ceases as soon as they carry out acts of hostility.

**603.** **The wounded, sick and shipwrecked, to whichever Party they belong, must be respected and protected in all circumstances** (1 12 para.1, 35 para.1); 2 12 para.1; 3 3 para.1 no.2; 5 10 para.1; 6 7 para.1). Any attempt on their lives or violence to their persons is prohibited. They must be treated humanely in all circumstances. They must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There must be no distinction among them founded on any grounds other than medical ones (1 12 para.2; 2 12 para.2; 5 10 para.2; 6 7 para.2).

**604.** **Reprisals** against the wounded, sick and shipwrecked are prohibited (1 46; 2 47; 5 20).

**605.** At all times, all possible measures must be taken to search for and collect the wounded, sick and shipwrecked and to ensure the necessary medical care for them. They must be protected against ill-treatment and pillage (1 15; 2 18 para.1; 5 11 para.1; 6 8).

**606.** It is prohibited to subject the wounded, sick and shipwrecked to any **medical procedure** which is not indicated by the state of the health of the person concerned and which is not consistent with generally accepted medical standards (2 12 para.2; 5 11 para.1; see also 1 12 para.2). In particular, physical mutilations, medical or other scientific experiments, and the removal of tissue or organs for transplantations are prohibited and punishable as war crimes (5 11 para.2; 35 8 para.1 no.8).

**607.** Detailed **medical records** of all medical procedures must be kept. This also applies to every donation of blood for transfusion or skin for grafting by persons deprived of liberty. These records must be available at all times for inspection by a Protecting Power (5 11 para.6).

**608. Exemptions to the prohibition** of removing tissue or organs for transplantation may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that

- voluntary consent is given,
- only for therapeutic purposes and
- under conditions consistent with generally accepted medical standards (5 11 para.3).

**609.** A detained person may furthermore be subjected to medical procedures which are indicated by the state of health of the person concerned and which are consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty (5 11 para.1). This may be applicable in the case of procedures that are necessary for combating contagious diseases, e.g. vaccinations.

**610.** Wounded, sick and shipwrecked have the right to refuse **any surgical operation** and any other comparable procedure affecting their physical integrity. In such cases medical personnel must endeavour to obtain a written statement to that effect, signed by the patient (5 11 para.5).

**611.** The wounded, sick and shipwrecked as well as dead persons must be **identified**. Particulars must be forwarded to the official information bureaus (1 16; 2 19). In the Federal Republic of Germany, the German Red Cross assumes the tasks of an official information bureau (3 122; 4 136).

**612.** **The dead** must be collected; looting the dead is prohibited (1 15 para.1; 2 18 para.1). Any burial or cremation must be preceded by a documented medical examination of the bodies (1 17 para.1; 2 20 para.1). One half of a double identity disc or, if the disc consists of one piece only, the entire identity disc must remain on the body (1 17 para.1; 2 20 para.1).

## II. Medical Establishments and Transports

**613.** Fixed medical establishments, medical vehicles and mobile medical units may in no circumstances be attacked (1 19 para.1; 4 18 paras.1 and 5; 5 12 para.1; 6 11 para.1). They must at all times be free to pursue their duties. Medical establishments and units should, as far as possible, be sited or deployed at an adequate **distance from military objectives**. Under no circumstances may they be used in an attempt to shield military objectives from attack (1 19 para.2; 4 18 para.5; 5 12 para.4).

**614.** Medical establishments and units may not be used to commit acts harmful to the adversary (1 21; 2 34; 4 19 para.1; 5 13 para.1; 6 11 para.2).

**615.** Should medical establishments or units fall into the hands of the adversary, their personnel must be free to pursue their duties until the Capturing Power itself has ensured the necessary medical care (1 19 para.1; 4 57 para.1; 5 14).

**616.** **Medical units** (5 8 lit.e) means 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, i.e. in particular:

- military hospitals and similar units,
- blood transfusion centres,
- preventive 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 (5 8 lit.k).

**617. Medical transports** are any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to a conflict; they include, above all, medical vehicles, medical vessels and medical aircraft (5 8 lit.g). A **medical vehicle** is any means of medical transportation by land (5 8 lit.h).

Medical transports and medical vehicles are subject to the laws of war. They may legitimately be captured by an adversary and are subject to the **right of booty of war** (1 35 para.2). Medical vehicles and their crews must not resist being captured by a military adversary. If medical vehicles or their crews resist capture, they will lose their protection under international law (1 21, 35 para.1). The right of medical personnel to bear arms only applies to self-defence and the defence of the wounded and sick; it does not apply to 'defence' against the capture of a vehicle by a military adversary. Defensive actions are, however, permitted against looters not controlled by the adversary.

Soldiers with the status of combatants may be employed for the protection of medical transports and vehicles. Since combatants may be attacked, the mere presence of such soldiers endangers the persons and items that are to be protected. For this reason, the pros and cons of employing soldiers for such protective functions must be carefully considered.

**618. The material** of mobile medical units of the armed forces (litters, equipment, medicine, surgical dressings, etc.) must continue to be still available to medical personnel so that they may perform their work (1 33, 35 para.2; 4 57 para.2; 5 14). Special provisions apply to hospital ships and medical aircraft.

**619. The property of aid societies** (buildings, material, stores, etc.) must be protected. It may be requisitioned in urgent cases, provided that the care of the wounded and sick has been properly ensured (1 33, 34; 5 14 paras.2 and 3, 21, 16a 53 para.2).

**620. Transports of wounded** and sick or of medical equipment must be respected and protected (1 35; 4 21, 22; 5 21). They must bear, clearly marked (1 36 para.2, 42 paras.2 and 4; 4 21; 5 18 para.4; 6 12), the **distinctive emblem** (red cross on white ground or an equivalent emblem) (1 38, 39, 44; 5 18).

**621.** The protection to which medical establishments and units are entitled will cease if they are used to commit, outside their humanitarian duties, **acts harmful to the adversary**; protection may only cease after a due warning has been given, naming a reasonable time limit, and after such warning has remained unheeded (1 21; 2 34; 4 19 para.1; 5 13 para.1; 6 11 para.2).

**622.** The following acts are not considered harmful (1 22 para.3; 2 35 para.3; 5 13 para.2):

- that medical personnel use weapons for their own defence and for that of the wounded and sick (see No. 627),
- that medical personnel, units and establishments are guarded by a picket or by sentries or by an escort,
- that medical personnel are employed as guards for the protection of own medical units and establishments,
- that arms and ammunition taken from the wounded and sick are stored in the units and
- that members of the armed forces or other combatants are in the unit for medical reasons.

**623.** The provisions on **hospital ships and medical aircraft** are covered in Chapters 10 and 11.

### III. Medical Personnel

**624.** Civilian and military medical personnel are entitled to special protection. They may neither be made the object of attack nor be prevented from exercising their functions (1 23 para.1, 24; 2 36; 4 14, 20; 5 15; 6 9-10).

**625.** **Medical personnel** are those persons assigned by a Party to the conflict **exclusively** to perform medical functions, administer medical units, or operate or administer medical transports. Such assignments may be either permanent or temporary. The term (5 8 lit.c) includes

- medical personnel of a Party to the conflict, whether military or civilian,
- medical personnel assigned to civil defence organisations,

- medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) societies and other voluntary national aid societies duly recognised and authorised<sup>1</sup> by a Party to the conflict and
- medical personnel of medical units and transports (5 9 para.2).

**626.** Medical personnel **exclusively** engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as hospital personnel on board hospital ships must be respected and protected in all circumstances (1 24; 2 30, 36, 37; 5 8 lit.c, 22 and 23).

**627.** A medical unit or medical establishment will not lose the special protection granted to it under the law of armed conflict (LOAC) if the personnel of the unit or establishment are equipped with **light individual weapons** and use these arms **in their own defence or in that of the wounded, sick and shipwrecked in their custody** (1 22 para.2; 2 35 para.1; 5 13 para.2 lit.a). Light individual weapons include, in particular, pistols, rifles and submachine guns. Heavy weapons and weapon systems that can only be carried and operated by more than one person are not considered light individual weapons.

**628.** **Medical personnel** who fall into the hands of the adverse Party may be **retained** only in so far as the state of health and number of prisoners of war so require (1 24, 28 paras.1 and 2; 2 37 paras.2 and 3). **Personnel of aid societies of a Party to the conflict** may be retained under the same conditions that apply to medical personnel (1 26, 28 paras.1 and 2).

**629.** The personnel of a neutral State or other State which is not a Party to the conflict, the personnel of an aid society of such State, and the personnel of impartial international humanitarian organisations which have been made available to a Party to the conflict for humanitarian purposes **must not be retained** (1 27, 32; 5 9 para.2).

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<sup>1</sup> In accordance with Section 2 Para.1 of the Act on the German Red Cross and other voluntary aid societies as defined in the Geneva Conventions, 5 December 2008 (German Federal Law Gazette I, p. 2346), the German Red Cross, which is a voluntary aid society, supports the Medical Service of the Bundeswehr, including the employment of hospital ships (1 26, 2 24); in accordance with Section 4 of this act, the Johanniter-Unfall-Hilfe e.V. and the Malteser Hilfsdienst e.V. are voluntary aid societies as defined in Section 26 of the First Geneva Convention (1 26); these two aid societies are authorised to support the Medical Service of the Bundeswehr in accordance with Section 5 of the Act on the German Red Cross.

**630. Retained personnel are not deemed prisoners of war** and are entitled at least to the advantages provided by any and all provisions of the Third Geneva Convention.

Retained personnel are free to pursue their **duties** within the framework of the military laws and regulations and under the direction of the Detaining Power, as long as the Detaining Power has not itself ensured the necessary care of the wounded and sick (1 19). Such personnel should preferably be employed for the care of the wounded and sick of the armed forces to which they themselves belong (1 28; 2 37).

Retained personnel may not be required to perform any **work** outside their medical duties (1 28 para.2 lit.c; 3 33 para.2 lit.c).

**631.** The senior medical officer in each camp is responsible to the camp military authorities for everything connected with the activities of retained medical personnel. This senior medical officer, as well as chaplains, has the right to deal with the competent authorities of the camp on all questions relating to their duties. Such authorities must afford them all necessary facilities for correspondence relating to these questions (3 33 para.2).

**632.** During hostilities, the Parties to the conflict must agree concerning the possible **relief** of retained personnel and must settle the procedure to be followed (3 33 para.3).

**633.** Medical personnel whose retention is not indispensable must be returned to the Party to the conflict to whom they belong as soon as a road is open for their return and military requirements permit. Pending their **return**, they must not be deemed prisoners of war; nevertheless they must at least benefit by all the provisions of the Third Geneva Convention. They must continue to fulfil their duties under the orders of the adverse Party and must preferably be engaged in the care of the wounded and sick of the Party to the conflict to which they themselves belong. Upon their departure, they may take with them the effects, personal belongings, valuables and instruments belonging to them (1 30; 2 37).

**634.** Military personnel specially trained for employment, should the need arise, as **hospital orderlies, nurses or auxiliary stretcher-bearers** in the search for or the collection, transport or treatment of the wounded and sick must likewise be respected and protected if they are carrying out these duties at the time when they come in contact with the adversary or fall into his hands. While carrying out medical duties, such personnel

must wear a white armband bearing in its centre the distinctive emblem in miniature (1 41). They will become prisoners of war but may be employed on their medical duties in so far as the need arises (1 25, 29).

**635.** The employment of medical personnel of the relief organisations of a neutral country or a country not involved in the conflict requires the consent of its own government and the authorisation of the Party to the conflict whom it assists (1 27).

**636.** The civilian population must respect the wounded, sick and shipwrecked even if they belong to the adverse Party. It must not commit acts of violence against them. The civilian population and aid societies, such as the national societies of the Red Cross or the Red Crescent, must be permitted spontaneously to collect and care for wounded, sick and shipwrecked. No one may ever be molested, prosecuted or convicted for such humanitarian actions (1 18; 5 17).

#### IV. Hospital Zones and Localities

**637.** The Parties to an armed conflict may agree to establish **hospital zones and localities** so organised as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organisation and administration of these zones (1 23; 4 14).

**638.** Such zones and localities must be situated as far as possible from military objectives and outside regions that may become important for the conduct of military operations. They must comprise only a small and sparsely populated part of the territory under the authority of a Party to the conflict. They must not be the object of attack and must be protected and respected by the Parties to a conflict at all times.

**639.** Hospital zones and localities must be clearly marked on the outer precincts and on buildings by means of the **Red Cross** (or Red Crescent or Red Lion and Sun) emblem on a white background (4 6 para.2 of Annex I).

**640.** Safety zones and localities can be established by mutual agreement for certain civilian persons (4 14; 4 1 para.1 of Annex I).

## V. Emblems, Markings and Distinctive Emblems

### 1. General

**641.** The emblem for medical and religious personnel as well as for medical establishments (including hospital ships), medical transports, hospital zones and medical material of the armed forces is the **Red Cross** on a white ground. States are permitted to use the **Red Crescent** instead of the Red Cross. As a distinctive emblem, the Red Cross indicates that persons wearing it and objects marked by it are protected under LOAC. As a marking, it indicates the affiliation of a person or an object to a component of the International Red Cross or Red Crescent Movement. International law also recognises the Red Lion and Sun on a white ground, which has not, however, been in use as a symbol since 1980. With the adoption of the Additional Protocol III to the Geneva Conventions (AP III), the **Red Crystal** on a white ground was added as an additional distinctive emblem and is equivalent to the already existing distinctive emblems recognised by international law (**6a 2**). AP III refers to it as the 'third Protocol emblem' (**6a 2 para.2**). Markings and distinctive emblems have neither a religious character nor any ethnic, racial, regional or political significance; they must all be fully respected at all times and in all places.

Fig. 6.1 (a)-(c): Symbols and distinctive emblems in red on a white ground in accordance with the Geneva Conventions

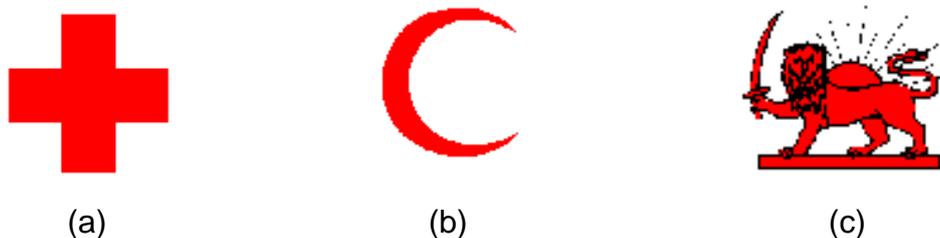


Fig. 6.2: Crystal in red on a white ground (Red Crystal)



**642.** In the past, States were entitled to allow their military medical and religious personnel to bear only one of the symbols and distinctive emblems (**Red Cross, Red Crescent, Red Lion and Sun**). The Additional Protocol III (6a) gave the contracting States more flexibility for improving protection (No. 648 below).

**643.** In addition, the Red Star of David on a white ground, which is only used by Israel, has in practice gained significance. International law did not provide for the use of the red Star of David. Israel had signed the First, Second and Fourth Geneva Conventions of 1949 with the reservation that it would make use of the Red Star of David as a distinctive emblem and marking in its own armed forces while recognising the distinctive emblems and markings of the Conventions.

Fig. 6.3: Red Star of David on a white ground



**644.** The contracting Parties may permit their military medical and religious personnel to make temporary use of any other distinctive emblem (Red Cross, Red Crescent or Red Crystal on a white ground) in addition to their current distinctive emblem if such use **enhances protection** (6a 2 para.4).

**645.** Medical and religious personnel participating in operations under the auspices of the United Nations may, with the agreement of the participating States, use one of the recognised distinctive emblems (Red Cross, Red Crescent or Red Crystal on a white ground) (6a 5).

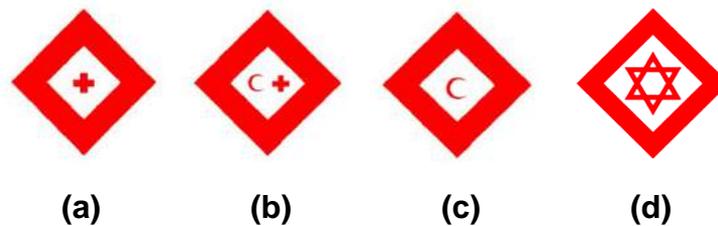
**646.** The distinctive emblem is worn by medical and religious personnel as an armlet in connection with a special identity card (1 40, 41; 2 42; 4 20 paras.2 and 3; 5 18 para.3; 6 12) and is used as a **flag** and **marking** on medical units, establishments, material and transports (1 39, 42, 43; 2 42 para.1; 4 18 paras.3 and 4 and 43; 5 18 para.4; 6 12). It must only be used for the designated purposes and must be an appropriate size and visible from far away.

**647.** The emblems also serve to identify the **national societies** of the Red Cross (Red Crescent), their establishments and members in peacetime. As far as they are used only as markings and as far as protection according to the Geneva Conventions does not exist (1 44), the emblem must be comparatively small in size and must not be placed on armlets or on the roofs of buildings (1 44 para.2; 5 18 para.7). In the past, national societies were only permitted to use one of the emblems. In accordance with national legislation, national societies of the contracting States to the Third Additional Protocol (6a) may **temporarily** use the Red Crystal **in exceptional circumstances** and in order to **facilitate their work**.

**648.** The national societies of the Red Cross (Red Crescent) of the contracting States which use the Red Crystal may, in accordance with national legislation, choose to incorporate into that emblem other emblems recognised by LOAC (6a 3 para.1 and Annex to Additional Protocol III, Article 2)). The following emblems may be used:

- a distinctive emblem recognised by the Geneva Conventions,
- another emblem which has been in effective use by a contracting State and was the subject of international negotiations prior to the adoption of the Third Additional Protocol (red Star of David on a white ground).

Fig. 6.4 (a)-(d): Examples of combinations involving the Red Crystal on a white ground



**649.** The perfidious use of distinctive emblems is expressly prohibited and furthermore considered a grave breach of international law, if not a war crime, if it has been wilfully committed and it causes death or serious injury to body or health (1 49, 53, 54; 2 44; 5 37, 38, 85 para.3 lit.f; 6 12; 6a 6; 16a 23 lit.f; 33 8 para.2 lit.b vii; 35 10 para.2, 11 para.1 no.7).

**650.** The usage of distinctive emblems by unauthorised organisations and persons is prohibited. The contracting States of the Geneva Conventions must take measures necessary for the prevention and repression, at all times, of abuses (1 53, 54; 2 45; 6 12;

**6a 6).** In the Federal Republic of Germany, the improper use of distinctive emblems<sup>1</sup> is subject to a fine also during peacetime pursuant to Section 125 of the German Administrative Offences Act.

## **2. Camouflage of Medical Establishments, Medical Units, Medical Transports and their Distinctive Emblems**

**651.** The Parties to a conflict must take the necessary steps, in so far as military considerations permit, to make the **distinctive emblems** indicating medical establishments, medical units and medical transports clearly visible to the adversary in order to obviate the possibility of hostile action in violation of international law (1 42 para.4; 5 18 para.1). Distinctive emblems must be displayed so that they are visible **from as many directions and from as far away as possible**, in particular from the air (5 5 of Annex I). Displaying distinctive emblems is, however, not an absolute obligation under international law. Camouflaging distinctive emblems does not therefore give rise to any legal concerns.

**652.** Military rationale may make it necessary in certain situations to deny the adversary any points of reference. **Camouflaging** medical establishments, medical units and medical transports to prevent detection by the adversary as well as camouflaging distinctive emblems is permitted if military reasons so demand. Distinctive emblems may only be camouflaged on the orders of a brigade commander or higher officer or an officer in an equivalent position unless otherwise directed by the Federal Ministry of Defence. The senior medical officer and the legal advisor must be heard in advance. In the event of an attack, this measure, which is in principle taken to protect medical establishments and units, must be stopped, unless the camouflage of distinctive emblems continues to be indispensable for protective reasons from a military point of view, e.g. because the adversary is violating international law by disregarding distinctive emblems and directly attacking medical units.

**653.** The obligation to respect persons and objects protected by the Geneva Conventions and their Additional Protocols is based on international law; their protection does not depend on the use of distinctive emblems, markings or identification signals. Medical establishments, units and vehicles thus do not lose or forfeit their protection under

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<sup>1</sup> Emblems of the Red Cross on a white ground and similar emblems such as the Red Crescent, the Red Lion and Sun, and the Red Crystal, each on a white ground.

LOAC if their protective markings are camouflaged. Without such markings, however, their protected status is no longer recognisable from outside. Medical establishments and units may therefore run the **risk** that the adversary does not identify them as medical establishments or units and, as a consequence, mistakes them for military objectives and launches an attack.

<p style="text-align: center;"><b>VI. Use of Distinctive Emblems in Conflicts and Peacetime</b></p>
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**654.** According to the instructions and under the direction of the competent authority concerned, medical and religious personnel as well as medical units and transports may display the distinctive emblem of the Red Cross on a white ground **in non-international armed conflicts**. The emblems must be respected in all circumstances and must not be used improperly (**6 12**).

**655.** With the exception of specific regulations for (inter)national relief and Red Cross societies, the emblem of the Red Cross (or the Red Crescent or the Red Lion and Sun) and the Red Crystal on a white ground may be used in time of peace only to indicate or protect medical units and establishments, personnel and material that are protected under international law (**1 44**).

**656.** If personnel perform non-medical activities, they may **not** wear an armlet with a distinctive emblem.

**657.** The distinctive emblems are legally protected at all times, not just in times of conflict (**1 53, 54; 2 45; 6 12**). Whoever, in the context of and associated with an international or non-international armed conflict, launches an attack against persons, buildings, material, medical establishments or transports that have been properly marked with distinctive emblems of the Geneva Conventions in accordance with LOAC or whoever makes improper use of distinctive emblems of the Geneva Conventions and thereby causes death or serious personal injury commits a war crime (**33 8 para.2 lit.b vii; 35, 10**).

## Chapter 7

### Religious Support

I. General
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**701. Religious personnel** means all military or civilian persons, such as chaplains, who are exclusively engaged in the work of their **ministry** and attached

- to the armed forces, medical units, medical transports or civil defence organisations of a Party to a conflict or
- to medical units or medical transports of neutral States, aid societies of neutral States, or international humanitarian organisations.

The attachment of religious personnel may be either permanent or temporary (5 8 lit.d).

The national legal status in which religious personnel exercise their ministry is irrelevant in international law. According to the law of armed conflict (LOAC), religious personnel may be military or non-military personnel. In the Federal Republic of Germany, religious personnel are not soldiers. They are thus not members of the armed forces in terms of LOAC (5 43 para.1). States may issue national regulations on the protective clothing of their religious personnel in accordance with international law.

**702. Chaplains** are ministers attached to the armed forces of a state who are exclusively engaged in providing religious support to the persons entrusted to their care (1 24; 2 37; 5 8 lit.d, 23 para.5). Chaplain status **is given to:**

- ministers who are members of militias not incorporated into the regular armed forces, members of volunteer corps or organised resistance movements, provided that their members are combatants (1 13 para.2; 3 4 A para.4),
- ministers who have been charged by the appropriate military authority to care for personnel accompanying the armed forces (1 13 para.4),
- ministers of **hospital ships** (2 36), even if they are not chaplains,
- ministers assigned to merchant vessels (2 37, 13 para.5).

**703. Non-permanent chaplains** are local ministers in their primary function. As a secondary function, they provide religious support to soldiers. Under international law, non-permanent military chaplains are not accorded the same status as permanent military chaplains. They are protected as civilians under the Fourth Geneva Convention (4).

**704. Auxiliary personnel of chaplains (assistants and drivers)** do not enjoy the same protection as religious personnel. They must, however, be protected and respected as far as possible in accordance with the spirit and principles of LOAC.

**705.** The **group of persons** to be attended to by chaplains includes:

- members of the armed forces which they themselves belong to,
- members of allied armed forces on the basis of agreements,
- chaplains detained by the adversary also attend to prisoners of war of allied armed forces (3 33 para.2, 35 sent.1),
- in exceptional cases, members of the opposing armed forces who have been taken prisoner (3 37),
- in emergencies, wounded, sick and shipwrecked persons of the adversary's armed forces and
- during an occupation, the civilian population – particularly children – (4 13, 24, 27 para.1, 38 para.3, 50 para.3, 58 para.1, protected persons accused of offences (4 76 para.3) and internees (4 93).

**706.** Detained chaplains exercise their **ministry** in accordance with the military laws and regulations of the Detaining Power and in accordance with their religious conscience (3 33 para.2, 35 sent.1. Their activities must not, however, be confined to religious duties. In particular, they may

- act as a personal adviser,
- receive the last wish of dying soldiers and forward it and
- provide material assistance.

**707.** Wherever possible, the dead shall be interred by chaplains of the same denomination. States are obligated to assist the chaplains, within the means available to them, in fulfilling their tasks (1 17 para.3 sent.1).

**708.** Chaplains wear, affixed to the left arm, an **armlet** bearing a red cross on a white ground (1 40 para.1; 2 42 para.1; 5 18 paras.1 and 3; 6 12). The armlet is issued and stamped by the **appropriate authority** (1 40 para.1; 2 42 para.1). The contracting Parties may authorise the temporary use of one of the other distinctive emblems (red cross, red crescent, red lion and sun, or red crystal on a white ground) by their military medical and religious personnel in addition to the protective signs they have already been wearing if this **enhances protection** (6a 2 para.4).

**709.** In addition to this armlet and the identity disk worn by all members of the armed forces, chaplains must also carry a special **identity card** (1 40 para.2; 2 42 para.2).

**710.** Chaplains may not be deprived by the adversary of their special insignia, armlets or identity cards. In case of loss or destruction, they have the right to replacement (1 40 para.4; 2 42 para.4). Should chaplains fall into the hands of the adversary, the latter is obligated to allow new identity cards or armlets to be forwarded to retained chaplains (1 40 para.4; 2 42 para.4).

## II. Protection of Chaplains

**711.** Chaplains must be respected and protected under all circumstances (1 24; 2 36, 37; 5 15 para.5). This applies

- at all times during an armed conflict,
- in all places and
- whenever a chaplain is temporarily or permanently detained by the adversary.

**712.** Chaplains are protected under international law at all times, not only when they perform religious functions.

**713.** Unlike medical supplies, **articles** used for religious purposes are not explicitly protected by international law. It is, however, in keeping with the spirit of the Geneva Conventions that the material required for religious purposes should be respected and not used for unintended purposes.

**714.** **Reprisals** against chaplains are prohibited (1 46; 2 47).

**715.** Chaplains may in no circumstances renounce the rights accorded to them by LOAC (1 7; 2 7). Chaplains may be deprived of privileges exceeding the statutory minimum of protection by the Geneva Conventions.

**716.** Any attack against a chaplain as well as any impairment of his rights is a violation of international law.

**717.** Chaplains do not lose their protection under international law if they are armed and use **arms** in their own defence or in that of the wounded, sick and shipwrecked; they may, however, use arms only to defend themselves against attacks in violation of international law. The protection accorded to chaplains will cease if they use arms for any purpose other than that of self-protection and the defence of protected persons. Under international law, chaplains may only use arms that are suited for defending themselves or others (small arms, see Chapter 6, No. 627). In the Federal Republic of Germany, chaplains are as a matter of principle not armed.

### III. Legal Status of Chaplains Retained by a Foreign Power

**718.** Chaplains may be retained to assist prisoners of war of the armed forces to which they themselves belong in so far as the state of health, the spiritual needs and the number of prisoners so require (1 28 para.1; 2 36, 37; 3 33). Chaplains who are retained by an adverse Party are not considered to be prisoners of war (1 28 para.2; 2 36; 3 33 para.1).

**719.** The provisions of the First and Third Geneva Conventions are **minimum requirements** for the treatment of retained chaplains. As a consequence, chaplains must at least enjoy all the benefits accorded to prisoners of war by these conventions (1 30; 3 33). Like prisoners of war, chaplains must be released and repatriated without delay after the cessation of active hostilities (3 33 para.1 sent.2, 118 para.1).

**720.** In particular, Detaining Powers must ensure the representatives of **religious organisations** a proper reception. They must provide duly accredited agents of these organisations with all necessary facilities for

– visiting prisoners of war and chaplains in camps,

- distributing relief supplies and material intended for religious, educational or recreational purposes and
- assisting prisoners of war and chaplains in organising their leisure time (**3** 125).

**721.** The provisions of the Geneva Conventions must be applied by analogy to chaplains received or interned in neutral territory (**1** 4; **2** 5).

**722.** Chaplains who are not retained must be returned to the Party to the conflict to whom they belong as soon as a road is open for their return and military requirements permit (**1** 28, 30; **2** 37).

**723.** Chaplains who are to be returned may take with them the effects, personal belongings, valuables and ritual objects belonging to them (**1** 30 para.3; **2** 37).

**724. Retained chaplains** must continue to carry out their spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong. They are subject to the control of the competent services (**1** 28 para.2; **2** 37; **3** 33 para.2, 35).

**725. Spiritual functions** exercised for the benefit of prisoners of war include in particular:

- holding religious services (**3** 34),
- ministering to members of the same religion (**3** 35) and
- burying prisoners of war who have died in captivity according to the rites of the religion to which they belong (**3** 120 para.4).

**726.** In order to ensure a **uniform level of assistance** for prisoners of war, chaplains must be allocated to camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion (**3** 35 sent.2).

**727.** Detaining Powers must grant chaplains all **facilities** necessary for the exercise of their spiritual duties (**3** 33 para.1).

**728.** In particular, they must be granted the following facilities:

- They must be provided with adequate **premises** where religious services may be held (**3** 34 para.2).
- They are authorised to visit periodically prisoners of war situated outside the camp (e.g. in working detachments or hospitals). For this purpose, the Detaining Power must place at their disposal the necessary **means of transport** (**1** 28 para.2 lit.a; **3** 33 para.2 lit.a, 35 sent.3).
- They must have direct **access** to camp authorities in all questions arising out of their duties (**1** 28 para.2 lit.b; **3** 33 para.2 lit.b sent.3).
- They must enjoy all facilities for **correspondence** on matters concerning their duties. They must be free to correspond, subject to censorship, with the ecclesiastical authorities in the country of detention and with international religious organisations. To this end letters and cards may be sent in addition to the quota provided for prisoners of war (**3** 35 sent.4 and 5, 71).
- They may receive by any means **individual parcels or collective shipments** containing religious items (e.g. Holy Scriptures, crucifixes and rosaries) (**3** 33, 72 para.1).

**729.** Retained chaplains are subject to the internal **discipline** of the camp they are retained at (**1** 28 para.2; **3** 33 para.2). They are therefore subordinate to the general orders of the camp commander. This does not apply to their religious duties.

**730.** Chaplains may not be required to perform any **work** outside their religious duties (**1** 28 para.2 lit.c; **3** 33 para.2 lit.c).

**731.** Ministers who are not chaplains (e.g. ministers serving as soldiers in the armed forces) and who become prisoners of war are to be authorised to minister freely to the members of their community (**3** 36 sent.1). The detaining Power is obligated to give them the appropriate authority if prisoners of war of the same faith are to be ministered. Ministers who have been granted this authority enjoy the same **privileges and facilities** as retained chaplains. They must not be obliged to do any other work (**3** 36). They nevertheless remain **prisoners of war**, although they possess special rights.

**732.** When prisoners of war have not the assistance of a chaplain or of a prisoner of war minister of their faith, a **minister** belonging to the prisoners' or a similar denomination, or alternatively, a qualified **layman**, if such a course is feasible from the confessional point

of view, must be appointed, at the request of the prisoners concerned. If necessary, the approval of the local religious authorities must be obtained (3 37). Such persons will normally be selected from among the prisoners of war; they may also be members of the civilian population of the Detaining Power.

**733.** The appointment of ministers and laymen is subject to the approval of the Detaining Power and usually takes place with the agreement of the community of prisoners concerned and with the approval of the local religious authorities of the same faith (3 37).

**734.** The ministers and laymen thus appointed enjoy the same privileges and facilities as chaplains. They are subject to the discipline of the camp as well as to all regulations established by the Detaining Power in the interests of discipline and military security (3 37 sent.3). If these persons are selected from the prisoner-of-war community, they keep their previous status.

## Chapter 8

### Protection of Prisoners of War

I. General
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**801.** The purpose of captivity is to exclude the adversary's soldiers from further military operations. They are not convicts. They are captives detained for reasons of security. Prisoners of war are prisoners of the adversary State whose power they are subject to **(Detaining Power)**.

**802.** The Detaining Power is responsible for the treatment of prisoners of war (**3 12** para.1). Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the Third Geneva Convention (**3 7**).

**803.** A Detaining Power may only **transfer** prisoners of war to another power if

- the other power is a Party to the Third Geneva Convention and
- the Detaining Power has satisfied itself of the willingness and ability of such transferee power to apply the Convention (**3 12** para.2).

**804.** The following **general rules** apply to the treatment of prisoners of war:

- Prisoners of war must be treated humanely and honourably at all times (**3 13, 14**).
- Discrimination based on race, nationality, religious belief, political opinions or similar criteria is unlawful (**3 16**).
- Measures of reprisal against prisoners of war are prohibited (**3 13** para.3).

**No** prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified as medical treatment of the prisoner concerned and are carried out in his interest (**3 13** para.1 sent.3). In addition, Section 606 of Chapter 6 applies here as well.

**805.** **Torture is outlawed throughout the world** and is prohibited by international law (**1 12; 2 12; 3 13, 17** para.4; **5 75** para.2 lit.a ii). The torture of prisoners of war is not permitted under any circumstances and is punishable as a war crime (**33 8** para.2 lit.a ii).

**806.** Representatives of the Protecting Power and delegates of the ICRC may visit prisoners of war in their camps at any time and talk to them individually and without witnesses. The law of armed conflict (LOAC) mandates the ICRC in international armed conflicts to visit prisoners of war (**3** 126 para.4). Visits of the ICRC include talks with camp directors, inspections of the camp area and all other relevant facilities, talks with individual prisoners, and the opportunity for prisoners to send short messages to their families using standard forms. Information collected and findings are used to prepare reports that are highly confidential and are only forwarded to the responsible authorities of the Detaining Power.

## II. Beginning of Captivity

**807.** The status of prisoner of war **begins** as soon as a person entitled to prisoner of war status falls into the power of an adverse Party (**5** 44 para.1).

**808.** An adversary who, having laid down his arms, or having no longer means of defence, surrenders or is otherwise unable to fight or defend himself may not be made the object of attack (**5** 41 para.1; **16a** 23 para.1).

**809.** The status of prisoner of war is attained by the following individuals who have fallen into the power of the adversary:

- combatants (**3** 4 A paras.1-3 and 6; **5** 44, 45 para.1),
- civilian component (**3** 4 A para.4),
- crews of merchant vessels and civil aircraft of the Parties involved in a conflict, who do not benefit by more favourable treatment under any other provisions of international law (**3** 4 A para.5),
- members of the armed forces and military units assigned to civil defence organisations (**5** 67 para.2).

**810.** Prisoners of war are entitled in all circumstances to respect for their persons and their honour (**3** 14 para.1). They must be protected particularly against acts of violence or intimidation and against insults and public curiosity (**3** 13 para.2). **Public curiosity** in this context refers not only to physically present crowds of people but also to media attention (e.g. print media, TV, radio broadcasting, internet).

**811.** LOAC does not prohibit all kinds of reporting about prisoners of war, but it does prohibit reporting that may affect the **dignity or honour** of prisoners of war or may lead to acts of violence, intimidation or insult. That is why reporting that involves individually identifiable prisoners of war usually is contrary to international law. The actual degree of individualisation is determined by the length of recording, film cuts, and the situation of the prisoners of war.

Even if prisoners of war give their consent to reporting, this does not rule out a violation of international law (3 7). These regulations are not only prohibitions for the Detaining Power. They also comprise requirements (protective obligations) to prevent unauthorised intervention by third Parties. In certain cases, breaches of these regulations may be considered inhuman treatment and, as such, crimes of war (33 8 para.2 lit.a).

**812.** Prisoners of war are to be disarmed and searched. Military equipment and military documents are to be taken away from them (3 18 para.1).

**813.** All effects and articles of personal use, their combat helmets and articles issued for personal protection such as NBC protective equipment as well as all effects and articles used for their clothing and feeding must remain in the possession of prisoners of war (3 18 para.1). They may keep their badges of rank and nationality, decorations and articles having above all a personal or sentimental value, e.g. pictures of family members (3 18 para.3, 40). Prisoners of war must always carry an identity document. The Detaining Power must supply such documents to those who possess none (3 18 para.2).

**814.** The Detaining Power is obligated to provide information about the fate of prisoners of war (3 122), wounded, sick, shipwrecked and dead persons (1 16; 2 19) and protected civilians (4 136–141). For this purpose, each of the Parties to a conflict must institute an **official information bureau** upon the outbreak of a conflict and in all cases of occupation (3 122 para.1). The bureau must cooperate with the central information agency of the International Committee of the Red Cross (3 122 para.3, 123). In accordance with Section 2 para.1 no.4 of the German Red Cross Act,<sup>1</sup> the German Red Cross is a voluntary relief society and, as such, will assume the tasks of an official information bureau (3 122; 4 136; see also Chapter 5, No. 517).

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<sup>1</sup> Act on the German Red Cross and other voluntary aid societies as defined in the Geneva Conventions, 5 December 2008 (German Federal Law Gazette I, p. 2346).

**815.** The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security. Sums of money or articles of value carried by prisoners of war may only be taken away from them by order of an officer of the Detaining Power and after a receipt has been given. Articles of value and sums of money kept in custody must be returned in their initial shape to prisoners of war at the end of their captivity (3 18 paras.4-6).

**816.** Prisoners of war must be evacuated as soon as possible to camps situated in an area far enough from the area of operations for them to be out of danger. Prisoners of war must not be unnecessarily exposed to danger while awaiting evacuation (3 19). If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps must be as brief as possible (3 20 para.3).

**817.** The evacuation of prisoners of war must be effected **humanely** and in conditions similar to those for the forces of the Detaining Power in their change of station. Prisoners of war must be supplied with sufficient potable water, food, clothing and medical care (3 20).

**818.** Prisoners of war who, due to unusual conditions of combat, cannot be evacuated must be **released**; all feasible precautions must be taken to ensure their safety (5 41 para.3).

**819.** To ensure the equal treatment of prisoners of war of the same rank, the Parties to a conflict must inform each other at the opening of hostilities about the ranks of all personnel entitled to prisoner-of-war status. Where ranks are introduced only belatedly, they must be made known in the same way. The Detaining Power must recognise promotions in rank which have been accorded to prisoners of war if they have been duly notified by the power on which these prisoners depend (3 4, 43). At the outbreak of hostilities, the Parties to a conflict must also agree on the subject of the corresponding ranks of medical personnel (3 33 para.2 lit.b).

**820.** Prisoners of war, with the exception of officers, must salute all officers of the Detaining Power. Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank (3 39).

**821.** Every prisoner of war, when questioned on the subject, is bound to give only the following **compulsory information** (3 17 para.1):

- surname,
- first names,
- rank,
- date of birth and
- army, regimental, personal or serial number (identity number in the Bundeswehr).

**822.** No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them the above information or other information. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind (3 17 para.4).

**823.** If, however, a prisoner of war wilfully infringes the rule to provide the above information, he may render himself liable to a restriction of the privileges accorded to his rank or status (3 17 para.2).

**824.** The questioning of prisoners of war must be carried out in a language which they understand (3 17 para.6). Prisoners of war may not be subjected to questioning by media representatives (3 13 para.2, 14 para.1).

**825.** No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind (3 17 para.4).

### III. Conditions of Captivity

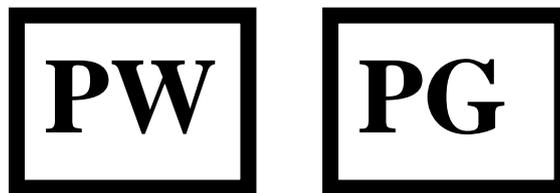
**826.** The Detaining Power may intern prisoners of war in camps and guard them (3 21 para.1). These camps must be on land and must not be situated in dangerous proximity to the combat zone (3 19 para.1, 22 para.1, 23 para.1). The presence of prisoners of war may not be used to render certain points or areas immune from military operations (3 23 para.1).

**827.** The camps must meet minimum requirements of **hygiene** and healthfulness (3 22 para.1). Prisoners of war must be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. These conditions must make allowance for the habits and customs of the prisoners. The quarters must be protected from dampness and adequately heated and lighted. Precautions must be taken against the danger of fire (3 25 para.1).

**828.** In every camp the text of the Third Geneva Convention, its annexes and the contents of any special agreement concluded between the Parties to a conflict must be posted in the prisoners' own language at places where all may read them (3 41).

**829.** Prisoners of war must have **protective shelters** against air bombardment and other hazards of war to the same extent as the local civilian population. Any other protective measure taken in favour of the population must also apply to them (3 23 para.2). Whenever military considerations permit, prisoner of war camps must be indicated in the daytime by the letters **PW** (prisoners of war) or **PG** (*prisonniers de guerre*), placed so as to be clearly visible from the air (3 23 para.4).

Fig.: Marking of prisoner of war camps



**830.** As far as possible, prisoners of war must be assembled in camps according to their nationality, language and customs (3 22 para.3).

**831.** **Women** must receive special respect and protection. In camps accommodating both women and men, separate dormitories and conveniences must be provided (3 25 para.4, 29 para.2). Women must be treated with all the regard due to their sex and must in all cases benefit by treatment as favourable as that granted to men (3 14 para.2). Women prisoners of war undergoing disciplinary punishment must be confined in separate quarters from male prisoners and must be under the immediate supervision of women (3 97, 108).

**832.** If, despite the provisions of international law, **children** who have not attained the age of fifteen years take a direct part<sup>1</sup> in hostilities, they must continue to benefit from the special protection they are entitled to, whether or not they are prisoners of war (5 77 para.3). If arrested, detained or interred for reasons related to an armed conflict, children must be provided special treatment and protection. International law requires that they be held in quarters separate from those of adults. This does not apply to captured or interned families; these should be accommodated as family units as far as possible (5 77 para.4, 75 para.5).

**833. Food** (3 26) must be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies; account must also be taken of the religious diet of prisoners. The Detaining Power must take all necessary hygiene measures. Prisoners of war must be given the necessary **medical attention** (3 29-31), and they must be supplied with **clothing** in sufficient quantities (3 27). The Detaining Power must encourage the practice of intellectual, educational and recreational pursuits, sports and games amongst prisoners, and must take the measures necessary to ensure the exercise of such pursuits by providing them with adequate premises and necessary equipment. Prisoners must have opportunities for taking physical exercise, including sports and games, and for being out of doors (3 38).

**834.** Within the limits of the disciplinary routine proscribed by the military authorities, prisoners of war enjoy complete latitude in the exercise of their religious duties; adequate premises must be provided where religious services may be held (3 34). Chaplains who remain or are retained with a view to assisting prisoners of war must be allowed to minister to them and to exercise freely their ministry amongst prisoners of war. Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces,

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<sup>1</sup> The use of children under the age of fifteen years to participate in hostilities or conscripting or enlisting them into armed forces is punishable as a war crime (33 8 para.2 lit.b xxvi and e vii). Notwithstanding the above, the states to the Optional Protocol to the Convention on the Rights of the Child have agreed to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities and are not compulsorily recruited (40 1 and 2). When it comes to voluntary recruitment, the Optional Protocol raised the minimum age laid down in the Convention on the Rights of the Child from 15 to 16 years. State parties to the Optional Protocol can thus employ persons who have attained the age of 16 years in voluntary service in the military. Persons under the age of 18 years are entitled to special protection.

must also be at liberty, whatever their denomination, to minister freely to the members of their community. They must not be obliged to do any other work (3 35, 36).

**835.** The Detaining Power may employ able-bodied junior enlisted men for certain non-military work (3 49 para.1), 50). Non-commissioned officers may only be required to do supervisory work. Officers are exempted from compulsory work (3 49 paras.2 and 3). Prisoners of war must be granted suitable working conditions which must not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work (3 51).

**836.** No prisoner of war may be employed against his will on labour which is of an unhealthy or otherwise dangerous nature (e.g. mine clearing), or which is humiliating. He may, however, volunteer to do dangerous or unhealthy work (3 52).

**837.** Not more than one week after arrival at a camp, every prisoner of war must be enabled to write directly to his family and to the Central Prisoners of War Agency a card informing his relatives of his capture, address and state of health (3 70, 123). He may thereafter correspond with his family on a regular basis.

**838.** Prisoners of war must be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the number must not be less than two letters and four cards monthly (exclusive of the capture cards provided for in 3 70). Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary reasons (3 71). Letters, parcels and financial services items addressed to or sent by prisoners of war must be exempted from all postal charges, with the exception of air surcharges (47 7 para.3).

**839.** Prisoners of war may apply to the authorities of the Detaining Power or the representatives of a Protecting Power in matters concerning poor conditions of captivity (3 78 paras.1 and 2). The exercise of the right to make complaints must not give rise to any punishment (3 78 para.3).

**840.** Prisoners of war elect prisoners' representatives to represent their interests. In camps with officers, the senior officer among the prisoners of war must be recognized as the camp prisoners' representative. Every representative elected must be approved by the Detaining Power before he has the right to commence his duties (3 79–81).

**841.** Prisoners of war are subject to the **laws, regulations and orders** applicable to the armed forces of the Detaining Power. The Detaining Power is entitled to take judicial or disciplinary measures in respect of any offence committed by a prisoner of war (**3 82** para.1). Prisoners of war may be prosecuted under the laws of the Detaining Power even for acts committed prior to their capture, especially for war crimes. They retain, however, the benefits of the Third Geneva Convention, even if convicted (**3 85**). For this reason, persons entitled to the protective status of prisoner of war must not be deprived of this status on the grounds that they have committed war crimes.

**842.** Legal and disciplinary sanctions must be based on the following rules in particular:

- no prisoner of war may be punished or disciplined more than once for the same act (**3 86**);
- prisoners of war may not be sentenced to any penalties except those provided for in respect of members of the armed forces of the Detaining Power who have committed the same acts (**3 87** para.1);
- prisoners of war must be given an opportunity to present their defence (**3 96** para.4, **99** para.3, **105**);
- collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden (**3 87** para.3);
- prisoners of war may only be tried by a court which offers the essential guarantees of independence and impartiality (**3 84** para.2);
- in no case may disciplinary punishments be inhuman, cruel or dangerous to the health of prisoners of war (**3 89** para.3).

If the **death penalty** is pronounced on a prisoner of war by the Detaining Power, the sentence must not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives the detailed communication about the sentence (**3 101**, **107**). In Germany, the **death penalty has been fully abolished** by Article 102 of its Constitution.<sup>1</sup> Under no circumstances may a person be sentenced to death or executed (see above No. 575).

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<sup>1</sup> This is in accordance with the protocols to the European Convention on Human Rights which apply to Germany: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty of 28 April 1983 and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances of 3 May 2002.

**843.** Acts which constitute offences against discipline must be investigated immediately (3 96 para.1). Disciplinary punishment may be ordered only by appropriate courts of law, military commands, camp commanders and their representatives who have been vested with disciplinary powers (3 96 para.2). In no case may prisoners of war themselves exercise disciplinary powers (3 96 para.3).

#### IV. Escape of Prisoners of War

**844.** Prisoners of war who have made good their escape and who are recaptured, must not be liable to any punishment in respect of their escape (3 91 para.2). The **escape** of a prisoner of war shall be deemed to have **succeeded** when (3 91 para.1)

- he has joined friendly or allied armed forces,
- he has entered neutral territory or otherwise left the territory under control of the adversary,
- he has joined a ship in the territorial waters of the Detaining Power which is not under the control of the Detaining Power.

**845.** The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, constitutes an extreme measure, which must always be preceded by warnings appropriate to the circumstances (3 42). A prisoner of war who is apprehended during an attempt to escape is liable only to disciplinary punishment in respect of his act (3 92 para.1); this also applies to a repeated offence.

**846.** A prisoner of war is not liable to judicial prosecution even if he has committed criminal offences to facilitate his escape, e.g. theft of food or clothing, or the drawing up and use of false papers; this may occasion disciplinary punishment only. If, however, the escapee has used violence against life or limb during his escape, judicial proceedings may be instituted against him (3 93 para.2).

#### V. Termination of Captivity

**847.** Unless a prisoner of war successfully escapes, captivity ceases with the **release** of the prisoner from the custody of the Detaining Power.

**848.** During an armed conflict, seriously sick and wounded prisoners of war must be **repatriated** if they are

- fit to travel and
- incurably or permanently mentally or physically impaired or who are not likely to recover within one year.

No prisoner of war may, however, be repatriated against his will during hostilities (**3** 109, 110), even if this constitutes a breach of domestic law in his or her country.

**849.** All prisoners of war must be released and repatriated without delay after the cessation of active hostilities (**3** 118). This requires neither a formal armistice agreement nor the conclusion of a peace treaty. What is crucial is the actual cessation of hostilities, if reasonable estimates indicate that they are unlikely to resume. Repatriation must be carried out in an orderly fashion, if possible following a plan agreed upon by all Parties to the conflict, with the participation and under supervision of the Protecting Powers and the International Committee of the Red Cross (ICRC) (**3** 8-10).

**850.** Prisoners of war who have committed an indictable offence and against whom criminal proceedings are pending or who have yet to complete a punishment may be detained beyond the cessation of active hostilities (**3** 119 para.5).

<p><b>VI. Internment of Members of the Adversary's Armed Forces</b></p>
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**851.** Members of armed forces (with the exception of medical and religious personnel) may be **interned** but not as prisoners of war

- if they belong or have belonged to the armed forces of an occupied country. This is also the case if they were originally released outside the occupied country during the hostilities. Those interned are entitled to prisoner of war status (**3** 4 B para.1);
- if they are generally entitled to prisoner of war status in accordance with the Third Geneva Convention and they have been received by a neutral or non-belligerent power on their territory or this power is required to intern them. These internees are in principle entitled to treatment commensurate with prisoner of war status. The interring power may give them more favourable treatment. Certain provisions (in particular **3** 15, 30 para.5, 58-67, 92) do not, however, apply (**3** 4 B para.2).

## Chapter 9

### Protection of Cultural Property

I. General
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**901.** The protection of cultural property in armed conflicts is based primarily on the 1954 **Hague Convention** for the Protection of Cultural Property in the Event of Armed Conflict and its Regulations for the Execution of the Convention (**24**; **24a**) and the related 1954 Protocol [Protocol I] (**24b**) and 1999 Protocol [Protocol II] (**24c**). Protocol II to the Hague Convention is considered a supplement to the Convention and also protects cultural property in non-international armed conflicts that take place on the territory of a Party to the Convention. In addition, a new category of specially protected cultural property was established (enhanced protection).

**902.** The term **cultural property** refers to movable or immovable objects of great importance to the cultural heritage of every people irrespective of origin or ownership (e.g. monuments of architecture, art or history, whether secular or religious, works of art and places of worship, buildings of historical or artistic interest, archaeological sites and collections, works of art, manuscripts, books) (**5** 53 lit.a; **6** 16; **24** 1; **24c** 1 lit.b).

**903.** In addition to cultural property in the proper sense, indirect cultural property is also protected. This includes:

- buildings for preserving or exhibiting cultural property (e.g. **museums, libraries, archives**),
- **refuges** for cultural property and
- **centres containing monuments**, i.e. centres containing a large amount of cultural property (**24** 1).

**904.** Cultural property must be respected by all Parties to a conflict; cultural property may be neither directly nor indirectly used in support of military efforts. Parties to a conflict must refrain from any act of hostility directed against cultural property (**5** 53; **6** 16; **24** 4 para.1).

**905.** Since they are civilian objects, buildings dedicated to religion, art, science and charitable purposes (churches, theatres, universities, museums, orphanages, homes for the elderly, etc.) and historical monuments must also be spared as far as possible as being civilian objects, regardless of their historical or artistic value (5 52; 16a 27 para.1; 21 5). They must therefore not be attacked. An attack violating international law is punishable as a war crime (33 8 para.2 lit.b ix; 35 11 para.1 no.2).

## II. Specific Provisions for the Protection of Cultural Property

### 1. General Protection

**906.** General protection applies to all cultural objects and does not require an entry in a special register. Cultural objects must be respected. Acts of hostility directed against cultural property must be avoided. Cultural property must not be attacked or damaged in any way (5 53; 6 16; 24 4 para.1). It is also prohibited to expose cultural property, its immediate surroundings and the appliances in use for its protection to destruction or damage by using them for purposes other than originally intended, for example for military purposes (24 4 para.1). This obligation may be waived only in cases where military necessity imperatively requires such a waiver (24 4 para.2).

**907.** A waiver on the basis of imperative military necessity may only be invoked when and for as long as the cultural property has, by its function, been made into a military objective and there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective. In case of an attack, an effective advance warning must be given whenever circumstances permit (24c 6 lit.a and d).

**908.** The use of cultural property for purposes that are likely to expose it to destruction or damage is permissible only for reasons of imperative military necessity. A waiver on the basis of imperative military necessity may only be invoked when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage (24c para.6 lit.b).

**909.** The decision to invoke imperative military necessity may only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise (**24c** para.6 lit.c).

**910.** Parties to a conflict must take sufficient measures to prevent cultural property from being used for military purposes or exposed to dangers resulting from such use (**24** 3, 4 para.1). Even cultural property used by the adversary for military purposes must be spared as far as possible.

**911.** Acts of theft, pillage, misappropriation, seizure or vandalism directed against cultural property are prohibited. Such acts must be prevented and stopped by Parties to a conflict (**24** 4 para.3).

**912.** **In the event of an attack, certain precautions** must be taken. Each Party to a conflict must

- verify that the objectives to be attacked are not protected cultural property,
- take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental damage to cultural property,
- refrain from deciding to launch any attack which may be expected to cause incidental damage to protected cultural property which would be excessive in relation to the concrete and direct military advantage anticipated and
- cancel or suspend an attack if it becomes apparent that the objective is protected cultural property or that the attack may be expected to cause incidental damage to protected cultural property which would be excessive in relation to the concrete and direct military advantage anticipated (**24c** 7).

**913.** **Precautions** must be taken against the effects of hostilities directed against cultural property. To the maximum extent feasible, **movable cultural property** must be **removed from the vicinity of military objectives** or adequate **in situ protection** must be provided. Military objectives must, in principle, not be located near cultural property (**24c** 8).

**914.** It is prohibited to make cultural property the object of **reprisals** (**5** 52 para.1 and 53 lit.c; **24** 4 para.4).

## 2. Special Protection

**915.** The Hague Convention provides for a two-tiered system of protection. General protection as described above is granted to all cultural objects. Certain cultural objects, however, may be placed under **special protection** (24 8).

**916.** Special protection may be considered only for the following cultural objects (24 8 para.1):

- a limited number of refuges intended to shelter movable cultural property in the event of armed conflict,
- centres containing monuments and
- immovable cultural property of very great importance.

**917.** Special protection is granted on the following conditions:

- The property to be protected must be situated at an adequate distance from any large industrial centre or from any other important military objective constituting a vulnerable point (aerodrome, broadcasting station, armament plant, a port or railway station of relative importance, a critical river crossing site or main line of communication) (24 8 para.1 lit.a).
- The property to be protected must not be used for military purposes (5 53 lit.b; 6 16; 24 8 para.1 lit.b).
- Special protection is granted to cultural property by its entry in the **International Register of Cultural Property under Special Protection**, which is maintained by UNESCO in Paris (24 8 para.6; 24a 12–16).

**918.** A refuge for movable cultural property may also be placed under special protection, whatever its location,

- if it so constructed that, in all probability, it will not be damaged by bombs or
- if the Party asking for special protection undertakes, in the event of armed conflict, to make no use of a military object located in the vicinity of the cultural property and particularly, in the case of a port, railway station or aerodrome, to divert all traffic from such locations (24 8 paras.2 and 5).

At the request of the Federal Republic of Germany, the **Barbarastollen underground archive** in Oberried near Freiburg in the Breisgau district (*Hochschwarzwald*) has been entered in this register as the **central refuge** for cultural property.

**919.** Neither cultural property placed under special protection nor its surroundings may be used for military purposes (24 9).

**920.** A **centre containing monuments** will be also deemed to be used for military purposes if it is used for the movement of military personnel or material, even in transit. The same applies whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried out within the centre (24 8 para.3).

**921.** The guarding of cultural property by armed custodians specially empowered to do so, or the presence of police forces responsible for the maintenance of public order is not deemed to be used for military purposes (24 8 para.4).

**922.** It is permissible to make cultural property under special protection the object of attack only in exceptional cases of **unavoidable military necessity**, and only for such time as that necessity continues. In accordance with the Hague Convention for the Protection of Cultural Property, such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger (24 11 para.2). The competent legal adviser must be consulted in advance of the decision. If circumstances permit, the opposing Party must be notified, a reasonable time in advance, of the decision (24 11 para.2). If a **Commissioner-General for Cultural Property** is appointed (24a 4-10), he or she must be informed in writing, stating the reasons (24 11 para.3).

**923.** If one of the Parties violates its obligation to protect cultural property under special protection, the opposing Party will, so long as this **violation** persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party must first request the cessation of such violation within a reasonable time (24 11 para.1). In addition, only measures that are necessary to ward off the danger arising from such a violation may be taken.

### 3. Enhanced Protection under Protocol II

**924.** Protocol II established a new protection category for certain types of especially valuable cultural property. Cultural property may be placed under **enhanced protection** provided it is cultural heritage of the greatest importance for humanity, it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection, and it is not used for military purposes or to shield military sites (**24c 10**).

**925. Cultural property under enhanced protection has immunity.** Such property may not be made the object of attack. Cultural property under enhanced protection or its immediate surroundings must not be used in support of military action (**24c 12**). Cultural property under enhanced protection will lose such protection if it is suspended or cancelled (**24c 13, 14**). Where cultural property no longer meets these criteria, the enhanced protection status may be suspended or cancelled (**24c 14 para.1**).

**926.** The 'Committee for the Protection of Cultural Property in the Event of Armed Conflict' (**24c 24**) is responsible for granting, suspending and cancelling enhanced protection for cultural property and establishing, maintaining and promoting the **List of Cultural Property under Enhanced Protection** (**24c 27**).

**927.** Enhanced protection may be suspended or cancelled if cultural property no longer meets the criteria in No. 924 (**24c 14 para.1**). In the case of a serious violation of the provision on the immunity of cultural property, the Committee may suspend the enhanced protection status (**24c 14 para.2**). This is the case when cultural property under enhanced protection is used in support of military action. Where such violations are continuous, the Committee may exceptionally cancel the enhanced protection status (**24c 1 para.2**).

**928.** Enhanced protection status will also be lost if, and for as long as, the cultural property has, by its use, become a military objective (**24c 13**). In this circumstance, such property may only be the object of attack if

- the attack is the only feasible means of terminating the use of the property (**24c 13 lit.a**),
- all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property (**24c 13 lit.b**),

- the attack is ordered at the highest operational level of command (**24c** 13 lit.c i),
- effective advance warning is issued to the opposing forces requiring the termination of prohibited use (**24c** 13 lit.c ii) and
- reasonable time is given to the opposing forces to redress the situation unless circumstances do not permit, due to requirements of self-defence.

#### 4. Protection of Cultural Property during Occupation

**929.** The protection of cultural property also extends to periods of **occupation**. This means that a Party occupying a territory must undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, seizure or other misappropriation of, and any acts of vandalism directed against, cultural property (**24** 4 para.3).

**930.** It is prohibited to **seize** or **wilfully destroy** or **damage** institutions dedicated to religion, charity and education, and the arts and sciences; the same applies to historic monuments and other works of art and science (**5** 53 lit.a; **6** 16; **16a** 56 para.2).

**931.** The Occupying Power must as far as possible support the competent national authorities of the occupied country in safeguarding and preserving cultural property (**24** 5 para.1). Should the national authorities be unable to take such measures of preservation for cultural property already damaged, the Occupying Power itself must, in close **cooperation** with these authorities, take the most necessary measures of preservation (**24** 5 para.2).

**932.** Each Party to a conflict undertakes to prevent the exportation of cultural property from a territory occupied by it **during** an international armed conflict (**24b** I para.1). If, in spite of this prohibition, cultural property is nevertheless transferred from the occupied territory to the territory of another Party, the latter shall be obligated to place such property under its protection. This must either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory (**24b** I paras.2 and 3). At the **close of hostilities**, each Party to a conflict undertakes to return to the competent authorities of the territory previously occupied cultural property which is in its territory, if such property has been exported in contravention of the above principles. Such property must never be retained as war reparations (**24b** I para.3). The former Occupying

Power must pay an indemnity to the holders in good faith of any cultural property which has to be returned (**24b I** para.4).

**933.** In relation to another contracting Party of Protocol II, the following activities must be prohibited or prevented on the occupied territory:

- any illicit export, other removal or transfer of ownership of cultural property,
- any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property,
- any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence (**24c 9**).

### **5. Transport of Cultural Property**

**934.** Authorised transport of cultural property exclusively engaged in the transfer of such property may take place under **special protection** (see **24a 17–19**). Transport under special protection must take place under the international supervision provided for in the Regulations for the Execution of the Convention and must display the distinctive emblem of the Convention. Acts of hostility directed against such transports are prohibited (**24 12**). It is also prohibited to seize such property in transport (**24 14**).

**935.** Transports of cultural property which, in urgent cases, are required to safeguard particularly valuable cultural property and for which the procedure for granting special protection cannot be followed must be spared as far as possible. If possible, opposing Parties should be notified in advance (**24 13**).

While cultural property remains on the territory of another State, that State must extend to it as great a measure of care as that which it bestows upon its own cultural property (**24a 18 lit.a**).

### **6. Personnel Engaged in the Protection of Cultural Property**

**936.** Personnel engaged in the protection of cultural property must, in the interests of the protection of cultural property, be respected (**24 15**).

**937.** Should protective personnel fall into the hands of the opposing Party, they must be allowed to continue to carry out duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing Party (**24 15**).

**938.** At the beginning of an armed conflict, the Director General of UNESCO must appoint a Commissioner-General for Cultural Property who, together with inspectors, monitors compliance with the Convention for the Protection of Cultural Property (**24a 2-10**).

### 7. Distinctive Marking of Cultural Property

**939.** Cultural property under general protection may and cultural property under special protection must be marked with a distinctive emblem in an armed conflict (**24 6, 10**). There are several signs for marking cultural property, even older ones. The sign provided in the 9th Hague Convention (**21 5**) has in practice been replaced by the protective sign included in the Hague Convention for the Protection of Cultural Property (**24**).

Figure 9.1: Hague sign for the protection of cultural property



The protective sign provided in the Roerich Pact (**24d**) is only of limited importance, namely for North, Central and South America.

Figure 9.2: Protective sign in accordance with Article 3 of the Roerich Pact



**940.** Cultural property under general protection is identified by a **blue-and-white shield pointed below**. This distinctive emblem may also be displayed as a means of identification on the **armlets and identity cards** of personnel engaged in the protection of cultural property (**24 17 para.2 lit.c; 24a 21 para.1**).

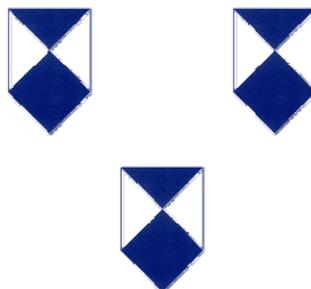
Figure 9.3: Present-day emblem for the protection of cultural property



**941.** Protective personnel may not, without legitimate reason, be deprived of their identity card or of their armlet (**24a** 21 para.4).

**942.** Cultural property (**24** 10) and transports under **special protection** – both authorised and in urgent cases (**24** 12 and 13) – as well as improvised refuges (**24a** 11) must bear the **distinctive emblem repeated three times** (**24** 17 para.1). The emblem must be repeated in a triangular formation with one shield below (**24** 16 para.2).

Figure 9.4: Special protective sign



**943.** During an international armed conflict, the use of the distinctive emblem for any other purpose than that of the protection of cultural property is forbidden (**24** 17 para.3).

**944.** The placing of the distinctive emblem and its degree of visibility is, in general, left to the discretion of the competent authorities (**24a** 20 para.1).

**945.** Distinctive emblems placed on vehicles of transport must be clearly visible in daylight from the air as well as from the ground (**24a** 20 para.2).

**946.** In the case of immovable cultural property under special protection, the emblem must be placed at the entrance of the cultural property concerned (**24a** 20 para.2 lit.b).

**947.** In the case of a centre containing monuments under special protection, the emblems must be placed at regular intervals sufficient to indicate the perimeter of the centre containing monuments (**24a** 20 para.2 lit.a).

## Chapter 10

### The Law of Armed Conflict at Sea

#### I. General

**1001.** In addition to specific rules, the general rules of the law of armed conflict (LOAC) described in other chapters of this manual also apply to naval warfare. Specific rules are endorsed in particular in the 1907 Hague Conventions (several conventions deal with armed conflict at sea [**18-23**]), the Second Geneva Convention (**2**), Additional Protocol I to the Geneva Conventions of 1949 (**5**), the Paris Declaration of 16 April 1856 Respecting Maritime Law (**25**), and the London Declaration concerning the Laws of Naval War of 26 February 1909 (**26**). There is, however, no comprehensive codification of rules in a single document with up-to-date laws of naval warfare.<sup>1</sup>

#### 1. Definitions

**1002. Warships** are ships that belong to the military forces of a State and that bear the external marks which distinguish the warships of its nationality. The commanding officer (commander) must be in the service of the State, his name must figure on the list of the officers of the armed forces or on an equivalent list, and the crew must be subject to military discipline (**48 29**). Warships need not be armed.

**1003.** Merchant vessels that are converted into warships in accordance with the Hague Convention (VII) of 18 October 1907 (**19**) and that thus fulfil the conditions of the definition of warships are called **auxiliary warships**. An auxiliary warship has the rights and duties of a warship when it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies. It must bear the external marks that distinguish the warships of its nationality. The commander must be in the service of the

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<sup>1</sup> At the initiative of the International Institute of Humanitarian Law, a series of meetings of legal and naval experts were held, which led to the adoption of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 12 June 1994. The purpose of this manual is to provide a modern revised version of international law applicable to armed conflict at sea. Although it is not legally binding, it is increasingly recognised as a reliable representation of international law applicable to naval war (see Chapter 1, No. 131 above).

State and duly commissioned by the competent authorities. His or her name must figure on the list of the officers of the armed forces or on an equivalent list, and the crew must be subject to military discipline. A State that converts a merchant vessel into a warship must, as soon as possible, announce such conversion in the list of its warships.

**1004. Auxiliary vessels** are vessels with civilian crews which are owned or operated by the State, in other words government ships, which perform auxiliary services for the naval forces but are not warships. As a rule, they meet the requirements of a military objective.

**1005. Government ships** are state-owned or state-operated ships that are used exclusively on government non-commercial service.

**1006. Government ships on non-commercial service** are e.g. customs and police vessels, State yachts, hospital ships, auxiliary vessels and food supply ships.

**1007.** Government ships for commercial purposes (**State merchant ships**) are treated as merchant vessels.

**1008.** A merchant vessel is a ship that is not a warship or a government ship and that is used especially for commercial trade, fishing purposes or for passenger transport. Non-commercial privately owned vessels (such as yachts) fall into the category of merchant vessels. The mere fact that a merchant vessel is armed does not change its legal status.

**1009.** Unmanned surface and submarine vessels can enjoy the sovereign immunity of government ships (including warships) provided that they cannot be classified as such themselves.

**1010.** Further definitions relating to aircraft are included in Chapter 11.

## **2. Territorial Scope of Application of the Law of Armed Conflict at Sea**

**1011. The territorial scope of application of the law of armed conflict at sea** comprises the theatre of war accessible for naval forces, namely

- the internal waters, the archipelagic waters and the territorial seas of the Parties to the conflict,
- the high seas,
- exclusive economic zones,

- contiguous zones,
- continental shelf,
- the land territory of the Parties to the conflict accessible by naval forces as well as
- the airspace over these areas.

This does not include areas in which military activities are prohibited on account of international agreements.

**1012. Internal waters** are waters on the landward side of the baseline of the territorial sea (48 8).

**1013.** The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the **territorial sea** (48 2 para.1). **Archipelagic waters** are waters on the landward side of archipelagic baselines (48 47). States have the right to define the breadth of their **territorial seas** up to a limit not exceeding 12 nautical miles measured from baselines (48 3). The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea. The contiguous zone (maximum 24 nautical miles from the baseline) (48 33 para.2) is not part of the territorial sea.

**1014. Exclusive economic zones** (48 55 ff.) may not extend more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. While coastal States and archipelagic States exercise full sovereignty within their internal waters, archipelagic waters and territorial sea, they have only specific sovereign rights and powers in the exclusive economic zone. The exclusive economic zone is not part of the high seas, but third States also enjoy freedom of navigation and overflight and other limited freedoms within it. The rights and sovereign powers of the coastal State do not include the right to be informed about military exercises or manoeuvres. There is no obligation to obtain the permission of the coastal State for such exercises or manoeuvres. Like on the high seas, naval operations may be conducted in the exclusive economic zone of neutral or non-belligerent States; the rights of coastal and archipelagic States must, however, be taken

into due consideration. Germany too has exclusive economic zones in the North and Baltic Seas.<sup>1</sup>

**1015.** The **high seas** (48 86 ff.) comprise all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. The high seas – like the exclusive economic zone – are an area that is not part of the territory of a State and is therefore a ‘no man’s zone’ or an ‘international zone’.

**1016.** Continental shelf areas of neutral and non-belligerent States can be part of the high seas affected by military operations. The rights of affected coastal and archipelagic States must be taken into due consideration. The continental shelf of a coastal State<sup>2</sup> comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance (48 76 para.1).

### **3. Naval Operations, Competence, and Principles**

#### **a. Naval Operations, Competence**

**1017.** In armed conflicts, naval operations within the meaning of this chapter are the use of weapons including the (special) means and methods of naval warfare as well as sinking and especially the following measures of economic warfare at sea (so called known as ‘prize measures’):

- stopping, visiting and searching,
- ordering to steer a specific course,
- capture of ships,
- seizure of cargo,

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<sup>1</sup> See the Proclamation of 25 November 1994 on the Establishment of an Exclusive Economic Zone of the Federal Republic of Germany in the North Sea and the Baltic Sea (German Federal Law Gazette 1994 II 3769). See also the Proclamation of 21 December 1976 on the Establishment of a Fishery Zone of the Federal Republic of Germany in the North Sea (German Federal Law Gazette 1976 II 1999) and the Proclamation of 18 May 1978 on the Establishment of a Fishery Zone of the Federal Republic of Germany in the Baltic Sea (German Federal Law Gazette 1978 II 867).

<sup>2</sup> For Germany see the Proclamation of 20 January 1964 on Research into and Exploitation of the German Continental Shelf (German Federal Law Gazette 1964 II 104).

- bringing-in and
- confiscation.

Blockades are not a prize measure. Vessels breaching a blockade may, however, be confiscated in accordance with prize measures. Vessels which, after prior warning, clearly resist capture become a military objective.

**1018.** Specific measures of warships against vessels taken in the exercise of the international law of the sea outside of armed conflicts can appear to be naval military operations without being therefore necessarily subject to LOAC. Such powers under international law exist for example on the high seas for fighting

- piracy (**48** 105 in conjunction with 107 and 110),
- the slave trade (**48** 110),
- unauthorised broadcasting (**48** 109, 110),
- drug trafficking<sup>1</sup>,

as well as for exercising the right of hot pursuit (**48** 111) and for enforcing the protection of the maritime environment (**48** 224).

Corresponding powers may result (e.g. maritime operations for fighting the proliferation of weapons of mass destruction) from international law, especially from resolutions of the UN Security Council based on Chapter VII of the Charter of the United Nations (**34**).

States are free to use national law to give or deny their warships the right to exercise these powers under international law.

On the high seas, flag States have jurisdiction over ships flying their flag. Under international law, all incidents occurring on vessels on the high seas are subject to the law of the flag State. However, ships do not, as a result, become ‘floating territory’ of the flag State.

**1019.** The following **may perform** naval operations:

- warships,

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<sup>1</sup> Art. 17 United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (German Federal Law Gazette 1993 II 1136, 1994 II 496); Art. 11 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 31 January 1995 (German Federal Law Gazette 1998 II 2233).

- military aircraft and
- army and air force units.

**1020.** The following vessels and persons may not perform naval operations:

- State ships other than warships, even when carrying out support services for the naval forces,
- merchant vessels,
- fishing vessels and other civilian ships,
- prize crews of captured vessels,
- State aircraft other than military aircraft and
- civil aircraft.

The crews of all ships and aircraft are, however, entitled to defend themselves against attacks by armed forces of the adversary.

#### **b. Principles of the Law of Armed Conflict at Sea**

**1021.** As long as no specific rules exist, the general rules of LOAC must be observed in naval warfare. For example, lowering the flag is a sign of surrender in naval warfare, and corresponding ships may no longer be attacked.

**1022. Ruses of war** are permissible in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags and military emblems – including electronic signatures – outside of hostilities (5 39 para.3). Before a battle begins, however, the nationality of a ship must always be revealed; in particular, the true flag must be displayed.

**1023. Perfidy** in naval warfare is prohibited under international law. In particular, it is prohibited to misuse the emblem of the Red Cross or to give a vessel in another way the look of a hospital ship for the purpose of camouflage. Furthermore, the misuse of other protective emblems similar to the Red Cross and the flag of truce is prohibited (2 45; 5 37). It is also prohibited to feign surrender or to feign distress by sending distress signals or by manning life rafts.

## II. Military Objectives and Protected Objects in Armed Conflict at Sea

### 1. Warships and Military Aircraft of the Adversary

**1024.** Subject to the principles applicable in armed conflicts at sea, warships and military aircraft of the adversary may be **attacked, sunk** or **seized** at any time without prior warning. If circumstances permit, ships should only be sunk after the crew has been brought to safety and the ship's papers have been secured. **Sinking** a warship does not in itself constitute an act of exercising the right of capture in naval warfare. Flag States continue to have ownership of ships sunken by the adversary or by scuttling, provided ownership has not been lost before sinking through the right of capture of the adversary.

**1025.** Upon capture, ships of the adversary and their cargo immediately become **booty of war** and property of the capturing State. They are not subject to the law of prize. Members of the crew who fall into the hands of the adversary become **prisoners of war**. The same applies to people on board who are accompanying the armed forces.

### 2. Merchant Vessels of the Adversary, their Cargo, Crew and Passengers

#### a. The Merchant Vessel of the Adversary

**1026.** The **adversary character** of a merchant vessel is determined by the flag the ship is entitled to fly (26 57).

**1027.** All measures of economic warfare at sea may be performed against merchant ships of the adversary without consideration of their cargo and owners. Prize law is applicable to wrecks and to unfinished new vessels. A prize court procedure must determine whether the capture of a merchant ship of the adversary is legal<sup>1</sup>. Upon confirmation by the prize court, the vessel becomes property of the capturing State.

**1028.** If a merchant vessel belonging to one of the Parties to the conflict is at the commencement of hostilities in an adversary's port, it must be allowed to depart freely after a reasonable number of days of grace. It may be furnished with a pass permitting it to

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<sup>1</sup> For Germany, see the Prize Regulations of 28 August 1939 (Reich Law Gazette 1939 I, p. 1585) and the Prize Court Regulations of 28 August 1939 (Reich Law Gazette 1939 I, p. 1593).

proceed without hindrance to its port of destination or any other port indicated (18 1). Merchant vessels unable, owing to circumstances of force majeure, to leave the adversary's port within the set period, or which are not allowed to leave, cannot be confiscated. The belligerent may only detain such vessels subject to the obligation to return them after the armed conflict or to requisition them on payment of compensation (18 2). These rules do not affect merchant vessels whose build shows that they are intended for conversion into warships (18 5).

**1029.** Subject to the principles applicable in armed conflict at sea, merchant vessels of the adversary become **military objectives** and may be attacked at any time without prior warning if they

- engage in hostilities, e.g. laying or sweeping mines, cutting submarine cables and pipelines, or visiting, searching or attacking other merchant vessels,
- make an effective contribution to military action, e.g. by carrying materiel or by transporting or supplying troops,
- are incorporated into or assist the adversary's intelligence gathering system,
- sail under convoy of warships or military aircraft of the adversary,
- refuse an order to stop or actively resist visit, search or capture or
- fulfil the prerequisites of a military objective in another manner.

**1030.** Merchant vessels of the adversary are allowed to defend against naval operations. This in itself is not considered illicit participation in hostilities. In this case defence may be broken by the capturing warship with armed force because the merchant ships of the adversary have thus become military objectives (No. 1029).

**1031.** Merchant ships of the adversary that do not meet the requirements of a military objective may only be destroyed if it is impossible to bring them into one's own or an allied port and if the passengers, crew, and vessel's papers have been first brought to a place of safety (27 2). Ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing 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 (27 2). Where possible, the personal belongings of the passengers and crew must also be recovered.

### **b. Cargo of Merchant Vessels of the Adversary**

**1032.** The **adversary character of cargo** is determined by the nationality of the owner or, if the owner is stateless, by his residence (**26 58**). In the case of organisations and companies, their seat is relevant. In case of a transfer of ownership during a journey effected after the outbreak of hostilities, goods of the adversary retain their adversary character until they reach their destination (**26 60**).

**1033.** **Cargo on board vessels of the adversary may be seized** and confiscated. This applies irrespective of whether such cargo is contraband or whether it is state or private property.

**1034.** **Contraband** is defined as goods destined for the adversary and which may be susceptible for use in armed conflict.

**1035.** **Neutral cargo** on board ships of the adversary **is exempt**. Such cargo may, however, be seized and confiscated if

- it is contraband (**26 22 ff.**),
- the vessel has breached a blockade, unless the shipper proves that at the time of the shipment of goods he neither knew nor could have known of the intention to break the blockade (**26 21**),
- the vessel is sailing under convoy of warships of the adversary or engaging in any activity that meets the definition of a military objective.

**1036.** Private and official **postal correspondence** found on board ships of the adversary is inviolable. If a vessel conveying such postal correspondence is captured, the correspondence must be forwarded by the captor without delay (**22 1**). If a vessel is to be sunk, postal correspondence must if possible be taken on and forwarded. A ship of the adversary is liable to capture even if it is a mail ship. The prohibition relating to the seizure of postal correspondence does not apply, in case of violation of blockade, to postal consignments destined for or proceeding from a blockaded port. Parcels are exempt from seizure if they are destined for neutral persons and do not contain any contraband. The captor is entitled to open mail bags and to inspect their contents. Inviolability does not apply to contraband contained in letter post.

**1037.** The following objects must **not be seized**:

- objects belonging to the passengers or the crew of a captured vessel and intended for their personal use,
- material exclusively intended for the treatment of the wounded and the sick, for the prevention of disease, or for religious purposes, provided that the transport of such material has been approved by the capturing Party (1 36; 2 38),
- instruments and other material belonging to aid societies,
- cultural property,
- postal consignments of the national information offices for prisoners of war (3 122) and the central prisoners of war agencies (3 123),
- postal consignments and relief shipments destined for prisoners of war and civilian internees as well as postal consignments dispatched by these persons,
- relief shipments intended for the population of an occupied territory, provided that the conditions attached by the capturing Party to the conveyance of such shipments are observed (4 59) as well as
- relief shipments intended for the civilian population of any territory under the control of a Party to the conflict other than occupied territory (5 70).

**c. Crews and Passengers of Merchant Vessels of the Adversary****1038.** The crews of merchant ships of the adversary

- become **prisoners of war** (3 4 A no.5) if they are **nationals of the adverse Party** to the conflict, unless they promise in writing not to undertake, while hostilities last, any service connected with the armed conflict (22 6).
- do **not** become **prisoners of war** if they are **nationals of a neutral State** (22 5). The latter applies to the captain and officers only when they promise in writing not to serve on a ship of the adversary for the duration of the armed conflict (22 5). Otherwise they become prisoners of war (3 4 A no.5).

The provisions on releasing crew members do not apply if the ship meets the conditions of a military objective.

**1039.** Passengers of merchant ships of the adversary must as a general rule be released. Passengers who have taken part in hostilities or are travelling to join the armed forces of the adversary may be detained. They become prisoners of war if they belong to

one of the categories enumerated in Article 4 of the Third Geneva Convention (3). Should any doubt arise as to whether they belong to any of these categories, they will be treated as prisoners of war until such time as their status has been determined by a competent authority (3 5; 5 45). Passengers who are members of the armed forces of the adversary will become prisoners of war.

### **3. Protected Vessels and Aircraft of the Adversary (with the Exception of Hospital Ships, Ships under Similar Protection, and Medical Aircraft)**

**1040.** The following ships of the adversary enjoying special protection may be neither attacked nor captured:

- vessels carrying material exclusively intended for the **treatment of the wounded and sick** or for the prevention of disease, provided that the particulars regarding the voyage have been approved (2 38),
- vessels carrying **relief goods for the civilian population** of an occupied territory, provided that the conditions connected with the transport are fulfilled (4 23),
- vessels that, with the consent of the belligerent Parties, are carrying **relief consignments** for the civilian population of any territory under the control of a Party to the conflict other than occupied territory (5 70),
- vessels used exclusively for **fishing along the coast** or small boats employed in **local trade** (22 3),
- vessels charged with religious, non-military scientific, or other philanthropic missions (22 4),
- vessels exclusively used for the transport of **cultural property** under special protection or in urgent cases (24 14),
- vessels used exclusively for the transport of parlementaires or the exchange of prisoners of war (**cartel vessels**),
- vessels which are furnished with an acknowledged **letter of transit**, provided that they observe the reservations imposed on them and,
- without prejudice to the right to capture on the high seas , **passenger vessels** used exclusively for the transport of civilians while engaged in such a transport.

The right to stop and search such vessels remains unaffected.

**1041.** Special protection ends if such vessels do not comply with conditions lawfully imposed upon them, if they act contrary to their mission, or if they meet the conditions of a military objective.

**1042.** The above-mentioned rules also apply to aircraft of the adversary serving the enumerated purposes and operating exclusively in established corridors (see Chapter 11). Such aircraft may be ordered to land or alight for visit and search.

#### **4. Other Protected Objects**

**1043. Undersea cables and pipelines** interconnecting neutral States must not be destroyed. Undersea cables and pipelines connecting parts of the territory of a Party to the conflict or the territories of Parties to the conflict or the territories of Parties to the conflict and neutrals may be interrupted within the territorial scope of the law of naval warfare and where required by military necessity.

#### **5. Land Targets**

**1044.** The Hague Convention (IX) Concerning Naval Bombardment in Time of War (**21**) has been considered obsolete since Additional Protocol I was ratified by the Federal Republic of Germany. With regard to land targets, in addition to the principle of constant discrimination, the rules concerning legitimate military objectives and precautions in attack are to be applied, especially the provisions of Additional Protocol I, Articles 50 to 60 (see Chapter 4).

<p style="text-align: center;"><b>III. Special Rules Concerning Certain Means and Methods of Naval Warfare</b></p>
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#### **1. Mine Warfare**

**1045.** The following types of mining are distinguished:

- **protective mining**, i.e. laying mines in own territorial and internal waters;
- **defensive mining**, i.e. laying mines in international waters for the protection of passages, ports and their entrances;

- **offensive mining**, i.e. laying mines in hostile territorial and internal waters or in waters predominantly controlled by the adversary.

**1046.** Any form of mine laying, be it prior to or after the outbreak of an armed conflict, is subject to the principles of effective **monitoring, risk control** and **warning (20)**. In particular, all feasible measures of precaution must be observed to ensure the safety of peaceful shipping.

**1047. Protective mining** is permissible **prior to an armed conflict**, with due regard to the right of innocent passage of foreign vessels through territorial waters , provided the mine laying State has sufficient control over the mines laid. If it is indispensable for the protection of its security and if vessels have been appropriately warned, a coastal State may temporarily prohibit innocent passage through parts of its territorial waters. In the case of straits serving international navigation, there is no right of protective mining prior to the outbreak of an armed conflict.

**1048. Protective mining** is permissible **in an armed conflict** without the limitations applicable to mining prior to the outbreak of an armed conflict.

**1049. Defensive mining** is in principle permissible only after the outbreak of an armed conflict; the sea lanes of neutral and non-belligerent States should be kept open to an appropriate extent if military circumstances permit.

**1050. Offensive mining** may not serve the sole purpose of intercepting commercial shipping **(20 2)**.

**1051.** At the close of hostilities the Parties to a conflict must to do their utmost to **remove** the mines they have laid in order to restore the security of shipping **(20 5)**.

## 2. Torpedoes

**1052.** The use of torpedoes that do not sink or become harmless in another way after missing their **target is prohibited (20 1)**. In accordance with the principles of naval warfare, it must be ensured that torpedoes damage only military objectives and not other ships or objects.

### 3. Missiles

**1053.** The general principles of the law of naval warfare apply to the use of missiles including cruise missiles at sea. Missiles, including cruise missiles at sea, are to be used in compliance with the general principles of LOAC concerning target discrimination and precautions in attack laid down in Chapter 4.

### 4. Submarine Warfare

**1054.** Submarines must conform to the rules of international law to which surface warships are subject (27 1). Merchant vessels that meet the conditions of a military objective may be attacked and sunk by submarines without prior warning. A submarine must first surface if it intends to capture a hostile merchant vessel that does not meet the conditions of a military objective. It may only sink the merchant ship when it has first brought the passengers, crew and ship's papers to a safe place (27 2). If the merchant vessel refuses a proper order to stop or actively resists visit or search, the submarine may attack without warning.

### 5. Exclusion Zones

**1055.** An exclusion zone is an area of water and the air space above that area (see also Chapter 11, No. 1144) over which a Party to the conflict claims to have extensive control rights and in which it prohibits or restricts access of ships and aircraft. Establishing and maintaining exclusion zones, which intervene in the freedom of the high seas, is permissible in exceptional cases. The use of weapons must be limited to military objectives. Provisions concerning the stopping, search and destruction of prizes must be observed.

**1056.** The purpose of such exclusive zones is to facilitate the identification of military objectives and defence against hostile acts but not to attack the war economy of the adversary.

**1057.** Exclusion zones are either static or movable. A **static exclusion zone** comprises a space in three dimensions designated by coordinates, in other words a distinct area of

water and the air space above. A **movable exclusion zone** comprises the space in three dimensions around naval units; it thus changes its position as the unit moves.

**1058.** The establishment of **static exclusion zones** is an exception under international law and is **permissible** only under the following conditions:

- The same rules and principles of international law which are applicable in international armed conflicts will apply both inside and outside the exclusion zone; the exclusion zone does not release naval forces from the obligation to identify valid military objectives.
- The extent and duration of as well as the rights claimed in exclusion zones must by no means exceed legitimate national security and defence requirements. Vessels in the exclusion zone must be granted appropriate time to leave it.
- The boundaries of exclusion zones, the restrictions placed on sea and air traffic in and above these areas, and the control measures taken must be determined in accordance with the principles of military necessity and proportionality. As far as military considerations permit, particular passages must be held free for neutral vessels in which only the right to stop, visit and search is exercised by the Party establishing the exclusion zone.
- The extent, the exact boundary lines and the duration of an exclusion zone must be **publicly declared**. If an exclusion zone is divided into subzones, the extent of restrictions and the boundaries of each individual subzone must be defined.

**1059.** **Movable exclusion zones** are permissible only if they are publicly declared in advance and in an appropriate manner. The declaration must include the rights claimed. The territorial extent of movable exclusion zones, restrictions on sea and air traffic in and above them, and the control measures taken must be determined according to the principles of military necessity and proportionality.

## **6. Blockades**

**1060.** A blockade is a means of preventing vessels and aircraft from entering or departing from coasts or ports belonging to, occupied by or controlled by the adversary (see also Chapter 11, Nos. 1142 ff.). The purpose of blockades is to cut off an adversary's coast from supplies without the intention of directly conquering the coast. Starvation of the

civilian population as a method of warfare is prohibited (5 49 para.3 in conjunction with 54 para.1). It is also prohibited to impede shipments for the civilian population (5 70).

**1061.** A blockade must be declared and notified by the government of the Party to the conflict or by a commander authorised by this government (26 8). Neutral Powers must also be notified (26 11). The same applies to any extension of the limits of a blockade and to the lifting of a blockade (26 12). The declaration must specify the following details:

- the date when the blockade begins,
- the geographical limits of the coastline under blockade,
- a period within which neutral vessels may leave the blockaded coastline (26 9).

**1062.** In order to be binding, a blockade, must be **effective** (25 Principle 4). It must be maintained by armed forces sufficient to bar access to the blockaded coast. **Long distance blockades** are also permissible, i.e. the blockade and control of an adversary's coast by armed forces at a greater distance from the blockaded coast as a result of military requirements.

**1063.** A blockade is effective if ship-to-shore logistics are cut off. To maintain the effectiveness of the blockade, the blockading armed forces may use military force against potential blockade runners. Air transports do not need to be stopped in a maritime blockade. A barricade achieved by other means, e.g. by ships scuttled to prevent entry, does not constitute a blockade. The mining of coasts and ports is not a substitute for the presence of warships even if all movements are temporarily stopped by mines. A blockade is not regarded as ineffective if the blockading force is temporarily withdrawn on account of bad weather (26 4) or to pursue a blockade runner. A blockade that ceases to be effective is no longer legally binding. A blockade ends with the expulsion of the blockading forces by the adversary or with their complete or partial destruction even if new forces are charged with this task without delay. In this case the blockade must be declared and notified again (26 12).

#### IV. Hospital Ships

**1064.** The following ships and boats (medical transports) enjoy special protection in naval warfare and must not be attacked, sunk or captured under any circumstance:

- **military hospital ships**, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting, treating and transporting the wounded, sick and shipwrecked (2 22),
- hospital ships operated by national Red Cross and Red Crescent societies, by officially recognised relief societies or by private persons (2 24-26),
- **small craft** employed by a State or by officially recognised relief societies **for coastal rescue operations** as far as operational requirements permit (2 27) as well as
- ships used to convey wounded and sick civilians (4 21; 5 22).

**1065.** The names and descriptions of military hospital ships must be notified to the Parties to the conflict ten days before they are employed for the first time (2 22). This also applies to hospital ships of national societies, officially recognised relief societies and private persons, which additionally require the prior consent of their own government and the authorisation of one of the Parties to the conflict (2 22, 25).

**1066.** Hospital ships must be distinctively marked as follows:

- all exterior surfaces must be white,
- the distinctive emblem of the Red Cross must be painted once or several times on each side of the hull and on the horizontal surfaces as large as possible, so as to be clearly visible from the sea and from the air,
- a white flag with a red cross must be flown as high as possible and visible from all sides.

In addition, all hospital ships must fly their national flag; neutral ships must further hoist the flag of the Party to the conflict whose direction they have accepted (2 43). As far as possible, their painting and distinctive emblems must be rendered sufficiently visible at night.

**1067.** Other identification systems, e.g. internationally recognised identification signals (light signals, radio signals, and electronic identification) are also permissible (5 6-9 of Appendix I). Accordingly, waterborne vehicles under the protection of the four Geneva Conventions of 1949 and Additional Protocol I should exhibit one or more flashing blue lights visible from any direction. The blue light should flash at a rate of 60 to 100 flashes per minute (5 6 para.1 of Annex I). Protected medical transports may, for their identification and location, use standard radar transponders; it should be possible for

medical transports to be identified by submarines by the appropriate underwater acoustic signals transmitted by medical transports (5 9 of Annex I).

**1068.** Lifeboats of hospital ships, coastal lifeboats and all small craft used by the medical service must be marked in the same manner as hospital ships (2 43 para.3; 5 23 para.1).

**1069.** Hospital ships must afford assistance to the wounded, sick and shipwrecked without distinction of nationality (2 30). They must by no means be employed for any military purposes.

**1070.** Hospital ships may be equipped with radio systems. They may not, however, possess or use a secret code for their wireless or other means of communication (2 34 para.2). Digitalisation as such is not viewed as the use of secret codes.

The following are also permissible (2 35):

- the use of apparatus designed to facilitate navigation,
- the transport of equipment and personnel intended exclusively for medical duties, over and above normal requirements,
- the carrying and use of portable arms by the personnel of a hospital ship for the maintenance of order, for their own defence or that of the sick and wounded,
- the presence on board of portable arms and ammunition taken from the wounded, sick and shipwrecked but not yet handed to the proper service and
- the care of wounded, sick or shipwrecked civilians.

Hospital ships may be protected by friendly or allied warships.

**1071.** Any hospital ship in a port which falls into the hands of the adversary is authorised to leave the port (2 29). During and after hostilities, hospital ships act at their own risk. Hospital ships must not hamper the movements of the combatants (2 30).

**1072.** Hospital ships may not be captured but they can be controlled and searched by Parties to a conflict (2 31). All warships have the right to demand that the wounded, sick or shipwrecked on board hospital ships or other ships be surrendered, whatever nationality such ships have, provided

- that the wounded and sick are in a fit state to be moved and
- that the warship can provide adequate facilities for necessary medical treatment (2 14; 5 30).

**1073.** Belligerents are not obligated to accept assistance from hospital ships. They may order them off, make them steer a certain course, control the use of their means of communication, and detain them for a period not exceeding seven days if the gravity of the circumstances so requires (2 31 para.1). A commissioner may temporarily be put on board to see that such orders are carried out. For monitoring purposes, the Parties to a conflict may also put neutral observers on board (2 31 para.4).

**1074.** The protection to which hospital ships and sick-bays are entitled must not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the adversary, especially if they are misused for military operations or their preparation. Protection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded (2 34).

**1075.** The religious, medical and hospital personnel of hospital ships and their crews must be respected and protected. They may not be detained during the time they are in the service of the hospital ship. This applies whether or not there are wounded and sick on board (2 36).

**1076.** The personnel of hospital ships including the crew must wear a white armlet bearing the distinctive emblem. Such personnel may not be deprived of their armlets or identity cards (2 42).

## Chapter 11

### The Law of Armed Conflict in and from the Air

#### I. General

**1101.** The rules applicable to international armed conflict in and from the air are – over land – based for the most part on the laws of war on land and – over the high seas and in adjacent areas – based for the most part on the laws of war at sea (5 49 para.3). Unlike the laws of war on land and at sea, the rules of aerial warfare have not been codified in a coherent manner. Although the 1923 Hague Rules of Aerial Warfare (14) did not come into force as treaty law, they have assumed crucial importance as an expression of customary international law.<sup>1</sup>

#### 1. Definitions

**1102.** The term **aircraft** refers to any vehicle – whether manned or unmanned – that can derive support in the atmosphere from the reactions of the air, including vehicles with either fixed or rotary wings as well as balloons and airships.

**1103. Military aircraft** means any aircraft belonging to and operated by the armed forces of a State which bears external military markings of that State (14 3). Military aircraft must be under the command of a member of the armed forces and be controlled or have been preprogrammed by a member of the armed forces; all members of the armed forces and the crew must be subject to regular military discipline (14 14). Military aircraft need not be armed. Only military aircraft are entitled to exercise belligerent rights and use military force in fighting military objectives of an adversary (14 13, 16 para.1).

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<sup>1</sup> The HPCR Manual on International Law Applicable to Air and Missile Warfare (HPCR/AMW) and the related commentary were prepared as part of a university project by a group of experts consisting of university professors and practitioners and were published by the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University, Cambridge, Massachusetts, USA, in March 2010. This manual, however, is neither legally binding nor is it a binding document for States (see Chapter 1, No. 131 above).

**1104. State aircraft**, in addition to military aircraft, means any non-military aircraft belonging to or used by a State and serving exclusively official, non-commercial state functions (e.g. in customs or police service) (14 2 para.1 lit.b, 4, 5).

**1105. Civil aircraft** means any aircraft other than military or State aircraft which serves to regularly transport passengers or cargo.<sup>1</sup> Civil airliner means a civil aircraft identifiable as such which is engaged in carrying civilian passengers in scheduled or non-scheduled service along air traffic service routes. Non-military State aircraft that are not employed for customs or police purposes will be treated as civil aircraft (14 5, 6).

**1106.** State aircraft or civil aircraft of a belligerent State may be converted into military aircraft, provided that the **conversion** is effected within the territory of the belligerent State to which the aircraft belongs and not on the high seas (14 9).

**1107. Cartel aircraft** means an aircraft that has been granted safe conduct by agreement between the belligerent Parties for the purpose of performing a specific function, such as the transport of prisoners of war or parlementaires (1-3 6; 4 7).<sup>2</sup>

**1108. Medical aircraft** means any military or civil aircraft to which the competent authorities of a Party to the conflict have assigned the **exclusive** permanent, indefinite or temporary **task** of aerial transportation and/or treatment of wounded, sick or shipwrecked persons or the transport of medical personnel and medical equipment or supplies and which is under the control of a competent authority of a Party to the conflict. Besides the national emblem, they carry the distinctive emblem on their hull and wings and must not be attacked (2 39; 5 8 lit.f, g and j, 24 ff.).

**1109. Neutral aircraft** means any aircraft of a State that is not a Party to the armed conflict (17 16).

**1110. Unmanned aircraft system/unmanned aerial vehicle (UAS/UAV)**<sup>3</sup> means an unmanned aircraft of any size which does not carry a weapon and which cannot control a weapon. It can be a military or other State aircraft or a civil aircraft.

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<sup>1</sup> Article 3 of the Chicago Convention of 1944 (German Federal Law Gazette 1956 II 411), as amended by the Amending Protocol of 26 October 1990 (German Federal Law Gazette 1996 II 2499, 2501).

<sup>2</sup> Standard national practice, see for example 3 109–117.

<sup>3</sup> The terms UAS/UAV and UACS/UACV are not a definition under (international) law but primarily a distinction that is based on technical features and is often used in connection with (reconnaissance or combat) drones; NATO now uses the following terminology in AAP-06 (2012): 'unmanned aircraft system:

**1111. Unmanned aerial combat system / unmanned aerial combat vehicle (UACS/UACV)** means any unmanned military aerial system of any size which carries or launches a weapon or which can use on-board technology to direct such a weapon to a target. UACS are carrier systems that in general, from a legal perspective, do not differ from other flying platforms such as manned aircraft.

**1112. Missiles** mean self-propelled unmanned weapons or weapon systems (such as cruise missiles or Taurus rockets), that are launched from aircraft, warships or land-based launchers and that are either guided or unguided.

## 2. Territorial Scope of Application

**1113.** Air or **airspace** means the area over land and sea up to the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit. Under international law, airspace is classified as either national airspace (that over the land, internal waters, archipelagic waters, and the territorial sea) or international airspace (that over contiguous zones, exclusive economic zones, the high seas, and territory not subject to the sovereignty of any State).<sup>1</sup>

## 3. Principles of the Laws of Armed Conflict in and from the Air

**1114.** The right of the Parties to a conflict to use armed military force is not unlimited (5 35 para.1; 16a 22). **The principle of discrimination between legitimate military targets and civilians as well as civilian objects is of special importance in aerial warfare.** Indiscriminate attacks that do not comply with this principle are prohibited (5 51 paras.4 and 5; 14 24; see also Chapter 4, No. 403). Air operations<sup>2</sup> that employ weapons that cannot be directed at a specific military objective and, consequently, are of a nature to strike military objectives and protected civilians or civilian objects without distinction (5 51 para.4 lit.b) or whose effects cannot be appropriately limited (5 51 para.4 lit.c) are thus especially prohibited. It is also prohibited to conduct air operations that employ weapons

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A system whose components include the unmanned aircraft, the supporting network and all equipment and personnel necessary to control the unmanned aircraft’.

<sup>1</sup> Article 1 of the Chicago Convention: ‘The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.’

<sup>2</sup> In this chapter, the term ‘air operations’ is understood to mean acts of violence in and from the air against the adversary, whether in offence or defence (see 5 49 para.1).

the aim or nature of which is to cause unnecessary suffering or superfluous injury (see Chapter 4).

**1115.** Only military aircraft are entitled to conduct air operations (5 43 para.2; 14 13). This also applies to all enforcement actions that do not in themselves entail the use of weapons such as intercepting, diverting or forcing to land other aircraft for the purpose of inspection.

**1116.** All military aircraft of the adverse Party to a conflict are lawful targets (5 52). Other aircraft become lawful targets as soon as they participate in hostile action in support of the adversary, facilitate his military actions, support or participate in his intelligence efforts, fail to follow orders or resist orders of their own military agencies, in particular orders to land for inspection (14 13), or contribute effectively in other ways to military action of the adversary.

**1117.** The law of armed conflict (LOAC) contains no obligation to use precision guided ammunition. There may however be situations in which the obligation to discriminate between military targets and civilians/civilian objects or the obligation to avoid or minimise collateral damage cannot be fulfilled without the use of such weapons (5 48, 51 paras.4 and 5).

<p style="text-align: center;"><b>II. Protected Persons – Special Rules Applicable to Operations in and from the Air</b></p>
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### 1. Principle

**1118.** The rules of LOAC presented in the previous chapters also apply to aerial warfare, in particular the rules regarding the protection of the civilian population and individual groups of persons such as medical and religious personnel, persons that are *hors de combat*, prisoners of war and internees; these rules also apply to the protection of cultural property and civil defence.

### 2. Loss of Protection

**1119.** Under LOAC, such persons lose their protection against attacks in particular if and as long as they take a direct part in hostilities. This may be the case, for example, if they

participate in the following air operation activities for the purpose of attacking hostile military objectives, or in order to

- engage in electronic warfare or computer network operations,
- select targets,
- plan air or missile attacks,
- operate or control weapons and weapon systems,
- refuel military aircraft on the ground and in the air,
- load military aircraft with weapons, rockets or precision-guided ammunition,
- service or repair military aircraft,
- load mission software and data onto military aircraft, weapons, rockets or precision-guided ammunition.

### **3. Parachute Troops and Aircraft in Distress**

**1120.** Persons parachuting from an aircraft in distress do not constitute lawful targets until they have landed and consequently may not be attacked (5 42 para.1). Upon reaching the ground in territory of a Party to the conflict, they must be given an opportunity to surrender before being made the object of attack, unless it is apparent that they are engaging in a hostile act directly upon landing (5 42 para.2). Parachute troops, however, constitute lawful targets during their descent, since descent is part of their combat mission and they can carry and use weapons during descent (5 42 para.3).

<p style="text-align: center;"><b>III. Protected Objects – Special Rules Applicable to Operations in and from the Air</b></p>
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#### **1. Principle**

**1121.** Air operations are also subject to the rules of LOAC for the general protection of civilian objects and the special protection of certain objects such as medical facilities and hospital ships and medical aircraft, churches, cemeteries, mosques, monasteries, prisoner-of-war camps, and internment camps, cultural property, civil defence facilities, and State or cartel aircraft. Military attacks must therefore only be directed against military objectives of the adversary (5 52 para.2).

**1122.** The following activities may render an otherwise protected aircraft a lawful military objective:

- engaging in hostile actions in support of the adversary, e.g. intercepting or attacking other aircraft; attacking persons or objects on land or sea; being used as a means of attack; engaging in electronic warfare; or providing targeting information to adversary's forces,
- facilitating the military actions of the adversary's armed forces, e.g. transporting troops, carrying military materials, or refueling military aircraft,
- being incorporated into or assisting the adversary's intelligence gathering systems, e.g. engaging in reconnaissance, early warning or surveillance measures (14 16),
- refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible seizure or clearly resisting interception as well as
- otherwise making an effective contribution to military action.

## **2. Civil Aircraft**

**1123.** Civil aircraft, including commercial aircraft, whether enemy or neutral, are civilian objects and as such not the target of military operations. They should therefore avoid airspace in which military operations are taking place or are to be expected. In the vicinity of hostilities, civil aircraft must comply with instructions from military authorities regarding their course and altitude (14 12). Whenever feasible, a Notice to Airmen (NOTAM) should be issued by Parties to a conflict, providing information on military operations hazardous to civilian or other protected aircraft (including frequencies to be monitored, identification modes and codes, altitude, course and speed restrictions, procedures to respond to radio contact by military forces, as well as possible action by the military forces if the NOTAM is not complied with or if the protected aircraft is considered a threat).

**1124.** Civil aircraft of the adversary and goods on board may be captured as prize on the ground or – when flying outside neutral airspace – be intercepted and ordered to proceed to a reasonably accessible belligerent airfield that is safe for the type of aircraft involved. Prior exercise of inspection is not required. The same applies if there is no contraband on board the aircraft (14 52).

**1125.** As an exceptional measure, captured civil aircraft of the adversary and goods on board may be destroyed when military circumstances preclude taking the aircraft for prize

adjudication. All persons on board must, however, be first placed in safety and documents relating to the prize must be preserved (14 58, 59).

**1126.** Civil airliners are civil aircraft and as such civilian objects. In case of doubt, civil airliners are presumed not to be making an effective contribution to military action. Civil aircraft should avoid entering the immediate vicinity of hostilities and no-fly or exclusion zones. They do not, however, lose their protection merely because they enter such areas.

**1127.** Any civil airliner suspected on reasonable grounds of carrying contraband or otherwise being engaged in activities inconsistent with its status is subject to inspection by a belligerent Party in an airfield that is safe for this type of aircraft and reasonably accessible.

### **3. State Aircraft**

**1128.** State aircraft that are not military aircraft are not entitled to participate directly in hostilities; they are protected in their pursuit of their non-military official tasks, and as such are not lawful targets (14 2 lit.b, 13). They may be intercepted, inspected or diverted by the armed forces of a Party to the conflict.

**1129.** Enemy military aircraft and State aircraft, unless they have the same status as civil aircraft (No. 1105), are booty of war when seized by the adversary. Prize procedures are not necessary and do not apply to such aircraft; instead their ownership immediately passes to the government of the adverse Party to the conflict by virtue of capture (14 32).

**1130.** If a military aircraft becomes disabled or experiences technical problems that require it to land in adverse territory, the aircraft may be seized and destroyed or converted for use by the adversary. Captured aircrews of military aircraft covered under this rule are prisoners of war.

### **4. Medical Aircraft**

**1131.** Medical aircraft (No. 1108) must not be attacked, but must be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned (1 36 para.1). In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the

respect and protection of medical aircraft of a Party to the conflict is not dependent on the consent of the adversary. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party (5 25, 29).

**1132.** In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they must nevertheless be respected after they have been recognised as such (5 26 para.1).

‘Contact zone’ means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground (5 26 para.2).

**1133.** A medical aircraft which flies over an area physically controlled by an adverse Party without prior consent of the competent authority of the adverse Party or in deviation from the terms of an agreement, either through navigational error or because of an emergency affecting the safety of the flight, must make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been identified by the adverse Party, that Party must make all reasonable efforts to give the order to land or to alight on water, or to take other measures to safeguard its own interests and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft (5 27).

**1134.** In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick, as well as the crew of the aircraft will become prisoners of war. Medical personnel continue to enjoy protection (1 36 para.5).

**1135.** The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft must not be used in an attempt to render military targets immune from attack (5 28 para.1). Medical aircraft must not be used to collect intelligence or other military data and must not carry any equipment intended for such purposes. Furthermore, medical aircraft

must not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board, and such light individual weapons as may be used/employed by the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

**1136.** Medical aircraft may be ordered to land or to alight on water to permit inspection. The inspection must be commenced without delay and must be conducted expeditiously. The inspecting Party must not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. The inspecting Party must in any event ensure that the condition of the wounded and sick is not adversely affected (5 30 para.2).

**1137.** If the inspection discloses that the aircraft is a medical aircraft and is not in violation of the prescribed obligations, it must be permitted to continue the flight without delay (5 30 para.3, 28). However, if the inspection discloses that the aircraft does not meet the requirements for special protection or has violated its obligations, it may be seized. An aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

## **5. Cartel Aircraft**

**1138.** Aircraft granted safe conduct by agreement between the Parties to a conflict enjoy special protection from attack. They only lose their special protection if they do not comply with the details of the agreement, including availability for identification and inspection, or if they intentionally hamper the movements of combatants and are not innocently employed in their agreed upon role. In case of doubt whether such an aircraft qualifies as a military target as a result of an action in terms of No. 1122, it will be presumed not to qualify as such (5 52 para.3). Such aircraft are exempt from capture as prize, provided that they

- are innocently employed in their agreed role,
- immediately subdue to interception and identification when required,
- do not intentionally hamper the movement of combatants and obey orders to divert from their track when required and
- are not acting in breach of a prior agreement.

## 6. Neutral Aircraft

**1139.** Parties to a conflict are entitled to intercept civil aircraft of a neutral State outside neutral airspace, provided that due regard is given to the safety of civil aviation. If, after interception, reasonable grounds for suspecting that a neutral civil aircraft is subject to capture exist, it may be ordered to proceed to a reasonably accessible belligerent airfield that is safe for the type of aircraft involved. As an alternative to capture as prize, such an aircraft may consent to be diverted from its declared destination; it may not be destroyed.

**1140.** Neutral civil aircraft are subject to capture as prize outside neutral airspace, if it is determined as a result of inspection or by other means that any one of the following conditions is fulfilled:

- they are carrying contraband,
- they are on a flight especially undertaken to transport individual passengers who are members of the adversary's armed forces,
- they are operating directly under the control, orders, charter, employment or direction of the adversary,
- they present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal such documents,
- they are violating regulations established by Parties to a conflict within the immediate area of military operations or
- they are engaged in breach of an air blockade (**14 53**).

**1141.** Goods on board neutral civil aircraft outside neutral airspace are subject to capture as prize if

- they constitute contraband or
- the neutral civil aircraft is engaged in activities rendering it a military objective (**25 Principles 2 and 3**).

**1142.** In order to avoid the need for interception, belligerent Parties are allowed to establish reasonable procedures for the inspection of the cargo of neutral civil aircraft and the certification that an aircraft is not carrying contraband. The fact that a neutral civil aircraft has submitted to such procedures is not an act of unneutral service with regard to the opposing belligerent Party.

<p style="text-align: center;"><b>IV. Blockades and Zones – Specifics in Operations in and from the Air</b></p>
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### **1. Principle**

**1143.** The establishment of zones designated for unlimited air or missile attacks is prohibited. A belligerent Party is not absolved of its obligations under LOAC by establishing exclusion zones or no-fly zones. Nevertheless, the Parties to a conflict have the right to control civil aviation in the immediate vicinity of hostilities or to take adequate measures of force protection in the form of, for example, the establishment of warning zones.

### **2. Exclusion Zones**

**1144.** The principles described in Chapter 10 (Nos. 1058 ff.) also apply to the establishment of an exclusion zone in international airspace by a Party to a conflict. The extent, location and duration of the exclusion zone and the measures imposed must not exceed what is reasonably required by military necessity. The commencement, duration, location and extent of the exclusion zone, as well as the restrictions imposed, must be appropriately notified to all concerned (preferably by means of a NOTAM). The establishment of an exclusion zone must neither compromise nor completely bar access to the airspace of neutrals; due regard must be given to the lawful use by neutrals of their exclusive economic zones and continental shelf, in particular artificial islands such as drilling platforms, installations, structures and safety zones. The concept of an exclusion zone is only recognised in international armed conflict.

### **3. No-fly Zones**

**1145.** A Party to a conflict may establish and enforce a no-fly zone in its own or in the national airspace of another Party to the conflict. The commencement, duration, location and extent of the no-fly zone must be notified to all concerned (preferably by means of a NOTAM). Aircraft entering a no-fly zone without specific permission are liable to be attacked. The concept of no-fly zones is also recognised in non-international armed conflicts.

#### 4. Aerial Blockade

**1146.** An aerial blockade concerns international airspace. It is the only measure to prevent exports by the enemy (see also Chapter 10, Nos. 1060 ff.). It is designed to prevent aircraft from entering or exiting the airspace over coastal areas belonging to, occupied by, or under the control of the adversary. An aerial blockade may be restricted to an individual port. An aerial blockade must be effective. The question whether such a blockade is effective or not is a question of fact (**25** Principle 4; **26** 2, 3). An aerial blockade must not bar access to the airspace of a neutral State (**26** 18). It must be declared by a Party to a conflict and notified to all States (**26** 8).

**1147.** The declaration must specify the commencement, duration, location, and extent of the aerial blockade and the period in which neutral aircraft may leave the blockaded area (**26** 9, 11, 16). Whenever feasible, the establishment of the aerial blockade should be declared through a NOTAM. The declaration should include information on the frequencies upon which the aircraft ought to maintain a continuous listening watch; the continuous operation of weather and identification modes and codes; altitude, course and speed restrictions; procedures to respond to radio contact by the military forces and to establish two-way communications; and possible action by military forces if the instructions (preferably by NOTAM) are not complied with or if the civilian or other protected aircraft is perceived by those military forces to be a threat. The cessation, temporary lifting, re-establishment, extension or other alteration of an aerial blockade must be declared and notified (**26** 12, 13).

**1148.** An aerial blockade must be enforced impartially as regards the aircraft of all States (**26** 5). Owing to the condition of effectiveness of an aerial blockade, the armed force maintaining and enforcing it should be deployed at a distance from the blockaded airspace at which effective enforcement is possible. An aerial blockade may be enforced and maintained by a combination of lawful means under LOAC. To the extent that an aerial blockade is enforced exclusively by military aircraft, a sufficient degree of air superiority of friendly forces is required. This creates a curtain at the borders of the blockaded area which is to be enforced a long distance before the curtain. Aircraft in distress must be allowed to enter the blockaded airspace when necessary (**26** 7).

**1149.** For an aerial blockade to be considered effective, it is required that civil aircraft believed on reasonable grounds to be breaching, or attempting to breach, an aerial blockade, be forced to land, be inspected, captured or diverted. If civil aircraft resist interception, an order to land and capture, they are at risk of attack after prior warning.

**1150.** The establishment of an aerial blockade is prohibited if its sole or primary purpose is to starve the civilian population or deny that population access to other objects essential for its survival, or if the suffering of the civilian population caused by the blockade may be expected to be excessive in relation to the concrete and direct military advantage anticipated from the aerial blockade (5 54, 57 para.2 lit.a iii).

**1151.** If the civilian population of the blockaded area is inadequately provided with food, medication, clothing, places to sleep, shelter and other objects essential for its survival, the blockading Party must provide for free passage of such foodstuffs and other essential supplies (basic food and materiel) as well as medication for the civilian population and injured and sick members of the armed forces, for example by establishing a humanitarian air corridor, subject to the following conditions:

- The blockading Party retains the right to prescribe the technical arrangements, including inspection, under which such passage is permitted.
- The distribution of such supplies may be made subject to the condition that it will be carried out under the local supervision of a Protecting Power or a humanitarian organisation which offers guarantees of impartiality, such as the International Committee of the Red Cross (4 9, 23; 5 5).

**1152.** An aerial blockade that has proven to be ineffective is invalid and all further military measures are unlawful. An aerial blockade may however subsequently be established anew under the above conditions; to do so, the measures described above must be carried out once more.

<p style="text-align: center;"><b>V. Precautions in Attacks – Specifics of Operations in and from the Air</b></p>
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**1. Precautions of the Attacking Party**

**1153.** As in other military operations, constant care must be taken in air operations to spare the civilian population, individual civilians and civilian objects against the effects of hostilities; all feasible precautions must be taken to spare all persons and objects entitled to specific protection against such effects. This includes doing everything feasible to verify that a target is a lawful target and does not benefit from general or specific protection. The means and methods of military operations must be chosen with a view to avoiding or minimising collateral damage. Everything feasible must be done to determine whether the collateral damage to be expected from an attack will be excessive in relation to the concrete and direct military advantage anticipated (5 48, 57).

**2. Specifics of Attacks Directed at Aircraft in the Air**

**1154.** Before an aircraft is attacked in the air, all feasible precautions must be taken to verify that it constitutes a military objective. Verification should use the best means available under the prevailing circumstances, having regard to the immediacy of any potential threat. Factors relevant to verification may include:

- visual identification,
- responses to oral warnings over radio,
- infrared signature,
- radar signature,
- electronic signature,
- identification modes and codes,
- number and formation of aircraft,
- altitude, speed, track and profile as well as other flight characteristics or
- pre-flight and in-flight air traffic control information.

**1155.** Parties to a conflict and neutral States providing air traffic control services should establish procedures whereby military commanders, including commanders of military

aircraft, are informed on a continuous basis of designated routes assigned to, and flight plans filed by, civil aircraft in the vicinity of hostilities (including information on communication channels, identification modes and codes, destination, passengers and cargo).

### **3. Precautions by the Party Subject to Attack**

**1156.** Parties to a conflict actually or potentially subject to air or missile attacks must, to the maximum extent feasible, avoid locating military objectives within or near densely populated areas, hospitals, cultural property, places of worship, prisoner-of-war camps, and other facilities that are entitled to specific protection (5 58 lit.b). In addition, they must, to the maximum extent feasible, endeavour to remove the civilian population, individual civilians and other protected persons and objects under their control from the vicinity of military objectives and to protect them against the dangers resulting from hostilities (5 58 lit.a and c).

**1157.** Parties to a conflict actually or potentially subject to air or missile operations must not use the presence or movements of the civilian population or individual civilians to render certain points or areas immune from air or missile operations, in particular they must not attempt to shield lawful targets from attacks or to shield, favour or impede military operations or to direct the movement of the civilian population or individual civilians from attacks or to shield military operations (5 51 para.7). If a Party to a conflict subject to a potential attack fails to take such precautions, this does not relieve the attacking Party to a conflict of its own obligation to take precautionary measures (5 51 para.8).

<p style="text-align: center;"><b>VI. Perfidy, Ruses of War, And Espionage in Operations in and from the Air</b></p>
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#### **1. Perfidy**

**1158.** It is prohibited to kill, injure or capture an adversary by resorting to perfidy (see Chapter 4). In air operations, the following acts in particular are examples of perfidy: the feigning of

- the status of a medical aircraft, in particular by the use of the distinctive emblem or other means of identification reserved for medical aircraft,

- the status of a civil aircraft (5 37 para.1 lit.c),
- the status of a neutral aircraft (5 37 para.1 lit.d),
- other protected status or
- a surrender (5 37 para.1 lit.a).

**1159.** Irrespective of whether or not they are perfidious, the following acts are prohibited in air and missile combat operations at all times:

- improper use by aircraft of distress codes, signals or frequencies (14 10).
- the use of any aircraft other than a military aircraft as a means of attack.

## **2. Ruses of War**

**1160.** Ruses of war are permitted (see Chapter 4). The following are examples of lawful ruses of war in air operations:

- mock operations,
- disinformation,
- the use of false military codes and false optical or acoustic means to deceive the adversary (provided that they do not consist of distress signals, do not include protected codes, and do not convey the wrong impression of a surrender),
- the use of decoys and dummy construction of aircraft and hangars and
- the use of camouflage.

Aircrews conducting combat operations on land or on water – outside their aircraft – must distinguish themselves from the civilian population as required by LOAC (3 4 A para.1; 5 43 para.2; 14 15).

## **3. Espionage**

**1161.** In air operations, military aircraft on missions to gather, intercept or otherwise gain information are not to be regarded as carrying out acts of espionage. The same applies to such use of civil aircraft or State aircraft flying outside the airspace of or controlled by their own Party to the conflict, although the aircraft may be attacked at such time as it is carrying out its information-gathering mission.

## Chapter 12

### The Law of Neutrality

I. General
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**1201. Neutrality in an international armed conflict** is defined in international law as the **status** of a State that is not participating in an armed conflict between other States. Mostly, it will be in the interest of third States not participating in an international armed conflict not to become involved in the conflict and, ultimately, not to become a Party to the conflict. Therefore, their behaviour is strictly impartial vis-à-vis the Parties to the conflict, i.e. neutral. A neutral status entails mutual rights and duties for the neutral State and the Parties to the conflict. **Sources** of the law of neutrality are customary international law and – with regard to certain questions – international conventions, particularly the 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (**17**) and the 1907 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War (**23**). The law of neutrality aims to protect neutral States and their citizens, avoid an escalation of the conflict, and also to protect the Parties to a conflict and their citizens.

**1202.** The neutrality of a State in an international armed conflict **begins** with the outbreak of an international armed conflict between other States which is of such **duration or intensity** that it requires the application of the law of neutrality. The law of neutrality thus has a smaller scope of application than the rest of the law applicable in international armed conflicts. The neutral status **ceases** with the end of the international armed conflict or if the hitherto neutral State becomes a Party to the conflict. However, neither limited measures aimed at an armed defence of neutrality nor breaches of particular neutrality obligations mean that this State is considered to be a Party to the conflict.

**1203.** Neutrality in an armed conflict is to be distinguished from **permanent neutrality**. Permanent neutrality means that a State pledges not to commit itself in any form in terms of security or military policy, in peacetime or in times of war, and to abstain from taking any

actions that may render the fulfilment of its duties of neutrality in an armed conflict impossible.

**1204.** Based on the **Charter of the United Nations** and particularly the prohibition of the use of force, peculiarities may arise in certain situations. The Charter of the United Nations does not generally supersede the law of neutrality. Within the framework of international law, every State may make a sovereign decision on whether or not it will participate in a conflict on the side of the victim (what is known as collective self-defence), provided that the victim accepts the assistance. If the United Nations Security Council has made a binding decision according to Chapter VII of the Charter of the United Nations, no State may invoke the law of neutrality in order to justify behaviour that is inconsistent with its obligations under the Charter (**34** 25, 39 and 103).

## II. The Rights and Duties of Neutrals

### 1. General Provisions

**1205.** The **territory** of a neutral State is **inviolable**. It is forbidden to commit any acts of hostility on such territory (**17** 1).

**1206.** Disregard of neutrality by one of the Parties to a conflict may constitute a prohibited use of force (**34** 2 para.4) and at the same time a grave breach of international law. This is true regardless of whether the Party to the conflict breaching neutrality may invoke its right to self-defence (**34** 51) in relation to the other Party to the conflict. The neutral State is called upon to oppose any violation of its neutrality, if necessary by force in accordance with the UN Charter (**17** 5; **23** 2, 9, 24).

**1207.** A neutral State must not **support** any of the Parties to the conflict. It is forbidden, for instance, to

- supply warships, ammunition or war material of any kind (**23** 6),
- permit military transits through the territory of the neutral State by water, land or air (**17** 2); however, exceptions exist for the passage of the wounded and sick (**17** 14) or the passage of warships and their call to ports (**23** 10, 12), or
- permit the establishment of military bases or supply and telecommunication facilities (**17** 3, **23** 5).

Humanitarian assistance to victims of the conflict, even if given to the victims of only one Party, is not a breach of neutrality.

**1208.** The neutral State is obligated to **treat** the Parties to a conflict **impartially** and may not discriminate against any of the Parties to a conflict (17 9; 23 9). A neutral State may in no case take part in **military operations of the Parties to a conflict**.

**1209.** State practice has modified the former contractual rule that a neutral State is not called upon to prevent the **export and transport of war materiel** by private persons for the benefit of one of the Parties to a conflict (17 7; 23 7). If the export of war materiel is State controlled, allowing such export is considered an unneutral service.

**1210.** Nationals of neutral States may, at their own risk, enter into the **service of one of the Parties to a conflict** (17 6). In such cases, they must be treated like nationals of this Party to a conflict and cannot avail themselves of their neutrality (17 17). The prohibition of the recruitment, use, financing and training of mercenaries must be observed (5 47; 28).

**1211.** It is prohibited to **recruit** and raise troops on the territory of a neutral State for the benefit of one of the Parties to a conflict (17 4).

## 2. War on Land

**1212.** If a neutral State permits a Party to a conflict to use generally accessible **means of communications** on its territory (17 8), this is not considered an unneutral service. The neutral State must not, however, install or permit on its territory special means of communication for a Party to a conflict (17 3).

**1213.** Neutral States intern troops which belong to a Party to a conflict and are received on the neutral territory (17 11, 12). Escaped prisoners of war who are allowed to remain in the territory of the neutral State may be assigned a specific place of residence (17 13).

## 3. Naval War

**1214.** The **internal waters**, the **archipelagic waters** and the **territorial sea** of a neutral State must be respected (23 1).

**1215.** The Parties to a conflict are forbidden to use neutral ports or territorial waters as a base of naval operations (**23 5**).

**1216. Hostilities** are forbidden **in neutral waters** as well as on neutral territory (**23 2**). Prohibited acts include the exercise of prize law in its entirety such as stopping, visiting and searching, ordering vessels to steer a specific course, and capturing of merchant vessels (**23 2**).

**1217.** When a ship has been captured by a Party to a conflict in the waters of a neutral State, the neutral State must attempt, if the **prize** is still within its jurisdiction, by all means at its disposal to **release** the prize and its crew. The prize crew must be interned (**23 3 para.1**).

**1218.** A neutral State may demand the **release** of a vessel seized within its waters even if the vessel has already left these territorial waters (**23 3 para.2**).

**1219.** If a warship of a neutral State takes **wounded, sick** or **shipwrecked** military personnel on board, it must, where so required by international law, ensure that they can take no further part in military operations (**2 15**).

**1220.** As regards the laying of sea mines, the same safety rules apply to a neutral State as to the Parties to a conflict (**20 4 para.1**). It must notify ship owners of the location of the minefields and inform governments without delay (**20 4 para.2**).

**1221.** A neutral State is obligated to prevent within its jurisdiction by all means at its disposal **the fitting out or arming of any vessel** which it has reason to believe is intended to engage in operations of war against a foreign Power. It is obligated to prevent the departure of any vessel that has been adapted entirely or partly within its jurisdiction for use in operations of war (**23 8**).

**1222.** Innocent passage by warships of the Parties to a conflict and by prizes through the territorial sea and archipelagic waters of a neutral State is not a violation of neutrality (**23 10**). While **transit passage** through international straits and **passage** through **archipelagic sea lanes** includes the right of overflight and the right of passage in submerged mode, such rights do not exist with regard to innocent passage outside these routes.

**1223.** In general, **warships** of the Parties to a conflict are not permitted to remain in **neutral ports**, roadsteads or **territorial waters** for more than twenty-four hours. The neutral State may prolong this period or altogether prohibit such vessels from remaining in its waters (**23 12**). Warships of Parties to the conflict may not extend their stay beyond the above-mentioned time limit except on account of damage or stress of weather. They must depart as soon as the reason for the delay is no longer applicable (**23 14**).

**1224.** In neutral ports and roadsteads, warships of the Parties to a conflict may only carry out such repairs that are absolutely necessary **to restore their seaworthiness**. Restoring the combat readiness of such ships cannot serve as a cause for extending the permissible duration of their stay. Measures aimed at increasing their combat strength are also prohibited (**23 17**).

**1225.** Warships of the Parties to a conflict may neither augment their **crews** nor replenish or increase their **armament** or their supplies of war material in neutral territorial waters, ports and roadsteads.

**1226.** Warships of Parties to a conflict may revictual in neutral ports and roadsteads only to bring up their supplies to the peace standard (**23 19 para.1**).

**1227.** In neutral ports and roadsteads, warships of Parties to a conflict may only ship sufficient fuel to enable them to reach the nearest port in their own country (**23 19 para.2**). A further refueling in a port of the same neutral State is permissible only after the end of a period of three months (**23 20**).

**1228.** If a warship of a Party to a conflict stays in a neutral port without being entitled to do so and does not leave this port notwithstanding notification, the neutral State may **detain** the ship and prevent it from departing throughout the duration of the armed conflict (**23 24**). The crew of the detained ship may also be detained. It may remain on the ship or be brought either onto another vessel or ashore. In any case, personnel necessary for the maintenance of the ship are to be left on board.

**1229.** A prize may only be brought into a neutral port if it is absolutely necessary on account of **unseaworthiness of the prize**, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end (**23 21**).

**1230.** If, after the cause for its stay has ceased to exist, a prize does not leave even after it has been ordered to do so by the neutral authorities, the neutral State must bring about the **release of the prize** and its crew. The prize crew must be interned (**23 21**). The same applies when a prize has entered a neutral port without authorisation (**23 22**).

**1231.** When **warships of several Parties to a conflict** are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ships belonging to one Party and the departure of the ships belonging to the other (**23 16 para.1**).

**1232.** A neutral State may allow warships of the Parties to a conflict to employ its **pilots** (**23 11**). It is obligated to prevent, within the means at its disposal, any violation of the rules of neutrality within its waters and to exercise such surveillance as is required for this purpose (**23 25**).

**1233.** A neutral State must apply impartially to the two Parties to a conflict the conditions, restrictions, or prohibitions implemented by it in regard to the admission into its ports, roadsteads, or territorial waters, of warships or prizes belonging to the Parties to the conflict (**23 9**). It may forbid a warship which has failed to conform to its directions or which has violated its neutrality to enter its ports or roadsteads (**23 9**).

**1234.** Warships of a Party to a conflict are entitled to **stop, visit and search** merchant vessels flying the flag of a neutral State on the high seas in order to verify the contents and destination of their cargo. If it is impossible or unreasonable to stop, visit and search on the high seas, neutral merchant vessels may be ordered to call at a port or to sail to a certain maritime area where the visit and search can be conducted.

**1235.** Warships of a Party to a conflict may use only such force against neutral merchant vessels as is necessary to exercise such inspection rights. In particular, neutral merchant vessels which are subject to inspection by a Party to the conflict and resist such inspection may be **damaged** or **destroyed** if it is not possible to prevent them from continuing their voyage by any other means. The captain of the neutral vessel must be warned in an appropriate manner. Rescue of shipwrecked persons must be ensured.

**1236.** It is permissible to attack a neutral merchant vessel, if it directly commits acts of or takes part in hostilities.

**1237.** To simplify the inspection, a Party to a conflict may, subject to the approval of the neutral State concerned, issue an inspection document (**navicert**) to the neutral vessel in the sea port of embarkation. A navicert issued by one Party to the conflict has no effect on the other Party to the conflict. The fact that a ship carries a navicert issued by another Party to the conflict is not a valid reason for further inspection measures.

**1238.** The right to inspection does not apply to merchant vessels flying neutral flags when they are **escorted by a neutral warship (convoy)**. In this case, however, a warship of a Party to a conflict may demand the commander of the neutral warship to provide information on the type and destination of the cargo. If a neutral merchant vessel sails in a convoy of enemy warships, it may be attacked as a military target. If the enemy ships are defeated, the escort disbanded, or if the neutral vessel separates from the formation, further use of force is only permissible if the ship resists measures based on the law of prize.

**1239.** If the cargo contains **war-essential goods** destined for an enemy port, such goods may be **seized** by the warship of the Party to a conflict (**absolute contraband**). The Parties to a conflict may notify the neutral States of lists of goods which they deem to be essential to the war. Any goods destined for the administration or the armed forces of the adverse Party to a conflict are likewise deemed to be contraband (**conditional contraband**) (26 22 ff.). Relief consignments, especially food, medicine and clothes consignments intended for humanitarian relief actions are not contraband (4 23, 59; 5 70).

**1240.** A neutral vessel carrying contraband (enemy ships are in any case subject to capture and confiscation regardless of their actions or cargo) is also subject to capture and confiscation if more than half of its cargo consist of contraband.

**1241.** The captured vessel (**prize**) is to be brought as safely as possible to a port of the Party to a conflict or of a State allied with that Party. Both ship and cargo may only be confiscated by judgement of a prize court. The State executing the law of prize becomes the owner of the ship and/or her cargo when the judgment becomes final.

**1242.** If a suspicion of carrying contraband which led to an inspection proves false and if the neutral vessel did not contribute to the suspicion, the Party to a conflict is obligated to compensate for the **damage** caused by the delay of the voyage.

**1243.** The Parties to a conflict cannot set up prize courts on neutral territory and on a vessel in neutral territorial waters (**23 4**).

**1244.** Warships of neutral States may escort neutral merchant vessels which fly their flag or a flag of another neutral State.

**1245.** On international sea lanes and on the high seas, warships of neutral States may **sweep mines** as necessary to ensure and maintain neutral shipping. Such minesweeping activities do not constitute unneutral service to the adversary of the mine laying Party to the conflict.

#### **4. Aerial Warfare**

**1246.** The **airspace** of a neutral State is inviolable (**14 40**).

**1247.** The Parties to a conflict are **forbidden** to enter **neutral airspace** with military aircraft, rockets or other missiles (**14 40**). The following exceptions apply:

- if a disabled aircraft of a Party to a conflict receives the permission by a neutral State to do so and to land on neutral territory. In this case the neutral State may give instructions regarding compliance with certain measures. The neutral State must induce the aircraft to land, seize it and intern its crew for the duration of the conflict (**14 43**);
- the airspace over neutral international straits and archipelagic sea lanes remains open also to military aircraft of the Parties to a conflict at all times; the same applies to overflight and transit flight of armed military aircraft over sea lanes or on air routes as designated or normally used (**48 44, 54**);
- if the neutral State permits military aircraft of the Parties to a conflict to enter its airspace for the purpose of capitulation.

**1248.** The right of passage and overflight of international waterways and over sea lanes or on air routes as designated or normally used in archipelagic waters remains unaffected (**48 44, 54**).

**1249.** A Party to a conflict must not commit any of the following acts:

- attack on or detention of persons or seizure of objects in neutral airspace (**14 39, 23 2**),

- use of neutral territory or airspace as a base for attacks, target engagement or information gathering against enemy targets on land, in airspace or on or above sea outside of this neutral territory and airspace (**23 5**),
- carrying out interception, inspection, diversion or seizure measures with regard to ships or aircraft in neutral territory (**23 2**) or
- any other measure conducted by armed force or as a contribution to the efforts to win the conflict, including the information transfer or the conduct of search and rescue measures on neutral territory (**14 42, 43; 23 2, 5**).

**1250.** The neutral State is obligated to monitor its territory as far as feasible in order to prevent **violations of its airspace**. If neutral airspace is violated by a Party to a conflict, the neutral State must use all available means to end such a breach. Aircraft which have entered neutral airspace must be compelled to leave or to alight. Military aircraft of a Party to a conflict must be seized for the duration of the conflict. The crews of alighted military aircraft of a Party to a conflict must be interned (**14 42**). Under no circumstances may such measures be regarded as a hostile act (**14 48, 17 10; 23 26**).

**1251. Medical aircraft** may be permitted to fly over and land in the territory of a neutral State (**1 37; 2 40; 5 31; 14 17**).

**1252.** Permission is required for **passage over** and **landing in** a neutral State. The neutral State may place conditions and restrictions on the passage (**1 37 para.2; 2 40 para.2; 5 31**).

**1253.** Neutral States must use all means at their disposal to cause capitulating military aircraft of the Parties to the conflict to alight, to seize the aircraft for the duration of the conflict, and to intern the crew members. If such an aircraft commits hostile acts or resists instructions to land, it may be attacked without further notice.

**1254.** Neutral States are obligated to inhibit the private export or transit of aircraft, components of aircraft or material, spares and repair parts or ammunition for aircraft of a Party to a conflict if the export and transit of those goods is placed under government control (see No. 1209) (**14 45, 17 7; 23 7**). In particular, neutral States are bound to use all means at their disposal

- to prevent the departure from its jurisdiction of an aircraft in a condition to conduct a hostile attack against a Party to a conflict if there is reason to believe that the aircraft is destined for such use (14 46 para.1) and
- to prevent the departure from its jurisdiction of a crew of a military aircraft or of passengers or crew members of a civil aircraft who are members of the armed forces of a Party to a conflict (14 46 para.2).

**1255.** The fact that a civil aircraft bears the marking of a neutral State is *prima facie* evidence (what is known as presumptive evidence) of its neutral character. The following activities render a civil aircraft of a neutral State a military objective:

- there is probable cause that such an aircraft is transporting contraband and, after previous warning or interception, the aircraft refuses deliberately and unequivocally to fly to a destination other than its original destination or to an enemy airfield that is within reasonable reach and that is suitable for this kind of aircraft (14 50),
- participation in hostile activities in support of the adversary, e.g. interception of or attack on other aircraft, persons or objects on land or at sea, use as a means of attack, participation in electronic warfare or transfer of target data to the adversary (14 53 lit.c),
- facilitating military activities of adverse forces, for instance performing troop transportation, transport of military materiel or fuelling of military aircraft (14 53 lit.c),
- integration into or support of adversary information gathering activities, for instance participation in reconnaissance, early warning or surveillance measures or command, control and information transfer measures,
- refusal to obey instructions of military authorities if these instructions concern alighting, inspection or possible seizure, or the unequivocal refusal to obey interception measures,
- any other activity constituting an effective contribution to the military activities of a Party to a conflict (14 53 lit.a-k).

**1256.** The right of neutral aircraft to **fly over the territory of the Parties to a conflict** is governed by general rules of international law on the protection of national airspace and the provisions of international aviation law.

**1257.** The inspection, **capture** and seizure of neutral civil aircraft above maritime areas and the treatment of their occupants is governed by the applicable rules of naval warfare

and maritime neutrality law (**14** 35, 49 ff.; **23**). An aircraft which does not carry a clearly visible national emblem of a neutral State may be treated as enemy aircraft.

## Chapter 13

### Non-International Armed Conflict

I. General
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**1301.** A **non-international armed conflict** is a protracted, intense, violent confrontation that normally takes place in the territory of a single country. This confrontation is between an existing governmental authority and an organised armed group (a non-state Party to the conflict) or between organised armed groups themselves, even when a governmental authority no longer exists (**33** 8 para.2 lit.d and f; **6** 1 para.2; **24** 3, 4). Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature are considered to be below the threshold of a non-international armed conflict.

**1302.** In a non-international armed conflict, the **provisions of international law regarding protection** must be observed, particularly those stipulated in common Article 3 (**1–4** 3) of the four Geneva Conventions of 1949, as well as in the Convention for the Protection of Cultural Property of 1954 (**24** 19) and the associated protocols. Customary international law plays a prominent role in the protection of victims of non-international armed conflicts.

**1303.** If an armed conflict takes place on national territory between the armed forces of an existing governmental authority and organised armed groups under responsible command and if those groups exercise such control over part of the national territory as to enable them to carry out sustained and concerted military operations and to implement the provisions of Additional Protocol II of 1977 (**6**), the provisions regarding protection of Additional Protocol II of 1977 developing and supplementing common Article 3 of the four Geneva Conventions of 1949 apply, provided that the conflict is carried out on the territory of a State party to Additional Protocol II. Additional Protocol II of 1977 thus has a higher application threshold than has common Article 3 of the Geneva Conventions of 1949. Additional Protocol II expressly does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar

nature, as not being armed conflicts (6 1 para.2). Although it does not contain explicit regulations on this matter, such cases of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature are not considered non-international armed conflicts in accordance with common Article 3 of the Geneva Conventions, either; this position results from the preparatory works and documenting circumstances of the 1949 Geneva Conventions.

**1304.** International treaties regarding international humanitarian law which have been concluded for the event of an international armed conflict are generally not applicable to a non-international armed conflict. The Parties to a non-international armed conflict are, however, called upon to bring into force, by means of special agreements, all or part of the provisions of the Geneva Conventions agreed upon for the event of international armed conflicts (1-4 3 para.3).

**1305.** **Certain** international conventions such as Protocol II for the Protection of Cultural Property of 1954 (24c), the Chemical Weapons Convention (29), the Ottawa Convention (32), the Oslo Convention (51), and above all the Rome Statute of the International Criminal Court (ICC; 33) expressly include non-international armed conflicts in their scope of application. With the entry into force of the amendment of Article 1 of the UN 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, this Convention including its Protocol I of 10 October 1980 on non-detectable fragments, its Protocol II of 10 October 1980 on the prohibition or restriction of the use of mines, booby-traps and other devices, its Protocol III of 10 October 1980 on the prohibition or restriction of the use of incendiary weapons as well as its Protocol IV of 13 October 1995 on blinding laser weapons has become applicable to non-international armed conflicts.

**1306.** In addition to the conventions of international humanitarian law concluded for the event of a non-international armed conflict, **customary international law** has also developed. Some provisions of Additional Protocol II are considered customary international law. This is reflected in war crimes as defined in international criminal law, which are now indisputably applicable to non-international armed conflicts. In accordance with the Statute of the ICC, the provisions of Additional Protocol II relevant to international criminal law are also applicable to conflicts among non-governmental armed groups with no participation of the State; their violation therefore is punishable as a war crime (33 8

para.2 lit.d and f). In the German International Criminal Code (**35** 8–12), almost all war crimes apply to both international and non-international conflicts.

**1307.** This applies in particular to

- the **protection of the civilian population** against hostilities, in particular against indiscriminate attacks, and the **protection of civilian objects**, in particular the **protection of cultural property**,
- the **protection of all persons, not or no longer taking part in hostilities**, particularly the prohibition of violence to life and person, of mutilations, cruel treatment or torture, rape, forced labour, and the taking of hostages,
- the **prohibition of means of warfare** prohibited in international armed conflicts, in particular the prohibition of chemical and biological weapons, toxic gas, dum-dum bullets and exploding shells, and blinding laser weapons,
- the **prohibition of certain methods of warfare**, such as perfidy, which are prohibited in international armed conflicts,
- the principle of military necessity,
- the principle of humanity,
- the principle of discrimination as well as
- the prohibition to cause civil damage excessive in relation to the military advantage.

**1308.** Unlike the law of international armed conflict, the law of non-international armed conflict does not recognise the status of combatants and prisoners of war. Enemy forces opposing a national authority have no authorisation for the use of force. The State has responsibility to decide on this authorisation and to prosecute, in particular in accordance with criminal law, persons who have taken part in combat for their participation in hostilities. As a result, a State can, in accordance with its criminal law, punish persons who have directly participated in hostilities on the side of a non-governmental party to a conflict even if such persons have not violated the regulations regarding the conduct of hostilities during a non-international armed conflict. As long as persons on the side of a non-governmental party to a conflict participate directly in hostilities, they lose their protection as civilians and may be attacked by military means. It is thus decisive when, how, and up to what point in time a person is directly participating in hostilities and is as a consequence a legitimate target of direct military force. This applies to persons for the duration of their participation in **specific acts** which can be considered participation in the hostilities. It also

applies to persons who, as a result of their role and function within the enemy forces, are continuously participating in hostilities (**continuous combat function**) and thus are a legitimate military target, even outside of their participation in specific acts of hostility. The general admissibility of detention is not controversial with respect to the law of non-international armed conflicts. However, only minimum protection standards are codified, as opposed to the detailed arrangements of the law of international armed conflicts. The authority of Bundeswehr personnel to detain a person must be assessed in each individual case and in each operation in accordance with current laws and concrete multinational operational rules (e.g. operation plan, rules of engagement). Members of a non-governmental party to a conflict who are detained are not entitled to treatment as prisoners of war in accordance with the Third Geneva Convention. Detained persons are, however, not without protection and must be treated humanely and in accordance with the standards of human rights.<sup>1</sup>

## II. Minimum Protection Provisions of the Geneva Conventions

**1309.** For the minimum protection provisions in common Article 3 of the four 1949 Geneva Conventions (**1–4 3**) to be applicable, there must be an armed conflict not of an international character occurring in the territory of one of the contracting Parties.

**1310.** According to common Article 3 of the four 1949 Geneva Conventions (**1–4 3**), the following in particular applies in a non-international armed conflict:

- with respect to all persons not taking an active part in the hostilities: **the principle of humane** treatment without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are **prohibited** with respect to the above-mentioned persons:

- violence to life and person, in particular murder, mutilation, cruel treatment and torture,
- taking of hostages,

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<sup>1</sup> See also Bundeswehr directives, in particular the order by State Secretary Dr. Wichert dated 26 April 2007 (*Behandlung von Personen, die bei Auslandseinsätzen von deutschen Soldatinnen und Soldaten in Gewahrsam genommen werden* – General Order Governing the Treatment of Persons Taken into Custody by German Soldiers on Missions Abroad).

- outrages upon personal dignity, in particular humiliating and degrading treatment and
- the passing of sentences and the carrying out of executions without previous judgement.
- with respect to all persons: the wounded and sick must **be collected and cared for**.

If common Article 3 is applicable in a non-international armed conflict, the applicability of the remaining protection provisions of the 1949 Geneva Conventions necessitates special agreements between the Parties to a conflict (1–4 3 para.3).

### III. Protection Provisions of Additional Protocol II

**1311.** For the **protection provisions** of Additional Protocol II (6) to be applicable,

- an armed conflict must take place which is not of an international character,
- the armed conflict must take place in the territory of one of the contracting Parties,
- **Additional Protocol I is not applicable**,
- the armed conflict must take place between
  - + the **armed forces** of one contracting Party and
  - + other **organised armed groups** (e.g. dissident armed forces) **and**
- the organised armed groups
  - + must be under **responsible command** and
  - + exercise such **control over a part of the territory** of the contracting Party as to enable them to carry out sustained and concerted military operations and to implement Additional Protocol II (6 1 para.1).

**1312.** The **principle of non-discrimination** prohibits any adverse distinction on the grounds of race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or any other similar criteria to all persons (6 2 para.1).

**1313.** All persons who do not take a direct part or who have ceased to take part in hostilities are entitled to respect for their person, honour and convictions and religious practices. They must in all circumstances be treated **humanely**, without any adverse distinction (6 4 para.1).

**1314.** With respect to all persons who do not take a direct part or who have ceased to take part in hostilities, Additional Protocol II (6 4 para.2) emphasises that the following acts are **prohibited**:

- violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment,
- collective punishments,
- taking of hostages,
- acts of terrorism,
- outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault,
- slavery and slave trade in all their forms,
- pillage as well as
- threats to commit any of these acts.

**1315.** Children who have not attained the age of 15 years may neither be recruited in the armed forces or groups nor allowed to take part in hostilities (6 4 para.3). In States such as Germany that have ratified the **Optional Protocol** to the UN Convention on the Rights of the Child (40), armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years (40 4).

**1316.** Persons deprived of their liberty for reasons related to an armed conflict

- will receive medical treatment,
- will be provided with food and drinking water to the same extent as the local civilian population,
- will be afforded safeguards as regards health care and hygiene,
- will be afforded protection against the rigours of the climate and the dangers of the armed conflict,
- will be allowed to receive individual or collective relief,
- will be allowed to practice their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions and

- will, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population (6 5 para.1).

**1317.** As far as possible, the following provisions relating to such persons will also be respected:

- women must be held in quarters separated from those of men and must be under the immediate supervision of women,
- they must be allowed to send and receive letters and cards, if necessary electronic messages,
- places of internment and detention must not be located close to the combat zone. They must be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety,
- they must have the benefit of medical examinations and
- their physical or mental health and integrity must not be endangered by any unjustified act or omission (6 5 para.2).

**1318.** Persons prosecuted or punished for criminal offences related to an armed conflict must receive elementary **legal guarantees** (6 6).

**1319.** All **wounded, sick, and shipwrecked** must be respected and protected without exception. In all circumstances, they must be treated humanely and must receive to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition. There must be no distinction among them founded on any grounds other than medical ones (6 7). Whenever circumstances permit and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them (6 8).

**1320.** **Medical and religious personnel** must be respected and protected and must be granted all available help for the performance of their duties. They must not be compelled by the opposing party to carry out tasks which are not compatible with their humanitarian mission (6 9).

**1321. Medical units and transports** must be respected and protected at all times and must not be the object of attack. Their protection ceases only when they are used to commit hostile acts and after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

**1322.** Under the direction of the competent authority concerned, the **distinctive emblem** of the red cross, red crescent, red lion and sun, or red crystal on a white ground must be displayed by medical and religious personnel and medical units, and on medical transports. It must be respected in all circumstances and must not be used improperly (6 12).

**1323.** The **civilian population** and individual **civilians** must enjoy general protection against the dangers arising from military operations. The civilian population as such, as well as individual civilians, must not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians must enjoy protection, unless and for such time as they take a direct part in hostilities (6 13).

**1324.** Starvation of civilians as a **method of combat** is prohibited. It is prohibited to attack, destroy, remove or render useless for that purpose objects indispensable to the survival of the civilian population such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works (6 14).

**1325.** It is prohibited to order that there must be no survivors (6 4 para.1).

**1326.** Works or installations containing **dangerous forces**, namely **dams, dykes** and **nuclear electrical generating stations**, must not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequently severe losses among the civilian population (6 15).

**1327.** Acts of hostility must not be directed against **historic monuments, works of art** or **places of worship** which constitute the cultural or spiritual heritage of peoples. This cultural property must not be used in support of the military effort (6 16, **24, 24c**, see also Chapter 9).

**1328. The displacement of the civilian population** in connection with a conflict may only be ordered if the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures must be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Civilians must not be compelled to leave their own territory for reasons connected with the conflict (6 17).

## Chapter 14

### Missions Carried out under the Auspices of the United Nations

#### I. General

**1401.** Bundeswehr operations must be permissible under international law. In accordance with Chapter VI and Chapter VII of the Charter of the United Nations (**34**), the applicable **resolutions of the United Nations (UN) Security Council** usually constitute the mandate under international law of a specific Bundeswehr mission abroad. They provide authority. They govern the scope of the mission to be accomplished and determine the framework for the use of military force.

**1402.** The national legal framework for operations of German armed forces is determined above all by the constitution of the Federal Republic of Germany, the Parliamentary Participation Act, the deployment decisions of the German Government for a specific mission, as well as the constitutive approval of the German Bundestag (Bundestag mandate).

**1403.** The international legal framework applicable to a Bundeswehr mission abroad must be defined on a case-by-case basis and can consist in particular of the following:

- the applicable provisions of international law<sup>1</sup> including the applicable rules of the law of armed conflict (LOAC),
- the basing agreements for the specific mission area (e.g. Status of Forces Agreement (SOFA), Status of Mission Agreement (SOMA), Technical Agreements/Arrangements (TA), and others) and
- the laws of the transit or receiving state as far as this is to be considered in accordance with basing agreements.

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<sup>1</sup> With regard to the territorial application of the International Covenant on Civil and Political Rights dated 19 December 1966, the German Government declared on 11 April 2005 that wherever its police or armed forces are deployed abroad, in particular in peace missions, Germany ensures all persons that they will be granted the rights recognised in the Covenant insofar as they are subject to its jurisdiction (original wording in UN document CCPR/CO/80/DEU/Add. 1: 'Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognised in the Covenant, insofar as they are subject to its jurisdiction.').

**1404.** In the event of a conflict between the obligations of the members of the United Nations under the UN Charter and their obligations under any other international agreement, their obligations under the UN Charter (**34 103**) will prevail. Under the UN Charter, UN members are obligated to accept and carry out the decisions of the UN Security Council (**34 25**). This is the reason why UN Security Council resolutions take precedence over other international agreements.

**1405.** Whether a UN mandate was issued or not does not affect the question of the applicability of LOAC. Instead, the norms of international humanitarian law are directly applicable if they apply to the sending states in question and if there is an armed conflict in the country of deployment.

**1406.** Article 43 of the UN Charter states that, at the request of the Security Council and upon conclusion of appropriate agreements, member States are obligated to make armed forces available to take enforcement action. Such agreements have, however, not been concluded.

## **II. (Multi)national Operations Authorised by the United Nations**

**1407.** In practice, the UN Security Council has authorised member States and international organisations (e.g. NATO, the EU) to carry out peacekeeping measures on the basis of Chapters VI or VII of the UN Charter. Operations authorised in this manner by the United Nations must be distinguished from operations that are carried out by the United Nations itself and within its own command structure.

## **III. United Nations Operations**

**1408.** Operations carried out by one or more states or international organisations with the authorisation of the United Nations Security Council must be distinguished from operations of the United Nations , i.e. operations that are carried out by the United Nations itself.

**1409.** Although the United Nations is itself not party to the four Geneva Conventions and their additional protocols or other important treaties of LOAC, it is subject to the principle of

international responsibility and the customary rules of LOAC if it takes **enforcement measures** in accordance with Chapter VII of the UN Charter (34) or is otherwise involved in armed conflict.

**1410.** For operations under UN command and control, the UN Secretary General set out the fundamental principles and rules of LOAC applicable to UN forces in the 'Bulletin on the Observance by United Nations Forces of International Humanitarian Law' (ST/SGB/1999/13) dated 6 August 1999 (49). This document presumes that, as a rule, a status-of-forces agreement obligating the UN force amongst other things to comply with these rules has been concluded (49 3) and defines the principles of the protection of the civilian population (49 5), the means and methods of warfare (49 6), the treatment of civilians and persons *hors de combat* (49 7), as well as the protection of the wounded, the sick, and medical and relief personnel (49 9).

**1411.** With respect to the **treatment of detained persons**, the bulletin provides (49 8) that the United Nations force will treat with humanity and respect for their dignity detained members of armed forces and other persons who no longer take part in military operations as a consequence of their detention. Without prejudice to their legal status, they will be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949. In particular:

- their capture and detention will be notified without delay to the party on which they depend and to the Central Tracing Agency of the ICRC, in particular in order to inform their families,
- they will be held in secure and safe premises which provide all possible safeguards of hygiene and health, and will not be detained in areas exposed to the dangers of the combat zone,
- they are entitled to receive food and clothing, hygiene and medical attention,
- they will under no circumstances be subjected to any form of torture or ill-treatment,
- women whose liberty has been restricted will be held in quarters separated from men's quarters, and will be under the immediate supervision of women,
- in cases where children who have not attained the age of 16 years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they will continue to benefit from special protection. In particular, they will be held in quarters separate from the quarters of adults , except when accommodated with their families,

- the ICRC's right to visit prisoners and detained persons will be respected and guaranteed.

**1412.** The promulgation of the bulletin affects neither the protected status of members of peacekeeping operations under the Convention of 13 February 1946 on the Privileges and Immunities of United Nations Personnel<sup>1</sup> and the Convention of 15 December 1994 on the Safety of United Nations and Associated Personnel nor their status, as long as they are entitled to the protection accorded to civilians under the law of international armed conflict (**49** 1 and 2).

**1413.** Pursuant to its Article 2, the Convention of 15 December 1994 on the Safety of United Nations and Associated Personnel<sup>2</sup> does not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which members of the personnel are engaged as combatants against organised armed formations and to which the law of international armed conflict applies.

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<sup>1</sup> German Federal Law Gazette 1980 II p. 941.

<sup>2</sup> German Federal Law Gazette 1997 II p. 230; 1999 II p. 718.

## Chapter 15

### Enforcement of the Law of Armed Conflict

#### I. General

**1501.** The provisions of the law of armed conflict (LOAC) are binding not only for the contracting Parties to international conventions and the Parties to an armed conflict but also for every individual. It is, however, of paramount importance that these provisions are complied with. This chapter provides an overview of the most important instruments and factors that encourage compliance with LOAC:

- dissemination of LOAC,
- criminal and disciplinary responsibility of individuals and the responsibility of superiors,
- the maintenance of discipline of the forces,
- the mutual interests of the Parties to a conflict,
- reprisals,
- State responsibility,
- involvement of a Protecting Power,
- international investigations and diplomatic activities,
- activities of the International Committee of the Red Cross and
- consideration of public opinion.

#### II. Dissemination of the Law of Armed Conflict

**1502.** Within the framework of LOAC conventions, the contracting Parties – including the Federal Republic of Germany – have pledged to disseminate the Conventions and their Additional Protocols, in times of peace as well as in times of armed conflict, as widely as possible in their respective countries, especially to include the study of them in military education programmes and to encourage the civilian population to study them so that these Conventions become known to the armed forces and the civilian

population (e.g. **1** 47; **2** 48; **3** 127; **4** 144; **5** 83; **6** 19; **8** 6; **24** 25). In the Bundeswehr, soldiers are instructed in LOAC pursuant to Section 33 para.2 of the Legal Status of Military Personnel Act (see Chapter 1, No. 149).

**1503.** LOAC includes the obligation, which applies during times of peace and times of conflict, to have legal advisers available (see Chapter 1, Nos. 153 ff.) for the armed forces to advise military leaders at the appropriate level of command on the application of and instruction in LOAC, especially the Geneva Conventions and their Additional Protocols (**5** 82).

**1504.** Effective implementation of LOAC depends on its **dissemination**. Knowledge of LOAC is a basic prerequisite for compliance with it and a necessary foundation for the development of a common understanding, among other things, with regard to the recognition by peoples of the main principles of LOAC as an achievement of the social and cultural development of mankind.

**1505.** The German Red Cross (DRK e.V.) also plays an important role in this context. According to the German Red Cross Act, it performs the task of disseminating knowledge about LOAC as well as about the principles and ideals of the International Red Cross and Red Crescent Movement and of supporting the German Government with regard to these efforts. Voluntary legal advisors of the German Red Cross disseminate LOAC through presentations, publications and media reports aimed at the general public as well as state and federal authorities. In addition, the 'International Humanitarian Law Committee'<sup>1</sup> has for many years been a forum for the exchange of ideas between government representatives and international law scholars. This exchange supports, in an advisory manner, dissemination efforts and other measures of implementation of LOAC.

### III. Criminal and Disciplinary Measures

**1506.** Every member of the armed forces who has violated the rules of LOAC must expect to be held accountable pursuant to **criminal** and **disciplinary** law.

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<sup>1</sup> In accordance with the statutes of the German Red Cross, this committee also acts as a German Committee on the Law of Armed Conflict.

**1507.** All States are obligated by international law to enforce the rules of LOAC by enacting corresponding provisions in their respective **national criminal law**. The Geneva Conventions and Additional Protocol I obligate the contracting Parties to penalise **grave breaches** of provisions granting protection and to take all suitable measures to ensure compliance with the Conventions (**1** 49, 50; **2** 50, 51; **3** 129, 130; **4** 146, 147; **5** 85). Germany has complied with this obligation, most recently by the German **Code of Crimes against International Law (CCAIL)** of 26 June 2002 (**35**).

**1508.** With the creation of the International Criminal Court (ICC), whose statute entered into force on 1 July 2002 (Rome Statute), it is possible to effectively punish crimes committed after its establishment such as **genocide, crimes against humanity and war crimes**. The German **CCAIL** follows the definitions of crimes as endorsed in the Rome Statute and other binding instruments of LOAC. In addition, international ad hoc tribunals have been established by resolutions of the United Nations Security Council (see Chapter 1, No. 130).

**1509.** According to the principle of complementarity, the ICC does not replace national criminal jurisdictions, the general priority of which is endorsed in the statute on several occasions. The ICC has, however, the authority to decide whether a State is unwilling or unable to genuinely carry out investigation or prosecution.

**1510.** The fundamental principles of the work of the ICC are:

- its jurisdiction is limited to four groups of crimes comprising the most serious crimes which affect the international community as a whole:
  - + genocide,
  - + crimes against humanity,
  - + war crimes and
  - + the crime of aggression;
- the Court can only exercise its jurisdiction when a State is
  - + unwilling or
  - + unableto genuinely investigate or prosecute (principle of complementarity, **33** 17);
- a State which becomes a Party to the statute accepts the jurisdiction of the Court with respect to the crimes referred to in the statute (automatic jurisdiction);

- the Court may exercise its jurisdiction when either the State on whose sovereign territory the crime was committed or the State of which the person accused of the crime is a national has accepted the jurisdiction of the Court; States not party to the statute may accept the jurisdiction on a case-by-case basis;
- the jurisdiction of the Court applies only to crimes committed after the entry into force of the ICC Statute or, with regard to States who accessed the statute later, to crimes committed after the entry into force of the ICC Statute for that State;
- the Court takes action based on a referral by a State Party, an initiative of the United Nations Security Council or on the initiative of the prosecutor.

**1511.** In order to align German criminal law with the Rome Statute, the regulatory framework of CCAIL(35), which to a large extent is self-contained, was created; it reflects the development of LOAC and international criminal law by penalising crimes against international law. With regard to crimes stipulated in the CCAIL, the principle of universal jurisdiction applies, regardless of a specific nexus to Germany. The German Code of Crimes against International Law consists of a section of general provisions and a section concerning genocide, crimes against humanity and war crimes.

**1512.** The CCAIL does not regulate criminal offences conclusively. Criminal offences penalised by general criminal law may still be punishable even if they are not punishable under the CCAIL.

**1513.** The prosecution of crimes and the execution of sentences imposed pursuant to the CCAIL are not subject to any statute of limitations (35 5).

**1514.** The CCAIL stipulates punishment for crimes against humanity if someone, as part of a widespread or systematic attack directed against any civilian population,

- kills a person (35 7 para.1 no.1),
- inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts of it, calculated to bring about its physical destruction in whole or in part (35 7 para.1 no.2),
- traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person (35 7 para.1 no.3),

- deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in violation of a general rule of international law (**35 7** para.1 no.4),
- tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering which does not arise only from sanctions that are lawful under international law (**35 7** para.1 no.5),
- sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population (**35 7** para.1 no.6),
- causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time
  - + by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts (**35 7** para.1 no.7 lit.a) or
  - + by refusing, on behalf of a State or of a political organisation or in violation of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to above (**35 7** para.1 no.7 lit.a) or by giving false information on such a matter (**35 7** para.1 no.7 lit.b),
- causes another person severe physical or mental harm, especially of the kind referred to in Section 226 of the Criminal Code (**35 7** para.1 no.8),
- severely deprives, in violation of a general rule of international law, a person of his or her physical liberty (**35 7** para.1 no.9) or
- persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law (**35 7** para.1 no.10).

**1515.** Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group

- kills a member of the group (**35 6** para.1 no.1),

- causes serious physical or mental harm to a member of the group, especially of the kind referred to in Section 226 of the Criminal Code (**35 6** para.1 no.1),
- inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part (**35 6** para.1 no.3),
- imposes measures intended to prevent births within the group (**35 6** para.1 no.4) or
- forcibly transfers a child of the group to another group (**35 6** para.1 no.5)

will be punished for **genocide** according to the German Code of Crimes against International Law.

**1516.** Further, the CCAIL determines the punishment of **war crimes against persons** if, in the context of and in association with an international or non-international armed conflict, someone

- + kills a person who is protected under LOAC<sup>1</sup> (**35 8** para.1 no.1),
- + takes hostage a person who is protected under LOAC (**35 8** para.1 no.2),
- + treats a person who is protected under LOAC cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person (**35 8** para.1 no.3),
- + sexually coerces, rapes, forces into prostitution or deprives a person protected under LOAC of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population (**35 8** para.1 no.4),
- + treats a person who is protected under LOAC in a gravely humiliating or degrading manner (**35 8** para.1 no.9),
- deports or forcibly transfers, by expulsion or other coercive acts, a person who is protected under LOAC and lawfully present in an area to another State or another area in violation of a general rule of international law (**35 8** para.1 no.6),
- exposes a person who is protected under LOAC to the risk of death or of serious injury to health

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<sup>1</sup> In international armed conflicts: persons protected under the Geneva Convention and Additional Protocol I, namely wounded, sick, shipwrecked, prisoners of war and civilians; in non-international armed conflicts: wounded, sick, and shipwrecked as well as persons not taking a direct part in hostilities and who are in the power of the adverse Party; in international and non-international armed conflicts: members of armed forces and combatants of the adverse Party who have laid down their arms or have no other means of defence (**35 8** para.6 nos.1-3).

- + by carrying out experiments on such a person who has not previously given his or her voluntary and explicit consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest (35 8 para.1 no.8 lit.a),
- + by taking body tissue or organs from such a person for transplantation purposes, unless it concerns taking blood or skin samples for therapeutic purposes in conformity with generally recognised medical principles, and the person concerned has previously given his or her voluntary and explicit consent (35 8 para.1 no.8 lit.b) or
- + by using treatment methods that are not medically recognised on such person, unless it is necessary from a medical point of view and the person concerned has previously given his or her voluntary and explicit consent (35 8 para.1 no.8 lit.c),
- imposes on, or executes, a substantial sentence in respect of a person who is protected under LOAC, in particular the death penalty or imprisonment, without that person having been convicted in a fair and regular trial respecting the legal guarantees as required by international law (35 8 para.1 no.7),
- conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities (35 8 para.1 no.5) or
- wounds a member of the adverse armed forces or a combatant of the adverse Party after the latter has surrendered unconditionally or is otherwise placed *hors de combat* (35 8 para.2).

**1517.** The CCAIL also stipulates punishment for **war crimes against persons** if, in the context of and in association with an international armed conflict, someone

- unlawfully detains or unjustifiably delays the return home of a protected person (35 8 para.3 no.1),
- transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory (35 8 para.3 no.2),
- compels a protected person by force or threat of appreciable harm to serve in the armed forces of a hostile Power (35 8 para.3 no.3) or

- compels a national of the adverse Party by force or threat of appreciable serious harm to take part in military operations directed against his or her own country (**35 8** para.3 no.4).

**1518.** Further, the CCAIL prescribes punishment for **war crimes against property and other rights** when someone

- in the context of and in association with an international or non-international armed conflict pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse Party contrary to international law, such property being in the power of the perpetrator's Party (**35 9** para.1) or
- in the context of and in association with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of the nationals of the adverse Party abolished, suspended or inadmissible in a court of law (**35 9** para.2).

**1519.** Further, the CCAIL stipulates punishment for **war crimes against humanitarian operations and emblems** if someone, in the context of and in association with an international or non-international armed conflict,

- directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations (**34**), as long as they are entitled to the protection given to civilians or civilian objects under LOAC (**35 10** para.1 no.1),
- directs an attack against personnel, buildings, material, medical units and transport using the distinctive emblems of the Geneva Conventions in conformity with LOAC (**35 10** para.1 no.2) or
- makes improper use of the distinctive emblems of the Geneva Conventions, of the flag of truce, of the flag or of the military insignia or the uniform of the enemy or of the United Nations and thereby causes a person's death or serious personal injury (**35 10** para.2).

**1520.** Further, the CCAIL prescribes punishment for the **war crime of using prohibited methods of warfare** if someone, in the context of and in association with an international or non-international armed conflict,

- directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities (**35 11** para.1 no.1),
- directs an attack by military means against civilian objects, so long as these objects are protected as such by LOAC, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones or against works and installations containing dangerous forces (**35 11** para.1 no.2),
- carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated (**35 11** para.1 no.3),
- uses a person who is protected under LOAC as a shield to restrain the adversary from undertaking military operations against certain targets (**35 11** para.1 no.4),
- uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impeding relief supplies in violation of LOAC (**35 11** para.1 no.5),
- orders or threatens, as a commander, that no quarter will be given (**35 11** para.1 no.6) or
- treacherously kills or wounds a member of the adverse armed forces or a combatant of the adverse Party (**35 11** para.1 no.7).

**1521.** The CCAIL also prescribes punishment for the **war crime of using prohibited methods of warfare** when someone in the context of and in association with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall military advantage anticipated (**35 11** para.3).

**1522.** Finally, the CCAIL provides for punishment for the **war crime of using prohibited means of warfare** if someone, in the context of and in association with an international or non-international armed conflict,

- employs poison or poisoned weapons (**35 12** para.1 no.1),
- employs biological or chemical weapons (**35 12** para.1 no.2) or

- employs bullets which expand or flatten easily in the human body (known as **dum-dum bullets**), in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions (**33** 8 para.2 lit. e xv); **35** 12 para.1 no.3).

According to the 'elements of crime' that were adopted by the ICC at the Review Conference for the interpretation of Article 8 para.2 lit. e xv, the ammunition must objectively violate international law. In addition, the perpetrator must have been aware that the nature of the ammunition was such that its employment would uselessly aggravate suffering or the wounding effect. Ammunition used by police, armed forces or other governmental forces for liberating hostages or in similar situations that call for such ammunition to protect bystanders or friendly forces is not prohibited, as law enforcement situations are exempt from ICC jurisdiction.

**1523.** According to Section 125 of the German Administrative Offences Act, unauthorised use of the **Red Cross** on a white background or emblems that, according to the rules of international law, are equal in status to the Red Cross constitutes an administrative offence and is liable to a fine.

#### IV. Responsibility of Superiors

**1524.** LOAC and international criminal law recognise the individual **responsibility of superiors**. Superiors bear penal and other responsibility for the conduct of their subordinates that violates international law (**5** 86, 87; **35** 4). This applies not only to orders contrary to international law but also to omissions in cases of a legal duty to act and to violations of obligatory supervision. According to the CCAIL, any person effectively giving orders or exercising command and control in a unit is equivalent to a military commander (**35** 4 para.2). According to the CCAIL, military commanders or civilian superiors will be punished in the same way as a perpetrator if they fail to prevent their subordinates from committing acts that violate international law and are punishable under the CCAIL (**35** 4 para.1). A military commander or civilian superior who intentionally or negligently omits to supervise a subordinate will be punished for violation of the duty of supervision if the subordinate commits an offence where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it (**35** 13). A military commander or a civilian superior will also be punished if he or she intentionally or negligently omits to immediately report an offence

committed by a subordinate to the attention of the agency responsible for the investigation or prosecution of such offences (35 14).

**1525.** If a disciplinary superior learns about occurrences which justify the suspicion of LOAC violations, he or she must investigate and consider whether disciplinary measures should be taken. Irrespective of the disciplinary investigation, the disciplinary superior must submit the matter to the competent law enforcement agency if the disciplinary offence is at the same time a criminal offence, and if the submission is necessary in order to maintain military order or because of the nature of the offence, the gravity of the injustice, or the degree of fault (Section 33 para.3 German Military Disciplinary Code). This is generally the case with regard to criminal offences as defined in the CCAIL (35).

#### V. Maintenance of Discipline

**1526.** Ordering or tolerating violations of LOAC can, among other things, seriously undermine the authority of the military leader who gives such orders and can jeopardise the **discipline** of the forces.

#### VI. Mutual Interests of the Parties to the Conflict

**1527.** Only those who observe the provisions of LOAC can expect the adversary to adhere to the principles of humanity during an armed conflict. Mistrust towards soldiers of the adverse Party, assuming that they will not observe these rules, must not be a basis for decisions and actions. Soldiers must treat their adversary as they, considering all circumstances, themselves would wish to be treated.

#### VII. Reprisals

**1528.** The employment of **reprisals** can induce an adversary acting contrary to international law to cease his or her behaviour that violates international law. Reprisals are permissible only as an exceptional measure and only for the purpose of enforcing compliance with international law. Reprisals may only be ordered by the highest political

level, which in Federal Republic of Germany is the Federal Government (see Chapter 4, No. 488).

The far-reaching prohibitions of reprisals as endorsed in LOAC must be strictly observed (see Chapter 4, No. 490).

### VIII. State Responsibility

**1529.** A Party to a conflict is responsible for all acts committed by persons forming part of its armed forces (5 91; 16 3). A Party to a conflict which does not comply with the provisions of LOAC can, if the case demands, be liable to pay **damages** (reparations) to the enemy State. Neither LOAC nor national State liability law provides a basis for claims for damages by individuals against Parties to a conflict.

### IX. Protecting Powers and Their Substitutes

**1530.** From the beginning of the conflict, it is the duty of Parties to an international armed conflict to secure the implementation of the Geneva Conventions and Additional Protocol I by the application of the system of Protecting Powers (5 5 para.1). For this purpose, each Party to the conflict designates a Protecting Power (1 8 para.1; 2 8 para.1; 3 8 para.1; 4 9 para.1; 5 5 para.2). Each Party must also, likewise without delay, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party. The ICRC may assist in the designation of Protecting Powers (5 5 para.3).

**1531.** If there is no Protecting Power, the Parties to the conflict must accept an offer by the ICRC or by any other impartial and effective organisation to act as a **substitute** with the agreement of the Parties to the conflict (5 5 para.4).

**1532.** A Protecting Power or a substitute has the duty to safeguard the interests of the Party to the conflict that has designated it and to encourage compliance with LOAC in an impartial manner (5 5).

<p style="text-align: center;"><b>X. International Investigations and Diplomatic Activities</b></p>
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**1533.** The International **Fact-Finding Commission (5 90)** enquires into any incident alleged to be a grave breach or at least a serious violation of the rules of LOAC in States that have recognised the competence of the Commission in general or for certain cases. Only States that have recognised the competence of the Commission in general have the right to take a case to the Commission. The Federal Republic of Germany declared its recognition of the Commission in a statement dated 14 February 1991. The Commission was established on 25 June 1991 and consists of 15 independent members.

**1534.** In addition, the Geneva Conventions of 1949 provide for the option that, at the request of a Party, an enquiry concerning any alleged violation of the Conventions can be instituted in a manner to be decided between the interested Parties (**1 52; 2 53; 3 132; 4 149**).

**1535.** In recent years, it has become established practice in the human rights committees of the United Nations to form independent ad hoc investigation and expert commissions to investigate violations of LOAC and, where appropriate, infringements of other applicable international law.

**1536.** In situations of serious violations, the contracting Parties are in addition obligated to undertake to act (**5 89**) jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter (**34**).

**1537.** The United Nations Security Council may also determine violations of LOAC in a resolution and respond to them, where appropriate, with measures mandated pursuant to Chapters VI and VII of the Charter of the United Nations.

**1538.** If international law is violated during armed conflicts, attention can be drawn to LOAC at the international and diplomatic levels as well by, for example, protests, good offices, mediation, investigation and diplomatic intervention, be this by neutral States, by international bodies, or by religious and humanitarian organisations.

## **XI. International Committee of the Red Cross**

**1539.** The **ICRC** is an independent humanitarian organisation based in Geneva. Its main purpose is to provide protection and assistance to victims of armed conflict. The Geneva Conventions and their Additional Protocols recognise the special status of the ICRC and assign it special tasks including visiting prisoners of war, collecting and distributing information about missing persons (Central Tracing Agency), and helping establish hospitals and safety zones. In broad terms, the ICRC advocates the faithful application of the Geneva Conventions and their Additional Protocols. It endeavours to ensure the protection of military and civilian victims of armed conflict and to serve as a neutral intermediary between belligerents. According to statutes of the International Red Cross and Red Crescent Movement which have been adopted by the States Parties to the Geneva Conventions, the ICRC has a general right of initiative in humanitarian matters. The ICRC is held in high esteem and deserves support owing to its humanitarian activities, which are guided by the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality. In recognition of its merits, the ICRC was awarded the Nobel Peace Prize in 1917, 1944 and 1963.

## **XII. Non-Governmental Organised Armed Groups**

**1540.** In armed conflicts, special legal instruments exist for ensuring compliance with the law by organised armed groups that are a non-governmental Party to a conflict. The purpose is to encourage organised armed groups to comply with LOAC:

- unilateral declarations to comply with the obligations of LOAC (**5 1** para.4 in connection with **96** para.3; **46 10**);
- special agreements as provided for in common Article 3 of the Geneva Conventions (**1-4 3** para.2).

Further, some non-governmental organised armed groups have published codes of conduct.

In addition, there are initiatives by the ICRC as well as by non-governmental organisations such as Geneva Call, a Swiss non-governmental organisation which

initiated the signing of the 'Deed of Commitment' to ban landmines and supports efforts to protect children and to prohibit sexual violence in armed conflicts.

### XIII. Public Opinion

**1541. Public** reporting of violations of international law can **support** the enforcement of international law. With a global information network, the media (such as the press, radio, television, internet, twitter) and their means of transmission (such as radio communication and satellites) are today able to do so in a comparably better, faster and therefore more effective way than in past armed conflicts. All Parties to a conflict cannot expect their offences to remain uncovered. They must be aware of the fact that truthful reporting of violations of international law will permanently affect the morale of their troops and domestic approval and not least that media coverage will expose such parties to massive international criticism and permanently damage their reputation.

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