OM 6-27-10

OPERATIONAL MANUAL FOR U.S. AND OTHER ARMED FORCES

(ALTERNATE TO U.S. ARMY FM 27-10, FM 6-27/MCTP 11-10C, AND DEPARTMENT OF DEFENSE LAW OF WAR MANUAL)

CONDUCT IN WAR

A GUIDE FOR THE ETHICAL WARRIOR

2023

"A timely and important topic for today's civilian leaders and Soldiers. Whether or not they fully agree with its content, senior leaders should read and discuss, and those executing close combat operations on the ground should study. A well-researched, documented, and thoughtful work."

Steve Whitcomb, Lieutenant General (US Army Ret.), armor battalion commander in Desert Storm, Third Army commander, and CENTCOM chief of staff during Operation Enduring/Iraqi Freedom, US Army Inspector General

"…visionary…I am learning a great deal I was never exposed to formally, but had experienced. So much of the legal aspects of warfare are never taught to young leaders and Soldiers. Actually alarming how much we don't know…the edits are exactly what the [the law] needs."

Active-duty lieutenant colonel who served in combat in Iraq and commanded a Special Forces unit in Afghanistan

"While I may disagree with some of its positions, Conduct in War constantly—and properly— challenges our moral and operational thinking on the law of war. It is comprehensive, systematic, and well-written, an appropriate resource for those who decide policy and a valuable reference for officer and NCO training. The book should become one of the most important on the subject."

H. Lane Dennard, Jr., infantry company commander, 1st Air Calvary Division, Vietnam; awarded Silver Star and two Purple Hearts; retired partner of major law firm; Adjunct Professor, Emory Law; Co-Founder/Director Emeritus, Emory Law Volunteer Clinic for Veterans; Marshall-Tuttle Award for Georgia's top lawyer providing pro bono service to Veterans

"Thirteen years after graduating from West Point, my military service was cut short due to a law of war decision I believed was right but ultimately not supported by my commanders. I am truly encouraged to see a practical and relevant guide that strives to reach beyond the theoretical and effectively address the nuanced challenges faced by our Soldiers and Marines today."

Roger Hill, infantry officer, Ranger, service in Korea, combat tours in Iraq and Afghanistan, co-author of Amazon best-selling military law book, *Dog Company, A True Story of American Soldiers Abandoned by Their High Command*

"An important and powerful work. I had reservations when I first learned of the project. Now I see the book is an absolute necessity. From the prologue until the last chapter, we are forced to face the often untenable decisions we ask our young soldiers to make, and their commanders and the military legal system to judge fairly. The book is a must for those on the frontlines, judge advocates, and government policy makers."

Stephen Huggins, retired aerospace executive, doctorate in military history, instructor at the University of Georgia and Georgia Military College, author of *America's Use of Terror*

ISBN 978-1-950794-58-4
52995
9 781950 794584

WARNING

This Manual is unofficial, unauthorized, and not in full compliance with the international law of war; international human rights law; U.S. military manuals, handbooks, directives, and training materials; domestic law; and executive orders.

If, as a combatant, you follow this Manual, doing so may, in some situations, increase the likelihood you will be charged with violations of the law of war. If convicted, you may be fined, reduced in rank, less-than-honorably discharged, imprisoned, or executed. Charges could be brought by the United States, one of its allies, a neutral nation, international courts, or those with whom we are at war.

Nonetheless, this Manual presents conduct which may be closer to that which should be practiced by honorable, humane combatants than currently found in international law and U.S. policy and military doctrine. It reflects how the formal law of war and military manuals might be rewritten to provide better guidance as to reasonable, responsible, moral conduct.

Given the magnitude, importance, and complexity of that which is covered in the Manual, and given the range of legitimately varying beliefs as to how its provisions should read, the positions of the Manual will continually be reviewed, analyzed, discussed, and possibly revised in order to "better get it right." To that end, those who would report errors and provide comments, suggestions, and rewrites are encouraged to do so through contact information available at www.conduct-in-war.com.

OM 6-27-10

OPERATIONAL MANUAL FOR U.S. AND OTHER ARMED FORCES (ALTERNATE TO U.S. ARMY FM 27-10, FM 6-27/MCTP 11-10C, AND DEPARTMENT OF DEFENSE LAW OF WAR MANUAL)

CONDUCT IN WAR

A GUIDE FOR THE ETHICAL WARRIOR

2023

Published in the United States of America by Deeds Publishing, Athens, Georgia

ISBN 978-1-950794-58-4 (paper)
ISBN 978-1-950794-59-1 (e-book)

Printed in the United States of America

Books are available in quantity for promotional, military training, educational, or premium use.
For contact information, visit www.code-of-conduct.com.

deedspublishing.com

First Edition

Second Printing (2023)
(Further edits and corrections; adjustments to 5.2.2; addition of 8.12 and 14.5.3.13)

Portions of the Introduction and Chapter 14 are from *The Roots of Restraint in War* (2018) and are reprinted by permission of the International Committee of the Red Cross (ICRC), Geneva, Switzerland.

This Manual was written for and is dedicated to those who must make the impossibly difficult decisions in war as to who lives and who dies, who suffers and who does not, what is destroyed and what survives, and try to do this as morally, humanely, and responsibly as they can.

It is also dedicated to all victims of war, be they combatants or non-combatants, in hope that, in ongoing and future conflicts, their numbers and suffering may be less.

SUMMARY OF CONTENTS

CONDUCT IN WAR
A Guide for the Ethical Warrior

TABLE OF CONTENTS

CONDUCT IN WAR

PROLOGUE

The drafting of a manual like the one you now hold was first contemplated in early 2015 because of an unpublished op-ed by a junior officer who served in combat. He wrote compellingly of what he saw as shortcomings of existing international law of war and the then-current U.S. Department of the Army FM-27-10, The Law of Land Warfare, and his belief in the need to revisit and revise both.

The United States has since issued the DOD Law of War Manual (2015/2016) and the U.S. Army/Marine Corps FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare (2019). While both are of value, they remain elaborations, interpretations, and updates of the formal law of war that still do not adequately meet certain decision-making challenges this young officer faced. Thus, combatants remain in need of better guidance as to that which is responsible, moral conduct in war. An appropriate beginning for understanding this need is this officer's op-ed.

A Soldier's Perspective

This is a difficult piece to write or, perhaps more accurately, a difficult piece to share. I fear that in doing so I will be vilified by many and possibly criminally charged for what I have done. Yet it would be worth such outcomes if reasoned consideration is given to that which has too long been neglected.

The first Geneva Conventions were adopted by twelve nations in 1864 with the United States not ratifying until 18 years later. These conventions were revised in 1906, 1929, and 1949 with additional protocols in 1977 and 2005. Their primary purpose, along with that of other international treaties on conduct in war, has been to reduce unnecessary death, injury, suffering, and destruction in war.

In 1956, U.S. Army Field Manual (FM) 27-10, The Law of Land Warfare, was adopted with five paragraphs amended or superseded in 1976. This manual codified for our armed forces international treaties the United States had ratified as to proper conduct.

Our leaders speak unequivocally of our commitment as a nation to comply with the Geneva Conventions and our law of war manual, and the moral imperatives we hold dear against unnecessary suffering and mistreatment of prisoners and civilians. While the goals and language of the Geneva Conventions and FM 27-10 and the heartfelt statements of our leaders are well-intentioned and admirable, the law of war is terribly flawed. Most people do not understand this as they have never read fully its treaties and manuals. Even if they have, they may not have attempted or been able to place into context what their articles and clauses mean for soldiers in combat when confronted with all situations which arise.

What most people also do not understand is that our nation, our civilian and military leaders, and our soldiers in combat never have nor ever will fully comply with the Geneva Conventions and our Law of Land Warfare. Nor should they, given how many of the laws and rules have been written.

If this is the reality, why have a set of laws we know in advance will not be observed? It has been nearly seven decades since we have had a major revision of the Geneva Conventions, nearly three decades longer than the longest period between past revisions. It is time to undertake this task once again. When we do, we need to provide a better, more realistic guide for soldiers in combat than now exists.

If we do not, we make potential criminals before the law of tens of thousands who served as best they could in ways they believed honorable. I am one among these thousands.

***

I arrived in Viet Nam, an inexperienced infantry lieutenant a few weeks shy of my twenty-second birthday. I had attended classes on the Law of Land Warfare. I knew I was to treat prisoners well. I knew to treat civilians with respect and try not to place them in harm's way. Upon arrival, we received the "Handbook for US Forces in Vietnam," which also told us such things.

Yet, I was ill-prepared for the decisions I would face. In this, I was no different than those who preceded me in our nation's wars and those who would follow.

I never engaged in what makes headlines…waterboarding, Abu Ghraib-type abuses, massacres like My Lai. But I did violate laws, some unknowingly, some knowingly, most I would violate again if placed in similar situations. These are the laws of war that would make a war criminal of me and others like me.

***

Among the forms of coercion prohibited is the impressment of guides from the local inhabitants.

Law of Land Warfare, Chapter 5, Article 270b

Halfway through the village, we heard the explosion, big, somewhere on our left. The company net [radios] *came to life. Someone in Third Platoon had hit a booby trap. Call a medivac? No, he was dead. Who was it? Nobody seemed to know. All that was left were pieces being collected in a poncho to send back to base camp…and home. They had to take a count to find who was missing. When I heard, I hated myself. He had wanted to move from Third Platoon to mine. I told him to wait a couple days until I could talk it out with his platoon leader. Now he was dead.*

Move out. Two minutes later another explosion. Another booby trap. Some farmers had been watching our man walk into it, knowing what would happen, doing nothing. This time the man was alive. Two legs and an arm gone; his belly and groin ripped open. We got him out on medivac alive. Everyone was afraid to move, to put a foot down. Third Platoon was ordered out of the village. We were instructed to move up the main trail along the river. Security had to be put on our flank…but all those booby traps. I told the men to seize [one of the] *farmer*[s] *and make him walk in front of them.* [The farmer] *protested, but we reached the bridge without hitting another booby trap.*[1]

[1] All in italics throughout are from letters to my wife and other writings of my experiences.

I knew what I did was a violation of the law of war. Yet this farmer lived in the village. Whether he was a VC sympathizer, he and others had to know where booby traps were. Otherwise, he, his family, and neighbors could not have moved about the village without being killed. We had already lost two men, one dead, one likely to be dead. So, I made the decision I did.

Of course, the farmer might not have known where all the booby traps were and been killed. My actions might have caused him to become a VC supporter if he were not already one. Yet, while I had an obligation to that civilian, I also felt an obligation to my men. I would not put their lives unnecessarily at risk when there seemed a reasonable alternative, one I believed had acceptable risk for the farmer. I violated The Law of Land Warfare.

***

A commander may not put his prisoners to death because their presence retards his movement or diminishes his power of resistance… It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations…

Law of Land Warfare, Chapter 3, Article 85

The voices drifted through the night air from the wood line where we searched for more bodies. I didn't like it here…too exposed in the corner of an open paddy, the ground dried and cracked, covered with the stubble of harvested rice stalks. The darkness of the [abandoned] *ville surrounded* [us on] *three sides …*

We had seen six [when we opened fire. We could only account for five.] *The other was hit, we thought, somewhere in the darkness. Waiting to fire a burst? Fleeing? Had others heard the firing and were moving against us?*

The man's arm was shattered [one of the three captured]*; his knee shattered; his foot hit; his neck torn somewhere beneath the blood; shrapnel protruded from his cheek. And the woman…three fingers torn off; part of her calf blown away; the other* [leg] *horribly broken.*

Walker was working on them. He didn't know a damn thing about medicine other than the little first aid the army had taught him. The other prisoner, a [young woman]*, was unhurt except for a sprained ankle.*

I'll finish this sometime.

I never did, or the letter was lost. Our company had broken into 10-man patrols operating alone in enemy territory. We were to ambush during the day; move and ambush at night.

On this occasion we left our day position at dusk. Within seconds we encountered six VC and responded quicker than they. None of us were hurt. We killed two, had three prisoners and no idea what had happened to their sixth.

Some on the patrol wanted to kill or leave the severely injured man and woman. We were miles from friendly forces. Helicopters would likely not be brought in to extract us in the dark. We could not move far with two so severely injured prisoners. If there were enemy in the area, they knew where we were because of the short violent firefight. If we left the injured, at least one could tell others the direction we had gone, how many we were, how we were armed.

I moved us further into the paddy to have better fields of fire and protection behind low dikes. Our prisoners' moans were audible to anyone nearby. Throughout the ensuing hours I struggled… leave them, kill them?

We did neither. Despite the risks, we spent the night trying to save them. She survived. He died before dawn. The third prisoner was his daughter. She cried inconsolably in the darkness. Morning came with no further contact. Helicopters took the two women out of our lives and us to a new location.

That night I did not violate the law of war but perhaps only by chance. While I knew I was not to kill prisoners, I never remember discussing in class situations like this.

Yet, what if I had known of this article of the law and that we must comply? I think had we come under attack, with no way to secure the two women, I would have done what I thought necessary for us to survive. In doing so, under the law, I might have become a murderer or violated the law in other ways.

***

Any unlawful act…causing death…of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.

Law of Land Warfare, Chapter 3, Article 89

Prisoners of war…whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given…

Law of Land Warfare, Chapter 3, Article 107

In the [abandoned] *village we came across an old man who had been seriously wounded, more dead than alive. I had the urge in my helplessness to end his suffering. Then the realization dawned…of what I was thinking, of shooting, of killing a man to put him out of his misery, not an animal. A strange feeling—cold—flooded through me. Had I time to consider the matter perhaps I would have shot him. There was nothing we could do. We left him there.*

Several months later, I wrote:

Wars are necessary and wars are horrible. In three days I have had three dying men shot through the head…mercy killing. Their limbs contract and jerk like a dying animal. It is not pretty.

These are the words of a twenty-two-year-old. I had three helpless enemy soldiers killed. They were horribly ripped and torn, entrails spilling out. How could they even be breathing? I looked at their terrible pain, their suffering. I may have asked our medic if they could survive. I don't remember now.

We had suffered no recent casualties so there was no revenge factor. They were not killed in the heat of battle when emotions run high. I had them shot because I believed I was doing the right thing for *them*.

We had no doctor, no way to provide the treatment needed. A helicopter would not be risked to take them to a hospital. We were going to leave them and continue our mission. Their comrades could not come to their aid with our gunships about. So I had them shot.

Yet who was I to have made those decisions? What gave me that right? Only my conscience, my compassion. Not the law. Under the law, I committed murder and, of lesser severity, I failed to secure for them the medical attention which was their right as prisoners under international law.

***

So how many is that …laws I violated? Three? Four? Although I did not know it then due to the breadth and complexity of the law, I broke others as well. I was only one soldier out of 2.7 million who served in Viet Nam. I was in the field less than a year while our nation was there for over a decade. What I have shared is miniscule compared to all which likely occurred… occurs in every war.

Yet none of this is being adequately discussed by our leaders, the laws with which we proclaim we intend to comply, the laws which make legal or illegal the complex moral decisions our men and women face constantly in every war.

I know such laws were written to make war a bit less horrible. They are intended to help those like me who might fall into enemy hands, or our families who might one day find themselves in the midst of a conflict.

Yet, in my cynical moments, I wonder if they are more to protect the sensibilities of those not in combat than to protect those in the war zone, to impose what outsiders believe is ethical rather than give soldiers reasonable guidance. I wonder if they exist so we can think better of ourselves as we slaughter one another, so those back home can feel better about what they want to think goes on, so politicians and the media can take the high road and condemn when something seemingly repugnant comes to light.

Years afterwards I wrote a poem about the shooting of those horribly injured men. I ended with:

Such a world we make
Heartless, asks such things of us
Gods at twenty-two

We did not want to be such gods, had never fully understood we might face such situations. Yet, when forced to do so, is it unreasonable to ask for laws whereby we do not risk becoming criminals when doing the best we can with no clear moral alternatives? Put yourself at twenty-two or younger into these

situations. Think if your sons or daughters were placed in similar circumstances. How then would you want these laws to read?

Soldiers in combat need something more understandable and realistic than found in the Geneva Conventions and our Law of Land Warfare. What is needed most are not rigid laws but guidelines and principles which help us make the best decisions possible on the battlefield as we try to balance survival and military necessity with minimizing the horrors of war. In doing so, the integrity of those who must make these impossible decisions will have been honored and respected.

I will close with words from another poem reflecting the depression and despair that enveloped me as we returned along a jungle trail passing the bodies of those we had killed on that mission after months of killing in endless other jungles, rice paddies, and villages:

Fathers husbands sons
A trail of death we follow
All our souls want out

Help us leave that trail honorably, not as criminals.

PREFACE

Begun in 2015, *Conduct in War, A Guide for the Ethical Warrior* (the "Manual") is a redrafting of the law of war and U.S. military manuals as an unofficial, unauthorized guide for combatants as to responsible, ethical conduct in war. Active-duty military, veterans, lawyers, and those with no legal or military background contributed to that found in its pages.

The Manual is not intended to be an all-encompassing scholarly or legal reference work, history, or textbook. It should not be considered legal advice or opinion provided by an attorney. It simply reflects the beliefs of one combat soldier based on his experiences, readings, training, education, conversations, and reflections. Hopefully, it will provide combatants a basic understanding of the law and how, when making decisions, they might at times deviate from it and be aware of the possible legal risks of doing so.

The Manual draws from U.S. FM 27-10, FM 6-27, the DOD Law of War Manual, the Operational Law Handbook, U.S. domestic law, international treaties, ICRC material, and other works addressing conduct in war. In most sections and subsections, conduct under the formal law and official manuals is first presented in summaries or quoted text in italics. Within or following, often in brackets, are positions, differences, and commentary of the Manual. When topics have not been addressed in the referenced official manuals, other sources may be included, or simply positions of the Manual. Numbered paragraphs from official manuals are not always sequential. Some were reordered; others omitted if repetitious or not essential for that being addressed.

After section titles, paragraphs, and sentences, an indication in bold is generally included of the author's informal, legally-unschooled assessment as to the consistency of the Manual with the formal law of war. Footnotes in quoted text have been omitted. If these are needed, one can refer to the works from which the material is drawn. Throughout the Manual, "must," "shall," "will," and sometimes "may" in official text are often followed by "[should]" as a generally preferable word. Bracketed punctuation, letters, and words can sometimes reflect minor errors found in official text. Three periods (…) indicate when quoted text is not fully reflected.

The Manual designation (OM 6-27-10) is unofficial, a blend of FM 6-27 and FM 27-10. Using Operational (O) rather than Field (F) distinguishes it further from the antecedent U.S. military manuals.

While the Manual often differs materially from FM 27-10, FM 6-27, the DOD Law of War Manual, and the Operational Law Handbook, generally this is not due to their professional or legal shortcomings. Rather this Manual's purpose is different. Official manuals delineate that required under the formal law of war based on U.S. interpretations and policy. This Manual presents that which may better reflect how ethical combatants might believe the law, policy, and regulations should be written.

There is an unevenness of detail in the Manual. This generally occurs when additional context is provided for a topic not fully addressed in an official manual, or the Manual's position varies materially from what has traditionally been considered legal, right, and moral under the formal law of war.

The Manual is not ideal as a quick reference for combat commanders and NCOs given its length; blend of international law, U.S. policy, and positions of the Manual; and commentary as to differences. Yet, its positions are believed to be more relevant for combatants than other manuals and texts now available.

The Manual does not pretend to have everything right. It should be viewed as a starting point, a living document that will undergo revisions and improvements. To that end, those who would point out errors or provide comments, suggestions, and rewrites are encouraged to do so at www.conduct-in-war.com.

INTRODUCTION

> ***Ethical:*** *pertaining to or dealing with morals or the principles of morality; pertaining to right and wrong in conduct; being in accordance with the rules or standards for right conduct or practice, especially the standards of a profession*
>
> **www.dictionary.com**

During times of war, every member of the United States Armed Forces, as well as any civilians contracted by or attached to these forces, are subject to the law of war as articulated in various treaties, manuals and handbooks, domestic laws, executive orders, rules of engagement, and directives. Soldiers, marines, and all others in the military are told this law, and related rules and regulations, are for their benefit and protection as well as for those against whom they fight, civilians, and other non-combatants who find themselves in the midst of a war. They are told compliance will materially increase the likelihood of achieving military objectives and reducing risks to themselves, that following these laws is the honorable and morally right thing to do. They are given compelling reasons and examples as to how compliance makes eminent sense. The reasons and examples provided generally do just that. Yet, in spite of good intentions and the case made for strict compliance, the formal law of war is not always the friend of the soldier in combat, a belligerent with limited resources, or all persons the law should protect.

Military manuals and training as to proper conduct in war are generally based on the premise that the law of war is the law and, as the law, should be complied with in all situations. This Manual begins with a different premise:

- While well-intentioned, the formal law of war can fall short in many situations faced.
- If the formal law of war is always explicitly followed, unnecessary death, injury, suffering, and destruction may sometimes be greater than need have occurred; military necessity may be inappropriately discounted with negative consequences for concluding the war as quickly and efficiently as possible; and fundamental human rights of combatants (which do exist although often not recognized) may be violated.
- Thus, situational imperatives can exist where it would be irresponsible, unreasonable, and even immoral, to comply precisely with the law as written.
- When this occurs, *responsible practice*—the custom of ethical combatants—should be that upon which conduct is based.

This Manual attempts to articulate that which is responsible practice.

Abram Chayes & Antonia Handler Chayes, in "On Compliance" (*International Organization,* 1993), make the following observation: "*If issues of noncompliance and enforcement are endemic, the real problem is likely to be that the original bargain did not adequately reflect the interests of those that would be living under it, rather than mere disobedience*."

No one understands this better than those on the frontlines of war and in its shadow worlds…combat soldiers, sailors, aircrews, and marines; those responsible for detained persons; and intelligence and special forces operatives. Yet, unless charged with a violation of the law, all too seldom does one hear the voice of those who actions are central to what occurs in war as to conduct affecting combatants and non-combatants. Nonetheless, it is they—not lawyers or diplomats, scholars or government officials,

human rights activists or elected leaders, generals or the media—who most often comply with, defend, stand aside in the face of, or violate the laws of war.

Thus, in deliberations as to how the law of war should be written, interpreted, and enforced, we should insist upon the active participation of those at the tip of the spear. It is their common practice, i.e., custom (as the word is understood by lay persons, not as defined under jurisprudence), rather than treaty or international customary law, which frequently dictates conduct in war. When responsible common practice is different than the formal law of war, it is essential that such practice be given a fair hearing so the two might become better aligned.

While that found in the formal law of war is often admirable, desirable, and that to which combatants should aspire, such law has numerous shortcomings. These include:

1. Much of war is situational while formal law, regulations, and rules which attempt to govern conduct are often black letter.
2. Military necessity has not always been adequately taken into consideration although most who drafted, approved, apply, and enforce the law often believe, or at least state, that it has.
3. The formal law of war does not always effectively, reasonably, and fairly apply to States, non-State parties, and combatants operating independently who do not have the resources and force options available to larger militaries and wealthier nations.
4. The logic behind what is legal can sometimes be inconsistent, convoluted, hypocritical, and lacking in common sense.
5. Certain protections and rights are inappropriately discriminatory and do not afford combatants certain legitimate rights and protections.
6. A comprehensive formal law of war has not been fully agreed to, nor that which has been agreed to always interpreted consistently by States, legal scholars, international organizations, and jurists.
7. The formal law of war can be outdated and not adequately address critical areas of conduct.
8. The law of war is so vast and complex that virtually no one, much less most combatants who are to comply with the law, can hope to understand fully and act legally in every situation encountered.

With respect to the last of these, the original Law of Land Warfare manual (FM 27-10) included 552 articles; the more recently issued FM 6-27, over 1,100 numbered paragraphs. The DOD Law of War Manual, upon which FM 6-27 is based, is approximately 1200 pages. There are dozens of international treaties addressing proper conduct in war. While not all found in these treaties and manuals is applicable to those on the frontlines, hundreds of provisions are. Thus, the law of war is far more than a few straightforward prohibitions against the use of torture, harm to civilians, mistreatment or killing of prisoners, and wanton destruction, misappropriation, or theft of property.

A second problem is that what is considered to be legal and illegal under the law is often seen as unreasonable by combatants. Because of shortcomings and seeming indifference of the law to many situations faced, combatants may decide for themselves what is moral and reasonable. They often do this, not because they do not believe in the importance of and need for humanity in war, but because they do. They honestly believe they have no moral or responsible alternative than to violate the law. Sometimes combatants make these decisions well. Sometimes they do not, just as they make tactical mistakes in battle.

Yet, there is a much greater danger associated with the shortcomings of the law than what occurs when combatants responsibly try to ascertain when a law may not be appropriate and make a mistake in doing so. This greater danger occurs when its shortcomings erode respect for the law more broadly, and

combatants ignore, not just portions of the law which are inappropriate to a situation, but also what is valid and with which they should comply. Thus, combatants need less flawed, more relevant laws and rules as to proper conduct, and a legal system which better assesses—and accepts—when violations may be desirable and permissible.

The reason often given for black letter law, rules, and regulations is they must be unequivocally clear to eighteen-year-old soldiers, that such soldiers are not competent to make decisions on their own in combat as to what is moral and reasonable. If deviations from the law are ever essential, only senior leadership is apparently believed qualified to make such judgements and given the latitude to do so without charges being brought.

There is an unjustified arrogance in these positions.

It is specious to suggest that the formal law of war has been drafted so it is clear to eighteen-year-olds. While some has, much has not, not just for the eighteen-year-old, but for all levels of command, for civilian leaders, and even for legal counsel who interpret and advise on the law.

As for senior leaders, whether civilian or military, being the only ones supposedly competent enough to make decisions whereby it is acceptable to violate the law, sometimes they do make sound decisions. They also make horrendous ones with far greater consequences than every frontline combatant combined who might make a mistake when deciding on their own when a law may reasonably and morally be violated. When senior leaders make such mistakes, unlike frontline combatants, seldom are they charged for their decision to violate the law.

Obviously, a potential danger exists in allowing combatants to interpret and ignore law when they believe it inappropriate. Yet, squad leaders, platoon leaders, company and higher-level commanders, special operations team leaders, intelligence operatives, and individual soldiers are already regularly making tactical decisions without black letter rules as to that which should be done in every combat situation. They have agency to interpret that contained in manuals and training to make operational decisions they believe best given circumstances. With proper training, combatants are equally capable of making responsible judgements regarding the rules and laws of war. They may sometimes make mistakes, but that occurs now when making tactical and strategic decisions without it necessarily being criminal.

The ability of lower ranks to make such moral decisions is possible and reflected in the following:

We've had leaders telling guys to shoot innocent people only to be ignored by privates with cooler heads… (Specialist 4 Patrick Tillman, 75th Ranger Regiment, journal entry, Afghanistan, 2003 [*Where Men Win Glory*, Jon Krakauer, 2010])

Dille [Special Operator First Class Dylon Dille, sniper, Seal Team 7, Iraq, 2017] *realized his mission…would have to shift. He had come to the Towers to kill ISIS. Instead he was going to have to keep Eddie from killing civilians. He would do it by firing warning shots to scare people away before Eddie could spot them… Now the snipers had to race to keep people from getting murdered. Every day when Dille lay down behind his rifle, his heart would pound…knowing he would have only a few seconds to decide whether to save or end a life.* (*Alpha: Eddie Gallagher and the War for the Soul of the Navy SEALs*, David Philipps, 2021)

All law is not moral or reasonable; nor has all that is moral and reasonable been inculcated in the law. Thus, the laws of war should allow combatants some degree of latitude, some degree of agency, as how best to conduct themselves, so the law better achieves its purposes. This does not suggest combatants should not be held accountable if their decisions are not moral, reasonable, and responsible. They can and should, and the need to do so is addressed throughout this Manual.

Many commanders and soldiers who learn of violations by those they command or with whom they serve—good soldiers whom they rely upon, trust, and respect—may be inclined not to report infractions, initiate investigations, or convene courts martial unless it is thought to be unavoidable for political, public opinion, career, and other such reasons, none of which generally should be the basis for not having done so. Thus, the challenge of how to make sound decisions as to proper conduct is not just deciding whether a situation is sufficiently appropriate for the law to be violated, but also whether to report or take legal action if violations may have occurred.

Ideally, combatants would learn this during appropriate training and from military manuals. This does not formally occur as it would require official recognition that violation of the law is sometimes acceptable, a recognition likely not forthcoming, at least publicly or officially. Yet, for those who wish to make the most moral, responsible decisions possible, guidance is needed even if following that guidance may expose them to severe legal consequences.

There will be those who argue that this Manual will contribute to a breakdown in discipline and contribute to greater death, suffering, and destruction than would otherwise have occurred. The opposite is believed to be true, that if this Manual is followed, discipline, mission accomplishment, and actual achievement of the purposes of the law of war will be greater and more widespread than now exist under a doctrine requiring rigid compliance with existing law, a law frequently violated because it is disrespected by many.

There are those who would say only a small minority would support the basic premise of this Manual that the law can sometimes be legitimately violated. This is not the case. Setting aside for the moment whether torture can ever be morally permissible, in a survey by Geoffrey Wallace ("International Law and Public Attitudes Toward Torture: An Experimental Study," *International Organization*, 2013), of over 6,000 respondents, 44% of civilians with no military background and 57% of veterans would support torture of captured insurgents if they might have knowledge of future attacks. In a small survey done as part of the drafting of this Manual, all respondents but one would violate the law of war at least once in six combat scenarios posed (see Appendix). A 2012 survey for the DOD Legal Policy Board subcommittee on war crimes found that 40-50% of soldiers and marines would not report law of war violations. During a class discussion in a course on international armed conflicts at a Florida university in October 2021, 70% of the students would end the life of a severely wounded prisoner during ongoing combat rather than leave him, leave him after administering morphine potentially needed by one's own command, or risk losing a medivac chopper and its crew for someone likely to die. No student changed his or her position even when informed this violated the law of war and might result in being tried as a war criminal.

Given the preceding, in an extended conflict, it is possible most frontline combatants might eventually violate or fail to report something for which charges should be brought under a doctrinaire approach to enforcing formal law. This means that most combatants would be considered criminal in their conduct even though these combatants believed what they, or their fellow combatants and commanders, had done was responsible, necessary, and moral.

The author of *A Soldier's Perspective* advocates for a redrafting of the law of war. While his desire is understandable, any major redrafting would likely face strong opposition. Among certain nations, especially in Western Europe and the United States, many individuals, groups, government officials, and elected leaders would likely oppose any initiative to redraft the laws of war along the lines suggested in this Manual. Conversely, those who do not want further restrictions on their actions might also oppose such an initiative, fearing restrictions found in treaties and protocols not ratified by the United States might become a reality. Even if revisions were undertaken, it would take years and possibly decades to

complete and approve given the multiplicity of parties and interests which would have to participate and concur. At the end, there would be no assurance guidance needed by combatants would have been appropriately addressed.

An alternative, albeit a radical one, would be for the United States to withdraw from the Geneva Conventions (permissible under treaty language) and draft its own law for conduct in war which better addresses shortcoming of international law of war now in place. However, it is not the intent of this Manual to assess and weigh the merits and faults of whether this would be advisable.

With any material change unlikely for the foreseeable future, regardless of whether one agrees that responsible practice as determined by conscientious, ethical combatants can take precedence over the formal law of war, that outlined in this Manual is conduct a combatant has a moral and operational right to at least consider—and then possibly follow—if that is what his or her moral and professional beliefs dictate. This Manual is an advocate for that right, just as the ICRC, Amnesty International, Human Rights Watch, and others advocate for the human rights of civilians and others during war. This Manual is a step towards the interests and viewpoints of combatants being more effectively represented, understood, and addressed and, in doing so, might better achieve the purposes for which the law of war was developed and adopted.

There is already precedent in the military for allowing legal judgements to be made at all levels. One of the foundations of the military is that orders are to be obeyed. Disciplined action in combat necessitates orders be carried out quickly and efficiently without challenge by subordinates. Nonetheless, even in combat, *blind obedience* to orders is not what is expected of soldiers. Rather *reflective obedience* is desired whereby soldiers are only to carry out *lawful* orders. Thus, soldiers are expected to apply a legal judgement whether to obey an order. A logical corollary is that *reflective moral obedience* is also that which should be desired. Soldiers should carry out not just legal, but also moral, responsible orders that best further the purposes of the law.

That this concept may produce better results seems to find support in an ICRC report, *The Roots of Restraint in War* (2018). This study differed from one in 2004 which "*opposed invoking moral values, arguing* [such values] *to be relativist and unreliable, and instead advocated for a formalistic adherence to orders, discipline and hierarchy*."

The more recent study found that *"value-based motivation can in fact be as powerful a motivator of combat behavior as the threat of punishment*," and states that "*…there is the need for both the law and the values underpinning it… The role of law is vital to setting the standards, but ensuring that the values it represents are internalized seems to be a more durable way of promoting restraint."*

Some may say the preceding is meant only to better achieve compliance with the law as written, not provide moral agency to disobey the law. It should be noted, however, that the 2018 report states the objective is "promoting restraint," which is not the same as requiring doctrinaire legal compliance. Also, "internalizing values" would seem to imply, not blind compliance, but a reflective application of these values to situations encountered.

Nonetheless, the laws are the laws. Any non-compliance—even if based on honest, conscientious reflection which leads to the best decision morally, and better realizes the purposes of the law—is still a violation of the law. With violation comes the inherent risk of charges, convictions, and punishments. Consequently, if the ethical warrior is to do what is reasonable, responsible, and moral regardless of the law, he or she must be willing to expose themselves to extraordinary risks, not only on the battlefield but in a courtroom.

George Lucas, Jr., former ethics professor, U.S. Naval Academy; professor of ethics and public policy, Naval Post-Graduate School; and president, International Society for Military Ethics, wrote in his introduction to the *Routledge Handbook of Military Ethics* (2015):

> *Where, we should ask, are the internationally disseminated results of broad, participatory deliberation and collaborative reflection from military practitioners, specifying the canons of (best) aspirational practice, and, critically, the limits on acceptable practice?*

This Manual is a step towards answering Professor Lucas's question, a work which will hopefully stimulate constructive reflection and deliberation with and among warriors at the tip of the spear—and those who command, legally advise, write about, and judge them—as to acceptable practice in war that is reasonable, moral, and responsible while better achieving the purposes of the law.

OM 6-27-10

CONDUCT IN WAR

A GUIDE FOR THE ETHICAL WARRIOR

While tasked with enforcing the law, the U.S. Army Criminal Investigation Command's motto is

Do what has to be done.

While tasked with following the law, the ethical warrior's motto should be the same.

When doing what has to be done, we should heed Nietzsche's words,

He who fights with monsters should… in the process
…not become a monster.

CODE OF CONDUCT

CODE OF CONDUCT

Due to the magnitude and complexity of the law of war, it is unreasonable that every combatant, to include those in command, can be sufficiently knowledgeable of, and understand precisely, what is expected in every situation to be compliant with the law. Nor will they always have the time or resources to reflect, research, or consult on what is legal. Consequently, combatants need basic rules to help guide decisions as to desired conduct.

After the Korean War, a need for such rules was recognized due to failures of U.S. forces in meeting acceptable standards of conduct just prior to and after surrender. As a result, all members of the United States Armed Forces are expected to comply with a code of conduct issued as Executive Order 10631 in 1955 and amended by Executive Order 12633 in 1988. However, it primarily addresses conduct if captured and whether to surrender.

Soldier's Rules/Basic Principles in the introduction to FM 6-27 provides a "quick reference checklist" for soldiers and marines as to proper conduct in combat. The introduction cautions that the guidelines are sometimes narrower "*than might be allowed for as a matter of law in specific situations*." Thus, their value is limited, and sometimes inconsistent with the basic premise of this Manual.

The U.S. Army provides similar guidelines in its Army Values, Warrior Ethos, Soldiers Creed, NCO Creed, Ranger Creed, Army Civilian Corps Creed, and Army Ethic. Other branches of the military have such codes and creeds. Some of the concepts found in these are reflected in the following amended-in-this-Manual 1988 code to which Articles II-V were added along with certain alterations to its language.

If combatants adhere to this expanded code to the best of their ability, it is believed most combat commanders and fellow citizens will believe such combatants have conducted themselves appropriately. Nonetheless, there will be commanders, politicians, lawyers, jurists, human rights advocates, academics, media, and some among the general public who may consider those who do so to be war criminals. This should not deter responsible, moral combatants from doing that which best achieves military objectives; reduces unnecessary death, injury, suffering, and destruction; and helps realize a sustainable peace.

Code of Conduct
for
Members of the United States Armed Forces

I. **I am an American, fighting in the forces whose mission is to protect my country and the principles upon which it was founded. To that end, I will support and defend the Constitution of the United States against all enemies, foreign and domestic.**

II. **I will conduct myself with honor and am prepared to give my life for my country and the values and principles for which I fight. Within that which is required for the success of my mission, I will do what I reasonably can to protect and assist the helpless, whether soldiers or civilians, my own side's or the enemy's.**

III. **My primary responsibility is to carry out the mission I have been assigned. My second is the welfare and safety of those with whom I serve and any I may command. Then and only then should I look to my own needs and safety.**

IV. **I will endeavor to use force only to the degree necessary to achieve my mission and protect myself, my fellow soldiers, and the units of which I am a part.**

V. **To the degree possible, I will treat prisoners as I would want or expect to be treated under similar circumstances, civilians as I would want my family and friends to be treated if the war were at home, and property as I would want my own to be treated, recognizing the inherent violence and destruction often unavoidable in war.**

VI. **So long as there is a reasonable means to resist and a need for doing so, I will not surrender or, if in command, will not surrender the members of my command.**

VII. **If I am captured, to the degree I am able, I will continue to resist, attempt to escape, and aid others to escape. I will accept neither parole nor special favors from the enemy solely for personal benefit.**

VIII. **If I become a prisoner of war, I will keep faith with my fellow prisoners. Unless under duress beyond a reasonable ability to withstand, I will give no information or take any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey and fully support reasonable, moral orders of those senior to me who are competent to fulfill such command.**

IX. **Should I become a prisoner of war, when questioned, I may, but am not obligated to, provide name, rank, identification number, date of birth, and family contact information. Within my ability to do so and as appropriate to the situation, I will resist answering further questions or making oral or written statements disloyal to my country and its allies or harmful to our cause.**

X. **I will be ever mindful that I am fighting for the welfare of others, responsible for my actions, and dedicated to the principles upon which our nation was founded. I will trust in myself and my fellow combatants to see me through the challenges I face.**

CHAPTER 1

Purpose, Applicability, Terminology, and Classes of Persons

Men who take up arms against one another in public war do not cease in this account to be moral beings, responsible for one another and to God.

Francis Lieber
Article 15, General Order No. 100
(issued by Abraham Lincoln)

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

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

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

Telford Taylor
Nuremberg Prosecutor
(from FM 6-27)

We should perhaps not so much complain that the law of war does not work well, as marvel that it works at all.

Geoffrey Best
Humanity in Warfare

1.1 Purpose

a. ***Manual*:** The purpose of this Manual is to provide guidance to combatants as to moral, honorable, responsible conduct in war.

b. ***War* (consistent):** The purpose of war is the submission of the enemy and achievement of military and political goals as quickly and efficiently as possible.

a. ***Law of War* (generally consistent):** The purposes of the law of war are to help:

(1) Reduce unnecessary death, injury, and suffering of persons caught up in war;
(2) Reduce unnecessary seizure, destruction, or harm to property and the natural environment;
(3) Provide protections for combatants and non-combatants no matter their legal status;
(4) Preserve the honor, humanity, and rights of combatants and non-combatants alike;

(5) Contribute to the disciplined, ethical, and effective use of force;
(6) Facilitate the restoration, sustainability, and maintenance of peace; and
(7) Reduce the savagery and brutality of war.

While each of the preceding is important, at its most basic, ***the purpose of the law of war is to reduce unnecessary death, injury, suffering, and destruction while overcoming the enemy as quickly and efficiently as possible in order to achieve a sustainable peace.***

While the Manual most often refers to, builds upon, and varies from U.S. policy and expectations for its own military forces, it provides guidance for all those involved in conflicts be they U.S. or non-U.S., State or non-State, civilian or military, allied or enemy.

The Manual is of value at every level of command and government as each leader, commander, and individual weighs the vast complexities and realities associated with fighting, surviving, and prevailing in war, and the decisions which must be made to do so successfully while attempting to reduce unnecessary death, injury, suffering, and destruction and retaining one's humanity and that of others caught up in the conflict.

1.2. Applicability of the Law of War

The law of war, and expected conduct under that law, are applicable whenever planning for and employing force against another party, or responding to expected or actual use of force by another party, regardless of whether a state of war has been formally or informally recognized, whether those involved are State or non-State, or whether acting as individuals or part of an entity engaged in some facet of the war **(consistent)**.

When applying the law, it should be understood the goal should not simply be the doctrinaire application of the law but achieving the purposes for which the law was established. While the formal law of war should be complied with when morally and reasonably possible, there are situations when it should not or cannot be **(inconsistent)**. These occur when compliance with the law:

1. Will not better achieve the purposes for which the law was established than non-compliant courses of action,
2. Cannot practicably be achieved due to combat conditions, insufficient resources (materiel, weapons, funds, personnel), and time constraints,
3. Unreasonably discriminates against nascent, smaller, and/or weaker belligerents opposing established, larger, stronger ones, or
4. Inappropriately discriminates in favor of certain persons and groups while inappropriately discriminating against others.

See Section 2.6 for further discussion of the applicability of the law of war.

1.3 Terminology

This Manual uses the following definitions of war and related terms:

a. ***War*** **(generally consistent)*:*** The specific legal or policy definition of war for parties to a conflict may depend on the purpose for which the term will be used. A party may or may not wish to refer to its participation in a conflict as war. Whether it does can depend on numerous considerations including domestic laws and processes for declaring that a state of war exists, the seriousness of the hostilities, the desire to escalate or deescalate what has brought about hostilities, or what might be required to secure domestic or international support.

Yet, whether a party wishes to define or refer to it as such, war is when one party, be it a State, regional or local government, movement, cause, ethnic group, tribe, or other organized assemblage of persons, plans for and inflicts material harm to further political, economic, religious, moral, or other like goals and policies upon or against another party, or defends against the imposition of such goals and policies by another party and uses force when doing so.

b. ***Act of War*** **(inconsistent)*:*** An act of war is the use of force (see f. below), or a stated or imminent intent to use force, to further political, economic, military, religious, or similar goals**.**

c. ***State of War*** **(somewhat consistent)**: A state of war, whereby conduct under the law of war are applicable, exists if that delineated in the preceding two paragraphs exists. It need not require a formal notification, declaration or acknowledgement of war. It need not employ attacks using traditional military weapons.

d. ***Proportionality of Response*** **(consistent with U.S. policy but not some interpretations of international law)*:*** Proportionality of response is that type and magnitude of force the attacked party believes necessary to overcome, discourage, or prevent further use of force against it by the attacking party. This may be the same, similar, or quite different force (type, intensity) than used by the attacking party, whether in a single attack or a series of attacks occurring over time.

Some States, legal scholars, international organizations, and court decisions take exception to this interpretation. Their position is that "proportionate" should not exceed "like type and/or intensity to that which the attacker employed."

While this may be an appropriate response and an attacked party should never escalate unnecessarily and irresponsibly, such determination belongs to the attacked party. Its response may legitimately be more violent, massive, or different than the force used by the attacking party. If there have been previous lower intensity attacks and warnings to cease such attacks were ignored, greater or different force than used in the most recent attack may be warranted. Any decision made should only occur after applying the principles of the law of war (Chapter 3).

e. ***State of Peace*** **(possibly consistent)*:*** Regardless of whether there is a signed peace agreement between belligerents, a declaration by one or more of the belligerents that a conflict is over, or the subjugation of one side by the other, a state of peace only truly exists when all belligerents engaged in a conflict are no longer actively planning or using force of any kind against another party to pursue their goals and policies or having to defend against such use of force by others. Until a true state of peace exists, conduct under the law of war and this Manual remains applicable.

f. ***Force*** (**partially inconsistent)*:*** Force that may be considered an act of war is not limited to traditional military weapons but any action which can materially harm the people, property, systems, or territory of another party, and includes but not limited to:

(1) Individual and crew-served weapons (e.g., personal arms, artillery, armor, rockets, and other ground-based delivery means)
(2) Armed aircraft, to include drones and missiles
(3) Mines, booby traps, and improvised explosive devises (IEDs)
(4) Poison, chemical and biological agents; nuclear weapons
(5) Autonomous weapons
(6) Advanced technologies, to include artificial intelligence, cyber, and nano
(7) Disinformation, propaganda, and other psychological and information operations

(8) Economic and financial interventions
(9) Political interventions
(10) Terrorism
(11) Lawfare

U.S. manuals do not include a similar list. The reason may be a reluctance to expand the types of force sufficient to be considered an act of war. Those who might oppose their inclusion may believe, perhaps correctly, that to include could increase the likelihood military weapons will more often be employed in response to what may be considered by many as insufficient to warrant armed response. Yet, the use of these other types of force can cause as much or more suffering and destruction, and the collapse of a nation, cause, or society, as that resulting from the use of traditional military weapons.

Regardless of whether every party views the above as force, some will. If they do, conduct outlined in this Manual should be in effect by all sides. Further, those who choose to employ one of the above types of force should be aware that it may be viewed as an act of war regardless of how formal law reads. Thus, a party should be judicious in the use of any force contemplated.

g. ***Violent Nature*** **(consistent)*:*** War by its very nature can be physically and psychologically violent and result in severe harm to persons, property, and the natural environment. This is recognized under the law of war and is not a violation if done in accordance with the law and its principles.

h. ***Fog of War*** **(consistent)*:*** Due to attempts to deceive one's enemies, keep information from them, the inexact nature of intelligence gathering, the flow of battle, and a range of other factors, decisions in war, whether strategic, operational, tactical, or to avoid unnecessary death, suffering and destruction, are seldom made with full knowledge. This is referred to as the fog of war. It is because of this fog that decisions are sometimes not what they ideally would be. This should be understood and taken into consideration by those judging actions of combatants engaged in planning and executing wartime operations.

i. ***Law of War:*** The law of war is referred to interchangeably as the ***Law of War*** (LOW), the ***Law of Armed Conflict*** (LOAC), and ***International Humanitarian Law*** (IHL). FM 6-27 most often uses LOAC; the DOD Law of War Manual, law of war. This Manual uses law of war as conflicts exist when application of the law of war is appropriate, but which are not traditional armed conflicts where kinetic force is employed, and "international humanitarian law (IHL)" may be confused with "international human rights law (IHRL)," with the two quite different**.**

With respect to the use of IHL, much of that which the law addresses and frequently allows in war can in no way be termed 'humanitarian." To refer to it as such is inappropriate, misleading, and may result in the belief that humanitarian components of the law always take precedence, which they do not. Thus, this body of law should simply be called what it is, the "law of war."

j. ***Formal Law of War:*** *"Formal law of war"* is used in this Manual to reflect that law based on treaties, widely accepted international customary law, court decisions and opinions, and legal treatises. Prefaced as it is with "formal," this distinguishes it from "*law of war*" which additionally considers responsible common practice of honorable, moral combatants as having equal, if not greater, legitimacy regarding proper conduct in war as treaties, customary international law, court decisions and opinions, and legal treatises.

k. ***Practice***, ***Common Practice***, C***ustom:*** *Practice, common practice*, and *custom* are used interchangeably and defined as traditional and widely accepted beliefs and ways of behaving or

doing something that are specific to a particular society, place, and time. In this Manual, the custom or practice being referenced is that of *combatants* (a society) *in conflict areas* (place) *during war* (time), and which can either contribute to or undermine the purposes of the law of war.

l. ***Responsible Practice/Common Practice/Custom:*** *Responsible* practice/common practice/custom is that which contributes to, rather than undermines, achieving the purposes of the law of war. It may vary among combatants of different ethnicities, religions, political beliefs, genders, cultures, and nations. Even with these differences, it is believed the majority of responsible, moral combatants will generally concur as to an acceptable range of behavior for a given situation in war. Nonetheless, there are cultures which will continue to ascribe to much harsher, brutal codes.

1.4 Classes of Persons (inconsistent)

1.4.1 Introduction

The DOD Law of War Manual devotes 86 pages to the classification of persons during conflicts and the rights associated with such classifications. FM 6-27 does this in 8 ½ pages, much of which is included below. This Manual's position is that the two official manuals inappropriately limit persons considered legal combatants while broadening protection for certain civilians and others beyond that which is reasonable.

Before addressing specific classes of persons, it is helpful to review why classification is essential. As with other law, the law of war provides certain rights, protections, liabilities, and responsibilities for persons covered by the law, both those who carry out certain acts and those who are affected by these acts. These include:

1. Ability to engage legally in hostilities
2. Legitimate targets of attack
3. Designation and treatment if captured or otherwise detained
4. Status under domestic law
5. Immunity (or lack of immunity) from capital and other types of punishment
6. Necessity/prohibition to wear, display, or carry certain identifying emblems, items, or objects

All persons who are located within the territory of a conflict, citizens or members of a belligerent, or associated with the conflict in any way, even those of neutral parties, require classification as either combatants or non-combatants. The following addresses how persons are classified by the United States miliary and under this Manual.

1.4.2 FM 6-27 (unless otherwise noted)

I. Combatants

A. Lawful

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

- *Members of the armed forces of a State party to a conflict, including members of the regular armed forces of a de facto government or authority not formally recognized by the opposing power, aside from certain categories of medical and religious personnel (GPW art. 4A(1) and 4A(3))* [This seems inconsistent with actual U.S. policy on members of the armed forces of such de facto governments or authorities as Al Qaeda and ISIS/ISIL]*;*

- *Members of militia or volunteer corps that are not part of the armed forces of a State but belong to a State party to the conflict, and that meet the following four requirements: commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying their arms openly; and conducting their operations in accordance with LOAC (GPW 4A(2)); and*
- *Inhabitants of an area who participate in a kind of popular uprising to defend against foreign invaders, known as a levée en masse (GPW 4A(6)).*

The United Stated does not accept the Additional Protocol I definition of lawful combatants. A princip[al] *U.S. objection…is the extent to which it would grant combatant status to individuals who fail to comply with the requirements of GPW for status as a member of a militia or volunteer corps that belongs to a State (GPW art. 4A(2) and thereby undermine*[s] *the protection of the civilian population…*

1-53. …Nationals of a neutral or non-belligerent State who are members of the armed forces of a belligerent State…

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

1-53. …[T]*he special privileges international law affords lawful combatants do not apply between nationals and their own State…* [I]*nternational law does not prevent a State from punishing its nationals whom it may capture among the ranks of enemy forces...who…may… be tried for treason (18 U.S.C. § 2381).*

B. Unlawful

The U.S. Supreme Court in *Ex Parte Quirin* (1942), distinguishes between lawful and unlawful combatants. "Unlawful combatants" are those referred to in FM 6-27 as "unprivileged belligerents." Regardless of the term used, these are persons engaged in hostilities who are not members of armed forces considered as "lawful" by the United States. FM 6-27, 1-65, classifies them into two categories:

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

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

1-68. …In general, unprivileged belligerents lack the distinct privileges afforded to lawful combatants and civilians, and receive the liabilities of both classes. Unprivileged belligerents may be made the object of attack by enemy combatants. They, however, must be afforded

fundamental guarantees of humane treatment if hors de combat. [This is inconsistent with the U.S. handling of many of those captured in its war on terrorism and during the Vietnam war.] *Unprivileged belligerents may be punished by enemy States for their engagement in hostilities if they are convicted after a fair trial.*

1-69. In some cases, U.S. practice has, as a matter of domestic law or policy, afforded unprivileged belligerents more favorable treatment than they would be entitled to receive under international law… Nonetheless, U.S. practice has also recognized that unprivileged belligerents should not be afforded the distinct privileges afforded lawful combatants, nor should they receive all of the protections afforded civilians under LOAC.

[The preceding two paragraphs seem to be an attempt to "talk around" the inconsistencies between U.S. law, treaties ratified by the U.S., and actual U.S. practice.]

II. Civilians

1-54. In general, a civilian is a member of the civilian population—that is an individual who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities.

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

III. Mixed Case

1-59. Certain classes of persons do not fit neatly within…combatants and civilians. [Such persons] *may be classified into three groups: certain humanitarian personnel; certain civilian supporters of the armed forces; and, unprivileged belligerents. Each of these classes has some attributes of combatant status and some attributes of civilian status; in certain respects*[,] *these classes are treated like combatants, but in other respects they are treated like civilians.*

A. Certain Humanitarian Personnel

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

- *Military medical and religious personnel (GWS art. 24, 33);*
- *Authorized staff of voluntary aid societies (GWS art. 26);*
- *Staff of a recognized aid society of a neutral country (GWS art. 27); and*
- *Auxiliary medical personnel (GWS art. 25).*
- [Persons engaged in duties related to the protection of cultural property (DOD LWM, 4.14)]
- [Civil defense personnel (DOD LWM, 4.22]

These persons may not engage in hostilities but have the right of self-defense, should not be targets of enemy attack, may be retained to treat/minister to POWs of the same military force or detained for military necessity or safety and security reasons but not as prisoners of war, may or may not wear uniforms (with risk of being assumed an enemy combatant if they do),

may be required to display identifying emblems, and are immune from punishment under domestic laws for carrying out their responsibilities.

B. Certain Civilian Supporters of the Armed Forces

1-61. Certain categories of persons are not members of the armed forces…, but are nonetheless authorized to support the armed forces in the fighting …:

- *Persons authorized to accompany the armed forces but who are not members thereof (GPW art. 4A(4))*(, examples include DOD and other government employees, government contractors, and journalists)*; and*
- *Members of the crews of merchant marine vessels or civil aircraft (GPW art. 4A(5)).*

With respect to protections and liabilities, those for civilians authorized to accompany armed forces are similar to those for humanitarian personnel.

With respect to crews of merchant marine vessels and civil aircraft, those that do not engage in hostilities "*are in many respects treated like persons authorized to accompany the armed forces. Under certain circumstances, crews of merchant marine vessels and civil aircraft of a neutral that engage in hostilities may be treated like crews of belligerent vessels or aircraft.* [DOD LWM, 4.16]."

DOD Law of War Manual: *4.16.2 Merchant or Civil Crews – Detention. Members of the crews of merchant marine vessels or civil aircraft of a belligerent are entitled to POW status, if they fall into the power of the enemy during international armed conflict.*

The GPW contemplates that certain members of the crews of merchant marine vessels or civil aircraft of a belligerent may benefit from more favorable treatment under international law[,] *i.e., they would not be detained as POWs. During wartime, enemy merchant seamen have customarily been subject to capture and detention. However, the 1907 Hague XI provides that the crews of enemy merchant ships that did not take part in hostilities were not to be held as POWs provided "that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war." Although these provisions proved ineffective during World War I and…II, the GPW allows for the possibility that they might apply.* [This is an example where States choose to ignore the law of war with no repercussions.]

IV. Representatives of Neutral Nations

1-94. Military attachés and diplomatic representatives of neutral States who establish their identity as such and are accompanying an army in the field, whether within the territory of the enemy or in territory occupied by it, are generally not detained provided that they take no part in hostilities or provided that temporary detention is not necessary for security reasons or for their own protection. They may be ordered out of the theater of military operations and, if necessary, transferred to the custody of representatives of their respective countries. Only if such personnel refuse to quit the theater of military operations may they be interned. Commanders should work through command channels to ensure consultation with the Department of State regarding the appropriate disposition of such persons.

1.4.3 Position of This Manual (often inconsistent)

This Manual's approach to classes of persons is quite different and materially inconsistent with official manuals and international treaties. It includes two classifications of persons: combatants and non-combatants. Military personnel and civilians are found under both classifications. It does not include FM

6-27's category of "mixed cases" as virtually all persons, military and civilian, can be combatants or non-combatants given a particular situation. Categories of combatants and non-combatants are also addressed in Chapter 4 (Hostilities); Chapter 6 (Interrogation); Chapter 7 (Prisoners of War); Chapter 8 (Wounded, Sick, Medical Personnel, The Dead); Chapter 9 (Civilians); and Chapter 10 (Neutral Parties).

1.4.3.1 Combatants

Combatants are those persons, military or civilian, actively engaged in hostilities or, except for certain medical, religious, legal, or humanitarian personnel, willingly support or actively work on behalf of the war effort of a State or non-State belligerent or neutral party in a conflict considered war. All such persons are considered lawful combatants. All such persons are legitimate military targets and to be treated as prisoners of war if captured. Nonetheless, those who engage in acts against the State or non-State party of which they are a citizen or member, and have not previously and openly renounced their citizenship or membership, can be tried and executed for treason if convicted. Those classified as combatants include:

a. Military

1. *Traditional Military:* Personnel of all military branches of a State belligerent, regardless of whether in uniform or on duty, who have not fully surrendered, are not permanently physically or mentally incapacitated, or have not agreed to parole
2. *Militias et al:* Personnel of belligerent State-sponsored/affiliated and non-State militias, para-military groups, private armies (e.g., those of warlords), insurgents, guerrillas, and rebels, regardless of whether in uniform or on duty, who have not fully surrendered, are not permanently physically or mentally incapacitated, or have not agreed to parole
3. *Intelligence Operatives:* Spies, secret agents, and other intelligence personnel acting on behalf of a State or non-State belligerent against a party of which they may or may not be a citizen or member
4. *Saboteurs:* Saboteurs acting on behalf of a State or non-State belligerent against a party of which they may or may not be a citizen or member
5. *Terrorists:* Terrorists acting on behalf of a State or non-State belligerent against a party of which they may or may not be a citizen or member
6. *Mercenaries:* Mercenaries and other for-hire military/security personnel acting as part of or on behalf of a State or non-State belligerent's military activities and operations
7. *Levee en Masse:* Inhabitants of an area who participate in a popular uprising to defend against an invading force
8. *Medical Personnel:* Military medical personnel indistinguishable from and imbedded with combatants during combat operations; maintaining the general health of combatants or returning them to duty as soon as possible; located in legitimate military targets; taking offensive action against enemy combatants; providing or acting as conduits for intelligence; or helping coordinate escapes or actions detrimental to enemy forces
9. *Wounded et al:* Wounded and sick combatants capable of bearing arms or otherwise fulfilling their duties, or might reasonably return to duty within 30 days
10. *Religious Personnel:* Religious personnel inciting, leading, or otherwise influencing combatants to do harm to others as part of a conflict; indistinguishable from and imbedded with combatants during combat operations; located in legitimate military targets; taking offensive action against enemy combatants; providing or acting as a conduit for intelligence; or helping coordinate escapes or actions detrimental to enemy

forces (Note: "Religious personnel" is used throughout the Manual to describe those who minister to the religious needs of others, e.g., priests, chaplains, rabbis, imams, shamans.)

11. *Peacekeeping Forces:* Peacekeeping forces whose presence in the territory of a conflict has not been approved or authorized by all affected parties

b. Civilian

1. *Civilian Leaders:* Elected, appointed, and private sector leaders who materially influence and/or vote in favor of legislation, and issue resolutions or orders, that (1) provide funding for the conflict, (2) commit to engaging in or not withdrawing from the conflict, (3) direct the deployment and operations of armed forces which are or may be used in the conflict, or (4) otherwise make decisions regarding and influencing the continued prosecution of the conflict rather than withdrawal from it
2. *Diplomats et al:* Diplomats and other foreign service staff and employees of States, non-State parties, and international organizations in non-sanctuary or otherwise protected postings whose function, all or in part, is to secure intelligence, military assistance or alliances, military materiel, financial assistance, or other support which aid a belligerent in its war efforts
3. *Law Enforcement:* Law enforcement personnel engaged in identifying, seeking out, apprehending, holding, punishing, or kinetically engaging enemy combatants
4. *Government Employees:* Government employees working in or for ministries, departments, agencies, businesses, and other organizations and entities which have some degree of direct responsibility or support for the war effort
5. *Support Personnel:* Non-military persons and firms who are contracted, hired, or volunteer to support military operations, e.g., transportation; communications; cyber; propaganda; intelligence; weapons research, design, or manufacture; war materiel and supplies production or storage; military facility construction and operation; security of prisoners of war; security of combatant facilities and personnel
6. *Collaborators:* Willing collaborators who remain citizens or members of the group against whom they act and whose actions directly harm, or may potentially harm, non-combatants or the military forces of those against whom they act
7. *Illegal Possession:* Persons who willingly and knowingly store, hold, purchase, or transport prohibited arms, munitions, explosives, explosive devises and materials, and other weapons and similar materiel used in combat operations, or transport, possess, or hide publications, recordings, intelligence, or other like items associated with intelligence and information operations during a conflict
8. *Media:* Persons who are members of or use media (traditional, social) to provide false, distorted, or misleading information, commentary, or advocacy that may contribute to starting, exacerbating, or continuing conflicts
9. *Academics:* Academics who work on war-related projects, advocate for the war, or write articles, books, or treatises which are not factual or objective as they relate to the conflict
10. *Criminals:* Criminal elements which engage in hostilities associated with the conflict, or sell or otherwise provide personnel, war materiel, financial assistance, intelligence, or other support which aid a belligerent in its war efforts
11. *Advocates/Supporters:* Persons who, individually or as part of an organization, are willing, vocal, active, material supporters of the conflict, to include those who do so through social media, but are not directly involved in military operations or civil administration of the conflict

12. *Individual Belligerents:* Private persons who independently plan or engage in hostilities to support militarily, or through intelligence, a belligerent State or non-State party to the conflict
13. *Neutral Party Persons:* Citizens, residents, members, and employees of States, non-State parties, businesses, organizations, and other entities not formally part of or allied with a belligerent party but who sell or otherwise provide weapons, munitions, war materiel, financing, or other support which aid a belligerent in its war efforts
14. *International Organization Personnel:* Personnel of international organizations whose private or official actions further the war interests of a belligerent beyond that which may be appropriate for providing humanitarian assistance to both sides, or bringing about a resolution of the conflict respectful of the interests of all belligerent parties

When there is uncertainty as to whether a civilian meets the criteria of one of the preceding categories, that person should be considered a non-combatant. With respect to 4, 5, 13, and 14, unless the person is considered critical personnel (e.g., owner, director, officer, manager, essential technician/scientist), all other persons are only legitimate targets while on-site or when actively working off-site on a conflict-related task or transaction. Critical personnel may always be legitimate targets. Nonetheless, any of the above civilian, medical, or religious combatants, unless their targeting is especially important for military or political purposes, should not always become targets if there is a reasonable possibility their involvement is involuntary or their targeting may undermine support for the targeting party's war effort.

All the above should be considered legal combatants regardless of whether civilians or military and, if detained, treated with respect and consistent with positions of this Manual.

1.4.3.2 Non-Combatants

Non-combatants are persons, military or civilian, who do not actively engage in hostilities or, except for certain medical, humanitarian, legal, and religious responsibilities, do not willingly support or otherwise actively work on behalf of the war effort of a State or non-State belligerent. Non-combatants should not be made the object of attack, and feasible precautions should be taken to reduce the risk of harm to them; qualify for protections established for such persons; and may be temporarily detained when militarily necessary and interned for reasons of security and safety. When reasonably possible, assistance should be provided in conflict areas to non-combatants who are in distress. Those classified as non-combatants include:

a. Military

1. *Medical Personnel:* Medical personnel readily identifiable as such who restrict their activities to working in emergency and surgical locations; providing care for military families, non-combatants, prisoners of war, enemy combatants, or disabled and incapacitated persons; not engaging in offensive use of force, assisting prisoners to escape, conveying intelligence, or otherwise undermining or harming enemy forces; and not working in military targets
2. *Religious Personnel:* Religious personnel readily identifiable as such who restrict activities to ministering to the non-political religious and spiritual needs of combatants or non-combatants and do not engage in offensive use of force, assist prisoners to escape, provide or convey intelligence, otherwise undermine or harm enemy forces, or work/minister in legitimate military targets
3. *Judges Advocates:* Judge advocates readily identifiable as such who restrict their activities to providing legal service for law of war, civil, and criminal matters and do

not engage in offensive use of force, assist prisoners to escape, provide or convey intelligence, otherwise undermine or harm enemy forces, or work in lawful targets

4. *Wounded et al:* Except as allowed in certain specific situations (see Chapter 4 Hostilities; Chapter 8 Wounded, Sick, Medical Personnel/Facilities, The Dead), wounded, injured, sick, and psychologically disabled combatants who pose no reasonable threat or are not reasonably expected to be able return to duty within 30 days
5. *Prisoners of War:* Prisoners of war who fully surrender and comply with provisions of this Manual regarding the rights and responsibilities of POWs
6. *Parolees:* Paroled POWs who are readily identifiable as such and comply with the terms of their parole
7. *Conscientious Objectors:* Conscientious objectors serving involuntarily in the military who are readily identifiable as non-combatants by a distinctive insignia
8. *Permanently Disabled:* Physically or psychologically disabled combatants not contributing to the war effort in a meaningful way
9. *Peacekeeping Forces:* Peacekeeping forces whose presence, responsibilities, and authority have been agreed to by all affected parties

b. Civilian

1. *Civilian Leaders:* Elected, appointed, or private sector leaders who do not influence, advocate, or vote for legislation, and do not issue resolutions or orders, (1) for military budgets or otherwise provide funding supporting the conflict, (2) to engage in the conflict or prevent withdrawal from it, (3) for the deployment and operations of armed forces which are or may be used in the conflict, and (4) other similar decisions or actions affecting the prosecution of the war
2. *Diplomats et al:* Diplomats and other foreign service employees of belligerents serving in sanctuary and other protected locations, employees of certain international organizations who are citizens or members of a belligerent, and all diplomatic and foreign service personnel who are not involved in securing intelligence, alliances, materiel, financial assistance, or other support which aids the war efforts of a belligerent
3. *Law Enforcement:* Law enforcement personnel who are responsible for enforcing civil and criminal law not associated with the conflict, and not responsible for the identification, capture, kinetic engagement, punishment, or incarceration of enemy combatants
4. *Government Employees:* Government employees, to include contractors and volunteers, working in or for ministries, departments, agencies, and other public entities which are not responsible for any direct facet of the war effort
5. *Civil Defense Personnel:* Persons who perform certain humanitarian tasks to protect or assist the civilian population during conflicts, natural disasters, and other civil emergencies and do not take offensive actions against the enemy
6. *Cultural Site Guards:* Those persons assigned to protect cultural and historic sites and structures from destruction or depredation who are armed appropriately to their protection responsibilities
7. *Non-Supporters/Non-Advocates:* Persons, who individually or as part of an organization, are not willing, vocal, active, material supporters of the conflict and do not use social media in support of or distort facts about the war

8. *Civilian Occupations:* Persons who work in occupations and positions which are not directly related to the war effort even if combatants individually may patronize or benefit from the establishment and work of that person (e.g., shops, restaurants, theaters)
9. *Forced Labor:* Reasonably identifiable civilians who are forced against their will to provide labor for military units, operations, military installations, facilities, or fortifications
10. *Humanitarian Personnel:* Individual humanitarian personnel, e.g., medical/aid workers, and, if part of an organization, authorized by relevant belligerents to work in conflict area
11. *International Organization Personnel:* Personnel of international organizations functioning in their official capacities on behalf of their respective organization which do not further the war efforts of a belligerent except as may be appropriate for reaching a resolution of the conflict respectful of the interests of all belligerent parties
12. *Media:* Persons in or using the media (traditional, social) who do so only for matters unrelated to the conflict or, if addressing the conflict, share or report only factual information and objective commentary
13. *Academics:* Academics who work on non-military projects, do not advocate for the conflict, and do not write non-factual, non-objective articles, books, or treatises related to the conflict
14. *Criminals:* Criminal elements which do not engage in hostilities associated with the conflict or sell or otherwise provide personnel, war materiel, financial assistance, intelligence, or other support which aid a belligerent in its war efforts
15. *Persons of Neutral Parties:* Military attaches, diplomats and other foreign service personnel, military forces, citizens, residents, members, and employees of States, non-State parties, businesses, organizations, and other entities not part of or allied with a belligerent party and do not sell or otherwise provide war materials or other support which aid a belligerent in its war efforts, to include trade or humanitarian assistance not authorized by the enemy(s) of that belligerent
16. *Psychologically Incompetent:* Psychologically incompetent persons
17. *Other Civilians:* All other civilians if there is insufficient evidence to reasonably demonstrate they are a combatant as defined/indicated above

1.4.4 Commentary (inconsistent)

The major differences between this Manual and official U.S. manuals are (1) whether certain persons should be excluded from coverage under the law of war as not being "lawful/privileged" combatants due to a legal technicality under current U.S. policy and its interpretation or non-ratification of international law, and (2) whether certain persons, especially civilians protected under U.S. manuals and the formal law of war, are deserving of protection in all situations.

With respect to the first, with the exception of treason, all combatants under this Manual, both State and non-State, whether in uniform or not, and whether lawful under U.S. domestic law and military manuals, are expected to provide and be accorded the same respect and treatment. Thus, spies, saboteurs, terrorists, and irregular forces should be treated no differently than traditional military force combatants during combat or after capture, and would not be subject to the death penalty simply because of their actions as a combatant. With respect to non-State irregular forces, the U.S. position is different from Additional Protocols I and II of the Geneva Conventions, which many U.S. allies have signed but the United States has not. The Manual's position is more consistent with the Additional Protocols on this matter.

With respect to the second difference, the DOD Law of War Manual (4.2.1) states: "*because the ordinary members of the civilian population make no resistance, it has long been recognized that there is no right to make them the object of attack. Thus, States have departed from ancient and medieval practices of war between entire peoples, and instead, as much as possible, have treated war as contention between the professional military forces of warring states. This separation of the armed forces and the civilian population has greatly mitigated the evils of war*."

This Manual takes exception to the correctness of the DOD Law of War Manual and the desirability of such a position in all situations. The deliberate application in "ancient and medieval" times of kinetic force to large sections of the civilian population has not died out as a State practice in modern times. It was highly evident during World War II and present in every subsequent war of consequence. Additionally, most conflicts are not "between the professional military forces of warring states" but between State and non-State parties and between non-State parties. Further, large segments of the civilian population not only may resist but actually take conscious actions against and harm (even if not kinetically) the belligerent which is the enemy of the party of which they are a part and, thus, should not necessarily be exempt from targeting. Additionally, blockades and embargoes against a party are, in effect, using force which harms most persons of that party regardless of whether they are combatants.

While this Manual strongly believes belligerents can and should do a better job of protecting non-combatant civilians than often occurs, it holds a belief seemingly not part of current formal law of war: If civilians who advocate for a war, and whose willing support or assistance contributes to the continuation, execution, and potential success of that war, are shielded from the consequences of their advocacy, assistance, and support, there will likely be more wars that last longer with greater unnecessary death, injury, suffering, and destruction. This may be especially true when these civilians are distant from the battlefield, such as civilians in most economically advanced nations who in recent decades generally do not see, experience, or risk the ravages of war firsthand but whose forces engage in conflicts in distant lands.

Civilians like these should not automatically be entitled to protections beyond that afforded military personnel. The latter are often not the perpetrators of wars, but simply the tools carrying out civilian priorities, goals, and decisions and may be more "innocent" and worthy of protection than many civilians who are now protected under the formal law of war. Thus, civilians classified above as "combatants" should realize they are not exempt from being targeted by enemy forces, and understand the reasons why.

CHAPTER 2

War and the Law

Each man calls barbarism whatever is not his own practice.
Michel de Montaigne

Cicero once wrote Silent enem leges inter arma*, commonly translated as "In times of war, the law falls silent." While not this bleak, the reality on the battlefield is that reasonable, moral conduct is situational and that the custom of combatants—not formal law—often prevails, with justice dispensed for actions on the battlefield, not according to formal law or that which is necessarily right or just, but as those with power see fit.*

Vietnam Combat Veteran

Civilization is a hopeless race to find remedies for the evils it creates.
Jean Jacques Rousseau

2.1 Law of War Components

The precepts of the law of war are most commonly found in common practice/custom, principles, treaties, customary international law, domestic law, executive orders, military regulations, rules of engagement, and status of force/mission and related agreements. Each of these is described below. Except for "common practice/custom," "executive orders," "military regulations," and "status of force agreements," they are based primarily on the DOD Law of War Manual and the Operational Law Handbook (18th edition).

a. ***Common practice/custom*:** Common practice (often referred to as custom by those not in the legal field) are those actions, decisions, and positions in war widely considered acceptable by combatants even if not always considered so by civilians, the legal system, scholars, human rights advocates, the public, or higher levels of command. Custom or practice may or may not comply with international and domestic law. It may or may not be honorable, moral, or responsible. A purpose of this Manual to attempt to delineate that which is.

Under this Manual, common practice/custom is not customary international law (addressed in *d.* below). Rather it is that which precedes and may become customary, domestic, or treaty law as States, organizations, and others attempt to suppress, change, validate, or cause behavior in war based on their beliefs as to what is moral, honorable, reasonable, and necessary.

David J. Bederman in "International Law Frameworks (2006)" writes (*International Law and Armed Conflict, Fundamental Principles and Contemporary Challenges in the Law of War,* Laurie R. Blank and Gregory P. Noone, 2013):

> *Custom is a source unique for public international law. It also presents special problems of interpretation and methodology. Most of these problems stem from the fact that in most mature legal systems, lawyers typically assume that the only binding rules are those made by legislatures (or, by delegation, to administrative agencies or bureaucrats) or by courts. We tend to forget that law can also be made by the consent of communities of people, without any*

formal enactment by governmental entities. Indeed, such customs or practices are sometimes not even written down….

So custom remains a powerful, if subliminal, source of law even in 'mature' legal systems. But public international law is not a mature legal system at all—it remains strikingly primitive. ...[custom] *allows international legal actors to informally develop rules of behavior, without the necessity of resorting to more formal and difficult means of law-making (like treaties). Custom 'tracks' or follows the conduct of such actors as States, international institutions, transnational business organizations, religious and civic groups and individuals involved in international matters.*

Karns, Mingst, & Stiles in *International Organizations, The Politics and Processes of Global Governance* (2015), write: "[T]*he statute of the International Court of Justice recognizes five sources of international law (treaties or conventions,* ***customary practice****, the writings of legal scholars, judicial decisions, and* ***general principles of law*** [see following] [emphasis added]."

b. ***Principles:*** The DoD Law of War Manual (2.1.1 and 2.1.2) states that "*General principles of law common to the major legal systems of the world are a recognized part of international law. Law of war principles have been understood to be included in this category*," and further states that "[l]*aw of war principles provide the foundation for specific law of war rules*."

Law of war principles are found in and are relevant not just for the law of war but many other facets of war, e.g., principles of war, rules of engagement, joint operations with allies, codes of conduct. As principles are not as specific as most rules of law, interpretations may vary for a given situation. They can (1) help practitioners draft, interpret, and apply treaty and customary international law; (2) provide a general guide for conduct when no specific rule seems to apply; and (3) are an independent and reinforcing part of a coherent system for conduct.

c. ***Treaties*****:** Treaties (also referred to as conventions, protocols, and agreements) are international agreements concluded in written form between States, governed by international law, and binding on those States which are a party to them. Unless precluded by the treaty when it is acceded to, a State may withdraw from a treaty and no longer be bound by its terms. Also, unless precluded by the treaty, a State upon signature/ratification may limit by reservation certain terms or include interpretations of its application to or by that State.

States can have different procedures whereby accession to a treaty is considered to have occurred and legally binding. For some, this is simply signing the treaty. For others, even if signed, it may require a domestic ratification process. Under the U.S. Constitution, a treaty must receive "the advice and consent" of the Senate (i.e., ratification) for the United States to become obligated by its terms. Nonetheless, even without ratification, customary international law may be interpreted that compliance with some or all terms of a treaty are still required even by those not party to the treaty (see below description of customary international law).

With respect to war, the most relevant treaties are those associated with the law of war (LOW/ LOAC/IHL) and those of international human rights law (IHRL). A tension can exist between these two bodies of law as to that which takes precedence in certain situations.

With respect to treaties, two cautionary notes are relevant with respect to precedence and custom:

In analyzing the conduct of states, individuals or other parties during armed conflict…, the first inquiry will always be to see which treaties bind those relevant states. Note, however, that ***treaties do not trump custom*** [emphasis added]. (Laurie R. Blank and Gregory

P. Noone, *International Law and Armed Conflict, Fundamental Principle and Contemporary Challenges in the Law of War,* 2013)

History has reflected that…rules [of treaties] *have been honored only to the extent that they are practical, capable of universal acceptance, and therefore do not conflict with a nation's national security interests. History also records that where such rules have not accurately codified customary practice or met the preceding requirements, they have been disregarded in the ensuing conflicts. (*W. Hays Parks, *Air University Review,* February 1991)

d. ***Customary international law*:** Customary international law is assumed to be—but is not always in fact—the general and consistent practice of States that is followed by them from a sense of legal obligation (*opinio juris)* but is not created through a written agreement by States. Such customary law is generally binding on all States unless a State has been a consistent objector to all or portions of its legality or applicability.

Determining whether State practice and *opinio juris* is sufficiently developed and accepted to constitute customary international law can be difficult. With respect to determining State practice, the following as a minimum should be assessed: (1) whether the practice is extensive and virtually uniform among States; (2) that which is actual operational practice of a State's combatants when engaged in a conflict, i.e., custom; (3) the practice of specially affected States, e.g., those States involved in conflicts or situations whereby such practice might often be present; and (4) whether there is contrary practice in similar circumstances sufficient to suggest that an extensive and virtually uniform standard does not exist.

One must also determine whether common practice, if it does appear to exist, results from a sense of legal obligation (*opinio juris)* or simply reflects States' policies or practical interests. These latter do not constitute *opinio juris* and, if not, such practice is not considered customary law. Finally, it should be understood, while treaty rules often evolve from customary law, treaty provisions may or may not reflect customary law, or be based on customary law but not precisely reflect it.

[Note: Under the above minimum criteria, a State which is not "specially affected" may not be considered entitled to determine that which constitutes customary international law. Further, it is clear that what is accepted currently as customary international law may not actually be "that which is actual operational practice of a State's combatants when in engaged in a conflict, i.e., custom," but is simply that which is States' official policy, or they would like others to believe is their policy. In fact, there is some generally accepted customary international law which may not extensively meet any of the four criteria.]

e. ***U.S. domestic law*:** The legal force of an international law of war rule under U.S. domestic law is a function of whether that rule is part of a self-executing treaty, non-self-executing treaty, or customary international law. A treaty may be classified as self-executing if its requirements do not necessitate domestic legislative action to become a rule before domestic courts, and non-self-executing if a legislative body first must take action for this to occur. Customary international law is part of U.S. law if it is not inconsistent with any treaty to which the United States is a party or any controlling domestic executive or legislative act. U.S. domestic law also includes that of its own creation and adoption that is relevant to the interpretation, application, enforcement, and effectiveness of certain portions of international law. Examples are the Leahy amendments and the Uniform Code of Military Justice.

Regardless of the preceding legal technicalities, FM 6-27, 1-104, summarizes applicability domestically of treaties as follows: "*Army and Marine Corps personnel should treat and observe all treaties in force for the United States as federal law. Similarly, Army and Marine Corps personnel should treat and observe customary LOAC as part of U.S. law.*" Further, paragraph 1-97 states that "[a] *State's domestic law, however, cannot excuse that State's noncompliance with a treaty obligation as a matter of international law.*" [This Manual would take exception to this last statement if noncompliance is consistent with this Manual **(inconsistent)**. Additionally, those who determine that which is consistent custom often base it on what they would like to believe is custom because it meets their moral beliefs or biases as opposed to that which is the actual custom or practice of combatants.]

f. ***Executive orders*** *(*Wikipedia, 20 November 2020*): An executive order is a means of issuing federal directives…by the president of the United States* [to manage] *operations of the federal government*[, to include the military]. *...Article Two of the United States Constitution gives the president broad executive and enforcement authority to use their discretion to determine how to enforce the law or to otherwise manage the resources and staff of the executive branch. The ability to make such orders is also based on expressed or implied Acts of Congress that delegate to the president some degree of discretionary power…*

…executive orders are subject to judicial review and may be overturned if the orders lack support by statute or the Constitution. Some policy initiatives require approval by the legislative branch, but executive orders have significant influence over the internal affairs of government, deciding how and to what degree legislation will be enforced, dealing with emergencies, waging wars, and in general fine-tuning policy choices in the implementation of broad statutes. As the head of state and head of government of the United States, as well as commander-in-chief of the United States Armed Forces, only the president of the United States can issue an executive order.

Presidential executive orders, once issued, remain in force until they are canceled, revoked, adjudicated unlawful, or expire on their terms. At any time, the president may revoke, modify, or make exceptions from any executive order, whether the order was made by the current president or a predecessor.

g. ***Military regulations et al*****:** Military regulations and rules for proper conduct in war are most commonly found in manuals; handbooks; directives and instructions from Department Secretaries of the military, the Chairman of the Joint Chiefs of Staff, and Chiefs of Staff; and Presidential orders and memoranda. They do not establish law but rather state, summarize, or explain (1) that which is found in treaties to which the United States is a party, (2) portions of treaties to which it may not be a party but accept as applicable, (3) relevant domestic law, (4) customary international law which the United States accepts, and (5) U.S. policy, to include executive orders. Presently, these manuals, handbooks, directives, instructions, orders, and memoranda are that upon which training is typically based and with which U.S. military forces are expected to comply when involved in conflicts.

h. ***Rules of engagement (ROE)*****:** Joint Publication 1-02, Dictionary of Military and Associated Terms, states that "*ROE are directives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground, and air* (and, now, space)*] forces will initiate and/or continue combat engagement with other forces encountered."*

The Operation Law Handbook includes the following as to their purpose: *"(1) provide guidance from the President and Secretary of Defense (SECDEF), as well as subordinate commanders, to*

deployed units *on the use of force; (2) act as a control mechanism for the transition from peacetime to combat operations (war); and (3) provide a mechanism to facilitate planning. ROE provide a framework that encompasses national policy goals, mission requirements, and the law."* ROE are intended to "*ensure that national policies and objectives are reflected in the actions of commanders in the field, particularly under circumstances in which communication with higher authority may not be possible."*

ROE do not create laws of war but generally are based on them and may be more restrictive than such laws. Essentially, ROE are used by belligerents to tailor the rules of law for their use of force to the circumstances of a particular operation, conflict, or campaign.

i. ***Status of forces agreement (SOFA)*** (Wikipedia, 23 January 2020) ***:***

A status of forces agreement is an agreement between a host country and a foreign nation stationing military forces in that country. SOFAs are often included, along with other types of military agreements, as part of a comprehensive security arrangement. A SOFA does not constitute a security arrangement; it establishes the rights and privileges of foreign personnel present in a host country in support of the larger security arrangement…

A SOFA is intended to clarify the terms under which the foreign military is allowed to operate. Typically, purely military operational issues such as the locations of bases and access to facilities are covered by separate agreements. A SOFA is more concerned with the legal issues associated with military individuals and property. This may include issues such as entry and exit into the country, tax liabilities, postal services, or employment terms for host-country nationals, but the most contentious issues are civil and criminal jurisdiction over bases and personnel. For civil matters, SOFAs provide for how civil damages caused by the forces will be determined and paid. Criminal issues vary, but the typical provision in U.S. SOFAs is that U.S. courts will have jurisdiction over crimes committed either by a servicemember against another servicemember or by a servicemember as part of his or her military duty, but the host nation retains jurisdiction over other crimes.

The political issue of SOFAs is complicated by the fact that many host countries have mixed feelings about foreign bases on their soil, and demands to renegotiate the SOFA are often combined with calls for foreign troops to leave entirely. Issues of different national customs can arise – while the U.S. and host countries generally agree on what constitutes a crime, many U.S. observers feel that host country justice systems grant a much weaker set of protections to the accused than the U.S. and that the host country's courts can be subject to popular pressure to deliver a guilty verdict; furthermore, that American servicemembers ordered to a foreign posting should not be forced to give up the rights they are afforded under the Bill of Rights. On the other hand, host country observers, having no local counterpart to the Bill of Rights, often feel that this is an irrelevant excuse for demanding special treatment…

[If a military operation is by an international organization, such as the United Nations or NATO with multiple nations participating, rather than status of force agreements, these may be referred to as "status of mission agreements."]

2.2 Sources of the Law of War

2.2.1 Treaties

The formal law of war is based primarily on the following international treaties. Quoted text from U.S. military manuals often includes references to these treaties using the abbreviations found in parentheses at the end of the most relevant treaties, e.g., "GPW" for "Geneva Convention Relative to the Treatment of Prisoners of War."

Law of War Treaties to Which the United States is a Party:

1. Washington Convention Regarding the Rights of Neutrals at Sea of October 31, 1854 (10 Stat. 1105, TS 300, 11 Bevans 1214).
2. Hague Convention for the Exemption of Hospital Ships, in Time of War, from the Payment of all Dues and Taxes Imposed for the Benefit of the State of December 21, 1904 (35 Stat. 1854, TS 459, 1 Bevans 430).
3. Hague Convention III of October 18, 1907, Relative to the Opening of Hostilities (36 Stat. 2259, Treaty Series 538) (Hague III).
4. Hague Convention IV of October 18, 1907, Respecting the Laws and Customs of War on Land (36 Stat. 2277, TS 539) (Hague IV), and the Annex thereto, entitled Regulations Respecting the Laws and Customs of War on Land (36 Stat. 2295, TS 539) (HR).
5. Hague Convention V of October 18, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (36 Stat. 2310, TS 540) (Hague V).
6. Hague Convention VIII of October 18, 1907, Relative to the Laying of Automatic Submarine Contact Mines (36 Stat. 2322, TS 541, 1 Bevans 669) (Hague VIII).
7. Hague Convention IX of October 18, 1907, Concerning Bombardment by Naval Forces in Time of War (36 Stat. 2351, TS 542) (Hague IX).
8. Hague Convention XI of October 18, 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (36 Stat. 2396, TS 544, 1 Bevans 711) (Hague XI).
9. Hague Convention XIII of October 18, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War (36 Stat. 2415, TS 545, 1 Bevans 723) (Hague XIII).
10. Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of April 22, 1930 (3 Bevans 298) (London Protocol).
11. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (6 UST 3114, T.I.A.S. 3362, 75 UNTS 31) (GWS).
12. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (6 UST 3217, T.I.A.S. 3363, 75 UNTS 85) (GWS Sea).
13. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (6 UST 3216, T.I.A.S. 3364, 75 UNTS 135) (GPW).
14. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (6 UST 3516, T.I.A.S. 3365, 75 UNTS 287) (GC).
15. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (249 UNTS 240) (1954 Hague Cultural Property Convention).
16. Outer Space Treaty of 1967 (OST)
17. 1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (BWC)
18. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of October 10, 1980, its Protocols I, II, III, IV, and V, its Amended Protocol II, and its extended scope of application (1342 UNTS 137) (CCW).
19. Convention on Certain Conventional Weapons Amended Mines Protocol II of 1996 (CCW AMP II)
20. International Convention for the Suppression of Terrorist Bombings of 1997 (ICSTB)
21. International Convention for the Suppression of the Financing of Terrorism of 1999 (ICSFT)

22. Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, May 25, 2000 (Optional Protocol on Children in Armed Conflict).
23. International Convention for the Suppression of Nuclear Terrorism of 2005 (ICSNP)
24. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), December 8, 2005 (AP III).

Arms Control Agreements to Which the United States Is a Party That Are of Direct Relevance to the Law of War:

1. Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925 (26 UST 571, T.I.A.S. 8061, 94 LNTS 65) (1925 Geneva Gas Protocol).
2. Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of April 10, 1972 (26 UST 583, T.I.A.S. 8062, 1015 UNTS 163) (BWC).
3. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 18, 1977 (31 UST 333, TIAS 9614) (ENMOD Convention).
4. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of January 13, 1993 (CWC).

Law of War Treaties Signed but Not Ratified by the United States:

1. Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977 (AP I).
2. Protocol (II) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977 (AP II).

Law of War or Relevant Arms Control Treaties to Which the United States Is Neither a Signatory Nor a Party:

1. Hague Declaration (IV, 3) Concerning Expanding Bullets of July 29, 1899.
2. Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities of October 18, 1907.
3. Hague Convention VII Relating to the Conversion of Merchant Ships into Warships of October 18, 1907.
4. First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954.
5. Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of September 18, 1997.
6. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of March 26, 1999.
7. Convention on Cluster Munitions of May 30, 2008.
8. Rome Statute of the International Criminal Court of July 17, 1988 (Rome Statute)

The above list of treaties is primarily from and categorized as per FM 6-27. However, in the first grouping, this Manual has added 16, 19-21, and 23.

These treaties can be found online at such websites and links as the United Nations and International Committee of the Red Cross. With respect to remaining current as to treaties applicable to U.S. troops, the Department of State publishes an annual listing of those in force. If there is doubt as to the applicability of a U.S. treaty obligation, the judge advocate chain of command should be consulted.

When the United States has signed but not ratified a treaty, this may reflect an acceptance in principle, if not all specifics or interpretations, of what is found in that treaty with unratified treaty language sometimes reflected in military manuals and handbooks.

2.2.2 U.S. Military Manuals, Policies, and Regulations

The United States executive branch, Congress, and military have developed and adopted laws, orders, policies, and regulations which codify, explain, or simplify that required for proper conduct in war based on the international treaties the United States has ratified and within its interpretation of the language and intent of the ratified articles. These are incorporated into manuals, pamphlets, orders, memoranda, and handbooks for use by U.S. forces and include:

1. Department of the Navy, Naval Warfare Information Publication 10-2, Law of Naval Warfare (1955)
2. Department of the Army, FM 27-10 The Law of Land Warfare (1956; amendment of five articles in 1976; replaced by FM 6-27 [see below])
3. Department of Air Force, Air Force Pamphlet 110-31, International Law—The Conduct of Armed Conflict and Air Operations, (1976; updated 1980)
4. Department of the Army, FM 27-2, Your Conduct in Combat Under the Law of War (1984)
5. Department of the Navy, Marine Corps, and Coast Guard, Commander's Handbook of Naval Operations (1987; latest edition 2007)
6. Judge Advocate General of the Air Force's School, Air Force Operations and the Law (2002; subsequent editions in 2009 and 2014)
7. Department of Defense, Law of War Manual (2016, 2017)
8. Presidential Executive Order 13732, United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force (July 2016)
9. Presidential Memorandum, Report on the Legal and Policy Framework Guiding the United States' Use of Military Force and Related National Security Operations (December 2016)
10. Joint Chiefs of Staff, Joint Publication 3-0, Joint Operations (2017; 2018 update)
11. Joint Chiefs of Staff, Joint Publications Operations Series, 3-12 Cyberspace Operations (2018)
12. U.S. Army Judge Advocate General's Legal Center & School, Operational Law Handbook (18th edition, 2018 (with updated editions issued regularly)
13. Department of the Army & Headquarters, United States Marine Corps, FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare (2019)
14. TRADOC Pamphlet 600-4, The Soldier's Blue Book, The Guide for Initial Entry Training Soldiers (2019)

The preceding can be found online. In addition to the above, the military has manuals which elaborate upon or restate conduct which is expected of its military personnel during conflicts, such as those on interrogation, psychological/information operations, civil affairs/civic action, special forces operations, and counterinsurgency operations. FM 6-27 includes references to other sources which may be of value to combatants who are a member of or working with U.S. forces.

The most comprehensive of the above is the nearly 1200-page Department of Defense Law of War Manual (LWM). While this Manual includes language from, and assumes this language is that required by U.S. forces during war, the extent of the authority of the DOD Law of War Manual is stated as follows:

> *This manual represents the legal views of the Department of Defense. This manual does not, however, preclude the department from subsequently changings its interpretation of the law. Although the*

preparation of this manual has benefited from the participation of lawyers from the Department of State and the Department of Justice, this manual does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.

FM 6-27, issued in 2019, includes the following in its Preface:

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

Not only does FM 6-27 not purport to represent the position of any other component of the Department of Defense or DOD as a whole, it apparently does not even provide definitive conduct expected by the United States government and legal system of its army and marine forces for whom the manual was drafted.

In spite of these two manuals' 1400 pages and over three decades in their making, based on the above language, U.S. military forces currently do not seem to have current comprehensive law of war guidance that can be relied on as that legally expected of them by all components of their government.

Their 1956 predecessor, FM 27-10, The Law of Land Warfare, on the other hand, states in Article 1:

> *The purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States…*
>
> *…those provisions of the Manual which are neither statutes or texts of treaties to which the United States is a party should not be considered binding on courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.*

Unlike the recent manuals, FM 27-10 states clearly that it provides "authoritative guidance" and indicates articles binding in courts and tribunals (those reflecting language of statutes and texts of treaties of which the United States is a party) with all else being only of evidentiary value as to custom and practice.

In the absence of better guidance, perhaps FM 27-10's approach can reasonably be applied to FM 6-27 and the DOD Law of War Manual as to that with which U.S. military forces are expected legally to comply. When their text and footnotes reflect the language of statutes and treaties, this will be binding in courts and tribunals. When it does not, it may only be of evidentiary value as the opinion of lawyers, jurists, and others who drafted these newer manuals. Yet, it is unfortunate members of the U.S. military do not have a single manual in which they can have confidence that reflects the definitive positions of the United States government as to conduct expected of its military forces when engaged in war.

2.2.3 U.S. Domestic Law

2.2.3.1 Uniform Code of Military Justice (UCMJ)

In 1951, the United States put into effect the Uniform Code of Military Justice (UCMJ) with a major revision effective January 2019. Key articles which address conduct possibly relevant during conflicts include:

1. Article 81. Conspiracy
2. Article 82. Soliciting commissions of offenses

3. Article 83. Malingering
4. Article 85. Desertion
5. Article 86. Absence without leave
6. Article 87. Missing movement, jumping from vessel
7. Article 87a. Resistance, flight, breach of arrest, and escape
8. Article 87b. Offenses against correctional custody and restriction
9. Article 88. Contempt toward official
10. Article 89. Disrespect toward or assault of superior commissioned officer
11. Article 90. Willfully disobeying superior commissioned officer
12. Article 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer
13. Article 92. Failure to obey order or regulation
14. Article 93. Cruelty or maltreatment
15. Article 94. Mutiny or sedition
16. Article 95. Offenses by sentinel or lookout
17. Article 96. Releasing prisoner without proper authority
18. Article 97. Unlawful detention
19. Article 98. Misconduct as prisoner
20. Article 99. Misbehavior before the enemy
21. Article 100. Subordinate compelling surrender
22. Article 101. Improper use of countersign
23. Article 102. Forcing a safeguard
24. Article 103. Captured or abandoned property
25. Article 104. Aiding the enemy
26. Article 106. Spies
27. Article 107. Espionage
28. Article 109. Property other than military property of the United States—Waste, spoilage, or destruction
29. Article 110. Improper hazarding of vessel or aircraft
30. Article 112. Drunkenness and other incapacitation or controlled substance offenses
31. Article 113. Drunken or other reckless operation of a vehicle, aircraft, or vessel
32. Article 114. Endangerment offenses
33. Article 115. Communicating threats
34. Article 116. Riot or breach of peace
35. Article 117. Provoking speeches or gestures
36. Article 118. Murder
37. Article 119. Manslaughter
38. Article 119b. Child endangerment
39. Article 120. Rape and sexual assault generally (and more specifically in 120 a-c)
40. Article 121. Larceny and wrongful appropriation
41. Article 122. Robbery
42. Article 124a. Bribery
43. Article 124b. Graft
44. Article 125. Kidnapping
45. Article 126. Arson
46. Article 127. Extortion
47. Article 128. Assault

48. Article 128a. Maiming
49. Article 129. Burglary; unlawful entry
50. Article 132. Retaliation
51. Article 133. Conduct unbecoming an officer and gentleman
52. Article 134. General article: "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces"

For U.S. military personnel and assigned civilians, alleged violations of the international law of war, FM 6-27, the DoD Law of War Manual, other relevant manuals, and rules of engagement will generally be investigated, charges made, hearings held, courts-martial or other legal proceedings conducted, and administrative punishments instituted under UCMJ.

2.2.3.2 U.S. Human Rights Law

There are at least four U.S. domestic laws with human rights implications related to conduct in war. One is the Leahy laws or amendments; a second, the Child Soldier Prevention Act. Both are addressed in this section and Chapter 4 (Hostilities). In addition, the War Crimes Act of 1996 and Detainee Treatment Act of 2005 are relevant and addressed in Chapters 6 (Interrogation), 7 (Prisoners of War), and/or 13 (Enforcement).

a. Leahy Amendments

One of the two "Leahy amendments" (now law under the Foreign Assistance Act) establishes restrictions on U.S. Department of Defense (DOD) provision of military assistance to foreign security force units which commit severe human rights violations. The other applies to U.S. State Department provision of foreign aid and will not be addressed as it is not directly relevant for U.S. forces engaged in conflicts.

The Leahy amendment related to DOD states:

(1) Of the amounts [of funds] *made available to the Department of Defense, none may be used for any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights.*

(2) The Secretary of Defense shall, in consultation with the Secretary of State, ensure that prior to a decision to provide any training, equipment, or other assistance to a unit of a foreign security force full consideration is given to any credible information available to the Department of State relating to human rights violations by such unit.

(b) Exception.—The prohibition in subsection (a)(1) shall not apply if the Secretary of Defense, after consultation with the Secretary of State, determines that the government of such country has taken all necessary corrective steps, or if the equipment or other assistance is necessary to assist in disaster relief operations or other humanitarian or national security emergencies.

(c) Waiver.—The Secretary of Defense, after consultation with the Secretary of State, may waive the prohibition in subsection (a)(1) if the Secretary determines that the waiver is required by extraordinary circumstances.

(d) Procedures.—The Secretary of Defense shall establish, and periodically update, procedures to ensure that any information in the possession of the Department of Defense about gross violations of human rights by units of foreign security forces is shared on a timely basis with the Department of State.

"Gross human rights violations" in the law generally are considered personal/physical integrity rights violations, i.e., extra-judicial/arbitrary killings; torture or cruel, inhuman, or degrading treatment;

extended detention without charges or trial; forced disappearance; and other similar violations. "Foreign security forces" include both military and law enforcement.

Four key points should be noted:

1. The restrictions apply to "foreign security forces," not just security forces of States. Thus, the law would seem to be applicable to non-State foreign security forces (e.g., insurgents, war lords) as well as those of States.
2. The restriction applies only to *units* which perpetrate gross human rights violations, not necessarily an entire State or non-State party and all its security forces;
3. Violations must be "gross," not incidental or non-material; and
4. After consultation (not necessarily agreement) with the Secretary of State, the Secretary of Defense may still provide such military assistance "*if the equipment or other assistance is necessary to assist in disaster relief operations or other humanitarian or national security emergencies*."

Sections (1) and (2) state that "*credible information*" must exist as to a gross violation of human rights having been perpetrated by a "*unit*" before the restrictions of the law are applicable. Section (e) goes on to state that "*information as to gross violations in the possession of the Department of Defense…is shared on a timely basis with the Department of State*." However, there is no elaboration as to that which constitutes "gross violation," "unit," "credible," "in the possession of," or "on a timely basis."

In the absence of such elaboration, under this Manual, these terms are defined as follows **(uncertain but possibly reasonably consistent)**:

1. *Gross Violation*: This is a judgmental determination. The intent would seem to be that it is more than the isolated or even periodic incidents of an individual soldier or several soldiers acting on their own, especially if, when the matter is brought to the attention of their chain of command, the matter is investigated and appropriate disciplinary or other action taken if there is substance to the allegation. Even major violations, such as a My Lai or Abu Gharib incident, might not constitute a gross violation for purposes of withholding assistance if appropriate action following the incident was taken and punishments imposed, reassignments made, and/or better training undertaken.

   It would require a number of smaller violations, or violations across units of the same command or a major obviously gross violation, without appropriate steps by the chain of command to investigate and take appropriate action, to be indicative of "gross violation" sufficient to trigger compliance with the requirements of this law. Nonetheless, even if isolated and handled appropriately by the chain of command, any such incidents should be recorded in the event other acts are observed or learned of that might be indicative of a pattern that would constitute a lack of training and command oversight.

2. *Unit*: A "unit" is assumed to be that level of command which perpetrated, ordered, condoned, or refused to exercise investigative, oversight, or disciplinary authority over those individuals responsible for an alleged gross violation. In the military, it, therefore, could be a unit as small as a squad or platoon or as large as a division, army, branch of the military, or military as a whole.

3. *Credible Information*: "Credible information" is assumed to be that generated from:

   (a) First-hand observation, or confirmation based on an investigation, by personnel of a U.S. department, agency, or military force, with sources and details of violation documented and signed by those with direct knowledge of and/or who investigated the incident.
   (b) First-hand observation, or confirmation resulting from an investigation, by personnel of a close and reliable ally or reliable international governmental organization, with sources and details of violations documented and signed by those with direct knowledge of and/or who investigated.

(c) First-hand observation or confirmation by at least two reliable documented sources with details of violation provided and signed by the recipient agent, official, unit, section, or agency

4. *In Possession Of*: "In possession of" is assumed to mean that a civilian official or military officer of the Department of Defense has generated or been provided, in written and signed form, one or more of the preceding documentations of gross violation.
5. *On a Timely Basis*: "On a timely basis" is assumed to mean that any receipt of such verified, written, and signed documentation by a member of the Department of Defense will be provided to the Department of State no less frequently than monthly.

Not referenced in the language of the law is an additional means by which military assistance can be provided even if noncompliant with the Leahy amendments. A specific program can be adopted by law which includes "notwithstanding" language exempting that program from other laws, to include the Leahy amendments. According to the Operational Law Handbook (18th Edition), an example of this has been the Afghan Security Force Fund.

As written, the Leahy amendment related to the DOD would seem to allow significant latitude to U.S. military forces involved in active armed conflicts to determine on their own when it is appropriate to provide military assistance when human rights violations may have occurred. Nonetheless, according to the Operational Law Handbook, some U.S. field commanders believe the law has been applied too broadly and has interfered with their ability to train foreign troops allied with the U.S.

While the vetting process for receiving approval for exceptions may be reasonable when there is no active conflict or when viewed some distance from the battlefield, it may not be when engaged in active conflict situations. At such times, it is the position of this Manual that the above vetting process may be overly cumbersome and unreasonable if it were to preclude assisting, leading, or operating with a foreign security unit which may have committed gross human rights violations but is essential to the survival of one's unit or accomplishment of an assigned military mission of importance. In such circumstances, a determination may be made by the commander in the field as to whether a sufficiently important disaster, humanitarian crisis, or public safety or other security emergency exists **(inconsistent)**.

b. Child Soldier Protection Act (CSPA)

The Child Soldier Protection Act passed in 2008 has facets similar to the Leahy amendments which are addressed here. Those which cover conduct related to the recruitment, use, and treatment of child soldiers are addressed in Chapter 4 (Conduct of Hostilities). Under the CSPA, certain distinctions are made for those under 18 and 15 years of age.

Specifically, this law prevents authority granted in the Foreign Assistance Act of 1961 and the Arms Export Control Act to be used to provide assistance or issue licenses for direct commercial sales of military equipment to the government of a country that is clearly identified for the preceding fiscal year *"as having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers*."

The President (not the Secretary of Defense nor military commanders in the field) may waive prohibition if this is in the national interest of the United States. The President also may provide assistance otherwise prohibited upon certifying that the government of such country has implemented:

> (1) *measures that include an action plan and actual steps to come into compliance with the standards outlined in the act; and*
> (2) "*policies and mechanisms to prohibit and prevent future government or government-supported use of child soldiers and to ensure that no children are recruited, conscripted, or otherwise compelled to serve as child soldiers.*

The President may also provide assistance to a country for international military education, training, and nonlethal supplies otherwise prohibited under the act upon certifying that:

> (1*) "the government of such country is taking reasonable steps to implement effective measures to demobilize child soldiers in its forces or in government-supported paramilitaries and is taking reasonable steps within the context of its national resources to provide demobilization, rehabilitation, and reintegration assistance to those former child soldiers; and*
> (2) "*the assistance provided by the United States Government to the government of such country will go to programs that will directly support professionalization of the military."*

Exceptions may remain in effect for a country for no more than 5 years.

Allowable penalties for those convicted of violations, or attempts to violate or conspire to violate the act, include fines, imprisonment for not more than 20 years, or both and, if death of any person results from a violation, fines and imprisonment for any term of years to include life.

The above language does not appear to preclude providing such assistance to certain non-State parties not supported by a State which use child soldiers. While this may be a violation of the spirit of the law, the United States and its military forces could conceivably provide support and operate with non-State parties who do not meet the above standards without being in violation of this law.

While the preceding elements of the CSPA may be reasonable in many circumstances, they may not be when involved with cultures very different than one's own or in certain more extreme combat situations. At such times, compliance with the act may preclude assisting a foreign military force which has technically violated the law but doing so was essential to a unit's survival, the accomplishment of a military mission of critical importance, or required to protect a village or territory, when faced with a militarily superior force. It is the position of this Manual that, under such circumstances, it is permissible to support, assist, or operate with such State or non-State parties **(inconsistent)**.

2.3 International Human Rights Law

2.3.1 Introduction

Human rights are those considered to be universal and inherent (i.e., inalienable) no matter a person's race, ethnicity, gender, age, political persuasion, religion, nationality, wealth, status, or other such factors and considerations. With respect to children, provided their well-being is adequately protected and provided for, and until that child has reached maturity in the culture and/or nation of which he or she is a part (often but not always considered between puberty and 18 years depending on the country or culture), under international human rights law, the extent to which such rights are granted fully to a child is the decision of the person(s) responsible for the child.

2.3.2 International Human Rights Treaties

With respect to war, the most relevant international human rights treaties are:

1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)
2. 1951 Convention Relating to the Status of Refugees (CRSR)
3. 1965 International Convention on the Elimination on All Forms of Racial Discrimination (ICERD)
4. 1966 International Covenant on Civil and Political Rights (ICCPR)
5. 1977 International Covenant on Economic, Social, and Cultural Rights (ICESCR)
6. 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
7. 1984 Convention Against Torture, Inhuman or Degrading Treatment, or Punishment (CAT)
8. 1989 Convention on the Rights of the Child (CRC)

9. 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC)
10. 2006 International Convention for the Protection of All People from Enforced Disappearance (CPED)

The United States has ratified 1-4, 7, and 9 of the preceding; signed but not ratified 5, 6, and 8; and taken no action on 10. Thus, U.S. military and other personnel are only subject to 1-4, 7, and 9. Nonetheless, certain allies and other parties which have acceded to the terms of treaties not ratified by the United States may expect adherence to standards reflected in them. Additionally, there can be language in ratified treaties which are interpreted by our allies and the enemy, or portions rejected outright by them, which are different from the United States' interpretation or acceptance of this same language or portions of these treaties.

2.3.3 Derogation

With respect to the International Covenant on Civil and Political Rights (ICCPR), derogation (i.e., suspension) is allowed during certain national emergencies, to include war, for all rights but the following:

1. Prohibition on arbitrary taking of life
2. Prohibition on torture and cruel, inhuman, or degrading treatment or punishment
3. Prohibition on slavery and involuntary servitude
4. Prohibition on imprisonment due to an inability to fulfill a contractual obligation
5. Prohibition on *ex post* punishment, i.e., punishment for laws not in effect when an act was committed
6. Recognition as a person before the law
7. Freedom of thought, conscience, religion, and parental choice as to their children's religion and education

There is no language in other international human rights treaties which explicitly allows derogation of rights not included in the ICCPR. This might seem to suggest their intent was that rights included under them would remain in effect even during armed conflict. However, international treaties as to the law of war explicitly allow certain acts which could result in infringements on rights protected under non-ICCPR human rights law. With respect to guidance for combatants, unless instructed otherwise, the non-derogable rights of ICCPR should be those combatants are most cognizant and respectful of in their operations and actions. This will be addressed in more depth in Section 2.5 *Lex Specialis* and Applicable Law in War.

2.3.4 Human Rights of Soldiers

2.3.4.1 Introduction

If, as many believe, a human right is one which is inalienable and universal, i.e., a right solely because a person exists, then by logical extension, soldiers have the same human rights as any other person, to include those which are non-derogable. Under this interpretation, a soldier would be entitled to all political, civil, economic, social, and cultural rights no different than any other person.

The most relevant of the non-derogable rights for a soldier would be freedom from involuntary servitude and arbitrary killing. Yet it is legal under international law for persons to be required to serve against their will and to be killed by their legally recognized enemies. Even in peace and when distant from the battlefield, other human rights of those in the military are derogated to varying degrees. Thus, the relevance for those in war is whether, and to what extent, various human rights are recognized to exist for

combatants as this can affect the presence, nature, and degree of military service and conduct in war of both one's own forces and those with whom or against whom one is fighting.

2.3.4.2 Freedom of Expression and Assembly

Both freedom of expression and assembly are derogable under international human rights law during national emergencies for all persons and, thus, would be for soldiers as well. This is consistent with U.S. law which extends to situations other than national emergencies. In the case of Parker vs. Levy (1974), the U.S. Supreme Court established limits on freedom of expression in the military. The court ruled that demands of military necessity are superior to individual constitutional rights in the military setting.

The online First Amendment Encyclopedia (2019) includes the following with respect to Parker vs. Levy:

> *Justice William H. Rehnquist, writing for the Court majority, recognized that service personnel possess constitutional rights but noted that the 'fundamental necessity for obedience, and…the imposition of discipline' might require greater limitations of First Amendment rights than are tolerable within civilian life. These necessities arise from the fact that the military is 'a specialized society separate from civilian society,' ready to fight wars and to act without question in response to orders. Consequently, the Court rejected claims of vagueness regarding the UCMJ, claiming that prior constructions of the Articles in question narrowed the scope of their application. The Court also denied to service personnel the right to challenge the Articles for overbreadth*.

On the surface, this U.S. Supreme Court ruling would be consistent with IHRL during times of national emergency, but perhaps not when there is no national emergency. However, in that the purpose of armed forces is not only to operate during a national emergency but always be prepared to do so, for this narrow group of persons under U.S. law, restrictions on free assembly and speech might always be considered applicable when felt necessary so long as a person is a member of a military force.

The following from a 2013 Opinion of The Judge Advocate General of the Air Force are examples of where courts upheld restrictions on First Amendment rights of those in the military:

- Directly encouraging or attempting to encourage other military members to shirk their duty or making statements critical of war efforts to other military members
- Distributing on-base newsletters critical of the war effort
- Participating in an anti-war rally (in civilian clothes) and carrying a sign critical of the President
- Participating in an overseas anti-war rally (in civilian clothes) in violation of a regulation against such activity
- Disrespecting the flag while on duty
- Disrespecting senior officers
- Making a false speech about fictitious battlefield accounts
- Speech amounting to sexual harassment or abuse of subordinates
- Anonymously posting white supremacist recruiting materials in a public place
- Circulating a petition on base without first getting command approval
- Trying to convince other military members to refuse the anthrax vaccine
- Applying stickers and signs on vehicles demeaning to the President

Nonetheless, military personnel always have the moral right to express "positions of conscience." However, in doing so, they must be willing to undergo possible consequence if this undermines "good order and discipline" or otherwise reduces the operational effectiveness of one's unit.

2.3.4.3 Involuntary Servitude

If a person voluntarily enlists or joins a military, or otherwise voluntarily participates in an armed conflict, such service would not comprise involuntary servitude and no human rights violations would have occurred by such service. However, drafts, conscriptions, *levees en masse* [if participation mandatory], human trafficking, and abductions to secure soldiers could comprise involuntary servitude. Further, while initially a person may voluntarily become part of a military force, that person may not wish to serve beyond their contracted obligation. At that point, requiring continued service would seem to be a violation of their non-derogable human right to be free from involuntary servitude.

The U.S. Constitution, while not specifically referencing drafts or conscription, does include the right to "raise and support Armies" which has been interpreted to allow drafts/conscriptions so long as Congress, no less frequently than every two years, approves funding for those serving in the armed forces. When drafts exclude the registration and drafting of women, drafts and conscriptions of only men could be considered a violation of a man's human rights as all persons would not be being treated equally under the law. However, this has not yet resulted in any law or court ruling that would preclude men from being drafted against their will regardless of whether women are as well. (Note: Allowing the drafting of women was initially part of the 2022 United States military appropriations bill but deleted in late 2021.)

In summary, while involuntary servitude as a non-derogable right would seemingly be precluded under international human rights law, it is not under the international law of war or U.S. Constitutional law. While some might argue that *lex specialis* (see Section 2.5 for discussion of *lex specialis*) would allow a State to force persons to serve during times of war, the ICCPR explicitly states that involuntary servitude is non-derogable even during national emergencies. Thus, a situation exists where IHRL conflicts with the law of war and the U.S. Constitution. How this might be resolved is addressed in Sections 2.5 and 4.2.

2.3.4.4 Arbitrary Killing

With respect to one's right to be free from arbitrary killing, the challenge is determining that which constitutes "arbitrary." Arbitrary can be defined as being "based on random choice or personal whim rather than any reason or system." Using this definition, for soldiers who die in war, seldom is it because of random choice or personal whim but due to "reason and system" determined by civilian leaders, military commanders, and even individual soldiers on both sides making the most rational choices possible given information available and the goals they are trying to accomplish. Of course, this same position could be taken by a government wishing to suppress democratic elections or political opponents (armed or otherwise), i.e., such killings are not arbitrary although they may be extra-judicial. However, the ICCPR excludes arbitrary killings, not seemingly extra-judicial ones. Whichever, the killing of combatants in war is generally not arbitrary, and neither the law of war nor human rights law preclude.

There are other situations where choices must be made as to who dies—or has the greater risk of dying—and who does not. For example, under the formal law of war, certain civilians, prisoners, women, children, the injured and incapacitated have a privileged position over that of the soldier, i.e., the soldier's life is generally considered less worthy of saving during war than those of protected persons when such choices have to be made. Here again, it could be argued that this is not arbitrary, but rather based on reason and a system of priorities as to who lives and who dies with these priorities inculcated in the formal law of war which favors civilians, prisoners, and certain others over soldiers.

Yet, under some religions and value systems, one life has no greater value than another. If one imposes the standards of the formal law of war which make protected persons' lives more valuable than that of soldiers, is one then violating the rights of those soldiers with such a religious belief? As freedom of

conscience and religion are not derogable under international human rights law (namely ICCPR), the answer might legitimately be Yes.

While not generally relevant for U.S. military personnel, the Supreme Court in the United Kingdom ruled in 2013 that there are situations whereby soldiers are protected under Article 2 of the European Convention of Human Rights which protects the right to life. While the court's ruling does not infringe on battlefield decisions which result in the death of soldiers, it does require that soldiers must be properly prepared and equipped when committed to combat. Thus, when working with U.K. military units, this may be the standard with which they are expected to comply.

A major factor this ruling fails to address is its seeming assumption that governments and other parties to a conflict have the ability to ensure that all persons committed to combat can always be properly trained and equipped. Such an assumption is flawed. Two historical examples are the Continental Congress's inability to secure resources consistently to adequately train, arm, and retain Washington's army and, had Germany soon invaded England after Dunkirk, many in England likely would have been thrown into combat without adequate training or equipment. Neither should be considered a violation of the law.

Additionally, what the U.K. Supreme Court does not seem to appreciate in its ruling is the conundrum whereby the better one trains and equips one's own soldier, while possibly reducing his or her risk of dying, may increase the risk to soldiers whose nation or cause cannot provide such training and equipment. Thus, the ruling discriminates in favor of those who are more advantaged against those who are less so. In essence, the Supreme Court of the United Kingdom has chosen to interpret European human rights law to favor its own soldiers over the less-resourced against whom they may fight. That is logical and reasonable under custom. While perhaps a stretch in light of *lex specialis,* it could be interpreted as illegal under international human rights law where all persons, not just one's own citizens, essentially have the same non-derogable right to life.

There can be further situations in which a soldier's inherent right to life comes into question. One is when a protected person, e.g., civilian, neutral party, prisoner, or detained person, has knowledge that, if shared with a soldier, might save the soldier's life or that of other combatants. If the protected person chooses not to share that information, have the right to life of the soldier and those other combatants been violated?

Under international human rights law, this would not seem to be a violation of the soldier's right to life. IHRL only addresses what a person's rights are but does not include concomitant responsibilities of a specific non-combatant towards another person's right to life. Effectively, only a State's responsibilities and that of its agents are addressed.

Nonetheless, one could argue that at least soldiers who are prisoners are agents of their State and, therefore, have an obligation under IHRL, and even possibly under the law of war, to help protect the lives of their captors if they can do so without undue risk to themselves. If they are to have special protection from their captors and certain exigencies of war due to the fact they are prisoners, should prisoners not also have a reciprocal responsibility towards their captors? Under custom/common practice, the answer would be No.

There can also be an additional complication in expecting non-combatants to share such information. If they do, this may increase the probability their life will be lost if it becomes known that the non-combatant provided such information. While soldiers are expected to incur an increased likelihood of loss of life in order to reduce harm to protected persons, under neither IHRL or the formal law of war is there an apparent reciprocal responsibility by protected persons. So again, under formal international law,

if there are no responsibilities of one individual to another with respect to the right to life, provided the former is not an agent of the State, that right has been derogated.

2.3.4.5 Concluding Comments

The only human rights of soldiers which would appear non-derogable under IHRL, LOW, and U.S. domestic law are "*the recognition of a person before the law*," and prohibitions against:

1. Torture and cruel, inhuman, or degrading treatment or punishment
2. Slavery (but not involuntary servitude)
3. Imprisonment due to an inability to fulfill a contractual obligation
4. *Ex post* punishment
5. Freedom of thought, conscience, and religion and a parent's right to determine the education and religion of their children

In light of this, no formal *legal* foundation seems to exist for the position that, other than the preceding, there are human rights which are universal and inherent for soldiers simply because they are persons.

Nonetheless, it is the position of this Manual that, in certain situations delineated herein, a soldier may have the same right to life as that of persons protected under the formal international law of war and international human rights law. Additionally, even though possibly illegal and punishable under domestic law, each individual has the moral right to refuse to serve, especially if the party they are being forced to serve is waging an unjust war as defined in this Manual. **(inconsistent)**

2.4 International Law and Use of Force

International law attempts to govern the relations between State and non-State actors, both in peacetime and war. *Jus ad bellum* is that part of international law that attempts to regulate circumstances in which State and non-State parties may resort to the use of force. *Jus in bello* is that part of international law relating to the conduct of hostilities, the protection of persons, and relationships between belligerents and between belligerents and non-belligerents. This section primarily addresses *jus ad bellum;* the remainder of the Manual, primarily *jus in bello.*

2.4.1 UN Charter

When States sign the UN Charter, under Article 2(4), they pledge to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. Provided reasonable means for maintaining peace have been exhausted, there are circumstances where the use of force by States will not violate this prohibition, which include (1) authorization by the UN Security Council, (2) consent of the territorial State where the use of force occurs, or (3) individual or collective self-defense against armed attack. With respect to the right of self-defense, many States individually, to include the United States, and collectively may use a relatively broad interpretation as to that which constitutes self-defense against armed attack, to include the stated right to take pre-emptive action to prevent an attack, and to respond to use of force by another party even if not necessarily armed attack.

The Charter delegates significant authority to the Security Council to "*determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures in accordance with Article 41 and Article 42, to restore and maintain international peace and security.*" Over time, the Security Council has expanded what it accepts as a threat to international peace and security which has been greeted with both support and opposition among scholars and nations.

Regardless of where one might stand on the issue, for a State which wishes or intends to employ force, the international landscape has changed somewhat since the years of the Cold War when it was

uncommon for a State to seek UN approval for its actions. Since the First Gulf War, States have increasingly looked for legitimization for their use of force and see potential downsides if they do not, either in fewer or more reluctant allies, less legitimacy for their actions among their own citizens, or possible future loss of international support when it may be more critical than in the current conflict for which they seek approval.

Recognizing this, the United States may seek UN approval when in the past it may not have. When it does, the U.S. may employ political pressure and foreign assistance incentives to secure approval. Other nations do as well, but sometimes with fewer carrots and sticks at their disposal. Yet, even the United States is not always successful in its efforts to secure approval. While the Security Council approved Resolution 1373 which affirmed the right of the United States to act with force in self-defense against terrorist groups and provided a degree of legitimacy for its military actions in Afghanistan, the UN did not support the U.S. invasion of Iraq in the Second Gulf War which proceeded anyway. Rather than broad international support, the U.S. was forced to move forward with only its "coalition of the willing."

Nonetheless, the U.S. decision to move forward despite not receiving UN authorization is perhaps more indicative of reality than is general compliance with the UN Charter and seeking Security Council approval on matters seen by States as critical to their security, economic, or political interests. The NATO bombings in Bosnia in 1999 did not have UN approval nor did NATO's 2011 bombing of Libya although, with respect to the latter, NATO claimed it was simply acting in support of Security Council Resolution 1973. Russia did not seek UN approval for its invasion of Georgia in 2008, annexation militarily of Crimea in 2014, or support of separatist forces in eastern Ukraine since then. Nor does China seek UN approval with respect to its policies and use of force in Tibet and the South China Sea. Generally, in spite of an increase in States seeking UN approval for their international actions, major powers still do as they choose, and smaller ones will if the wrong toes are not stepped upon or there is no major worldwide pushback. In summary, States, especially the more powerful, regularly choose to violate international law, to include the formal law of war (i.e., UN Charter Article 2(4)), which seldom results in charges against their leadership.

2.4.2 Humanitarian Intervention

While not part of the UN Charter or ratified treaty law, international customary law is evolving whereby there is increasing acceptance that the use of force by one State may be deployed to protect human rights in another State without UN Security Council approval or invitation from the State where the violation is occurring. The final document on outcomes of the 2005 United Nations-sponsored World Summit endorsed this emerging norm, that of a *responsibility to protect* (R2P), which is seen as a soft-law basis for humanitarian intervention when States are unable, unwilling, or otherwise fail to protect those at risk from genocide, ethnic cleansing, or other severe human rights violations (*International Organizations,* Karns, Mingst, and Stiles, 2015). This also is currently the position of the United Kingdom and Denmark. The United States periodically seems to use this position to justify taking certain kinetic and non-kinetic actions.

Yet, there are many in the field of national security law who, while understanding the often-admirable reasons for intervening when human rights are being egregiously violated, feel that such humanitarian intervention is fraught with the potential for abuse and may result in undesirable unintended consequences. Their position is that humanitarian interventions should be precluded unless approved by the Security Council, or the UN Charter is amended to allow such interventions. Presently, a problem with this is that the need for these interventions can be in the country of a permanent member of the Security Council, or in State or among non-State parties allied with or of special economic or other interest to a permanent member. As a result, humanitarian interventions in such States may be vetoed.

In light of the preceding, humanitarian intervention when egregious violations occur, especially of certain physical integrity rights, is acceptable under this Manual if it meets the standards of *just ad bellum* found herein **(uncertain given evolving custom)**. Nonetheless, humanitarian intervention is another example of the leadership of States violating the formal law of war and suffering no legal consequences for doing so.

2.4.3 Decision Responsibility

Decisions as to the use of force, and whether doing so complies with *jus ad bellum* principles, is relevant not only at the national level (the position of FM 6-27), but at all levels, as multiple parties make use of force decisions, not just State governments **(possibly inconsistent).** Such parties include but are not limited to:

- Sub-State governments, ethnic groups, religious sects, insurgents, warlords, and other non-State parties;
- Commanders isolated by circumstances from communications with their main force or government who may have to make commitment of force decisions if an active war is not in effect when a decision to act is required; and
- Persons, whether soldiers or civilians, who may have to decide whether to support or fight in a war depending on whether it is just or unjust.

Thus, all persons should understand at least the basics of that which constitutes *jus ad bellum*.

2.4.4 *Jus ad Bellum* Criteria

In making decisions as to the use of force, any person or entity should use similar standards as a State, as outlined in preceding sections, and compliant with DOD Law of War Manual 1.11.1 *Jus ad Bellum* Criteria:

- a competent authority to order the war for a public purpose;
- a just cause (such as self-defense);
- means proportionate to the just cause;
- all peaceful alternatives exhausted; and
- a right intention on the part of the just belligerent."

Although contrary to the DOD Law of War Manual, if all other criteria required for a war to be just are reasonably met, under this Manual, the "competent authority for ordering the war" can be other than the State. Among these can be a State's citizenry, state or regional governments within a State, certain non-State military forces and parties, and the UN Security Council **(inconsistent except for the latter)**.

2.4.5 Just/Unjust War

Although not fully consistent with the formal law of war and the DOD Law of War Manual, the following are examples of just and unjust wars:

Just Wars

1. Defending against an attack by another party **(consistent)**
2. Preventing an imminent attack by another party **(consistent with U.S. interpretation)**
3. Defending an ally or neutral party unjustly attacked by another party **(consistent)**
4. Removing a tyrannical, corrupt or illegal power in authority, especially if such power is egregiously violating human rights with a material negative effect on the population **(likely still inconsistent)**
5. Protecting/enforcing commonly recognized international boundaries **(consistent)**

6. Preventing the proliferation **(likely inconsistent)** or imminent use of weapons of mass destruction or their placement in outer space **(possibly consistent)**
7. Preventing material, long term/permanent environmental damage or destruction beyond the recognized territorial boundaries of the violating party **(possibly inconsistent)**
8. Halting genocide and other egregious violations of physical integrity rights when the State in which they occur is unable or unwilling to halt such violations **(possibly inconsistent although changing)**
9. Securing resources necessary to meet basic human needs of one' own population not available otherwise without causing one's adversary to be unable to meet its own **(inconsistent)**

Unjust Wars
(generally consistent)

1. Imposing a belligerent's political or economic system, religion, culture, government, or other belief system on others
2. Seizing territory not reasonably recognized as that of the belligerent or no reasonable historic, ethnic, or other such basis for borders to be adjusted
3. Seizing resources not essential to the belligerent's survival or are otherwise available to the belligerent without war
4. Securing persons against their will to work in or outside their homeland
5. Interfering improperly in the legal elections or economies of others
6. Indulging a desire for personal fame, wealth, power, possessions, or land
7. Defending an illegal, corrupt, or tyrannical government
8. Pursuing genocide

There are those in the law of war field who suggest that there can only be one just belligerent in any conflict. If one belligerent is engaged justly, then its adversary can only be an unjust belligerent. While this might simplify matters as to which party to the conflict has a morally or legally superior position, the possibility exists that those on each side of a conflict can both be engaged justly or unjustly. This is evident from the above examples of that which are just and unjust reasons for going to war. Parties to the conflict can have multiple reasons for becoming engaged, both just and unjust, or when going to war for a just reason violate a criterion which is legitimately unjust to their enemy.

2.5 *Lex Specialis* and Applicable Law in War

The following is from the Operational Handbook of the U.S. Army Judge Advocate General's Legal Center & School, 18th Edition:

…There are two primary views regarding how IHRL and LOAC interact with each other when arguments can be made that both apply to armed conflict.

1. The Displacement View*. Traditionally, IHRL and the LOAC have been viewed as separate systems of protection, where one wholly displaces the other. The displacement view is an all-or-nothing approach that results in either IHRL or LOAC setting the rules that govern* [some element of] *the armed conflict at issue. This view applies IHRL and LOAC to distinct situations and relationships. The United States embraced this view until recently.*

a. The displacement view adheres to the legal maxim lex specialis derogat lex generalis*, or the more specific rule displaces the more general rule. LOAC is cited as the* lex specialis *in relation to situations of armed conflict and therefore governs during armed conflict, displacing peacetime laws such as IHRL. The LOAC includes restrictive triggering mechanisms which limit its application to*

specific circumstances. This view also notes that the LOAC largely predates IHRL and therefore was never intended to comprise a sub-category of IHRL.

b. The Law of Armed Conflict, under the displacement view, regulates relations between belligerents and protected persons such as civilians, usually not a state's own citizens or nationals during armed conflict. For example, the 1949 Geneva Conventions largely do not apply to a state's own nationals, the very group IHRL was designed to protect. Much of the Fourth Convention applies to "protected persons," a group characterized as civilians in the hands of their nation's enemy.

c. Under the displacement view, IHRL, as the lex specialis *during peacetime, regulates the relationship between States and individuals within their territory and under their jurisdiction during peace. This reflects the original focus of IHRL—to protect individuals from the harmful acts of their own governments.*

2. Complementarity view. *An expanding group of scholars and States view the application of IHRL and the LOAC as complementary and overlapping. Under the complementarity view, LOAC does not displace IHRL during armed conflict. According to complementarity, IHRL can regulate a sovereign's conduct towards individuals on distant battlefields during armed conflict if its rules are a better fit than LOAC's for a given situation. The International Court of Justice adopted this view in two different Advisory Opinions. The Court determined that although the ICCPR prohibition on arbitrary deprivation of life still applies during armed conflict, in order to define arbitrary*[,] *one must refer to the LOAC as the* lex specialis*. Most international scholars accept that the LOAC constitutes a* lex specialis *for situations of armed conflict, particularly international armed conflict. In non-international armed conflict, where there are fewer codified LOAC protections, courts are increasingly applying IHRL rules and protections.* [Note: This trend in application may be creating a situation where non-State parties are using unreasonably what is often referred to as 'lawfare' in an attempt to restrict a State party opponent from employing force legal under the law of war.] *Accordingly, U.S. partners in multilateral operations, particularly in non-international armed conflicts, may be subject to significant operational restrictions.*

3. Most recent Periodic Report. *In the United States Fourth Periodic Report to the UNHRC, the U.S. State Dep't stated that 'a time of war does not suspend the operation of the* [ICCPR] *to matters within its scope of application.' The Report also noted that:*

> *. . Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts . . .*

These statement[s] *suggest that while the United States has not changed its position on the ICCPR's scope of application, it will consider rule-by-rule whether the LOAC displaces applicable provisions of IHRL when IHRL has been determined to apply geographically. In situations of armed conflict, where the LOAC provides specific guidance, LOAC, not IHRL, will likely set the rules and provide authoritative guidance for military action. However, where LOAC is silent or its guidance inadequate, specific provisions of applicable human rights law may supplement, or possibly even displace, at least to a limited degree, the LOAC in a particular situation. ...*[T]*o date there have been no significant pronouncements by U.S. officials declaring that a specific IHRL norm overrides a rule found in the LOAC.*

Based on the preceding, it is clear at the international level (a) certain human rights are derogable in times of national emergencies, i.e., all human rights do not take precedence in every situation; (b) there are

armed conflict situations in which LOAC/LOW (not IHRL) takes precedence as *lex specialis*; and (c) the International Court of Justice considers both these branches of international law.

It should be noted that, except possibly for the United States and Israel, other nations no longer seem to accept officially the concept of *lex specialis* as to the primacy or displacement of LOAC/LOW over IHRL. As Colonel Mark Dakers (British officer serving at the International Institute of Humanitarian Law) stated in a session of the 2021 1st IHL In-Depth Course, "That ship has sailed." Nonetheless, for those in US and Israeli forces who do not fall within the control of another State, *lex specialis* continues to be relevant. Further, regardless of their official position, most nations will be satisfied if their forces are compliant with the law of war even if it may be non-compliant with IHRL if the action occurs during an obvious militarily-relevant conflict situation.

As for custom (common practice) and customary law, their applicability is more complicated with likely less widespread agreement as to when they might apply and take precedence over IHRL or LOW based on international treaties. While States generally accept the legitimacy of customary international law over, or in addition to, treaty law, there is no precise delineation or universal agreement as to when and how custom actually becomes customary law and applicable. From a practical standpoint, its acceptance and use likely will not occur until most nations, especially major nations and permanent members of the UN Security Council, agree that custom has "graduated" to legally binding customary law.

As for responsible practice/custom as defined in this Manual, most judge advocates, scholars, diplomats, jurists, and international bureaucrats, even if sometimes agreeing with the reasonableness and morality of a particular custom or practice of combatants, may reject its legitimacy. On the other hand, soldiers and others who make actual field decisions in war will often continue to follow responsible practice/custom with some commanders overlooking non-compliance with formal law when this is seen as responsible, reasonable, and/or moral.

While possibly contrary to the position of the international legal community and judge advocates within most nations' militaries, in active conflict situations, under this Manual, the following is that which should be adhered to:

1. For most situations in conflicts, the formal law of war should have primacy and be that to which one first refers and attempts to comply **(consistent)**.
2. When formal law of war is not clear or is unreasonable to a specific situation, responsible practice/custom as delineated in this Manual should be followed if (a) it can reasonably be determined, (b) there is general consensus of those involved in making the decision as to what responsible custom or practice would reasonably be, or (c) those persons who order or carry out the action believe what they are doing is moral, honorable, and necessary and, if wrong, are willing to face possible charges, conviction, and resulting punishment for an action not compliant with the formal law of war **(inconsistent)**.
3. In all situations where formal law of war and responsible practice are not relevant or may be reasonably set aside, even in active combat areas, IHRL should be followed **(likely consistent)**.

2.6 Law of War Application

Combatants should be prepared to comply with the law of war whenever there is the possibility or actuality of military operations or hostile actions by a State or non-State party of which the combatant is a member. In the simplest terms, if you are trying to shoot or otherwise harm others for political, religious, or similar reasons, or they are trying to shoot or harm you and the nation or cause of which you are a

member, conduct delineated under the law of war and this Manual is applicable. However, there can be exceptions. Whether it applies and, if so, which of its rules apply, is a function of a range of factors.

a. Civil Purposes* (consistent):* The law of war is generally *not* applicable when military forces are used primarily for civil purposes, such as disaster relief, border control, and internal civil disturbances and tensions, such as riots, sporadic acts of violence, and political demonstrations.

b. Prior to Hostilities* (consistent):* The law of war may apply before hostilities begin. When a party intends to conduct or may have to respond to hostilities, the law of war should be taken into account before fighting actually begins, such as in planning anticipated military operations, gathering intelligence, or determining whether preventive or first strike actions are legally or reasonably permissible. This is addressed in more detail in Section 2.7 Right of Self-Defense.

c. Existence of War* (generally consistent):* War is when one party, be it a State, regional or local government, movement, cause, ethnic group, tribe, or other organized assemblage of persons, plans for and inflicts material harm to further political, economic, religious, moral, or other like goals and policies upon or against another party, or defends against the imposition of such goals and policies by another party and uses force when doing so. A state of war, whereby conduct under the law of war are applicable, exists if the preceding exists. It need not require a formal notification, declaration or acknowledgement of war. It need not employ attacks using traditional military weapons. However, the preceding assumes a determination by opposing sides that a state of war exists. If one or both do not, under this Manual, a FM 6-27 (1-14) rule of thumb should come into play for combatants: "…*where parties are, in fact, engaged in activities that LOAC contemplates…, those activities are subject to LOAC.*"

d. International vs. Non-International Conflict*:* For some parties to the conflict, to include the United States, whether and how the law of war applies is different depending on whether the conflict is international or non-international. This Manual's position is that the law of war applies the same whether international or non-international **(inconsistent).** Nonetheless, combatants should understand the position of the U.S. Army and Marine Corps reflected in FM 6-27:

> From 1-8. *Different LOAC rules can apply to an armed conflict against another State versus an armed conflict against a non-State armed group, such as a terrorist or insurgent group. Guidance will come from higher authority regarding which rule set may apply; but,* ***if no such guidance is forthcoming, commanders must adhere to the LOAC rules for State-on-State conflict*** *described in paragraph 1-14 below*. [emphasis added due to its extreme importance]
>
> From 1-14. *An* **international armed conflict** ***(IAC) refers to any declared war between States, or to any other armed conflict between States, even if the state of war is not recognized by one of them****. The Geneva Conventions apply to all cases of international armed conflict and cases of partial or total occupation of a territory, even if the occupation meets no armed resistance (Common Article 2 to Geneva Conventions). Other law of war treaties also generally apply to international armed conflict and occupation (such as the Hague Conventions of 1907). The United States has interpreted "armed conflict" in Common Article 2 of the 1949 Geneva Conventions to include any situation in which there is hostile action between the armed forces of two* [State] *parties, regardless of the duration, intensity, or scope of the fighting (see DOD Law of War Manual, 3.4.2).*
>
> 1-15. ***A* non-international armed conflict** ***(NIAC) is an armed conflict … between a State and a non-State armed group or a conflict between two non-State armed groups*** *(Common Article 3 to GWS, GES Sea, GPW, and GC). In assessing whether a NIAC exists, isolated and sporadic*

acts of violence, such as riots, and other acts of a similar nature do not amount to armed conflict (see DOD Law of War Manual, 3.4.2.2).

1-16 *Armed conflict not of an international character' for the purpose of applying the obligation in Common Article 3 of the 1949 Geneva Conventions was not specifically defined in those conventions. There is a range of views on what constitutes an 'armed conflict not of an international character' for this purpose. The intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between a NIAC and 'internal disturbance and tensions…'*

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

Common Article 3 of the 1949 Geneva Conventions

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties [i.e., those States party to the treaty]*, each party to the conflict shall be bound to apply, as a minimum, the following provisions:*

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

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- *(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- *(b) Taking of hostages;*
- *(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;*
- *(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

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

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

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

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

The inclusion of Common Article 3, which has been ratified by the United States, would lead one to believe this is the U.S. position with respect to the treatment of belligerent combatants in all conflicts, and included in its manuals, policies, and actions. Nonetheless, the United States does not always follow or

comply with this position. For example, when addressing those who are lawful combatants with rights of such combatants if captured, that which has been its position with respect to combatants kept at Guantanamo, and in positions taken by both the Bush II and Obama administrations with respect to non-legally compliant interrogation, the United States definitely distinguishes different classes of combatants with respect to their rights once captured. Essentially, it is the U.S. position that non-State combatants, especially if considered part of terrorist organizations affiliated with Al Qaeda, are not lawful combatants and do not have the same rights as other combatants. It is the position of this Manual that *all* combatants as enumerated in Chapter 1 are "lawful" combatants and subject to the rights and obligations outlined in this Manual **(inconsistent)**.

e. Civil War **(inconsistent with U.S. policy; consistent with the law of war)***: "The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents* [FM 27-10, 11a]*."* This language would seem to apply to any civil war, whether in one's own country or another country. There is no clarity as to that which constitutes "recognition of the rebels as belligerents," or by whom this recognition is to be agreed to or established.

The DoD Law of War Manual in Section 3.3.3.1 outlines four criteria by which *outside* States could recognize a rebel faction as a belligerent:

(1) general state of armed conflict in a territory,
(2) armed group occupies and administers a significant portion of national territory,
(3) armed group acts under responsible chain of command and respects the law of war, and
(4) circumstances exist that make it necessary for outside States to define their attitude toward the conflict.

These same criteria can provide a basis to recognize a rebel group by the State experiencing the internal conflict. However, there are shortcomings to the standards which create inappropriately high bars whereby recognition will more likely be denied and LOW not applicable. The first such shortcoming is the requirement that a "significant" portion of national territory must be occupied and administered. In a country as large as the United States, Brazil, China, India, Russia, and others, in order to be recognized, a rebel group might have to occupy and administer a region of multiple states or other large administrative districts, but not if there were widespread insurgent activity across most of the nation but only pockets (and possibly even no areas) are functionally occupied and administered.

The second is that the rebel group "respects the rule of law." As the formal law of law has been written, perhaps sometimes unintentionally, to benefit State actors with larger, better equipped militaries and greater resources to the detriment of smaller, poorly equipped belligerents, rebel groups may not reasonably be able to comply fully with "the rule of law" even if they wished to do so. If States are considered lawful belligerents even when they do not respect the law of war, it is unclear why respect for the law should be a criterion for non-State parties to be considered lawful belligerents.

Regardless of whether the above standards are fully met, all belligerents should follow the LOW if they are engaged in conflicts where there are recognizable antagonists, e.g., insurgents, guerrillas, terrorists, and others involved in asymmetric warfare. This position is consistent with Common Article 3 and Additional Protocols I and II even if not with the U.S. position.

2.7 Right of Self-Defense (generally consistent)

Prior to the recognized existence of a conflict, or when protected persons are engaged (e.g., medical, religious, judge advocates, civil defense, those protecting cultural resources), force may be used in self-defense in response to an ongoing or imminent attack by a State or non-State party and its combatants. In

such instances, force should be used only as necessary to bring an attack to an end, reverse the successes of the attack, or avert an imminent attack. Ideally, there should not be a practical alternative to utilizing the force applications planned or carried out in response to an attack.

In the case of responding in advance to a possible attack (anticipatory self-defense), there should be an actual or strongly probable threat and any unnecessary delay would result in the threatened party's inability to defend itself or avert the attack. When assessing the imminence of a possible attack, reference should be made to:

- the gravity of the attack,
- the capability of the attacker, and
- the nature of the threat.

Acts of self-defense are permissible to protect against imminent threat or actual use of other than simply kinetic armed military force, e.g., material economic coercion (see Section 1.3.f. "Force"). When exercising the right of self-defense, the principles of distinction, precaution, and proportionality should be applied (see Chapter 3 Principles of the Law of War). The force contemplated or used generally should not be excessive in relation to the need to avert or bring to an end an attack or to reverse the successes of an attack. Ultimately, however, the final determination of "proportionality" is that of the party protecting against actual or imminent attack (see Section 1.3.d. "Proportionality of Response").

If the right of self-defense is to be exercised in the territory of another State, it should be evident that:

(1) such State is unable or unwilling to deal with the attacking party, and
(2) it is necessary to use force from outside to deal with the threat where the consent of the territorial state cannot be obtained.

Force in self-defense directed against the government of the state in which the attacker is found is justified only in so far as it is necessary to avert or end an attack.

Measures of self-defense taken by State and non-State parties (but not necessarily those by belligerents during an ongoing conflict unless unwarranted attacks on protected persons are egregious) should be reported to the UN Security Council. The nature and timing of informing the Security Council of measures taken is at the discretion of the party protecting against actual or imminent attack consistent with its security requirements. The Security Council retains the right and responsibility to authorize collective military action to deal with actual or latent threats.

(The preceding draws on but overall is materially different from Chatham House ILP WP 05/01, "Principles of International Law on the Use of Force by States in Self-Defense," Elizabeth Wilmshurst, October 2005.)

2.8 Protecting Powers and Humanitarian and Human Rights Organizations

The 1949 Geneva Conventions specifically provide for *protecting powers* and contemplate the need for *humanitarian organizations*. *Human rights organizations*, which are not humanitarian organizations per se, have increasingly become involved in conflicts around the world. Each of these will be addressed.

2.8.1 Protecting Powers

Under the Geneva Conventions, protecting powers are neutral, non-belligerent States having humanitarian roles in armed conflicts. The appointment and role of a protecting power is at the discretion and authority of the States involved in its selection and acceptance as such. The protecting power's activities are conducted with the consent of the State in whose territory it serves and whose facilities it visits. A State can serve as a protecting power for more than one side in a conflict. If a State serving as a protecting

power enters the conflict, it can no longer perform as a protecting power for other belligerents in that conflict. A detaining power has the obligation to seek a protecting power if such does not exist for the wounded, sick, shipwrecked, medical personnel, chaplains, and prisoners of war within its control. [Note: This Manual's position is that a detaining power "will ideally seek" a protecting power but does not have an "absolute obligation" to secure one **(possibly inconsistent)**.]

Once selected and agreed upon, a protecting power may perform various functions, to include:

1. Assisting belligerents in complying with the Geneva Conventions
2. Monitoring and verifying compliance
3. Facilitating communications between belligerents regarding treaty implementation
4. Serving as a point of appeal for protected persons during conflicts

A belligerent may impose security restrictions on the activities of the personnel of the protecting powers working in its territories or facilities. Under the formal law of war, belligerents are only supposed to restrict activities of the protecting power's personnel "*as an exceptional and temporary measure when this is rendered necessary by imperative military necessity*." A protecting power should ensure that its personnel do not exceed their humanitarian responsibilities and respect the necessities of security and compliance challenges faced of the State within which it carries out its activities.

If a State cannot be found to perform the role of a protecting power, the International Committee of the Red Cross (ICRC) or other impartial humanitarian organization can assume the humanitarian functions performed by protecting powers if agreed to by all relevant parties.

The preceding summary of protecting powers is generally drawn from FM 6-27 (1-105 through 1-113) and the DOD Law of War Manual (18.15.1.2) and is consistent with the position of this Manual with the exception noted above and the following additions:

a. The Geneva Conventions addresses protecting powers occurring by the consent of and between States. It is this Manual's position that the humanitarian functions performed by protecting powers can also be desirable and appropriate in State versus non-State conflicts and those between non-State parties, and should occur if the consent of relevant belligerents can be obtained **(not inconsistent)**.

b. The Geneva Conventions states that any restriction of access by a protecting power for security reasons must only be an "exceptional and temporary measure" required by "imperative military necessities." In reality, the detaining power will do as it pleases with respect to access regardless of whether denial of access meets this standard. While a protecting power may insist on greater access as anticipated under the Geneva Conventions, if it wishes to continue to have any access, it will likely have to accede to what the detaining power deems appropriate. Otherwise, the detaining power may choose to exercise its right that a protecting power's presence is only at the consent of State in which the protecting power operates and whose facilities are being visited. **(not inconsistent)**

   If access problems arise, the protecting power has a decision to make:

   (1) do only that which the detaining power allows,
   (2) request greater access through diplomatic channels,
   (3) formally and/or legally protest the lack of access, or
   (4) resign from its role as the protecting power.

   In making this decision, the protecting power should make its determination based on that which is best for detained persons under the control of the detaining power and those who may become

so in the future, not whether the law is being fully complied with by the detaining power **(possibly inconsistent)**.

It should be understood that, while the detaining power may be seen as unreasonable and in violation of international law if it does not allow full access, it has to make decisions as to that which it believes is in the best interests of its cause, people, and country/territory, and that there may be legitimate reasons why its facilities and practices do not meet standards required under the Geneva Conventions, e.g., insufficient resources, the nature of the conflict **(possibly inconsistent)**.

2.8.2. Special Status of the International Committee of the Red Cross (ICRC)

"*The Geneva Conventions explicitly recognizes the special position of the ICRC among impartial humanitarian organizations. Similarly, Congress has specifically authorized—and the President has designated—the ICRC to be extended the same privileges and immunities that are afforded public international organizations in which the United States participates. The President has also recognized the role of the ICRC in visiting individuals detained in armed conflict. The ICRC does important work in visiting detainees, facilitating communications between detainees and their families, organizing relief operations, and undertaking similar humanitarian activities during armed conflict; it also provides confidential reports to the detaining power to facilitate humane treatment of detainees. As a practical matter, good relations with ICRC representatives in the field are essential to conducting detainee operations. In common practice, the ICRC fulfills the function of a central information agency for POWs and civilian internees during armed conflict*." (FM 6-27, 1-113)

In addition to the preceding, the ICRC often issues policy proposals and interpretive guidance on a variety of international law issues as they relate to conduct in war. "[A]*lthough] sometimes influential, these are not binding on States. In some cases, the United States has not accepted the ICRC's proposals or interpretations and instead expressed opposing views.*" [FM 6-27, 1-113].

This Manual concurs with the positive role the ICRC can potentially play in armed conflicts and the desirability of working closely with this organization whenever possible. However, for this to occur will be a function of the ICRC and its personnel remaining impartial, meeting its confidentially obligation with respect to reports regarding reasonable treatment of detainees, and understanding that its interpretative guidance on matters of international law is only that, interpretive, not binding **(possibly inconsistent)**. While the involvement of the ICRC in detainee operations is generally desirable, it is not mandatory **(inconsistent)**.

2.8.3 Humanitarian Organizations (generally consistent unless otherwise noted)

Humanitarian organizations (to include what are referred to as voluntary and relief agencies) are those which provide services that enhance the well-being of others. The Geneva Conventions contemplates such organizations, if impartial and in addition to ICRC, not only acting as possible protecting powers but also helping to mitigate the loss, suffering, and destruction of those affected by the ravages of war.

It is the position of this Manual that impartiality requires that such organizations:

- Operate only within the terms of their agreed upon humanitarian mission
- Refrain from acts harmful to either side
- Refrain from reports and public statements critical of either side **(possibly inconsistent)**

Violation of any of these could be a legitimate basis for revoking consent for the humanitarian organization to continue its operations in a conflict area. However, assisting one side or the other by

providing medical relief, food, clothing, and similar assistance is not a violation of impartiality if those activities are within an organization's humanitarian mission as agreed upon by all relevant parties.

Belligerents control a humanitarian organization's access to their territory and areas of military operations and may attach conditions to their consent. It should be noted that "belligerents" has been used in the preceding sentence, not "States" as does FM 6-27, as humanitarian organizations may wish to operate within areas not controlled, or only partially controlled, by a State. In such situations, if the organization does not have consent of all belligerents in an area, State and non-State alike, its operations may become targets of attack, supplies seized, and personnel harmed.

Commanders in the field have discretion for legitimate military reasons to deny requests for support from these organizations, to include not providing them classified or sensitive information or dedicated security. Nonetheless, when resources are available and doing so will not unduly harm missions of military importance and the safety of their personnel, military forces should provide logistical support and protect humanitarian operations whenever possible for humanitarian, political, and operational reasons. Assisting the local population in this manner may help undermine support for opposing belligerents and increase it for the assisting force.

2.8.4 Human Rights and Advocacy Organizations (possibly consistent)

While the distinction is not always this clear, among international non-governmental organizations (INGOs), there are those whose primary function is to provide services (e.g., education, health care, food and clothing, housing assistance, agricultural development, disaster relief, mine removal, care of children) and those where it is reporting/advocacy. The former includes those impartial humanitarian organizations addressed in the previous section. The latter includes human rights organizations.

In geographic areas of actual or potential conflict and in the field of domestic and international law which govern conflicts, human rights and other advocacy groups are increasingly present and influential. While their goals are generally admirable and their work well-intentioned, their actions can, at times, unfairly and inappropriately undermine the ability of military forces to conduct their missions in a manner that is consistent with the law of war. This occurs in a number of ways to include:

- Applying their own standards as to that which is acceptable in war as opposed to that which is an actual violation of international law
- Conducting insufficient investigation into reported wars crimes prior to inclusion in human rights compliance reports, rankings, and news releases
- Including as human rights violations in reports and annual rankings actions that are not illegal under international law
- Issuing non-objective and/or inflammatory headlines, interviews, news releases, and reports as part of "naming and shaming" strategies in an attempt to force compliance with their values, not necessarily international law
- Judging the reasonableness of actions by combatants which result in civilian casualties based on unreasonable standards
- Failing to consider that combatants have certain basic human rights just as non-combatants do

Such advocacy organizations have no inherent or legal right to be allowed access to one's territory, areas of conflict, or military forces. Nonetheless, when making access decisions, potential benefits and costs should be weighed as blanket exclusion can potentially undermine one's cause, support, and reputation. Ideally, advocacy organizations that are allowed access will be those with records of objectivity, understanding of the law of war, appreciation of that faced by combatants, and willingness to work constructively with all military forces to achieve the purposes of the law of war. For those which do not,

efforts should still be made to educate them as to the law, facts, and conditions on the ground and, failing that, take actions to counter biased reporting and advocacy.

CHAPTER 3

Principles of the Law of War

You people speak so lightly of war; you don't know what you're talking about.

I am tired and sick of war. Its glory is all moonshine. It is only those who have neither fired a shot nor heard the shrieks and groans of the wounded who cry aloud for blood, for vengeance, for desolation. War is hell.

War is cruelty. There is no use trying to reform it. The crueler it is, the sooner it will be over.

William Tecumseh Sherman

It is always easier to fight for one's principles than to live up to them.

Alfred Addler
Psychologist (1870-1937)

We have the wolf by one ear, and we can neither hold him nor let him go. Justice is in one scale, and self-preservation in the other.

Thomas Jefferson
Letter to John Holmes

3.1 Introduction

This chapter delineates law of war principles which attempt to balance conduct that is as humane and honorable as practicable when doing that which is politically and militarily necessary to achieve a war's goals as quickly and efficiently as possible.

Law of war principles are the basis for military doctrine, effective combat operations, and the ethical standards of the military profession. These principles provide:

- The foundation for specific law of war rules,
- A touchstone for when no specific rule applies and in new, unusual, and complex situations, and
- Guidance for interpreting specific treaty or customary rules

As principles are not as specific as rules, interpretations of how they apply to given situations may vary. Nonetheless, combatants can use these principles to help make difficult decisions in military operations. For example, with these principles as a guide, one can assess whether there is a legitimate military purpose for an action; a course of action is unreasonable or excessive; or whether there are precautions that can be taken to reduce unnecessary death, injury, suffering, and destruction. (The preceding is based on FM 6-27, 1-18, 1-20, and 1-22.)

FM 6-27 and the DOD Law of War Manual include five law of war principles:

1. Military necessity
2. Humanity
3. Honor
4. Distinction
5. Proportionality

This Manual adds two additional:

6. Political necessity
7. Precaution

FM 6-27 indicates that military necessity, humanity, and honor comprise three interdependent principles which together provide the foundation for other derivative principles, like distinction and proportionality, as well as most of the treaty and customary rules of the law of war. This Manual would suggest that "political necessity" should be considered a fourth interdependent principle which together with the other three provide the foundation for derivative/process principles and rules of the law of war. It would add "precaution" as a third derivative principle.

3.2 Military Necessity (somewhat inconsistent)

FM 6-27 (1-23) and the DOD Law of War Manual (2.2) define military necessity as "*the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC.*"

This Manual defines it as *"the principle that justifies the use of all measures necessary to defeat the enemy as quickly and efficiently as possible while attempting to further the purposes of the law of war."*

The difference is that the two official manuals require all measures employed "are not prohibited by LOAC." This Manual's priority is that all measures should help "further the purposes of the law of war." Under the DOD and FM 6-27, compliance with the law would seem more important than better achieving the purposes for which the law was established. Under this Manual, it is the reverse.

a. Compliance vs. Non-Compliance with the Law of War

FM 27-10, Article 3, includes the following as to why compliance with the law is considered a requirement, rather than aspirational, under military necessity. FM 6-27, the DOD Law of War Manual, and the Geneva Conventions provide similar language.

> "*Military necessity has been generally rejected as a defense for acts forbidden by customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity*."

This Manual rejects the premise that, during the development and framing of customary and treaty law, military necessity was reasonably and adequately taken into consideration. As a consequence, the formal law of war does not include a realistic view and understanding of military necessity for many situations faced by those engaged in war. As a consequence, the last clause of these military manual's definition of military necessity is inappropriately couched. Helping to "*further the purposes of the law of war"* is the true goal of the law, not simply strict compliance when laws are not reasonably or morally applicable.

While FM 6-27's definition assumes the formal law of war has been framed properly with respect to the principle of military necessity, time, wars, and the practice of responsible combatants have often shown it has not. Thus, the objective of proper conduct in war is not simply to comply with the law, but to make decisions on a case-by-case basis which may better help "*reduce unnecessary death, injury, suffering, and destruction*" and facilitate the restoration, sustainability, and maintenance of peace. If these can be accomplished but are non-compliant with the law, then the law in that instance may reasonably be violated **(inconsistent)**.

b. Determining Military Necessity (generally consistent)

This Manual does, however, concur with the DOD Law of War Manual where it clearly and appropriately outlines that which is faced in war and how combatants may act with regards to military necessity if they have done so in "*good faith based on the relevant information available to them at the relevant time.*" The following from the DOD Law of War Manual (2.2.3, 2.2.3.1) addresses the challenges of acting "*in good faith*" given the uncertainties and often situational nature of war.

> Military necessity *is a difficult concept to define and apply. What is necessary in war may depend closely on the specific facts and circumstances of a given situation, and different people often assess* military necessity *differently. The limited and unreliable information available during war compounds this difficulty in evaluating what is necessary. This difficulty runs throughout the law of war, since military necessity is itself important and is an element of many principles and rules.*
>
> *The law of war seeks to ameliorate these difficulties in applying* military necessity *by (1) permitting consideration of the broader imperatives of winning the war as quickly and efficiently as possible; (2) recognizing that certain types of actions are, as a general matter inherently militarily necessary; and (3) recognizing that persons must assess the* military necessity *of an action in good faith based on the information available to them at the relevant time and that cannot be judged based on information that subsequently comes to light* [(3) is sometimes referred to as the "Rendulic Rule"].
>
> *In evaluating* military necessity*, one…is not restricted to considering only the demands of the specific situation.*
>
> *This is the case because* military necessity *justifies those measures necessary to achieve the object of war, and the object of war is not simply to prevail, but to prevail as quickly and efficiently as possible. Thus,* military necessity *may consider the broader imperatives of winning the war and not only the demands of the immediate situation. For example, in assessing the military advantage of attacking an object, one may consider the entire war strategy rather than only the potential tactical gains from attacking that object. An interpretation of* military necessity *that only permitted consideration of the immediate situation could prolong the fighting and increase the overall suffering caused by the war.*
>
> *Some…have argued that* military necessity *should be interpreted so as to permit only what is actually necessary in the prevailing circumstances, such as by requiring commanders, if possible, to seek to capture or wound enemy combatants rather than make them the object of* [lethal] *attack. This interpretation, however, does not reflect customary international law or treaty law applicable to DoD personnel. For example, the law of war does not require that enemy combatants be warned…nor given an opportunity to surrender before being attacked. Moreover, the law of war may justify the use of overwhelming force against enemy military objectives.*

***c. Force Protection* (generally consistent)**

One key element of the principle of military necessity—force protection—is not sufficiently addressed in FM 6-27 or the DOD Law of War Manual, possibly because it is already felt to be sufficiently referenced or implied as part of military necessity. While this Manual considers force protection as equally important and distinct as the other principles, rather than adding an eighth, force protection is assumed as part of military necessity and defined as "**the legitimate need to protect the lives and well-being of one's own combatants and their effectiveness as a military force (critical mass, health, equipment, morale, specialized skills) so they can effectively and efficiently carry out their missions.***"*

There are two fundamental reasons why force protection is important as part of a principle of the law of war. The first relates to the obligation and duty commanders have to those they command. All commanders understand that when their soldiers are committed to war, some—perhaps many—will likely be injured and die. Yet, the goal of every commander should still be to try to bring everyone home alive and uninjured so long as missions are accomplished and principles of the law of war followed. Further, just because one is a soldier must not always mean he or she has less of a right to live than non-combatants caught up in the conflict regardless of how the formal law of war reads.

The second reason is that, to win a war as quickly and efficiently as possible, military forces must be able to function as effective operational units. That cannot happen if a unit incurs avoidable excessive casualties or physical deterioration if those adversely affected comprise the critical mass, skills, health, and/or knowledge and specialized competencies essential to a mission's success. Thus, in making decisions assessing military necessity in relation to other principles, one must weigh not only possible loss of life and injury to non-combatants but equally to one's own forces.

It is understood and accepted that reasonable efforts should be made to provide assistance, care, and protection whenever practicable to non-combatants. Yet, situations may arise where the well-being of combatants should take precedence over that of non-combatants. For example, if food, medicines, or medical care are limited, these may be provided first (and, in extreme situations, possibly exclusively) to one's own combatants if to do otherwise would mean they cannot survive or effectively carry out essential responsibilities and missions. However, even in such situations, combatants may still choose to share what little they have to their own detriment and put their lives and health at greater risk if that will not unduly undermine essential missions or responsibilities.

3.3 Political Necessity (likely consistent)

While both FM 6-27 and the DOD Law of War Manual recognize political/public support considerations as fundamentally important in conflicts, neither includes it as a separate principle of the law of war. This Manual does, and, in some cases, it can be a more important consideration than military necessity.

Under this Manual, political necessity is *"the principle that securing or maintaining political, moral, or other support from the public, other States and non-State parties, non-profit and intergovernmental organizations, and religious and other civil society groups is essential for defeating the enemy as quickly and efficiently as possible."*

Based on this principle, both strategically and tactically, assessing how an action in war may affect such entities and groups should be a consideration in many decisions made even in conventional conflicts. This reality often drives precautionary measures and rules of engagement. Yet, just as a war can be lost by not being sufficiently sensitive to political considerations, it can also be lost by overly bending to them whereby that which is required militarily to succeed or survive is not allowed. The assessment and balancing of military and political necessity are among the most difficult tasks civilian and military leaders face, including those at lower levels.

As a consequence, before engaging in a conflict, one should assess those military actions which will be essential to win the war militarily but, if employed, may cause an erosion of public/political support. If a strategy cannot be developed which allows essential military actions to be undertaken without losing the war politically, the war likely should not be fought.

At the conclusion of a conflict, political necessity will also be a key consideration when drafting and implementing terms of peace. Experience has shown that war is likely to return sooner and more often when peace agreements are not carefully and thoughtfully crafted. An example is the difference between

post-war restrictions on and assistance to Germany after World Wars I and II. Preventing future wars between the same parties is often less whether a losing party's military has been beaten and dismantled, but whether the terms of peace are overly punitive and otherwise inappropriate. Peace agreements should be crafted as much to avoid future wars as to end the current one.

If there are significant political risks associated with a conflict, there are possible measures for reducing the likelihood politics unnecessarily and inappropriately prevails in wars which are winnable militarily:

1. Fight only just wars and make it clear publicly and to one's forces why they are just
2. Overcome the enemy as quickly as possible
3. Do so with the least death, injury, suffering, and destruction possible
4. Treat with respect those whom you fight and those in whose home areas you fight
5. Educate the media, public, and polity as to that which is legal militarily under international law, or still moral when it is not
6. Consistently prosecute material, severe violations of the laws of war and human rights by one's own forces which do not contribute to better achieving the purposes of that law
7. Withdraw militarily as quickly as possible after hostilities cease if the security situation allows
8. Provide humanitarian and reconstruction assistance during and post-conflict if resources permit
9. Draft and implement peace agreements which are not overly punitive and do not sow seeds for future conflicts

To combatants many of these may seem more applicable strategically than tactically. Nonetheless, all can have implications when making decisions at every level.

3.4 Humanity (partially inconsistent)

FM 6-27 and the DOD Law of War Manual define humanity as *"the principle that forbids the infliction of suffering, injury, and destruction unnecessary to accomplish a legitimate purpose."*

While this Manual agrees with the preceding, it is felt too narrow and only prohibitively couched. Rather humanity is *"the principle that reduces unnecessary death, injury, and suffering to those caught up in war no matter their role or legal status, reduces non-essential harm to property and the natural environment, and lessens war's savagery."*

U.S. manuals make no mention of preserving the humanity and rights of both combatants and non-combatants, nor of forbidding unnecessary suffering which covers far more than simply death, injury, and destruction. As stated above, the principle of humanity is only prohibitively couched in the official manuals, i.e., forbidding the infliction of that unnecessary to accomplish a legitimate purpose; it should also include positive acts. The principle should not be just about "thou shall not," but also "thou shall."

For example, even during war, whenever reasonably possible and appropriate, military forces should use their personnel and resources to hold clinics; repair community structures, bridges, and roads; assist after destructive natural events and military operations; and otherwise help those being negatively affected by war. Even if some of those assisted are supporters of the enemy, not only will the military force have acted humanely, it also may have begun to shift allegiances of the local population and allow enemy combatants and non-combatants to see the investing military force in a more positive light that could have future benefits for that force providing such assistance.

Another difference between this Manual and the two official manuals is that not only do combatants have responsibilities under the principle of humanity, but non-combatants as well. (This is addressed further under the principle of *precaution.*) Non-combatants also have the potential to assist in reducing unnecessary death, suffering, injury, and destruction during war and help others preserve their humanity

and rights, not just of others like themselves but of soldiers on both sides. However, there is no law which requires this.

Provided it can be done without being treasonous or putting one's self, family, comrades, or community at undue risk of retaliation, non-combatants have a moral obligation to do things such as assist injured soldiers, help bury the dead properly, and protect separated soldiers and other persons who may be harmed or executed if captured, e.g., Jews in Europe during World War II. Further, non-combatant civilians should advocate against and attempt to minimize support for unjust wars. Once a conflict has begun, whether it is just or unjust, non-combatant civilians should advocate for responsible, moral, honorable conduct in war by their own forces not only the forces of others.

Just as soldiers have risked their lives on the battlefield, civilians throughout history have risked, and sometimes lost their lives demonstrating and advocating for what is right. Wars are not fought just because there are soldiers, but because civilians often have not done all they reasonably could to prevent and end wars and mitigate their harm. Thus, civilians should share in such risks and responsibilities.

3.5 Honor (partially consistent)

The DOD Law of War Manual (2.6) and FM 6-27 (1-31) state the following: *"Honor, also called chivalry, demands a certain amount of fairness on offense and defense, and a certain mutual respect between opposing forces." "Honor…requires adherence to LOAC regardless of the enemy's level of compliance"* and is a core value of the Army and Marine Corps drawn from warrior codes from a variety of cultures and time periods. It includes values such as respect, duty, loyalty, selfless service, integrity, and personal courage in everything a soldier or marine does.

This Manual defines honor somewhat similarly as *"the principle whereby a certain mutual respect exists between persons on opposing sides and is based not only on respect, but the additional values of duty, loyalty, service, integrity, and courage in what one does in war."*

To act with honor begins with an old-fashioned concept, *chivalry*. This Manual and the two referenced manuals, as well as FM 27-10, use the word *chivalry* as a key element in conducting oneself honorably in war. Yet the concept of chivalry is not consistently understood. For many, it may mean proper conduct of men towards women. For those engaged in war, it is far more.

The following, generally summarized from Chivalry Today found online, provides a sense of that to which combatants should aspire:

> Chivalry is, at heart, a guide for good conduct. It is not a mandate or directive from the powerful or chosen to the masses or the weak. It is a set of limitations which the strong place on themselves with the realization that setting a good example sends a message far more powerful than any words on paper. We want to know we have championed the right causes and embraced the right principles, not because we were told to do so, but because we have chosen to follow that path. In short, that's what chivalry is—a choice. The choice to do the right things, for the right reasons, at the right time.

That is the intent of this principle, to help combatants do the right things for the right reasons at the right times because it is their choice to do so, not because it is mandated by others or written into some treaty or rule, so that every combatant, as an honorable, ethical warrior, as a good soldier, can say when he or she returns home, "I served my cause, my fellow soldiers, my family, my people, and mankind in ways of which I am proud."

Based solely on the preceding, this Manual is consistent with the two official manuals as to that which comprises honor in war. There are other parts where they diverge. The official manuals equate honor

with compliance with the formal law of war. Compliance with the law is only that, compliance with the law, and may have little to do with honor as it may be no more than a desire to avoid prosecution. In fact, there are times when the more honorable thing to do is disobey the law. That is found, not only in war, but whenever one stands up and opposes an unjust law and does not do what that law requires.

Official manuals state the need for a certain amount of fairness in offense and defense. While that may be an admirable sentiment to some, it is often unrealistic, inappropriate, and counter to what is required to overcome the enemy as quickly and efficiently as possible. Additionally, inferior, poorly equipped forces may have little choice than to breach trust in certain situations in order to survive short term. They may have no alternative than to use weapons, ruses, and tactics considered illegal under the formal law of war. Each side should expect this and take appropriate measures to anticipate, protect against, counter, and overcome them. It should be understood that such violations of the law are not necessarily war crimes, or worthy of prosecution, if the violations were for the right reasons given circumstances.

Further, a legitimate goal in war is to create unfair situations whereby one's forces or actions are so overwhelming that political and military goals are achieved with minimal harm to friendly forces in comparison to those of the enemy. Yes, one should be fair in administering control over detained persons and when dealing with non-combatants. However, during combat operations against enemy forces, fairness is the last thing that should be observed.

This does not mean there are not areas where all parties should adhere to certain rules of fairness and trust no matter the situation (one such is respecting a white flag). However, these are narrower and more limited than the official manuals and the formal law of war require.

Mutual respect is quite different from fairness. Respect can and should be present in most situations. Opposing military forces share a profession, and fight one another on behalf of their respective causes, not necessarily because of personal hostility against the individuals they face. It takes something special to be a combatant, to risk one's life and endure horrendous conditions and circumstances. As soldiers, each should respect this in the other and treat each other with dignity and honor when reasonably possible. The exception may be when enemy combatants egregiously violate what is honorable for no legitimate reason, such as when genocide occurs.

Mutual respect between combatants and non-combatants also can and should be present in most situations. Combatants should understand the difficult situations and conditions in which civilian non-combatants find themselves when caught up in or opposing the war. Civilian non-combatants, in turn, should appreciate the risks and hardships combatants face. All are victims of war and, thus, share a bond whereby each is deserving of respect from the other.

In summary, if combatants follow the Code of Conduct found at the beginning of this Manual, they will have conducted themselves with honor.

3.6 Distinction (inconsistent)

In some respects, making determinations of military and political necessity, humanity, and honor are reasonably straightforward when assessed individually. However, the application of these four principles is interdependent and, at some point, must be assessed in relation to one another, a task which is a far more difficult challenge. This first occurs when decisions as to *distinction* are made.

FM 6-27 and the DOD Law of War Manual define distinction, sometimes called *discrimination*, as *"the LOAC principle that obliges parties to a conflict to distinguish between combatants and the civilian population and to distinguish between military objectives and protected property and places."*

This Manual defines distinction as *"the principle of determining the appropriate protections, rights, responsibilities, and liabilities which apply to persons, places, and property in a given situation."*

FM 6-27 states that *"*[p]*rincipally, distinction separates those taking part in hostilities (whom military necessity justifies as permissible to attack)..., and those taking no active part in hostilities (whom military necessity and humanity protect as unnecessary to attack)… By requiring parties to recognize and respect different legal categories that derive from military necessity and humanity, distinction seeks to confine the fighting between opposing armed forces and thereby spare the civilian population as much as possible."* (1-35)

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

Distinction gives rise to three different types of rules that obligate a party to assist its opponents in discriminating between protected and unprotected persons and objects, principally between a party's armed forces and the civilian population. Parties to a conflict must take certain measures, in offense and defense: (1) to ensure military forces are distinguishable from civilians and civilian objects, (2) to separate, if feasible, their military objectives from civilians and civilian objects, and (3) to refrain from misusing civilians and civilian objects to shield military forces or military objectives. (1-38)

Based on the preceding and the balance of the section from which it was drawn, FM 6-27 seems to view distinction as focusing primarily on (1) whom and what it is permissible to attack, (2) discrimination in the use of force against the enemy, and (3) insuring visible distinction of or separation of one's forces and objects from civilians and civilian objects. While each of these are relevant elements of distinction, under this Manual, the scope of distinction is broader and, in some instances, different from FM 6-27 and the DOD Law of War Manual.

a. Distinction Process

One starts the distinction decision process by applying the combatant versus non-combatant classifications found in Section 1.4 (Classes of Persons). While not yet addressed in detail, there are also classes of places, property, and structures which require determinations as to that which is permissible to harm in various situations. These include, but are not limited to, historic structures and sites, hospitals, schools, religious and scientific buildings, private residences, and personal property.

Unlike that which FM 6-27 and the formal law of war might suggest as having black letter protection, unfortunately there is no person, property, place, or structure that cannot legally come to harm in at least some situations under even the formal law of war. Yes, the purpose of distinction is to determine that which should or should not be attacked, killed, or otherwise harmed in specific situations. However, this should not be understood as the establishment of absolute classes of persons, places, or things which are protected under all circumstances. That can only be determined, not simply by referencing the law but through a reasoned application of the principles of the law of war. While those indicated in Section 1.4 as non-combatants should not be targeted specifically, they can knowingly, consciously, and legally become casualties (and even targeted) if there is no way to eliminate or overcome a target or complete a mission of sufficient importance whereby the anticipated level of non-combatant harm can be justified (see 3.8 Proportionality).

Further, distinction does not focus only on those persons and objects which can be attacked. It also includes making distinctions as to who has certain rights and responsibilities in a range of conflict situations beyond actual combat. It includes decisions such as who may be tried for what, how one may

be incarcerated, under what situations one may be detained, that which is permissible once detained, and whether humanitarian assistance will be allowed in a siege situation.

There is no single or combination of articles in the law of war which provide definitive rules or guidance in all situations as to distinction. What is permissible can only be determined after weighing and then balancing the four foundational principles referenced above.

Further, distinction is determining not just whether a person is a combatant or non-combatant, but that, even when this is known definitively, whether certain legally permissible actions can or should occur which affect that person. For example, it is legally permissible to attack and kill those who are classed as combatants. However, for humanitarian, political, or personal reasons, one may refrain from doing so. Conversely, we know that certain classes of persons are non-combatants and, as a rule, should not be targets of attack or harm and should be afforded certain rights when encountered or detained. However, due to military necessity or other considerations, when all is weighed and balanced, it may not be possible to afford protection for all whom it might ideally be provided. Weighing all these is part of distinction.

b. Uncertainty of Information

Distinction often includes situations of uncertainty where the right answer as to what should be done and, thereby, what was permissible under the law or would best help achieve the purposes of the law of war, will not be known until after one's decision has been carried out. An example might be a situation where a curfew is in place and rules of engagement allow any unauthorized person moving after curfew to be considered a combatant and engaged as deemed appropriate. Nonetheless, a situation might be encountered where persons are observed moving after curfew but it is sensed they are not combatants but out for some possibly legitimate purpose, e.g., a medical emergency where doctor or hospital care is essential and they are willing to risk being killed rather than have their loved one die if care is not received.

In the preceding example, if someone is observed moving after curfew and they are not kinetically engaged, or engaged in a manner that increases risks to the confronting party, there are potentially negative outcomes for the confronting party and possibly the mission in which it is engaged. If the safest course of action is taken and the confronting party opens fire, there may be no immediate negative consequences to the confronting party, but innocent people may have been killed. If, on the other hand, the confronting party fails to engage, those observed may be on a mission to attack or otherwise harm friendly forces or facilities or, if stopped and questioned, may detonate explosives or open fire before the confronting party can respond. In such a situation, there is no right answer which can be known in advance, yet a distinction decision must be made: no engagement, a higher personal risk engagement, or a lower personal risk engagement but lethal to those who may not be combatants with potential political or other negative consequences. Much of distinction is fraught with decisions like this.

The action/response ultimately decided upon in such situations of uncertainty (where the law of war does not provide relevant rules or guidance) will often be based on intangible considerations of the combatant decision-maker, e.g., the level of risk acceptance to one's self, unit, and mission vs. not making a mistake of harming those who would not have been harmed if one had full knowledge.

c. Major Differences with FM 6-27

Where this Manual varies most from the FM 6-27 approach to distinction relates to (1) insuring one's forces and objects are properly distinct from non-combatants and certain places and structures, (2) civilians and civilian objects can seldom, if ever, be the object of an attack, and (3) religious and medical personnel which are so distinguished should not be the object of an attack.

1. Visible Distinction (also relevant under the principle of *precaution)*: Given the prevalence of asymmetric warfare and often legitimate reasons non-State parties become engaged in war, visible distinction requirements in a conflict are often not appropriate and reasonable. This is also the case in conventional State vs. State conflicts, e.g., when soldiers are cut off from their main forces or escape from captivity, or a weaker belligerent is trying to defend against a stronger one. This Manual does not consider it a violation of responsible practice/custom *not* to wear distinctive uniforms and insignia, *not* to carry weapons openly, i.e., to "exist in the sea" of the people, or *not* to mark protected facilities or transport if one must hide from a vastly superior force to survive, accomplish an important mission, avoid being targeted by a belligerent which does not respect such markings but rather uses them to identify targets that otherwise would not have been attacked (e.g., transporting wounded combatants), or reduce personal risks of death or injury. All sides should understand their enemy may hide or alter their appearance or presence and, therefore, take measures to uncover and defend against such actions.

2. Civilians: As for civilian and civilian objects not being permissible objects of attack, while this generally should be the rule, other times it may not. It must be understood that civilians, more so than the military, are often the reason a nation or cause becomes engaged in a war, allows its continuance, or prevents it from being resolved. To protect in all instances those who are responsible for the existence, supply, and execution of the war, just because they are not considered by many to be active combatants, may inappropriately insulate them from the consequences of their responsibility that the war exists in the first place and is effectively carried out. Thus, any person responsible for the existence, supply, execution, or continuation of the war, civilian or military, may be considered under this Manual as lawful combatants who may be the object of an attack, as may their property and objects.

   Further, civilians may be working in, with, or on legitimate military targets. If they are, while they may not be the object of the attack per se, their presence to the attacking force and what actions are taken to eliminate the target and protect one's own forces may be little different than if they were combatants. At that point, considerations of *precaution* and *proportionality* come into play.

3. Religious and Medical Personnel: With respect to religious personnel, they are not always simply helping soldiers get through a personal crisis or addressing spiritual needs. Throughout history, religious leaders have sometimes been the cause of conflicts and used their influence and authority to compel, encourage, and inspire their followers to fight, even to the death, to include suicide missions. In this, they are no different than other civilian and military leaders who do the same. Thus, in certain circumstances, religious personnel are not necessarily entitled to special consideration or protection beyond those afforded combatants.

   In prisoner of war situations, religious and medical personnel who are captured often have greater freedom of movement. It would not be unusual that such personnel will become engaged in sharing intelligence from what they see or overhear, convey messages, and otherwise assist in prisoner escapes and other efforts to undermine and even overcome the detaining forces. When this occurs and is learned of, they lose their non-combatant status even if they do not employee arms. Deciding when and under what circumstances this occurs is part of the distinction process. For medical personnel, this is addressed more fully in Chapter 8.

3.7 Precaution (possibly consistent in principle)

FM 6-27 and the DOD Law of War Manual do not include *precaution* as a core principle of the law of war. Thus, there is no official definition of precaution as a law of war principle. This Manual defines precaution as *"the principle that obliges all parties to take practicable precautionary measures in advance of and during combat which can help reduce unnecessary harm to non-combatants and protected property without unreasonably hindering legitimate, essential military activities."*

a. Legal and Policy Basis

Including precaution in this Manual as a separate principle stems from a 2015 article, "Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures" by Geoffrey S. Corn and James A. Schoettler, Jr. (*Military Law Review* (Volume 223, Issue 4)). The primary legal basis they cite is Additional Protocol I (API), Articles 57, which addresses "*what are best understood as 'positive' precautions: measures that are integrated into the attack decision-making process that mitigate the risk of violating the distinction or proportionality obligation*, and Article 58, which addresses "*'passive' precautions, obligating belligerents to mitigate civilian risk by segregating civilians from military objectives and making it easier for an enemy to distinguish combatants from civilians during attack."* [Note: In the preceding and following from AP I and official manuals where "civilians" is used, it should generally be assumed to mean "non-combatants," both civilian and military **(inconsistent)**.]

Article 57 includes the following as "positive" precautions:

> *2. With respect to attacks, the following precautions shall be taken:*
>
> *(a) those who plan or decide upon an attack shall:*
>
> *(i) do everything* [reasonably] *feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives…*
>
> *(ii) take all* [reasonably] *feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;*
>
> *(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;*
>
> *(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;* [While the preceding is applicable, except perhaps in the planning stage, this is not a precautionary measure but rather a reactive one and part of distinction and proportionality as to how combatants should adjust during active combat if it is determined a target is not a military objective, incidental harm will be greater than the military or political advantage secured, or previously planned means and methods are no longer appropriate.]
>
> *(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.*
>
> *3. When a choice is* [reasonably] *possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.*

The DOD Law of War Manual includes an essential qualification:

> *...Persons who plan, authorize, or make other decisions in conducting attacks must* [should] *make the judgments required by the law of war in good faith and on the basis of information available to them at the time.*

With respect to "passive" precautions, AP I, Article 58, includes:

> *…Parties to the conflict shall, to the maximum extent feasible:*
>
> *(a) without prejudice to Article 49 of the Fourth Convention [establishing limits on the deportation or transfer of civilians in occupied areas], endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;*
>
> *(b) avoid locating military objectives within or near densely populated areas;*
>
> *(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.*

To the preceding, this Manual would add that these three precautions will be complied with to the degree practicable given available resources and personnel, combat conditions, and the significance of the military/political advantages to be gained.

While AP I and the DOD Law of War Manual focus on "civilian" risk mitigation, this Manual believes the principle has broader application to include all non-combatant mitigation (civilian and military) and all protected properties and places (civilian, government, historic, other). Thus, as outlined elsewhere in this Manual, similar "positive" and "passive" precautions and considerations as those covering civilian persons and objects should be taken to avoid harm to certain medical, detention, religious, cultural, civil defense, educational, and historic facilities, structures, and their personnel.

As much of the above is based on AP I, it should be noted that the United States and certain other countries have not signed/ratified AP I. While Corn, Schoettler, and others state that the terms of Articles 57 and 58 would still be applicable to non-signing/ratifying parties under international customary law, it is unlikely the U.S. and other non-signatory parties would agree to this position. Nonetheless, the United States would likely support and attempt to comply with what is presented above within certain limitations, such as that referenced in the DOD Law of War Manual regarding the qualifier of available information. That is also the position of this Manual.

b. Non-Combatant Education/Responsibilities

AP I and the DOD Law of War Manual address only the responsibilities of attacking and defending parties. This Manual includes the responsibility of non-combatants also to take certain precautions to reduce risk from, and occurrence of unnecessary harm by, military forces. Part of this would simply be based on common sense. For example, if civilians are working in a location in proximity to a military objective of one belligerent and they see that belligerent's enemy approaching this potential objective, they should remove themselves from that area as quickly as possible or seek safe cover. Similarly, if one's home or business is adjacent to a possible military target, they might relocate. If this were not possible, they might try to harden their walls closest to the military objective or construct a below ground or other protective room or structure where they sleep or remove to during nearby active combat. This would be similar to precautions taken by those living in tornado and hurricane country without its necessarily being mandated by law. Additionally, civilians should use caution if bearing arms openly

even if they are only for hunting, personal protection, or festivities. Religious, medical, and civil defense personnel should generally bear only sidearms for personal protection and that of those they assist.

For non-combatant civilians, their ability to take precautionary measures more effectively can be significantly enhanced if belligerents provide informational materials somewhat similar to what are commonly available in areas often hit by natural disasters. Such material might address matters like the following in the simplest, most straightforward language possible:

1. Persons and places which may be considered legitimate military targets
2. Ability (and limits on ability) to identify targets precisely by attacking forces
3. Limitations of precision targeting by and weapons of attacking forces with respect to the ability to reduce harm to civilians
4. Avoidance of becoming human shields, and responses which are legal by a force if encountered
5. How to improve personal safety in various active combat situations
6. How to make homes, businesses, and other locations safer for when active combat occurs

While some such information may be useful to opposing forces or used as material in adverse lawfare initiatives, it also has the potential to reduce harm to non-combatants and help win hearts and minds. Even if such informational material is not available for distribution, field commanders can still achieve some of the same ends by addressing such matters directly with local leaders, officials, and community groups.

3.8 Proportionality (generally consistent)

FM 6-27 (1-44) states that proportionality is the "*principle requiring combatants to refrain from attacks in which the expected loss or injury to civilians and civilian objects incidental to such attacks would be excessive in relation to the concrete and direct military advantage expected to be gained."*

This Manual would define it somewhat differently: Proportionality is *"the principle whereby combatants attempt to employ the minimum, most humane force options available to reduce unnecessary death, injury, suffering, and damage to persons and property commensurate with the military or political advantages expected to be gained.*

Official manuals, as well as the formal law of war, accept that harm to civilian populations and objects (places, property, structures) is an unfortunate, tragic, but inevitable part of war. Killing others, to include non-combatants who become incidental casualties, is part of that referred to as the "*combatant's privilege*." These manuals recognize that judgements of proportionality can involve difficult and subjective comparisons and that "[o]*ften equilibrium or a precise comparison between considerations is not possible* (FM 6-27, 1-48)." Where this Manual differs most from FM 6-27 is in the latter's use of certain terminology, the almost exclusive focus on civilians and civilian objects, and the absence of commentary that proportionality also includes consideration of the type of force selected even if the possible level of loss or injury would not vary.

This Manual takes exception to the use of "requiring" that combatants refrain from attacks which are not appropriately proportionally compliant. The best that can be expected in war is that combatants "attempt" to do this to the best of their ability in any given situation, as whatever occurs is usually done without full knowledge of conditions faced or the potential outcomes of whatever might be decided as proportional. Additionally, such decisions often must be made within seconds where it is impossible to weigh and balance adequately all factors that ideally would be considered. In light of this, it is not unreasonable that the decision will be to use greater force than might be required rather than less if the latter risks not

accomplishing that which needs to be accomplished or materially increasing death and injury to one's own forces.

As for proportionality decisions only being applicable as they relate to civilians and civilian objects, such decisions also must be made with respect to facilities such as those holding prisoner of war and wounded combatants, to important cultural and historical sites whether or not civilian, in areas where there is the potential for severe destruction or damage to the natural environment even if part of legally permissible military targets, and even when determining whether the extent of death and destruction against enemy military forces and facilities is proportionately necessary. Further, proportionality should assess the potential for death, injury, and suffering of one's own forces, as their lives and well-being are equally as important, and in some cases, more so, as that of non-combatant civilians and other protected persons. Essentially, the principle of proportionality is applicable whenever military action is contemplated, not just if it may affect civilians and civilian property.

In addition to determining the level of undesired casualties and damage which might be acceptable, one should also use care in selecting the type force used if more than one option exists. That chosen should, if possible, cause the least pain and suffering, both to the actual target and any others that might be harmed, to include one's own forces. An example might be selecting between the use of a rifle, grenade (fragmentation, flash-bang, white phosphorous), tear gas (although under the formal law of war [but not this Manual] its use is generally prohibited), fire/flame thrower, air or artillery strike.

Provided reasonable attempts to determine distinction, precaution, and proportionality have been made and followed, not employing the precisely least harmful force available or not providing advance warnings or notifications would generally not be a violation of the law of war. Only if optimal alternative conduct in a situation is clearly obvious, and conditions allow sufficient time for consideration as to the possible use of the more optimal alternative, might it be considered as such.

3.9 Application of Principles

a. Introduction (generally consistent)

Decisions as to proper conduct in war should apply a decision process similar to that used when making tactical field decisions when there are no "black letter" rules, only one's best judgement based on the situation faced, known information, available resources, and sound tactical and operational principles. Generally, one should employ the following "assessment-decision process" with the following goal:

> **To the degree the situation, resources, intelligence, and time allow, when carrying out a combat mission or other frontline or behind-the-lines responsibility that may affect the well-being of persons or property, combatants should use the least, most humane force available, or imposition of the potentially least adverse conditions, necessary to achieve the desired political or military advantage.**

b. Assessment-Decision Process (somewhat inconsistent)

Determining the least force which is most humane against an appropriately legitimate target is often situational and cannot always be reasonably governed in advance by treaty or legislation, customary international law, or rules of engagement issued by higher command. Each commander and, in other instances, such as when separated from one's unit or assigned missions such as intelligence operatives often are, each combatant should understand and employ an "assessment-decision process" for determining that which is proper conduct in war. The following delineates the elements of this process:

1. Initial order of priority, from highest to lowest
    (a) Mission

(b) Force protection
(c) Children, pregnant women, the disabled, critically injured or sick, caregivers to the preceding, neutral parties
(d) Other non-combatant civilians (excluding certain criminal elements)
(e) Prisoners of war, less than critically injured or sick combatants, and forced collaborators
(f) Other combatants (to include combatant civilians, civilian leaders, willing collaborators)
(g) Certain criminal elements

2. Possible priority adjustment:
   (a) Mission/action
      - Importance if not achieved, i.e., minimal to disastrous for tactical situation, major operation, or overall military or political strategy
      - Relative benefit gained vs. undesired harm caused
   (b) Personal/physical risk
      - Degree of risk and suffering to one's unit, allied forces, and self, especially if critical to mission i.e., minimal to high,
      - Degree of risk and suffering to friendly/neutral/enemy non-combatants within one's control and area of operation/responsibility, i.e., minimal to high
   (c) Force/resource options
      - Reasonably available
      - Tailored vs. untailored
      - Compliant vs. non-compliant with formal law of war
   (d) Political/civilian response (positive vs. negative)
      - Area of operation, i.e., minimal to high
      - Home country/region/cause supporters/members, i.e., minimal to high
      - Allies/international organizations/neutral parties, i.e., minimal to high

This assessment-decision process is not inconsistent with the formal law of war. It only becomes so if the decisions which result are in violation of that law or applied inappropriately under this Manual.

c. Example (generally consistent)

The following illustrates how the principles of the law of war and their application as part of the assessment-decision process might play out in a combat situation:

Your unit takes enemy fire from what is obviously a school. Your first assessment is whether there are children, teachers, or other non-combatants present in the building or on the grounds. If none are visible and it is a known non-school day, you have greater latitude with respect to what courses of action you might choose to pursue. The issue becomes less one of avoiding non-combatant casualties than an acceptable degree of damage to the building necessary to eliminate or capture those firing at you while minimizing your own casualties.

If available, you could conceivably call in an air or artillery strike which would likely take out the enemy with no casualties to your unit. While not illegal, this could destroy or make the school unusable and likely have negative consequences among the local population. Additionally, although not visible from outside the building, there might be administrators, maintenance staff, teachers, or students inside. Further, if media is present or civilians with smart phones, the news may soon show your forces destroying a school and present this out of context in a manner detrimental to your cause and unit.

There is also the degree of urgency and importance of eliminating the threat inside the building in order to accomplish your primary mission if this is not simply engaging and destroying the enemy whenever

encountered. Also, you need to consider whether those inside fired simply to halt your progress while they and others of their force escape or deploy more effectively.

Given the apparent absence of civilians on a non-school day and that it is a school which you ideally want to harm as little as possible, what should likely occur is that only the window or location from which enemy fire was received should be engaged with rifles, a grenade launcher, or possibly a machine gun depending on the nature of the perceived force opposing you, while part of your unit flanks the building to reduce the possibility of escape by whoever is inside. You would likely not burn the building if that option existed or risk burning with a flamethrower if one were available. If a readily deployable tactical drone is available, it might be used to help acquire information to allow a better decision to be made. If fire is received from multiple windows, then kinetic responses may be escalated, possibly to include the entire building.

As outlined, the above is a relatively easy assessment-decision situation. It becomes more complicated if it is a school day and students and staff are present. Then, whether to engage at all comes into question and will be a function of the size of your force and the criticality of quickly eliminating the threat inside the school in order to complete the mission you have been assigned. If time is not of the essence, the mission you have been assigned will not be compromised, and you have adequate forces at your disposal, you might choose to surround the building and try to negotiate the surrender of those inside while the rest of your unit proceeds with other responsibilities it may have. Trying to communicate to those inside to send out teachers, staff, and children before action is taken might also be pursued. If successful, ideally such persons will pass through your lines so it can be determined if those leaving are truly non-combatants. Of course, in asymmetrical warfare, this may be difficult to determine and certain adults may need to be detained until a better determination can be made if on-the-ground conditions allow this.

The complexity of the situation significantly increases if you are engaged in a critical mission, you cannot be unduly delayed at the school in order to accomplish that mission, you do not have sufficient forces to surround the school with others of your unit continuing the mission, and/or you cannot risk bypassing and leaving an enemy force of unknown strength to your rear. You may also have a situation where the school is of historic, cultural, or religious significance. If some of these are in fact the case, you need to determine what force to apply how quickly and what risks you assume to your own forces and their primary mission vs. the well-being of civilians inside or near the school and the probable damage to the building.

As horrible as it would be, if the enemy seems intent on holding the school; their presence prevents you from reaching your ultimate target; if bypassed, the enemy force inside seems too significant to leave in your rear; your primary mission is essential; and you do not have the time and cannot risk the loss of forces to assault the building in a manner which minimizes risk to civilians and still allows you to accomplish your mission, you may ultimately be forced to destroy the building with those inside or nearby.

Doing this may have significant negative political implications if what occurs is known by the media and human rights organizations. The enemy also may use such an action as part of a “lawfare” initiative whereby they distort the actual law of war in media releases to undermine your support locally, domestically, and internationally. If you face such a situation and conditions allow, you would consult up the chain of command to ascertain whether there are other factors which would preclude the destruction of the building.

In light of the potential downsides of doing so, as soon as a decision to destroy the school is made, your own public information and lawfare initiatives should be undertaken, if possible, in advance of those of

the enemy, human rights groups, and media if they are present or likely to become aware of what will occur. For humanitarian reasons, if possible given the intensity of the conflict in your area of operations and resources available, medical and other aid should be deployed immediately after destruction of the building to assist all who may have been killed or otherwise harmed in the attack. Additionally, plans to provide temporary and possibly permanent replacement, repair, or restoration of the school should be undertaken. If these cannot be done, one will simply have to live with the consequences of the decisions made. However, if throughout this situation you attempted to weigh and balance the above considerations responsibly and acted accordingly, you will have done your best to comply with the law of war. its principles and purposes.

3.10 Constant Care

AP I refers to an obligation for "constant care" with respect to mitigating risk of harm to non-combatant civilians and civilian objects. Ideally, constant care should exist whenever one attempts to balance the principles of the law of war for any purpose, not just reducing risk to civilians. At the opposite end of the spectrum is what Corn, Schoettler, and others refer to as "willful blindness." Constant care is unrealistic; willful blindness, unacceptable.

Most responsible, moral combatants will function somewhere between these two extremes. What they ultimately do will vary based on where they find themselves on continuums of six interdependent factors:

- Time availability
- Training effectiveness
- Command emphasis
- Command control
- Situation constancy
- Combat intensity

Given the inability to be able to completely anticipate and control the combination of where one will be on each of these continuums at a given point (temporal, physical) during a conflict, ideally the following should be effectively present for each combatant, from senior commanders to individual soldiers, marines, sailors, and air force personnel:

- An *ingrained subconscious awareness* of what is reasonable under each law of war principle and in a range of combat situations (i.e., a form of mental and physical "muscle memory" when conditions require an action or decision and allow little or no time for reflection)
- *Legally-protected situational agency* for each individual to balance principles and situational parameters as best he or she can within the parameters in which they find themselves

Pre-planning/planning is when constant care is generally possible and most likely. Typically, at this stage, more time is available for properly weighing available information and options. Yet, even in this stage constant care will seldom be possible. As important as it is, applying law of war principles is only one of a multiplicity of critical considerations which must be dealt with concurrently before carrying out attacks or defending against them, e.g., logistics, weather, geography, intelligence gathering and assessment, ongoing movements of enemy forces, condition and preparedness of one's own forces, and changing, sometimes last minute, orders from above. Further, those issuing strategic and operational orders cannot always be aware of field conditions, or have already determined battlefield success in a particular situation is more critical than attempting to minimize incidental harm.

Yet, even if law of war principles were somehow addressed perfectly during planning, continued constant care is not a given as responsibility for execution moves to those in the field who are trying to outthink,

out-maneuver an enemy trying to do the same thing, with the time to assess and decide what is best is constantly shortening, not just for law of war principles but the multitude of other variables about which decisions are required.

Constant care becomes even more difficult when opposing forces are kinetically engaged, with individual combatants and their immediate superiors simply trying to survive and appropriately react to the moment with zero or little time to reflect on and decide what is best with respect to balancing seven different law of war principles. Yet, even here, if principles training has been effective, i.e., if "muscle memory" exists, and realistic rules of engagement guidance are in place (which sometimes is not the case), some degree of care is still possible and occurs. While there are those who may feel constant care is too seldom observed and combatants all too frequently place military necessity above other principles, it is perhaps useful to reflect on a paraphrasing of Geoffrey Best's quote at the beginning of Chapter 1:

> *We should perhaps not so much complain that law of war* [principles do] *not work well, as marvel that* [they] *work at all.*

3.11 Concluding Comments

In many respects, what is proposed in this chapter may seem overly complicated and unreasonable when engaged in war, especially at the tactical level. It often is. In such situations, combatants should focus on three fundamental objectives and try to balance them appropriately:

- Overcoming the enemy as quickly and efficiently as possible,
- Reducing unnecessary death, injury, suffering, and destruction, especially for non-combatants
- Maintaining an effective fighting force

None of the three takes precedence in every situation. For example, prevailing in a crucial engagement may require significant casualties for one's own forces. Conversely, if no significant tactical or strategic advantage will be achieved in an engagement, force protection or political considerations may be more important than initiating an engagement or remaining engaged. If reducing harm to non-combatants and certain objects is essential to overcoming the enemy strategically, to do so may merit risking incurring greater casualties to one's own forces. Conversely, if the military or political advantage to be gained is sufficiently great, it may justify greater incidental harm to non-combatants.

Often the assessment process for many likely situations can be thought through before being attacked or attacking enemy forces, where commanders talk through likely scenarios with their superiors, junior officers, NCOS, and even individual soldiers. While no plan remains fully in place once the first maneuvering of forces begins and the first rounds fired, having worked through scenarios in advance during training, planning, and after-action-lessons-learned sessions can:

1. Allow development of more realistic rules of engagement,
2. Allow precautionary measures to be taken or put in place,
3. Reduce the number of on-the-fly decisions required after fighting begins, and
4. Make more manageable the factors which should be considered when doing so

While combatants can never successfully assess and balance law of war principles in every situation that arises, they can work hard at achieving the preceding four tasks and aspire to accomplish the three fundamental objectives outlined above when planning for and engaged in combat.

CHAPTER 4

Conduct of Hostilities

"...ranging for revenge, with Ate by his side come hot from hell, shall in these confines with a Monarch's voice cry 'Havoc!' and let slip the dogs of war."
William Shakespeare
Julius Caesar

Praise be to the LORD, my Rock,
who trains my hands for war,
my fingers for battle.

He is my loving God and my fortress,
my stronghold and my deliverer,
my shield, in whom I take refuge,
who subdues peoples under me.
Psalm 144

Ignorance leads to fear
Fear leads to hatred
Hatred leads to violence
Ibn Rushd
1126-1198

The law of war regulates the conduct of hostilities through principles and rules concerning both the means and methods of warfare. The terms are not synonymous: "means" refer to *weapons or devices used* in warfare; "methods," to *how* warfare is *conducted*. This chapter addresses "methods;" Chapter 5, "means."

4.1 Commencement of Hostilities

4.1.1 Declaration of War

While FM 6-27 and the DOD Law of War Manual provide guidance on that which constitutes conditions whereby the law of war is applicable, they do not seem to specifically address declarations of war at the outset of a conflict.

4.1.1.1 Hague Convention No. III Relative to the Opening of Hostilities

"The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war (HC III, Article 1)*."* In addition to the preceding from its Article 20, FM 27-10 includes a subsection entitled *"Surprise Still Possible"* but provides nothing which seems specifically to suggest such a possibility. The language does appear to imply that, while war must always be declared, it is acceptable to wait to do so as the first bombs are dropped and the first rounds fired.

In its Article 3, the Hague Convention states, *"Article I of the present Convention shall take effect in case of war between two or more of the Contracting Powers*." Neither the Hague Convention nor FM 27-10

make mention under what circumstances war is declared by, or in effect between, Contracting Powers and non-Contracting Powers or between non-Contracting Powers.

FM 27-10, Article 23, does add that the Charter of the United Nations requires members "*to bring about by peaceful means adjustment or settlement of international disputes or situation which might lead to a breach of the peace. However, a nonmember nation or a member nation which violates these provisions…commits a further breach of international law by commencing hostilities without a declaration of war or a conditional ultimatum as required by the foregoing articles of Hague Convention No. III. Conversely, a State which resorts to war in violation of the Charter will not render its acts of aggression or breach of the peace any the less unlawful by formally declaring war."* This language seems to suggest that all States (with non-States still not addressed) have a responsibility to somehow formally declare war or issue a conditional ultimatum so all parties would be aware a war or conflict exists. Nonetheless, there are numerous wars and conflicts not seemingly covered by the Hague Convention or FM 27-10 as to whether declarations of war are required and, if so, the timing of when these are required and take effect.

Even if seemingly not consistent with that which precedes it, FM 27-10, Article 24, states that, while under the U.S. Constitution Congress has the power to declare war, the "*law of war may, however, be applicable to an international conflict, notwithstanding the absence of a declaration of war by the Congress.*"

Although seemingly in violation of the Hague Conventions which it has ratified, the preceding seems to be the approach the United States has taken as it has not formally declared war since 5 June 1942 against Bulgaria, Hungary, and Romania. Since then, it has waged its wars under "authorizations to use military force." While this may meet domestic legal obligations, it would not seem to meet those of the international law of war.

4.1.1.2 Position of this Manual (somewhat consistent and inconsistent)

Due to the need for stealth and surprise by belligerents, no advance declaration of war should be assumed by either side before hostilities commence although all potential belligerents are encouraged to pursue every reasonable alternative to war before hostilities are initiated. Regardless of whether there have been formal declarations of war or conditional ultimatums, the reality of force having been employed by one party (State or non-State) against another is sufficient for a state of war to exist if one of the parties believes that it does. If a State or other entity is required under its laws or wishes to vote on and make a formal declaration of war, the choice is that of each individual State or entity.

The existence or lack of existence of such a declaration has no bearing on whether compliance with this Manual or the balance of the law of war is required. Compliance should begin when there is the first use of force by one party against another as well as during intelligence gathering and the planning for and placement of military and other resources in advance of the commencement of hostilities, and should continue until a peace as defined in this Manual is in place and observed by all parties.

4.1.1.3 Statements of Justification (inconsistent)

Formal declarations or publicly issued justifications for war or conditional ultimatums are not legally required under the law of war. Nonetheless, once becoming engaged in a conflict, it is the position of this Manual that, within 30 days of the initiation of hostilities, all belligerent parties (State and non-State) to the conflict should prepare and make public a statement or brief, with a one page summary, which states clearly the self-defense, humanitarian, economic, political, or other reasons why that party believes it is justified in becoming engaged in the conflict. Within 30 days of this, other parties (neutral or belligerent)

may issue a brief and summary which agrees with or takes exception to all or part of the stated rationales as to why a particular belligerent believes it is justified in participating in the conflict. That belligerent can then respond to these positions if it chooses.

The purpose of this process is for the political leadership of belligerent parties to demonstrate clearly to its citizens, military forces, those in government, neutral countries, international organizations, and most especially its enemy, why it believes conflict cannot be avoided and the benefits of participation in the conflict are worth the horrors of war which will ensue. Citizens, those in the military and government, neutral countries, and international organizations can then decide whether they wish to support, oppose, or become actively engaged in the conflict. Enemy parties might determine that the war occurred due to possibly resolvable misunderstandings. No person or party should feel compelled to support a conflict if a sufficient case has not been made that the conflict is just. Of course, such discretion may not be possible if the person or party is dependent on or legally or otherwise bound to or controlled by a belligerent whose justification is less-than compelling.

4.1.2 Notification of Neutrals

4.1.2.1 Hague Convention No. III, Article 2

"The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the of the existence of a state of war."

Article II [2] *is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention* (Article 3)." Neither the Hague Convention nor FM 27-10 make reference to those who are not party to the Convention and those not Powers, i.e., non-State parties.

4.1.2.2 Position of this Manual (somewhat inconsistent)

Again, due to the need for stealth and surprise by belligerents, neutral parties should not assume notification in advance of hostilities or even immediately after they commence. Neutral parties should monitor events that might lead to war which would affect them and take appropriate steps to protect their diplomats, citizens, property, financial resources, and armed forces. Politically and militarily, it may be important for attacking parties to provide some degree of advance or early notification to important allies and trade partners, and even unfriendly powers who are not targets but may perceive they are or might be and respond accordingly when hostilities begin. Practically speaking, the need for any notification of neutrals in advance or otherwise will be the decision of the attacking parties and those responding to such attacks.

If notification occurs, it may be by any appropriate means: electronic, diplomatic, media, or otherwise.

4.1.3 Status of and Effect on Enemy Persons (consistent except in reference to this Manual)

Upon commencement of hostilities, every member or citizen of one belligerent immediately becomes an enemy of its opposing belligerent(s).

All enemy persons residing within the control of an opposing belligerent can be held, allowed to leave, or exchanged by the controlling belligerent for its own citizens/members at the controlling belligerent's discretion. Such enemy persons shall have the same rights as to treatment as combatants and non-combatants described elsewhere in this Manual. Enemy persons most likely to be held are those known or likely to be soldiers, intelligence agents, and others with critical knowledge of the holding belligerent's war capabilities or plans. Enemy diplomatic personnel who do not fall into one of these categories will

likely be allowed to leave or exchanged for one's own diplomatic personnel. (The preceding draws on FM 27-10, Article 26, which in turn draws upon the Geneva Conventions. See also 9.3.9 in this Manual.)

4.1.4 Off-Limit Areas (consistent)

All enemy persons in the territory of their opposing belligerent may be precluded from living, working, or traveling in areas designated as high security locations such as seaports, airports, key government offices, military bases, communications and power facilities, dams, and others as determined. Any enemy persons found in such areas after notification to leave will be considered enemy combatants. Reasonable effort will be made to appropriately notify such enemy persons of off-limit areas and rules governing them and provide such persons time to vacate these areas. (Based on FM 27-10, Article 27, which draws on the Geneva Conventions.)

4.1.5 Compelling Enemy Persons to Fight (FM 27-10, Articles 32 & 279; FM 6-27, 2-178 through 180)

A belligerent should not compel an enemy person, whether combatant or non-combatant, to take part in military operations of war, except those of an indirect nature, against the party of which they are a citizen or member, even if such enemy person has been in the belligerent's employ before commencement of hostilities. *Underlying this prohibition is the principle that States must not compel persons to commit treason or otherwise violate their allegiance to their country* (FM 6-27, 2-178). *LOAC does not prohibit States from compelling their own nationals to serve in the armed forces. Similarly, this rule would not prohibit States from compelling persons to betray an allegiance to a non-State armed group* (FM 6-27, 72-180).

Unlike FM 6-27, this Manual's position is that this restriction applies to all persons who are committed to or members of an enemy party to the conflict, State or non-State, and that the reasons for this position are broader than reflected in FM 6-27, e.g., the impracticality and risks often associated with *compelling* a person who is an enemy to become a trusted member of one's own forces even if that person is a national or member of the compelling party **(inconsistent)**. This Manual does, however, concur with FM 6-27, 2-179, if applied to all belligerents, that: *This prohibition applies to attempts to "compel" enemy nationals; it does not apply to measures short of compulsion, such as bribing enemy nationals or seeking to influence them through propaganda* **(generally consistent)**.

An enemy person who is voluntarily a member of the armed forces of an opposing belligerent, upon or prior to the commencement of hostilities, should renounce his or her allegiance to the State or movement of which he or she is a member or be allowed to resign from the armed force within which he or she is serving. If the latter, or the risks associated with said enemy person remaining in the military force of which they are a part, are determined to be too great given the enemy person's military knowledge and capabilities, he or she may be detained and treated as a prisoner of war **(generally consistent).**

4.1.6 Dual Citizenship/Membership (possibly consistent)

None of the preceding addresses the possibility a person has dual citizenship or membership of two opposing belligerents. In such situations, under this Manual, to avoid being conscripted against his or her will or being considered a traitor by one of the two States or parties of which the person is a citizen or member, such person should openly relinquish their association with one party or the other. If they do not, they may be subject to conscription or arrested as a spy and tried for treason by either party.

4.2 Force Recruitment, Training, Integration, and Compensation

4.2.1 Introduction

While generally not viewed as a conduct in war consideration and, thus, not addressed in official military manuals on conduct in war, how a belligerent recruits, trains, integrates, and compensates its military forces may have significant law of war, IHRL, and, thus, conduct in war implications.

Persons become part of belligerent forces of State and non-State parties in a variety of ways including:

a. Voluntarily
b. Draft/conscription
c. *Levees en masse*
d. Abduction
e. Coercion
f. Trafficking
g. Parental instruction/decision/transaction
h. Cultural norms
i. Social pressure
j. Contract (e.g., individuals, private military companies, mercenaries)
k. Non-State alliances (e.g., para-military groups, militias, death squads, war lords)

4.2.2 Recruitment, Training, Integration, Compensation (likely generally consistent with U.S. positions but inconsistent with non-U.S. ratified international law and possibly U.S. domestic law)

As addressed in Chapter 2, involuntary servitude is a non-derogable human right. Nevertheless, international law and domestic law in most nations, to include the United States, allows drafts and conscriptions. Yet, these nations generally condemn and consider a human rights violation the abductions and coercions employed by many non-State and even some State belligerents to secure combatants. In practical terms, there is often little difference between any of these means of securing soldiers if persons are required to serve against their will. If a person so-conscripted refuses to serve or deserts, there are generally significant negative consequences even among democratic, rule of law States.

Beyond the limited addressing of recruitment referenced above with respect to not forcing enemy persons to serve in their opponent's armed forces, FM 6-27 and FM 27-10 do not address proper conduct as to how those recruited are to be trained, integrated into the forces with whom they will serve, and compensated. On the surface, such matters may not seem appropriate to address in a conduct in war manual. Reality dictates otherwise.

In certain conflict situations, persons forced into service against their will may be required to kill a family member or those from their community to make it more difficult for the recruit to return home, or as part of a desensitization process so they can more easily kill whomever they are instructed to kill, combatants and non-combatants alike. Training, indoctrination, initiations, and integration may involve socialization and conditioning which can include gang rape, executing and torturing captives, and destroying homes and villages. Compensation may include the right to rape, force marriages, or enslave, pillage, and rob those in areas in which they operate. While these actions most often occur among non-State parties, they can also be found in weaker States and even some stronger ones.

To some degree, the formal law of war (to include FM 27-10, FM 6-27, and the DoD Law of War Manual) addresses the preceding in articles covering treatment of civilians. Unfortunately, some of the above acts can still be "justified" based on one's interpretation of certain formal law of war language, for example, that covering the right to secure local resources required for military purposes, executing "spies," incidental casualties, and the destruction of property if unavoidable under military necessity.

4.2.3 Applicable Conduct

It is the position of this Manual that conduct in war standards need to be more explicit with respect to recruitment, training, integration, and compensation of combatants regardless of whether by State or non-State parties. The following provides basic guidance.

a. ***Recruitment***

(1) *Voluntary* **(seemingly consistent)***:* Any person may voluntarily join the military forces of any State or non-State belligerent, even if not a citizen, resident, or member of that belligerent's country, territory, ethnic group, race, or other defining characteristic. This is consistent with one's human rights under the ICCPR as to freedom of movement and belief. Nonetheless, if the belligerent joined is fighting against the country or cause of which the volunteer is a citizen, legal resident, or member without formally and openly renouncing citizenship, residency, or membership, the volunteer may be considered a traitor and treated as such if captured by their former State or non-State party.

(2) Draft, Conscription, Levee en Masse **(somewhat inconsistent with U.S. policy)***:* In territory reasonably controlled by a State or non-State belligerent, drafts, conscription, and *levee en masse* are a permissible means of recruitment of persons who are not stated or known enemy persons. Those who are stated or known enemy persons shall not be required to engage in hostilities against the country or cause of which they are a part. Also, if honestly believed, persons can claim conscientious objector status and should be assigned readily identifiable non-combat responsibilities if required to serve in the military forces of a belligerent.

(3) Contract **(consistent with U.S. policy)***:* Individuals, companies, private militias, para-military groups, ethnic groups, and others may be contracted to perform any role required of combatants engaged in an armed conflict, to include support personnel. Such contracted persons and entities shall adhere to the conduct and have the rights and responsibilities of other combatants as delineated in this Manual. (See Section 4.3 which follows.)

(4) Coercion **(generally consistent)***:* Beyond that normally and customarily part of drafts, conscriptions, and *levee en masse* by both State and non-State parties, no person shall be coerced into joining a military force through threat or act of death or injury against that person, his or her family or community, or other punitive acts against persons (beyond incarceration) or property.

(5) Parental Involvement **(consistent)***:* A parent shall not voluntarily give to, require to join, or receive compensation from a belligerent so that their child, regardless of age, becomes a member of that belligerent's military forces involuntarily. If a person under fifteen years of age wishes to voluntarily joint a belligerent's military forces, that person's parent(s) or guardian should first give consent to do so without being coerced by the recruiting party. If a parent is not available to provide such consent, a responsible third-party adult should represent the best interests of the prospective volunteer under fifteen.

(6) Trafficking **(consistent)***:* No person shall be bought, sold, or otherwise conveyed or transferred by one party to another, for purposes of becoming a combatant of, or performing a support role for, a belligerent, to include the provision of sexual services.

b. ***Training, Indoctrination, Initiation, Integration*** **(consistent)**

Upon becoming part of a military force, the following is not allowed with respect to the training, indoctrination, initiation, or integration of recruits:

(1) Killing or mistreatment of a non-combatant to demonstrate loyalty to, or reduce the likelihood of desertion from, the belligerent whose forces the recruit has become a member;
(2) Sexual or other violation or inappropriate mistreatment of the recruit or any other person, or the destruction of non-militarily-related private or public property, as a bonding or initiation rite, or as part of a training exercise;
(3) Any other act against a non-combatant person or property as part of training, indoctrinating, and integrating a recruit into a belligerent's forces which is in violation of this Manual; and
(4) Risk of personal psychological and physical harm during training which exceeds that required for the position, responsibility, or mission for which the recruit is reasonably being trained.

c. *Compensation* (consistent)

Personnel of military forces shall not be compensated by allowing formally, or by informal practice, the sexual violation, enslavement, trafficking, or robbery of persons with whom they come in contact during combat or within areas they temporarily or more permanently control, nor should they be allowed for personal benefit to pillage homes, businesses, farms, or other establishments and property which they encounter.

This does not preclude a military force from securing local resources if required for military purposes, one of which might be the compensation of personnel. However, if this occurs, it would be done as outlined in this Manual and the law of war and not by individuals or groups acting on their own volition for their personal benefit.

4.3 Mercenaries, Contractors, and Non-State Allies (generally consistent with U.S. policy except for reference to this Manual)

Although the United States has not, most of its allies and other nations have ratified Additional Protocol I to the 1949 Geneva Conventions which includes the following:

> *Article 47 -- Mercenaries*
> *1. A mercenary shall not have the right to be a combatant or a prisoner of war.*
> *2. A mercenary is any person who:*
> *(a) is specially recruited locally or abroad in order to fight in an armed conflict;*
> *(b) does, in fact, take a direct part in the hostilities;*
> *(c) 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;*
> *(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;*
> *(e) is not a member of the armed forces of a Party to the conflict; and*
> *(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.*

On a regular basis, the United States military employs non-citizens in active combat zones. It contracts with private firms often staffed by armed "mercenaries" to provide many services during hostilities which previously had been the responsibilities of the military, often at compensation greater than its soldiers receive. While some of those who choose to serve as "mercenaries" may not fully meet all Article 47 requirements to be considered a mercenary, there is often little difference between those who do and those who do not as to why they are serving and from where they might originate.

Section 4.2.1 of the DoD Law of War Manual, states: *The act of being a mercenary is not a crime in customary international law nor in any treaty to which the United States is a Party. Under the customary law of war and the GPW, 'mercenaries' receive the rights, duties, and liabilities of combatant status on the same basis as other persons."* That is also the position of this Manual, with the recruitment and use of persons as mercenaries considered both legal and custom.

With respect to contracted civilians working for the military who are not engaged in active combat (e.g., facility security, bodyguards for political and military leaders, logistics, weapons research and development), these may be hired to assist the war effort. Once hired, they become combatants with the same risks, responsibilities, and protections of other combatants.

Certain non-State allies of a State might also be considered "mercenaries," especially if they are paid all or in part by their State ally and, with respect to their rights and responsibilities, should be viewed no differently than standard mercenaries. Such non-State allies include, but are not necessarily limited to, local militias, para-military groups, war lord armed forces, and tribal or ethnic forces which are paid or otherwise supported by a belligerent.

Regardless of whether a person is a mercenary, contractor, or allied non-state party, all are subject to the law of war and this Manual. Those who hire them are responsible for insuring these employees are knowledgeable of their rights, responsibilities, and protections when engaged in a conflict. If such employees violate their responsibilities, those who hired, supervise, monitor, or command them may be subject to charges, trials, and punishment no different than civilian leaders and military commanders at all levels who can be held liable if traditional military personnel for whom they are responsible violate the law of war due to inadequate training, orders, oversight, investigation, or enforcement.

4.4 Child Soldiers

4.4.1 Introduction

An unfortunate reality in conflicts is that children may play major roles in a variety of ways. Consequently, those in combat must determine (1) what roles, if any, are appropriate for younger persons to perform in war, and (2) if encountered as combatants, how one may appropriately respond. While FM 27-10 and FM 6-27 include limited requirements for the handling and treatment of children, they do not address children as combatants. The DoD Law of War Manual includes a section on child soldiers, as does Additional Protocol I of the 1949 Geneva Conventions in its article on the protection of children. In addition to the U.S. Child Soldier Protection Act partially addressed in Chapter 2, the Optional Protocol to the Convention of the Rights of Children (OPCRC) also addresses child soldiers.

4.4.2 Geneva Conventions Protocol I, Protection of Victims of International Armed Conflict

The United States signed Additional Protocol I but has not ratified it. Thus, the following is not legally binding on U.S. forces under international treaty law although it may have some force under international customary law. Regardless of that which might be the United States' position on the legal application to our military forces and those with whom and against whom it fights, violations of Additional Protocol I could be viewed as war crimes if one acts contrary to this article and were to become a captive or within the control of a party which expects full compliance with its stated requirements.

Article 77. Protection of Children

1. *Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, because of their age or for any other reason.*

2. *The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavor to give priority to those who are oldest.*
3. *If in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by the Article, whether or not they are prisoners of war.*
4. *If arrested, detained or interned for reason related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.*
5. *The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.*

4.4.3 Optional Protocol to the Convention of the Rights of the Child

The United States is a party to the Optional Protocol to the Convention of the Rights of the Child on the involvement of children in armed conflicts. Under this protocol, it is required that a party "*take all feasible measures to ensure that members of* [its] *armed forces who have not attained the age of 18 do not take a direct part in hostilities*." When acceding to this protocol, in 2002, the United States made a statement of understanding regarding the phrase "direct party in hostilities" as meaning *"(i)…immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity in and the harm done to the enemy; and (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment*." (DoD Law of War Manual, 4.20.5.2, footnote 443). The DoD manual also states: "direct part in hostilities" may have other meanings in other contexts such as when civilians forfeit their protection from being made the object of attacks. While this is U.S. policy, if those seventeen years old enlist, they may be (and often are) trained for direct action on the battlefield so long as such deployment does not occur until after they have turned eighteen.

4.4.4 U.S. Child Soldier Protection Act

In 2008, the United States passed the Child Soldier Protection Act (CSPA) which defines a "child soldier" as:

> *(i) any person under 18 years of age who takes a direct part in hostilities as a member of governmental armed forces;*
> *(ii) any person under 18 years of age who has been compulsorily recruited into governmental armed forces;*
> *(iii) any person under 15 years of age who has been voluntarily recruited into governmental armed forces; or*
> *(iv) any person under 18 years of age who has been recruited or used in hostilities by armed forces distinct from the armed forces of a state; and …*
>
> *includes any person described in clauses (ii), (iii), or (iv)…who is serving in any capacity, including in a support role such as a cook, porter, messenger, medic, guard, or sex slave.*

Other definitions include:

(1) Active participation in hostilities: Combat, or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or direct support functions related to combat, including transporting supplies or providing other services.

(2) Armed force or group: Any army, militia, or other military organization, whether or not State-sponsored, excluding any group assembled solely for nonviolent political association.

The first of the preceding two definitions seems inconsistent with the U.S. stated definition when it acceded to the Optional Protocol to the Convention of the Rights of the Child (see preceding section).

Specifically, under the CSPA, the United States government should:

(3) Expand ongoing services to rehabilitate recovered child soldiers and to reintegrate such children back into their respective communities by:

(a) offering ongoing psychological services to help such children:

(i) to recover from the trauma suffered during their forced military involvement;

(ii) to relearn how to interact with others in nonviolent ways so that such children are no longer a danger to their respective communities; and

(iii) by taking into consideration the needs of girl soldiers, who may be at risk of exclusion from disarmament, demobilization, and reintegration programs;

(b) facilitating reconciliation with such communities through negotiations with traditional leaders and elders to enable recovered abductees to resume normal lives in such communities; and

(c) providing educational and vocational assistance;

(4) Work with the international community, including, as appropriate, third country governments, nongovernmental organizations, faith-based organizations, United Nations agencies, local governments, labor unions, and private enterprises:

(a) to bring to justice rebel and paramilitary forces that kidnap children for use as child soldiers;

(b) to recover those children who have been abducted; and

(c) to assist such children to be rehabilitated and reintegrated into their respective communities…"

4.4.5 Position of this Manual

Except as noted below, this Manual agrees with the preceding language of Article 77, Protocol I of the Geneva Conventions; Convention of the Rights of the Child; and Child Soldier Protection Act (CSPA).

a. Age (inconsistent)

This Manual takes a somewhat different view on age than does the Geneva Conventions, CSPA, FM 27-10, and the DoD Law of War Manual. Rather than simply "below 15 years" and "between 15 and 18" as stated in Protocol I and the CSPA, age appropriateness can be a function of the culture of the combatants, the nature of the conflict locally, and the role to be played in hostilities by the child. Thus, children 14 and under, and definitely those under 18, may in certain circumstances actively participate in hostilities whether as defined in the DOD Law of War Manual or under the CSPA.

b. Culture (inconsistent)

Setting aside for a moment the issue of whether and how young people might be engaged in conflicts, there are cultures where both boys and girls are considered as having become adults at or shortly after puberty. For boys this may mean going through training and initiation rites where, upon completion, they are expected to perform the role of a man in their society, to include having a family, producing or

securing food, participating in village decisions, defending against the aggression of others, and possibly being part of hostile attacks on others. For girls, this means they have attained womanhood, can marry, have children, help provide for those children, and defend their family or village if the need arises.

In the United States, it is possible to enlist in the military at age 17 with parental consent. In every war the United States has been involved since its independence, those in combat have been 17 and younger, either out of personal desire of the soldier or of necessity. In Vietnam, the youngest U.S. soldier killed was 15. A 15-year-old Montagnard bodyguard died saving the life of a Special Forces soldier. In more than one U.S. state today, it is possible to marry at 14 with one state allowing girls to marry at 12.

While using 15 years as a generally reasonable guideline in Western and other more developed nations as the absolute minimum age for those who may be involved in active combat in some way, given cultural norms, one should expect that those younger than this may also be reasonably involved without it being a violation of their culture, their rights, or their common or formal domestic law. If they are, this does not in and of itself make their involvement in armed conflict immoral or despicable, nor should it be considered illegal under international law.

Those who advocate for full compliance with international law may not have had to face the same challenges and conditions as those different than themselves. Thus, with respect to adversaries, allies, and even one's own forces, one should not always view this matter as narrowly as found in Protocol I, the DoD Law of War Manual, or the CSPA with 15 being the youngest age for which it is appropriate for a person to become involved in hostilities.

c. Local Nature of Conflict (possibly inconsistent)

Often the abhorrence of the involvement of children under 15 in hostilities is based on situations in recent times such as those found in the Lord's Resistance Army in Uganda, Janjaweed in South Sudan, Boko Haram in West Africa, Tatmadaw in Myanmar, and ISIS/ISIL in the Middle East. In these examples, children are abducted, sold, or given by parents to rebel groups for indoctrination, training, and deployment in active combat and terrorist activities with the process and combat roles sometimes more brutal, dehumanizing, and dangerous than adult soldiers experience.

Yet there can be situations where the involvement of those under 15, and definitely those under 18, may be necessary for survival. These include:

a. Protection of self, family, or village
b. Repressive government or occupation, e.g., Nazi occupation of much of Europe
c. Invasion of one's homeland
d. Anarchy after societal or governmental collapse

In light of the preceding, while it might generally be inappropriate for those under 15 years to be involved in active offensive combat, it may be essential for self-defense and survival.

d. Permissible Roles (inconsistent)

A third consideration as to the involvement of children in hostilities is the relative appropriateness and risk of the role to be performed. The following provides inexact guidelines when, depending on the culture and local conflict situation, it may be appropriate for children under the age of 15 years to perform critical tasks associated with hostilities especially when necessary for self-defense and survival:

Age	Role
0-5	None
≥ 6	Lookout

≥ 8	Messenger
≥12	Porter, Collection of Information
≥13	Protests, Active Self-Defense
≥15	Offensive Combat

Even with these guidelines, in extreme circumstances where it is necessary to defend one's life, family, or village, those younger than indicated might reasonably need to take on tasks which normally might be done only by those older.

***e. Education* (seemingly consistent)**

None of the preceding, including Article 77 of Additional Protocol I of the Geneva Conventions or the Child Soldier Protection Act, precludes children of any age from participating in educational programs as to beliefs and values, even if a third party might disagree with these teachings. Additionally, it is not inappropriate for children to be taught the safe and competent use of weapons common in that society or to participate in martial arts and personal self-defense training. Such activities for youth are common in many cultures and nations, including the United States, during peacetime as a normal part of non-militaristic civilian life. However, such educational and training programs should not be conducted or taught to harm intentionally or inappropriately those who participate, or those who do not. Additionally, in a temporarily or more lengthily occupied area, it would be appropriate for the controlling force to restrict teachings which are in violation of certain portions of international human rights law, to include the equality of women and all races and ethnicities; the proscription against genocide; or advocacy of attack upon or subversion of occupying forces or their cause.

***f. As Adversary* (likely consistent)**

The preceding has addressed when it may be appropriate for those under 15 years to become engaged in hostilities. It has not addressed proper conduct when one encounters child soldiers in combat situations, nor does Additional Protocol I, CSPA, the Child Protection Act, or FM 27-10.

The International Committee of the Red Cross has developed a series of instructional lessons related to the law of armed conflict. Lesson 3, Conduct of Operations—Part A, states: "*These child soldiers operate with little or no training and are often fed a diet of alcohol and drugs. Of course, they can be formidable and tough foes to deal with. Deal with them you must, but with due regard and some sympathy for their plight*."

The DoD Law of War Manual (Section 4.20.5) includes consistent language: *"If children are nonetheless employed in armed conflict, they generally are treated on the same basis as adults, although children may be subject to special treatment in detention because of their age."*

The preceding is all that can be reasonably said. If it is obvious or reasonably likely a child poses a threat, they must be dealt with as any adversary in a similar situation. Caution should be exercised with unarmed children who seem to be friendly and curious as one might find anywhere. Adversaries may understand one's guard is often less around children and, therefore, reward, coerce or brainwash a child to secure information or inflict harm, to include becoming a suicide bomber or carrying out other violent or harmful acts.

Nonetheless, every reasonable effort should be made to try to use the minimum force necessary when protecting against an obvious or possible child combatant and look for ways to respond which do not include deadly force. Further, if not perceived as a threat and even when being cautious as to the motives behind children's advances, a child treated politely and with respect, a child helped in some way may at some point warn you of danger or provide other worthwhile assistance.

g. Upon Capture (likely consistent with intent if not precise language)

Article 77, Paragraph 4, Additional Protocol I, and the CSPA provide goals and guidance on how children should be held if arrested, detained, or captured and the Child Soldier Protection Act advocates for the need to provide essential care, re-education, and re-entry assistance. Generally, the ultimate goal ideally is to reunite these children with their families as soon as possible. Unfortunately, this is not always straightforward if the child has been a combatant or has undergone certain forms of indoctrination or unit initiation and integration. Just as with adult combatants, child soldiers can suffer from PTSD and need treatment for this and other psychological damage. They may remain loyal to those of whom they were a part and, if an opportunity arises, may return to them to continue their roles as combatants, for protection, or to have access to food and other essentials necessary for survival.

Even if none of the preceding are relevant, returning them to their family may place them in personal danger, either from those whom they were once a member or from starvation, sexual violation, or other privations and violations. Further, their family may have voluntarily sold or given the child to those for whom the child fought and, upon his or her return, may repeat the process.

Thus, to the degree it is reasonably possible given combat conditions and available resources for holding prisoners in general and children specifically, every effort should be made to assess the child's physical and psychological condition; the nature of their recruitment, training, and involvement in combat; and their home situation if returned to their family.

An attempt should be made to ascertain whether there are qualified, responsible agencies or organizations which specialize in working with such children to whom the child might be transferred. Ideally, the availability of such entities should be ascertained in advance of the need. Based on these assessments of the child and available options for holding, returning, releasing, or placing the child, captors should try to make the best decision possible for the child's immediate and future welfare. If encountering child soldiers is expected to be or becomes common, if resources can reasonably be assembled for doing so, a military unit specializing in the evaluation and handling of such children should be created, to include individuals to represent and act on behalf of the child (*guardian ad litem)* as to that believed to be best.

4.5 Conduct with Respect to Enemy Combatants

4.5.1 Refusal of Quarter

a. FM 27-10, Article 28 (also see FM 6-27, 2-103)

Treaty Provision: *It is forbidden***to declare that no quarter will be given* [Annex to Hague Convention No. IV, article 3, paragraph (d)].

b. Position of this Manual (inconsistent)

Extreme circumstances (e.g., essential to the accomplishment of a critical military mission, survival or continued effective functioning of self or unit, or protection of non-combatants) would be required for an order to be issued that no quarter be granted. Seldom, however, will a situation be faced that all those engaged or captured must be killed when a battle has concluded, there is no longer material risk to the prevailing force, and wounded and other captured enemy personnel are within one's control.

It is less clear in situations when three factors are present: (1) significant risk remains, especially to a smaller, more exposed force; (2) there is no way to secure, care for, or evacuate prisoners; and (3) the escape or release of even a single person may result in the failure of a critical mission or the detaining unit being destroyed. In such situations, no quarter is at least a consideration with the understanding that, if taken, such action will be highly scrutinized and charges possibly brought even if the purposes of the law of war were better served than complying with the proscription against no quarter.

An example of when no prisoners be taken might be in a fluid combat situation where it is essential during an operation that guards or small outposts be totally eliminated quietly with no chance of anyone spreading an alarm. Another might be if there is insufficient manpower or means to secure and guard a prisoner before moving on to attack a highly important target. The latter is addressed further in the following subsection. In some respects, in certain situations, "no quarter" is little different than using legal force (e.g., artillery, air strikes) where it is known that all those targeted will likely be killed.

4.5.2 Killing or Injury After Surrender

a. *FM 27-10, Article 85*

Treaty Provisions:

(1) *It is especially forbidden…to kill or wound an enemy who, having laid down his arms, or having no longer means of defense has surrendered at discretion* [Annex to Hague Convention No IV, article 23, paragraph (c)].

(2) *A commander may not put his prisoners to death because their presence retards his movement or diminishes his power of resistance…*

(3) It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operation…

b. *Position of This Manual* (inconsistent)

Each of the preceding are aspirational goals which should be followed if reasonably possible. Nonetheless, there may be situations when killing a prisoner becomes necessary. These could include:

1. Mercy killing when the prisoner is so severely injured there is little or no likelihood he or she will live; the prisoner is suffering horrendous pain; there is no medical care available to address their injuries adequately; there is no or inadequate medication available to suppress the pain; and there is no reasonable way to transfer them to a medical facility. In such situations, if the captive is conscious and coherent, he or she should give consent. If a medic, other knowledgeable medical person, member of the prisoner's unit, family member, or other appropriate local person is present, they should be consulted and possibly make the final decision. It should be noted that this same decision with respect to mercy killing might be made regarding fellow combatants in similar circumstance. See 8.8.3 for further guidance;

2. Critical missions where there is no reasonable way to secure or have the captive accompany the capturing force, and release of or leaving the captive, even if secured, may result in the failure of a mission of critical importance;

3. Active fluid combat when conditions have not stabilized; there is no way to secure the prisoner adequately; and their freedom of movement puts at risk one's ability to continue fighting or prevent others of one's unit from being killed, wounded, or captured; and

4. Survival of the capturing party.

If such decisions are made under these circumstances, deaths or injury to those who have been captured, while unfortunate and tragic, are undesired incidental casualties. This would be no different than the tragic incidental death of non-combatants in an active battlefield environment which occurs legally if the principles of the law of war have been appropriately taken into consideration.

Decisions such as these should be made responsibly, with compassion, and using proportionality considerations similar to when facing an armed opponent against whom kinetic actions might result in non-combatant fatalities and injuries. When such decisions are necessary, those who order or carry out

should be monitored as to (1) detrimental psychological effects which may be experienced afterwards, or (2) an increased tendency to make such decisions when not essential. If psychological trauma or improper decision-making is observed, appropriate measures should be taken to treat or correct.

4.5.3 Descent by Parachute

a. FM 27-10, Article 30 (also see FM 6-27, 2-114 through 2-116)

Treaty Provision: *The law of war does not prohibit firing upon paratroops or other person who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon.*

b. Position of this Manual (somewhat inconsistent)

The decision as to whether to shoot rather than attempt to capture those descending by parachute from enemy aircraft is that of those on the ground regardless of whether the aircraft from which parachutists are descending has or has not been disabled and in danger of crashing. Those on the ground may not have the time or resources to safely attempt to capture parachutists once they have landed, especially if there are natural or manmade terrain features, active combat, or other conditions such as darkness or weather which would make this difficult or impossible. Additionally, even those descending from a disabled aircraft may be armed (as U.S. pilots generally are) and a threat to both military and civilian persons once on the ground as they attempt to evade capture or if, rather than a pilot or crew member, they are a saboteur, spy, or other special operative being inserted behind one's lines when their plane was disabled. Finally, if parachutists are able to avoid capture because of such situations, they pose a safety risk to civilians and those of one's forces who may be encountered in the parachutist's attempts to stay alive, carry out missions, or avoid capture.

4.5.4 Reprisals (consistent and inconsistent)

FM 6-27, as does FM 27-10 which it replaces, addresses reprisals in its Chapter 8 (War Crimes and the Enforcement of the Law of Land Warfare). This Manual feels reprisals are more appropriately included in the chapter on conduct of hostilities as commanders will more often refer to this chapter when attempting to ascertain proper conduct in combat than a chapter on enforcement which may be seen as of value to a commander primarily after the fact.

In that which follows, FM 6-27 makes one material modification to FM 27-10 (with this Manual's position closer to the latter's) as well as a number of valuable additions which help clarify for commanders what is intended.

8-80. Reprisals are acts that are otherwise not permitted by LOAC in order to persuade a party to the conflict to cease violating LOAC. They are taken in response to a prior act in violation of LOAC that was committed by or is attributable to that party. This could include, for example, the use of weapons forbidden by the Hague Regulations to counter the use of the same weapons by an enemy on combatants who have not yet fallen into the hands of the enemy. Reprisals are extreme measures that are only adopted as a last resort to induce the party to desist from violations of LOAC.

8-81. Customary international law permits reprisals, subject to certain conditions. Reprisals are highly restricted in treaty provisions (see paragraphs 8-87 and 8-88) and practical considerations may counsel against their use (see DOD Law of War Manual, 18.18.4). The conditions in paragraphs 8-82 to 8-86 are drawn from U.S. practice (see DOD Law of War Manual, Section 18.18).

4.5.4.1 Careful Inquiry That Reprisals Are Justified (generally consistent)

8-82. Reprisals shall be resorted to only after a careful inquiry into the facts to determine that the enemy has, in fact, [materially and seriously] *violated the law (see DOD Law of War Manual, 18.18.2.). In many cases, whether a law of war rule has been violated will not be apparent to the opposing side or outside observers.*

4.5.4.2 Proportionality in Reprisal (inconsistent)

8-83. To be legal, reprisals must respond in a proportionate manner to the preceding illegal act by the party against which they are taken. Identical reprisals are the easiest to justify as proportionate, because subjective comparisons are not involved. However, the acts resorted to by way of reprisal need not be identical nor of the same type as the violations committed by the enemy. A reprisal should not be unreasonable or excessive compared to the enemy's violation (for example, considering the death, injury, damage, or destruction that the enemy's violation caused).

It is the position of this Manual, that while reprisals should generally be proportionate, response as to type, magnitude, and intensity is at the discretion of the responding party just as it is when a party is attacked at the outset of a conflict and the absence of a legal requirement for applying a use-of-force continuum (see 1.3.d and 4.5.6).

4.5.4.3 Exhaustion of Other Means of Securing Compliance (consistent)

8-84. Before resorting to reprisals, ...[o]ther *means of securing compliance should be exhausted…. For example, the enemy should normally be warned in advance of the specific conduct that may be subject to reprisal and given an opportunity to cease it*[s] *unlawful acts. Leaders should consider whether reprisals will lead to retaliation rather than compliance. In certain situations, the enemy may be more likely to be persuaded to comply by a steady adherence to LOAC by U.S. forces.*

4.5.4.4 Who May Authorize

8-85. Individual service members may not take reprisal action on their own initiative. That authority is retained at the national level (see DOD Law of War Manual, 18.18.2.3). Commanders who believe a reprisal is warranted should report the enemy's violation promptly through command channels in accordance with DODD 2311.01E, as well as any proposal for reprisal action.

Paragraph 8-85 from FM 6-27 differs materially from FM 27-10, Article 497d, which reads:

> *<u>When and How Employed</u>. Reprisals are never adopted merely for revenge, but as an unavoidable last resort to induce the enemy to desist from unlawful practices. They should never be employed by individual soldiers except by direct order of a commander, and the latter should give such orders only after careful inquiry into the alleged offenses of the enemy. The highest accessible military authority in the relevant area of operation should be consulted unless immediate action is demanded, in which event a subordinate commander may order appropriate reprisals upon his* [or her] *own initiative. Ill-considered actions of reprisal may subsequently be found to have been wholly unjustified and will subject the responsible officer…to punishment for a violation of the law of war. On the other hand, commanding officers must assume responsibility for the need to take retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of violations of unlawful acts.*

This Manual's position regarding authorization and use is that found in FM 27-10 **(inconsistent with current manuals)**.

4.5.4.5 Public Announcement of Reprisals (inconsistent)

8-86 In order to fulfill their purpose of dissuading further illegal conduct, reprisals must [should] *be made public and announced as such to the offending party.* [Nonetheless, the party carrying out a legitimate reprisal, may at its sole discretion, determine whether doing as indicated in the preceding sentence will be most effective in reducing illegal conduct by the forces against which the reprisals are taken.]

4.5.4.6 Treaty Limitations on Reprisal

8-87 Certain treaties limit the individuals and objects against which reprisals may be directed. The following categories are protected from reprisals:

- *Combatant personnel who are wounded, sick, or shipwrecked (GWS art. 46; GWS Sea art. 47);*
- *Medical and religious personnel, medical units and facilities, and hospital ships (GWS art. 46; GWS Sea art. 47);*
- *POWs (GPW art. 13);*
- *Persons protected by the GC and their property (GC art. 33;); and*
- *Cultural property (1954 Hague art. 4(4); consider AP I art. 53).*

8-88 Additional Protocol I specified additional restrictions on reprisals that are applicable to AP I Parties that have not taken reservations to these restrictions, including protections against reprisal for:

- *Civilians and civilian objects (consider AP I art. 52(1));*
- *The natural environment (consider AP I art. 55(2));*
- *Objects "indispensable to the survival of the civilian population" (consider AP I art. 54(4));POWs (GPW art. 13); and*
- *Public works and installations containing dangerous forces (such as dams, dykes, and nuclear power stations) (consider AP I art. 56(4)).*

Some States in ratifying AP I have taken reservations from the additional limitations on reprisal provided for in Additional Protocol I. The U.S. position is that Additional Protocol I's reprisal provisions are counterproductive and remove a significant deterrent that protects civilians and war victims on all sides of a conflict. Reprisals are generally extraordinary measures, and, therefore, generally reserved for decision at the national level. [Use of the word "generally" makes this inconsistent with 8-85 and more consistent with this Manual.]

With the exception of 8-85 and parts of 8-87, this Manual's position is that, provided the reprisal is in keeping with all other of the above paragraphs, there is not automatically any individual, group of individuals, or object of the offending belligerent against whom reprisals are precluded **(inconsistent)**. Nonetheless, before carrying out a reprisal against medical and religious personnel, prisoners of war, civilians, wounded and injured, and certain facilities or sites, those in positions of authority of the injured party should consider whether doing so may unduly undermine support among its allies, neutral parties, civilians in conflict areas, and its own citizens and troops. Finally, as stated above, this Manual's position with respect to authorizations is that it need not always be *"retained at the national* level" as found in FM 6-27, but rather the language of FM 27-10 whereby, "*The highest accessible military authority in the relevant area of operation should be consulted unless immediate action is demanded, in which event a subordinate commander may order appropriate reprisals upon* [his or her] *own initiative."*

4.5.5 Hostages

a. *FM 27-10, Article 497g*

Treaty Provision*: The taking of hostages is forbidden. The taking of prisoners by way of reprisal for acts previously committed (so-called 'reprisal prisoners) is likewise forbidden.*

***b. Position of this Manual* (inconsistent)**

Under this Manual, the taking of hostages may sometimes be an appropriate form of reprisal and allowed, i.e., the taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners"). Taking reprisal hostages as well as other types may be a more humane approach resulting in less death and suffering than other legal options which might be carried out. Nonetheless, careful consideration should be employed by a belligerent before taking hostages. To do so, especially if the hostages are women, children, and others generally considered helpless or innocent, may cause negative repercussions among the belligerent's own people and government, allies, and neutrals.

4.5.6 Other Force That May Be Applied Against Combatants (generally consistent)

The following paragraphs from FM 6-27 are generally consistent with this Manual unless otherwise noted:

> *2-96 In the absence of expected harm to* [non-combatant] *civilians and civilian objects or of the wanton* [delete "wanton" as such destruction is never justified] *destruction that is not justified by military necessity, LOAC imposes no limits on the degree of force that may be directed against enemy military objectives, to including enemy military personnel. For example, LOAC does not require combatants to apply a use-of-force continuum or to employ the least harmful means, such as by attempting to capture enemy combatants before using deadly force against them...* [Under this Manual, while a "use-of-force continuum" is not required, if time, combat conditions, and multiple force options exist and the fog of war is not a relevant factor, combatants should use the minimum force necessary to achieve military and political objectives that reduce unnecessary death, injury, suffering, and destruction to the degree reasonably possible.]
>
> **Surprise Attack (consistent)**
>
> *2-97 LOAC does not prohibit the use of surprise to conduct attacks, such as the use of surprise in ambushes, sniper attacks, air raids, and attacks by special operations forces carried out behind enemy lines.*
>
> **Attacks on Retreating Forces (assumed consistent as modified)**
>
> *2-98 Enemy combatants remain liable to attack when retreating. Retreat is not the same as surrender. Retreating forces remain dangerous as the enemy force may recover to counterattack, consolidate in a new defensive position, or assist the war effort in other ways. Retreat may be a ruse. Retreating combatants may have the same amount of force brought to bear upon them as an attacking military force, and a military commander is under no obligation to limit force directed against enemy forces because they are, or appear to be, in retreat.* [Nonetheless, if retreating combatants are seemingly fleeing, have abandoned their weapons, and a means exists where they might be captured with minimal risk to capturing forces, doing so ideally should occur without the application of unnecessary force.]
>
> **Harassing Fire (consistent)**
>
> *2-99 ...harassing fire against enemy combatants* [is] *not prohibited. Harassing fires are delivered on enemy locations for the purpose of disturbing enemy forces' rest, curtailing their movement, or lowering their morale.*
>
> **Attacks on Individuals (generally consistent)**
>
> *2-100 Military operations may be directed against specific enemy combatants.*

While this Manual concurs with the right under the formal law of war to do as stated in the preceding paragraphs from FM 6-27, its position is, when reasonably possible and without putting oneself or forces at undue risk or jeopardizing missions, (1) enemy combatants should be captured, not killed, not just for humanitarian reasons, but for their potential intelligence value and as possible assets against the enemy force, cause, or State of which they are members, and (2) one should use less harmful means of force if available and the same assurance of success is equally probable as using the more harmful force option. With respect to the latter, if there is uncertainty as to success probability, one should generally apply the force most likely to be effective and consistent with a weighing of the principles of the law of war. Of course, once engaged in active combat, the luxury of such a reasoned and deliberate assessment of all possible force options is not realistic. In such situations, one may reasonably apply whatever force is readily available which will subdue or eliminate the enemy or objective with the least risk to one's own forces even if a later assessment would suggest a less harmful means of force would have sufficed.

4.6 Terrorism

4.6.1 Definition

There is no generally accepted definition of terrorism with over one hundred variations found worldwide incorporating combinations of more than twenty possible elements. One of the most concise is NATO's which defines terrorism in the AAP-06 NATO Glossary of Terms and Definitions, Edition 2014, as "*The unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate governments or societies to achieve political, religious or ideological objectives*".

The U.S. government has at least nine different definitions under or by various agencies, laws, codes, and acts. In 2010, the U.S. Department of Defense adopted the following definition*: "*[T]*he unlawful use of violence or threat of violence to instill fear and coerce governments or societies. Terrorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political."*

This Manual disagrees with both definitions that "unlawful" is relevant as lawful force can also be used in ways that cause terror for the same purposes as unlawful force. Additionally, terrorism and its use are not limited only to conflicts. A more appropriate and relevant definition is as follows:

An intentional act or threat of physical or psychological violence against a generally unsuspecting or defenseless party to coerce, primarily through fear, that party, or a third party, to respond in a desired manner intended to further the cause, beliefs, or other desires of the aggressor party.

In war, further delineation would include:

1. Aggressor, targeted, and third parties may be State or non-State; individual or group; civilian or military; combatant or non-combatant.
2. The cause/belief may be political, religious, economic, racial, ethnic, moral, or other ideological.
3. Violence may be kinetic, financial, economic, cyber, verbal, and other.
4. Terrorism is a means for employing force just as are economic sanctions, cyber operations, military weapons and units, and others.
5. Terrorism, if applied using responsible distinction, precaution, proportionality, and resource availability considerations, can sometimes reduce unnecessary death, suffering, and destruction in war.
6. All terrorist acts are not inherently immoral or illegal. They become so when determined by an individual, entity, cause, or State whose determination may differ from other individuals, entities, causes, or States. This is similar to what exists elsewhere in the law of war and human rights law

where there is not complete consensus or commitment to compliance by all parties in all situations.

7. There are few purely terrorist groups; rather there are groups which employ terror as part of their available arsenal of weapons and methods of force application, or during certain stages of their establishment and evolution.
8. Depending on applicable laws in force in the locations the terrorist actions occur and the parties involved or affected, an intentional act or threat of physical or psychological violence may be terrorism, a hate crime, otherwise illegal, revenge, criminal activity, an act of the insane, or a legitimate use of force.
9. An act or threat of violence by a mentally incompetent person against an unsuspecting defenseless person or group is not terrorism even though it may have been initiated seemingly for a cause or belief and instills fear until the perpetrator is apprehended.
10. If the primary purpose of the violence is not specifically to cause fear but to destroy or weaken the military or other war making capacity and capabilities of one's enemy, this is not terrorism even though it may cause fear with individuals and parties to the conflict.

4.6.2 Treaties and Laws

Presently, there is no comprehensive international treaty law addressing terrorism. There are three United Nations conventions which address subsets:

1. International Convention for the Suppression of Terrorist Bombings (1997)
2. International Convention for the Suppression of the Financing of Terrorism (1999)
3. International Convention for the Suppression of Nuclear Terrorism (2005)

In addition, there are sixteen other UN conventions, protocols, or amendments, that address that which often may be employed or targeted by terrorists and include those on civilian aviation, maritime navigation, fixed platforms on continental shelves, explosives to include nuclear materials, hostages, and protection of international staff. With respect to the above three conventions specifically, these charge States which have ratified or are parties to these conventions to adopt relevant domestic laws to address.

Under U.S. domestic law, Title 18—Crimes and Criminal Procedure of the U.S. Code, Part I—Crimes, Chapter 113 B, terrorism is addressed in detail. Specifically, Chapter 113B criminalizes the following:

2332a. Use of weapons of mass destruction.
2332b. Acts of terrorism transcending national boundaries.
2332d. Financial transactions.
2332f. Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities.
2332g. Missile systems designed to destroy aircraft.
2332h. Radiological dispersal devices.
2332i. Acts of nuclear terrorism.
2339 Harboring or concealing terrorists.
2339A. Providing material support to terrorists.
2339B. Providing material support or resources to designated foreign terrorist organizations.
2339C. Prohibitions against the financing of terrorism.
2339D. Receiving military-type training from a foreign terrorist organization.

Section 2332e allows the Attorney General, or other authorized official of the Department of Justice, to request the Secretary of Defense to provide assistance under Section 382 of Title 10 in support of

Department of Justice activities relating to the enforcement of Section 2332a during an emergency situation involving a weapon of mass destruction.

Under the U.S. Code, all acts of terrorism defined under the Code within the United States, and those outside the United States against U.S. citizens and property, to include shipping, are crimes punishable by fines, incarceration up to life, and execution depending on the severity of the violation. Legally, this would seem to apply to all U.S. military and intelligence personnel if they were to perform such acts on their own, even if on behalf of the United States, and to all terrorists captured by U.S forces if their acts were against U.S. persons or property. If those acts were against non-U.S. persons or property, theoretically the responsibility would be that of the country and its citizens and property against which the acts were perpetrated.

However, it would not seem to apply to the use of terrorism by U.S. military and intelligence personnel outside the United States if against non-U.S. citizens and property. Nonetheless, other laws can come into play such as those under the UCMJ proscriptions against what is considered murder and other illegal acts. Further, the country in which the terrorist act is committed may have domestic laws against what occurred.

In addition to the preceding, while FM 27-10 does not address terrorism beyond the odd reference, it does have language which would make a war crime any act of violence specifically targeting civilians. Under this article of FM 27-10, the U.S. could seemingly choose to hold and prosecute such perpetrators without turning them over to the State in which the act occurred.

4.6.3 Position of this Manual (inconsistent)

a. Introduction

Under this Manual, terrorism is permissible if targeting military and civilian combatants and property with only incidental harm to military and civilian non-combatants and property proportionate to the military or political advantage gained.

Allowing terrorism in any form or situation may seem anathema to most nations' and peoples' values. Yet, terror may be the most effective weapon a weaker belligerent has against a stronger one, to include elements of traditional forces separated for an extended time from their main unit. Whether by State or non-State actors, terrorism may be the best means for reducing overall casualties and destruction by bringing a war or battle to close sooner than might otherwise have occurred. The most devastating terrorist attacks in history were by the United States in bombing Hiroshima and Nagasaki for this express purpose, that of causing terror so great it would cause the other side to surrender which it did. Nonetheless, the use of terror even against combatant civilians should never be undertaken casually and avoided when reasonably possible.

The reality is that terrorism has been and will continue to be employed in war regardless of laws saying it is illegal, and relatively few terrorist acts will result in perpetrators being captured, tried, and punished. Therefore, rather than trying to eliminate terrorism, efforts may better be directed towards developing and inculcating norms where true innocents are not the targets. Over time, this is believed to be a realizable goal. This Manual's positions on terrorism are steps in that direction.

b. Goals of Terrorism

The goals of terrorism in war (legal, illegal, common practice) may include one or more of the following and may vary depending on cultural and political values, stage of economic or political development, strategic goals, and military strength of the State or non-State belligerent.

1. Punishment, reprisal, revenge
2. Personal or criminal benefit
3. Obtain worldwide, national, or local recognition or legitimacy
4. Demonstrate power or threat credibility/capability
5. Gain recognition as the legal or dominant body representing a group, geographic region, or State
6. Enhance recruitment
7. Secure cooperation and resources
8. Undermine opponent's will to resist or continue a conflict
9. Induce government action, overreaction, and repression leading to public dissension
10. Deflect attention and blame to a competing group or cause
11. Influence government decisions and courses of action
12. Harass, weaken, embarrass, or undermine confidence in opponent's government, military, or other security forces
13. Discourage foreign investment, foreign aid, or otherwise harm the economy

All the preceding are similar to goals of other types of force employed during war which may harm the defenseless in far greater numbers than terrorist acts. It should be understood that, while the use of terrorism may have been intended to achieve goals beneficial to the party employing, it often can have the reverse effect.

c. Targeting and Means

When selecting targets and means, the decision process should adhere to that found in this Manual rather than being arbitrary and indiscriminate with respect to who or what is to be intentionally harmed by the terrorist act. Other than in exceptional situations, only military and civilian combatants as defined in this Manual should be targets (see Section 1.4).

While any combatant can be a legitimate target, terrorists acts should not be indiscriminately undertaken, especially against those who are non-military. Before targeting, one should always apply the principles found in Chapter 3. With respect to political necessity specifically, this is an exceptionally important consideration for belligerents such as the United States and other rule of law, non-autocratic States, as a higher standard of consideration of protecting civilians is often expected by their citizens, the media, international organizations, human rights groups, and allies. Some of these persons and entities are combatants due to their acts in support of a conflict and, thereby, legitimate targets for terrorist attacks.

For anyone who would carry out terrorist acts, those indicated in this Manual as combatants provide more than ample targets of opportunity without the need to harm non-combatant persons and property beyond incidental casualties and damage proportionate to the military and political advantage gained. Terrorist attacks which unduly harm non-combatants are egregious crimes of war potentially punishable by death.

4.7 Bombardment, Assaults, and Sieges

4.7.1 Bombardment (consistent)

There is no prohibition of general application against bombardment from the air, by artillery, or other means, of combatant troops, defended places, undefended places as referenced [below]*, or other legitimate military targets* [FM 27-10, Article 42].

4.7.2 Defended and Undefended Places (consistent except for possibly b(1))

a. FM 27-10

Article 39: *The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.*

Article 40: *Investment, bombardment, assault, and siege have always been recognized as legitimate means of land warfare. Defending places in the sense of Article 25, HR,* [Annex to Hague Convention No. IV] *include:*

a. A fort or fortified place.

b. A city or town surrounded by detached defense positions, which is considered jointly with such defense positions as an indivisible whole.

c. A place which is occupied by a combatant military force or through which such a force is passing. The occupation of such a place by medical units alone is not sufficient to make it a defended place.

b. Position of this Manual

An "undefended place" is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance. In order to be considered undefended, in addition to not meeting the above three criteria, the following should not be present. If any are, such locations may be considered "defended" and subject to attack, bombardment, or other force being used against them.

(1) Such places consistently (a) harbor and actively support hostile forces, (b) fire upon one's forces, or (c) are protected by improvised explosive devises, booby traps, or other devices designed to harm or kill opposing forces should they enter such locations **(inconsistent)**; and

(2) Such places are home to factories producing munitions and military supplies, military camps, buildings storing materials used by military forces, railroads, ports, and other places useful in the support of military operations or accommodations of troops (**compliant with FM 27-10 and Hague Conventions**).

Even if any of the preceding criteria are present, the decision to justify an attack or bombardment should be undertaken with great reservation for humanitarian, political, and even military reasons. To carry out an attack or bombardment based solely on the preceding could increase resistance against a belligerent's forces, and turn public opinion against its cause among allies, neutrals, and its own citizens.

4.7.3 Unnecessary Killing and Damage (based on and consistent with Article 41, FM 27-10)

When such places are attacked or bombarded, loss of life and damage to property should not be out of proportion to the military advantage gained. Once a place has surrendered, only such further damage should occur as is demanded by the exigencies of war, such as the removal of fortifications and explosive devises, demolition of military buildings and those supporting military operations, and destruction of stores and refuges of value to the enemy's military.

4.7.4 Notice, Opportunity to Evacuate of Neutral Persons (based on and consistent with FM 27-10, Article 44b)

If reasonably possible, diplomatic and consular personnel of a neutral party who can provide verification of such status should not be prevented from leaving a location to be attacked before hostilities commence and during such hostilities. Nonetheless, there is no obligation of the attacking force to notify such neutral party personnel prior to an attack if to do so eliminates a needed element of surprise or prevents achieving other essential military objectives and force protection.

4.7.5 Treatment of Persons Within an Invested Area (based on and generally consistent with FM 27-10, Article 44)

a. Communications and Access

An investing force has the right to forbid all communications and access between the besieged place and the outside. Belligerents should endeavor to conclude local agreements for the removal of non-combatants and those who are wounded, sick, and infirm if such removal will not place an undue burden and responsibility on the investing force to provide care for those removed. If these cannot be reasonably removed and/or if it is felt that such relief will not strengthen the besieged force's ability to resist, belligerents should also endeavor to allow passage of foodstuffs, clothing, and medical personnel, supplies, and equipment to the besieged location.

b. Evacuation (reasonably consistent with FM 27-10; inconsistent with FM 6-27 and DOD Law of War Manual)

There is no treaty law which compels an investing force to permit non-combatants to leave a besieged locality with the decision to do so being solely that of the commander of the investing force. Thus, if the commander of the besieged force expels non-combatants to lessen the logistical burden he or she will bear, it is lawful to prevent these persons' departure so as to hasten surrender of the besieged force although this may be an extreme measure. Persons who attempt to leave or enter a besieged place without receiving the necessary permission from the investing force are liable to be fired upon, sent back, or detained.

For nearly 60 years under FM 27-10 and for far longer under customary law, the preceding was considered legal. FM 6-27 and the DOD Law of War Manual (LWM) now state it is no longer permissible to prevent civilians from leaving a besieged location or to force them back if they attempt to do so. The LWM cites various legal treatises (not treaties), a UN resolution, and other interpretations found in the LWM regarding the need to take precautions for the protection of civilians as the basis for its position. However, it does not cite treaty law, customary law, or actual practice of nations specific to siege and other evacuation situations.

This Manual supports the aspirational goal of allowing non-combatant civilians to leave besieged and other conflict locales when reasonably possible after due consideration of law of war principles. However, requiring this in all situations, as is the position of FM 6-27 and the LWM, does not allow consideration of all relevant factors which should be assessed in such situations. These include (a) whether the civilians are combatant or non-combatants as defined in this Manual, (b) the ability of the besieging force to protect and care for those allowed to leave or to screen all departing civilians as to whether they might be enemy combatants, (c) whether the countryside is devastated with few if any resources to support large numbers of displaced persons, (d) the presence of roving bands that prey on those who have little ability to protect themselves, (e) the presence or absence of relief organizations and neutral military forces able to assist and protect these civilians, and (f) lack of transportation to move civilians to safer areas which may have greater resources for their care.

In summary, the decision whether to allow or prevent civilians from leaving besieged or conflict locations requires one to assess that course of action which will allow the taking of such locations to be done with the least unnecessary death, injury, suffering, and destruction possible. Additionally, it should best contribute to achieving rather than undermining reasonable assessments of military and political necessity. It should not be based solely on a black letter requirement that it be allowed in every situation.

4.7.6 Buildings and Areas to Be Protected (based on and consistent with FM 27-10, Articles 45 and 46 except as indicated)

a. Buildings to Be Spared (consistent)

In sieges, bombardments, and other uses of force, and after successful investment of the target locality or structure by the attacking force, to the degree reasonable, measures should be taken to spare or protect from theft, defacement or other damage to certain buildings. These include those dedicated to religion, arts, culture, science, education, charitable purposes, historic monuments and structures of note, hospitals and other medical facilities where the sick and wounded are collected or treated (see Chapter 8 for further guidance regarding medical facilities), provided they are not being used at the time for military purposes. Yet, even if they are but their importance is of exceptional non-military significance, the decision may be to delay attacking such places until no other recourse is available to complete investment of a location and reduce risks to one's forces. This is what occurred with the Citadel in Hue, Vietnam, in 1968.

Additionally, defending and attacking forces should make reasonable efforts not to utilize, damage, or destroy residential buildings, especially when this will increase the danger to or suffering of non-combatant civilians remaining within the areas over which battles are being or likely to be fought.

To the degree reasonable, besieged and attacking forces should avoid using all above referenced buildings for military purposes. When possible, prior to an attack or bombardment, the besieged force and/or resident non-combatants should indicate the presence of protected buildings by distinctive and visible signs, with such information conveyed to the attacking force beforehand if time and opportunity permit.

Nonetheless, when such buildings constitute a natural portion of defensive lines and positions, when there may be little choice by the defending force but to use such structures for military administration, quarters, or storage, and when street-by-street fighting ensues, it will not always be possible to prevent damage to and destruction of these buildings.

b. Protection of Medical Areas **(consistent)**

To protect buildings used solely for qualifying medical purposes from being accidently hit, it is desirable that certain wounded and sick should, if possible, be concentrated in an area remote from military objectives or in an area neutralized by arrangement between the belligerents. (See Chapter 8 for additional guidance.)

c. Observing or Not Observing Signs or Emblems of Protected Buildings **(consistent)**

The besieging forces are not obligated to observe the signs or emblems indicating the need to protect buildings that are known to be used for military purposes**.**

4.7.7 Pillage and Further Damage (somewhat consistent with Annex to Hague Convention No. IV, Article 28 and FM 27-10, Article 47)

The pillage or further damage of a city, town, village, dwelling, monument, or other structure or facility by the investing force is prohibited, even when taken by assault, unless a military necessity for doing so can be clearly demonstrated. (Note: The preceding language adds "or further damage" and all after "unless a military necessity…", neither of which are found in FM 27-10, Article 47.)

4.7.8 Denial of Food and Water (generally consistent except as otherwise noted)

Except as noted and after adding "non-combatants" in front of "civilians," the following positions of FM 6-27 are consistent with this Manual:

> 2-130: *It is a legitimate method to starve enemy forces in order to lead to the speedier defeat of the enemy or its submission with fewer friendly force casualties. For example, it is not prohibited to destroy food intended for sustenance for enemy forces with a view towards weakening them and diverting their resources.*

2-131: *…it is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the* [non-combatant] *civilian population of an enemy nation, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations, and supplies…*

[It is the position of this Manual that this prohibition extends not just to the non-combatant civilian population of enemy nations but to non-combatant civilians in all conflict situations regardless of whether these are non-State, enemy, allied, neutral, or one's own.]

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

2-134: *Similarly, public utilities (such as electric power grids) may be attacked to deny power to enemy military forces and installations*[, and structures producing or storing materiel critical to military operations,] *even though such attacks may adversely affect the supply of power* [and goods] *to the civilian population or civilian objects, or the provision of sustenance for the civilian population (for example water).* [To the degree reasonably possible, c]*ommanders authorizing such attacks should determine the anticipated effect of those attacks on the* [non-combatant] *civilian population to ensure that such effects are not excessive compare*[d] *to the military advantage expected to be gained. Commanders should also consider taking precautions to ensure that the* [non-combatant] *civilian population is not left with inadequate water supplies. The poisoning of water supplies is prohibited under all circumstances (HR art. 23(a).]* [Under this Manual, there may be situations where contaminating or otherwise denying water supplies is permissible if they are primarily used by the military forces of one's enemy. For example, if the water supply of a military base or force is located in a desert or other wilderness environment with non-combatants not relying on this water source, such supplies can be denied to the opposing force if the means used will not cause unreasonable environmental harm or downstream effects. A temporary means of denying water to an enemy force which would provide a degree of warning that the water is unsafe would be to place decaying animals at the source; it need not be the use of an actual poison. Additionally, water towers, treatment facilities, and other water-related infrastructures may be specifically targeted if their use is fundamentally military.]

4.8 Guides

4.8.1 FM 27-10, Article 270

*a. No physical or moral coercion shall be exercised against protected person, in particular to obtain information from them or third parties. (*GC, art. 31)

b. Among the forms of coercion prohibited is the impressment of guides from the local population.

4.8.2 Position of this Manual (inconsistent)

If required for military necessity, guides and directional information may be secured from the non-combatant population. If this is done, such persons should reasonably be expected to have knowledge of whatever is requested (e.g., certain geographic features; addresses, businesses, and offices; minefields; booby traps/IEDs; military installations; roads and trails) that would be generally known to local residents and cannot be reliably ascertained or confirmed by the impressing party from other readily available sources.

All practicable measures should be taken to reduce the risk of death or injury to such persons while acting as guides or providing information and, if funds are available, offered fair compensation for their services when appropriate. Impressed persons should not be required to carry weapons or actively engage in actions against their own forces, and should be distinguishable from personnel of the impressing party. While the use of such guides or securing local directional information can obviously be of benefit to the impressing party, it can also reduce the risk of attacking the wrong target, the incidental death and injury of non-combatants, and the unnecessary destruction of property and the environment.

4.9 Human Shields (generally consistent)

Unless noted in brackets, the following from FM 6-27 is consistent with this Manual:

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

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

[It is the position of this Manual that, if faced, or likely to be faced, with that found in the preceding two paragraphs, appropriate legally permissible responses and actions by the attacking force should be conveyed as part of information operations to civilians and enemy forces in current and possible future areas of operation. Hopefully, in doing so, enemy forces will be less likely to employ human shields, and enemy non-combatants will be less inclined to volunteer to serve in such a capacity. Further, the attacking force may determine it worthwhile to coordinate with media, human rights organizations, and others in advance or immediately after such incidents as to that which actually occurred, and the steps taken to try to avoid or minimize harm to non-combatants. If possible, such coordination and that which is to be conveyed to third parties should be cleared with or assigned to those within one's forces who are most knowledgeable and professionally proficient in communicating such matters.]

4.10 Stratagems/Ruses

4.10.1 Stratagems Permissible (consistent except as noted)

The following is from FM 6-27 (emphasis added in bold):

2-171. …Ruses [stratagems] *of war are lawful acts of deception…intended to mislead an adversary or induce it to act recklessly,* ***but that do not infringe upon LOAC and, moreover, are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law with the intent to kill or wound*** *(see DOD Law of War Manual, 5.25.1).* [That in bold is inconsistent with this Manual and addressed under 4.10.3.]

4.10.2 Legitimate Stratagems

a. Deceptions (consistent with FM 27-10, Article 51 [1-10] and FM 6-27, 2-173 [11-15])

Examples of legitimate ruses and deceptions include:

(1) Feigning attacks, retreats, flights, supply movements, and other relocations of forces, weapons, and materiel
(2) Inducing commitment of enemy forces so they can be ambushed or captured
(3) Using small forces simulating large ones
(4) Simulating quiet and inactivity
(5) Transmitting false communications, pretending to communicate with troops or reinforcements which do not exist, planting false information, and other disinformation
(6) Conveying bogus orders purporting to have been issued by enemy commanders or leaders
(7) Moving landmarks and constructing false locational and directional signage
(8) Constructing dummy guns, vehicles, mine fields, installations, airfields, etc.
(9) Employing deceptive signals
(10) Removing or altering unit and rank designations from uniforms, vehicles, and signage
(11) Facilitating surprise attacks or ambushes by:
- Misleading the enemy as to the planned targets or locations of military operations;
- Using "bait" to lead the enemy into a trap; or
- Distracting or disorienting the enemy;

(12) Inducing enemy forces to waste their resources;
(13) Inducing enemy forces to surrender by falsely alleging military superiority;
(14) Provoking friendly fire among enemy forces; or
(15) Causing confusion among enemy forces.

b. Destabilization/Subversion (generally consistent unless otherwise noted)

Legitimate means of subversion include:

(1) Compromising and bribing enemy officials, soldiers, and civilians
(2) Encouraging defection or insurrection
(3) Inducing enemy soldiers to desert, rebel, or surrender
(4) Undermining enemy morale
(5) Paying for or otherwise inducing sabotage of factories, critical infrastructure, vehicles, and other items of importance to the enemy's war effort
(6) Employing psychological warfare and misinformation initiatives
(7) Utilizing hacking, viruses, and other information technology measures
(8) Utilizing criminal elements **(not specifically addressed in official manuals)**
(9) Encouraging "lone wolf" attacks and militarily and politically relevant assassinations **(not specifically addressed in official manuals but may be inconsistent, specifically assassination)**

c. Securing Information (likely consistent)

Legitimate means of securing information include:

(1) Spies and secret agents
(2) Compromise and bribery of potential sources
(3) Electronic measures and platforms, such as hacking, communications monitoring, false websites, internet accounts, and identities
(4) Identity theft
(5) Satellite, drone, and other aircraft overflights

4.10.3 Treachery/Perfidy (inconsistent)

a. Formal Law of War

FM 27-10 states that "*good faith with the enemy must be observed as a rule of conduct,*" and "*ruses of war are legitimate so long as they do not include treachery and perfidy*."

Article 37 of the 1977 Protocol I Additional to the 1949 Geneva Conventions states:

It is prohibited to kill, injure or capture and adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following are examples of perfidy:

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

While the Unites States has not ratified Additional Protocol I, all the preceding might be viewed by the United States as perfidy.

FM 6-27, 2-175, states: *Ruses are not perfidious because they do not invite the confidence of an adversary with respect to protection under LOAC with the intent to kill or wound that adversary.*

b. Position of this Manual (inconsistent)

With the exception of a flag of truce and as otherwise might be determined jointly by parties to a conflict during that conflict, all ruses, deceptions, subversion, and means of securing of information are legitimate so long as it is undertaken as a military necessity and attempts to comply with the precept of using minimum force that is most humane. War by its very nature entails a loss of good faith by the belligerents and is necessarily treacherous and fraught with perfidy in its conduct just as it is violent and destructive. Further, the use of treachery and perfidy may be one of the few resources available to smaller, weaker belligerents fighting a larger, better equipped enemy. Further, there is considerable inconsistency in FM 6-27 as to that which constitutes perfidy.

Essentially, most if not all legal ruses are, or contain a degree of, perfidy and treachery. The reason a ruse becomes perfidious and illegal is a bit of a Catch-22: because a ruse has been designated as precluded under LOAC, it invites confidence that it will not be employed by one's enemy, not necessarily because it may be more potentially harmful or treacherous than ruses not so designated. However, if it had not been precluded under the law, it would not have invited confidence, and its use by the enemy would not then be perfidious and a violation of the law.

A strict application of FM 27-10 and FM 6-27 would preclude a paratrooper—like the one in World War II whose chute caught on a church steeple in St. Mer-Eglise, France—from feigning death so as not to be shot while the battle is ongoing but then at some point possibly needing to use a weapon to escape or

protect his or her life afterwards. It would prevent prisoners such as those in the movie, *The Great Escape,* based on actual events, from dressing and posing as civilians or wearing uniforms or insignias of other forces or medical personnel in their attempt to escape, and then having to kill enemy persons while wearing civilian clothes or enemy uniforms and insignia in order to make good their escape.

Under this Manual, for those who are protecting their life during or after combat, attempting to escape, or avoiding capture, it is permissible to feign death, display non-applicable protective emblems, wear civilian clothes or enemy uniforms, and then use deadly force in self-defense if it becomes necessary. A strict application of the law and U.S. manuals would also preclude many special operations missions from being effectively carried out. It would make movement and activities of insurgent and many other non-State combatants in civilian clothing illegal if they engaged in active combat. None of the preceding are reasonable in war, especially wars which are asymmetric.

Under this Manual, none of the preceding would be considered unlawful. If captured, such persons should be treated as normal prisoners of war and not subject to the death penalty.

Article 53 of FM 27-10 addressing flags of truce states "*those who meet with representatives of an opposing force or party displaying the flag of truce or surrender are not absolved from the duty of exercising proper precautions against possible violations by the opposing party or force."* This is the approach all combatants should take with respect to possible actions by opponents to gain a strategic or tactical advantage. War is a life-and-death contest of subterfuge and misdirection where one is forever attempting to mask that which it will do next or is doing at the moment in order to prevail or survive. This should be recognized as reasonable common practice and custom and not considered illegal.

4.10.4 Flags of Truce or Surrender (partially inconsistent; see also Section 11.5))

a. FM 6-27 (bold added to highlight certain language)

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

2-154. The mere display of a flag of truce, without more communication, does not necessarily mean that the unit, or the person waving it, is prepared to surrender…

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

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

b. Positions and Commentary of this Manual **(partially inconsistent)**

Except for those portions of text highlighted in bold, this Manual concurs with the preceding from FM 6-27.

It should be understood that many persons believe a white flag is a sign only of surrender rather than an indication of a desire to meet to discuss matters of potential importance to both sides. Thus, if a flag is displayed by a belligerent, those journeying out from its lines may be taken captive and not released if the purpose of the meeting is not adequately established in advance. For this and other reasons, those who meet with representatives of an opposing party under a white flag are not absolved from the duty of exercising proper precautions against possible adverse responses by the opposing party or force.

Unlike FM 6-27, under this Manual, it is not prohibited for the party on either side while meeting under a flag of truce as an opportunity to retreat, redeploy forces, key individuals to escape, resupply, destroy information or military materiel, or plant false information with those with whom they meet, all of which are generally considered legal during armistices (but not under white flags) as per FM 6-27 and the DOD Law of War Manual. Thus, it is the responsibility of both parties to determine in advance of a meeting those actions which are acceptable to the other party if the flag is to be respected. If a party is then observed violating what was agreed to, the parlementaires of the violating party meeting under the flag can be seized (or shot if capture is not reasonably possible) and hostilities reinitiated against the party violating what was agreed. In effect, the restrictions included under FM 6-27 can be realized, not because of formal law, but through mutual agreement between the parties prior to any meeting under the flag.

A second area where this Manual differs from FM 6-27 relates to the authority which is required for possible rejection by one's forces of subsequent displays of the flag on the battlefield. According to FM 6-27, this authority would generally need to be that of the theater commander. This Manual feels that, during active, fluid combat situations, these decisions often have to be made by those on the battlefield as there may not be time to work one's way up from squad, platoon, or company level to the theater commander. If time is of the essence, this decision can be made by the unit commander of those engaged who would ideally check with his or her next higher level of command if reasonably possible. If greater time is available, or if the situation seems of major importance as to how one responds to a flag of truce or what is being requested by the party that displays the flag, then the decision as to the proper response might be taken to a higher level of command.

If virtual conferencing or cellular/internet communications are possibilities, these might be considered preferable to the various complications and challenges associated with what has been outlined above. To that end, if it can be done in a manner which does not risk degrading a belligerent's internal operational communications and information networks, at the outset or at any time during the conflict, means and procedures for cyber communicating might be shared with one another during actual combat. Of course,

just as with flags of truce and the physical use of parlementaires, both sides must anticipate and be prepared to respond to any ruse of the other side regardless of whether considered perfidious under the formal law of war. With respect to cellular, radio, and cyber communications, it should be remembered these can sometimes be traced and possibly penpoint command locations and those in hiding.

4.10.5 Permitted Use of Identifying Flags, Symbols, Insignia, and Uniforms (often inconsistent); Codes, Passwords, and Countersigns (consistent)

4.10.5.1 Flags, Insignia, and Uniforms (from FM 6-27; bold added to highlight language)

a. General

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

b. Of a Neutral or Non-Belligerent State

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

c. Spying

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

d. Escaping Prisoners of War

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

e. Personnel Evading Capture

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

[Note: Under 2-160 and 2-161 above, only engaging the enemy in combat when in the enemy's uniform is precluded, not when wearing civilian clothing. Yet, elsewhere in these manuals, using civilian clothing to hide one's intentions to use lethal force is also precluded and would allow the enemy to consider those so clothed as spies or saboteurs. Thus, there is inconsistency of language in official manuals.]

f. Position of this Manual **(inconsistent)**

Except where text is in bold, this Manual concurs with the above language of the Hague Conventions and FM 6-27. Under this Manual, it is permissible to use identifying flags (e.g., national flags), insignia, uniforms of other parties, to include the enemy and neutrals, and civilian clothing as a ruse or form of deception, to include during combat. Combatants, to include spies, secret agents, insurgents, escapees, or downed aircrews, are not required to be in their own forces' uniforms to be protected by the articles of this Manual.

This Manual disagrees with the premise that it is somehow honorable and permissible to have such ruses leading up to just before one fires and harms one's enemy as is permissible, but it is not honorable and permissible when you pull the trigger a second later as is the case under war at sea. Additionally, given that many conflicts are fought with and between non-State parties where there may be few if any uniforms or other identifying emblems or apparel worn by such parties, it is not unreasonable that:

1. Combatants not in their own uniform or insignia on all sides and in all situations are treated no differently than uniformed or otherwise identified combatants, and
2. Combatants of a party who face enemy combatants who are not in uniform or displaying identifying insignia have the same ability and right to merge with civilians as if civilians, and to confuse and surprise their enemies as those enemies do themselves.

In both cases, such persons should be considered lawful combatants with the same rights and responsibilities as uniformed and appropriately marked and commanded combatants under FM 6-27.

With respect to escapees and those avoiding capture, if in civilian clothes or enemy uniforms, their identity is or about to be discovered, or the elimination of an enemy person is required to effect their escape, under this Manual, they may use force against those who might kill, punish, report, or incarcerate them. It is unreasonable that an escapee, or those otherwise attempting to avoid capture, who are wearing civilian clothing or the uniforms of their enemy would, if discovered or challenged, simply surrender if they had force options available to prevent their capture. If they do so and are captured, under the formal law of war, they may be tried and executed as spies or otherwise punished for having violated the formal law of war or the laws or rules of their captor. Under this Manual, in such situations, the capturing party should treat captured escapees and those attempting to avoid capture like any other lawful detained combatant. It would not preclude, however, punishments by the detaining party, to include withholding privileges, if the possibility of such punishments had been conveyed previously to a prisoner of war who escapes and is recaptured.

4.10.5.2 Use of Enemy Codes, Passwords, and Countersigns

2-162 The prohibition on misuse of enemy flags, emblems, insignia, and uniforms refers only to concrete visual objects rather than enemy codes, passwords, and countersigns. Enemy codes, passwords, and countersigns may be used as a ruse to aid military operations. Use of these measures is permissible because enemy military forces are expected to take measures to guard against the use of their codes, passwords, and countersigns by their adversaries. [Using this same logic, as military forces are expected to take measures to guard against the misuse of their codes, passwords, and countersigns by their enemy (with the latter two actually being a form of perfidy even if not legally considered as such) which is consider legal under the formal law of war, so also should military forces be expected to take measures to guard against the misuse of flags, emblems, insignia, and uniforms which should equally be legal under the law of war. The reason it is not is that the drafters of the relevant treaties made arbitrary decisions that one was a legal ruse and the other illegal perfidy/treachery without seemingly any apparent substantive logic or moral reason for having done so.]

4.10.6 Protective Emblems/Markings (often inconsistent)

4.10.6.1 FM 6-27 (emphasis added in bold)

2-163 Certain signs, symbols, or signals reflect a status that receives special protection under LOAC and thus these signs may not be improperly used. They may not be used: ***(1) while engaging in attacks; (2) in order to shield, favor, or protect one's own military operations; or (3) to impede enemy military operations****. Thus, their use may be improper even when that use does not involve killing or wounding,*

and they may not be used to facilitate espionage *(except for signs, emblems, or uniforms of a neutral or non-belligerent State)…*

a. Red Cross and Other Equivalent Emblems

2-165 The distinctive emblems of the Red Cross, Red Crescent, and Red Crystal…are symbols that identify military medical and religious personnel, medical units, [medical facilities],] *and medical transports, or certain other categories of persons engaged in humanitarian work as personnel and objects entitled to special protection.* ***These emblems may not be used except to identify these protected persons and objects. Any unauthorized use is prohibited*** *(see DOD Law of War Manual, 7.15.4).* [Note: Elsewhere in the formal law of war or under this Manual, judge advocates, cultural site guards, media, civil defense personnel, those paroled, and conscientious objectors may also display distinctive emblems to receive certain protections if not involved in actions harmful to the enemy.]

b. POW and Civilian Internee Camps

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

c. Neutralized Zones

2-167 Markings that distinguish…neutralized zones established under the 1949 Geneva Conventions may [should] *not be used for other purposes.*

d. Cultural Property

5-39. It may be appropriate to identify protected persons and objects…through the use of distinctive and visible signs. For example, for cultural property, this may include use of the distinctive blue and white shield...

e. Civil Defense Facilities

5-64. Under Additional Protocol I, the international distinctive sign of civil defense…is an equilateral blue triangle on an orange [back]*ground when used for the protection of civil defense organizations, their personnel, buildings, and materiel, and for civilian shelters. The parties to the conflict must* [should] *take measures necessary to supervise the display of the international distinctive sign of civil defense and to prevent and repress its misuse...*

f. Other Protected Areas

In addition to the above, other buildings and properties are to be protected if practicable during bombardments, assaults, and other uses of force. These include religious, scientific, educational, arts, charitable, and historic. While there are no formally recognized symbols for these structures and properties, prior to a possible bombardment or attack, the defending force or local residents should indicate the presence of such buildings with distinctive and visible signs, with such information conveyed in advance to the attacking force when reasonably possible. Ideally, belligerents to the conflict would agree early in the conflict as to signage to be used. (See 4.7.6 of this Manual)

None of the preceding protective markings should be used for other purposes. *The parties to the conflict must, in so far as military considerations permit, take the necessary steps to make the distinctive emblems clearly visible to the enemy land, air, and naval force…to prevent intentional hostile action on the protected sites. Even if not so marked, …an attacking force may not knowingly target a building or other facility known to enjoy special protection… Similarly, attacking forces are not required to observe signs*

indicating inviolability of buildings if such buildings are known to be used for military purposes... (from FM 6-27, 5-39)

4.10.6.2 Position of this Manual (somewhat inconsistent)

Except as noted above in bold, the use of the Red Cross and other equivalent medical emblems and insignia should ideally only be used to identify qualifying medical units, aircraft, vehicles, ships, facilities, personnel, and materiel which are not fortified, bearing arms or armaments other than for personal protection and that of their patients, or the source of fire upon opposing forces in hopes this will reduce the possibility these will not mistakenly become de facto targets of opposing forces. The same approach is relevant for the other protected persons, structures and properties addressed above and in greater specificity in Chapters 7, 8, 9, and 10.

Unfortunately, there will be times when the use or targeting of protective structures and property may become essential in defensive or offensive operations. If this occurs, reasonable effort should be made by both parties to use distinction and proportionality in the use of, and force used against, such properties to minimize damage and destruction and harm to employees, visitors, and patients. Nonetheless, always giving preference to the protection of marked facilities may increase the risk to other protected persons (e.g., non-combatant civilians, to include children) in non-protected structures. Additionally, if to escape, prevail, or survive, a combatant finds no other reasonable alternative than to wear or display such insignia, that also is permissible as he or she has a right to protect their own life and well-being.

If there is any misuse of the emblems or insignia by a belligerent, an opposing force may legitimately ignore not only the use of the emblem, symbol, or signage in that instance but when displayed by the enemy at other times and places. Nonetheless, the misuse by individual escapees or others trying to avoid detection behind enemy lines would not provide justification for their enemy to ignore such emblems used by their opponent in a readily identifiable combat unit or protected facilities within their opponent's territory or behind their own lines. Conversely, the legitimate display of the Red Cross and other equivalent emblems and insignia does not automatically provide protection from attack if the attacking force reasonably believes a legitimate military objective can be achieved whose value outweighs the casualties or destruction which might occur if medical emblems are not respected.

4.11 Bribery, Offering of Rewards, Assassinations

a. FM 6-27

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

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

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

***b. Position of this Manual* (generally inconsistent)**

It is permissible to employ bribes to induce enemy persons to undertake actions they might not otherwise do which benefit the war effort of the party paying the bribe. Bribes may be offered for any action whose result is permissible under the law of war. Under this Manual, it is also permissible to offer rewards for killing or capturing enemy combatants, including specific individuals or classes of persons, e.g., officers. Thus, the Manual is inconsistent with the second sentence of 2-185, all of 2-186, and the first sentence of 2-187. It does concur with the first sentence of 2-185 and the second and third sentences of 2-187.

The basis for this difference with respect to rewards is that their use for the killing of specific persons or classes of persons can sometimes be (1) more surgically applied and, thereby, reduce incidental harm to non-combatants, (2) used to create a sense of unease and fear in, and undermine morale of, enemy forces, leadership, and other combatants in areas where one's own forces are not able to operate, and (3) an essential means of war for belligerents without the range or quantities of resources as their enemy.

Further, the positions found in 2-183, 2-184, and 2-185/6/7 are examples of how the formal law of war can sometimes be inconsistent and hypocritical. Under 2-185 et al, it is considered a violation of LOAC to offer "dead or alive" rewards for the capture or death of enemy personnel. The reason given is that "[s]*uch actions encourage the denial of quarter or…private persons to take up arms whose participation in hostilities is often undisciplined and associated with the commission of war crimes*." With 2-186 providing this rationale for precluding what might be termed a surgical application of force that would contribute to ending a war or reduce unnecessary harm to both combatants and non-combatants, the last sentence of 2-183 tells us that "*it is permissible to encourage insurrection among the enemy civilian population."* What the drafters of law of war treaties and manuals and defenders of strict compliance do not understand, or choose to ignore, is that there will likely be far more undisciplined acts and war crimes committed in a civil war or other non-State conflict than there would be if individual attacks on specifically targeted enemy personnel were encouraged instead of outright insurrection. This is not meant to suggest that insurrections should not be encouraged, but that it may be equally as legitimate to encourage the targeted killing of specific enemy persons by offering inducements, justifications, or instructions.

With respect to the concern that such rewards "encourage the denial of quarter," the targeting of enemy persons by third parties to secure a reward is functionally no different than when Delta and SEAL teams are given missions to kill or capture terrorists, such as Osama bin Laden. If a rewarding party truly does not want a target to be killed by an undisciplined third party, the reward should only be for capture, not dead or alive. Otherwise, the latter is appropriate and essentially little different than that with which individual soldiers are tasked without it being considered to "encourage the denial of quarter." While soldiers may be more disciplined than untrained third parties, unless instructed to capture a target, soldiers will likely kill, not capture, in order to remove a threat and reduce personal and unit risk in the process.

As for assassinations, these can be essential and reasonable not only for an irregular, revolutionary, resistance, or other underground movement's ability to wage war but also for States. Examples, include surreptitious assassinations when it is important to deflect attention from one's involvement in the elimination of a particular target. Another is when there is an occupying force and operations put into effect by opposing civilians or clandestine military combatants where unsuspecting enemy combatants, possibly unarmed, are lured into situations where they can be killed or captured. This is little different than the use of "bait" considered by the formal law of war as a legal ruse. Such applications of the targeted killing of individuals should not automatically be considered perfidy or illegal assassination.

In summary, while the indiscriminate use of assassinations, targeting of individual groups of persons, and "dead or alive" rewards should often not be utilized, the determination of the appropriateness of their use, nature, and type should be made on a situation-by-situation basis.

4.12 Treatment of Property and the Environment (generally consistent)

The following is primarily based on FM 27-10, Article 56, and FM 6- 27, 2-188 through 2-199. The following section (4.13) further addresses the natural environment.

Some degree of devastation of property and the environment is generally found in the strict necessities of war. Devastation as an end in itself or as a separate measure of war which is not a military necessity should not be employed. There should be a reasonably close justifiable connection between the destruction of property and the environment with the overcoming of the enemy's forces or will to resist of its government and supporting population.

Examples of permissible devastation and destruction for military necessity include that resulting from:

a. Operations, movements, and combat activity of military units such as marches, camp sites, and construction of field fortifications
b. Structures requiring removal for sanitary or safety purposes benefitting both combatants and non-combatants
c. Structures, fences, woodlands, crops, roads, bridges, tunnels, etc., required for defensive purposes, impeding the movement of the enemy, fields of fire, landing strips or zones, or to furnish building materials or fuel if needed for one's military forces and operations
d. Structures, woodlands, and other locations which provide refuge or resources for opposing forces

If essential, structures may be used for housing troops, the wounded, sick, vehicles, and military materiel even though this may increase the likelihood they will be destroyed or damaged by other belligerents.

While the above are permissible forms of devastation and destruction under the law of war, as time and circumstances allow, commanders should apply the law of war principles assessment process found in Chapter 3. Nonetheless, simply because something is permissible, it should not automatically be applied if reasonable alternatives exist which reduce unnecessary destruction to structures, other property, and the environment.

Protections for, use of, and harm to public and private property during a conflict is addressed further in Chapter 7 (Prisoners of War); Chapter 8 (Wounded, Sick, Medical Personnel/Facilities, Combat Dead); Chapter 9 (Civilians); Chapter 10 (Occupation); and Chapter 12 (Neutrality).

4.13 Natural Environment

4.13.1 General (likely consistent)

Elaborating on the preceding, regardless of that permitted by the formal law of war with respect to damage to or destruction of the natural environment, the same law of war principles are applicable to the environment as for persons and property. Additionally, there is environmental damage that can have far reaching unintended consequences which may eventually adversely affect one's own homeland and forces although that was not the intent. This should be taken into consideration when making decisions as to the type and amount of force used to achieve military and political objectives which may be harmful to the environment.

Further, extensive employment of methods which destroy the natural environment may hinder achieving a fair and reasonable peace or allow such a peace to endure once achieved. Thus, actions in war which will result in the material alteration or destruction of the natural environment should be, if reasonably possible, targeted and limited in scope using technologies and agents which allow eventual environmental recovery within a reasonable period of time (months or a limited number of years, not decades or generations).

In order better to understand actions which may have negative environmental implications that might outweigh military or political benefits achieved, environmental scientists should ideally contribute during the planning of military operations and the selection of weapons when possible longer-term effects on the environment and human health may not be readily apparent.

4.13.2 Geneva Conventions Additional Protocol I Provision on Environmental Protection (somewhat consistent with international law, not necessarily U.S. policy)

Article 55 of AP I includes:

> *(1) Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. 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. (2) Attacks against the natural environment by the way of reprisals are prohibited.*

The United States has not accepted provisions of AP I related to the natural environment. The DOD Law of War Manual (6.10.3.1) states that the United States has "*repeatedly expressed the view that these provisions are 'overly broad and ambiguous and "not part of customary law."' Articles 35(3) and 55 of API 'fail to acknowledge that use of such weapons is prohibited only if their use is clearly in relation to the concrete and direct overall military advantage anticipated.'*"

This Manual generally concurs with the United States discomfort with the imprecise language of AP I as to certain prohibitions related to the natural environment. The language *is* too vague to provide reasonable guidance, e.g., defining that which constitutes "widespread," "long-term," and "severe." A ravaged battlefield after a major engagement may be considered widespread damage to some but not to others. The DOD Law of War Manual provides a degree of guidance on this (see following section); AP I does not. [Note: Nonetheless, this same lack of precision in terminology exists throughout the Hague and Geneva Conventions, as well as U.S. manuals and domestic law, without the DOD Law of War Manual taking exception in every instance.]

Where this Manual differs somewhat from the U.S. position relates to the second sentence above from 6.10.3.1 of the Law of War Manual. While military necessity considerations as to the use of weapons which may create widespread, severe, and long-term damage to the natural environment are important, their use also must be assessed under the principles of humanity, political necessity, and proportionality. While those who drafted the DOD Law of War Manual may believe this and intended that users of the manual would infer that such considerations are relevant in addition to military necessity, this is not specifically stated. Rather, it appears military necessity is the dominant and overriding consideration which it should not always be as this is situational.

4.12.3 Certain Environmental Modifications (consistent except as noted)

The United States is a party to the Environmental Modification Convention along with 77 other States. Four key provisions for State parties to this convention include:

Article 1(1): *...not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.*

Article 1(2): *…not to assist, encourage or induce any State, group of States or international organizations to engage in activities contrary to the provisions of paragraph 1 of this article.*

Article 2: *The term 'Environmental modification techniques' refers to any technique for changing through the deliberate manipulation of natural processes the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.*

Article 3(1): *The provisions of this Convention shall not hinder the use of environmental modification techniques for peaceful purposes and shall be without prejudice to the generally recognized principles and applicable rules of international law concerning such use.*

The United States has defined key terms as follows (DOD Law of War Manual, footnote 212): *...(a) 'widespread:' encompassing an area on the scale of several hundred square kilometers* [preceding seems too broad as a standard]*; (b) 'long-lasting:' lasting for a period of months, or approximately a season* [seems too restrictive as it would allow damage only to seasonal vegetation, soil fertility, and single cycle aquatic resources which seldom is what occurs in war when bombs, rockets, and artillery are employed]*; (c) 'severe:' involving serious or significant disruption or harm to human life, natural and economic resources or other assets.* [This latter definition provides no substantive guidance but essentially leaves what is severe to the party using the technique after applying law of war principles.]

The DOD Law of War Manual provides the following commentary on ENMOD:

> 6-10.2: …*earthquakes, tsunamis, and cyclones are environmental effects likely to be widespread, long-lasting, or severe that could be caused by the use of environmental modification techniques. On the other hand, dispelling fog to facilitate military or combat operations may involve the use of environmental modification techniques that would not have widespread, long-lasting, or severe effect.*
>
> 6-10.3: *In order to fall within the ENMOD Convention's prohibitions, the environmental modification techniques must be used as a means of destruction, damage, or injury to another Party to the ENMOD Convention. The ENMOD Convention does not prohibit damage to the environment, but reflects the idea that the environment itself should not be used as in instrument of war.*
>
> *Weapons or military operations may incidentally have widespread, long-lasting, or severe effects on the environment. Such weapons and military operations are not prohibited by the ENMOD Convention because the harm to the environment is incidental and not intended as a means of destruction, damage, or injury to another Party to the ENMOD Convention. For example, nuclear weapons are not prevented by the ENMOD Convention because their effects on the environment are a by-product of their use rather than intended as a means of injuring the enemy.*

This Manual is generally in concurrence with the preceding with three exceptions: (1) it should apply to all belligerents, not just State parties to the convention, (2) there is still not sufficient recognition that consideration of the effect on the environment is essential as part of the process of evaluating the principles of humanity, political necessity, distinction, precaution, and proportionality, and (3) the wording of the last paragraph is misleading and imprecise. In its second and third sentences, the wording suggests that any damage done by weapons and military operations is never intentionally to cause environmental damage and that such damage is simply "incidental." While in many and, perhaps, most cases, this may be the case, legal weapons and military operations can be specifically used or expected to modify the environment. Thus, before their use, it is necessary to weigh the military advantaged gained not only to possible incidental non-combatant harm but also to incidental environmental harm.

The last phrase of both sentences is incorrectly written. The use of these weapons and operations is intended "as a means of destruction, damage, and injury to another Party to the ENMOD Convention" and

"as a means of injuring the enemy." It is assumed that what was meant to be understood was that these were not intended through the modification (i.e., destruction, damage, or injury) of the environment. Nonetheless, even if these sentences are rewritten, it does not relieve the initiating party of applying law of war principles in decisions which may cause material, long lasting environmental damage.

4.14 Information/Psychological Operations (consistent and inconsistent)

a. FM 6-27

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

2-183. Historically, permissible IO messages have been disseminated through a variety of communications media, including printed materials, loudspeakers, radio and television broadcasts, aircraft, and the internet. [Historically, *all* IO messages have been disseminated as indicated, not simply those considered permissible by FM 6-27.] *Information operations are sometimes used with financial or other incentives, if sanctioned and authorized. They may support intelligence gathering, be directed at enemy civilians and neutrals, or encourage*[e] *enemy persons to commit acts that would violate domestic law of the enemy State. For example, it is permissible to encourage enemy combatants to defect, desert, or surrender. Similarly, it is permissible to encourage insurrection among the enemy civilian population*

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

b. Position of This Manual (inconsistent with FM 6-27, 2-184)

This Manual generally concurs with FM 6-27, 2-182 and 2-183, but has different positions with respect to 2-184. FM 6-27, and the DOD Law of War Manual from which it draws, seemingly base 2-184 on Geneva Conventions language such as GC Article 33 (*Collective penalties and likewise all measures of intimidation or of terrorism are prohibited)* and GC Article 51 (*The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.*).

With respect to Article 51, FM 6-27 has restated this incorrectly when it combined the two sentences from the Geneva Conventions. As long as IO messages are not applying pressure (as opposed to incentives or positive rationales) and are not propaganda as most interpret the word (although the DOD Law of War Manual does not seem to) to mean false and misleading, then it would not be improper to use media and other means to recruit enemy citizens to serve voluntarily in its own or allied forces.

As to the use of non-lethal dissemination of information which might spread fear among the civilian population, this means of warfare has been and remains custom, i.e., actual practice. Provided it is done to bring the war to a close more quickly and effectively with less unnecessary death, injury, suffering, and

destruction, it is a far preferable course than continuing to pursue the war with kinetic force which, in and of itself, will also likely cause major fear and other psychological trauma among enemy civilian non-combatants. Nonetheless, as indicated previously, if terrorist acts are undertaken or threatened, they should only be directed at combatants (military and civilian), not non-combatants.

There are other shortcomings in the logic, reasonableness, and desirability of complying with the examples given in 2-184. Rather than highlighting each, with respect to that which should provide guidance for information and psychological operations, the same two goals emphasized throughout this Manual should govern conduct which best:

1. Allows the submission of the enemy as quickly and efficiently as possible, and
2. Achieves the purposes of the law of war, especially, the reduction of unnecessary death, injury, suffering, and destruction.

4.15 Economic and Financial Operations (uncertain but possibly consistent)

4.15.1 General

The formal law of war currently does not effectively address what is or is not permissible with respect to attacks by a belligerent on another party's economic and financial institutions and infrastructure, or protecting against such attacks. It is this Manual's position that efforts to undermine the economy and financial institutions of an enemy belligerent are permissible as are efforts to deny financial resources through the seizing or freezing of funds and other financial assets and instruments, disrupting financial flows from one location or party to another, and other such means as may be available. First use of these can be viewed by the injured party, at its sole discretion, as an act of war by the perpetrator.

While the primary target of such financial disruption operations will generally be belligerent governments and movements, and their military forces, such disruptions, by design or unintended, may also adversely affect non-combatant civilians and even neutrals. As a consequence, such measures may have far more adverse effects on non-combatants than other destructive measures undertaken in war which may affect only specific physical locations. Thus, these broader adverse economic effects should be considered as part of weighing the principles of the law of war when determining how best to employ the minimum and most humane force while achieving one's objectives.

4.15.2 Sanctions and Embargoes

Economic sanctions and embargoes are legitimate methods for conducting war and, may be preferable to the use of kinetic military force if goals can be achieved more efficiently and quickly with less death, injury, suffering, and destruction. However, it should be realized that such sanctions and embargoes are often ineffective or may take years to have material, or the ultimately desired, effects. One reason is that, in a creative world, ways can often be found, legally and illegally, to bypass or reduce intended effects.

Their application can also bring about unintended consequences. The first and most obvious relates to the true target and purpose of sanctions and embargoes often being enemy leadership and convincing them to change behavior or end a war. Yet, during such interruptions of resources, the leadership generally continues to have whatever it needs, but the people do not and can suffer significantly. Generally, only if the sanctions and embargoes cause an uprising politically, or through an armed insurrection by the people, may it have the intended effect. More often, these seem not to occur. Iran in recent years and the wheat embargo on the Soviet Union in 1980 and 2022 are good examples.

Embargoes and sanctions may also have reverse-than-desired effects on the people if their leadership is able to convince them that the hardships being experienced are by a callous, brutal opponent who should be resisted at all costs and under all duress. Other unintended consequences could include what occurred

in Haiti when the U.S. imposed an embargo which prevented fuel from reaching the country. While Haiti's leadership continued to do fine, the people increasingly were forced to produce charcoal from trees in order to continue to be able to cook and boil water. The cutting of these trees exacerbated what was already a major environmental problem where previous tree loss had caused devastating erosion and loss of scarce arable land on this heavily mountainous and over-populated island.

In summary, while economic sanctions and embargoes can be useful tools in war, the military and political benefits which might conceivably be gained should be weighed against the likelihood their use will succeed vs. the degree of undesired suffering inflicted on non-combatants and those not in power.

4.16 Cyber Operations (consistent unless otherwise indicated)

4.16.1 Introduction

As cyber capabilities were unavailable at the time of their drafting, the use of modern information technology in war is not addressed in the Geneva Conventions or FM 27-10. There are presently no international treaties governing the use of such technology. (The Tallinn Manual on the International Law Applicable to Cyber Warfare, now referred to as the Tallin Manual, has been drafted by experts in the field. However, it is a non-binding study and guide following the formal law of war and does not seem to have in-depth involvement of those with combat experience.) There are no unclassified U.S. military manuals or guidelines available to soldiers in combat as to how they should or should not use information technology offensively or defensively. The 18th edition of Operational Law Handbook devotes six pages to cyberspace operations which includes a general overview of current DoD thinking but does not provide guidance as to how it should be applied in specific wartime situations. The 2016 DOD Law of War Manual goes further and includes a 15-page chapter (XVI) on cyber operations.

4.16.2 DOD Law of War Manual

16.1.1 Cyberspace as a Domain. ...DoD has recognized cyberspace as an operation domain in which the armed forces must be able to defend and operate, just like the land, sea, air, and space domains.

Cyberspace *may be defined as "[a] global domain within the information environment consisting of interdependent networks of information technology infrastructure and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers."*

16.1.2 Description of Cyber Operations. Cyber operations may be understood to be those operations that involve "[t]he employment of cyberspace capabilities in or through cyberspace…"

16.1.2.1 Examples of Cyber Operations. Cyber operations include those operations that use computers to disrupt, deny, degrade, or destroy resident [information] *in computer and computer networks, or the computers and networks themselves. Cyber operations can be a form of advance force operations, which precede the main effort in an objective area in order to prepare the objective for the main assault… In addition, cyber operations may be a method of acquiring foreign intelligence unrelated to specific military objectives, such as understanding technological developments or gaining information about an adversary's military capabilities and intent.*

This Manual would include the following cyber operation examples applicable in a conflict:

(a) Disrupting communications
(b) Spreading disinformation and confusion
(c) Securing, rerouting, or denying access to financial resources
(d) Denying availability of public utilities, e.g., power, water
(e) Corrupting computer-operated early warning systems and weapons
(f) Influencing elections

(g) Disrupting transportation networks, control and defensive systems, vehicles, aircraft, and equipment
(h) Destroying or disrupting the operation of satellites

16.2.1 Application of Specific Law of War Rules to Cyber Operations.

The law of war affirmatively anticipates technological innovation and contemplates that its existing rules will apply to such innovation, including cyber operations. Law of war rules [and principles] *may apply to new technologies because the rules often are not framed in terms of specific technological means.*

[The DOD Law of War Manual includes examples of law of war rules that would cover cyber no differently than using traditional weapons when conducting attacks, dropping bombs, firing missiles, or seizing or destroying enemy property. In cyber operations, just as in more traditional military operations, the principles of the law of war should be applied to better achieve the purposes of the law.]

16.3.1 Prohibition on Cyber Operations That Constitute Illegal Uses of Force Under Article 2(4) of the Charter of the United Nations.

Cyber operations may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the Charter of the United Nations and customary international law. For example, if cyber operations cause effects that, if caused by traditional physical means, would be regarded as a use of force under jus ad bellum*, then such cyber operations would likely also be regarded as a use of force.*

16.3.2 Peacetime Intelligence and Counterintelligence Activities. …Generally, and to the extent that cyber operations resemble traditional intelligence and counter-intelligence activities, such as unauthorized intrusions into computer networks solely to acquire information, then such cyber operations would likely be treated similarly under international law.

[The problem not addressed in the DOD Law of War Manual is not that intelligence may actually be the purpose of the intrusion, but that it is not always possible to confirm this. The intrusion may be made to appear as intelligence gathering, while the real purpose is to corrupt or take control of the network prior to an attack (cyber or otherwise), or to be prepared to make such an attack even if not imminent. In essence, a fog of war situation has been created, and one must respond based on information available as to the perceived nature, purpose, and seriousness of the intrusion and its potential for harm.]

16.3.3 Responding to Hostile or Malicious Cyber Operations. A State's inherent right of self-defense, recognized in Article 51 of the Charter of the United Nations, may be triggered by cyber operations that amount to an armed attack or imminent threat thereof. As a matter of national policy, the United States has expressed the view that when warranted, it will respond to hostile acts in cyberspace as it would to any other threat to the country.

16.3.3.2 No Legal Requirement for a Cyber Response to a Cyber Attack. There is no legal requirement that the response in self-defense to a cyber armed attack take the form of a cyber action, as long as the response meets the requirements of necessity and proportionality.

16.3.3.3 Response to Hostile or Malicious Cyber Acts That Do Not Constitute Use of Force. Although cyber operations that do not constitute use of force under jus ad bellum *would not permit injured States to use force in self-defense, those injured States may be justified in taking necessary and appropriate actions in response that do not constitute a use of force. Such actions might include, for example, a diplomatic protest, an economic embargo, or other acts of retorsion* [i.e., retaliation for a similar act perpetrated by the offending party].

16.3.3.4 Attribution and Self-Defense Against Cyber Operations. Attribution may pose a difficult factual question in responding to hostile or malicious cyber operations because adversaries may be able to hide or disguise their activities or identities in cyberspace more easily than in the case of other types of operations.

A State's rights to take necessary and proportionate action in self-defense in response to armed attack originating through cyberspace applies whether the attack is attributed to another State or to a non-State actor.

[While the preceding two sentences are correct, they provide no guidance with respect to the "attribution conundrum," which includes a second troubling element: time. Even knowing that an intrusion/attack has occurred may not be known for weeks or months and then determining the source, even if successful, can often take additional weeks or months. Six months is not an uncommon length of time from the intrusion/attack and knowing who was likely to have perpetrated the attack if the latter does not wish their identity to be known and the intrusion/attack was not a prelude to an imminent kinetic or other non-cyberattack which subsequently occurred.

[Again, as in 16.3.2, the attacked party must operate within the fog of war. In doing so, it may have to act as it deems appropriate given its best assessment of how serious the threat is and who is the most likely perpetrator. This may result in a response, perhaps a violent one of some magnitude, against a party that is innocent. Essentially, there is no completely right answer as to what should or should not be done in such situations. Only a cautionary note can be proffered, that before taking major action against a party where there is not a strong degree of certainty that it was the actual perpetrator of the cyber intrusion/attack, one may wish to assume a higher level of risk to oneself by taking no or more modest action. Again, applying the principles of the law of war may be helpful to assess the risks and consequences of a major, moderate, or no response.

[There is an additional complicating factor with respect to the use of force in response to a cyberattack. There are those who use the Nicaragua case against the United States for actions of the latter in the early 1980s (International Court of Justice, Judgement of 27 June 1986, Concerning Military and Paramilitary Activities in and against Nicaragua) as the basis for suggesting that the use of force dissimilar in response which is different in type and scale than used in the cyberattack would be illegal under international law. The United States rejects this position, as does this Manual, provided the response, kinetic or otherwise, applies law of war principles as delineated in this Manual.]

16.3.3.5 Authority Under U.S. Law to Respond to Hostile Cyber Acts. Decisions about whether to invoke a State's inherent right of self-defense [under *jus ad bellum*] would *be made at the national level because they involve the State's rights and responsibilities under international law. For example, in the United States, such decisions would generally be made by the President.*

The Standing Rules of Engagement for U.S. forces have addressed the authority of the U.S. armed forces to take action in self-defense in response to hostile acts or hostile intent, including such acts perpetrated through cyberspace.

[While the preceding is appropriately worded for inclusion in this section addressing cyber and *jus ad bellum*, it should not be misconstrued, especially the second paragraph, that once war has broken out, U.S. forces are somehow constrained in their ability to use cyber only in self-defense. At all times, offensively and defensively, cyber is a legal weapon no different than any other legal weapon in the U.S. (or any other belligerent's) arsenal. Its use and limitations are those consistent with a given situation and the application of law of war principles to that situation. It is only when responding to an initial cyber intrusion/attack that may be seen as sufficient to warrant invoking a party's rights to engage in war under

the UN Charter and customary international law that approvals at the highest levels of government are generally required.]

16.4.1 Cyber Operations That Use Communications Infrastructure in Neutral States. ...[R]*elaying information through neutral communications infrastructure (provided that the facilities are made available impartially) generally would not constitute a violation of the law of neutrality that belligerent States have an obligation to refrain from and that a neutral State would have an obligation to prevent. The rule was developed because it was viewed as impractical for neutral States to censor or screen their publicly available communications infrastructure for belligerent traffic. Thus, for example, it would not be prohibited for a belligerent to route information through cyber infrastructure in a neutral State that is open for the service of public messages, and that neutral State would have no obligation to forbid such traffic. This rule would appear to be applicable even if the information that is being routed through neutral communication infrastructure may be characterized as a cyber weapon or otherwise could cause destructive effects in a belligerent State (but no destructive effects within the neutral State or States).*

[While this Manual generally concurs with the preceding, as no major conflict has been waged in the new cyber age in which the world now finds itself, it is not known whether the preceding will remain applicable in all situations. For example, provided it has the capability not to interrupt its own cyber-dependent communications and attacks, a belligerent party may find it essential to interrupt temporarily (and possibly for longer periods) that which goes through a neutral party's (or even its own) communications infrastructure. If this were to be considered desirable, the harmful effect not only on enemy forces, persons, and facilities but also those of neutral and allied parties should be taken into consideration. Additionally, if such an act were implemented, the neutral party may consider that an attack sufficient to justify a counterattack which may not simply be a cyber response, and/or that neutral party becoming an ally of one's enemy.

[This Manual would change the use of "State" in 16.4.1 to "party" as the same considerations would be as applicable for both State and non-State belligerents and neutrals.]

16.5.2 Cyber Operations That Do Not Amount to an "Attack" Under the Law of War. A cyber operation that does not constitute an attack is not restricted by the rules that apply to attacks. Factors that would suggest that a cyber operation is not an "attack" include whether the operation causes only reversible effects or only temporary effects. Cyber operations that generally would not constitute attacks include:

- *Defacing a government webpage;*
- *A minor, brief disruption of internet services;*
- *Briefly disrupting, disabling, or interfering with communications; and*
- *Disseminating propaganda.*

Since such operations generally would not be considered attacks under the law of war, they generally would not need to be directed at military objectives, and may be directed at civilians or civilian objects. Nonetheless, such operations must not be directed against enemy civilians or civilian objects unless the operations are militarily necessary. [The preceding two sentences are sufficiently confusing and unclear that a possible rewrite was not possible.] *Moreover, such operations should comport with the general principles of the law of war…* [C]*yber operations should not be conducted in a way that unnecessarily causes inconvenience to civilians or neutral persons.*

This Manual has the following comments and differences with 16.5.2:

(1) The second sentence is unclear. It is assumed that it means that if a cyber action does not cause irreversible or permanent effects, it generally will not be considered an attack. If that is the

meaning, this Manual does not concur that it can thereby be deduced that the action is most likely not an attack even if in most cases it may not have been an attack.

(2) Consistent with the preceding position, this Manual can concur only with the "defacing of a government webpage" as the one example "that generally would not constitute an attack." However, disruptions, even if "brief," of internet services or communications can be a prelude to an attack, part of an attack, or otherwise seriously harmful to an economy, election, transportation system, military preparedness, and utility network. Propaganda can be intended to help undermine or topple governments (and can be illegal under the law of war). Thus, any such cyber interference should be evaluated independently at the time it occurs in the context of the existence and prevalence of previous such cyber acts, and current events, prevailing relationships, and levels of political and military tensions. To do otherwise, is imprudent.

(3) With respect to the last sentence, under this Manual, the inconvenience precluded should only be that against non-combatant civilians and neutral persons, not all civilians.

16.5.3.1 Cyber Tools as Potential Measures to Reduce the Risk of Harm to Civilians or Civilian Objects. In some cases, cyber operations that result in non-kinetic or reversible effects can offer options that help minimize unnecessary harm to civilians [and civilian objects]. *In this regard, cyber capabilities may in some circumstances be preferable, as a matter of policy, to kinetic weapons because their effects may be* [more easily] *reversible, and they may hold the potential to accomplish goals without any destructive kinetic effect at all.* [As noted above, the opposite can also be the case. Additionally, throughout this section on cyber, generally where "civilian" is used, under this Manual, it would more appropriately be "non-combatant civilians."]

4.17 Criminal Elements

4.17.1 Introduction

FM 27-10, FM 6-27, and the DOD Law of War Manual do not include sections specifically on criminal elements; thus, there is no official text against which to compare the positions of this Manual.

Interface with criminal elements by combatants during conflicts typically occurs in one of three ways:

- Law enforcement
- Non-neutral force
- Resource/ally

Each may require a different approach and appropriate conduct during a conflict.

4.17.2 Law Enforcement (possibly consistent)

Generally, a commander will not choose to use resources—personnel or materiel—during war for standard law enforcement missions. The reasons are many. First, except for military police, criminal investigation, and other similar units, most military personnel, to include combat soldiers even with their proficiency with weapons, are not trained in law enforcement. Second, combat units and personnel diverted to law enforcement can lessen the ability to engage and destroy the enemy as quickly and efficiently as possible. Third, unless they are from the area in which operations are being conducted, combatants generally will not sufficiently understand local conditions, cultures, and personalities to be able to carry out law enforcement responsibilities effectively. Fourth, those who inform on or request assistance to quell "criminal activities" may simply be setting up competitors, personal enemies, political opponents, and those with resources they covet to be harmed or eliminated to the informant's/requestor's benefit.

Nonetheless, there are at least two situations where involvement may be appropriate and even critical. The first is if all effective civilian authority in an area is unwilling or unable to effectively maintain order, and the only "law" in place is that of the strongest and least ethical. The second is if opportunities arise whereby performing a law enforcement function can secure critical support for one's operations that might not otherwise be forthcoming. Nonetheless, for the reasons cited in the preceding paragraph, the military should only be used with caution for law enforcement in such situations and only if it will not unduly impede a unit's primary mission and other critical responsibilities. If available and time and conditions allow, assistance in understanding that which is required should be sought from local attorneys, judges, law enforcement personnel, community leaders, and intelligence assets.

4.17.3 Non-Neutral Force (possibly consistent)

In some situations, criminal elements will have become sufficiently large, well-financed, and organized that they may have certain components of their organization functioning essentially as para-military units. Such groups may control and even govern parts of cities and regions. Even if not to this extent, individuals and small criminal elements can potentially pose a threat or undermine the mission of military forces. In some cases, enemy forces may have secured criminal elements as allies (voluntarily, through coercion, paid) and sources of information, supplies, assassins, saboteurs, and combatants.

If at any time, the presence and activities of such criminal elements impede or potentially threaten a belligerent's mission or the well-being of its forces, the belligerent may take those actions against them no differently than against any enemy force or person acting in the same manner. While this would include the potential for inflicting death, injury, and destruction on these persons and their property, it also means that, under this Manual, while fighting, the criminal elements have the same rights as combatants but, once captured, may be subject to domestic law applicable to their actions.

If operating within a combatant's own country, territory under the jurisdiction of his or her country or cause, or in a jurisdiction of an ally and martial law has not been declared in that area of operation, unless there are rules of engagement to the contrary, a combatant should comply with applicable situation-specific domestic law if known when dealing with actual and suspected criminals. If available and cooperative, assistance in understanding that which is required should be sought from local attorneys, judges, law enforcement personnel, and intelligence assets.

4.17.4 Resource/Ally (uncertain)

There may be situations in which, rather than being an impediment to one's mission and responsibilities, criminal elements may be able to assist in achieving that mission and fulfilling these responsibilities. Criminal elements have the potential to provide resources not readily available from any other source. Just as for your enemy, they can potentially provide information, essential materiel, assassins, saboteurs, and combatants. Using them in this manner is permissible within the same bounds as any other weapon or action in war, i.e., one should apply the law of war principles found in Chapter 3.

When making the decision as to whether to utilize criminal elements, three considerations should be paramount in the assessment process:

(1) Whether that required to secure their participation (e.g., training, funds, weapons, legitimacy) will potentially create a stronger, more effective criminal force which might later be turned against their sponsor or the local population
(2) Whether this will increase their dominance and exploitation of civilian non-combatants beyond that which already exists, i.e., whether unnecessary death, injury, suffering, and destruction among non-combatants will be greater than what would have occurred if such alliances had not been made

(3) Whether such alliances and cooperation will undermine the support desired from the local population or government, current and potential allies, and fellow citizens/movement members

With these considerations in mind, if the decision is made to proceed with such alliances or cooperation, appropriate public information initiatives and responses may need to be prepared and possibly put into effect. This is further necessary as the use of criminal resources by one belligerent may become part of its opponent's lawfare/media initiatives (see following section).

4.18 Lawfare (perhaps consistent)

FM 27-10, FM 6-27, and the DOD Law of War Manual do not include a section on lawfare although it may be considered to be covered under information operations. Thus, there is no official law of war text on lawfare specifically with which to compare the positions and commentary which follow.

This Manual defines ***lawfare*** as "*the use of law as a method of war to accomplish a military or political objective in place of, or in conjunction with, kinetic or other types of force*." The law on which it is based or manipulates can be that of international treaties, international customary law, domestic law, common practice or custom, executive orders, rules of engagement, status of force agreements, or that which is fabricated or intentionally misinterpreted to fit the purpose of the moment. It can draw on, comply with, and deviate from the laws of war and human rights. Its use, even when based on fabrications and intentional misinterpretations, is not a violation of the law of war, and no less permissible than diplomatic initiatives, embargoes and sanctions, terrorism, information/psychological operations, cyber operations, or air, sea, and ground forces. It is neither "good" nor "bad" in and of itself, but only if it is or is not employed in support of a just cause and does or does not adhere to the principles of the law of war.

The following are examples of uses of lawfare which are permissible when compliant with the law of war and its principles (see Chapter 3):

- In advance of and during a conflict, educating one's own forces, the media, enemy forces, the public, humanitarian and human rights organizations, non-combatants in areas of military operations, and the legal community as to those portions of the law of war which are applicable to a particular incident, operation, area of operation, campaign, or conflict;
- Countering fabrications and misrepresentations of the law regarding actions taken by one's own forces and government which were, in fact, compliant with the law of war.
- Denying through legal means financial, human, intelligence, technological, trade access, war materiel, and other resources to a belligerent party;
- Undermining the legal and moral legitimacy and authority of a belligerent party;
- Providing a stronger legal foundation for desired, anticipated, or actual actions by one's government and military forces; and
- Undermining or eliminating the lawfare capabilities of persons, organizations, governments, and military forces working against one's own cause.

Additional background and discussions of lawfare can be found on www.lawfareblog.com.

4.19 Sanctuaries (uncertain but possibly consistent with U.S. policy)

In war, sanctuaries, refuges, and safe havens/routes, referred to collectively as "sanctuaries," in the territory of a neutral third party, can provide both strategic and tactical advantages for a belligerent with often a reduced risk of being targeted by one's enemy. (Sanctuaries also play a humanitarian role for those fleeing the war or persecution. This section only addresses their use for military purposes.) Sanctuaries in the territory of a neutral party could comprise a single room, office, or structure; an urban or rural enclave/refuge; or a supply route. Purposes of sanctuaries include:

1. Receiving, transshipping, or otherwise moving or storying military equipment, personnel, and supplies;
2. Training military personnel before deployment;
3. Staging offensive military operations;
4. Treating one's wounded and sick before redeployment;
5. Staging terrorist operations;
6. Conducting intelligence operations;
7. Securing political, military, and economic support and resources; and
8. Providing refuge after a defeat or clandestine attack

The existence of such sanctuaries and the political unwillingness of the United States to physically and consistently deny their use to North Vietnam in Cambodia and Laos in the 1960s and 1970s, and to the Taliban and Al Qaeda in Pakistan more recently, is in part why the Vietnamese civil war ended as it did and the Taliban remains as strong as it is today. The absence of such sanctuaries contributed to the Philippines' ability to defeat the Huk(balahap) rebellion in the 1940s and 1950s.

Given that sanctuaries are important and often exist during conflicts, the question becomes what is legal under the law of war and, according to some parties, human rights law, for those who establish and use these sanctuaries, and for their enemies and potential victims/neutral parties who may wish to deny their use. On one hand, the UN Charter strongly protects the sovereign inviolability of nations from attacks by others except in self-defense or the defense of one's ally. On the other hand, under the Charter and law of war, one has the right under certain circumstances to take preemptive action prior to an attack by another party, and respond militarily if attacked.

With respect to sanctuaries, a hybrid situation exists: A belligerent has made the decision to carry out acts of war and operations to enhance its war effort from within the sovereign territory of a non-belligerent. In doing so without an agreement (the existence of an agreement is tantamount to an alliance which alters those portions of the law which would be applicable), the belligerent will likely have violated the sovereignty of the non-belligerent. However, the belligerent has neither attacked nor taken any action to harm the host party. The question then becomes what actions the neutral party can legally take which can be different than those actions the enemy of the initially investing belligerent can legally take to eliminate this threat without violating the sovereignty of the host nation and cause that party to respond negatively to any such actions.

If the involuntary host party wishes to continue being considered a neutral non-belligerent, the rule of thumb, at least for the United States, seems to be that if the host party actively and effectively addresses the investing belligerent's use of the host party's territory as a sanctuary, the United States will not intervene if elimination or denial of the sanctuary results. However, if the host party is "unwilling or unable" actively and effectively to address the use of its territory as a sanctuary by a belligerent, that belligerent's enemies may feel legally justified to take actions they believe necessary to deny use of such sanctuaries and eliminate enemy persons or resources in the targeted sanctuary.

The preceding is the position of this Manual, seems consistent with current U.S. policy, and has sufficient legal basis under the law of war. [Note: Nonetheless, there are those who believe unilateral action to eliminate (i.e., deny and/or destroy) sanctuaries without express permission of the host nation is illegal under international law as well as possibly being a violation of human rights law]. This does not mean, however, that the same rights and prohibitions apply as those in active war zones in belligerent territory. Those in neutral territory are more nuanced and complicated.

The first five of the above potential uses of territory as a sanctuary, which are more traditionally military in nature, will be addressed in Chapters 12 (Neutrals); the last, which relates more to diplomats and other

belligerent representatives, in Chapter 9 (Civilians). This section will primarily address actions against typically smaller, non-traditional military targets which are often imbedded or operate within the civilian population, e.g., terror cells, spy rings, secret agents, assassins. Such actions may include: (1) targeted killing or capture of persons; (2) destruction of residential, storage and manufacturing facilities; and (3) destruction or disabling of transportation or delivery systems.

While each of these should be evaluated, planned, and carried out just as with any other military operation, operating in a neutral territory brings additional law of war considerations into play. As such, it is useful to review language included below from Chapter 17 of *The Handbook of the International Law of Military Operations (Second Edition),* Terry D. Gill & Dieter Fleck (editors). This is not meant to imply this Manual agrees with all that is found in that handbook's Chapter 17, but simply that it includes useful information and guidelines which might be applied, not just for targeted killing, but also for the targeted capture of persons and the destruction of enemy property in neutral territory (which may be owned by citizens or members of the neutral party which complicates matters further).

17.02

> *2. In principle, any targeted killing carried out by a State within the sphere of sovereignty of another State comes under the prohibition of inter-State force expressed in Article 2(4) of the UN Charter and, therefore, must be justified based on an exculpatory* [i.e., favorable to a party that tends to exonerate that party of guilt] *circumstance recognized in international law. In operational practice, the most relevant justifications for the use of force within the sphere of sovereignty of third States are the inherent right of self-defense, consent given by the territorial State, and UN Security Council authorization.*
>
> *3. On the other hand, even the existence of a circumstance justifying the use of inter-State force does not necessarily entail the international lawfulness of a particular targeted killing. It is conceivable, for instance, that a targeted killing carried out in self-defense or with the consent of the territorial State is permissible under the law of inter-State force, but that neither human rights law nor international humanitarian law* [i.e., the formal law of war] *allow the deliberate killing of the targeted individual.… It is also conceivable that the pursuit and targeted killing of an opposing rebel commander across an international border is lawful under international humanitarian law and human rights law but does not fulfill the requirements for the lawful use of force with respect to the injured State*[, i.e., the State in which the killing occurs even if no actual harm occurred to that State's citizens or property]. *Therefore, the prohibition of targeted killings as a form of inter-State force and their exceptional permissibility based on justifications such as consent or self-defense is relevant exclusively with regard to the question as to whether a particular targeted killing violates the rights of another State… The answer to this question has no influence on the permissibility of the same targeted killing with regard to the targeted individual. This second question requires a separate determination…* [Note: Under this Manual, wherever State is referenced in this section, it should also include non-State parties although these will be less common. An example would be a neutral or friendly area or region not fully under the control of the central government of a country that is not engaged in the conflict where one of the belligerents to that conflict wishes to or has established a sanctuary in this semi-independent region and another belligerent wishes to eliminate it, e.g., if a sanctuary were to exist in Kurdish Iraq.]

Generally, under this Manual, if a targeted action against a military or civilian combatant in another State is permissible in response to the first question and the action taken is compliant with the provisions of this Manual, then the second question has also been answered in the affirmative. Together, they provide

sufficient *lex specialis* to take precedence over that which might be determined as illegal under human rights law. However, what is often more likely to occur in such situations is that the requirements for targeted killing under other facets of the law of war have been met but not those under UN Charter Article 2(4). If that were the case, then whether the neutral State in which the action occurs is willing and able to take appropriate and timely action against combatants using that State as a sanctuary becomes the deciding factor. If it is and does, it would be a violation for the enemy of the targeted combatant individuals to take action in that State unilaterally. If it is not or does not, under this Manual, unilateral action may be taken by the party who is the enemy of those who are using the host party's territory as a sanctuary.

Nonetheless, that is not necessarily how the neutral party, allies, other belligerents, and even one's own country's legal system may view actions taken which comply with one but not all relevant fields of law. Thus, when evaluating whether to proceed with an operation, addressing these considerations is important so that law of war principles can be appropriately considered and weighed.

The opening paragraph of section 17.04 of *The Handbook of the International Law of Military Operations* includes the following:

> *In a situation of armed conflict, a targeted killing can be permissible only where it cumulatively: (a) is directed against a person subject to lawful attack; (b) is planned and conducted so as to avoid erroneous targeting, as well as to avoid, and in any event to minimize, incidental civilian harm; (c) is not expected to cause incidental civilian harm that would be excessive in relation to the concrete and direct military advantage anticipated; (d) is suspended when the targeted person surrenders or otherwise falls* hors de combat; *and (e) is not otherwise conducted by resort to prohibited means or methods of warfare. Even where not expressly prohibited under the above standards, targeted killings may not be resorted to where the threat posed by the targeted person can manifestly be neutralized through capture or other non-lethal means without additional risk to the operating forces or the civilian population.* [Note: Under this Manual, "non-combatant" should be inserted in place of "civilian" in the above as combatant civilians are legitimate targets and, therefore, not necessarily automatically a consideration with respect to reducing incidental harm. Additionally, this Manual sometimes differs from the formal law of war as to that which constitutes "prohibited means or methods of warfare." Further, during a conflict, political advantages can be as important as military advantages when making such decisions.]

Under this Manual, the preceding cumulative five considerations, applied using law of war principles as defined and discussed in the Manual, are a reasonable set of standards for assessing and planning actions using kinetic force in neutral territory, not just those for targeted killings. Further, while the above language of *The Handbook of the International Law of Military Operations* addresses targeted killings, similar considerations should be applied to the capture of persons and destruction of property.

It is worthwhile to include reference to another "principle" which should be considered when deciding whether to seek consent or ask the host party to take action on its own. That is whether the host party can be trusted with the information which provides the legal basis, military/political necessity, and/or operational specifics for the targeting. If that trust does not exist and sharing information may result in the target being forewarned, under this Manual, the operation could proceed unilaterally even given a possible weaker legal basis, unless in doing so the political and/or military downsides are considered too great (e.g., turning a friendly or allied party into an enemy; unduly exposing members of the operating unit to legal or other risks if captured).

It should also be understood that while this section makes reference to sanctuaries in neutral territories, it may equally apply to enemy sanctuaries in allied territory due to weakness or unreliability of an ally's

government, intelligence service, police, or military. When such a situation exists, one may have little choice but to act unilaterally to eliminate enemy sanctuaries.

4.20 Outer Space (generally consistent)

As outer space technology expands and becomes more accessible, more nations and private parties are employing and further developing these technologies for placing satellites, conducting research, engaging in travel, exploring celestial bodies, and preparing for the waging of war in and from space. The Outer Space Treaty, formally the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, provides the basis of international law addressing outer space. *"The treaty entered into force on 10 October 1967. As of February 2021, 111 countries are parties, while another 23 have signed the treaty but have not completed ratification. In addition, Taiwan, which is currently recognized by 14 UN member states, ratified the treaty prior to the United Nations General Assembly's vote to transfer China's seat to the People's Republic of China (PRC) in 1971*" (Wikipedia "Outer Space Treaty," 1 May 2021). The United States has both signed and ratified.

The treaty includes the following principles (from United Nations Office of Outer Space Affairs webpage):

- *the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind;*
- *outer space shall be free for exploration and use by all States;*
- *outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means;*
- *States shall not place nuclear weapons or other weapons of mass destruction in orbit or on celestial bodies or station them in outer space in any other manner;*
- *the Moon and other celestial bodies shall be used exclusively for peaceful purposes;*
- *astronauts shall be regarded as the envoys of mankind;*
- *States shall be responsible for national space activities whether carried out by governmental or non-governmental entities;*
- *States shall be liable for damage caused by their space objects; and*
- *States shall avoid harmful contamination of space and celestial bodies*.

From a law of war perspective, "*the Outer Space Treaty does not ban military activities within space, military space forces, or the weaponization of space, with the exception of the placement of weapons of mass destruction in space, and establishing military bases, testing weapons and conducting military maneuvers on celestial bodies. It is mostly a non-armament treaty and offers limited and ambiguous regulations to newer space activities such as lunar and asteroid mining*." (Wikipedia "Outer Space Treaty," 1 May 2021)

In addition to these principles and broad parameters, any military actions in and from outer space during war should comply with the principles and standards of conduct required under the law of war.

CHAPTER 5

Weapons

…let us at least fight with honorable weapons, since it seems we must fight.

Henrik Ibsen
Rosmerscholm

I still say the only good weapon for a woman is poison.

Murtagh in Diane Gabaldon's
Outlander

I must confess the sight of all this armament, all this preparation, greatly excited me. My imagination became belligerent, and defeated the invaders in a dozen striking ways; something of my schoolboy dreams of battle and heroism came back.

H.G. Wells
War of the Worlds

I know not with what weapons World War III will be fought, but World War IV will be fought with sticks and stones.

Albert Einstein

5.1 Means of Waging War

The following draws on relevant language of U.S. military publications regarding forbidden and acceptable means of injuring the enemy. Most are followed by positions of this Manual. FM 6-27 does not include a chapter addressing weapons. It does include a short section at the end of its Chapter 3 for ensuring the legality of weapons and weapon systems which this Manual does not.

5.1.1 Means of Injuring Enemy (FM 27-10, Article 33) (generally consistent)

Treaty Provision: *The right of belligerents to adopt means of injuring the enemy is not always unlimited.*

5.1.2 Prohibited and Lawful Weapons

a. DOD Law of War Manual

6.4 PROHIBITED WEAPONS

6.4.1 General Prohibitions Applicable to All Types of Weapons.

- *weapons calculated to cause superfluous injury; or*
- *inherently indiscriminate weapons.*

6.4.2 Specifically Prohibited Types of Weapons.

- *poison, poisoned weapons, poisonous gases, and other chemical weapons;*
- *biological weapons;*
- *certain environmental modification techniques;*

• weapons that injure by fragments that are non-detectable by X-rays;

• certain types of mines, booby-traps, and other devices; and

• blinding lasers.

[It is unclear why nuclear weapons would not also be prohibited based on the language of 6.4.1.]

6.5 LAWFUL WEAPONS

Apart from the categories of weapons described in § 6.4 (Prohibited Weapons), all other types of weapons are lawful for use by the U.S. armed forces; that is, they are not illegal per se... For example, a landmine is not necessarily a legally prohibited weapon; it is only prohibited if it falls under one of the specific classes of prohibited mines listed in § 6.12.4 (Prohibited Classes of Mines, Booby-Traps, and Other Devices)…

6.5.1 Certain Types of Weapons With Specific Rules on Use. Certain types of weapons, however, are subject to specific rules that apply to their use by the U.S. armed forces. These rules may reflect U.S. obligations under international law or national policy. These weapons include:

• mines, booby-traps, and other devices (except certain specific classes of prohibited mines, booby- traps, and other devices);

• cluster munitions;

• incendiary weapons;

• laser weapons (except blinding lasers);

• riot control agents;

• herbicides;

• nuclear weapons; and

• explosive ordnance.

6.5.2 Other Examples of Lawful Weapons. In particular, aside from the rules prohibiting weapons calculated to cause superfluous injury and inherently indiscriminate weapons, there are no law of war rules specifically prohibiting or restricting the following types of weapons by the U.S. armed forces:

- *edged or pointed weapons, including weapons with serrated edges or entrenching tools used as weapons;*
- *small arms, cannons, and other guns, including shotguns, exploding bullets, expanding bullets, suppressors, or large-caliber guns;*
- *blast weapons;*
- *fragmentation weapons;*
- *depleted uranium munitions;*
- *remotely piloted aircraft;*
- *autonomy in weapons systems; and*
- *non-lethal weapons.*

b. **Position of this Manual (inconsistent)**

Weapons precluded under 6.4 above are not always prohibited under this Manual. Other than exceptions referenced elsewhere in this chapter, no means of injuring or killing the enemy is expressly forbidden

beyond the admonition to use the minimum amount and most humane type of force necessary and reasonably available to achieve military and political objectives.

There are five primary reasons for this position:

(1) There is no logical consistency in that which is allowed and that which is forbidden in FM 27-10, the DOD Law of War Manual, the Operational Law Handbook (OLH), and international treaties with some banned weapons actually less harmful and more in keeping with the purpose of the law of war than other weapons allowed;
(2) Few if any weapons used in war are ever intended to *intentionally inflict unnecessary suffering*. The United States has used this position to support its non-ratification of certain treaties banning weapons or munitions agreed to by other States, including U.S. allies;
(3) The use of such forbidden weapons may be essential to the survival and success of certain belligerents (e.g., partisans, poorer nations, revolutionaries, individual units and soldiers cut off from their main force or sources of supply who still must function militarily) who may not have access to the range of "legal" weapons generally available to those whom they confront;
(4) States alone should not make the determination of what is prohibited or lawful without the involvement or, at least, due consideration of the resource and operational realities of non-State belligerents when it is often a State which has initiated an unjust war or created the conditions which compel non-State parties to undertake a just war; and
(5) With respect to weapons which are or are not permissible, anyone familiar with war is aware of the inconsistency of what has been decided as to those weapons which do and do not inflict unnecessary suffering.

Thus, any weapon should be permissible unless:

- intended primarily to cause superfluous injury;
- inherently indiscriminate
- likely to cause widespread, long-term destruction of property or the environment
- materially more harmful than a reasonably available alternative which could have achieved the same military or political purpose with similar risk to one's forces and mission
- one with the potential to wipe out mankind if released, or used extensively by belligerents

5.2 Nuclear Weapons (generally consistent)

5.2.1 DOD Law of War Manual

There is no general prohibition in treaty or customary international law on the use of nuclear weapons. The United States has not accepted a treaty rule that prohibits the use of nuclear weapons per se, and thus nuclear weapons are lawful weapons for the United States. [On 17 October 2020, the United Nations announced that 50 countries had ratified a U.N. treaty to ban nuclear weapons. Its "entry into force" became effective 22 January 2021. As of 1 November 2021, there are 86 signatories and 56 parties. The treaty requires ratifying countries to never develop, test, produce, manufacture, acquire, possess, or stockpile nuclear weapons or other nuclear explosive devices. It bans transfer or use of nuclear weapons or nuclear explosive devices, or employing threats to use such weapons. No nuclear power has yet ratified the treaty. Rather they oppose and generally feel it undermines the Nuclear Non-Proliferation Treaty already in place. At this time, the new treaty does nothing to change what is stated in this section.]

The law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons. For example, nuclear weapons must be directed against military objectives. [Yet, the only

time such weapons have been used was by the United States against two non-military targets.] *In addition, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.*

6.18.1 U.S. Policy on the Use of Nuclear Weapons. The United States has developed national policy on the use of nuclear weapons. For example, the United States has stated that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners. In addition, the United States has stated that it will not use or threaten to use nuclear weapons against non-nuclear weapons States that are party to the Nuclear Non-Proliferation Treaty and in compliance with their nuclear nonproliferation obligations. [Nonetheless, senior U.S. civilian and military leaders have considered and made statements whereby such weapons would be used when circumstances were not "extreme," essential to U.S. "vital interests", and "against non-nuclear weapons States," e.g., during the war in Vietnam (General LeMay) and in relation to Iran (Mr. Trump).]

6.18.2 Nuclear Weapons and Arms Control Obligations. Nuclear weapons are regulated by a number of arms control agreements restricting their development, testing, production, proliferation, deployment, use, and, with respect to specific types, possession. Some of these agreements may not apply in times of war. Guidance on nuclear arms control agreements is beyond the scope of this manual.

6.18.3 AP I Provisions and Nuclear Weapons. Parties to AP I have expressed the understanding that the rules relating the use of weapons introduced by AP I were intended to apply exclusively to conventional weapons. Thus, Parties to AP I have understood AP I provisions not to regulate or prohibit the use of nuclear weapons. Although the United States is not a Party to AP I, the United States participated in the diplomatic conference that negotiated AP I based upon this understanding.

6.18.4 Authority to Launch Nuclear Weapons. The authority to launch nuclear weapons generally is restricted to the highest levels of government.

5.2.2 Position of this Manual (possibly inconsistent)

Under this Manual, the first use of nuclear weapons is illegal, whether they are tactical or weapons of mass destruction. In response to a belligerent's employment, if use of nuclear weapons is considered, the same principles are in place as for any weapon, i.e., use the minimum amount and most humane type of force necessary to achieve one's objectives. Seldom will the overwhelming use of nuclear weapons meet this standard given the widespread and indiscriminate death, suffering, destruction, and long-term damage to the environment which will result.

Even if legally permitted, multiple users or uses of such weapons could result in widespread destruction, death, and suffering far beyond the battlefield even to the point of extinguishing mankind. Additionally, as weapons and delivery technologies expand, become more lethal, and availability becomes more widespread, such outcomes become more likely. Thus, extreme care must be taken not to be the first user of such weapons or overreacting if they are. Rather, if such weapons reside in a party's arsenal, their presence should be as deterrents, not as weapons to be employed.

While it is impossible to prevent the use of nuclear weapons, anyone who orders, or carries out orders, which result in their first use, or overwhelming use in response, whether by the prevailing or defeated party, should be required to appear before an appropriate objective tribunal to justify their actions. This tribunal should have the power to convict such persons and, if it does, impose sentences of imprisonment or execution.

5.3 Poison

5.3.1 DOD Law of War Manual

6.8.1 Poison and Poisoned Weapons. It is especially forbidden to use poison or poisoned weapons. For example, poisoning the enemy's food or water supply is prohibited. Similarly, adding poison to weapons is prohibited... Poisons are understood to be substances that cause death or disability with permanent effects when, in even small quantities, they are ingested, enter the lungs or bloodstream, or touch the skin. The longstanding prohibition against poison is based on: (1) their uncontrolled character; (2) the inevitability of death or permanent disability; and (3) the traditional belief that it is treacherous to use poison.

6.8.1.1 Designed to Injure by Poison. This prohibition on poison applies to weapons that are designed to injure or kill by poison. It does not apply to weapons that injure or cause destruction by other means that also produce toxic byproducts.

6.8.1.2 Death or Permanent Disability to Persons. The prohibition on using poison applies to use against human beings. Thus, the prohibition on the use of poison has been understood not to prohibit the use of chemical herbicides that are harmless to human beings...

5.3.2 Position of this Manual (inconsistent)

The last sentence of 6.8.1 citing the three reasons why there has been a longstanding prohibition against poison, as well as that included in 6.8.1.1, has little logical basis. First, all poisons which might be employed are not necessarily uncontrolled in character. Second, the inevitability of death and disability is inherent in many weapons employed in war, not just poisons. Third, regardless of beliefs that the use of poison may be treacherous, that accusation could be leveled at numerous legally permissible actions in war. Finally, the rationale that it is permissible to use weapons that kill and otherwise harm by other means but also do the same due to their toxic biproducts, but it is not permissible to use a weapon that intentionally kills through its toxicity, is specious. With respect to this latter, why should a weapon be permissible simply because its initial target is killed or harmed by other than its toxic nature but the byproducts produced create a toxic material that incidentally kills or harms others than the initial target?

In light of the preceding, this Manual takes a very different approach to the possible use of poison. If one is attempting targeted killings of specific individuals or groups of individuals, the use of certain types of and delivery means for poisons may sometimes reduce casualties among those who are not the target vs. the use of explosive devises, automatic weapons, artillery barrages, air strikes, and other less discriminatory weapons. Further, certain poisons may be one of the limited resources available to resistance, revolutionary, and other unconventional forces, as well as individuals and units cut off from the support or protection of their main force who are trying to survive or carry out an essential mission.

In summary, it is permissible to use poison if doing so meets the following conditions:

1. Proportionate to the military or political benefit anticipated;
2. No more incidental damage or suffering than if "legal" weapons were used;
3. Unavailability of equally or more effective weapon; and
4. Absence of unreasonable residual effects to the environment or non-targeted persons, especially if these would harm non-combatants, their sources of food and water, and ecosystem sustainability.

5.4 Gases, Chemicals, and Biological Warfare

In 1976, six paragraphs of FM 27-10 were amended. The first added treaties which the United States is a party. The other five were the amending or superseding all or portions of its articles 37-41. That which follows is based on the 1976 language with some updates referenced from the 18th edition of the

Operational Law Handbook with commentary as to certain implications of these changes. Additionally, portions of the DOD Law of War Manual related to chemical weapons have been included.

5.4.1 FM 27-10 and Operational Law Handbook

The following draws from the 1976 amendment language in the front of FM 27-10:

> *Although the language of the 1925 Geneva Protocol appears to ban unqualifiedly the use in war of the chemical weapons [asphyxiating, poisonous or other gases] within the scope of its prohibition, reservations submitted by most of the Parties to the Protocol, including the United States, have in effect, rendered to Protocol a prohibition only of the first use in war of materials within its scope. Therefore, the United States, like many other Parties, has reserved the right to use chemical weapons against a state if that state or any of its allies fails to respect the prohibitions of the Protocol.*
>
> *The reservation of the United States does not, however, reserve the right to retaliate with bacteriological methods of warfare against a state if that state or any of its allies fails to respect the prohibitions of the Protocol…In this connection, the United States considers bacteriological methods of warfare to include not only biological weapons but also toxins, which, although not living organisms and therefore susceptible of being characterized as chemical agents, are generally produced from biological agents. All toxins, however regardless of the manner of production, are regarded by the United States as bacteriological methods of warfare within the meaning of the proscription of the Geneva Protocol of 1925.*
>
> *Concerning chemical weapons, the United States considers the Geneva Protocol of 1925 as applying to both lethal and incapacitating chemical agents. Incapacitating agents are those producing symptoms that persist for hours or even days after exposure to the agent has terminated.*
>
> *The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within US bases and installations or around their immediate defensive perimeters, and first use of riot control agents in war except in defensive military modes to save lives…* [Note: Examples listed in FM 27-10 are deleted here as these are included below in 16.6.2.]
>
> *However, under Executive Order 11850, herbicides or riot control agents may be used 'by US armed forces either (1) as retaliation in kind during armed conflict or (2) in situations when the United States is not engaged in armed conflict. Any use in armed conflict of herbicides or riot control agents, however, requires Presidential approval in advance.'*

The 18th edition of the Operational Law Handbook states that when the United States ratified the Chemical Weapons Convention (CWC) in 1997, it gave up its previously reserved right to respond with chemical weapons in response to an attack by chemical or biological weapons. The CWC also prohibits the production, acquisition, stockpiling, retention, and use of chemical weapons. Parties to the convention are to declare their stockpiles and facilities with procedures for their destruction, verification of that destruction, and "challenge inspections" in response to another party's allegation of non-compliance. Further, it forbids the use of Riot Control Agents (RCAs) as a method of warfare. Nonetheless, Executive Order 11850 remains in effect with respect to RCAs and herbicides and the right to use these in certain situations. There seem to be slight variations in language for when they can be used as part of the Senate's ratification of CWC, but substantively there seems to be little material difference from that outlined in FM 27-10. The United States considers oleoresin capsicum pepper spray (OC) or cayenne pepper spray as a Riot Control Agent.

5.4.2 DOD Law of War Manual

6.8.3 CHEMICAL WEAPONS

6.8.3.1 Definition of Chemical Weapons. Under the Chemical Weapons Convention, chemical weapons mean the following, together or separately:

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

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

(c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

Toxic chemicals *refer to any chemical that through its chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans or animals… Chemicals that only cause harm to plants, such as herbicides, are not covered. In addition, toxic chemicals intended for purposes not prohibited by the Chemical Weapons Convention are also excluded…*

Precursor *means any chemical reactant (including any key component of a binary or multicomponent chemical system) that takes part at any stage in the production by whatever method of a toxic chemical. Key component of a binary or multicomponent chemical system means the precursor that plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.*

Equipment specifically designed for use directly in connection with the employment of such munitions and devices only applies to equipment designed solely for use with chemical weapons and does not, for example, include equipment that is designed also for purposes that are not prohibited.

6.8.3.2 Prohibitions With Respect to Chemical Weapons. Chemical weapons are subject to a number of prohibitions. It is prohibited [to]*:*

- *use chemical weapons;*
- *develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;*
- *engage in any military preparations to use chemical weapons; and*
- *assist, encourage, or induce, in any way, anyone to engage in any activity prohibited to a Party to the Chemical Weapons Convention.*

…chemical weapons may not be used in international armed conflict and non-international armed conflicts. Similarly, chemical weapons may not be used in retaliation after a State has suffered from a chemical weapons attack, even if that attack has been conducted by a State that is not a Party to the Chemical Weapons Convention.

6.8.3.3 Obligation to Destroy Certain Chemical Weapons and Chemical Weapons Production Facilities. In addition, a Party to the Chemical Weapons Convention has an obligation to destroy chemical weapons or chemical weapon production facilities it owns or possesses or that are located in a place under its jurisdiction or control. If U.S. armed forces encounter chemical weapons or chemical weapon production facilities during armed conflict, U.S. national authorities should be notified as soon as practicable. In addition, with due regard for safety and security considerations, reasonable efforts should be made to secure and retain information regarding the chemical weapons. [Note: The preceding should be expanded along the lines of: "U.S authorities, through coordination with higher military command, will supply appropriate resources for the removal of chemical weapons, or on-site destruction

of such weapons and/or facilities. If such resources cannot be provided on a timely basis such that essential combat operations will be hindered if combat resources must be diverted to securing such facilities and weapons, instructions must quickly be provided to on-the-ground forces as to how such chemical, weapons, and facilities may be safely secured, destroyed, removed, or vacated with no action having been taken, at least temporarily. Contingency plans should be in place for most likely chemicals, chemical weapons, or manufacturing or storage facilities which might be encountered."]

6.8.3.4 Certain Uses of Toxic Chemicals Not Prohibited. The Chemical Weapons Convention does not prohibit the use of toxic chemicals and their precursors for certain purposes…:

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

Seeking to develop and use means of protection against chemical weapons is permissible…

6.16 RIOT CONTROL AGENTS

The use of riot control agents is subject to certain prohibitions and restrictions. Riot control agents are widely used by governments for law enforcement purposes (such as crowd control), but are prohibited as a method of warfare.

6.16.1 Definition of Riot Control Agents. Riot control agents mean any chemical not listed in a Schedule Annexed to the Chemical Weapons Convention, which can produce rapidly in humans sensory irritation or disabling physical effects that disappear within a short time following termination of exposure. Riot control agents include, for example, tear gas and pepper spray, but generally are understood to exclude the broader class of non-lethal weapons that may sometimes be used for riot control or other similar purposes, such as foams, water cannons, bean bags, or rubber bullets. The United States does not consider riot control agents to be "chemical weapons," or otherwise to fall under the prohibition against asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices.

6.16.2 Prohibition on Use of Riot Control Agents as a Method of Warfare. It is prohibited to use riot control agents as a method of warfare. The United States has understood this prohibition not to prohibit the use of riot control agents in war in defensive military modes to save lives, such as use of riot control agents:

- *in riot control situations in areas under direct and distinct U.S. military control, including controlling rioting POWs;*
- *in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided;*
- *in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners; and*
- *in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists, and paramilitary organizations.*

[As with the prohibition in the use of poisons, there is an illogic to when RCAs can legally be employed. For example, the use of RCAs is considered to be legally permissible to assist in the rescue of escaping prisoners and personnel from downed aircraft but not to save the lives of soldiers in an active combat

situation. Similarly, they can be used to protect convoys outside the zone of immediate combat from terrorists and paramilitary operations but not from conventional forces.]

In addition to being permitted in war in defensive military modes to save lives, it is not prohibited to use riot control agents in military operations outside of war or armed conflict. Specifically, the United States has taken the position that riot control agents may be used in the conduct of:

- *peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict;*
- *consensual peacekeeping operations when the use of force is authorized by the receiving state, including operations pursuant to Chapter VI of the United Nations Charter; and*
- *peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter.*

[There is either an inconsistency in the above, or further explanation is required for peacekeeping operations. On the one hand, it is considered illegal to use RCAs in offensive operations; on the other, it is permissible for authorized peacekeeping operations to use them if the United States is not a party to the conflict and when operations are authorized by the UN Security Council, which could conceivably include offensive operations. If the intent is that even peacekeeping operations cannot use RCAs in offensive operations, this should be stated. If not, there should be consistency between that allowed for peacekeeping and non-peacekeeping offensive operations.]

6.17 HERBICIDES

The United States has renounced, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters.

6.17.1 Definition of Herbicide. An herbicide is a chemical compound that will kill or damage plants. Herbicides that are harmless to human beings are not prohibited under the rule against the use of poison or poisoned weapons. [The second sentence is not relevant to a definition of herbicides and should be moved to 6.17.2. Including it here may make it seem that an herbicide under the treaty has two characteristics: kills or damages plants, and is harmless to human beings. However, we know this is not the case. What it does suggest (and can be true) is that herbicides can be both harmless and harmful to humans, and that should be appropriately included under the definition. As to which is or is not covered by the treaty should be part of 6.17.2.]

6.17.2 Chemical Weapons Convention and Herbicides. The Chemical Weapons Convention does not add any new constraints on the use of herbicides…

6.17.3 ENMOD Convention and Herbicides. Under certain circumstances, the use of herbicides could be prohibited by the ENMOD Convention...

6.17.4 Authority Under Domestic Law to Employ Herbicides in War. Use of herbicides in war by the U.S. armed forces requires advance Presidential approval. Additional regulations govern the use of herbicides. [It is not clear whether this approval is required even within bases and installations and around their immediate defensive perimeters. It is assumed it is not. Whichever, it should be made clear.]

6.9 BIOLOGICAL WEAPONS

6.9.1 Biological Weapons – Prohibition on Use as a Method of Warfare. It is prohibited to use bacteriological methods of warfare. This prohibition includes all biological methods of warfare and the use in warfare of toxin weapons. For example, it is prohibited to use plague as a weapon. A prohibition against the use of biological weapons may be understood to result from U.S. obligations in the Biological

Weapons Convention to refrain from developing, acquiring, or retaining biological weapons. Bacteriological or biological warfare is prohibited, at least in part, because it can have massive, unpredictable, and potentially uncontrollable consequences.

6.9.1.1 Toxin Weapons. The term toxin refers to poisonous chemical substances that are naturally produced by living organisms, and that, if present in the body, produce effects similar to disease in the human body. Toxins are not living organisms and thus are not capable of reproducing themselves and transmissible from one person to another.

Toxin weapons have been regulated in connection with biological weapons because they have been produced in facilities similar to those used for the production of biological agents. However, even toxins that are produced synthetically, and not through biological processes, fall within these prohibitions. Substances that are classified as "toxins" for the purpose of applying the requirements of the Biological Weapons Convention may also be classified as "chemical weapons" that are subject to the requirements of the Chemical Weapons Convention.

6.9.2 Biological Weapons – Prohibition on Development, Acquisition, or Retention. It is also prohibited to develop, produce, stockpile, or otherwise acquire or retain:

- *microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes; or*
- *weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.*

6.9.3 Biological Weapons – Prohibition on Transfer or Assisting, Encouraging, or Inducing the Manufacture or Acquisition. It is also prohibited to transfer or to assist, encourage, or induce others to acquire biological weapons. The exchange of equipment, materials, and scientific and technological information for the use of bacteriological and biological agents and toxins for peaceful purposes, such as the prevention of disease, however, is not restricted.

5.4.3 Position of this Manual (consistent and inconsistent)

While this Manual generally concurs with the preceding as to the stated intent never to use chemical, bacteriological, or biological agents or weapons (to include toxins), there are exceptions beyond those outlined in the amended FM 27-10, as referenced in OLH, and included in the DOD Law of War Manual.

(1) Provided (a) their effect can be limited essentially to targeted combatants similar to if non-chemical or biological weapons had been utilized, (b) any incidental casualties and harm would be proportionate to the military advantage anticipated to be gained, (c) there will not be material residual environmental and health effects, and (d) suffering will not be greater than might occur from using legal non-chemical/biological weapons, the use of chemical weapons and bacteriological/biological agents is permissible if enemy forces use them first, if failure to use would mean the defeat or collapse of a force's nation or cause, or the general devastation of a region or people. In other words, more persons would be killed and suffer if such agents and weapons were *not* employed than would occur than if they were. (Note: The first sentence of this paragraph would preclude, in all situations, the use of such weapons if their damage cannot be limited in scope to the targeted enemy combatants and acceptable levels of incidental non-combatant injury based on proportionality considerations, i.e., this would prohibit the use of a bacteriological/biological agent that might spread throughout a region, country, or the world, e.g., COVID-19.)

(2) As riot control agents are commonly used "for law enforcement purposes because they produce, in all but the most unusual circumstances, merely transient effects that disappear within minutes after exposure the agent has terminated," such agents can reasonably be used more widely than indicated above, e.g., in offensive, not just defensive and rescue operations, with the realization that using them may be seen by an enemy ignorant of their nature as the first use of a lethal agent and respond in kind with a lethal agent even though this latter is a violation of the formal law of war. [See note to DOD LWM 6.16.2 above.]

An example of how the use of RCAs may be more humane and preferable would be where a bunker must be cleared of armed enemy combatants. A fragmentation grenade or flame thrower are legal means for doing so; an RCA is not. The former will kill or maim; the latter could force them out essentially unharmed so they could be captured.

(3) The individual use of pepper spray type agents, both defensively and offensively, is permissible under this Manual. It is unclear in the above language why such agents can be used by law enforcement and other security personnel to subdue or deter civilians but cannot be used against enemy combatants.

(4) Individuals and small units with limited resources may use "homemade" biological agents against specific legitimate (as defined elsewhere in this Manual) targeted individuals and groups of individuals if the effect of this use will not harm persons beyond permissible incidental non-combatant harm under proportionality considerations, and there would not be a material longer-lasting residual environmental or health effect. For example, feces (in effect a biological agent) on punji stakes or introduced into food eaten by enemy forces would be permissible under this Manual in certain situations and conditions.

(5) Due to the fluid, sometimes isolated or clandestine nature of operations, and uncertain communications (both in terms of equipment and chain of command) common in combat, if the use of herbicides and riot control agents is essential during armed conflict, such does not require Presidential approval. This is more likely to occur with riot control agents than herbicides as the benefit of employing the latter is typically not immediate which would a reason for not employing without higher approval.

(6) The language adopted in 1976 seems to remove an important prior restriction on the use of herbicides. The 1956 language of paragraph 37b states; *"The foregoing rule [against poisons and poisoned weapons] does not prohibit measures…to destroy, through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces* [of the enemy] *(if that can be determined)."* The language which supersedes this does not seem to place any restrictions on herbicides that, when used, must be "harmless to man" (although the DOD Law of War Manual does include such language) and that they should only be used to destroy crops intended for consumption by enemy forces. While this Manual has no concerns regarding when FM 27-10 and the DOD Law of War Manual allow herbicides to be used, it does have concerns of what might be permissible when Presidential approval is required.

It is the position of this Manual that herbicides, if used, should not be materially harmful in application or residual effect to humans (if such danger was known in advance) and should be limited to the uses currently indicated in FM 27-10 and the DOD Law of War Manual, as well as the destruction of crops whose primary, although not necessarily sole, purpose is to supply enemy forces. This latter might be food plots in the jungle or other remote areas planted by insurgents but would not include crops planted by villagers, some portion of which may be bought or seized by insurgent or occupying forces. The concern without these

additional strictures is that, with Presidential approval, a campaign similar to the one in Vietnam with Agent Orange, could be put in place with devastating and long-term human and environmental effects without reasonable consideration of distinction or proportionality.

5.5 Certain Conventional Weapons

Below non-bracketed text is from or based on the OLH (18th edition).

1. Certain Conventional Weapons. The 1980 United Nations Convention on Certain Conventional Weapons (CCW) is the leading and preferred framework to restrict, regulate, or prohibit the use of certain otherwise lawful conventional weapons. The United States has ratified the CCW and its five protocols… plus Amended Protocol II.

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

[The position of this Manual is that, if weapons of this nature are the only weapon available or their use will cause less death, suffering, and destruction than other available weapons to achieve an important military/political purpose, the use of such weapons may be permissible in certain situations **(inconsistent)**.]

b. Summary of OLH C1b. Amended Mines Protocol (AMP) II replaced CCW Protocol II and regulates use of mines, booby-traps, and other similar devices, while prohibiting certain types of anti-personnel mines to increase protection for civilians. The United States regards certain anti-personnel and anti-vehicle mines as lawful weapons subject to restrictions contained in AMP II and national policy. One such mine is the command detonated Claymore, which is also considered legal under the more restrictive Ottawa Treaty (the Anti-Personnel Mine Ban Convention, an NGO-initiated treaty which bans virtually all anti-personnel landmines, with the exception of some for training purposes). The United States is not a party to the Ottawa Treaty). A 2004 Presidential Memorandum instructs that the United States will no longer employ anti-personnel landmines (APL) (sometimes called "dumb" or "persistent" APLs) that do not automatically self-destruct or self-neutralize. In 2014, another Presidential order went further and announced that production of all APLs, persistent or non-persistent, would be discontinued and that service life of all APLs would not be extended through maintenance. The new policy also prevents the use (as well as the production and maintenance) of APLs except for use on the Korean Peninsula for which storage is permissible.

[The position of this Manual is that mines, booby traps, other IEDs (improvised explosive devices), and similar anti-personnel and anti-vehicle mines and devices, both persistent and non-persistent, are permissible for production, maintenance, storage, and use even outside the Korean Peninsula if they are one of the few or only weapon available, or the weapon which will cause less unnecessary death, injury, suffering, and destruction than other available weapons, to achieve a necessary military purpose **(inconsistent.)** The use of such weapons is subject to law of war principles, recording of placement, and removal considerations and responsibilities, i.e., at the close of hostilities, parties placing such devises have a responsibility to remove or assist in locating and removing.]

c. Protocol III does not ban incendiary weapons but restricts their use near civilian areas to increase civilian population protection. Napalm, flame thrower, and thermite/thermite type weapons are incendiary weapons." Protocol III 1(b) states that "incendiaries do not include munitions with incidental incendiary effects such as 'illumination, tracers, smoke or signaling systems,' or munitions designed to combine 'penetration, blast, or fragmentations effects with an additional incendiary effect'—particularly when the munition's primary purpose is not burn injury to persons. Thus, white phosphorous is not an

incendiary weapon when used as a tracer or illuminant, or in appropriate combined effects munitions. The United States ratified Protocol III with the reservation that incendiary weapons may be used against military objects in areas of civilian concentrations if such use will cause fewer civilian casualties...

[This Manual concurs with the preceding. Nonetheless, as fire is one of the most painful ways to die and burns can cause extreme suffering beyond that of many other injuries, the use of flamethrowers, napalm, white phosphorous, other incendiary weapons, and set fires as an offensive weapon should generally be used as a last option after consideration of other weapons availability and proportionality assessments.

[An example of when their use is appropriate would be if all grenades but white phosphorous have been expended, enemy combatants hold a bunker or position which must be eliminated, and to do so without use of the white phosphorous grenade would increase the risk of death or severe harm to investing combatants, the white phosphorous grenade could be employed. A flamethrower might also be appropriate in such a situation. In both instances, if there is a means to quickly and safely communicate to those in the position or bunker as to the impending use of an incendiary weapon, the enemy combatants should be given the opportunity to surrender and made aware of the risk of not doing so.]

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

[This Manual generally concurs with Protocol IV. However, if a blinding laser weapon is the only weapon available, without its use the survival of one's person or unit, or success of an essential mission, is at risk, and/or other less harmful weapon are not reasonably available, then such weapon may be employed **(inconsistent)**. Again, assessments of law of war principles are essential.]

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

[The position of this Manual **(inconsistent with official language, consistent with respect to the spirit of official position)** is that parties should go further than that seemingly required by Protocol V. Across all such ordinance (to include mines), if practicable, parties should not wait until the end of hostilities to clear such ordinance. To do otherwise will increase the probability of unnecessary civilian and military casualties, to include those of one's own forces. Children are especially vulnerable due their inability to always understand the risks and the time they often spend exploring and playing in areas not frequented by adults. Further, unexploded ordinance can be used by the enemy to make IEDs, boobytraps, and other weapons or munitions.

[If mines, IEDs, booby traps, and other such devices are employed by a belligerent, those who do so should maintain detailed records and maps of where such devices are located. At the end of hostilities or when a force leaves an area permanently with no military reason for leaving such devises in place and unidentified to one's former enemies or the civilian populace, such devices should be removed or information provided to the enemy, friendly forces, or civilian authorities who replace them. The devices can then be more safely located and removed reducing the risk of non-essential accidental deaths.

[Further, if a party to the conflict fires or drops large amounts of ordinance in the territory of a neutral or defeated party, the party doing so has a responsibility to assist in the location and removal of unexploded ordinance associated with its actions once such assistance can be undertaken reasonably and resources exist to do so.]

5.6 Cluster Bombs or Combined Effects Munitions (CM) (consistent)

Under U.S. policy, CMs are not mines, are legal under the laws of armed conflict, and are not designed to go off as anti-personnel devices… Since the [CM] *bomblets or submunitions dispensed over a relatively large area and a small percentage typically fail to detonate, this may create an unexploded ordinance (UXO) hazard. …disturbing or disassembling submunitions may explode them and cause civilian casualties… Current U.S. practice is to mark coordinates and munitions expended for all use of cluster munitions, and to engage in early and aggressive EOD clearing efforts as soon as practicable*. (Operational Law Handbook, 18th Edition)

[This Manual concurs with the preceding. As a point of information, there is another NGO-initiated treaty of which the United States is not a party, the 2008 Convention on Cluster Munitions (CCMs), also known as the Oslo Process. This treaty prohibits development, production, stockpiling, retention or transfer of CMs between signatory States, which include France, Germany, and the United Kingdom but not Russia, China, India, Israel, and the United States, which manufacture and/or use CMs.]

5.7 Exploding Bullets (consistent)

The1868 Declaration of St. Petersburg prohibits exploding rounds of less than 400 grams. The United States is not a State Party to this declaration and does not regard it as CIL [customary international law] (Operational Law Handbook, 18th Edition).

5.8 Hollow Point/Soft Point Ammunition (consistent)

…While expanding military small arms ammunition is prohibited by the 1899 Hague Declaration Concerning Expanding Bullets, the United States is not a party to this treaty, and takes the position that the law of war does not prohibit the use of bullets that expand or flatten easily in the human body. Like other weapons, such bullets are only prohibited if they are [solely] *calculated to cause superfluous injury…* (Operational Law Handbook, 18th Edition)

5.9 Autonomous Weapons

5.9.1 Introduction

There are presently no international treaties specifically addressing autonomous weapons nor is there clear agreement among lawyers, jurists, academics, militaries, nations, or organizations as to that which makes a weapon "autonomous." For some, it is so broad as to include mines as, once armed and left in place, when mines detonate and whom they kill is independent of both those who placed them and the originally intended target. Most, however, tend to take a narrower interpretation of what are variously referred to as "lethal autonomous weapons" (LAW), "lethal autonomous weapons systems" (LAWS), "lethal autonomous robots (LAR), or "robotic weapons."

5.9.2 U.S. Definitions

Under U.S. Department of Defense Directive Number 3000.09 (2012 with Change 1 in 2017), an autonomous weapons system is *"[a] weapon system that, once activated, can select and engage targets without further interventions by a human operator. This includes human-supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation.*" "Override" includes: "*the ability to intervene and terminate engagements, including in the event of a weapon system failure, before unacceptable levels of damage occur*." A semi-autonomous weapon system is one that: "*once activated, is intended to only engage individual targets or specific target groups that have been selected by a human operator.*" This includes:

a. Systems "*that employ autonomy for engagement-related functions including, but not limited to, acquiring, tracking, and identifying potential targets; cueing potential targets to human operators; prioritizing selected targets; timing of when to fire; or providing terminal guidance to home in on selected targets, provided that human control is retained over the decision to select individual targets and specific target groups for engagement*."
b. "*'Fire and forget" or lock-on-after-launch homing munitions that rely on TTPs [tactics, techniques, and procedures] to maximize the probability that the only targets within the seeker's acquisition basket when the seeker activates are those individual targets or specific target groups that have been selected by a human operator*."

5.9.3 U.S. Policy

With respect to the use of such weapon systems, DoD Directive 3000.09 states that:

> *Persons who authorize the use of, direct the use of, or operate autonomous and semiautonomous weapon systems must do so with appropriate care and in accordance with the law of war, applicable treaties, weapon system safety rules, and applicable rules of engagement (ROE).*

It also states:

> *(1) Semi-autonomous weapon systems (including manned or unmanned platforms, munitions, or sub-munitions that function as semi-autonomous weapon systems or as subcomponents of semi-autonomous weapon systems) may be used to apply lethal or non-lethal, kinetic or non-kinetic force. Semi-autonomous weapon systems that are onboard or integrated with unmanned platforms must be designed such that, in the event of degraded or lost communications, the system does not autonomously select and engage individual targets or specific target groups that have not been previously selected by an authorized human operator.*
>
> *(2) Human-supervised autonomous weapon systems may be used to select and engage targets, with the exception of selecting humans as targets, for local defense to intercept attempted time-critical or saturation attacks for: (a) Static defense of manned installations. (b) Onboard defense of manned platforms.*
>
> *(3) Autonomous weapon systems may be used to apply non-lethal, non-kinetic force, such as some forms of electronic attack, against materiel targets in accordance with DoD Directive 3000.03E (Reference (d)).*

5.9.4 Position of This Manual (generally consistent except in its reference to the applicability of responsible practice/custom as presented in this Manual)

With several exceptions, the definitions and policies as outlined in DoD Directive Number 3000.09 are reasonable and should be followed by combatants. The primary exception is that rather than actions related to the development, deployment, and use of autonomous weapons systems being governed solely by the international treaties, directives, and rules of engagement, combatants should have latitude in their actions to operate in accordance with responsible practice/custom as presented in this Manual as to which weapons can be used in what manner to achieve military objectives, comply with appropriate rules of distinction and proportionality, and reduce unnecessary death, injury, suffering, and destruction.

Presently there is an inordinate fear by many as to the legitimacy, morality, desirability, and safety in the use of autonomous weapons. There seems to be a belief by some that humans are always better decision makers in combat than are machines and computers; that turning over such decision-making to machines and computers will result not in less, but more, death, injury, suffering, and destruction, especially to the innocent; that developing and using autonomous weapons will eventually result in rogue killer robots

roaming the world wiping out or subjugating the human race, and that by reducing risk to humans, war may be resorted to more frequently than is now the case to resolve areas of disagreement and conflict with such wars evolving to where there is actually more harm to humans.

There can be situations where autonomous weapons can reduce harm to both combatants and non-combatants while achieving military objectives. Such weapons have been used for years on naval vessels to be able to more quickly and effectively respond to attacks on the ship from rockets, aircraft, drones, and small attack vessels. While often not perceived this way, semi-autonomous drones can reduce harm to civilians when compared with artillery bombardments and attacks by traditional aircraft.

It is also sometimes forgotten that the most common "autonomous" weapon system in combat is not a machine or computer, but the individual combat soldier. While such soldiers may be well-trained and well-commanded, the fact is that they can act as very flawed weapons systems depending on the extent and effectiveness of their training, their physical and mental health at each moment in time during combat, their intelligence, their knowledge of the laws of war and how to parse such laws as others would want them to, their cultural and religious beliefs, their degree of bravery, their ability to objectively and quickly assess proper actions under all conditions, and then implement those actions in a sufficiently timely manner. Thus, each soldier will always be somewhat autonomous in what he or she will or will not do in combat. Not infrequently, they will make unintentional misjudgments with negative consequences often far worse than accidents which may be caused by certain types of autonomous weapons. (See Section 14.3 as to the extensive multiplicity of factors which can result in individual soldiers violating the law of war.)

Thus, in certain situations, a well-designed and/or programmed non-human weapon, or weapon system, may be far easier to control, respond more quickly, and better achieve what is desired by the command structure and law of war than are individual soldiers.

5.10 Practices to Help Implement Law of War Obligations Related to Weapons

5.10.1 DOD Law of War Manual

The DOD Law of War Manual (6.3) outlines four practices which are U.S. policy intended to contribute to the effective implementation of law of war obligations with respect to weapons although none of the four are required by the law of war:

(1) Using weapons in accordance with their design intent and the doctrine that has been promulgated for their use;
(2) Refraining from modifying weapons without prior authorization;
(3) Refraining from using personal firearms during military operations; and
(4) Refraining from using captured weapons in combat, except on a field expedient basis.

5.10.2 Position of This Manual (generally inconsistent)

These guidelines are generally most appropriate for large, well-funded and supplied, bureaucratic, conventional, State military forces operating in conventional war situations and conditions. None are especially relevant for other types of military forces, individual combatants, and specific situations where one must use whatever is readily available, find that which is not, and adapt whatever is available as situations dictate. One of the historic strengths of the best U.S. military forces, commanders, and individual soldiers has been their ingenuity and ability to assess a situation and do whatever is required even if not standard operating procedure. Sometimes this is adapting tactics; sometimes, in using whatever is at hand for a weapon, or adapting weapons one has to the situation.

The need for this is sometimes forced on U.S. soldiers as units typically have specific Tables of Organization and Equipment which do not always provide what is required in each situation a unit is placed or encounters. As a large bureaucratic organization, the U.S. military is often slow to respond to and provide what is required. Thus, combatants and their commanders may have little alternative than to make adjustments on their own until the formal command and logistical structure catches up.

In doing so, combatants should always remain cognizant of a primary purpose of the law of war: to reduce unnecessary death, injury, suffering, and destruction. Thus, any deviation from the above four practices should not intentionally cause greater unnecessary harm. Further, weapons and their use should not be modified in a manner which permanently decreases their effectiveness or increases the danger to those who use them, unless the downsides of this is expected to be more than offset by the benefit of that which the deviation is intended to accomplish and the criticality of the situation.

As stated in the DOD Law of War Manual, none of the four practices are explicitly required by the law of war. While failing to comply may be a violation of U.S. policy and result in disciplinary action, doing other than prescribed is not a violation of the law of war. It should be noted that, if each of the first three of the above practices had been preceded by the final clause of the fourth ("except on a field expedient basis"), this Manual would not be inconsistent with the DOD Law of War Manual. It should be realized by civilian and military leadership that practice, as determined by responsible combatants, generally will be to do as reasonably allowed under this Manual if the situation is sufficiently critical, not that found in the DOD Law of War Manual.

CHAPTER 6

Interrogation

Of all human rights violations, torture is the most universally condemned and repudiated. The prohibition on torture is so widely shared across cultures and ideologies that there is little room for disagreement about the fact that physical and psychological abuse, when committed in a widespread or systematic manner, constitutes a crime against humanity…

Juan E. Mendez
UN Special Rapporteur on Torture and Other Cruel, Inhuman
and Degrading Treatment or Punishment
The Phenomenon of Torture, 2007

The Bush Administration has adopted the absolutely right posture on the matter. Candor and consistency are not always public virtues. Torture is a crime against humanity, but coercion is an issue that is rightly handled with a wink, or even a touch of hypocrisy; it should be banned but also quietly practiced. Those who protest coercive methods will exaggerate their horrors which is good: it generates a useful climate of fear. It is wise of the President to reiterate U.S. support for international agreements banning torture, and it is wise for American interrogators to employ whatever coercive methods work. It is also smart not to discuss the matter with anyone.

Mark Bowden
"The Dark Art of Interrogation"
Atlantic Monthly, October 2003

There are situations in which torture is not merely permissible but morally mandatory.

Michael Levin
"The Case for Torture"
Newsweek, 7 June 1982

I've always found, give me a pack of cigarettes and a few beers and I do better with that than I do with torture.

Reported comment by General Jim Mattis to President Donald Trump
23 November 2016

6.1 DOD Law of War Manual (8.4.1), FM 6-27 (3-62, 3-133), and U.S. Domestic Law

The law of war does not prohibit the interrogation of detainees, but interrogation must be conducted in accordance with the requirements for humane treatment…including the prohibition against torture, cruelty, degrading treatment, or acts of violence

…practical considerations have also counseled against such measures.

Intelligence interrogation of detainees immediately following capture is essential for purposes of accountability and intelligence collection…

No moral or physical coercion may be exerted on a POW to induce an admission of guilt.

No person in the custody or under the effective control of Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation…

Section 1003 of the Detainee Treatment Act of 2005 includes the following:

> *(b) …Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment….*
>
> *(d) … the term `cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment….*

6.2 International Treaties Ratified by the United States

6.2.1 Geneva Convention Relative to the Treatment of Prisoners of War (GPW), Article 17

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he willfully infringes this rule, he may render himself liable of the privileges accorded to his rank or status.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind [emphasis added in bold]**.**

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such persons shall be established by all possible means, subject to the provisions of this preceding paragraph.

The questioning of prisoners of war shall be carried out in a language they understand.

6.2.2 Geneva Conventions Relative to the Protection of Civilian Persons, Article 31

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties [emphasis added]**.**

6.2.3 Geneva Convention, Common Article 3

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

> *1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*
>
> *To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;…

(b) Outrages upon personal dignity, in particular, humiliating and degrading treatment…

6.2.4 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)

Part I, Article 1

1. …the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article *2*

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article *3*

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Article *4*

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article *5*

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

Article *6*

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence…

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article *7*

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article *8*

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties...

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

6.2.5 International Covenant on Civil and Political Rights (ICCPR)

Article 4

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

6.3 FM 2-22.3 Human Intelligence Collectors Operations

Under FM 2-22.3 (5-75), [i]*f used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to—*

- *Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner.*
- *Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.*
- *Applying beatings, electric shock, burns, or other forms of physical pain.*
- *"Waterboarding."*
- *Using military working dogs.*
- *Inducing hypothermia or heat injury.*
- *Conducting mock executions.*
- *Depriving the detainee of necessary food, water, or medical care.*

[Note: In the 2006 revision of the manual, the prohibition on using stress positions was removed and some of the preceding added.]

In FM 2-22.3, the United States includes eighteen authorized approaches to interrogation:

Direct approach	Emotional pride & ego-up approach	Repetition
Incentive approach	Emotional pride & ego-down approach	Rapid fire
Emotional love approach	Emotional futility	Silent
Emotional hate approach	We know all	Change of scenery
Emotional fear-up approach	File and dossier	Mutt & Jeff
Emotional fear-down approach	Establish your identity	False flag

A nineteenth—separation—is also allowed but restricted to certain circumstances. FM 2-22.3 addresses separation as follows:

M-1. As part of the Army's efforts to gain actionable intelligence in the war on terrorism, HUMINT collectors may be authorized, in accordance with this appendix, to employ the separation interrogation technique, by exception, to meet unique and critical operational requirements. The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story; decreasing the detainee's resistance to interrogation. Separation, further described in paragraphs M-2 and M-28, is the only restricted interrogation technique that may be authorized for use. Separation will only be used during the interrogation of specific unlawful enemy combatants for whom proper approvals have been granted in accordance with this appendix. However, separation may not be employed on detainees covered by Geneva Convention Relative to the Treatment of Prisoners of War (GPW), primarily enemy prisoners of war (EPWs). The separation technique will be used only at COCOM [Combatant Command]*-approved locations. Separation may be employed in combination with authorized interrogation approaches—*

- *On specific unlawful enemy combatants.*
- *To help overcome resistance and gain actionable intelligence.*
- *To safeguard US and coalition forces.*
- *To protect US interests.*

The detailed guidelines as to how separation is to be applied in practice requires that the prisoner be allowed at least 4 hours sleep every 24 hours. This would not preclude 40 hours of interrogation procedures being applied between the next 4 hours of sleep. Additionally, it does not preclude this from being continued indefinitely. Thus, according to U.S. manuals and policies on interrogation, a form of sleep and sensory deprivation is a permissible component of separation whether it is advertently or inadvertently intended.

[The preceding section (M-1) as it relates to "unlawful combatants" and the war on terror and the use of sleep deprivation and stress positions are inconsistent with the Geneva Conventions of 1949, Common

Article 3 and Article 17 as well as the Convention Against Torture (see above for relevant language). It is also inconsistent with the Detainee Treatment Act of 2005. Nonetheless, no one in senior positions, civilian or military, who authorized, oversaw, or were knowledgeable of their use have had charges brought against them for violating the formal law of war.

With respect to sleep deprivation, it should be noted that studies have shown it affects a person's mental health and grasp on reality. Therefore, a caveat: Depending on how sleep-deprived a person becomes, the information generated from that person may not be especially reliable. Finally, separation, sleep deprivation, and extended/continuous interrogation are three separate techniques with separation possible without employing either of the latter two techniques to achieve its stated purposes.]

6.4 Position of This Manual

6.4.1 Non-Combatant Civilians (uncertain)

With the exception of the second sentence of the third paragraph above from GPW, Article 17, all the preceding treaty provisions and domestic law are applicable in all instances to:

1. Civilians classified under this Manual as non-combatants
2. Civilians whose combatant or non-combatant status under this Manual is unclear

Other rules may apply under this Manual to those classified as combatants and military non-combatants.

Non-combatant civilians may reasonably be expected to provide information generally known locally, e.g., directions, presence of fixed military forces or installations. They are not obligated to provide self-incriminating information or that of potential danger to themselves or family. They may be detained if they refuse to provide information of public knowledge, and charged and punished for providing false information.

As the enemy may become aware of the questioning of these civilians and take action against them if it is thought they provided certain types of information, measures should be taken to reduce this risk. For example, if questioning people in a village as to locations of such things as mines, IEDs, weapons caches, hidden bunkers, and enemy personnel, if time allows, multiple persons might be questioned out of the presence of other villagers so that individuals can provide information without it being publicly known in the village which person may have provided the information.

6.4.2 Captured Person (inconsistent)

Any information provided by a prisoner of war need only be provided if asked, not voluntarily prior to being asked. Every prisoner of war may, but is not obligated, to provide name, identifying number, and blood type (if known), and be prepared to provide occupation and address if a combatant civilian, rank and unit if military, date of birth, and contact information of next of kin or other relevant person or entity. The veracity of information provided may be appropriate to:

(a) the situation, operation, or mission during which the prisoner was captured, and
(b) the possibility of adverse treatment by the enemy if this might vary by rank, unit, or other distinguishing information. In other words, for personal safety, or not making one's captors aware the captured person may be a "high-value intelligence asset," it is permissible to provide false information to the preceding questions.

If this is discovered by the captors, it may result in adverse conduct on their part even though a violation of the law of war by the person being interrogated has not occurred.

The type, amount, and veracity of any additional information provided is at the sole discretion of the prisoner or detained person based on the situation in which he or she finds themself, the importance of the

information to the safety and well-being of their cause and its members, to include self and fellow combatants, and their ability to minimize the information provided and its veracity.

Commanders should assume that any information known by combatants under their command who have been taken prisoner or are missing may be known by their enemy, and respond accordingly

6.4.3 Capturing Party

6.4.3.1 General (inconsistent)

Proportionate to the importance and criticality of the information sought, the capturing party may use the type, intensity, and duration of interrogation required to secure this information. The use of more intense methods of interrogation should comply with guidelines and restrictions found in this Manual. U.S. Army field manuals and directives on intelligence information should be referenced and followed when appropriate and not in conflict with this Manual. While mind-altering chemicals are referenced as prohibited in FM 6-27, if such chemicals are determined by qualified medical personnel knowledgeable of the effects of these chemicals to be safe, reasonably effective, and with no potentially longer-term detrimental effects, they may be considered for use if administered by qualified personnel.

The person to be interrogated should always be given the opportunity to provide desired information voluntarily before any coercive or more extreme measures are employed. The potential consequences of non-provision of information should be explained in advance of any use of coercive or extreme measures.

The use of incentives, to include cash and possible relocation/witness protection programs if the information is of sufficient value, should be tried before employment of more extreme measures. It is permissible to provide misleading or false information as part of the interrogation process.

If the person being questioned may potentially be retaliated against for providing information, if possible, measures should be taken that information obtained cannot easily be traced back to this person. Nonetheless, it is be permissible to threaten to and actually make other prisoners aware that the person being interrogated has revealed information even if he or she has not.

Captured persons should be questioned in a language he or she understands. If reasonably possible, the interrogator should be trained, and appropriately qualified medical and psychiatric personnel involved if more extreme measures are to be employed.

When it is determined that a person has provided, or will likely never provide, the information sought, interrogation should cease, and the person provided the same dignity, respect, medical care, housing, food, and other items and conditions equal to other locally held captive persons.

The psychological well-being of the interrogator should be monitored and addressed. The entire interrogation process should be overseen, if practicable, by persons with appropriate authority, training, experience, and knowledge.

Those who order the use of more extreme measures, but do not personally carry out themselves, should use care selecting those involved in the actual interrogation as to their psychological ability and moral grounding to be able to conduct and psychologically survive what is required. Those who refuse to carry out more extreme interrogation when ordered or requested to do so should not suffer negative consequences. Except in extreme situations, if no member of a unit is qualified or willing to employ these measures, those desiring such interrogation must carry out personally, secure qualified persons outside the unit, or refrain from using extreme measures.

In all instances, those who order and carry out more extreme measures should be monitored that they are not becoming inured to the point where they will begin using such measures when not justified or to a level of intensity not required. Additionally, having carried out more extreme means of interrogation may

adversely and unacceptably affect their other encounters with enemy combatants and civilians to the detriment of one's mission and unit. Such behavior should not be allowed, and appropriate actions taken if it does. The first step for insuring these corollary adverse actions do not occur is monitoring the psychological state of those who conduct such interrogation and, when warranted, providing counseling and possibly removal from future interactions with enemy combatants and non-combatants.

6.4.3.2 Command Approval and Review (inconsistent)

In an ideal world, the following is the approval and review process which would occur: If more extreme interrogation methods are being considered and time and conditions allow, a request for guidance should be made at least to the next level of command. Under all circumstances after more extreme interrogation measures are employed in apparent violation of the formal law of war, an internal review should be conducted, as a minimum, at the next level of command by those who have relevant operational experience.

A record of such requests, responses, reviews, and resulting decisions and actions should be maintained by each level of command involved. If a review indicates more extreme measures should not have been employed and if the persons approving and carrying out these measures made a reasonable effort to meet the standards of this Manual, charges should not be brought. Rather the review should be used as a teaching opportunity so combatants will not consider more extreme measures in similar circumstances in the future.

Unfortunately, it is not an ideal world. Most judge advocates (JA) will advise that the formal law of war should not be violated, and no extreme or other illegal measures of interrogation should occur. Commanders up the chain of command may not be willing to risk careers or may have moral reservations, other personal beliefs, or legal perspectives similar to JAs. If this is the case, they may automatically reject any request for the use of more extreme or other illegal measures under the formal law of war, or refer any use of such measures which comes to their attention to a JA or convening authority for an Article 32 investigation. The intent of such an investigation would likely not be to review what occurred to learn from it but to punish those who made the decision to use the extreme measures. Thus, those contemplating use of possibly illegal measures of interrogation must assess whether discussing with others in advance, or reviewing afterwards, will be an objective, constructive process for weighing distinction and proportionality related to interrogation.

6.4.3.3 Distinction (inconsistent)

For the use of more extreme measures, the following should exist:

1. A reasonable expectation the person has the needed information, or knowledge of from whom or where such information can be obtained.
2. The matter for which the information is sought is of such importance that the failure to obtain this information may have severe negative consequences for one's personal survival, that of the unit of which they are a part, a critical mission, the protection of non-combatants, or the cause for which one fights.
3. The timeliness of the information is sufficiently critical that less extreme, more time-consuming forms of obtaining information cannot first be tried.
4. The relevance of the information still exists, i.e., the information sought may have been sufficiently critical an hour, a day, or longer previously but also should exist when extreme measures are considered and used.

Throughout the interrogation process, efforts should continue for trying to substantiate that these four requirements continue to exist. If, at any time, any of the four do not, the use of more extreme measures should be suspended immediately.

6.4.3.4 Basis for Employing Extreme Measures (inconsistent)

a. ***Allowed Use***

Although illegal under the formal law of war and international human rights law, more extreme interrogation measures and certain other treatments of those within one's control may sometimes be employed in limited situations if essential for the following purposes and no other viable option seems reasonably to remain for securing critical information:

1. Prevention or termination of war
2. Force survival
3. Success of critical military mission/operation/campaign
4. Protection of non-combatants
5. Prevention of material and/or long-term environmental, infrastructure, or economic devastation
6. Material reduction in deaths, injury, suffering, and destruction

b. ***Precluded Use***

Torture, other extreme measures, or mistreatment of those within one's control should never be employed for:

1. Securing information no longer current or of limited importance
2. Securing confessions
3. Punishment or revenge
4. Entertainment
5. Sadism or other self-indulgence
6. Training, unit socialization, or psychological conditioning
7. Proving oneself

To do any of the preceding is a war crime and should be prosecuted as such.

6.5 Concluding Remarks (inconsistent)

During interrogations, beyond a non-threatening request, there is little which is legally permissible for securing information no matter how great its importance. In fact, many techniques considered legally permissible under U.S. military manuals are not allowed under the formal law of war. If a detained person refuses to answer a question, with one minor exception related to privileges accorded a prisoner based on rank or status, there are no punishments or pressures which legally can be imposed under international treaties which the United States has ratified. For those who might argue this is an overly restrictive interpretation, one need go no further than the following from GPW, Article 17: *Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.*

Under Article 17, this covers "*information of any kind whatever*," e.g., even basic information as to name, rank, identification, number, and date of birth. Those who refuse to provide information may not be "*threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind*," which would preclude anything detrimental beyond "*a restriction of privileges that would otherwise be accorded to a POW's rank or status."* Even this minor restriction of privileges is only applicable if a prisoner refuses to provide personal identification information, not information of military importance.

Thus, all the lengthy discussions and treatises are essentially moot as to that legally allowed under the law of war and what legally constitutes "physical or mental torture," "coercion," "extreme," "severe," or any other such terms and distinctions. Under treaties the United States has ratified, the only things legally allowed during an interrogation would generally be (a) non-threatening requests for information, (b) conveyance of misleading or false information to the person being interrogated, and (c) offers of incentives, e.g., better food or accommodations, various amenities and privileges, money, parole, witness protection, asylum. The language of Article 17 is simple and straightforward as to what is permissible.

Yet, not even human rights organizations seem to expect this interpretation and level of adherence. Perhaps being realistic, they concern themselves with that which they believe truly constitutes "cruel, inhuman, and degrading treatment," to include torture. Thus, are found the many legal, cultural, and moral debates over that which constitute "torture," "cruel," "inhuman," and "degrading."

Regardless of how torture might be defined and regardless of that we might wish reality to be, actual conduct was summed up in 2007 by Juan Mendez in his forward to *The Phenomenon of Torture: "*[D]*espite this unanimity of thought around torture* [which is the belief of Mendez which he then proceeds to disprove with the following]*, it is practiced routinely and systematically in more than half the countries that form the United Nations, and individual instances of torture or cruel, inhuman, or degrading treatment can be found in virtually all countries no matter how decent and democratic their institutions."* This Manual believes that no belligerent complies fully with Article 17.

As referenced previously, in a survey of over 6,000 respondents, Geoffrey Wallace found that nearly 40% of U.S. civilians with no military experience and over 50% of veterans would use torture to secure information from insurgents about possible future attacks even when the respondent knew of law precluding torture and that the perpetrator might be prosecuted in an international court. A 2016 Reuters/Ipso poll found nearly two-thirds of Americans believed torture can be justified to extract information from believed terrorists.

In a small survey by the author of this Manual, of 20 civilians with no military experience and 10 with, over 40% of the former and nearly 70% of the latter, even after a prompt that to do so was illegal, would use illegal interrogation measures to secure information. In a second scenario, if the information sought related to a nuclear device in a major city, approximately 70% of the civilians and 100% of those with military experience would use interrogation measures considered illegal under the Geneva Conventions.

Yet these positions are what Mendez says is the human rights violation "*most universally condemned and repudiated*." How can there be such a major disconnect of the law and the referenced universal condemnation and repudiation of torture given the apparent beliefs of so many in a country like the United States? Respondents of these surveys were not caught up in the immediacy of wartime decisions with all the emotions, stress, hardships, pressures, and violence which can lead to violations of formal law. Further, they were citizens and residents of a democratic, rule of law country which has signed treaties precluding the use of torture, a combination which research suggests tends to result in greater, not less compliance compared with autocratic regimes.

It is the position of this Manual that there are logical, moral, humane reasons why this disconnect exists and responsible practice/custom, not the formal law of war, is more dominant. The balance of this section will elaborate as to why this may be more reasoned and moral than strict compliance with the formal law.

International law prohibiting torture or other extreme treatment of those within one's control in war, and those who strongly support this prohibition, often base their position on the following:

1. A person once captured is helpless.
2. Enemy soldiers will be less willing to surrender if it is known they may be tortured.

3. Torture is ineffective in securing reliable information.
4. Other means of securing information from captives are more effective.
5. Torture is degrading, inhuman, and otherwise psychologically damaging for those tortured.
6. Torture is degrading, dehumanizing, and otherwise psychologically damaging for those who order and carry it out.
7. Allies and public support for even a just war may be lost if it is known torture is employed.
8. The use of torture is not who we are as a nation and people.
9. We are a nation of laws and the rule of law and must comply with the law.

All are legitimate considerations that should be carefully weighed if prohibited measures are considered.

Under this Manual, torture and cruel, inhuman, or degrading treatment of captives are to be assiduously avoided if reasonably possible. The reasons this may not always occur—and the need for developing guidelines as to appropriate non-compliance when it becomes necessary—are based on the following:

1. While one might like to believe or wish otherwise, in spite of it being illegal under the formal law of war and international human rights law, parties to a conflict always have and will likely continue to use torture and other illegal measures to secure information. By accepting this reality and providing guidelines which are consistently and regularly enforced as to when and how more extreme measures may be employed, the frequency and average intensity of their use might be reduced.

2. Torture, other extreme measures, and mistreatment of captives is no more inhuman, brutal, or less honorable than much of the violence in war which is permissible under the formal law of war and which hundreds of thousands of frontline troops who are not tortured face regularly and can suffer physically and psychologically from.

3. The abhorrence of torture is, in part, due to the fact that those tortured are helpless without the ability to resist or fight back, unlike combatants with weapons who are part of a combat unit. Yet soldiers who have not been captured are often equally helpless in the face of fear, death, and injury over which they have no control. This is especially true if soldiers are drafted or required to keep serving against their will. Those who may be harmed by more extreme interrogation under this Manual are vastly fewer than those harmed in combat who are equally helpless in their ability to avoid the horrors they face, the fear they regularly endure, and the dehumanization, other psychological damage, and physical suffering which often occurs in combat.

4. The abhorrence of torture is also because it is "up close and personal," because it is individually and seemingly dispassionately calculated and applied, because one can see each measure of pain and suffering inflicted at the exact moment it occurs, that one can hear the cries of pain, see the looks of fear, the blood, the savaging, and smell the carnage one has inflicted. Yet dropping a bomb or shooting from a distance, where one does not see the carnage, suffering, and fear up close, causes equal if not greater fear, pain, and suffering of those intentionally or accidently targeted with the anticipation of what awaits often being equally as great for combatants and non-combatants as it is for one who knows torture awaits. Just because it is not always individually applied, because one cannot personally see, smell, or hear what one has wrought does not make dropping bombs or shooting from a distance somehow less inhuman and more moral and honorable than the selective use of torture in critical situations.

5. The formal law of war could just as easily have been written that a combatant has not surrendered until he or she lays down their weapon, refrains from any further aggressive actions, *and* provides

any information requested of them. If this is how the law were written, there might be far less torture.

6. The use of torture, rather than its complete absence, may sometimes better contribute to the purpose of the formal law of war which is to use the minimal force required to achieve one's objective while minimizing unnecessary death, suffering, and destruction and contributing to the achievement of peace.
7. Most combat soldiers know they may be tortured if captured, understand the reasons for it, and train in expectation it may occur.
8. Unlike an active combatant who is unable to escape his or her situation without consequences, a person being tortured can potentially eliminate the suffering being experienced and the fear of what may come next simply by answering any questions asked to the best of his or her ability.
9. Knowing that one's enemy uses torture may result in a captive providing requested information without the need for torture.
10. While information obtained through torture frequently may be incorrect, that is true of many sources of intelligence acted upon by recipients of that intelligence. Even voluntarily provided intelligence can be incorrect, either accidently or intentionally. Information may sometime be voluntarily provided so those acting upon this intelligence will kill, arrest, or harm the informant's enemies, business or political competitors, owners of desired property or wealth, and other such reasons.
11. Torture is potentially a more focused, precisioned use of force to achieve a military advantage in a particular situation than certain types of legal force which might be available and more harmful.

Nonetheless, even though more extreme interrogation may be acceptable in special circumstances, it will likely be ineffective if not conducted properly by trained interrogators with prior experience that has proven successful, as part of other interrogation and reward techniques that are not torture, and under the supervision of well-trained monitors. This was reflected in the 2014 report by the Senate Select Committee on Intelligence (SSCI) assessing information gained through the use of torture (in this case, generally not gained) of 39 detainees, an inexcusable disastrously designed, executed, managed, monitored, and reviewed program.

Finally, utilizing torture (although not necessarily all illegal interrogation methods) may turn public opinion, allies, and neutral parties against one's cause. Before employing such methods, this should be weighed as part of the distinction-necessity-proportionality assessment process.

Although the position of this Manual is that more extreme interrogation measures may be permissible in more extreme situations, that is not where this chapter should end. Rather one should always keep close the words of those like Gary Solis—combat veteran, judge advocate, law professor, author of *The Law of Armed Conflict, International Humanitarian Law in War* and *Song Thang: An American War Crime*—who articulated his beliefs in two personal communications with the author:

> *The law of war is one-size-fits-all. Sometimes it fits like a glove, sometimes it doesn't fit at all… I think* [this] *of lesser concern to me than to you... That's not to suggest that you're wrong, or I'm right. It simply illustrates our differing views of the law of armed conflict.*
>
> *Torture is an exception. On that subject I have no hesitation in saying that your acceptance of special circumstances torture is flat wrong. I believe, there is never an exception, under any circumstance, justifying torture. After discussing, dissecting, and arguing torture for 10 years at West Point and 12 years at Georgetown Law, I must have heard every rationale,*

excuse, and reason there is to justify torture. I remain firm in believing there is never an acceptable reason to torture. The hidden nuclear bomb, I'll miss my helo extract and my team and I will die, …if they had my daughter…nothing justifies torture. Torture is a window that cannot be allowed to be opened only an inch or two; …once that window is cracked, it will be flung wide open. (20 October 2018)

I'll not yield on torture. Argue about it in a hundred ways and my response is the same; must be the same: I'm often asked in classes what I'd do if "they" had my wife... By now my response is practiced: never, ever, without exception, NEVER. I don't know, though. I hope I'd do what I preach, but until one is there, one can never say with assurance what they'd do. But I hope… (3 November 2018)

CHAPTER 7

Prisoners of War

A prisoner of war is a man who tries to kill you and fails, and then asks you not to kill him.

Winston Churchill
*The Observer (*1952)

The camp lived up to expectations as warmly dressed guards forced them to undress outside the gate where they searched them for valuables and weapons. The captives stood for a long time in ice and snow on that grim December 5, numb and shaking, while guards robbed them…

Guards punished anyone caught taking bones from the garbage by fastening the bone between his teeth, across his mouth, and then tying like a gag. "And then the poor fellow was made to fall down and crawl around on his hands and knees like a dog, a laughing stock for Federal soldiers, spies, and camp followers," Bean recalled bitterly.

George Levy
To Die in Chicago:
Confederate Prisoners at Camp Douglas 1862-1865

... during one train stop, I watched as another guard with a spirit of empathy, ran out into an apple orchard and picked apples. He carried his jacket like a bag and filled it with apples. The kind German came to our open train window and handed us each an apple. The juicy apple tasted so delicious. I so appreciated that apple and his unusual compassion.

Oliver Omanson
Prisoner of War Number 21860:
The World War II Memoirs of Oliver Omanson

Should any American soldier be so base and infamous as to injure any [prisoner]*...I do most earnestly enjoin you to bring him to such severe and exemplary punishment as the enormity of the crime may require. Should it extend to death itself, it will not be disproportional to its guilt as such a time and in such a cause…for by such conduct they bring shame, disgrace and ruin to themselves and their country.*

George Washington
Charge to the Northern Expeditionary Force
September 14, 1775

7.1 Practical Guidance on POW and Detainee Operations (FM 6-27)

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

[Note: In spite of the above statement that compliance is required "*without regard to a detainee's legal status,"* that has not been U.S. policy for certain detainees held as part of non-international conflicts, e.g.,

members of what are considered terrorist organizations such as Al Qaeda. This is evident in sections of FM 6-27, Chapter 3, which delineate those who are lawful and unlawful detainees. Further, with respect to the three Geneva Convention articles referenced above, only the first has been ratified by the United States. Thus, the requirements of the articles from Additional Protocols I and II are simply current U.S. policy which could change without it being a violation of international law ratified by the United States. With respect to the three treaty references, that which is contained in each is generally addressed elsewhere in FM 6-27 and this Manual. Thus, it is not essential to read the language of the treaties to have a fundamental understanding of what is required of U.S. forces.]

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

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

[While it is generally beneficial to refer to the above sources when available and time allows, this Manual should take precedence when there is a difference with these sources **(inconsistent)**.]

7.2 Basic Protections and Humane Treatment for All Detainees (intent is consistent; some exceptions may not be; modifications and notes in brackets)

3-4. Detainees in all circumstances must [should] *be treated humanely and protected against cruel, inhuman, or degrading treatment or punishment (see DOD Law of War Manual, 8.2)*[, except as otherwise noted in this Manual]. *Providing humane treatment to an individual or group of individuals does not affect the legal status of that individual, group, or any parties to a conflict (GPW art. 3).* [Note: The United States only complies with this and the following clause as it chooses to interpret "humane" and "cruel, inhuman, or degrading," not necessarily as these actually read in international law.]

3-5. Detainees must [should] *be provided humane care and treatment and with respect for their dignity from the moment they fall into the hands of DOD personnel until their release, transfer out of DOD control, or repatriation. Further, inhumane treatment of detainees is expressly prohibited and is not justified by the stress of combat or deep provocation.* [To the extent practicable within resources of the detaining party and combat conditions, h]*umane treatment and basic protections include, in part:*

- *Adequate food, drinking water, shelter, and clothing;*
- *Reasonable access to the open air, reasonable educational and intellectual activities, and appropriate contacts with the outside world (including, where practicable, exchange of letters, phone calls, and video teleconferences with immediate family or next of kin*[], as *well as family visits;*

- *Safeguards to protect health and hygiene, and protections against the rigors of the climate and dangers of military activities;*
- *Appropriate medical care and attention required by the detainee's condition…;*
- *Free exercise of religion, consistent with the requirements of detention* [and provided such exercise is not political in nature and does not advocate against or undermine the detaining party]*;*
- *Reasonable access to qualified interpreters and translators…;*
- *Respect for each as a human being without any adverse distinction founded on race, color, religion or faith, political or other opinion, national or social origin, sex, birth,* [rank,] *wealth, or other similar criteria;*
- *Protection against threats or acts of violence, including rape, forced prostitution, assault, theft, public curiosity, bodily injury, reprisals, torture, and cruel, inhuman, or degrading treatment or punishment; and*
- *Prohibition on being subject to medical or scientific experiments or to sensory deprivation intended to inflict suffering* [as an end in itself] *or serve as punishment (DODD 2310.01E).*

[Note: A number of the preceding have been violated by the United States during the Vietnam war and since 2001 without those carrying out and those in command being charged.]

3-6. Detainees must [should] *not be subject to criminal punishment without a fair trial and other important criminal procedural protections (see DOD Law of War Manual, 8.16)*[, as reasonably practicable within resources of the detaining party and the combat situation].

3-7. Detainees must [should] *be removed as soon as* [reasonably] *practicable from the point of capture and transported to a detainee collection point, temporary holding area, or DOD detention facility. Detainees not released or transferred from DOD custody or control from the detainee collection point or holding area will* [should] *be transported to a DOD* [or other authorized] *detention facility in a secure location within 14 days of capture, barring exceptional circumstances* [provided combat conditions and available resources allow]. *Detainees will be promptly informed of the reasons for their detention in a language that they understand* [at such time as an interpreter is available if required]. *Detainees will remain at a DOD* [or other authorized] *detention facility until their release or transfer from DOD custody or control (DODD 2310.01E).*

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

3-10. The ICRC will [should] *be promptly notified of all ISN assignments. The ICRC will* [may] *be given access to all DOD detention facilities and the detainees housed therein, subject to reasons of imperative military necessity (DODD 2310.01E).* [Under this Manual, the preceding, while often desirable, is at the discretion of the detaining party.]

3-11. Alleged detainee abuse [as defined in this Manual] *must* [should] *be reported in accordance with DOD* [and this Manual's] *policies (see DODD 2310.01E; DODD 2311.01E; DODD 3115.09).* [If no action is taken within 30 days, the alleged abuse should be reported to appropriate civilian authorities.]

3-12. DOD personnel will [should] *review periodically the detention of all individuals in DOD custody or control who do not receive the protections afforded POWs. Such reviews may include: (1) preliminary assessments of the detainee's status and threat; (2) formal determinations of the lawfulness and continued*

necessity of detention; and (3) determination of the status of unprivileged belligerents held in long-term detention, presided over by a military judge (DODD 2310.01E, para. 3i). [Under this Manual, the latter of these three will generally not be relevant as there is no distinction between any detainee held classified as an enemy combatant, i.e., there are no unlawful/unprivileged belligerents if they are persons with military, diplomatic, intelligence, leadership, or other responsibilities related to an international or non-international conflict.]

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

7.3 Persons Entitled to Be Treated as Prisoners of War

7.3.1 General Division of Enemy Population

Detained enemy persons should be divided into two categories:

a. Persons to be treated as prisoners of war as defined below, whose treatment is addressed in this chapter
b. Persons who are non-combatants without direct involvement in or support of the enemy war effort or decisions, whose treatment is addressed in other chapters, e.g., Chapter 8 Civilians.

7.3.2 Persons Considered to Be Prisoners of War (often inconsistent)

Prisoners of war (POWs), under this Manual, are persons belonging to one of the following categories who have fallen into the power of a detaining party and part of the use of force by a State, or non-State government, movement, cause, ethnic group, tribe, or other assemblages of individuals, with political-military objectives.

All such persons are entitled to be considered prisoners of war under this Manual regardless of the uniform or clothing worn at the time of capture, whether bearing arms openly or wearing distinctive insignia, complying with the law of war, or commanded by an officer or other recognized person of authority **(inconsistent, as U.S. manuals require those entitled to POW status to meet all four criteria)**. Below in italics is from GPW, Article 4 (per FM 27-10); that not in italics is specific to this Manual.

a. *Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming a part of such armed forces.*
b. *Members of other militias and members of other volunteer corps, including those of organized resistance movements,* […] *operating inside or outside their own territory, even if this territory is occupied by* [an investing force or the forces of a governing State]. [Note: Seemingly **inconsistent** with U.S. interpretation of the law as its position is that militias, volunteer corps, and resistance movements must be associated with a State party to be lawful combatants.]
c. *Members of regular forces who profess allegiance to a government or an authority not recognized by the Detaining Power.* [Note: Again, seemingly **inconsistent** for same reason as preceding in that, under this Manual, neither the government or authority need to be State-based.]
d. *Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces provided they have*

received authorization from the armed forces which they accompany who shall [should] *provide them for that purpose with an identity card similar…*)

e. *Inhabitants of a nonoccupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces without having time to form themselves into regular armed units…* (Note: The following was deleted at the end of the preceding clause: *"provided they carry arms openly and respect the laws and customs of war."*) **(likely inconsistent due to the deletion)**

f. *Person belonging, or having belonged, to the armed forces of the occupied country, if the occupying Party considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.*

g. *The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and when these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give*[ ] *and…, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned…*

h. The following additional persons indicated as "combatants" in Section 1.4.3.1 of this Manual **(often inconsistent)**:

   (1) Spies, other intelligence personnel, saboteurs, certain terrorists, mercenaries, and other for-hire military forces or personnel acting on behalf of a State or non-State party
   (2) Non-military persons, not assumed to be included in d. above, who willingly and/or for pay perform roles in support of military operations, e.g., transportation, communications, cyber operations, propaganda, intelligence, design or manufacture of weapons and other war materials and supplies, military facility construction and operation, security of prisoners of war, security of military facilities and personnel
   (3) Collaborators whose actions harm non-combatants and a belligerent's forces
   (4) Elected or appointed leaders who vote in favor of legislation, or issue resolutions or orders, that provide funding for the conflict, commit to engaging in or not withdrawing from the conflict, direct the deployment and operations of armed forces which are or may be used in the conflict, or otherwise make decisions regarding and influencing the continued prosecution of the conflict rather than withdrawal from it
   (5) Law enforcement personnel if engaged in identifying, seeking, apprehending, holding, or kinetically engaging combatants
   (6) Persons, individually or part of groups or organizations, who are willing, vocal, active supporters of the conflict but not directly involved in conflict-related operations or administration
   (7) Persons in the media (traditional, social) and academia, to include support staff, who advocate for or provide false, misleading, or inflammatory information, or commentary that may contribute to starting, exacerbating, or continuing conflicts, especially when such conflicts are unjust
   (8) Government employees working in or for ministries, departments, agencies, businesses, and other organizations and entities which have some degree of direct responsibility for the war effort

(9) Citizens, residents, and employees of States, businesses, organizations, and other entities not part of or allied with a belligerent party but sell or otherwise provide war materials and other support which aid a belligerent in its war efforts

In summary, in contrast to the formal law of war and U.S. policy, this Manual significantly broadens those who are to be treated as prisoners of war. Other categories of persons who may seem to have been excluded from the preceding will be addressed more explicitly in the balance of this section.

7.3.3 Retained/Detained Personnel

7.3.3.1 General

a. DOD Law of War Manual

7.9.1.2 Medical and Religious Personnel Who May Be Retained: *Certain classes of medical and religious personnel who fall into the hands of the adverse party shall be retained only in so far as the state of health, the spiritual needs, and number of POWs require. Personnel who are retained in this way are not considered POWs.*

These classes of personnel include:

- *Military medical and religious personnel, including*
  - *Medical personnel exclusively engaged in medical duties;*
  - *Administrative staff exclusively engaged in support to medical units; and*
  - *Chaplains attached to the armed forces; and*
- *Authorized staff of voluntary aid societies.*

***b. Position of This Manual* (inconsistent)**

This Manual does not recognize the term "retained" in relation to prisoners of war. Captured medical and religious personnel who are a member of, treat, minister to, or otherwise support, other than incidentally, any of the categories of military combatants listed in 7.3.2 of this Manual are considered POWs, not retained personnel. They will be referred to as POWs or "detained" persons. This status, and their detention, are not dependent solely on the state of health, spiritual needs, or number of POWs held as indicated in the DOD Law of War Manual. Rather, their being detained as POWs or released is solely at the discretion of the capturing party and will be a function, not only of POW needs, but also of other considerations, such as the state of health and spiritual needs of the detaining party's own forces and the local civilian population in which operations are taking place, the need for a particular medical specialty, and whether they or the spiritual leader play a political, command, or other non-religious role for an adverse party to the captors.

Captured medical and religious personnel will be subject to the same internal discipline and rules of the camp or prison in which they are held as other POWs, with provisions made for them to treat or otherwise minister to the needs of their fellow POWs as allowed under this Manual.

Consistent with FM 6-27, authorized staff of voluntary aid societies may be detained for security or other reasons but are not considered POWs.

7.3.3.2 Retained/Detained Medical Personnel (FM 6-27)

3-38. The following rules apply to [d]*etained medical personnel (GWS art. 28; GPW art. 33)* **(except possibly for the third bullet, each are inconsistent as modified)***:*

- *They shall continue to exercise their medical activities for the benefit of POWs, preferably of their own armed forces* [although, to the extent other persons not part of their armed forces require medical assistance and care, they shall assist as directed by the detaining power]**.**

- [To the extent reasonably practicable within the resources of the detaining power and the combat situation, t]*hey shall be authorized and afforded necessary transportation to make periodic visits to POWs and retained persons in labor detachments or hospitals outside the camp.*
- [D]*etained medical personnel shall perform their medical duties in accordance with their professional ethics. This occurs under the control of the detaining power's competent service, however, and within the scope of its military laws and regulations. The detaining power retains its responsibility for the health of those in its custody* [but may draw on the services of medical POWs as needed to this end]. **(consistent except possibly for added language)**
- *The senior* [d]*etained medical officer in each camp is responsible for everything connected with the activities of* [d]*etained medical personnel* [unless such responsibility is assigned to another person as determined appropriate by the detaining power].
- [D]*etained medical personnel may not be compelled to carry out work other than their medical duties* [unless otherwise determined necessary by the detaining power].
- *They may propose* [to the detaining party] *that POWs or* [d]*etained persons be examined by Mixed Medical Commissions with a view toward* [their] *being repatriated or accommodated in a neutral country and an entitlement to attend examinations conducted by Mixed Medical Commissions.* [Nonetheless, whether such proposals are acted upon in this manner is at the discretion of the detaining party.]
- *If their* [d]*etention is not indispensable to provide for the health of POWs*[, or other combatant and non-combatant persons affected by the conflict,] *during hostilities,* [d]*etained medical personnel are to be returned to the party to the conflict to whom they belong, as soon as the road is open for their return and military requirements permit. Upon their departure, they have the right to take their personal property, including medical instruments, with them* [unless such property is determined essential to the health and well-being of detaining party personnel, local civilians, or other protected persons].

7.3.3.3 Retained/Detained Religious Personnel (FM 6-27) (somewhat consistent)

3-39. POWs may be ministered to by [d]*etained military chaplains.* [Unless the detaining party determines there is a need to do otherwise for security, administrative, or other reasons, d]*etained military chaplains*[, priests, rabbis, imams, and others with similar responsibilities in a religion. (Hereafter, "chaplain" is assumed to include all such religious personnel)] *shall*[, to the degree determined appropriate by the detaining party,] *be allocated to camps and labor detachments containing POWs belonging to the same force, speak the same language, and practice the same religion.*

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

3-41. POWs who are ministers of religion, without having officiated as military chaplains to their own forces, may minister freely to members of their community. Those who are recognized to act in the capacity of a chaplain should be treated as such, and may not be required to do other work [except as may be required by conditions] *(GWS art. 28; GPW arts. 33, 36).* [It is unclear why ministers of religion who have not officiated as military chaplains would be held as POWs unless they are civilian combatants whereby they would receive the rights and protections of chaplains. Also, it is unclear what community

they may freely minister to, e.g., local civilian, fellow POWs, community where they reside or are from. In light of this lack of clarity, 3-39 and 3-40 suffice and 3-41 can be omitted.]

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

7.3.4 Military Forces of Unrecognized Parties (inconsistent due to expansion of entitlement)

FM 6-27, 3-25, includes the following: *During international armed conflict, members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power are entitled to POW status. This provision covers members of a regular armed force who remain loyal to their government* [or authority] *after its own territory has been occupied (GPW art. 4A(3)), but who continue to fight as part of an international armed conflict,…as well as other circumstances in which the regular armed forces have "right authority" but the detaining power does not recognize the government or authority of the opposing party.*

[This Manual concurs with the preceding but would expand to include non-international conflicts, armed forces which may not be "regular," and conflicts which may not be considered "armed" but are deemed to include the use of force sufficient to be considered war by a party to the conflict.]

7.3.5 Wounded and Sick (inconsistent due to reference to this Manual)

Regardless of their ability to continue functioning in their military capacity, if detained, *the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of* [this Manual] *concerning prisoners of war shall apply to them.* [That in italics is from GWS, Article 14. As the sentence is modified, it varies from the original language of Article 14 whereby the provisions of this Manual would take precedence over formal international law.]

7.3.6 Spies, Secret Agents, and Saboteurs (consistent except for b. Attempts)

FM 27-10 provides the following:

a. Necessity of Trial

A spy taken in the act shall not be punished without previous trial. (HR, art. 30.)

b. Attempts.

The spy is punishable with death whether or not he succeeds in obtaining information or in conveying it to the enemy.

c. Immunity upon Rejoining Own Army.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage. (HR, art. 31.)

[As evident from the preceding and other similar language related to spies, secret agents, other intelligence operatives, and saboteurs, under the formal law of war and U.S. policy and law, spies, saboteurs, and secret agents have not been afforded full prisoner of war status and may be tried and executed as a deterrent to others who may consider or be recruited to perform such work on behalf of a belligerent. However, spying and other such intelligence or subversive activities are considered by custom and formal law to be a legitimate part of war no different than that which is expected of regular soldiers and can play a significant role in whether a belligerent succeeds or fails. Thus, under this Manual, spying, other intelligence activities, and sabotage are equally honorable roles as that of regular combat soldier and, thus, such persons should be treated no differently if captured, especially with regards

to their not being subject to the death penalty for such activities if conducted as per this Manual **(inconsistent)**.

[Nonetheless, if a spy, secret agent, or saboteur is a member of a belligerent's own armed forces, citizen of its State, or member of its movement or cause, and has not previously openly renounced that relationship, such person, when captured by the belligerent of which he or she is a part, may be held and prosecuted under the regulations and laws of that belligerent which govern espionage and treason **(consistent)**.]

7.3.7 Terrorists (inconsistent)

Captured enemy terrorists should be treated like other captured combatants as they perform a function no different in its relevance to the war effort than that of other combatants. Just as with regular military commanders and individual soldiers, this does not mean terrorists should not be brought to trial and possibly executed for having employed inappropriate, unnecessary, or excessive force during the carrying out of their mission. Until such is determined, as difficult as it may be psychologically or politically for the capturing force, a captured terrorist should be considered a prisoner of war like any other detained combatant.

7.3.8 Absence of Uniform

a. *FM 6-27*

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

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

b. *Position of This Manual* **(inconsistent)**

Due to the permissible use of deception in war, the need to acquire intelligence, and the nature of conflicts between State and non-State parties and between non-State parties, the wearing of uniforms or military insignia is not a requirement to be treated as a lawful combatant and POW if captured. Any combatant not in his or her force's or unit's uniform or distinctive clothing or insignia, upon capture, should be treated as a prisoner of war no differently than those captured in uniform.

While participating in commando, airborne, partisan, or other special operations, it is permissible to wear civilian clothing, or uniforms of enemy forces, to avoid detection and contribute to the element of surprise, to include participating in offensive actions while wearing such clothing. Again, no special punishment or adverse treatment should be administered for doing so if captured wearing such clothing.

Additionally, to avoid capture, operating when cut off from one's unit, or if captured and an escape is effected, a combatant can wear civilian clothes and, if necessary, use force against enemy persons and objects while wearing such clothing if necessary to survive, conduct operations, or make good an escape.

While the preceding is the position of this Manual, if captured while not in proper uniform by an adverse party which does not accept this Manual's position, treatment such as that outlined above in FM 6-27 is that which should be expected.

7.3.9 Duration and Determination of Status

a. ***Duration:*** Prisoner of war status shall apply from the time a person falls into the hands of the detaining party until their final release, repatriation, other disposition, or successful escape as defined in this Manual **(consistent).**

b. ***Initial Status:*** During combat and the immediate aftermath, capturing units will make the initial determination of who is to be considered a prisoner of war, released, or turned over to other authorities **(possibly inconsistent)**.

c. ***Question of Status:*** If, after a battle is concluded, the detaining force wishes to widen or narrow those it holds as prisoner of war, it may do so. If persons disagree with their status as a prisoner of war, they may appeal their status as outlined elsewhere in this Manual **(likely consistent)**.

d. ***Competent Tribunal:*** Except for its own citizens or members who may be governed by other laws, a competent military tribunal will make determinations of prisoner of war status, acting according to such procedures as may have been established for such tribunals **(consistent with international law, possibly not with domestic law which may shift this to civilian courts)**.

e. ***Interim Status:*** During proceedings to determine appropriate status, those held should not be executed, harmed, or otherwise penalized until their status has been determined **(likely consistent)**. The detaining party need not provide legal counsel for appeals of POW status but should provide assistance in understanding the process and relevant laws/regulations **(uncertain).**

7.4 Persons Not to Be Treated as Prisoners of War

7.4.1 Certain Categories of Civilians (generally consistent)

Non-combatants classified as such in 1.4.3.2 of this Manual should not be treated as prisoners of war but may be detained as appropriate for their security or safety.

7.4.2 Certain Criminals and Criminal Elements (likely consistent)

Criminal elements are those individuals or groups of individuals, either formally or informally operating together, who use force or other means to secure illegal financial or other gains and benefits from individuals, groups, businesses, or governments. The suppression, apprehension, prosecution, and incarceration of such persons is generally the responsibility of civilian courts and law enforcement, if these are functioning and available. If not, and to do so will not unduly hamper their primary missions, military forces may temporarily hold convicted criminals and persons charged with crimes until other arrangements can be made. If available, military police units should be used in this capacity.

If criminal elements are directed, required, or employed by a belligerent to carry out military type missions, secure funds and other resources, or sow discord, and captured by the party against whose welfare their activities are employed, the capturing party, at its discretion, will decide whether such criminal elements will be handled as prisoners of war, by civilian courts and law enforcement agencies, by those responsible for administering martial law if in place, or by military governments in the case of occupying forces.

7.4.3 Those Aiding the Enemy (consistent except for expansion to others than belligerent nations)

Any of the following citizens or members of a belligerent nation, cause, movement, ethnic group, tribe, or other group with political-military-religious objectives who have not openly renounced their citizenship or membership in such entity shall not be considered prisoners of war if captured. They may suffer death or other punishment as may be directed by a court-martial, military commission, or other appropriate judicial body of the capturing party of whom they have not renounced their citizenship or membership.

(1) Aids or attempts to aid the enemy with arms, ammunition, supplies, money, or other material support; or
(2) Without proper authorization or unless forced to do so at risk of life of self, family, or others, knowingly harbors, protects, or gives intelligence to, or inappropriately communicates or corresponds with or holds intercourse with the enemy, either directly or indirectly.

7.4.4 Military Attaches and Diplomatic Representatives of Neutral Parties (consistent)

Military attaches and diplomatic representatives of neutral parties who establish their identify as such to the satisfaction of the capturing party accompanying an army in the field or if found in a [captured city, area of operation, or military installation]*, whether within the territory of the enemy or territory occupied by it, are not held as prisoners of war provided they did not take part in hostilities. They may, however, be ordered out of the theater of war. Only if they refuse to quit the theater of war will they be held as prisoners of war.* (FM 27-10, Article 83) [Note: "captured city, area, or military installation" replaced "fortress."]

7.5 General Protection of Prisoners of War

7.5.1 Beginning and Duration of Protection (generally consistent except for references to this Manual)

The present Convention [and this Manual] *shall apply to the person referred to* [as a prisoner of war] *from the time they fall into the power of the enemy and until their final release and repatriation *** (GPW, art. 5)*

A person is considered to have fallen into the power of the enemy when he has been captured by, or surrendered to members of the military forces, the civilian police, or local civilian defense organizations or enemy civilians, who have taken him into custody [FM 27-10, Article 84].

...the High Contracting Parties [and other State and non-State parties] *may conclude other agreements for all matters concerning* [prisoners of war] *which they may deem it suitable to make separate provision. No special agreements shall adversely affect the situation of prisoners of war, as defined in the present Convention* [or Manual]*, nor restrict the rights which it confers upon them.*

Prisoners of war shall continue to have the benefit of such agreements as long as the Convention [or this Manual] *is applicable to them where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict. (GPW, art 6.)* [FM 27-10, Article 86]

7.5.2 Full Surrender (inconsistent)

A person shall not be considered as having fully surrendered until he or she has given up any weapons carried, provided any intelligence of potential value to and requested by the enemy, and agreed not to attempt escape or harm his or her captors.

7.5.3 Prisoners of War as Combatants (inconsistent)

Combatants who are captured have generally been instructed to attempt to escape and help others escape, withhold intelligence, and undermine the activities of or overcome their captors whenever possible. Thus, prisoners of war may still be considered combatants who may do harm to their captors when opportunities arise. Such status only changes when the prisoner willingly and personally ceases any of the preceding, agrees to support the cause of his or her captors, or agrees and complies with agreed upon terms of internment or parole. Nonetheless, prisoners of war who have not done so are not to be arbitrarily killed, otherwise harmed, or mistreated and will be considered "conditional" non-combatants.

7.5.4 Killing of Prisoners

a. FM 27-10, Article 85

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war. [Note: This is similar language to FM 6-27 and the DOD Law of War Manual.]

b. Position of this Manual (inconsistent)

If no other reasonable alternative exists, a prisoner may be put to death if his or her presence can reasonably be expected to:

a. Prevent completion of a mission of vital importance,
b. Materially retard essential movement of the capturing party's personnel to its military objectives, or
c. Severely diminish the ability of the prisoner's captor(s) to escape, resist, or otherwise survive if the prisoner were to be released.

Prisoners may not be put to death if the risk of the preceding would not be considered sufficiently significant by military peers in similar situations and the military advantage sufficient to justify such incidental casualties. Additionally, prisoners should not be put to death solely because they may soon be liberated by their own or allied forces, or solely because there are insufficient resources to feed, house, clothe, or otherwise care for them. If resource restraints were to arise, and their release would not likely affect the defeat or survival of their captors, such prisoners should be paroled and, if that is not possible, released. If release of the prisoners might contribute to the defeat or ability to survive of the detaining party, an alternative may be to intern with a neutral party, ally, or international/humanitarian organization.

During combat, a prisoner may also be killed if he or she is so severely wounded, injured, or sick; their suffering is so great; and there is little likelihood reasonably available medical care will be able to save their lives and reduce their suffering to a manageable level. Even in such circumstances, if the prisoner is able to express his or her desire, such request should be respected. (Note: This same authority is applicable to one's own severely wounded, sick, or injured personnel under similar circumstances. Mercy killing is further discussed in Chapter 8.)

While all the preceding may seem harsh, inhumane, and criminal, such actions may better reduce unnecessary death, injury, suffering, and destruction which is the purpose of the law of war. Such a position also respects that combatants should have a basic right to life equal to that of protected persons. As for mercy killing, this may be the most humane and caring course of action available.

It should be understood that making the decision to kill a prisoner in extreme circumstances is fundamentally no different than when a decision is made to carry out an attack when it is known there will be incidental death of non-combatants but the political/military advantage is sufficiently great that it meets the proportionality standard and is, thereby, tragic but justifiable.

In the event a prisoner is put to death in combat situations, a subsequent review should be conducted by the immediate commander of the person ordering the death as to whether the principles of the law of war and the above guidelines were reasonably considered and followed before action was taken. As appropriate, the decision may be further reviewed by a panel of military personnel of appropriate rank with combat experience in situations and conditions similar to those under which the killing occurred.

7.5.5 Renunciation of Rights

a. Geneva Convention Relative to the Treatment of Prisoners of War, Article 7

Prisoners of war may in no circumstance renounce in part or entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

FM 27-10, paragraph 87, provides the following interpretation: *Subject to the exception noted in paragraph 199* [granting of asylum]*, prisoners of war are precluded from renouncing not only their rights but also their status of prisoners of war, even if they do so voluntarily. The prohibition extends equally to prisoners renouncing their status in order to become civilians or to join the armed forces of the Detaining Power.*

b. Position of this Manual (inconsistent)

Prisoners of war may voluntarily, if without pressure, renounce their rights or status as prisoners of war to become a civilian, accept parole, or even become a member of the armed forces or work on behalf of the detaining power against the party of which they were a part. This is consistent with the ICCPR. Nonetheless, if captured by, repatriated to, found within the territory of, or accessible to the party of which they were a part, they are likely to be subject to penalties and punishments, to include execution, by that party if permissible under its laws because of such renunciation or actions.

7.5.6 Responsibility for the Treatment of Prisoners

a. Geneva Convention Relative to the Treatment of Prisoners of War, Article 12

...Irrespective of the individual responsibilities that may exist [for persons or units which capture the detained persons]*, the Detaining Power is responsible for treatment given* [to its prisoners of war].

Prisoners of war may only be transferred by the Detaining Power to a Power which is party to the Convention and [change "and" to "and/or"] *after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power* [or other responsible party] *to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.*

Nevertheless, if that Power [or party] *fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power*[, should one exist, or by other responsible notifying parties]*, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must* [should] *be complied with.*

b. Position of this Manual (somewhat consistent except for precedence of this Manual over the Geneva Convention as to provisions to be complied with)

This Manual generally concurs with the preceding with two exceptions:

1. "Convention" should be replaced with "Manual," "this Manual," or "terms of this Manual"
2. The last sentence should be deleted, or modified as follows: "Such requests should be reasonably considered," rather than "must be complied with," as the latter may not always be reasonable given circumstances or, even if they are, the reality during war is that the original detaining power may be unwilling to use force, impose embargos, or take other such actions against an ally or neutral party to force return of prisoners of war.

In addition, this Manual includes the following elaborations: "The original detaining power is responsible for treatment of prisoners captured by its forces consistent with this Manual. While prisoners of war may be transferred to other parties, the treatment of such prisoners by the receiving party should be equal to or better than that of the original detaining power. As this Manual provides an appropriate and reasonable balance between military necessity and humane treatment, prisoners should never be transferred to another party simply because that party does not comply with the terms of this Manual."

7.5.7 Humane Treatment of Prisoners

a. Geneva Convention Relative to the Treatment of Prisoners of War, Article 13

Prisoners of war must [should] *at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will* [should] *be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.*

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

b. Position of this Manual

Except as otherwise noted in this Manual and the degree reasonably possible within resources available to the detaining power/party for holding and care of prisoners at each stage of captivity, prisoners of war should at all times be treated humanely **(inconsistent due to exceptions of opening clause)**.

Additionally, no prisoner of war should be subjected to:

a. Unauthorized acts of violence, intimidation, insults, shaming, or public curiosity **(inconsistent due to inclusion of "unauthorized");** or
b. Reprisals in retaliation for suffering or loss experienced as a result of actions by the prisoner of war and the forces of which he or she was a part, provided such actions were consistent with this Manual **(inconsistent due to last clause)**.

Due to the exigencies of combat and military necessity, if a combat unit captures members of an opposing belligerent and cannot immediately turn over such captives to those of its own forces who are able to hold prisoners of war as required by this Manual, the conditions under which these prisoners are held and treated will necessarily be different than required under the formal law of war. They will be legitimately dictated by the resources of, risks faced by, attacks against, and mission of the capturing unit even if in apparent violation of other articles of this Manual **(uncertain)**.

7.5.8 Maintenance of Prisoners

The parties which detain prisoners of war are responsible for providing free of charge for their maintenance and medical care within its ability to reasonably do so **(consistent with GPW, Article 15, with exception of addition of "within its ability to reasonably do so")**. This does not preclude

prisoners of war from performing work at no pay which benefits their welfare or to be required to perform work on behalf of the detaining power which benefits the detaining power financially and functionally **(inconsistent as GPW requires payment for work)**.

7.5.9 Equality of Treatment

With the exception of the state of their health and physical condition, technical qualifications, or political or intelligence value essential to the detaining power, all prisoners generally should be treated alike by the detaining power without any adverse distinction based on rank, position, wealth, gender, sexual orientation, race, nationality, cause, celebrity, occupation or profession, ethnicity, religious beliefs, political opinions, or other similar distinction **(somewhat inconsistent due to the second and third of the introductory clauses, and inequality of treatment is allowed under the formal law of war based on rank and for medical and religious personnel. See final bullet in 7.5.10.)**.

The foregoing does not preclude the segregation of prisoners of war to maintain order in camps, to impose punishment, or for medical reasons [FM 27-10, Paragraph 92). Further, in special circumstances, it does not preclude treating individual prisoners differently if there is a reasonable military or political objective to be achieved **(uncertain)**.

7.5.10 Other Prohibited Acts (somewhat inconsistent due to added language)

In addition to acts prohibited above, FM 6-27, 3-49 includes the following.

- *Exposure to insults or public curiosity* [without proper authorization for reasons of military or political necessity]. *For example,* [in most instances,] *POWs may not be paraded through city streets and subjected to the insults of the populace; POWs may not be publicly displayed in a humiliating fashion on television or on the internet. Custodians of POWs, such as escorts, must protect POWs from acts of violence.* [This Manual takes exception to the preceding under certain circumstances. For example, this Manual would not preclude the public shaming of a POW if his or her acts against combatants or non-combatants were sufficiently egregious or heinous, e.g., similar to South Africa's truth and reconciliation public hearings Further, for morale, propaganda, or similar purposes, POWs may be put on display before, or marched through, assembled civilians and military forces, but such persons should not be physically harmed.]
- *Improper photography and media exposure. For example, DOD policy has generally prohibited the taking of photographs except for authorized purposes in order to protect POWs and other detainees from public curiosity.* [Additionally, unauthorized photography has the potential to be of security, propaganda, lawfare, or other value to one's enemy. Violations should generally be handled administratively rather than judicially.]
- *Using POWs as human shields to protect military objectives.* [Holding POWs within military units or facilities, if separate holding facilities are not reasonably possible, is not prohibited even though the presence of the POWs may unintentionally function as a de facto human shield.]
- *Acts of reprisal against POWs* [except as may be allowed under this Manual's position on permissible reprisal].
- *Bartering and other transactions between members of the forces of the detaining power and POWs concerning the POWs personal effects are not considered proper* [without proper authorization from the detaining power's commander].
- *Adverse discrimination based upon race, gender, nationality, religious belief, political opinions, or any other similar criteria in regard to treatment of POWs. In some cases, however, the captor is permitted, and sometimes required, to make distinctions between POWs or* [d]*etained personnel as to rank, state of health, age, or professional status, as well as to provide additional*

protection for women[, e.g., pregnancy]. *Also, as explained in paragraph 3-43, distinctions for security purposes are permissible (GPW arts. 14, 16, 30, 43-45, 49, 109-110).*

7.6 After Captivity (italicized text from FM 6-27)

7.6.1 Actions Upon Capture (consistent and inconsistent due to certain added language)

3-50. Military commanders have an affirmative duty to take the measures within their ability and appropriate to the circumstances, to protect POWs captured by their unit until they are properly transferred to higher or other competent authority... [Last sentence of 3-50 related to killing of POWs deleted as it is addressed in 7.5.4.]

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

- *Captured personnel are to be disarmed.*
- *Following disarmament, they are to be searched for hidden weapons, identification documents, and items of potential intelligence value* [or useful for escape].
- *Captured enemy personnel may be segregated by rank or grade, service, gender, or nationality. They also may be segregated if they are deserters, civilians, or political indoctrination personnel, or by other categories, so long as the segregation is undertaken in a manner consistent with the prohibition against adverse distinction (see para. 3-35, supra).*
- *Each captured person should be examined to identify if he or she requires medical treatment. A capture card should be completed at the earliest possible* [reasonably practicable] *time to facilitate accountability.*
- *Personal property may be removed for intelligence purposes, but should be returned as soon as possible. This may include sun glasses* [if there is a medical requirement for the POW to wear them; otherwise, their wearing can be beneficial for the POW to mask facial expressions or make it less obvious security procedures and containment measures are being watched and evaluated]*, watches, family photographs, and personal correspondence.* [Note: The possible retention of property as souvenirs, and the process for doing so, by capturing personnel is addressed below.]
- *Captured personnel are entitled to retain the following items:*
    - *Clothing, including protective clothing* [unless latter required by the detaining party]*;*
    - *Equipment for personal protection, such as helmet, body armor, and gas mask* [except as required by the detaining party's forces if they do not have such equipment, with body armor seldom allowed as it can make POWs less vulnerable during escape attempts and possible efforts to overcome guards]*;*
    - *Canteens and mess kits* [provided there is no discernable risk in their being used as or turned into weapons]*;*
    - *Military badges of rank, nationality, service, and branch, and specialty badges* [as may be determined appropriate by the detaining party for camp administration or other purposes]*; and*
    - *Identity cards, dog tags, or similar identification items.*

3-57. The GPW does not prohibit routine security measures at the time of capture that are necessary to prevent the escape of a POW, concealment of identity or documents of intelligence value, or similar acts (see DOD Law of War Manual, 9.6). POWs may be…ordered to remain silent. The capturing unit may secure the POW's hands with [rope, other binding materials,] *handcuffs*[,] *or flex cuffs and take other security measures to protect those responsible for the POW's from physical or other abuse*[, and limiting a POW's ability to see or communicate (1) while moving POWs to and through military installations,

facilities, and other secure areas; (2) to prevent identification and/or assessment (e.g., identity, rank, number, equipment, and condition) of one's own forces and possibly that of other POWs; (3) communicating with fellow prisoners prior to interrogation; and (4) during interrogation.]

3-58. As soon as [reasonably] *possible after capture,* [and given the detaining power's resources and the combat situation,] *POWs must* [should] *be evacuated to camps located sufficiently distant from the combat zone so that they are out of danger.* [As practicable given the situation,] *POWs must* [should] *not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. A POW may be temporarily kept near the danger zone only* [delete "only"] *when wounds or illness would make the evacuation more hazardous to the POW's health. Furthermore, evacuation*[, to the degree practicable,] *should always* [delete "always"] *be done in a humane manner and in conditions similar to those for the forces of the detaining power. POWs must* [should] *receive sufficient food and potable water, and necessary clothing and medical attention* [if such are reasonably available and their provision will not inordinately reduce the combat effectiveness of the detaining force. To the degree practicable, a]*ll feasible precautions must* [should] *be taken to ensure POWs safety during evacuation. If POWs cannot be evacuated as provided for in Part III, Section I, of the GPW,* [at the detaining party's discretion that doing so will not unduly place at risk their forces or critical military operations,] *they may be released, provided that feasible precautions are taken to ensure their safety* [if this can be reasonably done by the detaining party] *(GPW arts. 19, 20; see DOD Law of War Manual, 9.9.2 and 9.9.3)* [see 7.5.4.b above].

3-59. When disarming prisoners at the time of capture, the capturing unit may confiscate firearms, ammunition, knives, bayonets, grenades, or other weapons, or any other device that may pose a threat to capturing force personnel, or any equipment or items that could possibly facilitate escape. Such items may include: flares, compasses, survival maps, or individual emergency radios. Capturing personnel may not confiscate items issued for personal protection, clothing, and feeding unless such an item is being impounded for security [or other previously cited (see 3-56 above)] *reasons.*

3-60. P*ersonal items such as a ring, wrist watch, or family photographs may not be taken from a POW or from dead enemy personnel except by authorized personnel, and then only for their safekeeping* [unless required for the welfare or military operations of the detaining party. For example, a watch may be of military value to a captor if they do not have one; a gold ring may provide revenue to secure essential supplies.]. *Items taken for safekeeping must* [should] *be itemized, separated, and packaged in order to permit accountability, safekeeping, and return upon a POW's release (GPW art. 18).*

3-61. Currency carried by POWs may not be taken except by order of an officer [or other person in authority]. *The amount of currency and the identity of the owner must* [should] *be recorded in a special register, and an itemized receipt must* [should] *be provided to the POW (GPW art. 18).* [Nonetheless, if personal funds of POWs are required by the detaining party for its operations or survival, these private funds may be used as necessary, just as other enemy private and public property may legally be if required for such purposes. In addition, limited quantities of small denomination enemy-issued currency may be kept by capturing party personnel as souvenirs if approved and supervised by a person in authority.] *The unexplained possession by a POW of a large sum of money justifiably leads to an inference that such funds are not his or her own property and are in fact either property of the enemy government or property that has been looted or otherwise stolen.*

Souvenirs and Retention of Personal Property

At the discretion of the belligerent party, funds and military items (e.g., weapons [civilian or military], rank/unit insignia and awards, flags, uniforms [if replaced with comparable clothing], protective gear, and

other military items not for personal use) may be appropriated and distributed at the discretion of the controlling belligerent among those responsible for the capture of the POW **(somewhat inconsistent).**

In combat, it is unlikely all possessions of captured or killed enemy combatants will be turned over to the chain of command unless there is a rigid policy that nothing can be retained by individual soldiers and clear punishments ensue if they do. Common practice is that combatants are "entitled" to certain "souvenirs" and will keep what they believe is "rightfully theirs" no matter official policy. Yet, it is important anything of intelligence value be turned over to, if not permanently retained by, the chain of command. Nonetheless, many personal items are not appropriate souvenirs and should not be retained by capturing personnel under any circumstances.

A more realistic approach is to establish policy whereby that found is turned over to higher command, but enemy unit and rank insignia, parts of uniforms, certain weapons, certain other military items, and some small denomination enemy currency might be returned to the unit or person who originally secured them. If this is the policy, it must be strictly adhered to by higher command. Further, it should be insured those in the rear handling such items do not retain such property if they were not part of capturing these items. If the preceding is not done, combatants will more likely attempt to keep and hide articles which may be of intelligence value or truly personal items which should not be kept.

7.6.2 Interrogation (see Chapter 6)

7.6.3 Internment/Detention

It should be understood that irregular forces, capturing units cut off from their main forces, and those of smaller, poorer, weaker States may not reasonably be able to provide fully what is required under this section. Generally, when this occurs, it should not be considered a violation of the law of war.

7.6.3.1 General (somewhat consistent)

3-66. POWs and retained personnel should be interned [replace "be interned" with "ideally be held"] *in camps* [or facilities] *that are situated in an area far enough from the combat zone for them to be out of danger.* [To the degree reasonably practicable, t]*he camps*[/facilities] *should be located in areas that afford every guarantee of* [delete "every guarantee of"] *hygiene and healthfulness and to prevent epidemics. If necessary for security reasons or other military reasons, such as to discourage escape or reduce the risk of enemy raids, POW camps*[/facilities] *may be located outside the theater of operations. Because POW status is not punitive, POWs shall not be interned in penitentiaries*[, huts, rooms in homes, offices, warehouses, factories, cages, and other such locations,] *unless such internment is in the POWs interest (see DOD Law of War Manual, 9.11.3.2)*[, required for security purposes, or the only facilities available, as determined by the detaining party given its resources, personnel, and the combat situation]. *Military conditions permitting, POW camps should be clearly marked by the letters PG, PW, or other agreed upon markings so the camps are clearly visible from the air during the day (GPW art. 23).*

3-67. POWs may have their movements restricted to certain limits, such as the camp where they are interned, or if the camp is fenced in, of not going outside its perimeter. Subject to the GPW provisions related to penal and disciplinary sanctions [and the exceptions noted in 3-66]*, POWs, may not be held in close confinement (for example a room or a cell) except where necessary to safeguard their health*[, reduce their likelihood of escape or overcoming detaining party security personnel, or it is the only reasonable space available for confinement,] *and then only during the continuation of circumstances that make such confinement necessary (GPW art. 21; see DOD Law of War Manual, 9.11.1).*

3-68. POWs are entitled to the following protections and protective measures in a POW camp [or facility] *(GPW arts. 13, 17, 23).* [Protections/protective measures addressed previously have been omitted below.]

- *POWs and retained personnel may be interned only in camps on land.* [The preceding is **inconsistent** with this Manual's positions that POWs and retained personnel may be interned in any location or facility consistent with the detaining party's resources, security requirements, personnel, and the combat situation, regardless of where this might be, to include on boats.]
- [To the extent reasonable given resource availability and the combat situation,] *POWs and retained personnel may* [should] *not be sent to or detained in areas where they may be exposed to fire of the combat zone…*
- *Camps*[/facilities] *may not be located or designed for the purpose of using POWs or retained personnel as human shields in order to prevent the attack of military objectives.* [Provided the purpose is not to function as a human shield, this would not preclude POW camps/facilities being established inside military installations and perimeters when surrounding or rear areas are not fully controlled by the detaining party, when alternative holding areas are not available, or when POWs are temporarily being held prior to transfer to a dedicated POW location.]
- [To the extent practicable within time constraints, available resources, and the combat situation,] *POWs and retained personnel must* [should] *have shelters against bombardment and other hazards of war to the same extent as the local civilian population,* [or the detaining party's own forces, and provided the resources and time are available to construct. If new or additional shelters are required, POWs can be required to participate in their construction with no compensation for having done so]. *If there is a risk of air, missile, or chemical, biological, radiological, or nuclear weapons attack, POWs shall* [should] *retain their personal protective equipment (such as, helmets, body armor, and protective masks) or be provided comparable equipment for personal protection* [provided the detaining party's forces have such protections. If they do not, the detaining party may use POWs protective equipment for their own use. Although it may choose to do so, the detaining party is not required to provide protections or protective measures if the POWs' own forces employ weapons banned under the law of war.]

7.6.3.2 Quarters (consistent and inconsistent)

3-69. [Unless determined otherwise appropriate by the detaining party for security or other relevant reasons], *POWs and retained personnel must* [may] *be quartered in* [facilities,] *camps or camp compounds according to their nationality, language, and customs in order to minimize friction among POWs or groups of POWs, provided that such POWs shall not be separated from POWs belonging to the armed forces with which they were serving at the time of their capture, except with their consent (GPW art. 22). In any camps* [or facilities] *in which women POWs, as well as men, are accommodated, separate dormitories and separate toilet facilities shall* [should] *be provided for women*[, and possibly alternative gender and sexual orientation,] *POWs. POWs may be segregated according to their known or suspected security risk level. Subject to compliance with the GPW, officer POWs may be separated from enlisted POWs. Female POWs will be under the immediate supervision of women (GPW arts. 21-25)*[, provided women are available to fill such supervisory positions].

[While there are advantages of quartering prisoners as indicated, there are potential downsides. Doing so makes it easier for POWs to plan and carry out escapes and undermine operations of the holding facility. The law should not dictate how prisoners are organized and housed. This should be based on characteristics of detention facilities or camps, available security personnel, and those being held. This, in part, is consistent with the third sentence of 3-69 which indicates POWs can be segregated based on known or suspected security risks.]

3-70. In addition to the requirements previously listed, [each of the following will be put into effect to the extent practicable based on available resources and personnel and ongoing combat conditions: (1)] *POWs*

and retained persons shall be quartered under conditions as favorable as those for the forces of the detaining power in the same area. [In fluid, active combat, this may be no more than sleeping on the ground in the rain or snow with no shelter or bedding while being secured with zip ties, rope, or whatever other means available. If such extreme conditions are necessary, they should only prevail until such time as improved alternatives are reasonably available.] [(2)] [If used and reasonably possible, quarters] [replaced "barracks"] *should be protected from dampness, adequately heated and lighted, and should include all necessary* [delete "all necessary"] *fire prevention measures. Conditions in the quarters must* [should] *make* [reasonable] *allowances for the habits and customs of the POWs.* [3] *In addition, conditions posing health risks should be identified and corrected to ensure that conditions in no case are prejudicial to the POWs' health (GPW art. 25).*

[As elsewhere in this chapter, the following shall be adhered to the extent reasonably practicable given available resources of the detaining party and combat conditions faced.]

3-75. …POWs interned in unhealthful areas, or where the climate is injurious for them, shall [should] *be removed as soon as* [reasonably] *possible to a more favorable climate* [locale] *(GPW art. 22).*

3-76. POWs shall have for their use, accessible day and night, toilets that conform to the rules of hygiene and are maintained in a constant state of cleanliness. [Such toilets may be no more than a bucket or hole in the ground with dirt scattered by hand after each use if that is all that is reasonably available] *Where feasible, toilets should be appropriate for the culture of the POWs. In addition, bathing and laundry facilities with sufficient soap*[, if available,] *and water are to be provided.* [Bathing and laundry "facilities" may be no more than a source of water, e.g., river, stream, pond, lake, with possibly a container for dipping water if that is all that is generally available to the detaining force and/or local population.] *Individuals must* [should] *be provided reasonable opportunity to make use of these facilities. Toilet, bathing, and laundry facilities must* [should] *be kept clean (GPW art. 29). POWs may be assigned cleaning duties. The detaining power, however, has the ultimate responsibility for the camp's sanitary conditions* [unless, intentionally or through neglect, POWs fail to fulfill their cleaning duties. If this occurs, POWs have the responsibility to return such facilities to healthful conditions when it is within their ability to do so **(possibly inconsistent)**.].

7.6.3.3 Food, Clothing, Canteen (consistent and inconsistent)

[The following should be followed to the extent reasonably practicable given resources of the detaining party, needs of the detaining party for its own forces, and ongoing combat conditions.]

3-72. The food and water ration of POWs and retained personnel should be as consistent as feasible with their actual needs. Medical, cultural, and religious requirements should be considered in determining and ensuring the appropriate diet for POWs. Food rations shall be of sufficient quantity, quality, and variety to keep POWs in good health and to prevent weight loss or the development of nutritional deficiencies. Adequate messing premises shall be provided and additional food provided for those whose labor require it. Tobacco use is to be permitted, but reasonable restrictions on when it is permitted, for health[, safety,] *and other legitimate reasons*[…]. [Generally, smoking should not be allowed as it typically places matches or lighters into the hands of POWs and could be used inappropriately against the detaining party or for escapes.] *Collective disciplinary measures affecting food are forbidden (GPW art. 26, 28, 31)* [unless there is organized widespread non-compliance with camp regulations].

3-73. Adequate supplies of clothing, underwear, [delete ", underwear,"] *and shoes* [replace "*shoes"* with "footwear"] *must* [should] *be provided to POWs free of charge. If available, uniforms of the armed forces to which POWs owe their allegiance should be made available to clothe them* [at the detaining party's discretion]. *POWs who work shall* [should] [add ", if reasonably possible,"] *be provided clothing*

consistent with their work, to include protective items. Clothing must [should] *be suitable for the regional climate… Uniforms or other clothing may contain markings denoting the individuals as POWs to help prevent escape, but the markings may* [should] *not be humiliating or degrading...*

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

[Detaining parties may make decisions not to establish, or to close, canteens if their existence is believed to be a source of conflicts between POWs who have funds and those who do not, their operation or stocking creates an undue burden on the detaining party, or it would allow POWs to have amenities not typically available to the personnel of the detaining party or local civilians upon whom the detaining power depends or requires support. **(inconsistent)**]

7.6.3.4 Medical Care (consistent and inconsistent)

[The following should be followed to the extent reasonably practicable given resources, trained personnel, available alternatives of the detaining party, needs of the detaining party's forces, and the ongoing combat situation:]

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

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

3-79. POWs who are not members of the medical services of their armed forces but who may be medically trained, may be required to provide medical care for their fellow POWs who belong to the same group[, as well as for any other POWs, personnel of the detaining party, and local civilians if other medical personnel are not available to provide such care. D]*etained medical personnel should be permitted to perform their respective duties. The detaining power, however, always retains responsibility for prisoner health and medical care. If available, POWs must* [should] *have access to medical care from personnel of the power on which they depend and, if possible, of their own nationality (GPW art. 30, 32)* [unless there are security or other reasons for doing otherwise].

3-80. Required medical treatment cannot [should not generally] *be denied POWs, and all medical treatment should be documented. The detaining power must* [should] *bear the cost of medical treatment and of remedial aids such as dentures, crutches, artificial limbs, or eye glasses (GPW arts. 15, 30).* [For example, denial might result from limited medical capabilities and supplies being required for more pressing needs of detaining power personnel (see following).]

3-81. Only urgent medical reasons[, to include those of detaining power personnel and local civilians,] *will* [should] *authorize priority in the order of treatment administered (GWS art. 12)*[, except as otherwise outlined in 8.3.1 Triage] **(inconsistent)**.

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

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

3-84. Even if not attached to their own force's medical service branch, POWs who happen to be doctors, nurses, or other medical practitioners may be required to assist in the medical services of their fellow POWs[, as well as other persons locally if non-POW medical personnel are not available to provide adequate care]. *If so, they may not be compelled to engage in any other work (GPW art. 32)* [except as may be determined necessary by the detaining party] **(inconsistent)**.

Mixed Medical Commissions **(somewhat consistent)**

3-166. According to the GPW, mixed medical commissions should be appointed upon the outbreak of hostilities in order to examine sick and wounded POWs and to make appropriate decisions regarding them (GPW art. 112). When necessary, consult AR 190-8 or other applicable guidance on mixed medical commissions. [Nonetheless, for security and other reasons, the detaining party may responsibly choose to use an approach to accomplish the same health assessment different than outlined above or in AR 190-8.]

7.6.3.5 Activities (generally consistent except as noted)

[The following should be followed to the extent reasonably practicable given resources, appropriate personnel, available alternatives of the detaining party, and the ongoing combat situation.]

3-85. POWs are entitled to religious worship, including attendance at services, subject to the POW's compliance with camp disciplinary routine[, provided the content of such services does not undermine or advocate against the detaining party]. *Accommodation for religious services shall* [should] *be provided (GPW art. 34).*

3-86. POWs may be ministered to by [d]*etained military chaplains or by other ordained chaplains or qualified laypersons, if available.* [D]etained *chaplains shall* [should] *be allocated to camps and labor detachments containing POWs of the same forces, language, or religion.* [As with medical personnel, this Manual does not recognize the retained status of religious personnel who, if captured, are considered POWs with similar treatment, responsibilities (non-occupational), and protections as all other POWs.]

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

3-88. Intellectual activities, including reading and courses of instruction, shall [may] *be* [made] *available to POWs. POW participation is elective. Educational courses, lectures, and other training methods of instruction on history and democracy are permitted, provided attendance is not compelled and POWs are not punished if they do not participate. This provision does* [should] *not permit the subjection of POWs to propaganda under the guise of education (see DOD Law of War Manual, 9.16.1).* [Unlike the second sentence, under this Manual, POWs may be required to attend educational classes which factually present

information regarding the detaining party's cause, political or economic system, reasons for engaging in the conflict, or other such topics **(inconsistent)**. If attendance is required, POWs may express their own views and not be punished for having done so.]

7.6.3.6 Communications, Shipments, and Related Entities (somewhat inconsistent)

[The following should be followed to the extent reasonably practicable given resources, appropriate personnel, available alternatives of the detaining party, and the ongoing combat situation.

3-92. A point of immediate concern for POWs is their communication with others outside the camp. [At the detaining party's discretion, unless there is a compelling security, logistical, military, or political reason for doing otherwise, e.g., not wanting the enemy to know of the capture, the following should be undertaken:] *Once POWs have fallen into the hands of a detaining power, that* power[, at its discretion,] *must* [may] *inform the POWs, and the powers upon which the POWs depend*[,] *of the measures taken to ensure compliance with the GPW. POWs may write to their families and to the Central Prisoners of War Agency*[, should one exist,] *informing them of their capture, mailing address, and state of health (GPW art. 70).*

3-93. POWs may send and receive letters and cards, subject to security requirements. Electronic means, including voice and video conferences, should be considered as time, resources, [security requirements,] *and circumstances permit. If the detaining power deems it necessary to limit such correspondence, it* [generally] *may not restrict any POW to sending fewer than two letters and four cards monthly, conforming as closely as possible to the models annexed to the GPW, not including capture cards sent to satisfy the notification referenced in the previous paragraph and certain other correspondence the GPW authorizes without counting against any prisoner correspondence quota (see DOD Law of War Manual, 9.20.2.1). The protecting power*[, should one exist,] *may permit further limitations only in the interests of the POWs concerned based on the detaining power's inability to find sufficient qualified linguists to carry out the necessary censorship. As a general rule, the correspondence of POWs shall be written in their native language although the parties to the conflict may allow*[, or require for security reasons,] *correspondence in other languages. In cases of urgency or of POWs having difficulty communicating with their next of kin, the POWs affected may send telegrams at prisoner expense. Limitations on the correspondence addressed to POWs may only* [delete "only"] *be ordered by the power on which the prisoners depend*. [However, excessive volume may tax the detaining power's ability or will to handle resulting in limitations of that which can be received.]. *Such letters and cards must* [should] *be conveyed as rapidly as the detaining power can* [practicably] *manage; they may not* [delete "not"] *be delayed or retained for disciplinary reasons (GPW art. 71)* [if a POW has violated his or her responsibilities as a prisoner under this Manual]. [Note: The preceding is far too detailed as to what should be reasonably required. Given the nature of combat, the need for some forces to remain hidden who hold prisoners, and the sometimes-limited availability of resources to devote to such communications, for most POWs, sending and receiving one type of communication weekly, and possibly even only monthly, is a reasonable standard which can be exceeded at the detaining party's discretion when conditions allow.]

3-94. Censorship of correspondence addressed to POWs or sent by them shall be done as quickly as possible [as reasonably practicable]. *Examination of consignments intended for POWs shall not be carried out under conditions that will expose the goods contained in them to deterioration* [provided combat and weather conditions allow]*; except in the case of written or printed matter, it shall* [should] *be done in the presence of the addressee, or a fellow POW duly delegated by him or her (GPW art. 76)* [subject to the detaining power's approval when, if withheld, will be carried out by the prisoner representative or other responsible person].

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

3-100. On outbreak of a conflict and in all cases of occupation, each State [and non-State] *party to the conflict must* [should] *establish an official national* [or non-State] *information bureau for POWs in its custody. The main purpose of the information bureau is to receive all reportable* [replace "reportable" with "relevant"] *information concerning POWs in the custody of the detaining party and forward it expeditiously to the parties concerned through the Central Prisoner of War Information Agency and the protecting power (GPW art. 122)*[, should either exist and acceptable to the detaining power].

3-101. The State [or non-State party] *concerned must* [should][, to the degree it has the resources to do so, combat conditions allow, and the immediacy of need for implementing the following] *(GPW art. 122):*

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

[None of the preceding would preclude the detaining party from withholding such information for certain prisoners whose capture or escape it may not wish to be known for tactical or strategic purposes.]

3-103. [At the detaining power's discretion and direction, i]*nformation bureau responsibilities* [would] *include (GPW arts. 122-123):*

- *On behalf of the detaining power, providing available information regarding POWs to the Central Prisoners of War Information Agency and, if applicable, to the designated protecting power.*
- *Responding*[, if and when appropriate,] *to authorized inquiries received about POWs, consistent with the protection from insults and public curiosity.*
- *Ensuring that its correspondence is properly authenticated.*
- *Collecting and forwarding personal valuables, currency, and important documents, left by POWs who died, escaped, or who were repatriated or released to the Central Prisoners of War Information Agency and, if appropriate, the protecting power. These items should be forwarded in sealed packets and accompanied by both an inventory of the packet's contents and statements providing clear and complete information as to the identity of the person who owned the articles.* [Depending on what is conveyed to POWs by the detaining party as to possible consequences of escape, personal items of those who escape may be forwarded at the detaining power's discretion. If essential to their war effort, the detaining power may retain personal valuables and currency.]

3-104. Subject to the consent of the detaining power, humanitarian organizations may provide collective relief and assistance to, and within, POW camps[/facilities]. *Historically, this role has been performed by*

the ICRC, [and] *its special position in this field shall* [should] *be recognized and respected at all times* [as appropriate]. *Access* [is at the sole discretion of the detaining party and] *is subject to security or other practical considerations and the obligation to protect POWs from* [unauthorized] *public curiosity (GPW arts. 9, 13).*

3-105. POWs have the right to make requests to the military authorities of the detaining power concerning the conditions of their captivity. [Subject to the consent of the detaining power given security, intelligence, and other considerations, t]*hey also have the right to lodge complaints about such matters to the protecting power if one has been appointed, or to ICRC representatives* [or other such organization which have been agreed to]. *Such complaints may be made by the POW or through the prisoners' representative. No restrictions may be placed on requests or complaints* [unless it is determined there is reasonable evidence POWs are using such requests and complaints as a form of "lawfare" or "administrative guerrilla warfare" to inconvenience and tie up resources of the detaining power inappropriately]. *Written complaints must* [should] *be transmitted without* [undue] *delay and may* [should] *not be counted against a prisoner's quota of allotted letters if a quota has been established.* [Provided there are not multiple examples of baseless complaints, t]*he individual making the complaint may* [should] *not be punished, even if the complaint is unfounded (GPW art. 78).*

3-106. The detaining power must [should] *provide POWs all* [delete "all"] *reasonable facilities for the preparation and execution of legal documents in their civil capacity, and for their transmission through the protecting power or Central Prisoners of War Information Agency (GPW art. 77)*[, provided these entities exist and have been agreed to by the detaining power and its available resources allow].

3-107. [Provided that disparities in what is received by individual POWs do not cause frictions within the POW population or what is available to detaining power personnel,] *POWs are allowed to receive relief shipments containing food, clothing, medical supplies, and articles of a religious, educational, or recreational character and materials allowing POWs to pursue their studies or cultural activities, free of import, customs, or other duties (GPW arts. 72, 74).* [If such disparities would occur, a solution as part of a separate agreement might be to allow some agreed upon portion of the shipments to be retained by the detaining party for its personnel or distributed to the other POWs.] *Procedures for collective relief shipments are delineated in Annex III to the GPW. States* [and non-State parties] *may arrange for relief shipments by special agreement as long as the agreement neither restricts the prisoner representative's right to take possession of relief shipments and distribute or dispose of their contents on behalf of the POWs nor restricts the protecting power, the ICRC, or other qualifying organization of their right to supervise shipment distribution (GPW art. 73).* [If the detaining party is unwilling to comply with the restrictions of the preceding sentence, it need not enter into any such special agreements or can state conditions under which it would.]

3-108. [With the exception of that delineated in the preceding paragraph, t]*he only limits that may* [should] *be placed on these shipments* [under special agreements] *shall* [should] *be those proposed by the protecting* [or detaining] *power in the interests of the POWs themselves, or by the ICRC or any other organization giving assistance to the POWs* [if these entities have previously been agreed to by the detaining party to assume such responsibilities]*, in respect to their own shipments only, on account of the exceptional strain on* [other POWs and detaining power personnel that do not receive such shipments,] *transport*[,] *or communication (GPW art. 72). Relief shipments for POWs are exempt from any postal charges or duties.*

7.6.3.7 Labor (often inconsistent)

3-109. Subject to the conditions outlined in Section III of the GPW, the detaining power may employ POWs and retained personnel (GPW art. 33, 49) [with or without compensation at the detaining power's

discretion]. [D]*etained* [medical and religious] *personnel, however, may not* [delete "however" and "not"] *be employed other than for work related to their medical or religious duties (GPW art. 33)* [provided a need is determined by the detaining party whose importance overrides their medical or religious duties].

3-110. Labor assignments for [replace "for" with "requiring'] *physically fit POW's must* [should]*, nevertheless, take into consideration a POW's age, gender, rank, and* [delete "age, gender, rank, and"] *physical* [and mental] *aptitude, with a view to maintaining POWs in a good state of physical and mental health* [if reasonably possible]. *Officers* [and non-commissioned officers] *may not* [delete "not" which makes the following two sentences irrelevant] *be compelled to work. They may be permitted to work if they request to do so and suitable work is available. Noncommissioned officers may be employed, but only in supervisory positions (GPW art. 49).* [Within above considerations, at its discretion, the detaining power decides which POWs work at which tasks and whether to use the POWs' chain of command for supervision or whether some other organizational structure is more appropriate for specific detention situations, security considerations, and the immediacy and importance of the work for which labor is required.]

3-111. POWs may never [should generally not] *be employed in labor that places them at risk of violence, intimidation, insults, or public curiosity, or that would be regarded as humiliating if performed by a member of the detaining power's military force* [unless the work is essential]. *Additionally, unless they volunteer, POWs may* [should] *not be compelled to perform labor that is unhealthy or dangerous (GPW art. 52)* [unless such risks are also required of the detaining party's personnel or citizens, or is to remove mines, unexploded ordinance, hazardous materials, obstacles, or debris which the POW's own forces employed, caused, or put in place**)**]. *They may not be compelled to take part in military operations directed against their own country* [or the non-State movement, cause, or forces of which they are a member].

3-112. POWs may be compelled to engage in a broad range of work, to include camp administration, installation, and maintenance. If [delete "If" and add "Regardless of whether"] *they volunteer, POWs may work in* [replace "work in" with "be assigned"] *a broader range of jobs, to include work on military bases* [deleted "*not directly connected with war operations"*]. *The following lists other permissible classes of work in which POWs may be compelled to work (GPW art. 50):*

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

[While the introductory paragraph as originally written and the 3rd, 4th, and 7th of the preceding bullets' references to "no military character or purpose" would preclude what follows, under this Manual, POWs can be employed even when there may be a military character or purpose in the work. For example, if the detaining party has no utilities specialist to repair an installation's water, sewer, or power system on or providing service to a military base or facility but a POW does, POWs with those skills may be used to repair the system. Likewise, if a possible attack by the detaining party's enemy places key food and medical supplies at risk of being damaged or destroyed, POWs can be used to help transport and handle these stores. While it need not always be a condition of such employment of POWs, it should be noted in both these examples, POWs may benefit from their work, not just the detaining party.]

3-113. POWs shall[, if reasonably practicable,] be *provided with appropriate food, clothing, equipment, conditions, and training for performing their work (GPW art. 51).* [Ideally, when POWs are employed in locations and/or where their presence or appearance might cause them to be mistaken for the forces of the detaining party, efforts should be taken to provide clothing or identifying markings or emblems which distinguishes them as POWs.] *The treatment of POWs who work for private employers must* [should] *not be inferior to that provided for under the GPW (GPW art. 57)* [unless the work is essential and the treatment is unavoidable].

3-114. [Only to the degree financial resources are available and similar compensation is able to be provided to the detaining party's own forces and civilians for similar work will the following two standards be considered.] *POWs performing labor shall* [may] *receive working pay at a fair rate established by the detaining power within GPW guidelines (GPW arts. 54, 62). POWs permanently assigned to work for the administration, installation or maintenance of POW camps, and POWs required to perform spiritual or medical duties for their fellow POWs are* [replace "*also entitled to fair working"* with "not entitled to"] *pay (GPW art. 62)* [except at the detaining power's discretion, and/or if such funds are provided by the State or non-State party of which such persons are a part]. *The duration of the POWs' daily routines should not be excessive and must* [should] *comport with GPW standards, which in general require working conditions that are safe* [within reasonable parameters of such work and the conditions under which it is required] *and not inferior to those the detaining power affords its nationals (GPW art. 51)* [and others affiliated with its forces]. *Prisoners shall* [should] *receive one hour of rest in the middle of the day's work and 24 consecutive hours of rest each week* [unless combat or other conditions, e.g., natural disaster response, do not afford the detaining party's forces or civilian workers similar periods of rest.] [Note: It should be understood that POWs of States are likely still to receive compensation at home from the party of which they are a member and that non-State and some State party combatants may fight with no compensation. Given that the detaining power is incurring costs to feed, cloth, house, and secure such persons, there is no need for POWs to receive double compensation, be paid when they were not being paid previously, or receive pay when detaining party personnel are receiving no or minimal pay.]

7.6.3.8 Advance Pay (inconsistent)

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

[The preceding is not the position of this Manual. While the detaining power may choose to do this, it has no responsibility for monthly advance pay commensurate with rank or any other standard. If the power of which the POWs are a member would like to provide funds for this purpose through the ICRC, other organization, or neutral State, the detaining party may allow this at its discretion. If providing such pay may create inequities, dissension, and other problems among POWs, its own forces, or the local population, the detaining party will either not allow these payments or hold the funds (or have a neutral third party hold the funds) until such time as such concerns would no longer be a consideration.]

3-116. An advance of pay [and compensation for work performed] *may be made in scrip or vouchers that can be used only in the POW camp in order to prevent POWs from having or hoarding currency, which might create a security concern* [or increase a prisoner's ability to effect successfully an escape]... [Procedures and records kept are at the discretion of each detaining power, other than it should provide reasonable evidence that those funds which are paid from moneys provided by the entity of which the

POW is a member, or by the POW's family or benefactor, are actually received in the proper amounts by the appropriate POW at the time of the detaining power's determination or at the end of captivity].

7.6.4 Facility Administration, Prisoners' Representative, & Discipline (often inconsistent)

3-117. Every POW camp [or other POW facility] *must* [should] *be put under the immediate authority of a commissioned officer of the detaining power's regular armed force* [or other responsible person of the detaining party with this determination based on location of the facility and availability of personnel suitable for the responsibility]. *Officers* [and others] *in charge of POW camps* [and facilities] *will* [should] *have copies of the GPW*[, as well as this Manual]*, will ensure the others in charge of camp*[/facility] *administration understand and adhere to the GPW*[/Manual]*, and will* [should] *ensure it and other camp*[/facility] *administration regulations are posted for POWs' reading in languages they understand. Orders addressed to a POW individually must* [should] *be in a language that the POW understands (GPW arts. 39, 41).* [These latter two requirements are subject to the availability of competent translators and interpreters. If they are not, the responsible authority and security personnel of the detaining power will try to overcome this challenge to the degree reasonably possible through options such as online translation apps, bi-lingual dictionaries, and linguistic capabilities of the POWs themselves.]

3-95. The role of the prisoners' representative is to represent POWs before the military authorities, the Protecting Powers [(should one exist)]*, the ICRC* [if involved]*, and any other organization that may assist them. The prisoners' representative shall* [should] *also* [work to] *further the physical, spiritual, and intellectual well-being of POWs. The prisoners' representative facilitates much of the communication and shipments the GPW authorizes on behalf of POWs*[, subject to the detaining power's approval]. *If prisoners decide* [and are allowed] *to organize for mutual assistance, their organization will be within the purview of the prisoners' representative* [subject to the detaining power's approval]. *Prisoners' representatives may* [should] *not be held responsible for any offenses committed by POWs…simply by reason of their duties. POWs may freely consult their prisoners' representative* [unless there are compelling reasons why this is not practicable or appropriate]. *Any POW correspondence limits as referenced in paragraph 3-93 shall not apply to correspondence to or from a prisoner*[]*s*[*'*] *representative… (GPW arts. 80, 81).* [This does not mean that a prisoners' representative is allowed unlimited correspondence with any party he or she wishes, but only that which is reasonable within guidelines above addressing translation, censorship, authorized organizations and bodies, reasonable need, and security considerations of the detaining party.]

3-96. [Unless otherwise determined by the detaining party, t]*he highest ranking military POW officer* [physically, mentally, and emotionally capable of doing so] *acts as the prisoners' representative, assisted by advisers chosen by fellow POWs in the camp. In camps*[/facilities] *without officers,* [unless otherwise determined by the detaining party,] *a representative is elected by secret ballot every six months. An elected prisoners' representative must be approved by the detaining power before commencing duties as the representative. If the detaining power refuses to approve the elected representative, it must inform the protecting power or the ICRC*[, if the detaining power has agreed to and is communicating with a protecting power or the ICRC on POW matters,] *of the reason for such refusal and the prisoners are entitled to hold a new election. A*[t the detaining party's discretion, a] *prisoners' representative is to have the same nationality, language, and customs as the POWs represented. Thus, a camp*[/facility] *having…differing prisoner nationalities, languages, or customs will* [may] *have multiple prisoners' representatives (GPW art. 79).*

3-97. The detaining power must [should] *provide prisoners' representatives all* [reasonable] *facilities* [given local availability and combat conditions] *necessary to communicate with the detaining authorities, the protecting power, the ICRC, and those organizations given to assist POWs* [if the detaining power

recognizes and is communicating with these entities on POW matters and circumstances allow and are essential. To the degree reasonable given resource availability, security requirements, and combat conditions, o]*ther material facilities shall* [should] *be granted prisoners' representatives, particularly sufficient freedom of movement to accomplish their duties, such as visits to those premises where POWs are detained, inspection of labor detachments, and receipt of supplies.* [However, if it is determined the prisoners' representatives are using their freedom of movement and communications to organize escapes, undermine or overcome their captors, or otherwise engage in activities detrimental to the detaining party, they can be relieved of their positions and appropriate action taken against them. With approval of the detaining party, p]*risoners' representatives may appoint assistants they need from among the POWs.* [Except as may be reasonably required, t]*he detaining power may not require prisoners' representatives to perform other work if doing so makes their duties more difficult (GPW art. 81). 3-98.* [Provided circumstances allow, p]*risoners' representatives who are transferred*[, or otherwise are no longer able or authorized to function in this role,] *shall* [should] *be allowed a reasonable time to acquaint their successors with current affairs. The reasons for the dismissal of a prisoners' representative must* [should] *be communicated to the protecting power* [if the detaining power recognizes and is in communications with a protecting power on POW matters] *(GPW art. 81).*

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

[Under this Manual, while both detaining power personnel and POWs should each display the same respect and courtesy to the other, any saluting requirements are at the discretion of the detaining power and shall be communicated as part of the administrative regulations of the camp/facility. Thus, it is possible no POW officer will be saluted by other POWs and possibly all detaining power personnel regardless of rank must be saluted or shown other certain courtesies of respect, e.g., bows, wah/wai. This is not a matter that, if not adhered to, should become a matter of contention, worthy of reporting, or considered a criminal act if done differently than stated under the formal law of war.]

3-119. Apart from judicial authorities or superior military authorities, only the camp[/facility] *commander, the officer* [or person] *acting in the commander's place, or the officer* [or person] *to whom the commander has delegated command powers, may* [should] *award disciplinary punishment. This authority cannot* [generally should not] *be delegated to POWs (GPW art. 96).* [Nonetheless, if the number of POWs held is significant, this may be delegated to subordinates responsible for portions of a camp or other holding facility. When this is done, any such disciplinary actions should be reported to and reviewed by the overall camp/facility commander.]

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

[Under this Manual, none of the preceding are necessarily relevant or desirable to the orderly, disciplined, and secure administration of a POW camp or facility and, therefore, their retention, use, or wearing is at the discretion of the detaining party. Further, such items of a military nature can be taken from POWs and not returned as decided by the detaining party. The party of which the POW is a member can replace these items upon release and repatriation of any affected POWs. As all POWs should generally be

treated equally, age should have little bearing as to respect towards an individual POW unless it might be helpful in achieving good order and discipline within the camp/facility or goodwill amount locals.]

3-121. [Lethal and n]*on-lethal weapons may be used to control rioting or to prevent escape. Deadly force may be used to prevent the escape of a POW or to restore discipline in certain circumstances, such as*[, but not limited to,] *when POW actions pose an imminent threat of death or serious bodily harm to camp*[/facility] *personnel or other POWs.*

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

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

3-124. A POW who attempts to escape but does not succeed before recapture may only be subject to disciplinary punishment, even if it is not a first attempt. [Nonetheless, such punishment may become more severe each time a POW escapes and is recaptured without having effected a successful escape as delineated above.] *If recaptured by civilians, the prisoner should be turned over to* [the nearest military unit, or to] *local,* [s]*tate, or federal* [replace "federal*"* with "national*"*] *law enforcement authorities for safekeeping so that he or she may be turned over to military* [or other proper] *custody as soon as possible… A recaptured POW must* [should] *be handed over without delay to the* [replace "the" with "a"] *competent military* [or civilian] *authority* [tasked with processing, handling, and holding POWs]. *A recaptured individual remains a POW and the responsibility of the detaining power and…treated accordingly.*

3-125. A POW who commits offenses with the sole intention of facilitating escape and whose offenses do not involve violence [deleted "against life or limb, such as offenses"] *against public* [replace "public" with "persons or"] *property, theft with*[ ]*intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, may be subject to disciplinary punishment only* [unless, possibly, there have been multiple escape attempts]. *Similarly, a POW who aids or abets an escape or an attempt to escape may be subject to disciplinary punishment only*[, provided it does not involve or result in any of the above exceptions or is of a recurring nature]. *Escape or attempt to escape may* [should] *not be considered an aggravating circumstance if the POW is subjected to trial by judicial proceedings in respect of an offense committed during the POW's escape or attempt (GPW art. 93).*

7.6.5 Penal and Disciplinary Sanctions

[All the below requirements are to the extent reasonably practicable within the resources of the detaining power and ongoing combat conditions. Smaller units, especially those not able to communicate with or convey POWs to larger allied forces within the time frame in which a disciplinary infraction needs to be addressed, should attempt to follow the spirit of that found below but may have to do that reasonably required by circumstances and not in full compliance with the formal law of war or what is ideal under this Manual.]

3-126. A POW is subject to the laws, regulations, and orders that apply to the armed forces of the detaining power (GPW art. 82). The UCMJ applies to POWs held by the United States. POWs also

remain subject to the laws of the State[, cause, or movement] to *which they claim allegiance, and may be prosecuted by that State* [or non-State party] *following release and repatriation for misconduct committed during their captivity.*

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

3-128. …Commanders should seek the counsel of judge advocates and apply relevant provisions of U.S. law, such as the UCMJ[, or the laws of the State or non-State power of the detaining party,] *in accordance with the requirements of the GPW*. [If judge advocates are not available, commanders should exercise their responsibility to the best of their ability even if not to the precise requirements of the GPW, UCMJ (or other detaining parties laws), and this Manual].

7.6.5.1 Judicial Proceedings (inconsistent with 3-130)

3-129. POWs should normally be tried in military courts only. However, if the law of the detaining power permits members of its own armed forces to be tried in civilian courts for particular offenses, then civil courts may try POWs under the same conditions. [Regardless of whether military or civilian, a]*ll courts trying POWs must* [should] *offer essential guarantees of independence, impartiality as generally recognized and, in particular, must be* [delete "must be'] *guided by the procedures provided for under the GPW related to the rights of the accused and to means of defense (GPW arts. 84, 105; consider AP I art. 75)*[, to the degree possible given available resources, combat conditions, and the timeliness of a legal resolution of the offense. If a court system or situation does not fully provide such guarantees and a trial still proceeds, the POW should be tried in the manner and court of the detaining power which best adheres to these procedures.]

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

[This Manual disagrees with the preceding when determining whether an offense shall be judicial or disciplinary. The greatest leniency should not be exercised. Rather this determination should be neither overly lenient nor harsh, but appropriate for the offense being considered and would be fair to the alleged offender no differently than one would for those members of its own forces.]

7.6.5.2 Double Jeopardy (consistent)

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

7.6.5.3 Offenses Committed Prior to Capture (consistent except reference to this Manual)

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

7.6.5.4 Disciplinary Measures and Pre-Trial Issues (consistent and inconsistent)

3-133. Acts that constitute offenses against discipline shall [should] *be investigated immediately (GPW art. 96)* [subject to limitations of combat conditions, the availability of personnel or other resources to investigate the alleged offense, and the seriousness of the offense]. Judicial i]*nvestigations related to a*

POW shall [should] *be conducted as rapidly as circumstances permit so that his or her trial may take place as soon as possible (GPW art. 103). No moral or physical* [delete "moral or physical"] *coercion may* [should] *be exerted on a POW to induce an admission of guilt* [beyond that allowed in the U.S. law enforcement/judicial system (see Chapter 6 Interrogation].

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

3-135. A POW confined as a disciplinary punishment or pending trial continues to enjoy the benefits of the GPW [and this Manual] *except for those necessarily rendered inapplicable due to the nature of confinement.* [To the extent practicable given available detention options, resources, and combat conditions,] *POWs shall* [should] *not in any case* [replace "in any case" with "generally"] *be transferred to a civilian prison to undergo disciplinary punishment therein; female* [and non-traditional gender/ sexual orientation] *POWs shall* [should, except possibly when first captured and during active combat when doing so may be unreasonable,] *be confined in separate quarters from men* [delete "from men"] *and shall remain under the immediate supervision of women (GPW art. 97)* [or those who will not discriminate against those with non-traditional genders or sexual orientations, provided sufficient qualified personnel are reasonably available for supervision]. *Parcels and remittances of money to such a POW may be withheld until completion of confinement; POWs shall meanwhile be entrusted to the prisoners' representative…* [Note: This clause is not clear; it is presumed that this was meant to read "the POW's parcels and remittances of money received during confinement should meanwhile be entrusted to the prisoners' representative." That is acceptable under this Manual unless the detaining power handles such matters differently or the prisoners representative may not be able to do so correctly.]

[Unless inconsistent with the policies of this Manual,] *POWs confined for* [either] *disciplinary* [or judicial] *punishment or pending trial retain*[ ] *the right to (GPW arts. 98, 103)* [Note: The following blends 3-135 and 3-136.]*:*

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

[The first three bullets are at the detaining party's agreement, determination and discretion; the latter three, as practicable within reasonably available resources of the detaining party and combat conditions.]

7.6.5.5 Rights of an Accused (generally consistent)

3-137. With respect to disciplinary proceedings, before any disciplinary punishment is announced, the accused must [should] *be given precise information regarding the offenses…accused*[,] *and an opportunity to explain the conduct and defend himself or herself. The accused must* [should] *be allowed to*

call witnesses [within reason given operational conditions and available resources] *and, if necessary* [and available]*, be given the services of a qualified interpreter (GPW art. 96).* [If conditions do not allow the calling of legitimate and essential witnesses or the availability of a competent interpreter, consideration should be given to delaying judgment and/or attempting to secure translation or virtual testimony without the interpreter's or witness's physical presence.] *A record of disciplinary punishments must* [should] *be maintained by the camp*[/facility] *commander and must* [should] *be open to inspection by representatives of the protecting power (GPW art. 96* [if the detaining power recognizes and is communicating with a protecting power on POW matters]*).*

3-138. With respect to judicial proceedings, [subject to security and political considerations,] *the detaining power must* [should] *notify the POWs concerned, the prisoners' representative, and the protecting power* [(if one is recognized by the detaining power on POW matters)] *of any plan to initiate judicial proceedings against any POWs as soon as possible and at least three weeks before the opening of the trial* [unless there is a need to hold the trial more quickly]. *The notification must* [should] *contain the following information (GPW art. 104):*

- *Surname and first names of the POWs, their rank, their army, regimental, personal or serial numbers, their dates of birth, and their professions or trades, if any*[, if such information has been provided by the POW or others, with the precise information in the notification possibly varying depending on whether the POW is military or civilian]*;*
- *Place of internment or confinement* [unless this would pose a security or political risk]*;*
- *Specification of the charge or charges on which the POWs are to be arraigned, giving the legal provisions applicable; and*
- *Designation of the court that will try the cases and the dates and places fixed for the opening of the trials* [provided this will not pose security risks to the forces or facilities of the detaining party].

3-139. At trial, accused POWs are [may have] *(GPW art. 105):*

- *Assistance by fellow POWs;*
- *Defense by a qualified advocate or*[, at the POWs expense,] *counsel of the POW's own choice* [within reasonable limits, e.g., transportation, security limitations, combat conditions]*;*
- *The right to call witnesses* [within reasonable limits similar to 3-137]*; and*
- *If necessary, the assistance of a competent interpreter (GPW art. 105).*

7.6.5.6 Sentencing and Execution of Penalties

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

3-141. Judgments and sentences pronounced upon a POW must [should] *be immediately reported to the protecting power*[, if one is recognized by the detaining power and communications are in effect for POW matters] *and the prisoners' representative concerned in the form of a summary communication, which shall also indicate whether the POW has the right to appeal with a view to the quashing of the sentence or the reopening of the trial. The communication must* [should] *also be sent* [replace "sent" with "conveyed"] *to the POW in a language that the POW understands* [deleted "*if the sentence was not pronounced in the POW's presence"*] *(GPW art. 107).*

7.6.5.7 Permitted Disciplinary Punishments (consistent and inconsistent)

3-142. ...[D]*isciplinary punishments that may be awarded* [include]*...:*

- *A fine not exceeding fifty percent of advances of pay and working pay for a period of thirty days* [provided such payments are in effect, or fifty percent of funds held for the POW if they are not].
- *Discontinuance of privileges granted over and above the treatment provided for by the GPW* [and this Manual] *for not more than thirty days* [unless the POW has previously been convicted of other infractions and the possibility of lengthier punishment for multiple infractions has been conveyed prior to a new violation].
- *Fatigue duties, not exceeding two hours a day, for not more than thirty days*[, except as noted in the preceding bullet]. *This punishment may not* [delete "not"] *be given to officers.*
- *Confinement for not more than thirty days*[, except as has been noted above]. *In no case shall* [should] *disciplinary punishments be inhuman, brutal, or dangerous to the health of* [the] *POW*[].
- [Other punishments not materially more severe than the preceding which are deemed appropriate by the presiding court and which might be applied to one's own forces in similar circumstances provided the punishments are not inhuman, brutal, or dangerous to the health of the POW.]

7.6.5.8 Prohibited Penalties (inconsistent)

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

- *Collective punishments for individual acts* [except as noted previously]*;*
- *Corporal punishment*[, unless applied for the same offense to the detaining party's own forces and civilians and POWs have been made aware of this possible punishment for specified infractions]*;*
- *Imprisonment in premises without daylight*[, unless no other facility is reasonably available]*;*
- *Any form of torture or cruelty; or*
- *Deprivation of rank or of the right to wear badges*[, if such are allowed by the detaining party].

[A detaining power cannot in reality reduce the rank of a POW who is a member of its enemy's forces except as rank may have relevance in the detention facility. When a POW is in such a facility, rank relevant to that facility is solely at the discretion of the detaining party and can be granted and revoked when and under whatever criteria the detaining party deems appropriate. As for the right to wear badges in a POW facility, that also is at the discretion of the detaining party.]

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

[The preceding is somewhat nonsensical. While all three points are correct, it is irrelevant that a POW is under the duty to escape, owes no allegiance to the detaining power, or is a prisoner through circumstances beyond his or her control. If rules are established which are broken by the POW and the potential punishments are known in advance, the POW has foreknowledge of what will occur if the prisoner does that for which he or she is being punished. Thus, such person had a choice to either comply and not face this punishment, or break the rules and suffer the consequences.]

7.6.5.9 Death Penalty (generally inconsistent)

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

- *A POW and the protecting power shall* [should] *be informed, as soon as possible, of any offense that is punishable by a death sentence under the laws of the detaining power. Other offenses shall not thereafter be made punishable by the death penalty without the concurrence of the power on which the POWs depend.* [The preceding related to communications with protecting powers are only of relevance if a protecting power is recognized by the detaining power and there is agreement that such communications will occur on POW related matters. Although whether to do so is at the sole discretion of the detaining power, ideally the nation or force of which the POW is a member would be notified if a POW has been sentenced to death unless there are military (to include security) or political reasons where it is not advisable for the detaining power to do so. With respect to the last sentence of the official text above, the power on which the POW depends has no authority to concur or not concur with any change in offenses for which the death penalty may be newly applied. Nonetheless, the detaining power should not arbitrarily change death penalty offenses based simply on an arbitrary ruling of a single court or commander, or the offense of a single POW.]
- *A death sentence may* [should] *not be pronounced on POWs unless the attention of the court has been drawn particularly to the fact that:*
  - *Since the accused is not a national of the detaining power, he or she is not bound to it by any duty of allegiance; and*
  - *That he or she is in the power of the detaining power as the result of circumstances independent of his or her own will.*

    [The preceding two considerations are lacking in relevance as to whether the death penalty is pronounced for a POW. It should be based on the actions of the POW for which he or she is charged, whether these are capital crimes under either the law of war (to include this Manual) or domestic/military law of the detaining power, and the POW should have been reasonably aware of the implications of their actions if convicted.]
  - *If the death penalty is pronounced on a POW, the sentence shall not be executed for at least six months after communication to the protecting power of the details related to the death sentence.* [In war, given the nature of some offenses, as well as other considerations, a six-month delay may be unreasonable. However, if notice of the death sentence is conveyed to the protecting power or the State or non-State party of which the POW is a member, the detaining power should ideally give at least one-month notice before carrying out the execution as an arrangement might be negotiated that is mutually beneficial to both parties. If that seems to be a possibility, the one-month time frame can be extended. Nonetheless, there may be occasions where a death sentence may be carried out immediately after a sentence is imposed. If this is to be done, the POW should be guilty not just beyond a reasonable doubt, but beyond all doubt based on reliable evidence, and there should be a compelling reason for expediting the execution.]

7.6.5.10 Appeals (inconsistent)

3-146. [Except as referenced in the commentary/position addressing the last bullet in the preceding, e]*very POW must* [should] *be given the same rights of petition or appeal from any sentence pronounced against him or her as members of the armed forces of the detaining power, with a view to the quashing or revising of the sentence or reopening of the trial. A POW must* [should] *be fully and immediately informed of those rights and of any applicable time limits.* [To the degree there are ongoing communications on such matters, t]*he detaining power must* [should] *also immediately communicate to the protecting power the POW's decision to exercise or to waive the right to an appeal (GPW arts. 106,*

107). [Nonetheless, the preceding does not preclude punishments from being carried out during any petition or appeal process or time frame if there is a compelling reason for doing so.]

7.6.5.11 Notification of Final Conviction (somewhat inconsistent)

3-147. If a POW is finally convicted or if a death sentence is pronounced, the detaining power must [should]*, as soon as possible* [unless there is a compelling military or political reason for doing otherwise]*, send the protecting power* [if there is one on such matters, or to the State or non-State party of which the convicted POW is a member,] *written details of (GPW art. 107):*

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

7.6.5.12 Conditions Under Which Sentences Are to Be Served (generally consistent)

3-148. Any sentence pronounced on a POW must [should] *be served*[, if practicable and without increased risk to the POW,] *in the same establishment and under the same conditions as a member of the detaining power's armed forces would serve a similar sentence. The conditions must* [should] *in all cases conform to the basic requirements of health and humanity established in the GPW*[, or as prescribed in this Manual and as resources and combat conditions permit. As allowed under this Manual, a] *POW deprived of liberty shall* [should] *retain the benefit of complaints to and access by the ICRC and a protecting power, and other benefits related to spiritual assistance, exercise, correspondence and parcels (GPW art. 108).*

3-149. ...POWs undergoing punishment must [should] *not be subjected to more severe treatment than members of the armed forces of the detaining power* [deleted "*of equivalent rank"*] *undergoing the same punishment (GPW art. 108).*

3-150. Women [and those with non-traditional sexual orientations and genders] *are not to be awarded or sentenced to a punishment more severe, or treated more severely while undergoing punishment, than a female or male member of the detaining power's armed forces would be for a similar offense (GPW art. 88). Women sentenced to confinement are to be confined in separate quarters from men and must* [should] *be under the supervision of women*[, provided such personnel and quarters are reasonably available. Additionally, those with non-traditional genders and sexual orientations should also be confined in a manner, and supervised by persons without prejudice against such persons, whereby all prisoners are treated equally.]

7.6.5.13 Effect of Disciplinary Punishment or Sentence Upon Repatriation (consistent)

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

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

7.6.6 Transfer of Prisoners of War (mostly consistent)

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

3-154. [To the extent practicable within existing resources and combat conditions, the following should be done:] *POWs who are scheduled for transfer must* [should] *be identified and listed before departure.* [If reasonably possible,] *POWs must* [should] *be notified in advance so that they can pack their baggage and have an opportunity to inform their next of kin* [if this will not pose a security risk for the detaining party]. *POWs must* [should] *be allowed to take their personal property and any correspondence and parcels that have arrived for them* [subject to other terms of this Manual]. *If the conditions of transfer so require, such as in cases of transport shortages, the detaining power may limit the amount of personal property to what each POW can reasonably carry. No POW may be made to carry more than 25 kilograms (about 55 pounds) each* [unless conditions require and the POW is capable of carrying a heavier load]. *The camp commander must* [should] *take measures in agreement with the prisoners' representative to forward any remaining community property or personal property that POWs could not carry* [if this is possible given resource availability and combat conditions]. *The costs of transfers shall* [should] *be borne by the detaining power (GPW art. 48).*

3-155. Transfer of POWs to or from the custody of another State [or non-State] *party may be desirable in some conflicts due to force structure and manpower constraints, costs, and cultural sensitivities, but is subject to a number of rules in the GPW.* [Generally,] *POWs may* [should] *only be transferred by the detaining power to a power that is a Party to the GPW and after the detaining power is satisfied of the willingness and ability of such receiving power to apply the GPW.* [However, if such a power cannot conveniently or will not willingly accept such prisoners and a party which is not a State or a signatory to the GPW (e.g., a humanitarian organization) will meet its requirements, transfer to such a party is permissible if it will improve the situation of the POWs.] *Any transfer must* [should] *comply with relevant treaty obligations*[, this Manual,] *and policy requirements, including that no detainee may be transferred to another country when a competent authority has assessed that it is more likely than not that the detainee would* [unreasonably] *be subject to torture (GPW arts. 46-48; DODD 2310.01E). The U.S. practice has been to negotiate transfer agreements setting forth the terms and conditions of transfer and care.* [Ideally, t]*o ensure accountability, a POW should not be transferred prior to formal processing and submission of all required information to the information bureau* [if one is effectively operational].

3-156. Once transferred, responsibility to apply the GP [and requirements of this Manual] *rests upon the State* [or other suitable] *party that has assumed custody of the POWs or retained personnel. Nevertheless, the State* [or non-State] *party that transferred the POWs retains a residual responsibility for these personnel. If the State* [or other party] *receiving the POWs fails to carry out the provisions of the GPW in any important respect, the transferring power must* [should, to the degree it is reasonably able,] *upon being notified by the protecting power*[, or other responsible party,] t*ake effective measures to correct the situation or request the return of the POWs (GPW art. 12).* [Realistically, once POWs have left the

control of one party in the midst of a conflict, and unless the shortfalls of the receiving party are especially egregious, it is unlikely that the transferring party will use military or other means to force return or compliance by an ally or a neutral if doing so might undermine the support of the former or the latter becoming or supporting one's enemy. In such situations, only diplomatic efforts will likely be employed.]

7.6.7 Death of Prisoners of War (generally consistent)

3-157. [Provided there is a mutually agreed upon relationship regarding prisoners of war between the detaining power and the protecting power, t]*he protecting power must* [should] *be notified of the death or serious injury of POWs caused or suspected to have been caused by a sentry, another POW, or any other person, as well as any death the cause of which is unknown and underlying incidents must* [should] *be the subject of an official inquiry by the detaining power* [if the detaining power's resources, personnel, and the combat situation allow and there are not political or other responsible reasons for not doing so. If a relationship with a protecting power does not exist and the detaining power has next of kin contact information, it ideally would inform the State or non-State party of which the deceased was a member.]. *If the inquiry indicates the guilt of one or more persons, the detaining power must* [should] *take all* [reasonable] *measures* [given existing circumstances] *for the prosecution of the person or persons responsible (GPW art. 121).*

7.6.7.1 Wills

3-158. Following the death of a POW, the detaining power must [should] *send without delay any will in its possession to the protecting power* [if such a relationship exists, or to the party of which the POW was a member] *and a certified copy must* [should] *be sent to the Central Prisoners of War Information Agency (GPW art. 120)* [if such exists for the conflict in which the death occurs. If such entities or relationships do not exist, the detaining power would ideally send the will directly to the family of the deceased if such contact information is available, to an appropriate authority of which the deceased POW was a member, or an appropriate international or humanitarian organization. A copy of the will ideally should be retained by the detaining power for at least a year after forwarding in the event the original is lost or destroyed.]

7.6.7.2 Death Certificates

3-159. [Provided resources and combat conditions reasonably allow, a] *death certificate must* [should] *be completed, including at a minimum the information contained in the form annexed to the GPW, for all who die as a POW. It must* [should] *be certified by a responsible officer* [or other designated person of the detaining party] *and forwarded, as rapidly as* [reasonably] *possible, to the information bureau*[, or appropriate authority/organization, or family of the deceased directly if such entities do not exist and family contact information does. A copy of this information ideally should be retained until one year after the conflict has concluded if it is reasonably practicable to do so. Provided it is available, t]*he required information includes (GPW art 120):*

- *Service number, rank, full names, date of birth, and army, regimental, personal, or serial number, or equivalent information* [(if a civilian or irregular combatant)]*;*
- *Date and place of death;*
- *Cause of death;*
- *Date and place of burial;*
- *Where applicable, the fact of and reason for, cremation; and*
- *All information necessary* [replace "necessary" with "available and relevant"] *in order to identify the grave or inurnment/columbarium location.*

7.6.7.3 Burial or Cremation and Interment (generally consistent)

3-160. The GPW establishes procedures that must [should] *be followed after the death of a POW (GPW arts. 120, 121).* [If reasonably practicable, b]*urial or cremation of a POW or* [or other d]*etained person shall* [should] *be preceded by a medical examination of the body to confirm the death to enable a report on the death to be made, and, where necessary, to establish identity.* [There will be combat situations where this may not be possible due to the number of such deaths; the need for rapid burial due to religious, disease, sanitation, and other such factors; and the absence of resources to take a more structured and detailed approach.]

7.6.7.4 Maintenance and Records of Graves and Ashes (DOD Law of War Manual) (consistent and inconsistent)

9.34.4 <u>*Maintenance and Records of Graves and Ashes*</u> . [To the degree reasonably possible given resource availability, combat conditions, and no political or other relevant reason for not doing so, t]*he detaining authorities shall* [should] *insure that the graves of POWs who have died in captivity are respected, suitably maintained, and marked as to be found at any time.*

9.34.4.1 <u>*Records Held by the Graves Registration Service*</u>*. In order that graves may always* [delete "always"] *be found, all* [relevant] *particulars of burials and graves shall* [should] *be recorded with a Graves Registration Service* [if] *established by the Detaining Power. Lists of graves and particulars of the POWs interred in cemeteries and elsewhere shall* [should] *be transmitted to the Power on which such POWs depended. Responsibility for the care for these graves and for records of any subsequent moves of the bodies shall* [should] *rest on the Power controlling the territory, if* [replace "if" with "regardless of whether"] *that Power is party to the GPW.* [Once the conflict has concluded, responsibility for maintenance falls to the party of which the deceased was a member provided the detaining party allows access to the interment sites. In certain circumstances, the location of a grave may intentionally not be reported to the party of which the deceased was a member. An example was the secret burial at sea of Osama Bin Laden.]

The Graves Registration Service shall [should] *also identify, record, and respectfully* [delete "respectfully"] *keep the ashes until they can be disposed of in accordance with the wishes of the home country* [although these may be appropriately buried and recorded no differently than other burials].

7.6.7.5 Individual Graves and Cremation (likely consistent)

Deceased internees[, i.e., POWs and other detained persons.] *shall* [should] *be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his* [or her] *expressed wish to this effect* [Geneva Conventions, Article 130]. [Notwithstanding the preceding, deceased POWs can be buried at sea or in space as circumstances dictate.]

7.6.8 Termination of Captivity (generally consistent)

3-161. [Given available resources,] *POWs shall* [should] *be released and repatriated without delay after the cessation of active hostilities (GPW art. 118)*[, provided opposing belligerents are equally complying with this requirement]... **(somewhat inconsistent)**

7.6.8.1 Repatriation of Wounded and Sick (somewhat inconsistent)

3-162. Before the end of hostilities, parties to a conflict are obligated [encouraged] *to repatriate certain POWs who are seriously wounded or seriously sick, after they are fit enough to travel. No such sick or wounded POW may* [should] *be repatriated against his or her will during…hostilities (GPW art. 109).* [If

the detaining power does not have sufficient resources to care for such POWs, they may be transferred to a third party willing to accept them. If none will do so, POWs may be repatriated to the party of which they are a member even if against their will.] *In accordance with GPW Article 110, the seriously wounded and sick are those POWs who meet one of the criteria listed in paragraph 3-164 below. In the case of certain less seriously wounded or sick persons, parties are obligated* [encouraged] *to endeavor to make arrangements for their accommodation in neutral countries (GPW arts. 109-110).*

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

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

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

[While the preceding is that to which a belligerent might generally aspire, there will be certain prisoners of such military, political, scientific, or other importance that they may not be released for even these reasons until the end of the conflict. This should not be seen as a breach of the law of war.]

3-165. Such POWs repatriated before the end of hostilities may [should] *not be employed* [by their forces] *on active military service (GPW art. 117)*[, unless part of a prisoner exchange. Nonetheless, this is an unrealistic expectation of those parties whose personnel have been repatriated if there is a need for such persons to return to military duty. This also should not be seen as a breach of the law of war.]

7.6.8.2 Parole (inconsistent)

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

[The policy of this Manual is that combatants have a moral right to accept parole if they so choose regardless of the policy of the party of which they are a member. This is consistent with the concept of conscientious objection and the right under IHRL to freely choose one's allegiance. Additionally, while a POW should not accept special favors from the enemy which only benefit that person, he or she may accept special favors if, in doing so, those favors benefit other POWs in need. Examples of this might be extra rations, clothing, or medicines which might help another POW who will unduly suffer and perhaps die without such assistance from the favored POW, or a paroled POW having access to items that can be surreptitiously conveyed to non-paroled POWs who suffer shortages of critical items.]

7.6.8.3 Release and Repatriation at the End of Hostilities (generally consistent)

3-168. POWs shall [should] *be released and repatriated without delay after the cessation of hostilities. Commanders should seek guidance from national* [or other senior]*-level authorities on negotiating*

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

7.6.8.4 Repatriation Procedures (generally consistent)

3-169. Repatriation is effected under conditions similar to those for the transfer of POWs during captivity as outlined in paragraphs 3-153 and 3-156. Costs of repatriation at the end of hostilities are to be equitably borne between the detaining power and the power on which the POWs depend, generally with the detaining power bearing the costs of transport to its border or port of embarkation closest to the territory of the power on which the POWs depend (GPW art. 118). If the two powers are not geographically contiguous, the detaining power and the power on which the POWs depend shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation (GPW art. 118). The detaining power may [should] *not delay repatriation solely because the parties to the conflict have not agreed on an equitable allocation of costs (GPW arts. 116, 118, 119).* [Nonetheless, the detaining power does not have an obligation to continue indefinitely to care for POWs at its own expense and may take appropriate steps to end this responsibility in a humane manner. If either the detaining power, or power on which the POW depends, does not have the financial capability to cover its equitable share of repatriation costs, the other power, allied or neutral parties, or international organizations ideally will provide funding for such shortfalls so all POWs can be quickly and safely repatriated.]

3-170. Articles of value, and any currency [of a POW] *that has not been converted into that of the detaining power, must* [should] *be returned to the POWs upon repatriation.* [If a POW's funds have been converted into the currency, or military payment certificates, of the detaining power, the detaining power should exchange this for a solvent international currency at the then-current exchange rate and return this to the POW as well.] *Any items not returned must* [should] *be sent to the information bureau* [if one exists, or to another appropriate international or humanitarian organization]. *Baggage limitations may be imposed similar to those allowed during the transfer of POWs outlined in paragraph 3-139; those personal effects POWs cannot take with them are forwarded once the parties agree regarding costs and procedures (GPW art. 119).*

CHAPTER 8

Wounded, Sick, Medical Personnel/Facilities/Transport, Combat Dead

I swear by Apollo Physician, by Asclepius, by Hygieia, by Panacea, and by all the gods and goddesses, making them my witnesses, that I will carry out, according to my ability and judgment, this oath and this indenture.

I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing.

Into whatsoever houses I enter, I will enter to help the sick, and I will abstain from all intentional wrong-doing and harm, especially from abusing the bodies of man or woman, bond or free. And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets.

Now if I carry out this oath, and break it not, may I gain for ever reputation among all men for my life and for my art; but if I break it and forswear myself, may the opposite befall me.

From Hippocratic Oath in Original Greek

I have seen surgical "sisters," women whose hands were worth to them two or three guineas a week, down upon their knees scouring a room or hut, because they thought it otherwise not fit for their patients to go into. I am far from wishing nurses to scour. It is a waste of power. But I do say that these women had the true nurse-calling—the good of their sick first, and second only the consideration what it was their "place" to do—and that women who wait for the housemaid to do this, or for the charwoman to do that, when their patients are suffering, have not the making of a nurse in them.

If a patient is cold, if a patient is feverish, if a patient is faint, if he is sick after taking food, if he has a bed-sore, it is generally the fault not of the disease, but of the nursing.

Florence Nightingale

That in italics in this chapter is from FM 6-27 unless otherwise noted.

8.1 Basic Principles

8.1.1 FM 6-27

4-1. LOAC imposes certain obligations on parties to an international armed conflict regarding the wounded, sick, and shipwrecked…, as well as those identified as exclusively engaged in collecting, caring for, or transporting them. Soldiers and Marines must:

- *Respect and protect wounded, sick, and shipwrecked military and other personnel to whom the Geneva Conventions apply during an armed conflict (GWS art. 12, 15; GWS Sea art. 12, 18; consider AP I art. 10(1)).*
- *"Respect and protect" means that these persons generally may not be knowingly attacked, fired upon, or unnecessarily interfered with (see DOD Law of War Manual, 7.3.3).*

- *Provide for the respectful recovery, accounting for, and disposal of enemy dead in a manner that facilitates the identification and proper disposition of remains (GWS art. 16-18; GWS Sea art. 19, 20; consider AP I art. 32-34).*
- *Respect and protect enemy military medical personnel, facilities, units, and ground transports in the performance of their duties. It is prohibited to make them the object of an attack or unduly interfere with their medical function, provided that those persons do not engage in, and those objects are not used to engage in, acts outside their humanitarian duties that are harmful to the enemy (GWS art. 19-21, 24-27, 35; GWS Sea art. 22-27; consider AP I art. 10, 12, 21).*

4-2. The fact that an enemy force has violated its obligations by firing upon U.S. medical personnel endeavoring to care for wounded U.S. military personnel does not [automatically] *provide a basis for U.S. military personnel to respond by violating U.S. obligations by, for example, intentionally firing at enemy medical personnel, or denying medical care to captured enemy military personnel…* [Nonetheless, as addressed elsewhere, legitimate, authorized reprisals may be permissible in certain situations.]

8.1.2 Position of this Manual (inconsistent)

This Manual's position can, in certain situations, be materially different than the formal law of war with respect to the protections afforded military medical personnel, facilities, and transport and the combatants for whom they care. This is based on three considerations:

(a) the frequent significant imbalance among opposing belligerents as to their ability to maintain the health of their forces and provide medical evacuation and treatment for their wounded and sick,
(b) the primary purpose of medical care often not being humanitarian but rather the maintenance and fielding of an effective fighting force, to include possibly one of oppression, and
(c) the intent that those being medically cared for will be able, as soon as possible, to return to duty and fulfill their responsibilities as combatants.

With respect to (a), complex considerations arise when belligerents are engaged in a conflict where one has few if any medical capabilities and those of its opponent are extensive. This is often the case when States are engaged in conflicts with non-State parties, and large, wealthier States with smaller, poorer ones. Troop morale, survival, and quicker return to combat can be greatly enhanced when such capabilities exist which provides a military advantage to the better resourced belligerent.

With respect to (b), to survive and for their health and welfare, all people need food, clothing, shelter, medical care, and the ability to defend themselves. The formal law of war allows all persons—military and civilian— the right to defend themselves. Providing food, clothing, shelter, and medical care for *non-combatants* during a conflict are considered humanitarian endeavors, and those engaged in this are generally protected under the law. However, providing *combatants* with food, clothing, and shelter for their survival, health, and welfare is not considered a humanitarian service. Those engaged in doing so do not have protected status and can be targeted. Yet, under the formal law of war, providing medical care *is* considered a humanitarian service entitled to certain legal protections. Such a position is illogical.

All persons providing food, clothing, shelter, ***and*** medical care to combatants are engaged in helping their country or cause field the most effective fighting force possible (put another way, the most efficient killing machine) capable of overcoming an enemy as quickly and efficiently as possible. As such, all military support personnel may be considered legitimate targets, including medical staff under certain circumstances.

Additionally, if medical personnel truly wish to receive protected status, they should weigh whether the humanity of their treating sick and wounded combatants does not exceed the harm which can occur from their having done so. Using Nazi Germany as an example, the mission of its medical corps was not

humanitarian per se but to ensure the good health of its armed forces and return sick and wounded combatants as quickly as possible to their work of illegally invading countries, destroying resistance movements, and exterminating those considered undesirable. It is unreasonable for those part of or allied with a country or territory invaded or occupied, or those whose families, friends, and people are being sent to death camps, to provide special protection to medical services aiding the return as quickly as possible of enemy combatants engaged in these endeavors.

In light of the above, medical support services cannot automatically expect to be provided protections not afforded to others supporting the fielding of the best offensive/oppression force possible. A paradigm shift is required, whereby medical professionals, facilities, and transport are no longer always viewed as humanitarian and, thus, non-combatants. Rather there will be times they can be viewed no differently than other military support personnel who are legitimate targets.

With respect to (c), as harsh as it may seem, unless combatants are longer-term disabled (see FM 6-27, 3-164 under 7.6.8.1 of this Manual), there is no fundamental logic that, when wounded or sick, they should automatically be any more protected than other combatants who are generally unarmed and helpless. For example, recruits in training are often unarmed, involuntarily conscripted, and yet still legitimate military targets. Both these groups—trainees and the wounded and sick—are undergoing a transitional process whose primary purpose is to prepare them for combat or otherwise contribute to the war effort. Additionally, many of those who are wounded, injured, and sick can still, or will soon be able to, fulfill certain duties of a combatant and should not necessarily be immune from targeting.

In light of the preceding, under this Manual, basic rules regarding the protection of military medical personnel, facilities, transport, and combatants for whom they care are as follows:

1. Emergency and operating rooms and facilities, locations, transportation, and personnel providing emergency or surgical services or the care of those who cannot be returned to duty for physical or psychological reasons within 30 days are not to be targeted. Likewise, medical facilities, locations, transport, and personnel treating military families, non-combatant civilians, prisoners of war, enemy combatants, or the longer-term disabled should not be targeted.
2. Medical clinics, care facilities and locations, transport, and personnel that treat combatants who remain capable of fulfilling duties as combatants or will be able to do so within 30 days after treatment are not automatically protected from being targeted, i.e., clinics might be legitimate targets but not critical care. Whether to carry out such attacks is at the discretion of the enemy.
3. Wounded, injured, or sick combatants who are still able to fulfill responsibilities related to the conflict or will be able to do so within 30 days are not automatically protected from being targeted. Whether to carry out such attacks is as the discretion of the enemy.
4. Based on the preceding:
    a. After emergency treatment or surgery, combatants who will be able to fulfill duties related to the conflict within 30 days should be separated from those who will not be
    b. Only those facilities, locations, transport, and personnel referenced in 1, to include combat medics, are entitled to display or wear the Red Cross or comparable symbol
5. None of the preceding allows unarmed and non-resisting medical personnel or wounded, injured, and sick to be killed when encountered in combat. Rather they should be treated no differently than surrendering, captured, or other non-resisting enemy personnel.

A belligerent which invokes its rights under 2 and 3 above should understand that, in doing so, it may increase the risk that its own sick and wounded captured by the enemy may die or be further and more seriously harmed if they are being treated in the same facilities or transported in the same vehicles,

aircraft, or ships as their enemy's wounded and sick. Further, it may also cause loss of international support and possibly that of its own people.

8.2 Basic Rules (generally consistent)

4-4. … members of the medical service should understand their special duties…under the law of war. They must [should]*…:*

- *Provide medical care to the wounded or sick, whether friend or foe.*
- [Except in self-defense, r]*efrain from engaging in acts harmful to the enemy*
- *Continue to care for other members of the U.S. armed forces, if captured by the enemy…*
- [Do not steal from wounded, injured, sick, or dead of the enemy or one's own forces.]

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

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

8.3 Classes of Persons Protected by the GWS and GWS Sea (consistent except as noted)

4-6. The GWS and GWS Sea protect those persons listed in Article 13 of the GWS and the GWS Sea (including members of the armed forces of a party to a conflict and persons authorized to accompany the armed forces) who are wounded, sick, or shipwrecked—that is, those who are incapacitated by wounds, sickness, or shipwreck such that they are no longer capable of fighting, provided they abstain from any hostile act and do not attempt to escape (see paragraph 2-105 regarding wounded and sick as hors de combat). The GWS also applies to the wounded and sick who are POWs (see paragraphs 4-11 through 4-16). The GWS and GWS Sea also protect military chaplains exclusively engaged in religious ministration and military medical personnel exclusively engaged in the provision of medical care or the administration of medical units and establishments (GWS art. 24; GWS Sea art. 37). Wounded and sick civilians benefit from provisions of the GC pertaining to the treatment and protection of the wounded and sick (GC art. 16). [Simply being shipwrecked, wounded, or sick does not necessarily mean those who are no longer are a cohesive, effective fighting unit or unable to carry out their duties. Under this Manual, such persons must first surrender or be obviously helpless before receiving the protected status of POWs.]

8.4 Duration of Application of the GWS (consistent)

4-7. The GWS applies to persons protected by the GWS who have fallen into the hands of the enemy until their final repatriation (GWS, art. 5). The GSW [GWS] *Sea does not specify when it ceases to apply, but only states that GWS Sea only applies "to forces on board ship." (GWS Sea art. 4). Once persons who are covered by its provisions reach land, the GWS, or possibly the GPW or GC*[,] *will be applicable to them.* [This language introduces some confusion related to the language of 4-6 unless "shipwrecked" means only that the vessel is damaged and destroyed and those aboard are either swimming or in life rafts or boats rather than their having reached shore.]

8.5 Special Agreements

4-8. The GWS and GWS Sea provide for special agreements to be negotiated between the parties for protection of the wounded and sick (see GWS arts. 6 and 15; GWS Sea arts. 6 and 18). Special agreements may not adversely affect the situation of the wounded and sick or military medical personnel or chaplains, nor can such agreements restrict the rights GWS and GWS Sea confer on them (GWS, art. 6; GWS Sea, art. 6)[, except as noted in 8.1.2 and related sections **(inconsistent)**]. *Wounded and sick and military medical personnel and chaplains will enjoy the benefits of any special agreements so long as GWS or GWS Sea applies to them, except when express provisions in such agreements or in subsequent agreements provide otherwise or when more favorable measures have been taken with regard to them by one of the parties to the conflict (see GWS, art. 6; GWS Sea, art. 6).*

8.6 Non-Renunciation of Rights (inconsistent)

4-9. [Provided it is done voluntarily while of sound mind with no coercion, w]*ounded and sick, as well as military medical personnel and chaplains, may not* [eliminate "not"] *renounce, in whole or in part, their rights secured to them by the GWS or GWS Sea or by special agreements (GWS, art. 7; GWS Sea, art. 7).* [As amended, this would allow a severely wounded combatant in extreme pain with no medication or access to needed medical facilities and little chance of survival to renounce any further treatment (equivalent to informed refusal and advance directives/living wills) and even consent to euthanasia.]

8.7 Protection and Care of the Wounded, Sick, and Dead (partially inconsistent)

4-11. [Except as noted elsewhere, a]*ll wounded and sick, including members of the armed forces, other persons who are entitled to POW status, and civilians, must* [should] *be respected and protected…whether or not they have taken part in the armed conflict (see GWS, arts. 12-13; DOD Law of War Manual, 17.14.1; consider AP I, art. 10). They shall* [should] *be treated humanely and*[, within available resources and combat conditions,] *cared for by the party to the conflict in whose hands they have fallen, without any adverse distinction based on sex, race, nationality, religion, political opinions,* [celebrity, rank, gender or sexual orientation,] *or any other similar criteria. They shall not be willfully left without medical assistance and care, nor exposed to contagion or infection*[, if practicable given available medications and facilities, one's mission, and combat conditions]. *They shall not be treated violently, murdered, or exterminated. Only urgent medical* [or essential operational] *reasons will authorize priority in the order of treatment, a process called triage* [however, see 8.8.1 below]. *Women* [replace "Women with "All persons"] *shall* [should] *be treated with all consideration due to their sex* [replace "due to their sex" with "regardless of their gender or sexual orientation"]. [The original language of the preceding is inappropriately sexist. All persons should be treated with "all consideration" regardless of gender or sexual orientation whatever that may be, not just women.] *A party to the conflict that is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit,* [should] *leave with them part of its medical personnel and materials to assist with their care (GWS, art. 12).*

8.7.1 Search for Casualties (consistent except possibly last two sentences)

4-12. At all times, and particularly after a military engagement, parties to the conflict must [should]*, without delay, take all possible* [reasonable] *measures*[, given the combat situation and available resources,] *to search for and collect the wounded and sick to protect them from pillage and ill-treatment and to ensure their adequate care. Further, the parties to the conflict shall* [should] *search for the dead to prevent them from being despoiled. Whenever circumstances permit, armistices or cease-fires must* [should] *be arranged or local arrangements made to permit such collection and removal as well as transport or exchange* [dead,] *wounded*[,] *and sick from the battlefield...(GWS, art. 15). The obligation to*

search for, collect, and take affirmative steps to protect the wounded, sick, and dead are subject to practical limitations. Military commanders are to judge what is possible and to what extent they can commit their personnel to these duties (see DOD Law of War Manual, 7.4.4). [Enemy and/or civilian casualties may be left on the battlefield by the prevailing force if it does not have the medical capacity, personnel, or transportation to care for these casualties, or the operational requirements of its mission would make the provision of care impractical. In such situations, if practicable, local civilians or enemy authorities should be notified in the event they might be able to provide care and collect the dead. If enemy forces respond with combat personnel, these would be subject to being targeted unless previous arrangements had been made.]

8.7.2 Record of Wounded, Sick, and Dead Falling into Enemy Hands (consistent)

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

- *Designation of the power on which he or she depends;*
- *Service, unit, personal, or serial number*[, or other identifying information if a civilian]*;*
- *Surname;*
- *First name or names;*
- *Date of birth;*
- *Any other particulars shown on an identity card*[, tag,] *or disc;*
- *Date and place of capture or death; and*
- *Particulars concerning wounds, illness, or cause of death.*

4-15. Burials or cremation of deceased personnel under the GWS must [should, provided resources and combat conditions permit,] *be preceded by a careful examination, if possible by a medical examination, of the bodies with a view to confirm the death, establish identity of the deceased, and enable a report of death to be made. One half of the double-identity disc*[/tag] *(or the disc*[/tag]*, itself, if it is a single disc*[/tag]*) should be left with the body of the deceased interred on land. Cremation may* [should] *only occur for imperative reasons of hygiene or for motives based on the religion* [or prior request] *of the deceased. The dead must* [should] *be honorably interred, if* [reasonably] *possible* [given combat conditions]*, according to the rites of the religion to which they belonged* [if this is readily known]*. At the commencement of hostilities, a graves registration service must* [should] *be established to allow for subsequent exhumations and to ensure the identification of bodies and possible transportation to the home country*[, or home territory of a non-State party. As appropriate, t]*he graves registration service will* [should] *also keep ashes until they may be properly disposed of in accordance with the wishes of the home country*[/non-State party/family]. If ashes are buried, information of the location and identification of the person interred will be provided, if practicable, to the appropriate party.] *Lists showing the exact location and markings of the graves must* [should] *be exchanged between parties to the conflict; this will facilitate post-conflict return of remains to the next-of-kin…(GWS art. 17; consider AP I art. 32-34).*

8.7.3 Voluntary Care (consistent)

4-16. The military authorities may appeal for volunteers from the local inhabitants to assist with the collection and care for, under the respective military authority's direction, the wounded and sick… Once volunteers are identified, they are to [should] *receive necessary protection and facilities. Should the adverse Party take or retake control of the area, that Party must* [should] *likewise grant these persons the same*[/similar] *protection and the same*[/similar] *facilities. No one must* [should]*…be molested or convicted for having given aid or care to the wounded and sick (GWS art. 18; consider AP I art. 17).*

[L]*ocal inhabitants' voluntarily giving treatment to the wounded and sick do not relieve military authorities of their obligations to care for the wounded and sick.*

8.7.4 Personal Property of the Dead (somewhat consistent)

2-195. During international armed conflict, personal property recovered from the enemy dead becomes the property of the United States [replace "United States" with "recovering party"] *for the purpose of returning it to the next-of-kin of the deceased. The individual service member or civilian accompanying the force who captures or finds such enemy property acquires no* [automatic] *title or claim to it*.

[Under this Manual, personal property of the dead is considered to be items such as personal photographs, letters not of intelligence value, jewelry, identification discs or tags, and similar items, but not military insignia, uniforms, decorations, arms, or equipment. Provided resources exist, personal property of enemy dead which comes into a belligerent's possession should be returned to the next-of-kin in both international or non-international conflicts. This is also addressed in Chapter 7 (Prisoners of War).]

8.8 Fluid Combat Conditions and Operations (not addressed in detail in FM 6-27)

8.8.1 Triage (likely partially inconsistent)

In war, just as during civil disasters, if casualties are significant and medical capacity, facilities, and transportation limited, triage should be applied. Those injured should be quickly evaluated and divided into three categories: (a) non-critical injuries where treatment can be delayed, (b) critical injuries where immediate treatment has a reasonable likelihood of saving the person, and (c) more serious injuries where available treatment is unlikely to save the person. Available medical care and transportation should focus first on (b). Within this category, treatment and transportation may be provided first to one's own casualties, and to persons of essential importance to one's mission or cause. As practicable, categorization should continually be reassessed as new casualties occur, casualties are treated, and the condition of individual casualties change. It should be understood that realistically, and as part of custom/common practice, a belligerent may choose to treat its own casualties in the third category ahead of civilian and enemy casualties in the second. This should not be viewed as a violation of the law of war. Without this provision, morale and support of one's forces may suffer with severely wounded enemy killed before medical assistance arrives.

While not triage in the traditional sense, if a combat unit has responsibilities which cannot be reasonably delayed during or following a battle, that unit is not obligated to forego these responsibilities in order to provide medical care, collection, or transport of enemy or civilian casualties who temporarily come under its control. If possible, it should inform the chain of command of their presence and location which can convey this information to civilian authorities or enemy forces as appropriate.

8.8.2 Battlefield Dead (likely consistent)

The bodies of those who die in combat often pose major challenges for the engaged belligerents and local civilians as to handling, burial, recording, and reporting the deceased. Notwithstanding the requirements presented above for proper handling and reporting of the dead, it is the position of this Manual, that which will dictate what should be done on the battlefield is a function of:

- Number killed
- Whether these are friendly forces, enemy combatants, or local non-combatants
- Degree of communications and nature of relationship with local authorities and residents, and with enemy forces
- Likely duration of safe access to the battlefield

- Availability of resources to transport, bury/cremate, secure valuables and identifying information, and record and handle whatever information and property secured
- Immediacy of need to vacate battlefield after conclusion of fighting to continue military operations or achieve force protection

With respect to battlefield deaths not part of one's own forces, the senior on-the-ground commander will make the initial decision as to that which can be immediately accomplished. They should convey to higher command what was or was not done. Higher command would determine whether additional steps should be taken and communications opened with local authorities, local civilians, or enemy forces/ representatives.

Special consideration should be given to trying to ensure that the presence and leaving, if necessary, of those killed does not create frictions with or hardships on nearby residents and the civilian population more broadly, especially if their support and cooperation is essential, which is often the case in asymmetrical warfare. To the degree reasonable in advance of combat, one's forces should develop understandings with local authorities or residents as to the best way to handle battlefield dead under different circumstances, which would include consideration of local religious and cultural customs.

8.8.3 Mercy Killing (inconsistent)

It is the position of this Manual that, during active, fluid combat situations and operations and when medical facilities, transportation, medications, medical supplies, and qualified medical personnel are not reasonably available, mercy killing is permissible of personnel of one's own forces, the enemy, and even civilians. Conditions required for this to occur include but are not necessarily limited to:

- A person within one's control or command is so severely injured, there is a strong probability they cannot live with the medical care reasonably available with this to be confirmed, if possible, by medical personnel first hand or through available means of communications.
- There is no reasonable means to transport the injured person to a medical facility or, if that is possible, to do so would likely endanger more lives than might be saved.
- The pain and suffering of the injured person are considered unbearable.
- There are no medications available to sedate or control the pain whose use would not put at risk others who may need such medications or have a greater likelihood of survival.
- If conscious, the injured person gives his or her permission.
- The senior person present makes the decision subject to the preceding.

While the mercy killing of a civilian is permissible under such conditions, it should generally not be done without approval of an appropriate civilian, e.g., family member, employer, local official, religious leader.

8.8.4 Desecration, Mutilation (likely consistent)

To the degree possible given conditions and resources, bodies of combatants and non-combatants should be treated with respect and not desecrated or mutilated for reasons such as anger, revenge, souvenirs, retaliation, and gallows humor. This means that one should not urinate on bodies, cut off ears or other body parts, pose bodies in macabre or supposedly humorous positions, hang them from trees or structures, or photograph them other than recording what occurred or for identification purposes. Any photographs taken should not be posted on social media, or shared with media or others without authorization unless there is a compelling reason (e.g., prevent the coverup of an atrocity), or otherwise inappropriately used. Nonetheless, if the preceding occurs, they should generally be handled non-judicially.

8.9 Medical Units, Facilities, Personnel, and Transport

8.9.1 Loss of Protection (see 8.1.2 for exceptions)

4-18. If military medical units or facilities are used to commit, outside their humanitarian duties, acts harmful to the enemy, they may forfeit their special LOAC protections, but only after due warning (with, in all appropriate cases, a reasonable time limit), and only after such warning has remained unheeded (GWS art. 21; DOD Law of War Manual, 7.10.3). [Such forfeiture is immediate, however, if the harm to the enemy is material, observable, and verifiable, e.g., if medical personnel, vehicles, aircraft, or vessels take offensive actions against the enemy, they immediately forfeit their protection even without any warning from the enemy **(consistent)**.] *Consistent with DOD policy, misuse of the protected status of any military medical unit or facility, or medical ground transport, whether by U.S. forces, coalition forces, or enemy forces, should be reported immediately through the chain of command to the appropriate combatant commander (see DODD 2311.01E).* [If after a warning resulting from a first transgression, there is a second transgression in the same area of operation, the transgressed-against party, at its sole discretion, may assume medical facilities and personnel of its enemy's forces can be considered legitimate targets **(possibly inconsistent)**. Knowing this is policy, the enemy may attempt to entice the transgressed-against party to attack medical facilities, personnel, and transports as part of a lawfare/public information campaign to undermine support for the transgressed-against party. Thus, that party may choose to continue to respect all medical facilities and personnel while assuming they may have at least token enemy forces or military materiel inside that must be dealt with appropriately with the least harm to the facility and non-combatants. It should be understood that in active combat situations where medical personnel or facilities are used to commit acts harmful to the enemy, due to the absence of interpreters, means to communicate, or the safety of one's forces, it may not be reasonably possible to warn those personnel or facilities to desist or they will become targets **(uncertain).**

[When medical personnel, facilities, and transport are imbedded in operational combat units and forward operating bases likely to become engaged in exchanges of fire, the opposing force is not expected to be able to adequately plan for, distinguish, and avoid harming medical persons, facilities, and transport. Examples of medical personnel who might be legitimately harmed incidentally would be the medic of an infantry platoon or special operations team, a medical unit and facility located within a forward operating base which is attacked by mortars, rockets, and artillery, and a medical unit or vehicle moving at night accompaning combatant transport which enters the kill zone of an ambush. **(consistent)**

[This means that if an opposing force breaches the perimeter of a FOB or other defended position and comes upon or enters a facility that is obviously marked as medical in purpose, that facility and those inside should not be objects of attack unless the medical staff or patients take up arms against or attempt to overcome members of the attacking force entering the facility. It also means that if, on the battlefield, an attacking force comes across what is obviously someone administering first aid to a wounded combatant, that person would not become the object of attack unless they posed a reasonable threat. Likewise, a readily recognizable medical facility in a village or enemy encampment would generally not be attacked during a drone strike where greater target precision is often possible. An exception may be if key leadership or critical and especially lethal military materiel is located within or adjacent to the facility and the perceived military necessity for elimination of such leadership or materiel is determined to exceed the incidental harm to medical personnel and patients located in the target area. **(consistent)**

[Nonetheless, there may be circumstances as outlined in 8.1.2 where medical personnel, facilities, transport, and the sick and wounded will not be protected as outlined in the above. The first clause of 3-18 allows this when medical resources are not used for truly humanitarian purpose. **(inconsistent)**]

8.9.2 Self-Defense (generally consistent)

4-20. The [general] *obligation to refrain from the use of force against a medical unit acting in violation of its mission and protected status without due warning does not prohibit individuals or units from*

exercising their right of self-defense (see DOD Law of War Manual, 7.10.3.2[, and commentary in 4-18 above]*).*

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

- *...Military medical personnel and units may be armed for defense of themselves and the wounded and sick in their charge against unlawful attacks (GWS, art. 22).* [Unless a legitimate target under 8.1.2, such arms should be restricted to personal sidearms for medical personnel, and rifles or shotguns for those guarding entrances to a medical facility, wing, or room. Unless a legitimate target, it does not include machine guns, grenades or grenade launchers, and other such weapons. This does not preclude combatants with such weapons being assigned perimeter protection for a medical unit or facility. When this occurs and it is uncertain to the attacking force precisely what is being protected, these combatants may be fired upon until it is obvious that the only thing being protected is medical in nature and not a threat.]
- *... Equipping hospital ships and military medical aircraft with defensive devices—such as chaff for protection against over-the horizon weapons or similar threats—is not prohibited, provided that such devices are not used to commit acts harmful to enemy military forces acting in conformity with the law of war.* [This does not allow medivac helicopters to be armed with machine guns or medical ships and other aircraft being armed with offensive weapons if special protection is expected. If protection of any of these is felt necessary beyond measures like pistols, shotguns, rifles, automated defensive weapons, and chaff, then separate warships and armed aircraft should be tasked with this responsibility. This reduces the likelihood the enemy mistakes fire from a medical aircraft or ship as offensive in nature.]

[If situations exist where the medical capabilities of opposing belligerents are materially imbalanced and a lesser-resourced-belligerent has invoked its right under this Manual to treat military medical personnel, facilities, and transport no differently than non-medical support, medical personnel, facilities, and transport can arm, defend, and protect themselves and those being cared for the same as any other person or object which can be targeted.]

8.9.3 Other Acts Not Cause for Loss of Protection (generally consistent)

From 4-22:

- *...The use of non-medical personnel, in the absence of armed orderlies, as a picket, sentries, or as an escort for security against unlawful attacks…(GWS, art 22).*
- *The temporary presence of small arms and ammunition recovered from the wounded and sick, within the military medical unit, installation, hospital ship, or sick-bay before they* [such items] *are handed over to competent authorities...*
- *The presence of military veterinarians and their equipment within a medical unit or facility or transport to which they are not assigned...*
- *The temporary presence of* [non-injured] *combatants within a military medical unit or facility (for example, to visit or leave wounded or to escort a prisoner to facilitate the prisoner's care)... As a feasible precaution,* [non-sick and wounded] *combatants should avoid unnecessary presence within a medical unit or facility.* [If such combatants in a medical facility begin firing on enemy troops, those fired upon may take appropriate action to eliminate the threat.]

- *…The temporary presence of objects that are military objectives, such as a tactical vehicle or aircraft within a military medical unit or facility (for example, a military vehicle that is not protected as medical aircraft or transport used to deliver the wounded and sick to a medical facility)…(see DOD Law of War Manual, 7.10.3.6). However, commanders of military medical units and facilities should establish procedures during international* [and non-international] *armed conflict to ensure that the non-medical transports do not remain unnecessarily within or near military medical units or facilities.*
- *…Care for civilian wounded or sick...*
- *…Equipment intended exclusively for medical purposes or military medical personnel over and above normal mission requirements, either stockpiled in military medical units and facilities or transported in medical ground transports...*

8.9.4 Capture of Military Medical Units and Facilities (consistent and inconsistent)

4-23. Military medical units and facilities may be captured. In the event of capture, its personnel are entitled to continue to perform their medical duties so long as the capturing force has not itself ensured the necessary care for the wounded and sick found in the unit or facility (GWS art. 19). **(consistent)** *The material of mobile medical units that fall into the hands of the enemy must* [should] *be reserved for the care of the wounded and sick* [of either side in the conflict as well as civilians] **(uncertain)**. *The material and stores of mobile medical units and fixed medical establishments that fall into the hands of the enemy must* [should] *not be intentionally destroyed* [except as might be permitted under 8.1.2] **(inconsistent)**.

4-24. In the event of urgent military necessity, commanders of forces in the field may make use of the buildings, material, and stores of a fixed military medical establishments, provided they make previous [delete "previous" and replace with "reasonable"] *arrangements* [given combat conditions and force protection requirements] *for the welfare of the wounded and sick who are being cared for in the establishment (see GWS art. 33)* **(consistent)**.

8.9.5 Medical Aircraft (consistent with 4-25 except for reference to 8.1.2; inconsistent with 4-26)

4-25. [Provided they are not inappropriately armed, not offensively firing on enemy forces, or permissible under 8.1.2, m]*edical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick, and shipwrecked, and for the transport of medical personnel and equipment, must* [should] *not be attacked, but must* [should] *be respected by the belligerents, while flying at heights and times, and on routes, specifically agreed upon by the belligerents concerned (GWS art. 36). Such aircraft, while designated or operating as medical aircraft, may not be used also for military purposes, such as to transport able-bodied combatants*[, to include those who are civilians,] *or to carry ammunition to combat forces (see DOD Law of War Manual, 7.14.2). Medical aircraft must* [should] *obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flights after examination, if any (GWS art. 36).*

4-26. … [K]*nown medical aircraft, when performing humanitarian functions, must* [should] *be respected and protected.* [Except as noted in 8.1.2,] *such aircraft do not constitute a military objective that is liable to being made the object of attack. Thus, even if not flying pursuant to an agreement, such aircraft shall not be deliberately attacked or fired upon, if identified as protected medical aircraft. For example, if there is no agreement and a military force happens upon a medical aircraft belonging to an enemy State* [or non-State party]*, the aircraft must* [should] *not be made the object of attack until all other means of control (such as directing the aircraft to land and submit to search) have been exhausted. A medical aircraft that is not flying pursuant to a special agreement that seeks to claim protection as medical aircraft must make every effort to identify itself and to inform the enemy State* [or non-State party] *of its*

status and operation, such as its flight times and routes. For example, an unknown aircraft within a theater of military operations would often be reasonably presumed to be a military objective, and the aircraft must take affirmative steps to rebut this presumption... (GWS art. 36; see DOD Law of War Manual, 17.14.1).

[In addition to that referenced in 8.1.2, the position of this Manual varies somewhat from 4-26. Whether for humanitarian assistance to civilian populations or medical support of military forces, non-fixed wing aircraft, e.g., helicopters that land in an active combat situation, even if appropriately identified as medical transport, are not protected from being engaged and shot down. The reasons are three-fold for "hot LZs": (1) it is often not possible for the attacking force to direct fire against armed opponents so precisely it will not endanger such aircraft and their crews (see commentary in 4-28 and 4-29 below for small naval craft performing humanitarian and medical transport missions which face the same risks), (2) the attacking forces cannot be assured that such aircraft may not be bringing in non-medical personnel and supplies or taking out non-wounded combatants; and (3) such aircraft are often armed and, while it might be reasoned as only being for self-defense, in reality in a hot LZ, such aircraft may be landing with its weapons laying down suppressing fire that is little different than other offensive fire being employed by the forces the medical helicopters are supporting.

[In light of the preceding, the party undertaking medical evacuation in active combat situations is responsible for balancing the benefits and risks of arming medical transportation, possible rules of engagement, and the risks it is willing to expose its medical personnel to with the nature of the conflict, the intensity of the fighting, and whether its enemy has agreed to respect appropriately marked aircraft.]

8.9.6 Hospital Ships and Coastal Rescue Craft (generally consistent except for 4-27, last clause of 4-29, and possibly 4-30)

4-27. Military hospital ships (such as ships built or equipped by States [delete "by States"] *specially and solely with a view to assisting, treating, and transporting the wounded, sick, and shipwrecked)* [deleted "*may in no circumstances;*"] [should not] *be attacked or captured, but must* [should] *be respected and protected, provided their names and descriptions have been notified to the parties to the conflict ten days before the ships are employed (GWS Sea, art. 22). Military hospital ships are to have all exterior surfaces painted white with at least one large, dark red cross (or other protected medical symbol as in paragraph 4-30) on each side of the hull and on the horizontal surfaces and distinctively marked further as specified in Article 43 of GWS Sea. Military hospital ships, commissioned civilian hospital ships, and authorized neutral civilian hospital ships that meet the applicable requirements must* [should] *be respected and protected and are exempt from capture (GWS Sea art. 24; DOD Law of War Manual, 7.12.4). ...*[A]*ny hospital ship in a port that falls into the hands of the enemy is authorized to leave the port and the religious, medical, and hospital personnel of the ship and its crew may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board (GWS Sea, arts. 29 and 36).*

This Manual differs with 4-27 on several points:

1. Such ships may be captured and/or disallowed from leaving a port if the forces of the capturing party do not have medical personnel, equipment, and facilities sufficient to meet its needs. In some respect, this is little different than using other captured military materiel for the captor's use or seizing stores of food or other supplies to feed or benefit its own forces or civilians, both of which are legally permissible when occurring on land. In capturing such a ship, the capturing party becomes responsible for the patients on that ship just as they are for any other wounded, sick, injured, or other persons who become its prisoners of war. The preceding is generally

consistent with 4-22 which allows on land the detaining party's use of medical personnel, equipment, materials, and facilities when captured.

2. While it is ideal that hospital ships be painted all white, if a critical need arises for additional sea transport for the wounded, sick, and injured, e.g., putting a passenger or cargo ship into service as a hospital, that ship need not be all white so long as it is adequately marked with medical emblem signage that is reasonably visible to enemy forces. In such situations, if possible, it is important to inform enemy forces that the purpose of this ship has changed to that of a hospital, especially if the ship has been used previously to transport troops, military supplies, or for other military purposes.
3. All enemy persons on captured hospital ships become detained persons governed by other sections of this Manual. However, authorized persons of a neutral party who are on the ship, whether patients, crew, or religious and medical staff, should generally be allowed to return to their neutral party if they are in no way acting with or in support of the enemy.
4. The ten-day notification requirement for the names and descriptions of hospital ships is aspirational and is intended to provide sufficient time between notification and use of the ship for medical purposes to ensure the ship is not accidently attacked. However, if the ship has been appropriately and visibly marked, even if not all white, unless weather, smoke, or other factor obscures that the ship's use is for medical purposes, there is generally no legitimate reason for an attack on that ship even if there has been no notification (except as permissible under 8.1.2)

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

4-29. The phrase "so far as operational requirements permit" acknowledges the risk to which small craft, because of their small size, are exposed when working in a combat environment. Their small size may increase the likelihood of misidentification by enemy or friendly forces, or it may not be feasible to avoid incidental harm to them. They act at their own risk during or after any engagement (GWS Sea, art. 30). Although small craft may be exposed to certain risks, if a party to a conflict has recognized the craft [as operating solely for medical purposes]*, it is prohibited from making a deliberate attack on them (GWS Sea, art. 27)*[, except as may be allowed under 8.1.2 **(inconsistent)**.

4-30. Religious, medical, and hospital personnel under the GWS Sea who are [d]*etained to care for the wounded and sick at sea and are later* [d]*etained to care for the wounded and sick on land are subject to GWS on landing (see GWS Sea, art. 37). Similarly, wounded and sick personnel put ashore who previously may have been engaged in the land-sea battle are subject to GWS once put ashore (see GWS Sea, art. 4).* [Under this Manual, there is no distinction as to protection, rights, and responsibilities between medical personnel and the wounded and sick who are detained or operating on land versus those detained or operating at sea. Also, this Manual does not recognize "retained" status.]

8.10 Distinctive Emblems (consistent)

4-31. To serve as the visual expression of the protections accorded under the 1949 Geneva Conventions and Additional Protocol III, to medical and religious personnel, and medical units, facilities, transports, and equipment, four distinctive emblems have been established and recognized[:] *1) a Red Cross; 2) a Red Crescent; 3) a Red Crystal, and 4) a Red Lion and Sun (not currently in use) (GWS arts. 38-42; GWS Sea arts. 41-43; consider AP I, art. 18; AP I, Amended Annex I, arts. 3-4; AP II art. 12; and, AP III art.*

2). A party may [should] *only use one emblem at a time. The chosen emblem will* [should generally] *be displayed in red on a white background.*

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

8.10.1 Display by Personnel (generally consistent except as noted)

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

- [Certain m]*ilitary medical personnel and chaplains (GWS art. 39, 40; GWS Sea art. 41, 42; consider AP I, Amended Annex I, art. 5(4))* [with the emblem when used by qualifying chaplains and other religious personnel required to have a black R superimposed on the red medical emblem, as religious personnel may have functions beyond those of providing personal spiritual advise and counseling of a non-military, non-political nature]*;*
- [Certain a]*uxiliary medical personnel, while carrying out their medical duties (GWS art. 41);*
- *Members and medical staff of the Red Cross Movement; that is, official representatives of the ICRC, the International Federation of Red Cross and Red Crescent Societies, and national Red Cross societies in accordance with the GWS (see GWS art. 44);*
- *Staff of recognized aid societies of neutral countries (see GWS art. 27); and*
- *Staff of national societies or other voluntary aid societies, auxiliary to, or assisting, the military medical services… (see GWS art. 26).*

[With respect to the last three bullets, such aid societies should be recognized by all relevant belligerents as authorized to operate in the conflict area for these emblems to be automatically respected. Additionally, those medical personnel permitted to display this emblem should be consistent with 8.1.2.]

4-34. Wearing of the Red Cross armlet by U.S. military medical personnel is subject to service authorization and may be limited by tactical conditions. The emblem does not in itself confer protected status, but it facilitates the identification of protected objects and persons (DOD Law of War Manual, 7.15.3.2). When authorized, such military medical personnel, staff of national Red Cross societies, and staff of recognized aid societies of neutral countries, may wear on the left arm an armlet displaying the appropriate distinctive emblem and issued and stamped by competent military authority (see GWS art. 40). Such personnel are required to [should] *bear an identity card that states in what capacity its possessor is entitled to protection under the GWS and that is embossed with the stamp of the military authority (see GC art. 40). Auxiliary medical personnel require similar authorization to wear an armlet in a similar manner and carry similar identification, but such armlets are to bear a smaller distinctive emblem (see GWS art. 41).* [While the above states that such armlets should be on the left arm, this does not allow such person automatically to become a target of attack if the emblem is on the right arm. It is unclear, unreasonable, and unnecessary that auxiliary medical personnel must wear a smaller emblem if they are carrying out only qualifying medical responsibilities. Additionally, provided the person is in fact providing only qualifying medical care or services, such person is permitted to display the distinctive emblem without this having been approved by an official authority. Further, while identification, and thus protection, may be more difficult, medical personnel in combat may use an emblem which is black

on green, grey, brown, or camouflage rather than red on white although this may increase the risk of accidentally being targeted.]

8.10.2 Display by Military Medical Units and Establishments (somewhat consistent)

4-35. The GWS provides for military medical units, both fixed and mobile, and military medical establishments of parties to a conflict to display the distinctive emblem when they are entitled to protection under the GWS, subject to authorization by competent military authority (see GWS art. 42). The GWS also provides for such display by medical units belonging to neutral countries, when authorized to lend their services to a belligerent (see GWS arts. 27, 43). [If units, transportation, and physical locations are in fact providing medical care and services exclusively for either qualifying combatants (see 8.1.2) or non-combatants, even without formal approval by an officially designated authority, they are entitled to display distinctive emblems that they are appropriately medical in nature and thereby should be protected from being specifically targeted unless there is a strong probability the emblem is displayed improperly.

8.10.3 Display by Military Medical Aircraft (generally consistent)

4-36. The GWS and GWS Sea require that military medical aircraft (those aircraft exclusively employed for the removal of the wounded, sick, and shipwrecked [who are physically or mentally incapacitated]*, and for the transport of medical personnel and equipment), shall* [should] *bear the distinctive emblem, together with their national insignia, on their lower, upper and lateral surfaces (see GWS art. 36; GWS Sea art. 39).* [Nonetheless, if this is done not quite as required by accident or intent, this does not deny protection and does not allow the aircraft to be used for other military purposes.]

8.10.4 Mandatory Removal of Distinctive Emblem from Vehicles, Naval Vessels, and Aircraft (consistent)

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

4-38. If ground transport[, naval vessel,] *or aircraft is used temporarily for medical transport work, such ground transport*[, vessel,] *or aircraft should bear the distinctive emblem only while on the medical mission and will be entitled to protection of the Conventions only for its duration. If the vehicle*[,vessel,] *or aircraft is to be used for tactical purposes, military authorities must* [should] *take the greatest care to remove all distinctive emblems as soon as the ground transport*[, naval vessel,] *or aircraft are no longer employed as medical transport (see GWS, arts. 35, 36).*

8.11 Medical Care Provided by Impartial Humanitarian Organizations (consistent and inconsistent)

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

- *Medical care* [by humanitarian organizations] *during armed conflict is an activity that is fundamentally of a neutral, humanitarian, and non-combat character...* [If this medical care is for combatants and their supporters on, or heavily weighted to, only one side of a conflict, it is not "fundamentally of a neutral, humanitarian, and non-combat character," but quite the opposite. It will help one of the belligerents field a more effective combat force than its opponent. For this reason, there needs to be agreement by all affected belligerents if care is to be provided by a humanitarian organization to combatants and related supporters of either side.]

- *…Combatants must* [should] *not use the presence*[ ] *or movement of the wounded and sick to attempt to make certain points or areas immune from seizure; to shield military objectives from attack; or otherwise shield or favor one's own military operations or to impede the adversary's military operations.*
- *The wounded and sick shall* [should] *receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall* [should] *be no distinction among them founded on any grounds other than medical ones.* [It is this Manual's position that for all medical personnel and facilities handling the wounded, sick, and injured in a conflict, the preceding sentence does not preclude providing medical care for serious injuries first to one's own forces or to persons, to include civilians and detained persons, whose military, scientific, intelligence, political, or other similar value is of special importance to the war effort, force protection, or ongoing military operation. If a humanitarian organization is operating independently and only caring for non-combatant civilians, it need not take these factors into consideration. However, if such organization is operating with the permission or under the supervision of the force in control of the humanitarian organization's area of operation and requested to do so by that force, the organization is to comply with such instruction as they relate to the care of that belligerent's combatants, prisoners, and detained civilians.]

4-41. Impartial humanitarian organizations may offer their services to any of the parties to the conflict. [It should be recognized, however, that if humanitarian organizations offer their services to only one side or operate only in the territory of one belligerent, the opposing belligerent may not view them as a neutral party. If this occurs, the unserved belligerent may remove its authorization, protection, and support for such humanitarian organization except as would be required for military provision of medical services under 8.1.2 in order to qualify as protected.] *States* [and non-State parties] *should not arbitrarily withhold their consent to the activities of humanitarian organizations. Where a State* [or non-State party] *has accepted the services of an impartial humanitarian organization, it must* [should] *not regard such services, including the provision of medical care, as unlawful and subject to punishment.* [The intent of the preceding sentence is unclear. The subject of the sentence, "it," perhaps should have read, "the enemy belligerent of that State or non-State party."] *If a State* [or non-State party] *does withhold its consent to the activities of the humanitarian organization and that organization enters the theater of conflict anyway, it* [the humanitarian organization] *does so at its own peril.*

4-42. Personnel, units, transports, and facilities belonging to impartial humanitarian organizations providing medical care shall [should] *be respected and protected* [to the extent reasonably practicable given combat conditions and available resources]. *Such personnel, units, transports, and facilities of impartial humanitarian organizations are those that are exclusively engaged in humanitarian functions* [authorized by the belligerent(s) controlling or operating in the area in which the humanitarian organization is operating]. *Such personnel, units, transports, and facilities must* [should] *not be made the object of attack or unnecessarily prevented from discharging their proper functions* [if they are carrying out their responsibilities in an impartial manner consistent with that which has been agreed to by all relevant belligerents]. *The protection to which such units (including units composed of personnel and facilities) and transports are entitled shall* [should] *not cease unless they are used to commit hostile acts outside their humanitarian function* [or violate the terms of the agreement which allows them to function in the conflict area]. *Protection may* [should]*, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.* [Additionally, if there is no reasonable alternative than for the humanitarian organization to depart the conflict area, any time limit given should be sufficient to break down equipment and facilities, pack, secure transportation, and exit the area of operation.] *Any attack must* [should] *comply with all applicable*

rules and principles of LOAC [and this Manual]*, such as the prohibition on attacks that are expected to cause excessive incidental harm and the requirement to take feasible precautions in conducting the attack. Combatants must* [should] *not use the presence or movement of such personnel, units, transports, and facilities to attempt to make certain points or areas immune from seizure or attack; to shield military objectives from attack; or otherwise to shield or favor one's own military operations or to impede the adversary's military operations.*

4-43. [Provided they are operating in an area with the authorization of the party/parties to the conflict controlling or operating in that area, p]*ersonnel belonging to impartial humanitarian organizations providing medical care must* [should] *be granted*[, to the degree practicable given personnel, resources, and combat conditions,] *all available help in the performance of their duties, including by establishing appropriate channels of communication with such organizations. They must* [should] *not be subject to harassment or attacks for having performed their humanitarian duties for the wounded and sick. They must* [should] *not be compelled to carry out tasks that are not compatible with their humanitarian mission. In the performance of their duties, they may* [should] *not be required to give priority to any person except on medical grounds* [except as otherwise indicated in 4-40].

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

[Additional Clause: Humanitarian organizations operating within an area for which they have received authorization of the belligerent party(s) generally controlling or operating in that area are entitled to arm themselves similar to military medical units for the defense of their facilities, patients, personnel, equipment, transport, and supplies. **(uncertain)**]

8.12 Further Guidelines Regarding Medical Emblems (inconsistent)

In light of the language of 8.1.2 which is contrary to the formal law of war and custom, with respect to the use of emblems identifying medical services personnel, transport, and facilities, be they military, civilian, or humanitarian organizations, should, as appropriate, superimpose in black on the red cross, crescent, or other recognized emblem which is displayed the following:

a. "C" when these (military or civilian) are primarily for the care of non-combatant civilians
b. "EC" when these are military and primarily for emergency care of injured combatants first off the battlefield
c. "CC" when these are military and primarily for the continuing care of injured combatants who will not be able to return to duty for at least 30 days

This is essential where blanket protection of medical personnel, transport, and facilities is not recognized by one or more parties to the conflict. The preceding three *are* eligible for blanket protection; others may not be, e.g., clinics serving only combatants with non-critical health conditions, facilities where sick or injured combatants can soon return to duty. If a belligerent does not have the capability for separate medical facilities, personnel, or transport, they may legally use the above three emblem designations.

CHAPTER 9

Civilians

It's never acceptable to target civilians. It violates the Geneva Accords, it violates the international law of war and it violates all principles of morality.

Alan Dershowitz
Lawyer, Academic

There are no innocent civilians… So it doesn't bother me so much to be killing the so-called innocent bystander.

Actually, I think it's immoral to use less force than necessary, than it is to use more. If you use less force, you kill off more of humanity in the long run, because you are merely protracting the struggle.

Curtis LeMay
U.S. Air Force General

We burned to death 100,000 civilians in Tokyo—men, women, and children. LeMay recognized that what he was doing would be thought immoral if his side had lost. But what makes it immoral if you lose and not immoral if you win?

Robert MacNamara
U.S. Secretary of Defense
The Fog of War (2003 documentary)

9.1 Introduction

This Manual divides civilians into two categories or classes: combatants and non-combatants. This chapter will focus on the classification of and conduct towards non-combatant civilians and additional rules which apply when civilians are considered combatants.

9.2 Civilian Combatants and Non-Combatant (often inconsistent)

9.2.1 FM 6-27

2-11. LOAC does not expressly prohibit civilians from taking a direct part in hostilities, but it does provide that civilians who do take a direct part in hostilities forfeit protection from being directly attacked (DOD Law of War Manual, 5.8; consider AP I art. 51(3); AP II, art. 13(3)). Civilians who have ceased to take a direct part in hostilities may not be made the object of attack, but could still be subject to detention for their previous hostile acts. Such civilians generally do not enjoy the combatant's privilege—that is, they do not have combatant immunity, and, if captured, they may be prosecuted for their belligerent acts under the domestic law of the capturing State. [This Manual's position is that, if a civilian takes part in hostilities, it has the same protections as those which FM 6-27 allows for what it terms "lawful combatants." However, for those whose acts are against the State or non-State party of which they were originally a citizen or member, they may be charged with treason and, if convicted, executed regardless of whether they had ceased such acts when detained.]

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

2-13. In the context of when civilians may be directly targeted, neither treaty law nor customary international law provides a definition of the phrase "direct part in hostilities." At a minimum, it includes actions that are, by their very nature and purpose, intended to cause actual harm to the enemy. Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations. Taking a direct part in hostilities, however, does not encompass the general support that members of the civilian population provide to their State's war effort, such as working in a munitions factory far from the battlefield or buying war bonds. [The second and third sentence are inconsistent with the last. Given the first sentence of this paragraph, the last sentence is based, not on the law per se, but the interpretation of the intent of the law by those who drafted and approved FM 6-27. This Manual has a significantly different interpretation than reflected in the second sentence and is first found in Chapter 1 of this Manual as to classes of persons. Based on this Manual's interpretation, the second sentence from FM 6-27 may not always be applicable as interpreted above, and such civilians may be considered combatants if certain conditions are met. Many of the following contextual considerations (see that highlighted in bold) provide a basis for expanding those civilians who can legitimately be designated combatants as per section 1.4.3 of this Manual.]

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

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

[That highlighted in bold is, in part, the basis for expanding those civilians classified as combatants.]

9.2.1.1 Examples of Taking a Direct Part in Hostilities (consistent)

2-15. The following acts are generally considered [by the U.S military as] *taking a direct part in hostilities, which deprive*[ ] *civilians who perform them of the protection against direct attack. These examples are illustrative…, (See DOD Law of War Manual, 5.8.3.1)*[and do not include all acts by civilians considered hostile under this Manual].

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

9.2.1.2 Examples of Acts not Considered Taking a Direct Part in Hostilities

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

- *Expressing mere sympathy or moral support for a party's cause* [Under this Manual, there would not be an automatic protection of such persons as non-combatants but rather would be based on the nature and degree of this support **(inconsistent)**.]*;*
- *Making general contributions to a State's war effort (for example, buying war bonds or paying taxes to the government that will ultimately be used to fund the armed forces* [Under this Manual, buying war bonds might be sufficient for a person to be considered a combatant if done voluntarily and willingly by that person and of a material amount **(inconsistent)***;* paying taxes would not.]*;*
- *Providing police services* [so long as such services are not to identify, capture, kill, transport, or incarcerate enemy combatants **(possibly inconsistent)**] *(for example, police officers maintaining public order against common criminals during armed conflict);*
- *Engaging in independent journalism or public advocacy (for example, opinion journalists writing columns supporting or criticizing a State's war effort)* [Under this Manual, there is not this degree of broad-based protection; see below sub-sections on Political and Advocacy Organization Members and Social Media Users; Media; and Academics **(inconsistent)**]*;*

- *Working in a munitions factory or other factory supplying weapons, materiel, or other goods useful to the armed forces of a State but not in geographic or temporal proximity to military operations* [Again, under this Manual, there is not this degree of broad-based protection; see below sub-section Personnel of Companies Providing Services or Materiel Related to the War Effort **(inconsistent)**]*; or*
- *Providing medical care or other impartial humanitarian assistance* [for non-combatant civilians, families of combatants, or longer-term disabled combatants (see medical care to combatants addressed in Chapter 8, especially 8.1.2) **(sometimes consistent)**] .

9.2.1.3 Duration of Liability to Attack (inconsistent with 2-17; consistent with 2-18)

2-17. Civilians who have taken a direct part in hostilities must [should] *not be directly attacked after they have permanently ceased their participation because the military necessity for attacking them has passed. The assessment of whether a person has permanently ceased direct participation in hostilities must* [should] *be based on a good faith assessment of the available information. For example, a civilian might engage in an isolated instance of taking a direct part in hostilities. This isolated instance is likely to involve multiple acts because taking a direct part in hostilities includes deploying or moving to a position of attack and exfiltrating from an attack. If this participation, however, was an isolated instance that will not be repeated, then no military necessity for attacking that person exists after that individual has ceased taking a direct part in hostilities. Accordingly, the civilian must not be made the object of attack after he or she has ceased taking a direct part in hostilities. Other legal consequences from this participation may continue, however. For example, civilians often may be detained, interned, or prosecuted because of these actions.* [In some respects, the preceding is nonsensical. Its premise seems based on the assumption that the enemy of a civilian who has taken a direct part in hostilities can somehow reasonably discern when next encountered that such civilian may have somehow "permanently ceased participation in" and/or the action was "an isolated instance of taking a direct part in hostilities." This is an unreasonable assumption. Enemy combatants cannot be expected to know whether a hostile act was isolated or final act of that civilian or whether additional acts will follow.

[The position of this Manual is that, if a civilian has committed a hostile act against his or her enemy and that enemy is certain the act was carried out by that civilian, the enemy party can legitimately consider this person a combatant subject to targeting.

[Nonetheless, if such civilians are targeted, it should be made clear why they are being targeted so that such an action is not interpreted as an unjust or random act of violence against a supposedly protected person. If at any time it becomes reasonably known that the civilian is no longer a combatant and unlikely to return to being one, the belligerent against whom the hostile act was carried out, may choose to forego the targeting of this person. If this is done, it may also be something that should be made public so others who have carried out hostile acts may be more inclined to refrain from doing so again to avoid being targeted.]

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

to lawful combatants. Adoption of such a rule would risk diminishing the protection of the civilian population. [The preceding essentially reflects this Manual's position outlined in brackets after 2.17.]

9.2.2 Positions of This Manual (frequently inconsistent)

This section will elaborate on distinctions as to whether a civilian is considered a combatant or non-combatant based on situational considerations, and elaborates on that found in 1.4 of this Manual. Categories of civilians where such situational distinctions will often have to be made include:

1. Leadership
2. Diplomatic and other foreign service personnel
3. Law enforcement personnel
4. Other government employees
5. Political or advocacy organization members and social media users
6. Media (to include social media)
7. Academics
8. Criminals
9. Persons providing and producing services or materiel relevant to the war effort
10. Conscientious objectors

The deciding consideration is generally whether a person plays a role in how or whether a war is fought, continues, financed, supplied, supported, or conducted. When they do not or when this is uncertain, such persons should be considered non-combatants. Otherwise, they are combatants, not "innocent civilians," and should not have special protection or immunity from the risks of a war they have helped wrought, actively support, or direct. As such, they may be targeted within guidelines outlined below.

Nonetheless, it should be re-emphasized that even when such civilians are considered combatants, this does not mean they automatically should become targets of attack. Whether this should occur would be based on an application of the principles of the law of war as relevant to each of the above categories and even to individuals within a category.

9.2.2.1 Leadership

a. FM 6-27

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

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

b. Position of this Manual (somewhat inconsistent)

While there are exceptions, most wars are fought, financed, and continued based on decisions made by dictators, monarchs, elected/appointed leaders, and private sector leaders and lobbyists, not necessarily by soldiers and their senior officers. If a country is engaged in a conflict, such civilians are legitimate targets. If parliamentary/legislative members vote for a war or its financing or against discontinuing the war, they are legitimate targets. Likewise, private sector leaders and lobbyists who press and advocate for war publicly, or are behind the scenes influencers, may equally be considered combatants. Even constitutional monarchs can be legitimate targets if they actively support and advocate for the war and are the inspirational head of a nation or movement. Appointed officials heading ministries/departments of defense/war, intelligence, cyber, and national security also are legitimate targets. Staffs of all the preceding may be similarly classified. Such targeting is not considered illegal assassination precluded under the formal law of war and U.S. Executive Order 12333. Only if these civilian leaders and their staffs do none of the preceding are they not legitimate targets.

Generally, in international conflicts, local leaders should not be considered combatants. However, in non-international conflicts and when hostilities are being conducted in or near a non-national administrative geographic area, local officials may become actively engaged in the war effort in some manner and thereby be considered combatants. Nonetheless, even then, care should be taken to determine whether they are actual collaborators and true supporters of the war effort, or whether they are simply trying to look out for the welfare of their citizens to the best of their ability in often untenable situations.

As indicated in the last sentence of 2-67, there may be reasons why a belligerent may choose not to target civilian leadership. Nonetheless, this Manual does not support the premise of this sentence as written, that *comity,* or the need to "ensure authorities exist with whom peace agreements can be concluded," is sufficient reason for not attacking legitimate civilian leaders. If restraint does occur, it will be for diplomatic, political, or other substantive reasons. It should be understood that by not targeting civilian leadership, a war might last longer with more death, suffering, and destruction, or one may be negotiating peace with a stronger, more competent adversary.

Family members of targeted leaders and lobbyists should not be considered civilian combatants unless it is reasonably known they actively direct, support, advocate for, supply or otherwise engage in or assist the war effort. Thus, when targeting such persons, ideally this should be done when they are not with their families. Nonetheless, if their strategy to avoid attack is for such person to always be with family or other non-combatant civilians, especially children, they may still be targeted if they are of sufficient importance militarily or politically, even if family members, children, or other civilians may become incidental casualties. When this occurs, part of the operational planning for the attack should include a lawfare/information operations component that may be implemented in advance of and/or after the attack. Advance notification might include a public information initiative that such persons are using innocent civilians, to include children, as human shields and, if they persist, they are putting such civilians at risk.

9.2.2.2 Diplomats and Other Foreign Mission Personnel (possibly inconsistent)

a. Introduction

As a corollary to the preceding section on elected and appointed leaders, it is also the position of this Manual that certain diplomats and other foreign mission personnel of a belligerent party serving in any State or territory other than country or territory of the enemy of that belligerent, are not automatically protected from targeting during war. Certain of these persons may be killed or captured in their embassy, other foreign mission buildings, and homes, and while traveling and otherwise carrying out their responsibilities. Whether they are legitimate targets, and whether the decision is made to carry out a targeting operation against an individual or group of foreign mission personnel, is based on the same

assessment process outlined elsewhere in this Manual related to whether a person is a combatant or non-combatant and, if a combatant, whether they should always be targeted.

There is a mistaken belief by many that, under formal law of war, attacks on embassies, consulates, and other foreign mission facilities and the harming of those who work therein is illegal under international law. Except international law which precludes targeting civilians in general and sets rules for carrying out targeting operations in a neutral country, treaty law does not preclude third party attacks on diplomatic and other foreign mission personnel or facilities except within the State of the attacking party or when diplomatic personnel are given permission by their enemy to pass through its territory.

b. Vienna Convention on Diplomatic Relations and Optional Protocols

The following are key articles from the 1961 Vienna Convention on Diplomatic Relations and Optional Protocols most relevant to protections for foreign mission personnel and facilities in/by receiving, sending, and third-party States:

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 27

5. The diplomatic courier…shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in [certain cases].

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.

3. Third States…shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

Article 41

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

[Except in the event a third-party State has issued a visa or otherwise allowed a sending State's foreign service personnel or couriers to pass through its territory traveling to or from the sending and receiving States, nowhere in this treaty (nor in the later treaty on consular affairs) does it restrict third party States from targeting its enemy's foreign mission personnel or facilities. Rather it is the position of this Manual that the Vienna Convention focuses only on the receiving and sending States' prohibitions and responsibilities in the receiving State, and third States through which diplomatic personnel are given permission to pass. It is the receiving State, not all other States or parties, which cannot violate the

sanctity of diplomatic mission facilities, or the well-being of their diplomatic personnel, in the country of the receiving (or third-party) State, as well as do all that is reasonable to ensure the safety of a sending State's mission facilities and personnel in the receiving State.]

c. Position of This Manual (possibly inconsistent)

With respect to diplomatic and other foreign mission personnel, in addition to the preceding paragraph, this Manual's positions are:

a. Any diplomatic and other foreign mission personnel (or family members) of a belligerent who engage in the following are considered combatants if their activities have relevance to the conflict in question.
   - Collecting intelligence or developing intelligence networks related to the war effort
   - Negotiating military or trade agreements relevant to the war
   - Securing financial or other support from the receiving party which will benefit the war effort
   - Coordinating military alliances, training, or joint operations relevant to the war
   - Undertaking other tasks which may benefit the sending party's ability to successfully conduct its military operations against its enemy

   Such civilian combatants may be targeted by their enemy in their own territory and in territory of neutral States and non-State parties within the guidelines found in Chapter 11 Neutrals. All other diplomatic and foreign mission personnel of the belligerent are considered non-combatants and not to be targeted by their enemy.
b. Sending parties should not house offices or residences of foreign mission personnel who are considered combatants in buildings with foreign mission personnel who are not combatants in order to reduce the likelihood of incidental non-combatant casualties if the combatant foreign mission personnel are attacked by their enemy.
c. If diplomatic relations are not suspended between belligerents on opposite sides of the conflict who are the receiving and sending parties, the two parties should comply with the Vienna Convention as it pertains to foreign mission facilities and personnel in their own State or controlled territory.
d. If it is believed that one or more of the foreign mission personnel of the sending party are engaged in one or more of the above activities in the receiving State or territory, there are provisions within the Vienna Convention for requiring removal of such persons without their being liable for targeting. If the sending party continues to post personnel to its mission who engage in such activities, the receiving party can discontinue diplomatic relations and all personnel of the sending party must remove from the territory of the receiving party.
e. If the sending party violates that allowed under Article 41(3), and allows its foreign mission personnel to engage in activities supportive of its war efforts in the territory of the receiving party, the receiving party no longer has an obligation to protect facilities, persons, and property of the sending party's personnel so involved. Before removing this protection, the receiving party should provide the sending party 30-days-notice so the latter can correct the situation, close its mission, or provide additional security on its own at a level acceptable to the receiving party.
f. Diplomatic relations will often be suspended during conflicts between opposing belligerents. Yet, it remains important that dialogue between belligerents can continue. While this may be done through third-party missions in the territory of receiving belligerent parties, it can be important that these occur directly between belligerents. To facilitate this, sanctuary countries, cities, and organizations should be established wherein no diplomatic and foreign mission

personnel of a belligerent party should be targeted regardless of the activities in which they are engaged. This would not preclude requiring certain personnel of a belligerent posted to a sanctuary location located in the territory of their opposing belligerent to vacate their post if they are identified as actively engaged in intelligence, sabotage, or other similar activities against, rather than just communications with, the host party. Unless agreed otherwise by the belligerents and other countries, cities, and organizations, such sanctuaries will be:

Countries	*Cities*	*Organizations*
Costa Rica	Geneva	Food & Agriculture Organization
Georgia	Hague	Intl. Committee of the Red Cross
Oman	New York	International Monetary Fund
Senegal	Rome	United Nations
Singapore	Washington	World Bank
Switzerland		World Health Organization

9.2.2.3 Law Enforcement Personnel (possibly inconsistent)

Law enforcement personnel are only considered combatants when some or all of their responsibilities include researching, identifying, capturing, eliminating, protecting against, transporting, incarcerating, killing, or executing enemy combatants and intelligence personnel. Except in or near actual war zones, such personnel are generally part of national level law enforcement agencies and holding facilities. In the United States, this would include Federal Bureau of Investigation; Secret Service; Alcohol, Tobacco, and Firearms; and the federal prison system.

Less frequently will it include non-national law enforcement entities such as state bureaus of investigation, highway patrols, sheriff departments, and municipal police forces. However, any of these may be brought in to assist national law enforcement on specific operations, or to be on the lookout for or to arrest or temporarily hold certain individuals. When this occurs and local law enforcement personnel become engaged in such activities against enemy combatants, they may be considered combatants for the duration of such operations and activities, or the likelihood they will reengage in such activities.

All law enforcement combatants (national or local) are legitimate targets both on and off duty. Exceptions may be non-leadership administrative staff when they are off duty and should be evaluated as to their potential as assets for recruitment. Family members should not be considered legitimate targets for attack simply because they are related to or living with a law enforcement combatant who is attacked.

Where local law enforcement personnel are apt to become more heavily involved in actions directed against enemy combatants and intelligence personnel is when kinetic portions of the conflict include or are near the communities or administrative areas for which they are responsible. When this occurs, they should not automatically be considered combatants for two reasons: (1) their responsibilities may have nothing to do with actions against enemy combatants/intelligence personnel, or (2) they may be being forced to do what they do unwillingly, especially if an outside force is controlling the area in which they work. If such unwilling cooperation can be reasonably determined, rather than being seen as solely combatants, such law enforcement personnel can be viewed as potential clandestine assets to be recruited.

If a belligerent law enforcement agency or department has some but not all of its personnel involved in actions against enemy persons and does not wish its non-involved personnel to become targets or incidental casualties, it should make every effort to keep its non-combatant personnel physically separate and make this known publicly. As this may simply be subterfuge, their enemy should make its own assessments as to whether such personnel and facilities so designated are truly non-combatant.

9.2.2.4 Other Government Employees (possibly somewhat inconsistent)

As with law enforcement, most other ministries, departments, and agencies engaged in the war effort are most likely at the national level. In the United States, such entities will include the Department of Homeland Security, Department of Defense, Central Intelligence Agency, National Security Agency, National Security Council, and Defense Intelligence Agency. Transportation, Justice, and Commerce may or may not be. Other countries will have similar war and intelligence related ministries, departments, and agencies. In the new world of cyber operations, entities subject to targeting by an enemy in war would also include ministries, departments, or agencies which provide cyber capabilities for the war effort. All employees of such entities, both on and off duty, may be considered combatants with their facilities being legitimate targets for attack. As with law enforcement, the exception may be off-duty, non-leadership administrative staff who, again, may be potential clandestine assets and recruits.

Those national level ministries, departments, and agencies whose employees should not be considered combatants are those with no direct involvement in the war effort. These would include those related to food and agriculture, public health (to include veterans affairs), housing, environmental protection, education, family and child services, immigration (except when arresting, holding, and transporting enemy agents attempting to enter or exit a belligerent's territory), customs, postal services, and other similar entities. Additionally, seldom will employees of such state and local government entities be considered combatants or their facilities legitimate targets for attack.

There are personnel of other government entities at the national, state/regional, and local levels where the distinction between combatant and non-combatant is not as clear-cut. These include but are not limited to foreign affairs, commerce, treasury/finance, transportation and ports, communications, energy, and public utilities. In some cases, their facilities or equipment may be targets but not their personnel; sometimes, all three will be targets; other times, none. Given this uncertainty, care should be taken only to target those persons, facilities, and equipment which are truly important to the war effort.

9.2.2.5 Political or Advocacy Organizations and Social Media Users (inconsistent)

Conflicts often occur because of the votes, support, advocacy, financing, profiteering, or acquiescence of civilians. If, because of this, soldiers are sent off to die, kill others, and inflict destruction and suffering on an enemy, such civilians are no more innocent or worthy of protection from targeting by the enemy than the soldiers they send and those who legally suffer under international law as a result.

An argument can be made that all civilians of age to vote who, even at the risk of death, do not actively oppose tyranny in their country, or their government engaging in unjust wars, might legitimately be considered combatants. Nonetheless, this Manual limits those portions of the general civilian population considered combatants not addressed elsewhere in 9.2 to members and staff of political and advocacy organizations who openly and actively support the war effort, and providers and users of social media engaged in the same. This latter group would include hackers, online trolls, creators and purveyors of online bots, operators of fake news sites, and internet service providers and social media companies who allow such activities on their platforms. It would include individuals who use the internet to spread false or biased information, stories, and commentaries related to the war, especially if that war is an unjust one, and who use the internet to recruit others to their cause.

Those who are members of political and advocacy organizations and use social media for purposes not related to the conflict would be non-combatants and not subject to targeting. To avoid becoming a target, a person simply need not join such political or advocacy organizations or use social media in any way that might be construed as taking a position in support or continuation of the war effort.

As with all preceding and following categorizations of civilian combatants:

1. These organization members and social media users are potential targets at all times as are their facilities, equipment, and social media hard- and software;
2. Their families and homes are not automatically targets unless it is known that family members also are engaged in activities associated with the waging or continuation of the war, or their home is the location where such operations are planned, mounted, or carried out; and
3. Even though they are legitimate targets, special consideration should be assessed before action is taken against them.

9.2.2.6 Media (likely inconsistent)

Belligerent governments and military forces regularly conduct information, psychological, and lawfare operations to secure support for their cause, and undermine that of the enemy and are generally permissible targets under the formal law of war. Media personnel, to include social media, who engage in similar activities, either as individuals or part of a company or organization are considered combatants little different than those part of a military or government unit performing similar tasks. They are, in essence, *private persons who engage in acts of hostility* [and] *forfeit many of the protections to which members of the civilian population are entitled…* [FM 6-26, 1-11]. Such media personnel would include print journalists; radio and television commentators (and possibly guests); talk show hosts; bloggers; and those who help produce, publish, distribute, or broadcast their writings or programs.

Additionally, internet service providers and social media firms, e.g., Facebook, Twitter, You Tube, which allow distorted, false, inflammatory, misleading, and other similar information or commentary on their sites related to the war when this could have reasonably been excluded, may become targets for attack. Prior to any such attack, such entities should be notified as to areas of concern and given a reasonable time to correct or shut down problematic users, information, or communications.

The preceding does not preclude the media from reporting or commenting on the war without being considered a combatant. Non-combatant media personnel and entities are those who report, analyze, and comment factually and objectively on the war as opposed to distorting, misleading, producing, or disseminating false information or commentary, or advocate for initiating or continuing a conflict, especially when such conflict is unjust.

When media personnel are embedded within military units, while they may remain non-combatants if they are reporting factually and objectively on the conflict, practically speaking, in most instances of active fluid combat, they may not always be able to be distinguished from actual combatants. In such situations, their injury or death is not a violation of the law of war. Rather they are incidental casualties. It is only when such media persons have been captured, or are in a large and distinguishable group that the attacking force can reasonably determine in advance their protected status, can they expect treatment afforded non-combatants. To avoid being targeted, frontline media personnel should wear distinctive signage on their clothing.

There will be those who will suggest that allowing any media personnel to be targeted as combatants no matter whether they distort, mislead, produce, or disseminate false information will reduce transparency and accountability and undermine the democratic process. While in some instances this may be the case, war is different than peace. Governments can legally impose censorship. Media may voluntarily work with government during conflicts on restricting that which is reported. Thus, during war, transparency and free speech may already be being legally or cooperatively constrained.

From a legal perspective, the International Covenant for Civil and Political Rights (ICCPR), which the United States has ratified, includes in Article 20, paragraph 1: *Any propaganda for war shall be prohibited by law.* Additionally, Article 19 states in paragraph 2 that [e]*veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas*

of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice... It also goes on to include:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order,…public health or morals.

The above from the ICCPR makes reference to "by law" as to prohibition and restrictions. With respect to propaganda, the language states that it "shall" be "prohibited" by law. This implies that signatories of the covenant are required to adopt law, or enforce as customary law, that which prohibits propaganda during war. If media personnel mislead, distort, produce, or disseminate false information or commentary, they can be viewed as having used propaganda in violation of the law and are possible criminals before the law, or in this case, considered combatants under the law of war.

With respect to Article 19, paragraph 3, it includes language that restrictions "shall only be such as are provided by law and are necessary." If no such laws are passed in that country, the argument could be made that such restrictions are not in place making the position of this Manual seemingly invalid under international law and the domestic law of that country. Yet, this Manual would be comfortable with such an interpretation so long as that which is expressed as a right under Article 19, paragraph 2, does not stray into propaganda, defined by Encyclopaedia Britannica as: *information that is used primarily to influence an audience and further an agenda, which may not be objective and may be presenting facts selectively to encourage a particular synthesis or perception, or using loaded language to produce an emotional rather than a rational response to the information that is presented*.

The preceding legal justification for this Manual's position is also applicable for 9.2.2.5 Political or Advocacy Organization, and Social Media Users and 9.2.2.7 Academics, and is consistent with the position of the ICCPR that freedom to "*seek, receive and impart information and ideas of all kinds, regardless of frontiers*," is derogable during national emergencies. Further, as this basic human right is in effect "*regardless of frontiers*" during peacetime, it can reasonably be assumed to be derogable as well, "*regardless of frontiers"* during war, i.e., an outside party can enforce (or attempt to enforce) the derogation of the right and prevent (or attempt to prevent) the use of propaganda by its enemy regardless of whether generated by the military or civilians.

While the ICCPR might state that "*Any propaganda for war shall be prohibited by law,"* common practice is that most, if not all, parties to a conflict will employ propaganda even if they choose to call it otherwise. This Manual accepts the use of propaganda as permissible during war. However, military and civilian persons who create and distribute propaganda are both classified as combatants who may be targeted.

9.2.2.7 Academics (uncertain)

Most academics, i.e., professors and researchers at educational institutions, their administration, and staff will be non-combatants during conflicts and should not be targeted. However, there are several categories of academics and others at such institutions which are civilian combatants. These include the following:

1. Those engaged in research for the military and other entities engaged in the war effort which could provide a military advantage to the belligerent for whom the research is conducted
2. Those, similar to the media, who advocate for entering or continuing a conflict, or produce articles, papers, books, and other publications which might reasonably be considered propaganda under the definition found in the preceding sub-section
3. Those who, as part of their professional expertise or responsibilities, otherwise assist or support the war effort, to include as advisors to civilian and military leadership on war related matters

As combatants, they may be targeted at any time until they permanently desist from the activities which qualified them as combatants and this can be reasonably known in advance by those who might target them. As with other civilian combatants, their families should not be targeted solely for their being related to the combatant. Their places of work are legitimate targets. As such, the institutions of which they are a part have a moral obligation to separate physically combatant and non-combatant personnel to reduce the risk of harm to the latter if work places of combatants are targeted.

9.2.2.8 Criminals

Except as it might relate directly to actions during war, or be in conflict with this Manual, anyone who does that which is considered criminal under domestic law would generally and similarly be considered criminal under this Manual. Such persons would be exempt from any protections or rights of the law of war not otherwise afforded convicted criminals or those accused of criminal acts. **(consistent)**

During wars, when there are often breakdowns and even absence of civilian authority and an effective law enforcement presence, criminal conduct will often increase and become prevalent. From a combatant's perspective as to conduct, even though persons performing these acts may be civilians and technically non-combatants, this does not mean they must be responded to and handled as one would other civilian non-combatants **(possibly consistent)**. An example would be armed individuals and gangs that terrorize and loot.

From the perspective of combatants and military forces, categories of criminal persons most relevant during a conflict, which can be comprised of either military personnel or civilians, include but are not limited to:

1. Traitors/collaborators
2. Looters
3. Black marketers
4. Human traffickers
5. Resource extractors/consolidators/processors, e.g., diamonds, ivory, coltan/tantalite
6. Predators
7. Smugglers

These may be individuals, small groups, or large highly organized entities (e.g., triads, mafia, gangs, warlords) engaged in several or possibly all the preceding, as well as other areas such as gambling, drugs, extortion, prostitutions, and protection. **(likely consistent)**

During normal times, these persons and their activities would be solely the responsibility of the police and civilian legal system and treated as appropriate under that system. During war, given that each of these categories of criminals can have both operational and administrative implications for military forces in an area of operations or during occupation, the status and treatment of criminal elements may fall between that of combatants and non-combatants, although perhaps closer to the former. For example, criminal elements can become targets of military operations similar to those undertaken against combatants but not have the rights of lawful combatants if captured. **(uncertain)**

The role and treatment of criminals during conflicts is also addressed in Section 4.17 of this Manual.

9.2.2.9 Persons Providing Services or Materiel to the War Effort (inconsistent)

Regardless of whether located in or part of a belligerent, allied, or neutral party, all individuals and the personnel of all companies or entities which provide services or materiel of military value to a belligerent for its war effort, or to a party it is known will likely provide such to a belligerent, are considered combatants and may be targeted while at their places of work or carrying out responsibilities associated

with the provision of such services and materiel. Such individuals or entities may design, produce, store, transport, finance or otherwise assist in the provision of materiel or services of value to a belligerent's war effort. When such persons are "off duty," they are not to be considered combatants unless they are an individual provider or an owner (to include owners of material amounts of stocks, bonds, or other financial instruments), board member, officer, manager, or key employee of such entities. Key employees are those with technical, financial, or other knowledge essential to financing, providing, producing, storing, or transporting that which supports a belligerent's war effort. Again, family members are not to be targeted solely because they are related to such combatants.

While some may feel including those who own material levels of stocks, bonds, and other financial instruments of war industries and businesses may be too extreme, it may give pause to those who would invest in and seek financial gain from a conflict and promote involvement in or continuation of a conflict so they or their clients might personally benefit. Additionally, during times of peace, it might cause those that are currently invested in such entities to advocate against entry into a conflict unless they truly believe in the rightness of and need for that conflict to the degree they are willing to risk being categorized as a combatant and, thereby, becoming a legitimate target for attack.

9.2.2.10 Conscientious Objectors

Conscientious objectors are those who claim the right to refuse to perform military service on the grounds of freedom of thought, conscience, or religion. Conscientious objectors may consider themselves pacifists, non-interventionists, anti-militarist, stateless, or other similar belief. If their conscientious objections are legitimately (as opposed to conveniently) held and their actions as an objector are not violent or destructive, this Manual respects the right of such persons to claim such status **(consistent).**

This designation is expanded to include those who "conscientiously" object to a single conflict if that conflict is clearly not a just war as defined in this Manual (see section 2.7 Use of Force and International Law). This would allow even active-duty military personnel to claim conscientious objector status for a specific conflict so long as it is in advance of their deployment to the conflict, or the nature of the conflict changes from being a just war under this Manual to an unjust one **(likely inconsistent with U.S. policy).**

This position is consistent with Resolution 1995/83 of the United Nations Commission on Human Rights which states that "persons performing military service should not be excluded from the right to have conscientious objection to military service" and Resolution 1998/77 that "persons [already] performing military service may develop conscientious objections." While accepting the preceding (as this Manual does) may produce complications for the military within which these persons serve, it is believed such situations can be reasonably and fairly accommodated if responsibly and cooperatively addressed by both parties prior to or upon return from deployment **(possibly inconsistent with U.S policy)**.

Conscientious objector status does not preclude such person from being required to serve in some capacity, with such service ideally being humanitarian or non-war-related administration. In the military, this might be in certain medical, civic action, civil affairs, or similar capacities. Alternatively, a qualified military conscientious objector might be assigned civilian service. **(consistent)**

9.2.3 Civilian Combatant Rules of Engagement (inconsistent as many of the preceding categories of civilians are not to be targeted under the formal law of war regardless of rules of engagement employed)

Those classified as civilian combatants, as well as their property, can be legitimate targets. Nonetheless, unlike military combatants, they are not automatically targeted even when opportunity exists. Rather they only become so based on the situation of the moment for that particular group, sub-group, or individual. As a consequence, there are precise guidelines before and when civilian combatants should be targeted :

1. *Clarity*: It should be clear the person, group, location, or property to be attacked is as indicated in one of the above categories. If such clarity does not exist, they should not be engaged as a target, especially if kinetic force is to be employed.
2. *Desirability*: Often attacking certain of these civilians can have as much (and possibly more) potential for harming rather than benefitting one's war effort if it strengthens political and public support and resolve against the party which carries out the attack. Additionally, it may be determined that the military or political advantage of using kinetic force in a particular situation is not of sufficient value to justify causing such loss of life, injury or destruction even if the target is a legitimate combatant under this Manual. If the decision is made that an attack using kinetic force would not be justified, the party being considered for targeting may still be attacked or undermined in other ways, e.g., cyber, social media, financial.
3. *Notification*: Prior to a kinetic attack against members or property of one of the above civilian groups, some form of advanced notification should be conveyed informing that group specifically, or the public more generally, that a specific civilian group, or type of group, and its members are considered legitimate targets. This need not be done prior to each individual attack on a group, or for specific individuals or property of the group, but simply "prior to" which might be at the beginning of a conflict months before any such attacks are contemplated or carried out. Notification could be in one or more formats depending on the potential target, e.g., formal notification in hard copy, internet notification, provision of a manual which outlines how a belligerent intends to conduct its operations, media notification. Nonetheless, there may be certain targets of sufficient importance that would not be put on notice if that might cause them to be on heightened alert, with this the exception, not the rule.
4. *Explanation*: An explanation of the reason for a classification of persons being targeted should be provided. This could be during the advance notification, after individual attacks, or both. Depending on which is felt to be more beneficial to one's war effort, it may be publicly shared or only with the targeted group, or to third-parties which it is hoped will be influenced by the attack. Both advance notice and explanations should be carefully thought through and be an integral part of the attacking party's lawfare/psychological/information operations strategy and tactics.
5. *Collateral Harm*: Especially when kinetic force is used against most civilian combatants, a higher standard is in place with respect to the level of acceptable harm incidental to the targeted party given that these attacks will generally be outside areas of combat operations. Ideally, attacks should be planned where no incidental harm occurs.
6. *Family*: The family of a legitimate civilian target should not be a target of kinetic force unless they are also individually or part of a group or cause whose members and property can be legitimately targeted.

   Impermanence: Simply because a group or individual in a classification of persons is considered a legitimate target at a point in time does not mean they necessarily have become a permanent target. A person may leave the group, change their actions and positions, leave the employment of, or for other reasons become a non-combatant and subject to conduct appropriate to that classification. When this occurs, it is important this is understood by their enemy so they are not accidently harmed. To be aware of a change of status and still carry out attacks would be immoral and possibly harmful to the attacking party's cause.

9.2.4 Capture and Detention (uncertain)

Under this Manual, civilian combatants may be captured and detained. As civilians rather than members of the military, this may be a preferable action than kinetic attack if the ability to do so exists and is a better option for achieving the objectives of why this particular person or group is being targeted. If

capture and detention occur, those detained should be treated consistent with the provisions of this Manual applicable to other captured combatants, i.e., prisoners of war.

9.3 Non-Combatant Civilians

This section will draw heavily from U.S. military manuals addressing proper conduct as it affects non-combatant civilians. As is evident from 1.4 and 9.2 of this Manual, there are major differences of this Manual with official manuals as to who is considered a non-combatant civilian. Rather than always making this distinction whenever "civilian" is used in FM 6-27, its use of "civilian" should only be assumed as relevant for non-combatant civilians under this Manual unless otherwise noted. In this respect, the Manual is inconsistent with official manuals. Nonetheless, the same standard of conduct is often applicable to all civilians, whether combatant or non-combatant.

The balance of this chapter cites in italics FM 6-27's positions on conduct related to civilians.

9.3.1 Practical Guidance (generally consistent except as to precedence of this Manual)

5-1. …With respect to the protection of civilians and civilian objects, all Soldiers and Marines must [should] *adhere to the following guidance… :*

- *When conducting an attack, …exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and objects that may* [should] *not be made the object of attack.*
- *Do not abuse, degrade, or seek revenge against civilians, or take other unnecessary actions that could harm civilians.*
- *When necessary to detain, search, question, or exercise other measures of control over civilians, perform such measures humanely, respectfully, and professionally…*
- *Do not steal.*
- *Follow accountability and reporting procedures related to civilians and civilian property* [to the degree possible with existing resources and combat conditions]. *For example:*
    - *Follow command guidance on reporting the presence of civilians or civilian casualties during military operations* [with all incidences of the latter reported].
    - *When feasible, give receipts when seizing private enemy property, such as holding for safekeeping o*[f] *family documents or valuable*[s] *from civilian internees.*
    - *Report alleged violations of the law of war against civilians.*

5-2. In addition to adhering to the practical guidance on detainee operations and the basic protections provided at the beginning of Chapter 3 [of FM 6-27]*, Soldiers and Marines who are conducting internment of protected persons under the GC must* [should] *comply with the GC's requirements and with applicable U.S. law and U.S. and DOD policies.*

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

- *Make the necessary judgments and decisions required by the principle of proportionality to ensure that harm to civilians and civilian objects is not excessive compared to the expected military* [or political] *advantage.*
- *Determine the feasible precautions to take for the protection of civilians in planning and conducting an attack, including canceling or suspending an attack based on new information raising concerns of expected civilian casualties* [in excess of that which can be justified for the military advantage to be gained] *or determining whether it is feasible to provide warnings or to use different types of weapon systems in order to reduce the risk of civilian casualties) (see DOD Law of War Manual, 5.11). .*

- *Administer civilian internment camps*[/facilities] *in accordance with the GC*
- *Arrange for passage of humanitarian relief* [when this will not be taken by enemy's military].

9.3.2 General Provisions (consistent and inconsistent)

9.3.2.1 Protected Persons (inconsistent)

5-6. In general, the GC uses the term "protected person" to refer to those individuals who are entitled to receive its protections. Principally, protected persons include persons of enemy nationality living in the territory of a belligerent State and the inhabitants of occupied territory. Even if a person is not a protected person under the GC, other rules may be applicable to them. For example, persons protected by the GPW, the GWS, or the GWS Sea, are not considered protected persons under the GC (GC art. 4). [Preceding is not clear and needs elaboration.] *Further, certain baseline rules apply to the treatment of all detainees, including those who are not protected persons or POWs (DOD Law of War Manual, 10.3).* [It is the position of this Manual that all persons, combatants and non-combatants alike, are protected persons under the law of war; however, the nature of protection varies based on the person, category of persons, and the situation and conditions prevalent at the time a decision has to be made as to appropriate conduct related to a specific person, group, or property.]

5-7. The GC underlies most of the treaty rules applicable to the United States for the treatment of civilians in the hands of a party to the conflict during international armed conflict and occupation. Although the GC's provisions should be interpreted in light of the principles that underlie the treatment of civilians, protected persons do not simply refer to persons who are civilians. Protected persons may include certain unprivileged belligerents, although certain rights and privileges that unprivileged belligerents receive are subject to derogation for security reasons (see DOD Law of War Manual, 10.3.2.4). Subject to certain exceptions, persons protected by the GC are those who, at a given moment and in any manner whatsoever, find themselves, in the case of occupation or conflict, in the hands of a party to the conflict or occupying State of which they are not nationals (DOD Law of War Manual, 10.3.2). The GC term "protected person" does not, under the framework of the GC, apply to non-international armed conflicts (conflicts against or between non-State armed groups). [The preceding has been presented in a somewhat unclear and overly complicated way. Additionally, the position of this Manual is that the term "protected person" <u>*does*</u> apply to non-international armed conflicts and non-State armed groups **(inconsistent)**. This is also the position of most nations even if not the United States. Additionally, the last sentence of 5-7 is incorrect, as GC, Common Article 3, does provide a basic level of protection even during non-international conflict; Additional Protocol II also provide protections during such conflicts.]

5-8. The phrase "in the hands of" is used in an extremely general sense. It is not limited to physical custody or control, such as a prisoner. The mere fact of being in the territory of a party to the conflict or in occupied territory implies the person is in the power or "in the hands of" the Occupying Power. [This Manual agrees with the first sentence and with the sense of the second but not its precise wording. For example, one could be in the territory of a party to the conflict which does not control all portions of its territory. In such cases, persons in such territory cannot reasonably be assumed to be in the power or hands of that party.] **(consistent with understood intent if not precise wording)**

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

however, are considered as protected persons under the GC (see DOD Law of War Manual, 15.6.4.1). [Again, it is the position of this Manual that all persons, regardless of whether the party of which they are a member is neutral or not bound by the GC, have "protected person status" with protections, rights, and responsibilities simply varying between categories of persons and specific situations and conditions. This interpretation, that at least certain basic protections exist for every person no matter the type of conflict, is found in the GC and its additional protocols and related treaties. **(possibly inconsistent with U.S. policy)**]

9.3.2.2 Policy and Practice (inconsistent/consistent)

5-10. Subject to the derogation provisions discussed in paragraphs 5-11 through 5-13, those persons who have engaged in hostile or belligerent conduct, but are not entitled to treatment as POWs, are not per se precluded from receiving protected person status under the GC. [Although the terminology of this paragraph is inconsistent with this Manual, the final words are not.]

9.3.2.3 Derogations (consistent except for broadening to include non-State parties)

5-11. The GC permits States [and, under this Manual, non-State parties] *to derogate from the GC's requirements to provide certain rights and privileges otherwise afforded to protected persons for security reasons. Such derogation may differ based on location of the protected person, such as in occupied territory or in the belligerent's home territory, and the conduct of the civilian (GC art 5; DOD Law of War Manual, 10.4).* [This should be elaborated upon and include examples.]

9.3.2.4 In a Belligerent's Home and Occupied Territory (consistent except for inclusion of non-State parties)

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

9.3.2.5 Other Areas (consistent except for reference to this Manual)

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

9.3.2.6 Authority to Punish (inconsistent)

5-14. The derogation provisions of the GC implicitly recognize the power of a party to the conflict to impose the death penalty and lesser punishments (after judgment by a properly constituted court) on

protected persons who are spies, saboteurs, and other persons not entitled to be treated as POWs, such as unprivileged belligerents, except to the extent that that power has been limited or taken away by the GC (see GC art. 68, which limits application of the death penalty and other punishments in the case of protected persons, subject to the U.S. reservation with respect to imposing the death penalty). [It is the position of this Manual that enemy spies, saboteurs, and other persons not entitled to be treated as POWs under the United States' interpretations of its obligations under the law of war should be treated no differently than other combatants and should not be executed for carrying out responsibilities which are legal under the law of war. This would not preclude a State or non-State belligerent to the conflict from charging, fairly trying, convicting, and executing its own citizens or members if they had operated as spies and saboteurs and had not previously renounced their citizenship or membership status, and committed that which would reasonably be considered treason.]

9.3.3 Detained Civilians

9.3.3.1 Minimum Standards of Treatment (consistent)

5-15. Even when derogations of other provisions may be appropriate for security reasons, Soldiers and Marines must [should] *comply with LOAC with respect to the treatment of all detainees. Until a detainee's release, repatriation, or transfer from DOD custody or control, Soldiers and Marines will, without regard to a detainee's legal status, at a minimum apply: (1) common article 3 of the 1949 Geneva Conventions during all military operations; (2) the principles in Article 75 of AP I during international armed conflict and occupation; and (3) the principles in Articles 4-6 of AP II during non-international armed conflict (DODD 2310.01E). As a matter of U.S. law and policy, there are no situations in an armed conflict, however characterized, in which individuals are not entitled to at least this humane care and treatment. Further, as a matter of U.S. policy, such care and treatment will be accorded, at a minimum, to detainees in any military operations not involving armed conflict.* [This paragraph is one of the most important in FM 6-27 and consistent with this Manual's broadening its interpretation of protected persons beyond that considered by the United States to be required. While the preceding is clearly stated, it has not been the policy in fact of the United States or consistent with certain above paragraphs of FM 6-27. Additionally, while this Manual has broadened the coverage of those who have protected person status, in certain carefully designated situations, this Manual does allow treatment in certain situations that would be in violation of formal law of war articles referenced above.]

9.3.3.2 Humane Treatment and Other Basic Protections of Detained Civilians (generally consistent except for references to this Manual)

5-16. [To the degree reasonably possible given operational conditions and available resources, d]*etainees must* [should] *be provided humane care and treatment and with respect for their dignity from the moment they fall into the hands of DOD personnel until their release, transfer out of DOD control, or repatriation. Further, inhumane treatment*[, as defined in this Manual,] *of detainees is expressly prohibited and is not justified by the stress of combat or deep provocation.* [Except when inconsistent with this Manual, h]*umane treatment includes, in part:*

- *Adequate food, drinking water, shelter, and clothing*[ ] *(consider AP II art. 5);*
- *Regular access to the open air, reasonable educational and intellectual activities, and appropriate contacts with the outside world (including, when practicable, exchange of letters, phone calls, and video teleconferences with family, as well as family visits) (consider AP II art. 4, 5);*
- *Free exercise of religion, consistent with the requirements of detention (consider AP II art. 5);*
- *Safeguards to protect health and hygiene, and protections against the rigors of the climate and dangers of military activities (consider AP II art. 5);*

- *Appropriate medical care and attention required by the detainee's condition, to the extent practicable (consider AP II art. 5);*
- *Respect for each as a human being without any adverse distinction founded on race, color, religion or faith, political or other opinion, national and social origin, sex, birth,* [ ] *wealth,* [celebrity, rank, unit,] *or other similar criteria;*
- *Protection against threats or acts of violence, including rape, forced prostitution, assault, bodily injury, and reprisals, torture, and cruel, inhuman, or degrading treatment or punishment; and*
- *Prohibition on being subjected to medical or scientific experiments, or to sensory deprivation intended to inflict suffering or serve as punishment (consider AP I art. 75; consider AP II art. 4).*

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

5-18. Detainees must [should] *be removed as soon as practicable from the point of capture*[/detention] *and transported to a detainee collection point, temporary holding area, or DOD detention facility. Detainees not released or transferred from DOD custody or control from the detainee collection point or holding area will* [should] *be transported to a DOD detention facility in a secure location within 14 days of capture* [detention]*, barring exceptional circumstances. Detainees will* [should] *be promptly informed of the reasons for their detention in a language that they understand…* [While the United States may have the resources to comply with the preceding, all belligerents may not, and these are U.S. requirements, not necessarily those found in international law of war. Provided the spirit of that which is outlined above is followed, each belligerent may establish its own procedures and timelines for detaining persons in as secure locations as they are reasonably able to provide. This would include procedures decided upon by U.S. combatants who may be cut off or operating separately from their main forces. (Note: The 14-day rule was put in place in 2010 due, in part, to a CNN investigative report into a 2008 incident in Afghanistan. Detained persons were released when they should not have been because of the 96-hour release rule then in place. Charges were brought against a West Point-graduate company commander who tried to delay release and, in doing so, took actions which violated the formal law of war. This led to his accepting a general discharge that ended his military career.)]

9.3.3.3 Procedural Protections (somewhat inconsistent)

5-20. [Once in a reasonably secure location, d]*etainees will* [should] *be registered, and property in their possession will be inventoried. Records of their detention and such property will be maintained according to applicable law, regulation, policy, and other issuances*[; a]*ll detainee records will be maintained* [and] *safeguarded*[; and d]*etainees will* [should] *be assigned an Internment Serial Number (ISN) normally within 14 days after their capture by, or transfer to, the custody or control of DOD* [or other appropriate] *personnel, barring exceptional circumstances*[, to include the absence of resources to accomplish].

5-21. [At each belligerent's discretion and generally barring material reasons for not doing so, t]*he ICRC will be promptly* [delete "promptly"] *notified of all* [delete "all"] *ISN assignments.* [At each belligerent's discretion and provided the ICRC has met its obligations as to neutrality and objectivity, t]*he ICRC will* [may] *be given access to all* [delete "all"] *DOD* [or other party's] *detention facilities and the detainees housed therein, subject to reasons of imperative military necessity. (DODD 2310.01E).*

5-22. Alleged detainee abuse [as delineated in this Manual] *must* [should] *be reported in accordance with DOD policies (see DODD 2310.01E; DODD 2311.01E; DODD 3115.09)* [and those of this Manual (see Chapter 13)].

5-23. DOD [or other] *personnel* [authorized by the detaining party] *will review periodically the detention of all individuals in DOD* [delete "DOD"] *custody or control who do not receive the protections afforded*

POWs. Such reviews may include: (1) preliminary assessments of the detainee's status and threat; (2) formal determinations of the lawfulness and continued necessity of detention; and (3) determination of the status of unprivileged belligerents held in long-term detention, presided over by a military judge (DODD 2310.01E, para. 3i). [This Manual does not recognize the term "unprivileged belligerents."]

5-24. [With respect to persons held by or in the control of U.S. forces,] *DOD personnel, including DOD contractors, must* [should] *not accept the transfer of a detainee from another U.S. Government department or agency, coalition force, multinational partner personnel, or other personnel not affiliated with the DOD or the U.S. Government, except in accordance with applicable law, regulation, policy, and other issuances (DODD 2310.01E, para. 3e)*[, to include this Manual. However, at a local commander's discretion, transfer would be possible if it removes the detainee from an untenable situation which improves their well-being without undermining that of the receiving unit or its primary responsibilities.]. *No detainee may be released or transferred from the care, custody, or control of a DOD component except in accordance with applicable law, regulation, policy, and other issuances (DODD 2310.01E, para. 3m)*[, to include those of this Manual].

9.3.3.4 Greater Protections (inconsistent)

5-25. As a matter of law, persons who are entitled to treatment as either POWs or retained personnel under the GPW, or as internees under the GC, are entitled to even greater protections than the minimum humane care and treatment described above. [It is the position of this Manual that *all* detained persons are treated respectfully and in accordance with the provisions of this Manual regardless of whether they are POWs, retained personnel, or detained internees as referenced in this section.]

9.3.4 Special Agreements (inconsistent)

5-26. Parties to a conflict may conclude special agreements for all matters [deleted "concerning which"] *they deem* [deleted "it"] *suitable to make separate provision... No special agreement may adversely affect the situation of protected persons nor restrict the rights the GC confers on them* [unless consistent with this Manual].

5-27. In no circumstances may protected persons renounce the rights secured to them by the GC and by any special agreements negotiated under the GC (GC art. 8). [It is the position of this Manual that a person may renounce any rights he or she chooses affecting only themselves provided this is done knowingly and voluntarily without any coercion or intimidation.]

9.3.5 Protection of Civilians and Civilian Property in the Conduct of Military Operations (generally consistent)

9.3.5.1 Introduction

Enemy property, whether that of the enemy's government, officials, armed forces, or private persons and entities, generally may be seized and used or disposed of as the seizing belligerent deems appropriate.

a. *Public Property:* All enemy public moveable property secured in enemy, neutral, or one's own territory becomes the property of the capturing belligerent to do with as it sees fit. All enemy public real property in enemy and one's own territory (except for agreed upon diplomatic facilities) may be used, and possibly destroyed, if essential for military purposes.
b. *Private Property:* Any enemy private moveable or real property in enemy, neutral, or one's own territory should only be appropriated or destroyed by the investing force to the degree required for military purposes. To the degree possible, records of its harm or disposition should be kept by the investing force. If securing the support of the enemy populace is important, such

appropriation or destruction should be fairly compensated by the investing force when appropriate and funds exist to do so.

9.3.5.2 General Related to Civilians and Private Property (consistent unless otherwise noted)

5-30. In the conduct of military operations, constant care shall [should] *be taken to spare the civilian population, civilians, and civilian objects (consider AP I art. 57(1))... Measures of intimidation or terrorism against the civilian population are prohibited, including acts or threats of violence, the primary purpose of which is to spread terror among the civilian population (consider AP I art. 51(2); AP II art. 13(2))…*

5-32. Feasible precautions to reduce the risk of harm to civilians must [should] *also be taken by the party subject to attack. For example, military commanders and other officials responsible for the safety of the civilian population must* [should, to the degree practicable and consistent with the type of conflict in which a belligerent is engaged] *take reasonable steps to separate the civilian population, individual civilians, and civilian objects under their control from military objectives and protect the civilian population from the effects of combat. Other feasible precautions may include avoiding locating military objectives within or near densely populated areas, removing civilians and civilian objects from the vicinity of military objectives, and other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control from the dangers resulting from military operations (consider AP I art. 58; see DOD Law of War Manual, 5.14).* [Nonetheless, in asymmetric warfare and when separated from one's main force in conventional warfare, weaker, smaller, nascent, less well armed, and other similar belligerent parties generally must blend with the civilian population to survive and operate effectively. For such parties, doing so should not be considered a violation of the law of war.]

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

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

5-35. …in general, no use should be made of cultural property, its immediate surroundings, or appliances in use for its protection, for purposes that are likely to expose it to destruction or damage in the event of armed conflict. However, such use is permissible when military necessity imperatively requires such use…

5-37. Any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property are prohibited… Military commanders also have an obligation to take reasonable measures to prevent or stop any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property (see DOD Law of War Manual, 5.18.6.1

[Exceptions to the above may exist if the sale of moveable cultural items is essential to finance the continued operations of a war and other funding sources are not sufficient. This would not be a "form of theft, pillage, or misappropriation." This would not allow such sales to benefit individuals, units, or other entities of a belligerent for anything other than that required under military necessity and the welfare of the local population. Nonetheless, before using such items as a source of funding, determination should be made whether political downsides outweigh humanitarian and military benefits.]

5-38. For the purpose of the 1954 Hague Cultural Property Convention and this publication, cultural property includes, irrespective of ownership or origin: (1) movable and immovable property of great importance to the cultural heritage of every people [delete "every people" as this may be interpreted as meaning all mankind would find of great importance and replace with "of a nation, locale, people, or ethnic group"]*, such as monuments of architecture, art, or history, whether religious or secular; (2) buildings intended to shelter cultural property, such as museums and depositories of archives; and (3) centers* [and locations, such as cemeteries,] *containing monuments*[.]

9.3.5.3 Non-Enemy Property and Territory (likely consistent with U.S. policy; possibly not with international law)

There are two special circumstances that may be faced during combat operations related to property and in non-enemy territory that are not addressed in official manuals: (1) property of U.S., allied, or neutral persons, companies, or governments within the territory of an enemy belligerent, and (2) property in the territory of a neutral or allied party in which enemy forces are present.

a. Neutral/Allied Property:

Under FM 6-27, "enemy property *includes all property located in enemy territory regardless of ownership*." Under this language, even property of U.S. citizens, allies, and neutrals would technically be considered "enemy property" if in the territory of that enemy and can legally be destroyed or seized as required. This is a legitimate and reasonable position when one becomes engaged in active, kinetic combat in a geographic area. However, if it is reasonably known in advance or becomes known during operations that certain properties in enemy territory are owned by U.S, allied, or neutral private or public parties, whether and to what degree such properties are destroyed or seized should be an additional consideration of attacking forces, somewhat similar to the additional considerations given to the protection of historic, cultural, medical, educational, civil defense, and scientific properties. To do otherwise may create undesirable responses from governments and persons whose property is destroyed or seized if it is believed by their owners that destruction or seizure could have been reasonably avoided.

b. One's Own, Neutral, and Allied Territory **(addressed further in 12.2.4)*:***

In much of asymmetric warfare, one's opponent may not hold, or be located, in that which would be considered "enemy territory." Rather they may be in individual houses, businesses, caves, and bunkers in one's own, neutral, or allied territory. A rule of thumb in attacks against such adversaries is that the force employed might be similar to that by police or other non-military national security units when faced with armed criminal elements. When operating in an allied or neutral country or territory with the permission of the government of that country, ideally there should be a status of force (SOFA) or other appropriate agreement in place between the military force carrying out the attack or operation and the government of the country in which it occurs. Ideally, these should be in writing agreed to by appropriate authorities of the party using force and the party in whose territory the property is located. However, if the ally or neutral country or territory is occupied by an enemy belligerent and no legitimate domestic or local government exists inside or outside the areas of conflict to conclude such agreements, the forces investing

the country should attempt to use the same restraint and care it would in its own territory to reduce destruction or harm to such property.

Complications arise when operating in an allied or neutral country or territory when permission has not been granted, and/or it is not feasible to inform the country in advance or seek permission due to security concerns or other reasons (e.g., need for immediate response without time for negotiating a single-operation SOFA). While there are differences of opinion, many strict interpretations of international law suggest it is illegal for an outside party to unilaterally conduct a military/police operation in another country without that country's permission if the countries are not enemy belligerents of the other.

Common practice or custom and even some formal law would suggest that the threatened country can still carry out the attack in the allied or neutral party's territory if the threat is of sufficient importance to the attacking party's national security. Practice or custom and formal law will also be that the country in which the operation takes place may choose to take actions against the attacking party or its sponsor. These could include using force to stop the attack if discovered in advance or during its execution, imprisoning or executing members of the attacking party if captured, breaking off diplomatic relations, allying with the attacking party's enemy, or imposing sanctions or other measures.

Finally, it must be realized that if a country carries out such operations in other countries without their permission or advance notice, other countries may feel free to do the same in the country of the attacking party. Thus, any such operations should be undertaken with forethought and caution and approved at senior levels if the situation allows.

9.3.5.4 Mitigate Burden on Non-Combatant Civilian Property (generally consistent except as noted)

Unless otherwise noted, this Manual generally concurs with the following from FM 6-27 with respect to feasible precautions to mitigate the burden of war on non-combatant civilian property when possible.

2-198. In seizing or destroying enemy property, feasible precautions should be taken to mitigate the burdens imposed on civilians. For example, in U.S. practice, religious buildings, shrines, and consecrated places employed for worship are used only as aid stations, medical installations, or for the housing of wounded personnel awaiting evacuation, provided in each case that a situation of emergency requires such use. Similarly, if armed forces use a private residence, the inhabitants and owners must [should] *be treated humanely and with as much consideration as the circumstances permit. In particular, the armed forces should generally allow the inhabitants to continue to live there and should not expel them if alternate shelter is not available. If imperative military necessity requires the removal of the inhabitants, …then effort should be made to give them notice and to aid them in taking their essential possessions. If the armed forces take anything, they should leave a note to this effect. There is no obligation, however, to protect abandoned property in the area of active operations.* [This Manual does not agree with this last sentence. Even seemingly abandoned property, unless damaged beyond reasonable use, should have the same considerations of protection from destruction as given other non-occupied property as the person may have planned only to vacate the property during that moment of danger and intends to return as soon as it is past.]

2-199. LOAC imposes no obligation to compensate for…incidental harm to civilian property due to combat operations, whether such harm arises from attacks on military objectives within proximity to the damaged property, maneuver damage, mechanical error, enemy countermeasures, human error (including mistake of fact), or other actions resulting from the fog or friction of war or from the necessities of war. If time allows, however, a record of the use or damage should be kept or given to the owner so that in the event either belligerent provides funds at the close of hostilities to compensate the

owners, evidence may be available to assist the assessors. During certain operations and as a matter of policy not law, the U.S. practice has been to provide ex gratia payments to alleviate the suffering of the civilian populace not involved in the conflict... R]*eceipts should be given and compensation paid, when feasible...*

[Given the widespread availability and capabilities of smart phones and electronic tablets/notebooks, ideally non-military property which is damaged or destroyed should be photographed and annotated, to include pictures of any receipts provided. This should then be conveyed to one's chain of command and, as appropriate, with those directly affected. This is advisable for: (1) more accurate assessments as to that for which compensation might be made, (2) better damage assessment for planning possible reconstruction or other relief assistance, and (3) documentation as to that which actually occurred as others with such capabilities will record (sometimes inaccurately for lawfare and other purposes) what has taken place. Additionally, if reasonably practicable, one should photograph "before" images as to the condition of property, especially protected structures, e.g., hospitals, schools, cultural, religious, and historic sites. Again, this can be important when there is pre-existing damage or deterioration in order to protect against enemy lawfare or media initiatives intended to undermine support for one's forces or cause. In and after active, fluid combat, this may not be possible.]

9.3.5.5 Markings

See also Sections 4.10.6, 8.10, 8.12, and 9.3.8.3 for protective markings of various types of property.

9.3.6 Sick, Wounded, Hospitals, Medical Personnel and Transport

9.3.6.1 General (generally consistent; much redundant with Chapter 8)

5-40. LOAC requires ... protection and respect for [civilian] *wounded and sick, as well as the infirm and expectant mothers (GC art. 16)... As far as military considerations allow, each party to the conflict must* [should] *facilitate the steps taken to search for killed or wounded* [civilians]*, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment (GC art. 16). Even though civilian authorities would often be responsible for collecting*, [ ] *bringing in*[, treating, and caring for] *civilian casualties, the armed forces may be asked to lead such efforts or to carry out a joint relief operation with civilian authorities (DOD Law of War Manual, 7.16.1). Parties to the conflict may appeal to the civilian population and local aid societies to assist in collecting the sick and wounded and locating the dead (consider AP I art. 17).* [With respect to enemy and civilian dead after a combat action, the party in control of the battlefield or environs should coordinate with local civilians as to who will be responsible for removing, burying, conveying, recording, and reporting civilians and enemy combatant dead in an appropriate manner. As combat troops will most often not have the capacity to handle these tasks, and support troops may be otherwise engaged, a plan for handling the dead should be developed with civilian authorities or citizens, ideally in advance, with compensation possibly provided if civilians have primary responsibility and resources exist to provide such financial support.]

9.3.6.2 Civilian Hospitals (consistent and inconsistent)

[While not specifically stated in FM 6-27, "hospital" should be assumed to be any facility, to include clinics, tents, and other permanent, ad hoc, or temporary structures, whose purpose is to provide care to the wounded, injured, sick, infirm, and expectant and recently delivered mothers.]

5-41. Civilian hospitals organized to give care to the wounded and sick, the infirm, and maternity cases, may [should] [replace "*in no circumstances"* with "not"] *be the object of attack but must* [should] [deleted "*at all times"*] *be respected and protected* [if reasonably practicable] *by the parties to the conflict (GC art. 18; consider AP I art. 12). The protection to which civilian hospitals are entitled shall* [should] *not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.*

Civilian hospitals must [should] *avoid any interference, direct or indirect, in military operations, such as the use of a hospital as a shelter for able-bodied combatants, as an arms or ammunition store, as a military observation post, or as a center for liaison with combat forces (see DOD Law of War Manual, 7.17.1.1). However, the fact that sick or wounded members of the armed forces are being cared for in these hospitals, or the presence in these hospitals of small arms and ammunition taken from such combatants and not yet handed to the proper service, are not to be considered acts harmful to the enemy (GC art. 19).* [Nonetheless, if such a facility is treating an enemy combatant of significant political, scientific, leadership, or other importance to the enemy's conduct of the conflict, provided proportionality and precaution have been duly considered, such persons may be legitimately targeted.

[In the event individual medical personnel in such a facility disguise a combatant as a patient to avoid detection, capture, or execution, this is not sufficient cause for withdrawing such facilities and personnel from the protections provided, although medical staff who perpetrated such an act could be detained with charges possibly brought against them or their being detained as an enemy combatant.]

5-42. [Provided conditions allow, p]*rotection for civilian hospitals may* [should], [ ] *cease only after due warning has been given, naming in all appropriate cases a reasonable time, and after such warning has remained unheeded (GC art. 19; consider AP I art. 13). The obligation to refrain from the use of force against a civilian hospital acting in violation of its mission and protected status without due warning does not prohibit the exercise of the right of self-defense (see DOD Law of War Manual, 7.17.1.2)* [or certain targetings as addressed in the commentary following 5-41 above.].

5-43. States [and non-State entities] *that are parties to a conflict must* [should] *provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings they occupy are not used for any purpose that would deprive these hospitals of protection in accordance with Article 19 of the GC. They must* [should] *also be marked with the appropriate distinctive emblem provided for in Article 38 of the GWS (as described in paragraph 4-30)* [or a reasonable recognizable facsimile thereof]*, but only if authorized by the State.* [Delete "*but only if authorized by the State*" as civilian hospitals in territory controlled by non-State parties should still be afforded such protections. Additionally, during war, a State may lose control of territory or become non-functioning and medical personnel who are operating or establish a hospital or clinic should be able to mark their facility without authorization from a central authority. In doing so, they should comply with all restrictions on such facilities found in this Manual associated with the prohibition against engaging in hostilities or other acts detrimental to the enemy.] *The parties to the conflict must* [should]*, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals in a manner clearly visible to the enemy land, air, and naval opposing forces…to obviate the possibility of any hostile action (see also figure 4-1, page 4-8). In view of the dangers to which civilian hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be located as far as possible from military objectives (GC art. 18).* [This last sentence has little practicality in the context of civilian hospitals. While military hospitals are often not stationary during conflicts whereby there may be some ability to locate them as far as possible from typical military objectives, civilian hospitals are generally fixed. Thus, they will have little ability to comply with this recommendation. Therefore, the last sentence should be rewritten to read "Military objectives, to the degree practicable, should be located as far as possible from any medical facilities, civilian or military."]

9.3.6.3 Civilian Medical Personnel (consistent with intent)

5-44. Persons regularly and solely engaged in the operation and administration of civilian hospitals—including the persons engaged in the search for, removal, transport of, and care for wounded and sick civilians, the infirm, and maternity cases—must [should] *be respected and protected by State* [and non-

State] *parties to the conflict (GC art. 20). In occupied territory and in zones of military operations,* [to the degree practicable with available resources and time,] *such persons must* [should] *be recognizable by means of an identity card certifying their status, bearing the photograph of the holder, and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet that they must* [should] *wear on the left arm while carrying out their duties. This armlet must* [should] *be issued by the State* [or non-State party] *with control over such persons and shall bear the Red Cross, Red Crescent, or Red Crystal, as applicable (GC art. 20).* [The issuance of armlets and identity cards should not be restricted solely to the State with control over such persons but may be issued by all parties to the conflict (State and non-State), administrators or heads of medical facilities, and even individual medical personnel if none of the preceding are available to provide the armlet or identity card. Regardless of who provides, they should not be provided to persons who are not medical personnel or those assisting such personnel. Also, given field conditions, identity cards and armlets may not always be precisely as indicated.]

9.3.6.4 Medical Transport (likely consistent)

5-45. Means of transport, including vehicles, convoys, and hospital trains, must [should] *be respected and protected in the same manner as hospitals as long as they are exclusively engaged in the transport of wounded and sick civilians; they must* [should] *be appropriately marked (GC art. 21, 22; consider AP I art. 21).* [The preceding should not be interpreted that this would preclude civilian medical transport from also carrying wounded, injured, or sick combatants. It would also not preclude a train to have cars carrying that which are not the wounded and sick, e.g., other civilians, civilian baggage and goods. If this should occur, the medical cars should be specifically marked if possible.] *Civilian medical aircraft are subject to the same restrictions as military medical aircraft, and should be respected and protected when recognized as such (GC art. 22; consider AP I art. 24-28).* [All such transport may be stopped/forced to land and searched if it is uncertain whether they are only engaged in the transport of the wounded and sick.]

9.3.6.5 Consignments of Medical Supplies, Religious Objects, Food, and Clothing (possibly inconsistent)

5-46. Parties to the conflict must [should] *allow the free passage of all consignments of medical and hospital stores* [and equipment] *and objects necessary for religious worship for civilians of another State* [or non-State party]*, even if that State* [or non-State entity] *is an opposing party. Parties to the conflict must* [should] *also permit the free passage of consignments of essential food, clothing, and medicine intended for children under 15 years of age, expectant mothers, and maternity cases. A State* [or non-State] *Party's obligation to allow free passage is subject to the condition that* [the] *State* [or non-State] *Party is satisfied that there are no serious reasons to fear: (1) that the consignments may be diverted from their destination; (2) that the control may not be effective; or (3) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services, or facilities as would otherwise be required for production of such goods. Technical arrangements may be negotiated with the opposing side to facilitate such passage (GC art. 23).* [In addition to the preceding reasons for denying free passage of such items, unless there is a prior agreement between all parties shipping, receiving, and through whose territory these items move, if a belligerent through which the consignments move does not have sufficient medical and hospital stores and equipment, it may seize such items for use by its military forces but not if the purpose of seizure is to sell these stores and equipment to support its war effort. With respect to the free passage of religious objects, this would only cover those that have no relevance to the war or human rights possibly harmful to the persons in the territory through which these items are being transported.]

9.3.6.6 Special Zones (likely consistent)

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

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

9.3.7 Children, Mothers, and Women

9.3.7.1 Children and Other Special Categories (generally consistent with intent)

5-49. In an international [and non-international]*...conflict,* [to the degree practicable given the combat situation and within resources not essential for military operations,] *the parties to the conflict must* [should] *take the necessary measures to ensure that children under the age of 15 who are orphaned or who are separated from their families as a result of war, are not left to their own resources, and that their maintenance, the exercise of their religion, and their education are facilitated* [deleted "*in all circumstance*"] *(GC art. 24). The maintenance of the children concerned means their feeding, clothing, and accommodation, care for their health, and, where necessary, medical and hospital treatment (see DOD Law of War Manual, 4.20.1.1).*

5-50. Their education must [should]*, as far as* [reasonably] *possible* [given combat conditions]*, be entrusted to persons of a similar cultural tradition* [provided such persons are available and this education will not foster beliefs antithetical to the party making arrangements for this education or to train these children to fight against this party's forces and cause].

5-51. [To the degree practicable and in the best interests of the child, t]*he parties to the conflict must* [should] *facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the protecting power, if any, and under due safeguards for the observance of the above principles. The parties to the conflict must* [should, to the degree practicable]*, furthermore, endeavor to arrange for all children under the age of 12* [change "12" to "15"] *to be identified by the wearing of identity discs, or by some other means (GC art. 24).*

5-52. Finally, [to the degree practicable,] *parties to the conflict should enable personal communications between persons in their home territory or in the territory occupied by them and other members of such protected persons' families, including possibly with the cooperation of national Red Cross societies (GC art. 25, 26).* [As with such communications with and from detainees, they may be subject to quotas and to censorship for security purposes.]

9.3.7.2 Children and Responsible Parent under Additional Protocol I (generally consistent)

5-53. Although the United States is not bound by Additional Protocol I, it contains several provisions that grant enhanced protection to children and their mothers; these provisions should guide Army/Marine Corps practice. For example, pregnant women and [single parent non-combatant] *mothers* [and fathers] *having "dependent infants"* [for whom they are directly responsible] *who are arrested, detained, or*

interned for reasons related to the armed conflict are to have their cases considered with the "utmost priority" (consider AP I art. 76).

5-54. Additionally, Additional Protocol I provides children shall [should] *be the object of "special respect" and* [deleted "*must be"*] *protected against any form of indecent assault (consider AP I art. 77). Furthermore, the State*[ ] [or non-State] *Party to the conflict are* [is] *to provide such children with the care and aid they require (consider AP I arts. 70, 77)* [given resource availability and combat conditions]. *No party to the conflict shall* [should] *arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation when compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety so require*[s]. [This seems inconsistent with 5-51 which allows evacuation of orphaned children regardless of whether they are its own nationals. Perhaps the key word is "temporary."] *When the parents or legal guardians can be found, their written consent to such an evacuation is* [generally] *required. If they cannot be found, the written consent to the evacuation of the persons who by law or custom are primarily responsible for the care of the children is required* [desirable]. *Any such evacuation must* [should] *be supervised by the protecting power*[, if any,] *in agreement with the parties concerned, namely, the party arranging for the evacuation, the party receiving the children, and any parties whose nationals are being evacuated. In each case, all parties to the conflict must* [should] *take all feasible precautions to avoid endangering the evacuation. If children are evacuated, their education, including their religious and moral education as their parents' desire* [if that is known]*, must* [should] *be provided while they are away with the greatest possible continuity. Furthermore, if children are evacuated, the party arranging for the evacuation and, as appropriate, the authorities of the receiving State must* [should] *establish for each child a card with photographs, which they must send to the Central Tracing Agency of the ICRC (consider AP I art. 78).* [All the preceding is to be done to the degree practicable given combat conditions and the availability of resources, e.g., personnel, transportation. Education (to include religious) should not be inappropriate as delineated elsewhere in this Manual. For additional guidance on the treatment of children, see 4.4 of this Manual on child soldiers.]

9.3.7.3 Women (likely consistent)

[This paragraph is superfluous with respect to its specificity to women. All persons—female, male, transgender, homogamous, gay, straight, bisexual—should have the same protections and respect.]

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

9.3.8 Civil Defense

9.3.8.1 Civil Defense Personnel (likely consistent)

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

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

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

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

5-61. ...The rules from Additional Protocol I concerning civil defense organizations and personnel also apply to the personnel and materiel of civilian civil defense organizations of neutral States or other States [and non-States entities] *not parties to the conflict that perform civil defense activities in the territory of a party to the conflict with the consent and under the control of that party.* [This sentence is confusing due to reference to parties which are indefinite and/or the territory of the party to the conflict could be the enemy's whose consent and control would not be logical.]

9.3.8.2 Civil Defense Organizations and Acts Harmful to the Enemy (likely consistent)

5-62. The protection to which civilian civil defense organizations are entitled ceases if they commit or are used to commit acts harmful to the enemy outside their humanitarian activities. [Unless for defensive purposes by civil defense personnel against harmful acts caried out against them, p]*rotection may* [should] *cease only after a warning has been given that sets, whenever appropriate, a reasonable time-limit for ceasing these activities and such warning has remained unheeded. Merely carrying out civil defense tasks under military direction or control and cooperating with the military in performing civil defense tasks are not considered to be acts harmful to the enemy. Nor is it harmful to the enemy if some military personnel are attached to civilian civil defense organizations*[, provided their attachment is solely to assist the civil defense organization to carry out its humanitarian responsibilities,] *or if the performance of civil defense tasks incidentally benefits military victims. Military personnel permanently*

and exclusively assigned to civil defense organizations (and properly distinguished with civil defense symbols) do not lose their status as POWs if captured, but they could lose their immunity from attack should they directly participate in hostilities, and they may be prosecuted for their hostile acts while acting under the color of civil defense authority. [Under this Manual, detained civil defense personnel would not be considered "captured" or POWs unless they had engaged in hostilities against the detaining party; rather, they would be considered having been detained and, thereby, "detained non-combatants."]

5-63. Civilian civil defense personnel may bear light individual weapons for the purpose of maintaining order or for self-defense without losing their protections, although in areas where land fighting is taking place or is likely to take place, the parties to the conflict must [should generally] *take measures to limit these weapons to handguns* [and possibly shotguns]*...to assist in distinguishing between civil defense personnel and combatants. If civil defense personnel bear other light individual weapons in such areas, however, they must* [should] *nevertheless be respected and protected as soon as they have been recognized as such* [and it is clear they are not intent on actions harmful to a belligerent]. *The mere formation of civilian civil defense organizations along military lines, and compulsory service in them, does not deprive them of these protections (consider AP I art. 65). If civil defense organizations are participating in military activities, however, like providing warning to military organizations (as well as civilians), they may become military objectives.* [However, providing warnings to all persons, e.g., air raid sirens, would not constitute an act sufficient to become a military objective although enemy forces may legitimately attempt to take control of or sabotage such warning systems in advance of an attack so warnings cannot be given that would alert their adversary's military.]

9.3.8.3 Marking of Civil Defense Organizations and Structures (consistent)

5-64. Under Additional Protocol I, the international distinctive sign of civil defense…is an equilateral blue triangle on an orange [back]*ground when used for the protection of civil defense organizations, their personnel, buildings, and materiel, and for civilian shelters. The parties to the conflict must* [should] *take measures necessary to supervise the display of the international distinctive sign of civil defense and to prevent and repress its misuse (consider AP I art. 66).*

9.3.9 Aliens in the Territory of a Party to the Conflict (generally consistent)

5-80. With the exception of special measures of control authorized by the GC, such as internment, the situation of [alien] *protected persons*[, including enemy aliens, hereafter cumulatively referred to as "protected persons" in this section] *in the home territory of a State party to the conflict continue to be regulated, in principle, by the provisions concerning aliens in time of peace (GC art. 38). In any case, the following rights must* [should] *be granted to them:*

- *They must* [should] *be enabled to receive the individual or collective relief that may be sent to them*[, if such relief has been agreed to by the respective belligerents and non-belligerent parties]*;*
- *They must* [should]*, if their state of health so requires, receive medical attention and hospital treatment* [generally] *to the same extent as the* [non-military] *nationals of the State* [or members of the non-State party] *in whose hands they are;*
- *They must* [should] *be allowed to practice their religion and to receive spiritual assistance from ministers of their faith* [to the same extent as citizens or members of the party in whose hands they are, and provided such spiritual guidance is not war-like in nature in support of enemy belligerents nor advocating repression of others]*;*
- *If they reside in an area particularly exposed to the dangers of war, they must* [should] *be authorized to move from that area to the same extent as the nationals of the State* [or members of the non-State party] *where they are residing* [unless there is a compelling security reason for not allowing this]*; and*

- [Non-combatant c]*hildren under 15 years of age, pregnant women, and* [single parent non-combatant] *mothers* [and fathers directly responsible for] [ ] *children under 7 years of age are to benefit from any preferential treatment to the same extent as the nationals of the State* [or members of the non-State party] *in whose hands they are (GC art. 38).*

5-81. Protected persons who, as a result of the war, have lost their gainful employment, must [should] *be granted the opportunity to find paid employment. That opportunity must* [should]*, subject to security considerations to the provisions of Article 40 of the GC, be equal* [generally] *to that enjoyed by the nationals of that State* [or party] *in whose territory they are. When a party to the conflict applies to a protected person methods of control (see paragraphs 5-83 through 5-88) that result in the protected person being unable to support himself or herself, and especially if such person is prevented for reasons of security from finding paid employment on reasonable conditions, the said party must* [should] *ensure provisions of his or her support and that of his or her dependents* [provided it has the resources to do so. If it does not, the protected person should be allowed and provided assistance to leave the territory of that party unless there is a security reason for doing otherwise. If there is such a reason, the person should be detained and provided all rights and benefits of detained persons.] *Protected persons may in any case receive allowances from their home country, the protecting power, or relief societies referred to in Article 30 of the GC (the national Red Cross or Red Crescent society of the country where they may be) (GC art. 39).*

5-82. Protected persons may be compelled to work only to the same extent as nationals of the party to the conflict in whose territory they are. If protected persons are of enemy nationality, they may [should] *only be compelled to do work that is normally necessary to ensure the feeding, sheltering, clothing, transport, and health of human beings and that is not directly related to the conduct of military operations* [except as otherwise may have been addressed in this chapter for work by civilians in conflict areas]. *In the cases mentioned in the first two paragraphs of Article 40 of the GC (that are described in the preceding two sentences), protected persons compelled to work must* [should] *have the benefit of the same working conditions and of the same safeguards as national workers, in particular as regards wages, hours of labor, clothing and equipment, previous training, and compensation for occupational accidents and diseases (GC art. 40)* [provided resources exist to accommodate such considerations and benefits].

5-83. Enemy aliens and other protected persons in the home territory of a party to the conflict when hostilities break out between two States[, or non-State parties who control such territory,] *are not necessarily made prisoners or interned en masse. For example, all protected persons who may desire to leave the territory at the outset of or during a conflict may be entitled to do so, unless their departure is contrary to the national interest of the State* [or non-State party in whose territory they are located] *(GC art. 35).*

5-84. Although the GC provides that the parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war, it does not list every measure that may be implemented (see GC art. 27). Such measures can include many different types of measures. For example, in the home territory of a party to a conflict, measures of control are normally taken with respect to, at the very least, persons known to be active or reserve members of a hostile army (they would be the first POWs), persons who would be liable to service in the enemy forces, and persons who would be expected to furnish information or other aid to a hostile State [or non-State party]...

5-85. Other measures may include, for example, requiring protected persons: (1) to register with and report periodically to the police authorities; (2) to carry identity cards or special papers; (3) to refrain from carrying weapons; (4) to refrain from changing their place of residence without permission; (5) to

refrain from accessing certain areas; (6) to have an assigned residence; and (7) to be interned [or otherwise held].

5-86. Should the State [or non-State party]*, in whose hands protected persons may be, consider the measures of control mentioned in the GC to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43 of the GC. The internment or placing in assigned residence of protected persons may be ordered only if the security of the detaining power makes it "absolutely* [reasonably] *necessary." If any person, acting through the representatives of the protecting power*[, if one has been agreed to by the relevant parties]*, voluntarily demands internment* [or other form of detainment]*, and if his or her situation renders this step necessary, he or she must* [should] *be interned* [held] *by the State* [or non-State party] *in whose hands he or she may be (GC art. 42). All protected persons subject to measures of control are to be provided treatment consistent with the minimum humane treatment standards discussed in paragraphs 5-16 through 5-18*[, as is practicable and with available resources].

5-87. Any protected person who has been interned or [otherwise] *placed* [involuntarily] *in assigned residence is entitled to have such action reconsidered as soon as* [reasonably] *possible by an appropriate court*[, official,] *or administrative tribunal designated by the detaining power for that purpose. If the internment or placing in assigned residence is maintained, the court*[, official,] *or administrative board must* [should, if reasonably possible,] *periodically, and* [ideally] *at least twice yearly, consider his or her case with a view to favorably amending the initial decision, if circumstances permit (GC art. 43).*

5-88. Unless the protected persons concerned object, [to the degree practicable given conditions and available resources,] *the detaining power must* [should]*, as rapidly as* [reasonably] *possible, give the protecting power*[, if one has been agreed to by the relevant parties,] the *names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of Article 43 of the GC must* [should] *also, subject to the same conditions, be notified as rapidly as* [reasonably] *possible to the protecting power (GC art. 43)*[, if the detaining power recognizes such courts or boards].

9.3.10 Treatment of Internees

The treatment and care of interned non-combatant civilians, as addressed in FM 6-27, 5-89 through 5-139, is sufficiently similar to that found in Chapter 7 (Prisoners of War) that it will not be presented again. Nonetheless, there are notable differences where references in Chapter 7 obviously only relate to enemy combatants, not non-combatant civilians.

CHAPTER 10
Occupation

Occupation means that every day you die, and the world watches in silence. As if your death was nothing, as if you were a stone falling in the earth, water falling over water.

Suheir Hammad

... if one hasn't been through, as our people mercifully did not go through, the horrors of an occupation by a foreign power, you have no right to pronounce upon what a country does, which has been through all that.

Anthony Eden

I am merely noting that the creation of native prostitutes to service foreign privates is an inevitable outcome of a war of occupation, one of those nasty little side effects of defending freedom that all the wives, sisters, girlfriends, mothers, pastors, and politicians in Smallville, USA, pretend to ignore behind waxed and buffed walls of teeth as they welcome their soldiers home, ready to treat any unmentionable afflictions with the penicillin of American goodness.

Viet Thanh Nguyen
The Sympathizer

10.1 Introduction (likely consistent)

While this chapter focuses on conduct during occupations in times of war, regardless of which exists—occupation or active combat, to the extent practicable given available resources, military forces in an area of active hostilities should also attempt to assist in the provision of that required under occupation, with civil affairs units and staff (S-5, G-5) used to plan for, coordinate, and carry out occupation-like responsibilities and actions, such as the following from FM 6-27 (6-5 and 6-6):

- Restore and ensure, as far as possible, public order and safety, to include stopping looting, while respecting the laws in force unless not reasonably possible for military, human rights, and security reasons.
- Ensure there is sufficient food and clean water and other basic services for the inhabitants;
- Not make arbitrary changes to local governance;
- Enforce obedience from the inhabitants as may be necessary for the security of one's forces, maintenance of law of and order, and proper civil administration;
- Restrict freedom of movement and control means of transportation when necessary;
- Suspend, repeal, or change municipal/domestic law as needed for effective administration and coordinate with or, when necessary, control and operated relevant levels of government; and
- Control property and private businesses to address the needs of the population.

In carrying out these and other responsibilities, neither an operational or occupying party is required to provide food, housing, clothing, and basic services beyond what was provided by the previous State or non-State party governing the territory even if they have the resources to do so. Nonetheless, for humanitarian reasons, if such party has the capability and resources to ensure that at least all basic needs are met, every reasonable effort should be made to provide these even if prior authorities did not.

Note: Quoted text below in italics from FM 6-27 seemingly uses interchangeably "protected persons," "civilian population," "civilian inhabitants," and "inhabitants" or "population of occupied territory," although, in different contexts elsewhere under the law of war, there can be nuanced differences.

10.2 Overview and Practical Guidance (consistent)

6-1. Military occupation of enemy territory establishes a special relationship between the government of the Occupying Power, the occupied government, and the civilian population of the territory occupied. The body of international law governing occupations recognizes that the Occupying Power is responsible for the general administration of the occupied territory and its civilian inhabitants, including the maintenance of public order and safety (HR art. 43).

6-2. Military occupation is a temporary measure for administering territory under the control of an invading army, both for purposes of military necessity and of safeguarding the welfare of the population of the occupied territory. To administer occupied territory effectively, the Occupying Power has authority, within certain limits, to enact laws and to suspend certain local laws. (See HR art. 27; GC art. 64.) The Occupying Power generally may not suspend or alter laws that pertain to private matters such as family life, inheritance, and property, except as required to enable the Occupying Power to fulfill its obligations under LOAC, to maintain an orderly government, and to ensure the security of the Occupying Power.

6-3. Commanders should be prepared to apply occupation law, including by planning for the requirements of occupation even before the entry into foreign territory. Successful stability operations may be critical to achieving the political objectives of combat operations. Many of the rules of occupation law reflect sound principles for stability operations that technically occur outside the context of occupation.

6-4. Commanders should be prepared to work and coordinate with a range of organizations and entities on occupation issues to utilize relevant expertise and to ensure consistency with national policy and… legal obligation[s]…

10.2.1 Law of Military Occupation (consistent except possibly for 6-16)

6-11. The law of military occupation applies in international armed conflict and also in all cases of partial or total occupation of a country's territory, even if the occupation meets with no armed resistance (HR art. 2; GC art. 2)… Even if the requirements of the law of military occupation do[ ] *no*[t] *apply as a matter of law, general LOAC principles and rules will continue to apply (see DOD Law of War Manual, 11.2).*

6-12. Whether a situation qualifies as an occupation is a question of fact under LOAC. Under Article 42 of the 1907 Hague Regulations, "Territory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Military occupation:

- *Must* [should] *be actual and effective; that is, the organized resistance must* [should] *have been overcome, and the Occupying Power must* [should] *have taken measures to establish its authority;*
- *Requires the suspension of the territorial State's* [or non-State's] *authority and the substitution of the Occupying Power's authority; and*
- *Occurs when there is a hostile relationship between the State* [or non-State authorities] *of the invading force and the State* [or non-State authorities] *of the occupied territory.*

6-14. Mere physical presence of a belligerent's military in the territory of its enemy does not constitute military occupation (see HR art. 42) and does not activate military occupation law. Air superiority alone does not constitute an effective occupation. For example, [replace ". For example" with ", nor does"] *a brief physical holding of enemy territory by a small unit* [deleted *"does not constitute military occupation*"]. *Capturing a military objective, such as a town or city in the process of defeating enemy forces, and even holding it for an indeterminate period of time, by itself may not constitute a military occupation, as the government of the invaded State* [or non-State party] *may remain capable of exercising its authority.*

6-15. The law of military occupation does not apply to the liberation of friendly territory. Indeed, a military occupation presupposes that the Occupying Power is hostile in relation to the State whose territory is being occupied. The administration of liberated territory may be conducted in accordance with a civil affairs agreement. In the absence of such an agreement, a military government may be established in the area as a provisional and interim measure (DOD Law of War Manual, 11.1.3.2).

6-16. Generally, the law of military occupation would not apply in a non-international armed conflict because a military occupation presupposes that the Occupying Power is hostile in relation to the State whose territory is being occupied. A State's military forces controlling its own territory would not be regarded as conducting an occupation; similarly, foreign forces conducting operations with the consent of the territorial State would also not be regarded as conducting an occupation. However, the law of military occupation may be applicable to a non-international armed conflict when a non-State party to the conflict has been recognized as a belligerent and the criteria identified in Paragraph 6-12 are met (see DOD Law of War Manual, 11.1.3.3). [While a State's or non-State's military forces controlling its own territory during a conflict would not constitute occupation, if conditions in that territory are sufficiently unsettled, martial law may be put into effect by both State and non-State parties and remain in place until such time as local control can reasonably be returned to civilian governance. Further, if a non-State party takes control of territory in a State with which it is at war but does not consider this territory to be part of that for which it seeks independence or permanent control, such non-State party would, in effect, be an Occupying Power of that territory with the rights and responsibilities found in this chapter. **(uncertain)**]

["In limbo" or transitional situations may exist where (1) the government of the invested territory no longer effectively functions, (2) the invested territory is effectively controlled militarily by the investing force, and (3) the investing force does not have the personnel, skills, or other resources to fulfill its responsibilities under occupation law. In each such situation, ad hoc formal or informal arrangements will evolve. Their characteristics will vary based on a variety of strategic, resource availability, need, military, leadership, cultural, public safety, local initiative, and other considerations and conditions. Ideally, the investing force and local population would attempt to work together to minimize hardships of the local population without undermining security requirements of the investing force. **(uncertain)**]

10.2.2 Effectiveness, Commencement, Limitations, and Termination (generally consistent)

6-19. ...Military occupation does not require the presence of military forces in all populated areas, although those forces must control the most important places. The type of forces used to maintain the authority of the Occupying Power is not material. For example, the occupation might be maintained by permanently based units or mobile forces, either of which would be able to send detachments of forces to enforce the authority of the Occupying Power within the occupied district.

6-20. Additionally, an occupation may be effective despite the existence of areas…temporarily controlled by enemy forces or pockets of resistance.

6-21. The fact that a defended location (such as a city or town) still controlled by enemy forces exists within an area declared occupied by the Occupying Power does not render the occupation of the remainder invalid, provided that continued resistance in such a place does not render the occupier unable to exercise control over the remainder of the occupied territory.

6-22. There is no specific legal requirement that the Occupying Power issue a proclamation of military occupation. [Nonetheless, d]*ue to the special relations established between the civilian population of the occupied territory and the Occupying Power, the fact of military occupation and the territory over which it extends should be made known to the citizens of the occupied territory and to other States* [and to non-State belligerents].

6-24. ...Military occupation does not transfer sovereignty to the Occupying Power, but simply gives the Occupying Power the right to govern the enemy territory temporarily.

6-25. The fact of a military occupation does not authorize the Occupying Power to take certain actions. For example, the Occupying Power is not authorized by the fact of a military occupation to annex occupied territory or create a new State. Nor may [should] *the Occupying Power compel the inhabitants of occupied territory to become its nationals or otherwise swear allegiance to it (HR art. 45).*

6-26. The U.N. Security Council may call upon Occupying Powers to comply with existing international law. Acting under the Charter of the United Nations, the Security Council may also establish authorities or limitations that might interact with those otherwise applicable under occupation law. For example, a U.N. Security Council Resolution may provide additional authority for an Occupying Power to take action in governing occupied territory that would otherwise not be permissible under the law of belligerent occupation, including such actions related to modifying existing laws of the territorial State, and encouraging political reforms. [Nonetheless, regardless of what positions the United Nations Security Council or General Assembly might take or desire, whether such positions become effective will depend on whether the States or non-State parties which support those positions are militarily or economically stronger than and politically willing to use such force against a non-compliant Occupying Power.]

6-27. Military occupation will cease when the conditions for its application are no longer met (see paragraphs 6-11 through 6-12). In particular, the military occupation would cease when the invader no longer factually [controls or] *governs the occupied territory or when a hostile relationship no longer exists between the State* [or non-State parties] *of the occupied territory and the Occupying Power…*

6-28. …if a peace treaty legitimately transfers sovereignty of the territory to the Occupying Power, it would no longer be characterized as a military occupation (DOD Law of War Manual, 11.3.1).

6-29. …In the case of occupied territory, the application of the GC will cease to apply to occupied territory one year after the general close of military operations (GC art. 6). [This one-year period may be extended if the security and welfare of the territory's residents cannot be reasonably achieved or maintained by replacing the Occupying Power with another governing authority.] *However, the Occupying Power is bound for the duration of the military occupation, to the extent the Occupying Power continues to exercise* [military control and] *governmental functions in the occupied territory…*

6-30. … individuals entitled to GC protection[, or protection under this Manual,] *who remain in the custody of the Occupying Power following the end of occupation retain that protection until their release, repatriation, or re-establishment (GC art. 6).*

10.2.3 Protected Persons (consistent and inconsistent)

6-31. The GC is concerned in large part with the welfare of "protected persons" located either in occupied territory or the home territory of a party to the conflict. Subject to certain exceptions, persons protected by the GC are those who, at a given moment and in any manner whatsoever, find themselves, in the case of conflict or occupation, "in the hands of" a party to the conflict or occupying State [or non-State party] *of which they are not nationals (GC art. 4)* [or members]. *The following persons are specifically excluded from being considered protected persons under the GC, even though they may nonetheless receive the protection of the population against certain consequences of armed conflict:*

- *Nationals of any State that is not a party to GC;*
- *A State's own nationals;*
- *Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State (for example, nationals of a State that is a multinational partner of the Occupying Power in the armed conflict), while the State of which they are nationals has normal diplomatic representation with the Occupying Power; and*
- *Persons protected by the GWS, GWS Sea, or GPW (for example, those persons entitled to be treated as POWs or retained personnel if captured by the Occupying Power).*

[Except with respect to treason, this Manual does not make the preceding distinctions as to those who are not protected persons. Rather, all persons are protected or not protected from or for certain things based on whether they are combatants or non-combatants, not whether their State or cause is a signatory to the GC; whether they are citizens or members of a State or non-State neutral or belligerent party; or whether diplomatic representation exists between various parties of which they are a member **(inconsistent)**.]

6-33. …protected persons who are in occupied territory must [should] *not be deprived, in any case or in any manner whatsoever,* [except as may be allowed under this Manual,] *of the benefits of the GC by any change introduced, as a result of the occupation of a territory, into the institutions or governments of the occupied territory, nor by any agreement concluded between the authorities of the occupied territories* [or any other party] *and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory (GC art. 47)* **(consistent except for reference to this Manual)**.

10.2.4 Administration of Occupied Territory (generally consistent)

10.2.4.1 General

6-37. The Occupying Power may take measures of control and security necessary to maintain orderly government of the occupied territory, to ensure its own security, and to further the purposes of the war (HR art. 43; GC art. 27, 47, 64). The Occupying Power may suspend laws that constitute a threat to the Occupying Power's security or the security of the general population, or laws constituting an obstacle to application of the law of occupation, provided it ensures protected persons are humanely treated (GC art. 27). In meeting obligations regarding public order and safety, the Occupying Power will [should] *continue to enforce the ordinary civil and criminal laws of the occupied territory, except to the extent authorized by the law of occupation to alter, suspend, or repeal such laws (see HR art. 43; GC art. 64). The Occupying Power is prohibited from arbitrarily exercising its authority to suspend, repeal, or change the municipal law applicable to occupied territory (see DOD Law of War Manual, 11.5.2).*

6-38. …The Occupying Power has… the positive obligation and authority to ensure the protection, security, and welfare of the population living under occupation. This includes the obligation and authorit[y] *to ensure that the civilian population has adequate food and access to essential medical services, and related to ensuring the working of institutions for the care and education of children (GC arts. 50, 55, 56)* [to the degree these are practicable within the resources of the Occupying Power].

6-39. It is immaterial whether the government over an enemy's territory consists of a military or civil or mixed administration. Its character is the same, and the source of its authority is the same. It is a government imposed by force and the legality of its actions are determined by LOAC (see DOD Law of War Manual, 11.8.6). For example, in the initial stages of a military occupation, authority may be exercised exclusively by military authorities. In later stages, occupation authority is sometimes exercised through a civilian governing authority established by the Occupying Power.

6-41. [In order not to be considered combatants,] *…inhabitants of occupied territory have a duty to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the forces or in respect to their operations, and to render strict obedience to the orders of the Occupying Power. Subject to the restrictions imposed by international law, the Occupying Power may demand and enforce from the inhabitants of occupied territory such obedience as may be necessary for the security of its forces, for the maintenance of law and order, and for the proper administration of the country* [or territory].

6-42. Obligations of the Occupying Power may [should] *not be avoided through appointment of a surrogate or puppet government, central or local, to carry out acts that would be unlawful if performed directly by the Occupying Power. Such acts induced or compelled by the Occupying Power are nonetheless its acts (see GC art. 29).*

6-43. The functions of the hostile [pre-existing] *government continue only to the extent they are sanctioned by the Occupying Power. The Occupying Power may permit the government of the country to perform some or all of its normal functions.*

6-44. The compulsion of civil servants and other officials of local governments to continue to execute their duties must [should] *be justified by military necessity*[, by that required for the welfare of the local population,] *and be consistent with applicable provisions of the GC.*

10.2.4.2 Laws of and in Occupied Territory (generally consistent)

6-45. In general, the municipal law (i.e., the ordinary domestic civil and criminal law) of the occupied territory and the administration of such law remain in full force so far as the inhabitants of occupied territory are concerned, unless changed by the Occupying Power…

6-46. The duty of the Occupying Power to respect, unless absolutely prevented, the laws in force in the country prohibits it from arbitrarily exercising its authority to suspend, repeal, or change the municipal law applicable to occupied territory. … the Occupying Power must [should] *use its power with respect to the municipal law of occupied territory in good faith and not for the purpose of oppressing the population.*

6-48. The penal laws of the occupied territory are to remain in force during the occupation, except an Occupying Power may repeal or suspend laws where they constitute:

- *A threat to its security; or*
- *An obstacle to the application of the GC (GC art. 64)*[, this Manual, and other relevant international law].

Laws that may constitute a threat to the security of occupation forces might include, for example, laws mandating resistance to any occupation or permitting civilian ownership of weapons, munitions, or components thereof. Laws that may be an obstacle to the application of the GC might include laws that are inconsistent with the duties of the Occupying Power…[, or provisions of this Manual].

6-49. The Occupying Power may subject the population of the occupied territory to penal provisions:

- *That are essential to enable the Occupying Power to fulfill its obligation under the GC* [and this Manual]*;*
- *To maintain the orderly government of the territory; and*
- *To ensure the security of the Occupying Power, its forces and property, or the occupying administration, and likewise the establishment and lines of communication used by them (GC art. 64).*

6-50. Protected persons may [should] *not be arrested, prosecuted, or convicted by the Occupying Power for acts committed or opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war (GC art. 70).*

6-51. Nationals [or members] *of the Occupying Power who sought refuge in the territory of the occupied State* [or non-State territory] *before the outbreak of hostilities, may* [should] *not be arrested, prosecuted, convicted, or deported from the occupied territory, except for offenses committed after the outbreak of hostilities or for offenses under common law committed before the outbreak of hostilities that, according to the law of the occupied State* [or territory]*, would have justified extradition in time of peace (GC art. 70).*

6-52. [Unless for a compelling military or political reason,, except for their safety, p]*rotected persons may* [should] *not be forcibly transferred or deported to another country*[;] *nationals* [or members] *of the Occupying Power may be involuntarily removed under certain conditions (see DOD Law of War Manual, 11.11.7.2).*

6-53. The Occupying Power is not required to adhere to the local procedure for amending municipal law. However, the population of the occupied territory must [should] *be informed of any alteration, suspension, or repeal of existing laws and of the enactment of new laws. In particular, penal provisions enacted by an Occupying Power must* [should] *not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effects of these penal provisions may* [should] *not be retroactive (GC art. 65).*

6-54. It is expressly forbidden to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals [or members] *of a hostile party (HR art. 23). This rule has been interpreted to apply solely to enemy areas occupied by a belligerent. It has been interpreted to prohibit a military commander from arbitrarily annulling the results of civil proceedings between private parties (see DOD Law of War Manual, 11.11.1.4).*

10.2.4.3 Functioning of Local Courts and Tribunals (consistent)

6-55. In general, the courts and other tribunals of the occupied territory should continue to function. For example, ordinary crimes that do not affect the safety of the Occupying Power or its personnel are normally left to the jurisdiction of the courts in the occupied territory (GC art. 64). However, the administration of justice in occupied territory, like the performance of other governmental functions, is subject to the direction of the Occupying Power (see DOD Law of War Manual, 11.10).

6-56. The ordinary courts in occupied territory should be suspended only if:

- *Judges and magistrates are unable or unwilling to perform their duties (GC art. 54);*
- *The courts are corrupt or unfairly constituted, for example, failing to provide the impartial and regularly constituted courts respecting the generally recognized principles of regular judicial procedure, recognized by international law (consider AP I art. 75); or*
- *Local judicial administration has collapsed due to the hostilities preceding the occupation (see DOD Law of War Manual, 11.10.1).*

In such cases, the Occupying Power may use its own properly constituted, non-political military [or civilian] *courts to ensure that offenses against the local population are properly tried (see DOD Law of War Manual, 11.10.1).*

10.2.4.4 Immunity of Occupation Personnel from Local Law (likely consistent)

6-57. Military and civilian personnel of the occupying forces and occupation administration, and persons accompanying them, are not subject to local laws or to the jurisdiction of the local civil or criminal courts of the occupied territory, unless expressly agreed to by a competent officer [or authority] *of the Occupying Power.* [This in no way exempts such persons from being charged for offenses which might be violations under local laws, but rather any charges resulting from such violations, may be adjudicated in military or other courts of the Occupying Power unless it agrees otherwise.]

10.2.4.5 Censorship (consistent)

6-58. For the purposes of security, an Occupying Power may establish censorship or regulation of any or all forms of media (for example, press, radio, [internet,] *or television) and entertainment (for example, theater or movies), of correspondence, and of other means of communication. For example, an Occupying Power may prohibit entirely the publication of newspapers that pose a threat to security or it may prescribe regulations for the publication or circulation of newspapers or, of other media for the purpose of fulfilling its obligations to restore public order (see DOD Law of War Manual, 11.7.2).*

10.2.4.6 Control of the Means of Transport (consistent)

6-59. An Occupying Power is entitled to exercise authority over all public and private transportation, whether on land, water or air, within the occupied territory and may seize them and regulate their operation[.]

10.2.5 Protection of the Population (generally consistent except for 6-62)

10.2.5.1 General

6-60. …The population of an occupied territory…are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices [within bounds referenced elsewhere]*, and their manners and customs (HR art. 46)*[, provided the health, safety, and well-being of other inhabitants are not being inappropriately harmed or infringed upon by such practices]. *They must* [should] *at all times be humanely treated, and must* [should] *be protected especially against all acts of violence or threats of violence, and against insults and public curiosity (see DOD Law of War Manual, 11.6.1).*

6-62. Other provisions for the humane treatment of protected persons set forth in Articles 27 through 34 of the GC apply to the population of an occupied territory[, except as might otherwise be consistent with this Manual]. *For example, women* [all persons] *must* [should] *be especially protected … against rape, enforced prostitution, or any form of indecent assault. Reprisals against protected persons and their property are prohibited* [except as allowed under this Manual]. *The taking of hostages is prohibited* [except as otherwise noted in this Manual]. *In addition, protected persons in occupied territory must* [should] *have every facility for making application to the protecting powers (if designated), to the ICRC, to the national red cross or red crescent* [or other similar] *society of the country where they may be, as well as to any organization that might assist them.* [The position of this Manual is that it is not the responsibility of the Occupying Party to facilitate this beyond allowing correspondence to occur which may be censored as necessary for security reasons. Anything beyond this is the responsibility of the person who wishes to make such application and those who might wish to assist such person. Nonetheless, if a person does make such application, the Occupying Party will not punish that person for

having done so. It should be understood that, as the official text is written, those who wish to undermine the administration of the Occupying Power could organize thousands of such applications which may be groundless as part of certain lawfare or other initiatives. **(possibly inconsistent)**]

6-64. ...No general penalty, pecuniary or otherwise, may [should] *be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible (HR art. 50). Such penalties are prohibited, even if authorized under the law of the occupied territory (see DOD Law of War Manual, 11.6.2.2).*

6-65. Citizens of neutral States residing within occupied territory are generally treated the same as other residents of occupied territory.

10.2.5.2 Applicability of Human Rights Law

6-66. Human rights law has some limited [delete "*limited*"] *relevance and application to military occupation. It has been the U.S. view that the International Covenant on Civil and Political Rights (ICCPR) does not create obligations for an Occupying Power with respect to the occupied territory because a contracting State's obligations under the ICCPR only extend to persons within its territory and subject to its jurisdiction. Although persons within occupied territory are subject to the jurisdiction of the Occupying power for certain purposes, they are not within the Occupying Power's national territory.* [While the U.S. view may be legally correct, it is the position of this Manual that the Occupying Power becomes, *de facto,* the State government of the occupied territory and, therefore, is bound by ICCPR except when the law of war takes precedence under *lex specialis* **(seemingly inconsistent with U.S. position)**.]

6-67. ...Other States, including many U.S. allies, interpret their human rights treaty obligations to create obligations for their military operations outside their home territory in the context of belligerent occupation (see DOD Law of War Manual, 11.1.2.5). [The practice of these other States is consistent with this Manual's position referenced in the preceding paragraph **(inconsistent with U.S. position)**.] *Further, there are court cases, public pronouncements, and resolutions of international bodies that have sometimes addressed occupations by citing provisions contained in regional and general human rights treaties.*

6-68. Although international human rights law is not specifically designed for situations of armed conflict and occupation, it may have relevance to certain situations arising in an occupation. Subject to the Occupying Power's authority to change local law, an occupied State's domestic law that has been enacted pursuant to its human rights treaty obligations or that meets the requirements of the occupied State's human rights treaty obligations may continue to apply during an occupation. (see DOD Law of War Manual, 11.1.2). [Subject to exceptions found in this Manual, its position is that the ICCPR is applicable to all persons regardless of whether their State or non-State party is a signatory to that treaty. What must be determined, however, is whether the law of war or IHRL takes precedence for a particular situation. **(possibly inconsistent)** This is addressed in Chapter 2 and elsewhere in the Manual.]

10.2.5.3 Movement of Protected Persons (mostly consistent except for parts of 6-72)

6-69. As a general matter [during conflicts], *the Occupying Power assumes the authority of the ousted government in controlling the movement of person within the occupied territory, as well as entering or exiting the occupied territory. For example, private individuals, members of private organizations, or representatives of foreign governments or public international organizations seeking to enter the occupied territory may not do so without express authorization from the Occupying Power.*

6-70. For security and other valid reasons, including those relating to its duties and responsibilities as an Occupying Power, an Occupying Power may prohibit individuals from changing their residence, restrict

freedom of movement within the occupied territory, …declare certain areas off limits, prohibit emigration and immigration by protected persons who are nationals of the State [or members of non-State party] *whose territory is occupied, and require all individuals carry identification documents.*

6-71. Protected persons who are not nationals [or members] *of the power whose territory is occupied may avail themselves of the right to leave the territory, subject to Article 35 of the GC, and decisions thereon must* [should] *be taken according to the procedure that the Occupying Power must* [should] *establish (GC art. 48). Article 35 of the GC sets forth rules regarding the departure of protected persons from the home territory of a belligerent State and provides protected persons with a right to depart. But, Article 35 allows a belligerent to prevent such departure if such departure is contrary to the belligerent's national interests, and Article 35 specifies certain procedural requirements (see DOD Law of War Manual, 11.12.2). For example, persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use. If a person is refused permission to leave the territory, he or she is entitled to have the refusal reconsidered as soon as* [reasonably] *possible by an appropriate court or administrative board designated by the Occupying Power for that purpose (GC arts. 35, 48)*[, provided such courts or administrative boards are effectively in place which may not be the case during initial phases of occupation].

6-72. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power, or of any other country, occupied or not, are prohibited, regardless of their motive. The unlawful deportation or transfer of protected persons in violation of this rule constitutes a grave breach of the GC. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if required for the security of the population or for imperative military reasons. Such evacuations may [should] *not involve the displacement of protected persons outside the bounds of the occupied territory, except when, for material reasons, it is impossible to avoid such displacement. The evacuees must* [would ideally] *be transferred back to their homes as soon as hostilities in the area in question have ceased (GC art. 49)*[, unless the capability to do so does not exist, the relocated persons do not wish to return and the State or territory where they have been relocated agrees to their continued residence, or political or military necessity. Additionally, while this Manual generally concurs with the 6-72, there may be certain individuals who need to be relocated outside the occupied territory for the duration of the occupation due to military or political necessity.]. *This provision applies only to protected persons under the GC; for example, POWs may be transferred from occupied territory to POW camps in the home territory of a belligerent. Similarly, a person who is not a protected person (such as a national of a neutral or a co-belligerent, who travels to an occupied State to fight the Occupying Power would not be covered by this prohibition.* [Such persons are considered protected but simply subject possibly to different responsibilities and regulations.] [See exceptions of this Manual as reflected in FM 6-27 (6-52) above.]

6-73. The Occupying Power undertaking such transfers or evacuations must [should] *ensure, to the greatest* [delete "greatest"] *extent practicable: (1) proper accommodation is provided to receive the protected persons; (2) …evacuations or transfers are effected with satisfactory conditions of hygiene, health, safety and nutrition; and (3) …members of the same family are not separated.* [If one exists, t]*he Protecting Power must* [should] *be informed of any transfers and evacuations as soon as they have taken place (GC art. 49).*

6-74. The Occupying Power must [should] *not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. Additionally, the Occupying Power must* [should] *not deport or transfer parts of its own civilian population into the territory it occupies (GC art. 49).*

10.2.5.4 Children (generally consistent)

6-75. …Although the GC does not set forth a specific age criteria for the term "children," for the purposes of article 50 of the GC and its obligations with respect to the protection of children in occupied territory may be understood generally to refer to children under fifteen years of age (GC art. 50). [See 4.4.5 for additional considerations with respect to age related to child soldiers.]

6-76. The Occupying Power must [should, to the degree practicable with available resources]*, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children (GC art. 50). This obligation goes beyond merely not interfering with such institutions, as it also includes the affirmative duty to support them when the responsible authorities of the country fail to do so.*

6-77. The Occupying Power must [should, within their capabilities and resources for doing so,] *take all* [delete "all"] *necessary steps to facilitate the identification of* [separated or orphaned] *children and the registration of their parentage*[, guardians, or responsible family] *(GC art. 50). The Occupying Power may* [should] *not, in any case, change their personal status, nor enlist them in formations or subordinate organizations (GC art. 50)* [except to enhance their well-being which would not be possible otherwise and would not be for their deployment militarily, politically, or for religious purposes].

6-78. Should the local institutions be inadequate for the purpose, the Occupying Power must [should, within their capability and resources for doing so locally,] *make arrangements for the maintenance and education, if* [reasonably] *possible by person of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and cannot be adequately cared for by a near relative or friend (GC art. 50).* [Such education by persons of their own nationality, language, and religion should not undermine the security and authority of the Occupying Power or teach values antithetical to the welfare, rights, and equality of other persons.]

6-79. A special section of the National Protected Person Information Bureau[, if such a bureau effectively exists,] *is to be responsible for taking all necessary steps to identify children whose identity is in doubt (see paragraph 5-33). Particulars of their parents or other near relatives should be recorded if available.* [Except under extreme circumstances, t]*he Occupying Power must* [should] *not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war that may have been adopted prior to the occupation in favor of children under fifteen years of age, expectant mothers, and* [single parent non-combatant] *mothers* [and fathers] *of children under seven* [replace "seven" with "fifteen"] *years of age (GC art. 50).*

10.2.5.5 Food and Public Health (generally consistent)

6-81. [At its discretion, t]*he Occupying Power must* [should] *allow the protecting power*[, if one exists,] *to verify the state of the food and medical supplies in occupied territories, at any time, except where temporary restrictions are made necessary by imperative military* [or other] *requirements (GC art. 55).*

6-82. To the fullest extent available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national[, local, and non-State humanitarian organizations,] [ ] *local authorities, medical and hospital establishments, medical services, and public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories must* [should] *be allowed to carry out their duties (GC art. 56; consider AP I art. 15).*

6-83. If new hospitals are set up in occupied territory and if the competent organizations of the occupied State [or non-State territory] *are not operating there, the occupying authorities must* [should]*, if necessary, grant them the recognition provided for in Article 18 of the GC (GC art. 56). This recognition*

allows civilian hospitals to show that they are civilian hospitals and that the buildings they occupy are not used for any purpose that would deprive them of protection (see DOD Law of War Manual, 11.15.3). In similar circumstances, the occupying authorities must [should] *also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21 of the GC (GC art. 56). …In adopting measures for purposes of health and hygiene, and in their implementation, the Occupying Power must* [should, to the degree reasonably practicable,] *take into consideration the moral and ethical* [replace *"*moral and ethical" with "custom and cultural"] *sensitivities and susceptibilities of the population of the occupied territory (GC art. 56).*

6-84. The Occupying Power may requisition civilian hospitals only temporarily and in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the hospital's current patients and for the future needs of the civilian population for hospital accommodation. The material and stores of civilian hospitals may not be requisitioned so long as they are needed for the civilian population (GC art. 57; consider AP I art. 14). [It is the position of this Manual that, under triage situations, civilian medical personnel, facilities, and supplies can be requisitioned to treat wounded combatants first if their need is greater due to military necessity considerations balanced with other law of war principles **(inconsistent)**.]

6-85. The Occupying Power may not requisition food, articles, or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been considered [and which may or may not take precedence]. *Subject to the provisions of other international agreements, the Occupying Power must* [should] *make arrangements to ensure that fair value is paid for any requisitioned goods (GC art. 55* [, if funds are available for this purpose].

10.2.5.6 Spiritual Assistance (somewhat inconsistent)

6-86. The Occupying Power must [should] *permit ministers of religion to give spiritual assistance to the members of their religious communities*[, provided this is not antithetical to the safety and welfare of the civilian population and the Occupying Power]. *The Occupying Power must* [may] *also accept consignments of books and articles required for religious needs and must* [delete "must"] *facilitate their distribution in occupied territory (GC art. 58).* [The position of this Manual is that, while it may do so, the Occupying Power has no obligation to "accept" or "facilitate" distribution of religious books and articles. However, the Occupying Power should not hinder their acceptance and distribution by others provided these materials are not subversive of the Occupying Power's authority, security, and cause, or detrimental to the welfare of residents of the occupied territory. Such restriction is permissible under Occupying Power rights of censorship.]

10.2.5.7 Collective Relief (somewhat consistent)

6-87. If the population of an occupied territory is inadequately supplied, the Occupying Power must agree [should be open] *to relief schemes on behalf of the affected population and must* [should] *facilitate them* [replaced "by all means at its disposal" with "given its capabilities for doing so"]. *Such schemes may be undertaken either by States*[, non-State parties,] *or…impartial humanitarian organizations, such as the ICRC, and consist, in particular, of food, medical supplies, and clothing (GC art. 59; consider AP I art. 69).*

6-88. All parties to[, and regardless of whether signatories of,] *the GC must* [should] *permit the free passage of the consignments and must* [should] *guarantee their protection* [if resources exist to do so]. *A State* [or other party] *granting free passage to consignments on their way to territory occupied by an adverse party to the conflict, must* [should]*, 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 [if one exists]*) that these consignments are to be used for the relief of the needy population and not to be used for the benefit of the Occupying Power (GC art. 59)*[, except as otherwise allowed under this Manual].

6-89. [Except as noted previously regarding conditions, capabilities, and available resources, r]*elief consignments do not relieve the Occupying Power of its responsibilities under Articles 55, 56, and 59 of the GC, which address the provision of food, medical supplies, and medical services to the population. The Occupying Power may* [should] *not divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity in the interests of the population*[, administration, and security] *of the occupied territory and with the consent of the protecting power (GC art. 60)*[, if such exists].

6-90. The distribution of relief consignments referred to in Articles 59 and 60 of the GC must [should] *be carried out with the cooperation, and under the supervision, of the protecting power* [if one has been authorized and in communication]*. This duty may be delegated, by agreement between the Occupying Power and the protecting power* [if one exists and, if one does not, by the Occupying Power alone]*, to a neutral State, to the ICRC, or any other impartial humanitarian* [or responsible] *body. Such consignments must* [should] *be exempt in occupied territory from all charges, taxes, or customs duties* [deleted *"unless such are necessary in the interests of the economy of the territory*"]*. The Occupying Power must* [should] [, to the degree it is able,] *facilitate the rapid distribution of these consignments. All* [State and on-State] *parties to the GC* [delete "*to the GC"*] *must* [should] *endeavor to permit the transit and transport of such relief consignments free of charge on their way to occupied territories (GC art. 61). Subject to imperative reasons of security* [and military necessity]*, protected persons in occupied territories must* [should] *be permitted to receive the individual relief consignments sent to them (GC art. 62; consider AP I art. 71).*

6-91. Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power, recognized national Red Cross and Red Crescent Societies [and other comparable organizations] *must* [should] *be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. ...the Occupying Power may* [should] *not require any changes in the personnel or structure of these societies that would prejudice these activities. The same principles are to apply to the activities and personnel of special organizations of a non-military character that already exist* [in the occupied territory] *or that may be established for the purpose of ensuring the adequate living conditions of the civilian population by maintaining essential public utility services, distributing relief, providing medical care*, [caring for children, the disabled and elderly,] *and organizing rescues (GC art. 63).*

10.2.5.8 Relief Societies, Other Organizations

[Addressed in Chapter 2 War and the Law, Chapter 7 Prisoners of War, and Chapter 9 Civilians.]

10.2.6 Treatment of Enemy Property (generally consistent)

Treatment of enemy property is also addressed in Sections 4.7.6 and 9.3.5.

10.2.6.1 General

6-96. The general prohibitions against pillage and wanton destruction of enemy property that apply to military operations also apply to the occupation of enemy territory. Further, any destruction by the Occupying Power of real (immoveable) or personal (moveable) property belonging individually or collectively to private persons, to the Occupied State [or non-State party]*, to other public authorities, or to social or cooperative organizations is prohibited except where such destruction is rendered absolutely*

[reasonably] *necessary by military operations (GC art. 53)*[, disaster relief, or eminent domain proceedings which are lawfully approved for the public good]…

6-98. An Occupying Power may always take temporary possession of enemy property (real or personal, and public or private) where required for direct military use in military operations. In the case of private property, an Occupying Power, where possible, should requisition the property and offer [fair] *compensation to the owner (HR art. 52).*

10.2.6.2 Enemy Private Property (generally consistent)

6-112. Private property may [should] *not be confiscated, that is, it may* [should] *not be taken without* [reasonable] *compensation (HR art. 46). This prohibition against confiscation of private property extends not only to outright taking in violation of LOAC, but also to any acts that, through the use of threats, intimidation, or pressure, or by actual exploitation of the power of the Occupying Power, permanently or temporarily, deprive the owner of the use of such property without his or her consent or without authority under international law. The prohibition against confiscation of private property does not extend to takings by way of contribution, requisition,* [eminent domain,] [ ] *the valid imposition of penalties*[, or for legitimate tax or lien purposes as permissible under standard public finance measures appropriate to any government.]

6-113. ... Private property[, real and personal,] *susceptible of direct military* [and occupation administration] *use, such as cables, telephone and telegraph facilities, radio, television, telecommunications and computer networks and equipment, motor vehicles, railways, railway plants, port facilities, ships in port, barges and other watercraft, airfields, aircraft, depots of arms (whether military or sporting), documents connected with the conflict, all varieties of military equipment (including that in the hands of manufacturers), component parts of or material suitable only for use in the foregoing, and, in general, all kinds of war material*[, may be seized but should be restored or compensation possibly paid when peace is made]. [Note: Verb seems to be missing in FM 6-27 text.]

6-114. If private property is seized…, a receipt should be given to the owner, or a record made of the nature and quantity of the property and the name of the owner or person in possession of it, in order that restoration and compensation may be made at the conclusion of the armed conflict [if reasonably possible].

6-101. ... requisition…is the method of taking private enemy real and personal property for the needs of the army of occupation. Requisitions in kind and services are not to be demanded from municipalities or inhabitants except for the needs of the army of occupation. They must [should] *be in proportion to the resources of the country* [replace "country" with "occupied territory"]*, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country* [or region]*. Requisitions must* [should] *be made under the authority of the commander* [or other appropriate Occupying Power authority] *of the locality (HR art. 52).*

6-102. Contributions in kind must, as far as possible, be paid for in cash; if not, a receipt must [should] *be given,* and *the payment of the amount due must* [should] *be made as soon as* [reasonably] *possible (HR art. 52). The prices of articles and services requisitioned will be fixed by agreement if possible, otherwise by military authority (see DOD Law of War Manual, 11.18.7.3)* [and should be reasonably consistent with local prices for such articles and services.]

6-103. Goods and services that are necessary for the maintenance of the occupation army, such as fuel, food, clothing, building materials, machinery, tools, vehicles, or furnishings for quarters, may be requisitioned. Billeting of troops in occupied areas is also authorized.

6-104. However, the Occupying Power may [should] *not requisition foodstuffs, articles necessary to support life, or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been considered* [and which may or may not take precedence]. *Subject to the provisions of other international conventions, the Occupying Power must* [should] *make arrangements to ensure that fair value is paid for any such requisitioned goods (GC art. 55).* [Nonetheless, if the needs in the occupied territory have reasonably been met and material shortfalls of such items exist in the home territory of the Occupying Power where the health and welfare of its population is suffering, foodstuffs, items necessary to support life, and medical supplies may be requisitioned to meet such needs if this can be done without unduly harming the welfare of the local population in the occupied territory.]

6-105. Coercive measures may be used to enforce requisitions but will be limited to the amount and kind necessary to secure the articles requisitioned.

6-106. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must [should] *likewise be restored and compensation*[, if any,] *fixed when peace is made (HR art. 54) This rule applies only to activities on land and does not deal with seizure or destruction of cables in the open sea (see DOD Law of War Manual, 11.18.2.4).* [It is not clear why this requirement would not also apply to cables in the open sea connecting countries and territories, unless there is a compelling reason to do otherwise. These cables should also not be seized or destroyed unless essential and, if they are, restored and/or compensated for as appropriate and proportionately by those who caused the damage.]

10.2.6.3 Enemy Public Property (consistent)

6-107. In general, an Occupying Power may capture or seize the real (immovable) and personal (movable) property of the occupied State [or non-State party] *and use it for military operations or the administration of the occupied territory. No compensation needs to be paid to the occupied State* [or non-State party] [f]*or the use or taking of such property.*

6-108. Real (immovable) property of the occupied State that is of direct military use, such as forts, arsenals, dockyards, magazines, barracks, railways, bridges, piers, wharves, airfields, and other military facilities, may remain in the hands of the Occupying Power until the close of the hostilities [or post-hostilities occupation]. *Such property may also be destroyed or damaged by the Occupying Power if it is deemed necessary to military operations.*

6-109. The Occupying Power is regarded only as an administrator and usufructuary[, i.e., a party or individual having the right to the temporary use of another's property with the basic obligation of preserving its form and substance, and returning it at a designated time,] *of* [non-military] *public buildings, real estate, forests, and agricultural estates belonging to the hostile State* [or non-State party] *and situated in the occupied territory. It must* [should] *safeguard the capital of these properties and administer them in accordance with the rules of usufruct (HR art. 55). Thus, the Occupying Power may use and enjoy the benefits of public real property belonging to an enemy State* [or non-State party]*, but it does not have the right of sale or unqualified use of such property. Further, it should not exercise its rights in such a wasteful and negligent manner as to seriously impair the value of the property* [although, during and immediately following a conflict, full repairs and maintenance may not be possible to all public buildings which were damaged during the conflict due to a shortage of materials, funds, or specialized skills]. *It may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and* [delete "and"] *work the mines*[, and extract other subsurface resources, e.g., oil, natural gas, water]. *The term of a lease or contract should not extend beyond the conclusion of hostilities* [or post-hostilities occupation] *(see DOD Law of War Manual, 11.18.5.2).*

6-111. An army of occupation may take possession of cash, funds, and realizable securities that are strictly the property of an enemy State [or non-State party]... [P]*ersonal (movable) property that is not susceptible of military* [or occupation administration] *use must* [should] *be respected and may* [should] *not be appropriated (DOD Law of War Manual, 11.18.5.3).*

10.2.6.4 Property Control (consistent)

6-116. Public and private property within occupied territory may be controlled to the degree necessary to prevent its use by or for the benefit of hostile forces or in a manner harmful to the Occupying Power. Conservators may be appointed to manage the property of absent persons (including nationals of the United States [Occupying Power] *and of friendly States* [and non-State parties]*) and of internees, property managed by such persons, and property of persons whose activities are deemed to be prejudicial to the Occupying Power. When the owners or managers of such property can resume control of their property and the risk of its hostile use no longer exists, it must* [should] *be returned to them.*

6-117. Measures of property control must [should] *not extend to confiscation of private property. However, the authority of the Occupying Power to impose such controls does not limit its power to seize or requisition property or take such other action with respect to it as may be authorized by other provisions of law.*

10.2.6.5 Municipal, Religious, Charitable, and Educational Property (consistent)

6-118. The property of municipalities and institutions dedicated to religion, charity[,] [ ] *education, and the arts and sciences, even when State* [or other government or movement/cause] *property, is treated in the same manner as private property. Just as private property may be subject to requisition and us*[e] *for contribution and certain other purposes during a military occupation, so may such property be subject to such demands (HR art. 56).*

10.2.6.6 Determining Whether Property Is Public or Private (generally consistent)

6-119. ...For the treatment of property under military occupation, one must often look beyond strict legal title and ascertain the character of the property based on its beneficial ownership. Thus, for example, trust funds, pension funds, and bank deposits generated by private persons are not to be regarded as public property simply by reason of their being held by a State-owned bank [nor should public pension or other social security funds or other assets reserved for the current or future benefit of public employees].

6-120. Property that is ostensibly private but is subjected to a large measure of governmental control and management, or property that is used to perform functions that are essentially public, would tend to be viewed in practice as public property. If the Occupying Power appropriates property that is beneficially owned in part by the enemy State [or non-State parties] *and in part by private interests, the occupation authorities should compensate the private owners to the extent of their interest* [and to the degree funds are available for this purpose at any time from requisition through and after occupation]. *Such compensation should bear the same relationship to the compensation that would be paid if the property were entirely privately owned. The Occupying Power may take those measures it deems necessary to ensure that no portion of the compensation paid on account of private interests accrues to the enemy State* [or non-State party, during the period of hostilities and until peace has been made and in effect].

6-121. If it is unknown whether certain property is public or private, it should be treated as public property until its ownership is ascertained.

10.2.6.7 Protection of Cultural Property (consistent)

6-122. An Occupying Power is obliged, as far as possible [within available personnel and resources]*, to support the competent national* [or other relevant] *authorities* [and owners or custodians] *in safeguarding*

and preserving the cultural property of the occupied State [or non-State territory]. *Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national* [or other relevant] *authorities be unable to take such measures, the Occupying Power must* [should]*, as far as possible, and in close co-operation with such authorities* [and relevant parties]*, take the most necessary measures of preservation (1954 Hague art. 5)* for which funds and qualified preservationists and specialists are reasonably available].

6-123. [All p]*arties to the 1954 Hague* [delete "*to the 1954 Hague*"] *have an obligation to prohibit, prevent, and, if necessary,…stop…any form of theft, pillage, or misappropriation of, and any acts of vandalism…against cultural property. The requisition of movable cultural property situated in the territory of another party* [deleted *"to the 1954 Hague"*] *is prohibited (1954 Hague art. 4).*

10.2.6.8 Protection of Civil Defense Facilities and Property (generally consistent)

6-127. …Additional Protocol I provides that the Occupying Power may not requisition or divert from their proper use buildings or materiel belonging to, or used by, civil defense organizations, if such diversion or requisition would be harmful to the civilian population. [Under this Manual, such use and the following diversions and requisitions are temporarily permissible if required by military necessity.] *The Occupying Power may requisition or divert these resources if the buildings or materiel are necessary for other needs of the civilian population; however, such requisition or diversion may continue only while such necessity exists. The Occupying Power may* [should] *not divert or requisition shelters provided for the use of the civilian population or that the civilian population needs* [unless exceptional military necessity requires].

10.2.6.9 Capture or Seizure and Vesting of Title in the Occupying Power (consistent)

6-128. Public property captured or seized from the enemy, as well as abandoned property and private property validly captured on the battlefield, is the property of the Occupying Power[, not the individuals or units which capture or seize it with limited exceptions as noted previously, e.g., military souvenirs]. *Wrongful failure to turn over such property to the proper authorities* [by personnel of the Occupying Power] *is punishable…as a violation of Article 103 of the UCMJ. Further, under Article 103 of the UCMJ, wrongfully buying, selling, trading, dealing in, or disposing of captured or abandoned property in order to receive any personal profit, benefit, or advantage to either themselves or to others connected with themselves is made punishable.*

10.2.7 Services of Inhabitants and Officials (consistent except for age)

6-129. The Occupying Power may not compel protected persons to work unless they are over eighteen [replace "eighteen" with "fifteen"] *years of age, and then only on work that is necessary for (1) the needs of the army of occupation; (2) the public utility services; or (3) the feeding, sheltering, clothing, transportation, or health of the population of the occupied country (GC art. 51).* [Those under eighteen years of age should not be removed from school to perform such work unless an emergency.]

10.2.7.1 Conditions for Requisitioned Work (generally consistent)

6-130. Requisitioned work may [should] *only be carried out in the occupied territory where the persons whose services have been requisitioned are resident, and such persons, so far as possible, are to be kept in their usual place*[/locale] *of employment.* [Except under extreme conditions, e.g., widespread damage from a natural disaster or military operations; economic collapse, w]*orkers must* [should] *be paid a fair wage* [and/or in-kind compensation, e.g., housing, food, transportation, as conditions and resources allow]*, and the work must* [should] *be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training, and compensation for*

occupational accidents and diseases are to apply to the protected persons assigned to the work (GC art. 51)[, which may be reasonably adjusted as necessary to accommodate the exigencies of occupation and extreme situations, e.g., natural disasters, damage from military operations].

10.2.7.2 Services That May Be Required (generally consistent)

6-131. The services that may be obtained from inhabitants by requisition include those of professionals, such as engineers, physicians, and nurses, and of artisans and laborers, such as clerks, carpenters, butchers, bakers, and truck drivers. The officials and employees of (1) railways, trucking companies, airlines, canals, and river or coastal steamship companies; (2) cable, telegraph, telephone, radio, postal[, cyber] *and similar services; (3) gas, electric, and water works; and (4) sanitary authorities, whether employed by the State*[, non-State party,] *or private companies, may be requisitioned to perform their duties only so long as the duties required do not directly concern the operations of war*[, e.g., bearing arms,] *against their own country. The Occupying Power may also requisition labor to restore the general condition of the public works to that of peacetime, including the repair of roads, bridges, railways, and telecommunication networks, and to perform services on behalf of the local population, such as* [the removal, repair, and/or rebuilding of damaged buildings (both public and private),] *the care of the wounded and sick, and the burial of the dead (DOD Law of War Manual, 11.20.2.1).* [Essentially, any form of labor may be requisitioned if it is for a reasonable public good that benefits Occupying Power administrative responsibilities, military necessity, and/or the resident civilian population and does not require the requisitioned party to bear arms or otherwise become actively engaged in military operations against their own country, movement, cause, people, or group.]

6-132. In general, police, firefighters, prison guards, and others who provide services essential to good order and security in occupied territory may be compelled by an Occupying Power to continue to provide those services. Such a requirement is consistent with the Occupying power's obligation to maintain public order in occupied territory. These officials, however, may [should] *not be required to participate in military operations or other measures aimed at countering belligerent acts against the Occupying Power that are performed by privileged combatants under the law of war. For example, civilian police forces in occupied territory may* [should] *not be compelled to provide security for an occupying force against attacks in compliance with the law of war launched by lawful* [replace "lawful" with "State and non-State"] *combatants, including resistance fighters who, if captured, would be entitled to POW status under the GPW (see paragraphs 3-14 through 3-30 regarding POW status). On the other hand, such police forces may be required to continue to perform their normal policing functions with respect to actual or threatened criminal acts, even when the victim of such acts is the Occupying Power.* [A gray area is when local police forces and other public service personnel, such as during the Nazi occupation of various European nations, are required to support the Occupying Power's efforts to ferret out, capture, and eliminate indigenous underground movements and resistance personnel and operations. When this occurs, for those of the Occupying Power who require such participation by local police officers and officials, this would be considered a serious violation of the law of war. Whether compliance by the public service employee would also be considered a violation should be evaluated on a case-by-case basis as to whether this is voluntary and/or in violation of other laws or rules for which they may be punished.]

10.2.7.3 Types of Labor That May Not Be Compelled (partially inconsistent)

6-134. Protected persons may not be compelled to undertake any work that would involve them in the obligation of taking part in military operations (GC art. 51). This prohibition would preclude requisitioning their services in work directly promoting the ends of the war, such as construction of fortifications, entrenchments, and military airfields, or the transportation of supplies or ammunition in the zone of operations. [Realistically, if the need is sufficiently great, the latter will not in fact be actual

practice. Thus, rather than prohibit, it is more important to delineate that which should be done if protected persons do perform such roles. These would include the following:

1. Work should not be required unless essential and no other personnel are reasonably available.
2. Ideally, the work will be restricted to building or repairing structures such as barracks, mess halls, medical facilities, and other such buildings and structures, as opposed to fortifications, bunkers, gun emplacements, and airfields, or to transport in appropriately identified vehicles, those who are wounded, sick, or dead.
3. Workers should wear clothing, armbands, or other identifying items which clearly distinguishes them from combatants.
4. When attack is expected to be imminent, if reasonably practicable, work should be halted and workers moved to the safest location possible.
5. During non-working hours, to the degree reasonably possible, workers should be removed to locations outside the military facility or installation within which or on which they are working.]

6-135. [Except as may otherwise be allowed in this Manual, a] *belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense* [delete "the army of the other belligerent, or about its means of defense" and replace with "the forces or activities of the party of which they are a citizen or member unless the information provided is generally known, e.g., the location of a fixed installation which are not hidden, directions to a town or street, or essential to the protection of the general population. Sometimes, the Occupying Power knowing this information can reduce mistakes which result in civilian casualties.] *(HR art. 44).*

6-136. In no case may [should] *requisition of labor lead to a mobilization of workers in an organization of a military or semi-military character* [unless those against whom they will be deployed pose a direct threat by third parties to those mobilized, their families, or their communities] *(GC art. 51).*

6-137. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where protected persons are performing compulsory labor [except as indicated in 6-136] *(GC art. 51).*

6-138. Although the GC prohibits protected persons from being compelled to provide certain work related to military operations, there is no prohibition in the law of war to such persons being employed voluntarily and for pay in such work (see DOD Law of War Manual, 11.20.4). [This Manual does allow the use of protected persons to perform certain work prohibited under the GC. For such work, it may be voluntary or involuntary, for pay or without (see Chapter 7 Prisoners of War).]

6-139. All measures aiming at creating unemployment or restricting the opportunities offered to workers in occupied territory in order to induce them to work for the Occupying Power [should be prohibited] *(GC art. 52).* [Note: It seems the verb has been omitted from the preceding; it is believed the addition of the added verb corrects this. As modified, the paragraph is compliant with the position of this Manual.]

10.2.7.4 Access to Protecting Power (somewhat inconsistent)

6-140. No contract, agreement, or regulation may impair the right of any worker, whether voluntary or not and wherever he or she may be, to apply to the representatives of the protecting power[, should one exist,] *in order to request the protecting power's intervention with the Occupying Power (GC art. 52). It would be improper, for example, to forbid workers who are protected persons, as a condition of work, to renounce their right to apply for assistance to the protecting power concerning work conditions or any other matter (see DOD Law of War Manual, 11.20.5.1).* [As there is no legal requirement that there must be a "protecting power" unless the existence of one has been previously agreed to by the belligerent who

is the Occupying Power, if such Occupying Power wishes to do other than prescribed in this paragraph, it simply needs to withdraw its recognition of the protecting power to act in this capacity for that belligerent. What should be allowed, however, is for such persons to file an appeal for assistance with the appropriate court or other body within or outside the occupied territory without punishment for having done so unless such appeals are frequent, repetitive, and reasonably considered frivolous.]

10.2.7.5 Public Officials and Judges (uncertain)

6-141. The Occupying Power may not alter the status of "public officials" or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience (GC art. 54). "Public officials" includes officials at [ ] *the national*[, regional/state/county, departmental, provincial,] *and local levels who fulfill public duties.* [If it is reasonably believed by the Occupying Power that the public official is abstaining for spurious "reasons of conscience," the appropriate commander or other Occupying Power person or body of authority may review the abstention and make a fair and objective determination as to its legitimacy. If the decision is that the abstention is in fact spurious or otherwise inappropriate, the official should continue to perform his or her responsibilities. If he or she does not, appropriate actions may be taken by the Occupying Power, e.g., detention, cessation of benefits and pay, work parties, even imprisonment. This ability, at least partially, is recognized in 6-142.]

6-142. This prohibition does not prejudice the application of the second paragraph of Article 51 of the GC. Thus, a public official may be compelled to work to meet the needs of the army of occupation or for public utility services, such as water, electricity, or sanitation.

6-143. This prohibition does not affect the right of the Occupying Power to remove public officials from their posts. For example, the Occupying Power may remove the political leadership and other political agents from their posts to prevent them from undermining the Occupying Power's administration.

6-144. An Occupying Power may [should] *not require the inhabitants of occupied territory, including officials, to swear allegiance to it (HR art. 45). However, the Occupying Power may require such officials who continue in their offices to take an oath to perform their duties conscientiously and not to act to its prejudice. Any official who declines to take the oath may be removed; but, even if the official does not take the oath, the official is required to obey the legitimate orders of the Occupying Power as long as they remain in office.* [This does not preclude the official, individually or as part of clandestine forces, to do all in his or her power to undermine or bring about the defeat of withdrawal of the Occupying Power. In doing so, if discovered by the Occupying Power, that power may choose to take punitive actions against the official although under this Manual, they would simply be considered prisoners of war.]

6-145. The salaries of civil officials of the hostile government who remain in the occupied territory and continue the work of their offices, especially those who can properly continue their work under the circumstances arising out of the war—such as judges, administrative or police officers, and officers of city or communal governments—are paid from the public revenues of the occupied territory, until the military government has reason wholly or partially to dispense with their services. [If such revenues are insufficient for this purpose, the Occupying Power should, if reasonably able to do so, provide financial or in-kind compensation sufficient to meet at least the basic needs of the official and his or her family.] *Based on consistent practice, salaries or incomes connected with purely honorary titles would be suspended* [unless there is a compelling reason to do otherwise, e.g., to secure or maintain public support due to the high regard the person holding the honorary title is held].

10.2.8 Public Finance (consistent except for added language to 6-147)

6-146. As a result of assuming the functions of government of the occupied territory, the financial administration of the occupied territory passes into the hands of the Occupying Power. During the occupation, the fiscal laws of the occupied territory or State remain in effect, but may be amended or suspended by the Occupying Power under certain circumstances, as discussed below.

6-147. If in the occupied territory, the Occupying Power collects the taxes, dues, and tolls imposed for the benefit of the State [or non-State party previously governing the occupied territory]*, it must* [should] *do so, as far as possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the ousted government was bound* [using funds so collected] *(HR art. 48). The first charge upon such taxes would be for the costs of the administration* [and provision of public services and infrastructure] *of the occupied territory. The balance may be used for the purpose of the Occupying Power. The Occupying Power may use tax revenue to defray the cost of maintaining order in the occupied territory or for expenditures that benefit the local population (for example, infrastructure improvements). Furthermore, the Occupying Power is not required to spend money for the support of any activity opposed to either its military interests or to the restoration of order in the occupied territory, even if the ousted government formerly allocated tax revenues to such activity* [Note: This last clause is not correctly written as the intent seems to be that "restoration of order" relates only to the Occupying Power suppressing resistance/insurgent activities. If this is the actual intent, it needs to be made clear. However, if the "restoration of order" relates to suppressing criminal activities, looting, and other like activities, it would be appropriate and essential to spend money for this purpose.] [While what is delineated under this section (6-147) is ideally what should occur, situations may exist where the Occupying Power finds it necessary to suspend or reduce public services and administration and use funds freed for the maintenance and operations of its own forces and/or the welfare of those in its home territory. This should not be considered a violation of the law of war if the need for doing so is the result of its enemies' actions (e.g., blockades, embargoes, military operations), and those of its forces and people who benefit are worse off than persons in the occupied territory.]

6-148. The Occupying Power, as the paramount authority in the occupied territory, is exempt from indigenous taxation in the occupied territory unless it waives its sovereign immunity and consents to be taxed. Its personnel are also generally exempt from local taxation, as part of their immunity from local law. In practice, the Occupying Power often issues an order to the effect that no taxes of any kind may be levied or assessed within the occupied territory on the persons, agencies, property, instrumentalities, or transactions of the Occupying Power. [For simplification of administration and when personal benefit accrues to occupying personnel, this provision may be relaxed for the imposition of sales taxes and user fees when purchases of goods and services are made by occupying personnel for personal benefit.]

10.2.8.1 Method of Tax Collection (consistent)

6-149. The Occupying Power may [should] *only collect taxes, as far as possible, in accordance with the rules of assessment and incidence in force. If, due to the flight or unwillingness of local officials, it is impracticable to follow the rules of incidence and assessment in force, then the total amount of taxes to be paid may be allotted among the districts, towns, or other subdivisions, and the local authorities may be required to collect it.*

6-150. The power of the Occupying Power to collect taxes extends only to persons and property under its actual control. For example, persons and property wholly outside occupied territory generally may not be taxed, but the property of absent inhabitants that is within the occupied territory, such as real estate, may be taxed.

10.2.8.2 Changes in Tax Law (uncertain due to how official text has been written)

6-151. The Occupying Power may suspend the tax laws of the occupied territory, but such a suspension does not affect the Occupying Power's responsibilities related to the occupied territory. Similarly, the Occupying Power may also reduce the rate of taxes under the existing tax laws.

6-152. Unless required to do so by considerations of public order and safety, the Occupying Power may create new taxes. Additional revenue may be raised in some other form, such as monetary contributions or customs duties. UN Security Council resolutions may provide additional authority for the Occupying Power to amend the tax laws. [Note: The two parts of the first sentence do not seem to properly relate. Possibly a "not" may have been accidently omitted after "may." This Manual's position would be to replace "Unless" with "If. If the actual language of FM 6-27 should have read "may not" rather than "may," it is the position of this Manual that new taxes may be created for reasons other than public order and safety. These could include the need to remove, repair, and replace damaged or destroyed structures essential to the population; to secure food or medications for those in need; and to repair public utilities and transportation networks. These assume that any new taxes can reasonably be levied in a manner that does not unduly harm the disadvantaged, or cause undue resentment and protests from local inhabitants.]

10.2.8.3 Social Welfare Taxes (consistent with intent)

6-153. An Occupying Power is often an employer of local civilian labor. Local law may provide that employers are responsible for the deduction and transfer to indigenous agencies of unemployment, health insurance, pensions, and similar welfare contributions. However, in general, the agencies of the Occupying Power do not act as a collector for the local authorities, and will not be responsible for the employer's share of such welfare taxes. On the other hand, the inhabitants retain their obligation to pay their share of such contributions out of their remuneration. [Nonetheless, the preceding does not preclude the Occupying Power from paying, collecting, or distributing such taxes and benefits if it has the capacity to do so; it is simply not an obligation. If it chooses not to, if reasonably possible, accommodation should be allowed for appropriately organized Operating Power entities to collect, administer, and distribute these funds to benefit the persons for or from whom these taxes are levied.]

10.2.8.4 Taxes Collected by Local Authorities (inconsistent but consistent with benefitting the local population)

6-154. The Occupying Power may only collect those taxes, dues, and tolls imposed "for the benefit of the State" (HR art. 48). The words "for the benefit of the State" were inserted in Article 48 of the Hague IV Regulations to exclude local taxes, dues, and tolls that are collected by local authorities [which may continue to be levied and collected by such authorities]. *The Occupying Power may supervise the expenditure of such revenue and prevent its hostile use.* [It may also find it necessary to collect and supervise the expenditure of this revenue not just so it will not be used for "hostile" purposes but to ensure that it is utilized for intended public purposes rather than siphoned off for the benefit of local authorities or unauthorized special interests. Unfortunately, when occupation occurs, due to the frequent breakdown of the local economy and public services, misuse rather than proper use may be the norm.]

10.2.8.5 Contributions (generally consistent)

6-155. If, in addition to continuing to collect taxes under the existing law of the occupied territory as permitted by Article 48 of the Hague IV Regulations, the Occupying Power levies other money contributions in the occupied territory, this may only be for the needs of the army or of the administration of the territory in question (HR art. 49). The economy of an occupied territory may only be required to bear the expenses of the occupation, and these expenses should not be greater than what the economy of the occupied territory can reasonably be expected to bear.

6-156. The Occupying Power may seek contributions from the inhabitants of an occupied territory in the form of forced loans. The Occupying Power is required to repay such loans. As forced loans are viewed as a form of contribution, they are governed by the rules applicable to contributions.

6-157. Contributions may...not be levied for the enrichment of the Occupying Power or for the payment of war expenses generally. Furthermore, although fines or pecuniary penalties may be imposed on responsible individuals and entities, contributions may [should] *not be levied against the general population for purposes of collective punishment or impoverishing the population in order to pressure the enemy to sue for peace. No general penalty, pecuniary or otherwise, may* [should] *be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible (HR art. 50).* [If it is apparent there is widespread civil disobedience that undermines the administration and security of the Occupying Party, causes damage to public property, or increases occupation costs, such financial obligations may be levied even if this may affect some persons who are not participating in disobedience. However, care should be taken in levying funds in this manner as, in doing so, it may exacerbate the conditions that led to the civil disobedience and lead to new or increased kinetic resistance.]

6-158. No contribution shall [should] *be collected except under a written order, and on the responsibility of a "commander-in-chief."* *The collection of contributions may* [should] *only be affected as far as possible in accordance with the rules of assessment and incidence of the taxes in force. For every contribution a receipt must* [should] *be given to the contributors (HR art. 51). The term "commander-in-chief" is understood to refer to the highest military officer* [or civilian authority] *charged with the administration of the occupied territory. Commanders of small units or detachments may not order the collection of contributions*[, except possibly when operating in units cut off from main forces for an extended period where some degree of administrative control may be being exercised].

6-159. ...[I[*f the inhabitants of the occupied territory use certain commodities, rather than money, as a medium of exchange and receivable in payment of tax obligations*[, or doing so is a more convenient form of payment for the Occupying Power and local residents]*, contributions in-kind limited to such commodities*[, unless others are more practicable given existing conditions,)] *would be permissible. Additionally, if the Occupying Power finds it difficult to secure prompt money payment, it may accept securities and bills of exchange from contributors in lieu of money.*

6-160. ...The Occupying Power…is under no obligation to reimburse contributors for such contributions[, except as noted in 6-156 for forced loans]. *The receipt* [provided] *is intended to secure for the contributors the possibility of being indemnified afterward by their own government, and does not imply a promise of reimbursement by the Occupying Power.*

10.2.8.6 Customs Duties (consistent except for deletion of last clause)

6-161. The Occupying Power has the right to continue to exact existing duties as part of its right to collect existing taxes. Such collections must [should] *comply with the rules for the collection of taxes. The Occupying Power may also exact new duties as a form of contribution levied against the enemy or its trade. Such new duties must* [should] *comply with the rules for contributions (see DOD Law of War Manual, 11.22.3). However, relief shipments for POWs, relief shipments for internees, and other relief consignments for occupied territory are exempt from customs duties (GPW art. 74; HR art. 16; GC arts. 61 and 110).* [This Manual has deleted "unless such duties on other relief consignments for occupied territory are necessary in the interests of the economy of the territory.*"*]

10.2.8.7 Enemy Debts (consistent)

6-162. Generally, the Occupying Power is not permitted to collect pre-occupation debts owed to the sovereign of the occupied territory because it is not a party to the agreement originating the debt. However, the Occupying Power may collect the debts owed to the sovereign provided that the debts may be legitimately characterized as realizable securities that are strictly the property of the State [or other governing entity]*, such as bearer instruments (see HR art. 53; DOD Law of War Manual, 11.22.4.1).* [Note: "Sovereign" needs to be defined. As it does not read "sovereign state," it is presumed to mean the person possessing or held to possess supreme political power or sovereignty, exercises supreme authority, and/or the acknowledged leader of the occupied territory. Yet, in a democracy, the people not a single person, are sovereign. However, if the people as sovereign were intended, only the second sentence would be required. If it is the sovereign as a person which was intended, such debts would have to be evaluated individually as to whether they were legitimate personal debts owed to the sovereign vs. debts owed because of his or her position or exercise of power. The former would not generally be collectible by the Occupying Power; the latter would.

6-163. The Occupying Power is under no obligation to pay the debts owed by the occupied territory (although it may choose to do so as a matter of policy). The Occupying Power may prevent payments from being made from occupied territory to a hostile belligerent.

6-164. In general, the Occupying Power may [should] *not contract new debts on behalf of the occupied territory or collect taxes to pay interest on such debt. However, new debt may be undertaken on behalf of the occupied territory if immediately necessary for the welfare of the inhabitants of occupied territory, and if undertaking such debt constitutes a fair and reasonable transaction (see DOD Law of War Manual, 11.22.4.3). The Occupying Power may refinance or consolidate already existing public debt of the occupied territory if it is clearly in the interest of sound financial administration of that territory and therefore of direct benefit to the inhabitants.*

10.2.8.8 Currency, Exchange Controls, and Price Controls (consistent)

6-165. The Occupying Power may leave the local currency of the occupied area in circulation. The Occupying Power may also introduce its own currency in the occupied area or issue special currency for use in the occupied area, should the introduction or issuance of such currency become necessary. The Occupying Power may set exchange rates for currency in occupied territory. [Deleted "For example" as it has no relevancy to preceding text.] [I]*ntentional debasement of currency by the establishment of factitious*[, (i.e., artificially created or developed)] *valuation or exchange rates, or like devices, as well as failure to take reasonable steps to prevent inflation, with the result of enrichment of the Occupying Power, would violate international law (see DOD Law of War Manual, 11.22.5).*

6-166. The Occupying Power may also institute exchange controls, including clearing arrangements and, if necessary, the freezing or blocking of certain assets in order to conserve the monetary assets of the occupied territory, as well as for security purposes. Such measures must [should] *not, however, be utilized to enrich the Occupying Power or otherwise circumvent the restrictions placed on requisitions, contributions, seizures, and other measures dealing with property.*

6-167. The Occupying Power may regulate prices in the occupied territory. Shortages of commodities and increased demand for certain commodities in the occupied territory may result in increased price fluctuations requiring the Occupying Power to resort to measures designed to maintain prices at a reasonable maximum level. The Occupying Power may [should] *not use its power over price controls, however, for the purpose of exploiting the occupied territory to its* [the Occupying Power's] *own illegal advantage.*

10.2.8.9 Control of Business and Commercial Intercourse (generally consistent)

6-168. The Occupying Power has the right to regulate commercial intercourse within, into, or out of the occupied territory. It may subject such intercourse to such prohibitions or restrictions as are essential to the purposes of occupation. The Occupying Power may also remove existing commercial restrictions or regulations when essential to the purposes of the occupation. The purposes of the occupation that justify economic regulation may include the military interest of the Occupying Power, the needs of the inhabitants of occupied territory, and applicable law of war obligations (see DOD Law of War Manual, 11.23.1).

6-170. The Occupying Power may…regulate foreign trade, including completely suspending such trade. For example, the Occupying Power may halt the export of precious metals and other valuable items that are readily converted or exchanged on the international market, such as copper, jewels, and securities. Commercial relations between the occupied territory and the remaining territory of the enemy and its allies are normally suspended. [Order of 6-169 and 6-170 have been reversed.] [As written, based on the language of the second sentence, unless needed for local industry or the Occupying Power's military requirements, it is unclear why the export of such items would be suspended if it is generating employment, tax revenues, and other benefits to the local population and occupation administration. However, this sentence does not negate the validity of the first and last sentences of the paragraph.]

6-169. …The Occupying Power may compel a business to continue operations if necessary to serve the needs of the local populace or for military purposes. The Occupying Power may also take steps to increase production from private business, including granting subsidies out of available governmental revenues from the occupied territory. If necessary to serve the needs of the local population or for military purposes, the Occupying Power may assume control and management of such a business. Title to the business in such circumstances remains with the legal owner, and if the Occupying Power earns a profit from the operation of the business, the legal owner must be indemnified to avoid violating the prohibition on confiscating private property. On the other hand, if the Occupying Power determines that the continued operation of a business is detrimental to the interests of the local populace or to the Occupying Power, the Occupying Power may close down the business. [If the Occupying Power finds it necessary to do this, it is a legal business, and resources are available, it should either compensate the owner fairly for the business or provide financial and/or other support for the owner and his or her dependents if he or she has no other source of income.] *For purposes of security and restoration of public order, the Occupying Power may also take steps to prevent hoarding of supplies, to curb or prevent black markets, and to regulate labor conditions, including strikes.*

10.2.9 Obedience, Security Measures, and Penal Legislation and Procedures (generally consistent)

6-171. Subject to the restrictions imposed by international law [and, when appropriate, as delineated in this Manual]*, the Occupying Power may demand and enforce from the inhabitants of occupied territory such obedience as may be necessary for the security of its forces, for the maintenance of law and order, and for the proper administration of the country*[.] *The inhabitant's obedience to the Occupying Power is generally distinguished from a duty of allegiance. The inhabitant's duty of allegiance to his or her State of nationality*[, or to a non-State government or cause,] *is not severed. The inhabitants, however, are not bound to obey their State of nationality* [or non-State government or cause, except as the inhabitant may choose due to personal convictions, or the probability of punishment by their State or non-State authorities or military forces if they do not. If they choose to obey their State or non-State party, not the Occupying Power, they are still subject to whatever rules and laws may have been put into effect by the Occupying Power for disobedience.]

6-172. Neutral persons resident within an occupied territory are not entitled to claim different treatment, in general, from that accorded other inhabitants. They must [should] *refrain from all participation in the war and from all hostile acts, and must* [should] *observe strictly the rules of the Occupying Power. All nationals of neutral States, whether resident in or temporarily visiting an occupied territory, may be punished* [for] *offenses committed by them to the same extent and in the same manner as enemy nationals. In addition, it may be possible to extradite nationals of neutral States who have committed offenses to their home States for prosecution.* [Replace "If nationals of neutral States are not 'protected persons, they'" with "Nationals of neutral parties"] *may be deported or expelled for just cause. In the event that such a person is arrested, suspicions must be verified by a serious inquiry, and the arrested neutral person must* [should] *be given an opportunity to present a defense, and to communicate with his or her national consul, if requested (DOD Law of War Manual, 15.6.4)*[, and conditions allow].

10.2.9.1 Prohibition of Corporal Punishment, Torture, and Other Acts (inconsistent)

6-173. [Except as might otherwise be permissible under this Manual for enemy combatants (civilian or military, a]*n Occupying Power is strictly prohibited from taking any measure of such a character as to cause the physical suffering or death of protected persons in the occupied territory. This prohibition applies not only to murder, torture, corporal punishment* [except milder forms as may be common locally]*, mutilation, and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality, whether applied by civilian or military agents (GC art. 3; consider AP I art. 75).*

10.2.9.2 Security Measures, Assigned Residence, and Internment (consistent)

6-178. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may [should generally]*, at the most, subject them to assigned residence or to internment (GC art. 78).*

6-179. Decisions regarding such assigned residence or internment must [should] *be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the GC. This procedure must* [should] *include the right of appeal for the parties concerned. Appeals must* [should] *be decided with the least possible delay. In the event of the decision being upheld, it must* [should] *be subject to periodic review, if* [reasonably] *possible every six months* [if requested by the person interned or assigned to a residence]*, by a competent body set up by the said power. Protected persons made subject to assigned residence and thus required to leave their home must* [should] *enjoy the full benefit of Article 39 of the GC (GC art. 78). For example, the internment standards in the GC should also be a guide for support to protected persons and their dependents who are subject to assigned residence in occupied territory (DOD Law of War Manual, 10.6.4).*

10.2.9.3 Penal Legislation (generally consistent)

6-181. The penal laws of the occupied territory must [should] *remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the GC* [and applicable human rights law ratified by the Occupying Power]. *Subject to the latter consideration*[s] *and the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory must* [should] *continue to function in respect of all offenses covered by these laws. The Occupying Power may, however, subject the population of the occupied territory to provisions that are essential to enable the Occupying Power to fulfill its obligations under the GC* [and other applicable international law ratified by the Occupying Power]*, to maintain an orderly government over this territory, and to ensure the security of the Occupying Power, of*

the members and property of the occupying forces or administration, and likewise of the establishment and lines of communication used by them (GC art. 64).

6-182. The penal provisions enacted by the Occupying Power may [should] *not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions must* [should] *not be retroactive (GC art. 65).*

10.2.9.4 Properly Constituted, Non-Political Courts (consistent)

6-183. In case of a breach of the penal provisions promulgated by the Occupying Power by virtue of Article 64 of the GC, the Occupying Power may hand over the accused to its properly constituted non-political military courts, on condition that these courts sit in the occupied country [or territory, and such courts comply with the standards of legal process required under international law and this Manual]. *Courts of appeal must* [should] *preferably sit in the occupied territory (GC art. 66).*

6-184. Properly constituted, non-political courts must [should] *apply only those provisions of law that were applicable prior to the offense and that are in accordance with general principles of law, in particular the principle that the penalty must be proportionate to the offense. The courts must* [should] *also take into consideration the fact that the accused is not a national of the Occupying Power (GC art. 67).* [The last sentence generally is irrelevant to whether a person is innocent or guilty, or the punishments imposed, if consistent with preceding language.]

10.2.9.5 Penalties (somewhat inconsistent)

6-185. Protected persons who commit an offense that is solely intended to harm the Occupying Power, but that does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damages the property of the occupying forces or administration, or the installations used by them, are liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offense committed. The minor offense must [should] *have been solely intended to harm the Occupying Power in order to trigger these restrictions. For example, an offense such as travelling without a permit or violating exchange control regulations would not fall under this restriction, but, nonetheless, may result in internment or simple imprisonment (see DOD Law of War Manual, 11.11.4).*

6-187. The GC provides that the penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 of the GC may impose the death penalty on a protected person only when the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power, or of intentional offenses that have caused the death of one or more persons, provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began (GC art. 68). However, the United States has reserved the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, of the GC without regard to whether the offenses referred to in that paragraph were punishable by death under the law of the occupied territory at the time the occupation begins (see DOD Law of War Manual, 11.11.5). [It is the position of this Manual that espionage and sabotage are not punishable by death but legitimate acts of war and persons carrying out such acts are to be treated as any other POW, unless the person carrying out these acts is doing so against the State or non-State party of which he or she is a citizen or member and has not publicly renounced this relationship. This would not preclude the imposition of the death penalty if the intent to harm involves the intentional killing of Occupying Power personnel who are non-combatants or filling non-combatant positions of occupation administration not located in a legal military objective subject to attack as, in essence, they would be committing murder of a non-combatant civilian.]

6-188. The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that because the accused is not a national of the Occupying Power, the accused is not bound to it by any duty of allegiance. [The preceding is irrelevant as to guilt or innocence, or the punishment to be imposed.] *In any case, the death penalty may* [should] *not be pronounced against a protected person who was under eighteen years of age at the time of the offense (GC art. 68)* [unless the decision was made beforehand that the person should be tried as an adult as may occur under U. S. domestic law if certain standards are met].

10.2.9.6 Deductions from Sentences of Period under Arrest (consistent)

6-189. The duration of the period during which a protected person accused of an offense is under arrest awaiting trial or punishment must [should] *be deducted from any period of imprisonment awarded (GC art. 69).*

10.2.9.7 Penal Procedures (generally consistent)

6-190. No sentence may [should] *be pronounced by the competent courts of the Occupying Power except after a regular trial*[, to include non-jury trials if conducted with proper rights for the accused]. *Accused persons who are prosecuted by the Occupying Power must* [should] *be promptly informed, in writing in a language that they understand, of the particulars of the charges preferred against them and must* [should] *be brought to trial as rapidly as* [reasonably] *possible* [given conditions and available resources] *(GC art. 71).*

6-191. [Provided one has been agreed to by all relevant parties, t]*he protecting power must* [should] *be informed of all proceedings instituted by the Occupying Power against protected persons with respect to charges involving the death penalty or imprisonment for two years or more, and must* [should] *be enabled, at any time, to obtain information regarding the state of such proceedings... Furthermore, the protecting power must* [should] *be entitled, on request, to be furnished with all particulars of these and any other proceedings instituted by the Occupying Power against protected persons (GC art. 71).* [The "two years or more" seems unreasonable as there are numerous relatively commonplace crimes which might result in sentences of two year or more. This should perhaps be five years or more and involve actions against the Occupying Power before there is a need to report to the protecting power.]

[All in the preceding and following paragraphs are subject to the existence of a protecting power agreed to by all relevant parties.]

6-192. The notification to the protecting power, as provided for in the second paragraph of Article 71 of the GC, must [should] *be sent immediately* [as soon as reasonably possible]*, and must* [should] *in any case reach the protecting power three weeks before the date of the first hearing*[, if practicable given combat conditions, security requirements, and communications availability]. *The notification must* [should] *include the following particulars (GC art. 71):*

- *Description of the accused;*
- *Place of residence or detention;*
- *Specification of the charge or charges (with mention of the penal provisions under which it is brought);*
- *Designation of the court that will hear the case; and*
- *Place and date of the first hearing.*

6-193. Although the GC provides particular trial rights and protections for protected persons, ...the procedures applied in these courts must [ideally should] *conform to international standards for a*

regularly constituted court affording all the judicial guarantees that are recognized as "indispensable by civilized peoples" (see GC art. 3; consider AP I art. 75).

[Under this Manual, in spite of all which precedes and follows related to the required legal process, during war, occasions may arise where the crime is so egregious, the guilt beyond a doubt, and the need for justice so compelling that this process may be not be followed precisely or allowed to be drawn out due to numerous notifications, lengthy trials, and time-consuming appeals.]

10.2.9.8 Right of Defense (somewhat consistent)

6-194. Protected persons accused of offenses shall [should] *have the right to present evidence necessary to their defense and may, in particular, call witnesses* [within reason given available funding, staffing, transportation, location, and time required to secure]. *They shall* [should] *have the right to be assisted by a qualified advocate* [provided by the Occupying Power,] *or counsel of their own choice* [at their expense and if time allows]*, who shall be able to visit them freely* [delete "freely" and replace with "sufficiently"] *and shall* [should] *enjoy* [access to] *the necessary facilities* [reasonably available locally] *for preparing the defense (GC art. 72*

6-195. If the accused fails to choose an advocate or counsel, the protecting power may provide the accused with an advocate or counsel... Accused persons must [should]*, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall* [should] *have the right at any time to object to the interpreter and to ask for the interpreter to be replaced (GC art. 72)*[, which may or may not be granted depending on the availability of additional interpreters or if it is reasonably believed that the objection to a particular interpreter is simply a delaying tactic by the accused].

10.2.9.9 Right of Appeal (generally consistent)

6-196. A convicted person shall [should] *have the right of appeal provided for by the laws applied by the court. The convicted person shall* [should] *be fully informed of the right to appeal or petition and of the time limit within which to do so. The penal procedures in Section III of the GC (which is the section of the GC pertaining to occupied territories) is to apply, as far as they are applicable, to appeals. Where the laws applied by the court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power (GC art. 73).* [The preceding may not always unfold as ideally as this due to conditions and available resources, especially for non-State parties, in asymmetric warfare, and the ebb and flow of military action.]

10.2.9.10 Assistance by the Protecting Power (generally consistent)

6-197. Representatives of the protecting power[, provided one has been agreed to by all relevant parties] *shall* [should generally] *have the right to attend the trial of any protected person unless, the hearing, as an exceptional measure*[ ]*, must be held in camera in the interests of the security of the Occupying Power, which shall* [should] *then notify the protecting power. A notification with respect to the date and place of trial must* [should] *be sent to the protecting power (GC art. 74).*

6-198. Any judgment involving a sentence of death or imprisonment for two [replace "two" with "five"] *years or more* [and is due to actions against the Occupying Power] *must* [should] *be communicated, with the relevant grounds, as rapidly as possible to the protecting power* [in the event one is functioning]. *The notification must* [should] *contain a reference to the notification made under Article 71 of the GC (as described in paragraph 6- 164), and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served*[, if security allows]. *A record of judgments, other than those referred to above, must* [should] *be kept by the court and must* [should] *be open to inspection by representatives of the protecting power*[, if one has been agreed to and is functioning]. *Any period allowed for appeal in the*

case of sentences involving the death penalty or imprisonment of two [five] *years or more must* [should] *not run until notification of judgment has been received by the protecting power (GC art. 74).*

10.2.9.11 Death Sentence (partially inconsistent)

6-199. In no case may [should] *persons condemned to death be deprived of the right of petition for pardon or reprieve.* [Generally, n]*o death sentence may* [should] *be carried out before the expiration of a period of at least six months from the date of receipt by the protecting power of the notification of the final judgment confirming the death sentence, or of an order denying pardon or reprieve. This six month period of suspension of the death sentence may be reduced in individual cases in circumstances of grave emergency involving an organized* [or other serious] *threat to the security of the Occupying Power or its forces, provided always that the protecting power*[, if one exists,] *is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities with respect to such death sentences (GC art. 75).* [The six-month notification may also be reduced for egregious violations of the law of war as delineated in this Manual, and a swift carrying out of punishment might contribute to better compliance with the law of war, and law and rules in effect as part of the occupation.]

10.2.9.12 Detention of Protected Persons Convicted or Accused of Offenses (somewhat consistent)

6-200. If found in occupied territory, protected persons accused of offenses must [should] *be detained in the occupied country*[/territory]*, and, if convicted, they shall* [should] *serve their sentences therein* [provided facilities exist for secure incarceration]. *They must* [should]*, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene that will be sufficient to keep them in good health, and that will be at least equal to those individuals imprisoned in the occupied country. Much like internees,* [unless conditions and available resources require otherwise,] *such protected persons must* [should] *receive the medical attention required by their state of health, have a right to receive any spiritual assistance that they may require*[, provided it is not subversive or otherwise detrimental in content to the Occupying Power]*, have the right to receive relief parcels monthly* [if such is the policy of the Occupying Power]*, and have the right to be visited by the protecting power or the ICRC in accordance with Article 43 of the GC* [provided a protecting power has been agreed to and if the Occupying Power recognizes the ICRC's right to do so]. *Women*[, transgender persons, and those of non-traditional sexual orientations] *must* [should] *be confined in separate quarters and be under the supervision of women* [or personnel non-prejudicial to such other persons, if this is reasonably possible given available personnel and facilities]. *Proper regard must be paid to the treatment of children under the age of 15 (GC art. 76).*

10.2.9.13 Disposition of Accused or Convicted Persons Upon Close of Occupation (somewhat consistent)

6-201. Protected persons accused of offenses or convicted by courts in occupied territory must [should] *be handed over at the close of occupation with the relevant records to the authorities* [assuming responsibility] *of the liberated* [replace "liberated" with "previously occupied" as the end of occupation does not always mean liberation] *territory (GC art. 77).* [Exceptions may be if the crime committed was an egregious violation of the law (e.g., war, occupation, local), and it is believed such transfer will result in the charged or convicted person being inappropriately released or going unpunished.] *Pending their transfer to such authorities, such protected persons must* [should] *continue to be protected by the GC because protected persons whose release, repatriation, or re-establishment may take place after such dates continue to benefit from the protections of the GC (see DOD Law of War Manual, 11.11.8).*

CHAPTER 11
Non-Hostile Relationships between Belligerents

If you want to make peace with your enemy, you have to work with your enemy. Then he becomes your partner.

Nelson Mandela

They make a desolation and call it peace.

Gaius Cornelius Tacitus
C. Cornelii Taciti Germania, Agricola, Et de Oratoribus Dialogus

That in italics is from FM 6-27.

11.1 General Background (generally consistent except for last sentence of 7-8)

7-1. War between nations may result in the termination of formal diplomatic relations and direct communications and exchanges between opposing governments, [between such governments and non-State parties, between non-State parties,] *or between the territories occupied by belligerent armies. This is not limited to communications and exchanges, but includes commerce, transportation, and postal services. Termination of communications and exchanges (non-intercourse) may occur with or without special proclamation. The traditional rule of non-intercourse reflects a belligerent's authority under LOAC to limit and regulate intercourse between persons and territory controlled by or belonging to that belligerent and persons and territory controlled by or belonging to the enemy (see DOD Law of War Manual, 12.1.1). Even in the midst of armed conflict, however, opposing forces often find they need to communicate or exchange with each other…*

7-2. Exceptions to the general rule of non-intercourse during armed conflict have been granted on behalf of individuals only with the approval of national authorities[, non-State authorities,] *or a designated commander* [although, in some tactical situations, exceptions can be permissible without such authority having been granted (see 7-7 below)].

7-4. The conduct of military operations and the restoration of peace often necessitate the establishment and maintenance of certain communications and non-hostile relations between belligerents…

7-7. This chapter summarizes several modes of communications and exchanges and the conditions for their implementation. They are not necessarily precise, rigid communications "packages." A "package" may be tailored for the circumstances and mission at hand. Historic examples of communications packages described below generally occurred at the operational level or higher. Communication at the tactical level was less formal, ad hoc, and sometimes occurred without higher command knowledge or express authorization…

7-8. Good faith is essential in all non-hostile relations between belligerents... Among other things, the principle of good faith in the context of nonhostile relations requires that compacts between belligerents be faithfully adhered to, neither party to a conflict take[s] *or attempt*[s] *to gain an advantage not intended* [or understood as a possibility] *by the opposing party, and the means of conducting non-hostile relations must* [should] *not be misused (see DOD Law of War Manual, 12.2).* [Nonetheless, taking or attempting to

gain certain "advantages" in specific situations are sometimes considered permissible under this Manual and the formal law of war.]

11.2 Practical Guidance for Commanders (generally consistent except as otherwise noted)

7-9. Commanders must [should] *act in good faith in non-hostile relations with the enemy. In particular, they must* [should] *strictly comply with agreements made with the enemy, such as armistices, truces, and safe conduct... Commanders also must* [should] *ensure that their forces do not misuse the means of conducting non-hostile relations, such as flags of truce (see DOD Law of War Manual, 12.2).*

7-10. Although commanders must [should] *act in good faith, this does not prohibit commanders from continuing military operations while negotiations are ongoing* [which could include the repositioning, withdrawing, or bringing up troops, munitions, and equipment] **(inconsistent under formal law when meeting under white flags but not when negotiating armistices)**. *Consistent with the principle of good faith, commanders may decline to respond to offers to negotiate, refuse offers to negotiate, or refuse specific offers from the enemy for reasons of military expediency (see DOD Law of War Manual, 12.2).*

7-11. Commanders should be prepared to negotiate agreements like local temporary cease-fires, to[,] *for example, allow for the collection of dead and wounded, or agreements for the surrender of enemy forces. Offers by the enemy to negotiate agreements that may have strategic or national-level implications should be reported up the chain of command.*

7-12. Under the Code of Conduct for the U.S. armed forces, a commander must [should] *never surrender the members of his or her command while they still have* [reasonable] *means to resist* [and to do so is not an unnecessary waste of lives and property given the military benefits which might be achieved by continued resistance. For example, if a squad sized unit still has personal arms (the means to resist); they are surrounded by a much larger well-armed force that can easily overrun or destroy them from a distance; they have no intelligence of special military value; failing to continue to resist will accomplish little of military value, such as allowing another friendly unit to escape or carry out its mission; and there is no likely way to slip or fight through enemy lines and escape, the senior member of that unit may legitimately consider surrender **(possibly inconsistent)**.] *Under the Uniform Code of Military Justice, shameful surrenders are punishable. In addition, compelling or attempting to compel a commander to surrender or striking colors or flag to an enemy without proper authority is* [can be] *punishable (see DOD Law of War Manual, 12.8.2.1).*

11.3 Communications Between Belligerents (consistent)

7-13. Belligerents may communicate with one another directly by telecommunications [and cyber]*, through diplomatic channels (sometimes through intermediary governments), through a display of a flag of truce and sending of parlementaires, indirectly through a protecting power (Common art. 8 to GWS, GWS (Sea), and GPW; GC art. 9), international organizations, such as the United Nations, or, when a protecting power has not been appointed or agreed upon, through the ICRC or* [deleted "any other impartial" as the ICRC and other such organizations may not always be impartial] *humanitarian organization (see DOD Law of War Manual, 12.3).*

7-14. ...local communication may be necessary to facilitate the conclusion and implementation of special arrangements, including: ...the establishment of agreed routes, heights, and times at which medical aircraft must [should] *fly to be entitled to protection from attack (GWS art. 36; GWS (Sea) art. 39; GC art. 22); where* [replace "where" with "location of"] *authorized, battlefield exchange of POWs and* [d]*etained personnel during hostilities; or passage of humanitarian relief supplies (GC art. 23). As an armed conflict approaches an end, communication may also be necessary to arrange for temporary ceasefires leading to a conclusion of hostilities, separation of forces, a formal cessation of hostilities, and repatriation of POWs and retained personnel (see DoD Law of War Manual, 12.1.2.2).*

11.4 Parlementaires (generally consistent)

11.4.1 Description

7-17. Parlementaires ordinarily are agents or envoys employed by commanders in the field to go in person [between or] *within the enemy lines for the purpose of communicating or negotiating openly and directly with the enemy commander…*

7-18. …a parlementaire does not need to carry or be the physical bearer of the white flag...

7-19. A parlementaire may be civilian or military, and may come alone, or he or she may request to have others, such as an interpreter, accompany him or her. A parlementaire may perform duties at the national (strategic), operational, or tactical level.

11.4.2 Refusal or Acceptance of Parlementaire (generally consistent)

7-20. A commander to whom a flag of truce is sent is not in all circumstances obligated to receive it (HR art. 33). For instance, a commander may decline to receive a parlementaire for reasons of military necessity. A commander is under no obligation to allow unnecessary repetition of parlementaire visits. However, a belligerent may [should] *not declare beforehand, even for a specified period – except in case of reprisal for abuses of the flag of truce – that it will not receive parlementaires. Although commanders may refuse to receive a parlementaire and other envoys seeking to negotiate, commanders may* [should] *not refuse the unconditional surrender of the adversary or declare that they will refuse unconditional surrender (see DOD Law of War Manual, 12.5.2)*[, unless there is a compelling military reason for doing so, e.g., without the surrendering force being aware of the fact, it may be far larger than the force to which it is surrendering and, when seeing this, choose to violate its surrender and overcome the capturing party].

7-21. A commander accepting an offer of a parlementaire is entitled to declare the circumstances and conditions under which the parlementaire will be received. Such commander may set the time, place, number of persons accompanying the parlementaire, authorized method of transport (for example, by foot or vehicle), and other meeting details, to include frequency of meetings if more than one will take place (see DoD Law of War Manual, 12.5.2). Moreover, the receiving commander may take all necessary measures to prevent a parlementaire from taking advantage of their mission to collect intelligence (HR art. 33).

11.4.3 Parlementaire Must Be Authorized (consistent)

7-22. A parlementaire must [should] *be authorized by a* [sending] *belligerent to enter into communications with the opposing commander. In addition to presenting themselves under the protection of the white flag, a parlementaire must* [should] *possess—and present—written and signed authorization from the enemy commander the parlementaire claims to represent* [if the means to do so are available]. *The authorization should clearly specify the commander's name, unit, and the scope of the matters on which the parlementaire is authorized to speak. The receiving command is entitled to know that the representative has the authority to negotiate on the matters on which the representative purports to offer terms…*

11.4.4 Procedures for Parlementaire Party Travel and Conduct (consistent)

7-25. …[Parlementaires] *may only enter* [or approach opposing lines] *as and where permitted by the receiving command…and* [should] *move slowly and deliberately. While within the lines of the enemy, the parlementaire must* [should] *obey all* [relevant and reasonable] *instructions given to him or her (see DoD Law of War Manual, 12.5.3).*

7-26. If a parlementaire is ordered by the receiving force to suspend their mission and return to their own lines, the parlementaire must [should] *do so* [as quickly as reasonably practicable]. *If the parlementaire obeys this order, the parlementaire remains entitled to protection and may* [should] *not be intentionally fired upon or interfered* [with]*…until reaching their own lines.*

7-27. Parlementaires should transmit an agreed signal to the receiving force as they approach, or as otherwise directed by the receiving command.

7-28. Once recognized and when authorized, parlementaires and their party will [should] *proceed by the approach route designated. They may be provided an escort by the receiving command to accompany and direct them to the latter's lines.*

7-29. Parlementaires may be furnished an escort or guard if necessary…for their safety or…[the] *receiving command's security. The parlementaires and their accompanying party may be blindfolded for security purposes.* [This is also the reason it is common practice to blindfold or hood POWs and should not automatically be considered a violation of the formal law of war. Parlemenaires not only may be searched for security purposes but doing so should be common for the receiving party to preclude the possibility of suicide bombers or those bent on gaining access to the enemy command structure to bring them harm. Such searches should be done respectfully and, if women, the search should, if practicable, be conducted by a woman. **(seemingly consistent)**

7-30. …[Upon entering the receiving party's lines,] *the* [receiving] *commander may direct that* [a parlementaire] *proceed alone with friendly* [replace "friendly" with "receiving"] *force escort.* [Other m]*embers of* [the parlementaire's] *party awaiting* [his or her return] *return may be restricted in their movement.* [Generally, the parlementaire should be allowed an accompanying interpreter.]

7-31. A parlementaire is not [automatically] *entitled to be received by the* [enemy] *commander. The parlementaire's message, if written, may be delivered to the commander outside the parlementaire's presence. If the parlementaire's message is oral, the parlementaire may be required to reduce it to writing or deliver it orally to such person as may be designated to receive it.*

7-32. A parlementaire has no right to pass beyond authorized limits within the opposing force[']s[ ] *positions.*

7-33. When a decision from higher authority is required or expected, the parlementaire may be expected to wait.

7-34. Parlementaires will [should] *be permitted to return to their own lines with the same courtesy, formalities, and precautions as upon their arrival.*

11.4.5 Inviolability (consistent)

7-35. Parlementaires [and all members of their party] *have a right of inviolability in the execution of their functions (HR art. 32).*

11.4.6 Loss of Inviolability (consistent)

7-36. Parlementaires lose their right of inviolability if it is established in a clear and uncontestable manner that they took advantage of the privileges associated with the position to provoke or commit an act of treachery (HR art. 23(f), 34). That includes engaging in sabotage or the secret gathering of information about the adversary while under the adversary's protection. Parlementaires or any member of their party abusing their privileged position may be detained temporarily (HR art. 33)[and, if the abuse is egregious, possibly detained longer as a prisoner of war and possibly tried for a war crime].

7-37. Parlementaires do not take advantage of their privileged position if they report what they observed in plain sight [or heard from unguarded conversations] *during their mission. As paragraph 7-29 demonstrates, the receiving command may take necessary steps to prevent the parlementaire and his or her party from taking advantage of their mission to obtain information, including by using blindfolds.*

11.4.7 Other Reasons for Detention (consistent)

7-38. In addition to a right of detention for abuse of his privileged position, a parlementaire may be detained for other imperative security reasons, such as in case the parlementaire or his or her party saw anything, or otherwise obtained knowledge [of which] *the receiving commander regards as detrimental to his* [or her] *force, or if their departure might reveal information as to the movement of friendly force units (see DOD Law of War Manual, 12.5.4.3).* [To avoid the necessity of such detentions, the receiving

party has a responsibility to do that necessary to prevent the parlementaire and his or her party from observing or overhearing that which may be of value to its enemy.]

7-39. A parlementaire should be detained only for as long as circumstances imperatively require. Information regarding the parlementaire's detention, as well as any other action against the parlementaire, or any member of the parlementaire's party, should be sent to his or her commander.

11.4.8 Neutral Areas for Negotiation (likely consistent)

7-40. The parties to the conflict may agree to the establishment of a neutral zone or area as a site for negotiations if prolonged negotiations are anticipated [or, even for a single meeting, if neither party is comfortable with entering the lines of the other party, or allowing the other party to enter its lines].

11.5 Significance of White Flag (generally consistent except for 7-46; see Section 4.10.4)

7-41. A white flag, when used by military forces, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other legal meaning in LOAC. [All individuals or units which may wish to display a white flag may not have anything white with which to do so. In such situations, they may use material of other colors to indicate an honest desire to communicate although this may not be understood as intended as a white flag. However, if a non-white flag is seemingly being displayed accompanied by a cessation of fire and discontinuance of other hostile actions or movement of troops, the opposing side may take this as a legitimate attempt to communicate and proceed accordingly. However, they must also be aware this may be an effort to deceive and take measures to protect against this possibility.]

7-42. Forces displaying a flag of truce must [should] *show clearly that they intend to engage in non-hostile relations. The* [displaying] *forces bear the burden of communicating their intent to the opposing forces. To indicate that the hoisting of the white flag is authorized by its commander, the force hoisting it should cease fire completely (see DOD Law of War Manual, 12.4.2).*

7-43. A party is not required to cease fire or other military operations when a white flag is raised by the other side. Fire must [should] *not be directed intentionally on individuals carrying the white flag or on persons near them unless there is a clear manifestation of hostile intent by those persons. It is essential to determine with reasonable certainty that the flag is shown by actual authority of the enemy commander before basing important actions upon that assumption. For example, the force should not assume that all* [or even any] *enemy forces in the locality intend to surrender and*[, thereby,] *expose themselves to hostile fire based on the enemy's display of the white flag.*

7-44. [Provided time and means exists to do so, individual] *Marines and Soldiers should be instructed to report promptly the display of the white flag through their chain of command so that the commander may determine if the opposing force seeks to engage in non-hostile relations. The burden is on the party displaying the white flag to establish such intention to its adversary and should consider sending a parlementaire to communicate the commander's intent. If the force displaying the white flag ceases fire and other hostile acts, Marines and Soldiers should seek guidance from their commander about whether and under what conditions they may wish to engage in non-hostile relations with that force.* [If reporting to the chain of command is not immediately possible, a field decision can be made to receive the parlementaire, ascertain his or her intentions if possible (to include surrender), and convey his or her presence and intentions, if learned, back though the chain of command if communications exist for doing so. If this is not possible, those on the ground may still choose to communicate and should act in relation to the parlementaire as delineated in this chapter.]

7-45. While it is not a legally recognized form of surrender, a white flag hoisted by an individual Soldier may also express a genuine desire or intent to surrender. Its display, however, does not mean that a unit, or the person waving it, is prepared to surrender—nor should this be assumed by opposing forces. Nor does it mean that other enemy soldiers in the immediate area have the same intent. Friendly forces seeing a white flag hoisted by an enemy soldier whom the friendly forces believe is genuinely attempting to surrender should consider whether it is feasible to accept such surrender…

7-46. Prohibited uses of a white flag include use of a flag of truce to feign an intent to surrender or to negotiate (HR art. 23(f))… Improper use of a flag of truce also includes its use while engaging in attacks or in order to shield, favor, or protect one's own military operations, or otherwise to impede military operations (DOD Law of War Manual, 12.4.2.1). For example, forces may not use the bearer of a white flag as cover to advance or maneuver for hostile purposes. [Under this Manual, the preceding would not preclude a force displaying a white flag to withdraw or bring up additional forces, munitions, or equipment, or strengthening defensive positions **(inconsistent)**. It also may choose to add or withdraw troops, munitions, and equipment during negotiations, to include destruction of the latter two **(inconsistent)**. Such actions are permissible under armistice negotiations; allowing similar acts under a white flag should not be considered perfidy. It would preclude maneuvering against the enemy force, either directly or in flanking movements or taking any form of offensive action **(consistent)**.]

11.6 Military Passports, Safe-Conducts, Safeguards, Cartels, and Other Special Agreements (generally consistent)

[When military passports, safe-conducts, licenses to trade, safeguards, passes, permits, cartels, and other agreements or arrangements addressed below are issued, in the areas where recipients or parties to these agreements are likely to be encountered, one's own combatants should be thoroughly trained as to how to identify or otherwise verify valid documents or persons, as well as that which is proper conduct towards and the handling of the bearers of such documents or the carrying out by the combatants of their positions of safeguards or cartels.]

11.6.1 Description

*7-47. A **military passport** is a document issued by order of a commander of belligerent forces that authorizes a person or persons named therein and residing or sojourning within territory occupied by such forces to travel unmolested within the territory, with or without permission to pass, or to pass and return, by designated routes, through the lines, subject to conditions or limitations imposed by the commander. A military passport differs from a passport issued by a government…for peacetime travel...*

*7-48. A **safe-conduct pass** is similar to a military passport. It is a document issued by a commander of belligerent forces, but to persons residing or traveling outside territory occupied by such forces, to enter and remain within or pass through areas occupied by such forces. Safe-conduct passes may also refer to similar documents the same authority issues to persons that permit them, whether they reside within or outside areas occupied by the authority's forces, to carry specified goods to or from designated points within those areas and to engage in trade otherwise forbidden by the general rule of non-intercourse (see paragraphs 7-1 through 7-8 for discussion of the general rule of non-intercourse). A safe-conduct pass to engage in a specified trade for goods to which the grantee is given a continuing right for a prescribed period, or until further ordered, may also be referred to as a **license to trade*** [bold added as this is an additional form of authorization (see Section 11.6.4)].

7-49. Ambassadors and other diplomatic agents of neutral governments accredited to the opposing party to the conflict may receive a safe-conduct pass through territory under opposing force control. A request for a safe-conduct pass is typically granted to them absent military or other security reasons to the contrary, including the safety of the personnel in question, unless they may reach their destination conveniently by another route. There is no legal requirement, however, for issuing such a safe-conduct pass. A safe-conduct pass is usually granted by national[or non-State higher] *level authorities* [of forces which typically control or occupy territory]. *Refusal of a request is not to be regarded as an international or national affront.*

*7-50. A **safeguard** is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral (see Manual for Courts-Martial (2016), part IV, para. 26 (art. 102)). A safeguard falls within LOAC only when granted and posted by arrangement with the enemy or a neutral. For example, guards posted by a belligerent for the protection of its own personnel or property would not be governed by* [those parts of] *LOAC* [covering safeguards]. *Military personnel on*

duty as safeguards, on the other hand, occupy a protected status under LOAC. They may [should] *not be attacked, and it is customary to send them back, together with their* [personal] *equipment and arms to their own armed forces when the locality is occupied by the enemy and as soon as military exigencies permit.*

7-51. ***The term "safeguard"*** *also refers to a written order left by a commander with an enemy subject, or posted upon enemy property, for the protection of that person or property. Usually*[,] *it is directed to the succeeding commander and requests a continued grant of protection.*

7-52. The effect of a safeguard is to pledge the honor of the nation [or relevant non-State party] *that the person or property will be respected by its armed forces. It does not commit the government to its protection or defense against attacks by enemy armed forces or other hostile elements.*

7-53. ***"Forcing a safeguard"*** *means to perform an act or acts in violation of the protection of the safeguard. Any trespass on the protection of the safeguard by persons subject to the UCMJ will constitute an offense under Article 102 (Forcing a Safeguard), UCMJ, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.* [Enemy belligerents would be entitled to take legal actions against such violations.]

11.6.2 Character of Military Passports, Safe-Conducts, and Related Instruments (mostly consistent)

7-54. Military passports and safe-conducts fall within the scope of international law only when granted by arrangement with opposing forces or with a neutral power [or party]. *Military passports and safe-conducts issued to persons are both specific to the individual issued the instrument and nontransferable. A safe-conduct for goods, however, while restricted to the articles named in them, may be transferred from one person to another, provided it does not designate who is to carry (or trade) the goods. If the safe-conduct designates a specific licensee, the goods may only be transferred if the authorizing belligerent approves the transferee.*

7-55. The terms "pass" or "permit" may be used in lieu of passport. ***"Pass"*** *is used for a general permission to do certain things, while* ***"permit"*** *is used like "safe-conduct," to signify permission to do a particular thing.* [Note: This paragraph is an example of why this portion of the chapter and the law of war needs simplification. It becomes overly complicated for combatants to remember whether something is a pass, permit, passport, safe-conduct, license to trade, or other instrument with sometimes only slight distinctions between them. Rather, there should be a permit, passport, or pass which can be issued for any of the above reasons and relevant time periods, locations, activities, and/or things, which should be readily apparent and clear to the holder of the permit as well as anyone who might inspect it, with the permit ideally being in the languages of the issuer, the recipient, and those most likely to inspect. Further, if reasonably possible, it should be "official" appearing, standardized, and not easily forged. If multiple documents continue to be used, each should include clear explanation of purpose, rights, restrictions, duration, and authorization. Forging such documents for use by enemies of the issuing party should not be considered perfidy or treachery but rather a legitimate stratagem **(possibly inconsistent)**. Nonetheless, those preparing or using forged documents can be detained as prisoners of war.]

11.6.3 Revocation (consistent)

7-57. A military passport or safe-conduct may be revoked by the commander [or other person approved for] *issuing them or by the commander's* [or other authorized person's] *superiors for good reasons of military expediency. Until revoked, they remain valid according to their specific terms…*

7-58. Documents must [should] *not be revoked for the purpose of detaining the holder* [who should be] *permitted to withdraw in safety unless suspected of unlawful activities. In a case of violation of the terms of the safe-conduct or military passport, the privilege may be revoked* [and legal or other appropriate actions taken against the violator. If reasonably possible, revocation should not become effective until the

person or persons to whom issued can be notified unless it is known the person is intentionally in violation].

11.6.4 Licenses to Trade (generally consistent; uncertain with respect to authorization)

7-59. Licenses to trade must, as a general rule, emanate from the supreme authority of the State[, or non-State party, controlling relevant territory]. *In an international* [or non-international] *armed conflict, a State* [or non-State party] *controlling enemy territory may grant licenses to trade that relax its prohibitions on trading with the enemy.* [While this paragraph as written in FM 6-27 relates to enemy territory, it may also have applicability in other territory in which a belligerent operates and has control during a conflict, even if not longstanding, if there are reasons to control trade due to military necessity and general security. Further, such licenses to trade need not emanate from the supreme authority of the State or non-State party if there is an immediate and evident need for such trade to take place for the basic well-being of residents of relevant areas or for military operations. However, authorization for issuance should generally be by the senior military or civilian authority controlling or responsible for the territory in which the trade will occur.]

7-60. Licenses to trade issued by military authorities may be either general or special. A general license is a document that generally or partially relaxes the exercise of the rights of war in regard to trade in relation to any community or individuals liable to be affected by their operation. A special license is a document that allows individuals to take a particular voyage or journey to import or export particular goods.

11.6.5 Cartels (generally consistent)

7-61. …A cartel is a statement commanders agree to at the tactical or operational level (when authorized by higher authority [if necessary communications are in place, and by local commanders if not]*), arranged either through parlementaires, negotiations conducted during a truce, or exchange of letters.*

7-62. In its broader sense, a cartel is an agreement concluded between belligerents for the purpose of arranging or regulating certain kinds of non-hostile intercourse that would otherwise be prohibited by the existence of the armed conflict. These are not limited to matters regarding exchanges of POWs and can include, for example, postal communication or trade in certain goods or commodities.

7-63. Parties to a cartel are honor bound to observe its provisions with the most scrupulous care. A party may void a cartel upon definite [reasonable] *proof that the other party has violated it intentionally in an important particular (see DOD Law of War Manual, 12.7).*

11.7 Armistice

11.7.1 General (consistent except as noted)

7-65. An armistice is an agreed upon cessation of active hostilities between opposing forces for a period agreed upon by the belligerent parties.

7-66. …An armistice is not a partial or a temporary peace; it is only the suspension of [specified] *military operations to the extent agreed upon by the parties to the conflict (HR art. 36). War, as a legal state of hostilities between the parties, may continue, despite the conclusion of an armistice agreement. In certain instances, …armistice agreements may be in place for a long time*[, e.g., Korea].

7-67. An armistice agreement may arrange for a variety of humanitarian activities, such as the recovery of wounded or shipwrecked from the battlefield (land or sea) or the exchange of POWs. [Note: It is unclear how this is different from a cartel as delineated in FM 6-27, 7-61 through 7-63.]

7-68. Hostilities need not cease during the negotiation of an armistice. [As this is permissible for armistices, this Manual's position with respect to parlemenataires carrying a white flag, that while hostilities should cease, it is not necessary to refrain from certain other actions during negotiations occurring under the white flag, e.g., repositioning forces, munitions, and equipment **(inconsistent)**.]

7-69. The existence of an armistice agreement is not a reason to relax either the vigilance or readiness of forces, or to expose positions to the enemy (see DOD Law of War Manual, 12.11.4.4).

11.7.2 Types of Armistice (consistent)

7-70. An armistice may be general or local...

7-71. Other terms have been and may be used for an armistice, to include truce, local truce, ceasefire, cessation of hostilities, and suspension of arms. Other terms may also be used in other languages...

11.7.2.1 General Armistice (generally consistent)

7-72. A general armistice suspends all (ground, naval, and air) operations between opposing forces throughout the theater[s] *of operations. It often is of a combined political and military character. It usually precedes negotiations for peace. Due to its political importance, a general armistice usually is agreed to at the national or diplomatic level*[, or the most senior military or administrative level when involving non-State parties]*, with implementation of the agreed terms by military commanders, such as by the relevant combatant commander*[s].

11.7.2.2 Local or Partial Armistice (consistent)

7-73. A local or partial armistice suspends military operations between certain portions of opposing forces and within a specified area (HR art. 37). It may suspend combat operations indefinitely or for a specified period of time, ranging from hours to days. The primary distinction between a local or partial armistice and a suspension of arms, discussed in paragraph 7-77, is the size of the units or area affected, and the broader interests than the local military requirements that are addressed in a suspension of arms.

7-74. A partial armistice…may apply only to operations of ground forces, for example, or naval operations in an area specified by longitude and latitude, or air operations above a specified parallel.

7-75. A unilateral suspension of operations is not a partial armistice. A unilateral but conditional suspension of operations may be a partial armistice if there is tacit agreement by the opposing force. A partial armistice requires express agreement between the [relevant] *opposing forces*[, non-State parties,] *or governments.*

11.7.3 Suspension of Arms (consistent)

7-77. A suspension of arms, also referred to as a suspension of fire, is a form of local armistice concluded between commanders of military forces for some local military purpose, such as to recover and bury the dead, to collect and care for the wounded and sick, to arrange for exchange of prisoners, or to enable a commander to communicate with his or her government or superior officer. [Note: Again, it is unclear why this is referred to as a "cartel" in 7-61 through 7-63 for the same things as referred to in this paragraph as a "suspension of arms", or "some form of local armistice". It is suggested that the section on cartels be eliminated as it seems to add little to the various types of agreements utilized during conflicts, or be defined as a having specific relevance different than other agreements, documents, or actions addressed in this chapter.] *A suspension of arms is not intended to have, and does not have, any legal or other effect on the war generally, or its political bases. It is intended to serve military* [and/or civilian] *interests of local importance only. An opposing commander* [or other appropriate authority] *with the competence to do so can agree upon a suspension of arms.*

11.7.4 Authority to Conclude (generally consistent)

7-78. The degree to which opposing forces seek to suspend hostilities will determine what authorities are needed to conclude the armistice agreement. An armistice agreement must [should] *be concluded by authorities who are competent to agree to it and to enforce its terms. An armistice that includes more substantive and expansive terms must* [should] *be approved by more senior authorities. For example, a commander would not have the authority to conclude an armistice agreement that binds units or areas that are not under his or her command* [without their express authorization]. *Similarly, if an armistice contains political terms, it must* [should] *be made under authorization from the governments* [or most

senior non-State authorities] *concerned or subject to approval by them (see DOD Law of War Manual, 12.11.2). In U.S. practice, any proposed final armistice would be coordinated with higher civilian authority.*

7-79. Commanders are presumed to have the authority to conclude a suspension of arms for forces or areas within their control… Commanders negotiating an armistice agreement have the responsibility in the course of negotiations to inform the opposing force commander of any units or areas within the scope of the armistice over which they lack command authority. The opposing force commander has the right to accept or reject this as a condition for agreement.

7-80. An armistice agreement is not a proper mechanism for resolution of political issues, such as territorial claims or permanent rights to be conferred on [or removed from] *the local population.* [However, it could include provisions for the continuation of curfews and other restrictions on the movement of civilians during the period of the armistice.] *Higher authority may renounce terms of agreement related to political issues that exceed the commander's authority. Renunciation of a non-military provision, however, does not constitute authority to revoke the remaining terms of the armistice* [without reasonable prior notice to the other party(s) to the armistice].

11.7.5 Form of Armistice (consistent)

7-81. No special form for an armistice is prescribed. It should, if possible, be reduced to writing to avoid misunderstandings and for reference should differences of interpretation arise. It should be drafted with the greatest precision and clarity.

11.7.6 Stipulations Included (generally consistent)

7-82 & 7-83 [blended]. *To avoid misunderstanding and an unintentional resumption of hostilities, and to ensure it can accomplish its intended purposes, stipulations regarding the following matters should be fixed as precisely as possible and incorporated into an armistice agreement: Date, Day, and Time of Commencement. Effective times may differ in different time zones. Time should be specified in Zulu time (Greenwich Mean Time) and* [the time in] *each time zone in which the armistice will apply.* [If only in a single time zone, Greenwich Mean Time need not be included, only the name of the time zone in which the armistice is effective.]... *In the absence of agreement to the contrary, an armistice commences at the moment it is signed. Agreement to commence at a later time may be necessary…in order to ensure all forces receive the order prior to its entry into effect…*

11.7.7 Duration (consistent)

7-84. The duration of an armistice may be for a definite or indefinite period of time, and with or without a period of notice prior to its expiration.

7-87 …If the armistice is for a fixed period of time and no agreement has been made for prolonging it, hostilities may recommence without prior notice the moment the period of time has elapsed.

7-85. When duration of an armistice is indefinite, parties to the armistice may resume combat operations at any time, subject to prior notice to opposing forces in accordance with the terms of the agreement (HR art. 36). …Recommencement of combat operations without prior notice (when notice is required by the armistice) in order to gain surprise is inconsistent with the intent of an armistice and is prohibited under LOAC. [Such a violation would be considered a grave breach of the law of war.]

7-86. The requirement for notice prior to recommencement of combat operations does not, however, preclude a party to the conflict from reacting to serious violations of the armistice by opposing forces, including recommencing hostilities immediately (HR art. 40). When an armistice violation is not serious, and perhaps the result of a mistake by one side or the other, commands affected by an enemy's breach remain subject to higher authority orders. Nevertheless, they retain the inherent right of self-defense.

11.7.8 Boundaries, Including Location of Forces (likely consistent)

7-88. An exchange of maps or other imagery showing the lines of opposing forces at the time of armistice commencement may facilitate understanding while reducing risk of confrontation. If agreed by the parties, locations of forces may be displayed. [If a party to the armistice does not wish to display the location of its forces, a map or other imagery should still be provided showing the line(s) and/or physical features across which no forces should move or on which fire should not be directed. However, if the terms of the armistice limits troop numbers, types, and/or weaponry, this would likely require display.]

11.7.9 Neutral Zone (consistent)

7-89. Armistice elements may include a "neutral zone" situated between lines of demarcation sufficient in breadth to minimize risk of unintentional confrontation between opposing forces. A neutral zone does not exist absent express agreement between the relevant parties….

7-90. In the event of a general ceasefire, it may be sufficient to agree to a line… [O]ne *or both parties* [may need to effect] *a partial withdrawal in order to establish a neutral zone* [or line]. [S]*pecificity as to either (such as through use of maps or Global Position System) is essential in order to minimize the risk of accidental breach or confrontation. For this purpose*[,] *maps with the lines of the neutral zone indicated may be attached to and made part of the armistice. The extent of the zone will vary according to the circumstances and agreement of the parties* [and historically] *have ranged from 1,000 yards* [approximately 900 meters] *to two miles* [approximately 3.2 kilometers]*, and in other circumstances have made use of the respective sides of a natural boundary, such as a river.*

7-91. A road or roads through the neutral zone should be identified by which communications between opposing forces must [should] *pass during the armistice.*

7-92. It is usually agreed that military personnel of either side may not encroach upon a neutral zone except by parlementaires or other parties by special arrangement for specified purposes…

11.7.10 Signals (consistent)

7-93. Signals may be agreed to for communication between opposing parties, whether for passage of parlementaire, a start or cessation of an armistice, or…other reasons.

11.7.11 Language (consistent)

7-94. …[A]n *armistice should be drawn up in the language of each belligerent force, with each side retaining a copy in* [each] *language. Each belligerent should confirm the text in each version to ensure consistency…*

11.7.12 Additional Elements (likely consistent)

7-95. Occasionally, an armistice contains additional elements that may be appropriate, such as addressing issues of a humanitarian nature[, relations with the local population, civilian administration, detained persons, refugees, and evacuation and resupply].

11.7.13 Relations of Forces with Local Population During Armistice (generally consistent)

7-96. In the terms of an armistice agreement, the contracting parties may settle what communications may be held in the theater of war with the inhabitants and between the inhabitants of one belligerent State [or non-State party] *and those of another (HR art. 39).*

7-97. "Communications" are not limited to electronic forms of communication and postal services, but refer to the movement of civilians and commerce as well. The rule applies with respect to citizens [replace "citizens" with "residents" as the former has government-related criteria] *of a State* [or non-State party's territory] *divided by military operations between opposing forces. If changes in the relations between the opposing forces and the local population during the armistice are desired, this must* [should] *be the subject of express agreement between relevant parties to the conflict…*

7-98. An armistice does not alter commanders' responsibilities and authorities to take all necessary measures for the security of their forces and mission. As a state of hostilities continues to exist during an

armistice, commanders are entitled to weigh whether civilian movement may place the mission at risk through, for example, the facilitation of espionage by the opposing forces. If nothing is stipulated, communication remains suspended, as during actual hostilities. As a general rule, movement between the territories held by opposing forces remains suspended in the same way as during actual hostilities.

11.7.14 Humanitarian Activities (consistent)

7-99 …Operations of [humanitarian and other] *non-government organizations within an armistice area are subject to the express authorization of the commander*[s] *affected by their operations and to limitations the commander*[s] *deems necessary for reasons of military security (GWS art. 9).*

11.7.15 Civil Administration of Area Concerned (consistent)

7-100. Regardless of whether the armistice agreement contains provision for relations between the opposing forces and the local population during the armistice, each commander maintains authority to address issues concerning the civilian population in territory within that commander's control in accordance with other applicable principles of LOAC, such as the law governing belligerent occupation (see Chapter 6 [of FM 6-27; Chapter 10 of this Manual]*). The armistice agreement may stipulate responsibilities of each party for civil administration of areas under its respective control. Where control is shared, the armistice agreement should specify the specific responsibilities of each opposing force commander.*

11.7.16 Disposition of Prisoners of War, Detained Persons, and Internees (consistent)

7-101. If POWs…or civilian internees are to be released or exchanged during an armistice, specific provision in this regard must [should] *be made within the armistice agreement*[, or a separate parallel agreement to the armistice agreement].

11.7.17 Consultative Mechanism (consistent)

7-102. The armistice agreement may provide for the establishment of a commission composed of representatives of the opposing forces to supervise implementation of the armistice agreement. If appropriate and agreed upon by all relevant belligerent parties, local authorities may be represented on the commission.

11.7.18 Political and Military Stipulations (consistent)

7-103. A general armistice may contain political and military stipulations, to include evacuation of territory; disposition of aircraft and shipping; cooperation in the investigation and prosecution of war crimes; recovery and restitution of captured or looted property; maintenance of public utilities, including communications facilities; restoration of civil administration, public safety, and public health needs; and provision of assistance to displaced persons. Political [and more far-reaching military] *terms require authorization and approval at the national* [or most senior non-State] *level.*

11.7.19 Evacuation or Re-Supply of Besieged Positions (generally consistent)

7-104. Parties to the conflict shall [should] *endeavor to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions* [if their role is solely for spiritual (not political or military) purposes]*, medical personnel, and medical equipment*, [and any other non-military resupplies agreed upon, e.g., food, clothing,] *on their way to such areas (GC art. 17).*

11.7.20 Notification, Commencement of, and Binding Effect (generally consistent)

7-105. An armistice must [should] *be notified officially and in good time to the competent authorities and to the forces* [of all parties to the conflict affected by the armistice, as well as to local populations for matters affecting them]. *Hostilities are suspended immediately after the notification, or on the date fixed (HR 38). It is the obligation of the contracting authorities to disseminate the armistice officially and in good time to subordinate commands. Commanders are responsible only from the time of receipt of*

official notification of the armistice. There may be reasonable differences between the agreed time and date for commencement and time of notification at the local unit level.

7-106. Significant differences between the agreed date and notification may be regarded as tantamount to breach of the agreement[, unless there are extenuating circumstances due to local conditions, communications interruptions, or other factors which understandably delay notification]. *Risk of this situation may be reduced by specifying a reasonable period of time for notification by each side prior to the time and date specified for an armistice to enter into effect. Parties may agree to, or unilaterally execute, a partial armistice pending commencement of an agreed armistice.*

11.7.21 Prohibited Acts

7-107. …Belligerent forces affected by an armistice are prohibited from engaging in any act expressly prohibited by the armistice, any act contrary to the express terms of the agreement, and any other act inconsistent with the purpose for the armistice. These acts would include any offensive military operations, such as conducting attacks or seizing territory beyond its lines. For example, an overt penetration of opposing forces' lines or territory or neutral territory, including tunneling to penetrate enemy lines or positions or to escape a besieged position, would constitute a violation of the armistice. Airborne penetration of enemy airspace is prohibited unless expressly agreed otherwise. [This would not preclude satellite surveillance, but may preclude drones and other aircraft deployed for information gathering unless agreed otherwise in advance.]... **(generally consistent)**

7-108. Absent express agreement, an armistice does not give authorities of a besieged place the right to receive food, water, or other provisions for military forces or the civilian population beyond what LOAC [or this Manual] *already requires* [or allows] *concerning civilians. Obligations concerning the transport of medical supplies, religious supplies, and food to civilians are outlined in* [FM 6-27] *Chapter 5 (GC art. 23)* [and elsewhere in this Manual]. **(possibly inconsistent due to reference to this Manual)**

11.7.22 Permissible Acts (consistent except as noted)

7-109. In the absence of written agreement to the contrary, each belligerent is entitled to take steps that are not offensive in character, but will tend to improve its situation. This includes, but is not limited to, troop movement within its own lines; troop reinforcements; construction of new fortifications, installations, and bases; construction and repair of transportation and communications facilities; intelligence collection; movement of supplies and equipment; and in general, taking advantage of the time and means at its disposal to prepare for possible resumption of hostilities. [Note: These are the same types of activities permissible for either belligerent under this Manual during the period white flags are employed and parlimentaires are engaged in negotiations but not once an agreement has been communicated to both sides **(inconsistent)**.]

7-110. Espionage or clandestine ground force reconnaissance behind opposing lines is not prohibited; but individuals captured while engaged in espionage are subject to the risks entailed under LOAC the same as at other times (HR art. 29; consider AP I art. 46)[, which vary from the positions of this Manual, e.g., execution of spies who are members of the enemy party].

11.7.23 Individual Violations (generally consistent)

7-111. An armistice violation by an individual Soldier, Marine, [sailor, aircrew,] *or a small group of Soldiers*[, sailors, aircrews,] *or Marines acting on their own initiative does not constitute a serious violation of an armistice, nor does it provide a basis for renunciation of the armistice. The injured party, however, is entitled to demand punishment of such Soldiers*[, sailors, aircrews,] *or Marines for their unauthorized acts, or, if necessary, compensation for the losses sustained (HR art. 41).*

7-112. Deliberate [serious] *violation of the terms of an armistice by individuals is punishable as a war crime. Such violations…do not justify denunciation of the armistice unless they are proved to have been committed with the knowledge and actual or tacit consent of their own government or commander. Consent may be inferred in the event of a persistent failure to punish such offenders* [or a persistent

recurrence of such offenses] *(see DOD Law of War Manual, 12.13.2.2).* [Accidental crossing the armistice line or neutral zone entry would not constitute a war crime; staging a raid behind enemy lines would.]

7-113. If Service Members acting in their individual capacity to violate the terms of an armistice are captured, they remain entitled to POW status, provided such entitlement exists during general hostilities (GPW art. 4). Deliberate violation of an armistice by an individual Service Member resulting in the [intentional] *killing or wounding of any member of the opposing force is an act of perfidy,* [delete "*an act of* perfidy"] *punishable as a war crime (consider AP I, art. 37(1)). It does not, however, constitute a basis to deny the Service Member entitlement to POW status (GPW art. 85)*[, and the right to a fair trial with competent representation]. [Note: It is not clear why any Service Member, upon capture during hostilities, would not be entitled to POW status. Even if it is shown, he or she committed a war crime, misdemeanor under the law of war, or a violation of domestic law or UCMJ, they would still be entitled to certain protections similar to those of all POWs.]

11.7.24 Armistice Violations (consistent except as to that which are serious violations)

7-114 & 7-115 [blended]. *Depending on factors discussed above such as notification and the isolated* [or accidental] *nature of violations, the following actions…constitute serious violations of an armistice:*

- [Material, intentional] *violation of the express terms of an armistice agreement.*
- [A[*ction taken by opposing forces to gain a military advantage it would not be able to gain but for the armistice* [not allowed under 7-109 and 7-110],
- [O]*vert manifestation of bad faith* [too vague; if kept, requires example or more precise language].
- [M]*ovement beyond agreed lines* [if not intelligence related or accidental].
- [E]*ncroachment or unauthorized entry into neutral areas* [if not intelligence related].
- [P]*hysical seizure of objectives outside agreed lines.*
- [D]*irect attack of opposing forces.*
- Violation of restrictions on troop numbers, types, and/or weaponry in armistice agreed areas.

[Under this Manual, the first and last three bullets would be considered grave breaches. The other four would not necessarily be grave breaches sufficient to elevate them to war crimes unless material, intentional death, injury, or destruction occurred affecting enemy combatants or the local population.]

11.7.25 Denunciation (generally consistent)

7-117. A belligerent denounces an armistice when it notifies the opposing party of its intent to terminate the armistice. Absent urgent necessity, a delay[, e.g., 48 hours,] *should occur between denunciation of the armistice and resumption of hostilities. If compelling evidence exists of a serious violation and* [to proceed with the process of a] *formal denunciation and warning seems likely to provide the violating party a substantial advantage of any kind, the aggrieved party may resume offensive military operations without warning, with or without formal denunciation.*

7-118. A commander of a military unit faced with any suspected or apparent violation of an armistice agreement, regardless of its severity, retains the right an[d] *obligation to use force in the exercise of unit self*[-]*defense.*

11.7.26 Extension (consistent)

7-120. An armistice may be extended in the same manner as originally concluded or in any other manner satisfactory to each [participating] *belligerent.*

11.8 Capitulations (consistent except as otherwise noted)

11.8.1 Description

7-121. A capitulation is an agreement, sometimes with certain conditions, entered into between the commanders of belligerent forces for the surrender of a body of forces, a defended position, other defended town or place, or a particular district of the theater of operations (See DOD Law of War Manual, 12.8.1). Surrenders of territory sometimes include provisions for the withdrawal [of] *defenders from it and allowing the victorious forces to enter into possession. A capitulation is a surrender by agreement; surrender can also occur without capitulation (see paragraphs 7-124 and 7-125).*

7-123. A capitulation may be of a small unit, such as a squad, platoon, company, or battalion, or of larger forces, such as a division or corps. Commanders have the authority to conclude capitulation agreements only with respect to areas under their control and forces or units under their command.

11.8.2 As Compared to Surrender

7-124. Capitulation involving personnel refers to unit surrender pursuant to an agreement. Individual Soldiers or groups of Soldiers who throw down their arms and surrender do not capitulate, but surrender. A surrender may occur without a capitulation agreement. For example, individuals or units may surrender themselves unconditionally to the opposite side without a specific capitulation agreement. On the other hand, an unconditional surrender may also be effected through a capitulation instrument. [Certain conditions should exist before a U.S. commander capitulates or surrenders his or her command as referenced elsewhere in this Manual, e.g., see the Code of Conduct and added commentary above to FM 6-27, 7-12.]

7-125. Surrender also may be arranged between belligerents at national levels [or with the senior commanders or authorities of non-State parties] *without the involvement of military commanders, possibly through third parties. A capitulation agreement may be negotiated between opposing military forces in local implementation of a surrender negotiated at national* [replace "national" with "higher"] *levels.*

11.8.3 Military Honor (somewhat consistent)

7-127. Executing a capitulation with honor and respect for the adversary is…the professional way to treat a defeated enemy, but one in which the psychological stigma of capitulation is diminished… [While that referenced in the last clause may occur, it is not the reason for acting with honor with respect to the treatment of and conduct towards surrendering enemy forces by capitulation or otherwise. All surrendering forces should be treated with respect until such time as shown that they are not deserving. Even then, the prevailing force should act with honor and provide, if not respect, the protections and rights to which all captured persons are entitled.]

7-129. Honorable treatment does not serve to diminish illegal acts, or criminal responsibility, by capitulating forces. Military and other personnel entitled to POW status (GPW art. 4) suspected of criminal acts, including violations of LOAC [and this Manual]*, remain POWs and, as such, remain entitled to protections afforded by their status*[, to include during resulting legal proceedings *(GPW art. 85).*

11.8.4 Authority and Responsibilities of Commanders (consistent except as noted)

7-130. Commanders are generally presumed to have the authority to conclude a capitulation agreement with respect to forces under their command or areas under their control…

7-131. For example, if commanders of military forces conclude continued fighting has become impossible and is unable to communicate with their superiors, under LOAC, they may assume they have authority to surrender their position or forces, or both. [The preceding is consistent with this Manual but seems inconsistent with FM 6-27, 7-134, 7-137.]

7-132. Unless their respective government has granted authority to do so, commanders do not possess the authority to bind their government to a permanent cession of places under their command, to surrender sovereignty over territory, or to agree to terms of a political nature that will take effect after the termination of hostilities.

7-133. The fact that a commander surrenders in violation of orders or domestic law does not itself invalidate the surrender.

7-134. Commanders who surrender in violation of orders or the law of their own State may be punished by their State [or non-State authorities]. *Under the Code of Conduct for U.S. armed forces, a commander must never surrender the members of his or her command while they still have the means to resist. Under the Uniform Code of Military Justice, shameful surrenders are punishable. In addition, compelling or attempting to compel a commander to surrender or striking colors or flag to an enemy without proper authority is punishable (for U.S. practice regarding this type of prosecution, see UCMJ art. 99(2)) (for more information regarding a U.S. commander's authority to capitulate, surrender, and capture with respect to the U.S. Code of Conduct, see para. 7-137.* [This Manual has a different position as to whether it is appropriate to surrender. See 7-12 above and 7-137 below; also see the Code of Conduct found at the beginning of this Manual for slightly different language **(possibly inconsistent)**].

11.8.5 Violations of Capitulation Agreements by Individual Soldiers (uncertain)

7-135. Capitulations extend to all military personnel under a commander's command. Deliberate [serious] *violations by individual Soldiers*[, sailors, aircrews,] *or Marines of the terms of a capitulation agreement may be punished as a war crime*[.] *Individual Soldiers* [and other combatants] *are also subject to prosecution by their own government for disobeying the capitulation order (see UCMJ art. 92 (10 U.S.C. 892)). Violation of a capitulation agreement, like other pre-capture law of war violations, is not a basis for denying a person POW status, if that person otherwise qualifies for POW status under the GPW (GPW arts. 4 and 85).* [The above assumes the capitulation by a commander is not in violation of the Code of Conduct or orders against surrendering. Otherwise, Service Members are bound by their obligation not to comply with illegal orders which certain capitulations might reasonably be considered. If captured after a violation of the capitulation agreement, the detaining party should, before imposing any punishments, give consideration to the reasons the person violating the capitulation terms believed it necessary not to comply with the agreement based on standing orders or regulations for the forces of which the person is a member.]

11.8.6 Code of Conduct for U.S. Armed Forces (consistent and inconsistent)

7-137. The Code of Conduct for U.S. Armed Forces is a moral code designed to provide U.S. military personnel with a standard of conduct (see DOD Law of War Manual, 9.3.9). Article II of the Code of Conduct states: "I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist" (DODI O-3002.05). Code of Conduct (CoC) Training provides that:

- *Military personnel must* [generally should] *never willingly surrender and must do their best to avoid capture. If a military member is isolated and unable to execute his or her mission or otherwise advance U.S. military objectives, it is his or her duty to evade capture and delay contact with individuals that may lead to capture, rejoin the nearest friendly force, and return to U.S. control (Enclosure 4, para. 2.a).*
- *Military personnel must understand the difference between surrender and other circumstances resulting in an adversary having control of the individual. Surrender is the voluntary relinquishment of a military member, or his or her subordinates, to an adversary's control. When there is no chance for meaningful resistance, evasion is impossible, and further military engagement will squander life with no significant advancement of U.S. objectives or hindrance to the adversary's objectives, members of Armed Forces should view themselves as "captured' against their will," versus "surrendering." (Enclosure 4, para. 2.b.(1)).* [This distinction is an unnecessary parsing of terms. One could as easily say they "surrendered against their will." Additionally, if the preceding conditions are in place whereby one can reasonably allow themselves to be "captured against their will," to avoid unnecessary additional injury or loss of life, they will likely have to do those things associated with a surrender, to include possibly the

use of a white flag and parlementaires. There is no need to complicate what a U.S. combatant is doing in such cases. Additionally, most combatants will know whether theirs is an honorable or dishonorable capitulation regardless of the term used. **(likely inconsistent)**]

- *The responsibility and authority of a commander never extends to the surrender of command, even if isolated, cut off, or surrounded, while the unit has a reasonable power to resist, break out, or evade to rejoin friendly forces (Enclosure 4, para. 2.b.(2)).* [This paragraph is closer to the position of this Manual and a somewhat clearer delineation of what is expected than what is found in the preceding bullets and the official Code of Conduct (vs. the Code of Conduct as expanded and revised in this Manual).]

11.8.7 To Accept Enemy Surrender or Capitulation (uncertain)

7-138. A commander [or individual combatant] *possesses the inherent authority to accept enemy surrender or general capitulation. The authority to accept enemy capitulation with conditions, however, is subject to approval by higher authority*[, provided communications with higher authority are possible. If they are,] *commanders agreement to conditions without higher authority approval is subject to higher command repudiation.* [If reasonably possible, "higher authority" should be assumed to be at least to battalion level, or if by a battalion commander or above, to his or her next level of command.]

11.8.8 General Nature of Capitulation Agreements (partially inconsistent)

7-139. The general effect of concluding a capitulation agreement is that of an unconditional surrender. [That described below indicates a capitulation may have conditions associated with it and, when it does, would be a conditional rather than unconditional surrender.] *Absent specific terms in the capitulation agreement to the contrary, the…capitulating party must* [should[*generally* [delete "generally"] *cease operations and maintain the military status quo at the time in which the capitulation becomes effective. For example, the capitulating forces must* [should] *not engage in offensive operations against opposing forces. Similarly, although forces may destroy their own weapons*[, munitions, equipment, supplies,] *and intelligence information to prevent them from falling into the hands of the enemy before they capitulate, after the capitulation is effective, the capitulating forces must* [should] *abstain from all destruction and damage to their own facilities and equipment, unless expressly permitted by the capitulation agreement.* [Realistically, the destruction of all such items may continue until such time as the enemy forces take actual control of capitulating or surrendering parties, and this should not be considered a law of war violation.] *The capturing side is free to confiscate as war booty or, at its discretion, destroy the weapons, ammunition, and military equipment of the capitulating side (see DOD Law of War Manual, 12.8.5).*

7-140. Capitulations normally contain nothing but military stipulations, such as addressing issues related to movements and administration of the surrendered forces. [However, o]*ther relevant issues may be addressed, such as the administration of the local civilian population.*

11.8.9 Form (consistent)

7-141. There is no specified form for a capitulation agreement. They may be oral or in writing. As in the case of armistices, …a written agreement is preferred to avoid misunderstandings and disputes over the terms. The agreement should be as specific and precise as possible as to terms to be observed on either side, excepting such conditions as are clearly imposed by LOAC. Details of time and procedure should be prescribed in the most exact and unequivocal language. [While ideally the agreement should be in the language of both sides to the agreement, if that is not reasonably possible, the language of the agreement will be at the discretion of the non-capitulating party.]

11.8.10 Terms and Conditions Usually Addressed (consistent)

7-142. A capitulation agreement may, and often should, include provisions addressing each of the following, insofar as they are relevant to the circumstances:

- *Time of surrender*

- *Forces (including to what extent detached forces or personnel may be included) or territory to be surrendered*
- *Disposition of surrendered forces*
- *Disarmament of surrendered forces*
- *Disposition of* [p]*risoners of war, civilian internees, and other persons held in custody*
- *Requirement to follow orders of the victorious commander*
- *Consequences of not following orders of the victorious commander*
- *Prohibition on acts of destruction by surrendered forces*

11.8.11 Command Responsibility After Capitulation (possibly inconsistent)

7-146. Capitulating units remain military units, subject to LOAC, and commanders remain responsible for the units under their command and for military personnel over whom they exercise authority. As such, commanders remain responsible for criminal misconduct of capitulating forces. Prevention of acts of looting and destruction by capitulating forces, whether of military equipment or civilian objects, remains a responsibility of commanders, for which they may be held criminally accountable. [Realistically, the capitulating commander may have little ability to ensure compliance, both before and once the surrender has been effected except through respect for his or her person by those commanded. Additionally, if the capitulation is believed to be less than honorable by those he or she commands, a commander's effectiveness may be reduced or non-existent. Thus, it should be the responsibility of the non-capitulating party to monitor and ensure proper conduct. The surrendering commander should only be held liable for what he or she can reasonably control. Once the capitulation agreement is complete, control of the acts of the capitulating force, now prisoners of war, becomes the responsibility of the prevailing party.]

11.8.12 Denunciation (generally consistent)

7-147. ...[I]*f a party to* [the capitulation agreement] *violates it based on directions by the commander who capitulated or by* [his or her] *higher authority*[, t]*he other belligerent may denounce the capitulation agreement and resume hostilities. Likewise, a denunciation action may also be taken if the capitulation was obtained through a breach of faith. It may not, however, be denounced because one of the parties has been induced to agree to it by a means consistent with LOAC, such as by a ruse, or by that party's own incapacity, such as by mistake of fact.* [Essentially, all a commander on either side needs to understand is that if the capitulation agreement is violated by one party, the non-violating party is free to choose to denounce the agreement and resume hostilities. If one side was induced into agreeing to the capitulation terms through a breach of faith, the party that perpetrated the breach must recognize that the non-breach party may choose to denounce the agreement and resume hostilities. If the capitulating party was induced to surrender through a breach of faith and the capitulation has been effected, even though the capitulating party can allege a breach of faith, realistically, the prevailing party will not likely free what are now its prisoners of war. The only redress may be if those who breached faith come under the control of enemy forces.]

11.8.4.9 Annulment (possibly inconsistent)

7-148. A capitulation is null and void if it takes place following the agreement of a general armistice of which the parties to the capitulation had no knowledge, unless the terms of the armistice stipulate that the cessation of hostilities occurs from the time when notification reaches the forces concerned, rather than from the date and time of signature. [Again, if such a capitulation has been effected, it may be unlikely the non-capitulating party will simply agree to rearm and release those who capitulated, especially if the forces and materiel surrendered are significant. It is the position of this Manual that capitulations which occur mistakenly after an armistice is in place are still valid no different than if a capitulation occurred because of a ruse by their enemy or their own incapacity or mistake of fact, which this would be, i.e., the capitulating party's higher command did not adequately and in a timely manner keep its forces informed (see FM 6-27, 7-147).]

CHAPTER 12
Neutrality

The hottest places in hell are reserved for those who, in times of great moral crisis, maintain their neutrality.

Dante Alighieri

If you are neutral in situations of injustice, you have chosen the side of the oppressor. If an elephant has its foot on the tail of a mouse, and you say that you are neutral, the mouse will not appreciate your neutrality.

Desmond Tutu (Foreword)

You can't be neutral on a moving train.

Howard Zinn

It is very possible to acknowledge another person's concerns without entering into their vibration.

Alaric Hutchinson

FM 6-27 does not include a chapter on neutrality; the DOD Law of War Manual and FM 27-10 do. "Neutral Power" in quoted text may be either a State or non-State party **(possibly inconsistent)**.

12.1 General

12.1.1 Definition

a. FM 27-10

512. Traditionally, neutrality on the part of a State [or non-State entity] *not a party to the war has consisted in refraining from all participation in the war, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents. It is the duty of belligerents to respect the territory and rights of neutral States* [or parties].

b. Position of this Manual

Neutrality on the part of a State or non-State entity not a party to the war consists in refraining from all participation in the war, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals or members, and by belligerents. In so doing, neutral parties are entitled not to be attacked, invaded, or otherwise harmed by belligerents. **(generally consistent)**

While this remains the major form of neutrality, situations will occur where the traditional State is not functional or in full control of all parts of its territory, with some elements of that State at war and others which are not. In such situations, the faction desiring neutrality may wish to follow the characteristics of a neutral State but not have the ability to do so fully, especially in regulating, preventing, and stopping certain acts of its citizens/members and those of belligerents. As a consequence, these factions and States, and parties which interact with them, may require or accept a form of neutrality with somewhat different characteristics **(inconsistent)**. Such differences are addressed in this chapter.

12.1.2 Neutrality Under Bilateral and Multi-Lateral Agreements

a. FM 27-10

513. In the event of any threat to the peace, breach of the peace, or act of aggression, the Security Council of the United Nations is authorized, under Articles 39 through 42 of the Charter, to make recommendations, to call for the employment of measures short of force, or to take forcible measures to maintain or restore international peace and security. Measures short of force or force itself may also be employed in pursuance of a recommendation of the General Assembly of the United Nations. Although these provisions of the Charter have not made it impossible for a State to remain neutral, the obligations which the Charter imposes have to a certain extent qualified the rights of States in this respect. For example, if a State is called upon, under Articles 42 and 43 of the Charter, to take military action against an aggressor, that State loses its right to remain neutral but actually loses its neutrality only to the extent that it complies with the direction of the Security Council [or General Assembly]. *A military commander in the field is obliged to respect the neutrality of third States which are not allied with the United States in the conduct of hostilities and are not violating their duty of neutrality toward this country, except to the extent that the State concerned has expressly qualified its neutrality.*

b. Position of this Manual

States, and even some non-State entities, can be part of bilateral and/or multi-lateral mutual defense or other military agreements, treaties, and arrangements. For States, this often includes membership in international and international or regional organizations such as the United Nations and NATO. If such a party becomes engaged in a conflict covered by the agreement or treaty, or membership in such an organization, the belligerent(s) of this party may reasonably assume all parties to the agreement, treaty, or arrangement are not neutral to the conflict unless they formally and expressly profess their neutrality in a manner satisfactory to the belligerent parties. Such an assumption is consistent with the UN Charter which allows mutual defense agreements whereby members of that alliance can come to the assistance of another member which is attacked. **(consistent)**

A military commander in the field and the troops he or she commands are obliged to respect the neutrality of a party whose neutrality is recognized by the party of which the military commander and his or her force are a member. Military commanders and their forces are also obliged to respect the terms of any agreement, treaty, or arrangement of which their State or non-State entity is associated provided they have been made aware of the provisions of such agreements and treaties. **(likely consistent)**

12.1.3 Notification of State of War to Neutrals

a. FM 27-10

514b. When war occurs, neutral States [or parties] *usually issue proclamations of neutrality, in which they state their determination to observe the duties of neutrality and warn their nationals* [or members] *of the penalties they incur for joining or assisting a belligerent.*

b. Position of this Manual **(somewhat inconsistent)**

Belligerents are not required to notify non-belligerent (neutral) parties in advance of hostilities, nor is formal notification required after hostilities have commenced. Nonetheless, to avoid uncertainty and confusion, to allow non-belligerents to declare their neutrality appropriately, and to reduce the risk of the conflict expanding unnecessarily, belligerents should make clear those States and non-State entities with which they are at war. Such neutral parties should also warn their nationals or members of the penalties and risks for joining or assisting a belligerent.

Unless a non-belligerent party is in or near a theater of war, part of a multi-lateral agreement some of whose members are belligerents, or will continue to have some intercourse with a belligerent, it is not necessary for every State and non-State entity formally to declare its neutrality or the conditions of that neutrality.

12.1.4 Violations of Neutral Territory

a. FM 27-10

515. *The territory of a neutral* Power [or other State] *is* [should generally be] *inviolable (H. V, art. 1.). The foregoing rule prohibits any unauthorized entry into the territory of a neutral State, its territorial waters, or the airspace over such areas by troops or instrumentalities of war. If harm is caused in a neutral State by the unauthorized entry of a belligerent, the offending State may be required, according to the circumstances, to respond in damages.*

518. ...A neutral Power [or other State] *must not allow any of the acts referred to in Articles I1 to IV to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory. (a.V, art. 6.)*

519. ...The fact of a neutral Power[or other State] res*isting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act. (IT.V, art. 10.) In order to protect its neutrality, a State whose territory is adjacent to a theater of war normally mobilizes a portion of its forces to prevent troops of either belligerent from entering its territory, to intern such as may be permitted to enter, and generally to carry out its duties of neutrality.*

520. ...Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory.

b. Position of this Manual

International law prohibits any unauthorized entry into the territory of a neutral State, its territorial waters, or the airspace over such areas by troops or the instrumentalities of war. Nonetheless, such incursions will occur and may not always be able to be reversed or appropriately punished. Thus, when unauthorized incursions do occur, there should not be a set response for all situations as this may simply widen the conflict rather than punishing a transgressor, or discouraging repetition or other parties from transgressing.

Conduct associated with transgressions is as follows (see also Sections 4.19 and 9.2.2.2):

1. ***Transgressing Belligerent*** **(possibly consistent with FM 27-10, Article 520)*:*** In the event a belligerent determines a military necessity to violate the territorial integrity of a neutral party, it should:
    (a) Do all within its power to minimize the damage, loss, and injury to neutral party persons, structures, facilities, infrastructure, crops, livestock, and the natural environment found within the affected territory;
    (b) Withdraw from or cease actions in such territory as soon as the military necessity no longer exists;
    (c) Treat with all neutral party civilians, officials, and military forces that pose no threat to the transgressing belligerent in a respectful and peaceful manner;
    (d) To the degree reasonably possible, provide restitution to neutral party persons and governments which have suffered financial and other loss because of the actions of the transgressing belligerent; and

(e) To the degree reasonably possible, provide aid to local populations whose lives and livelihoods have been disrupted.

2. ***Neutral Party*** **(consistent)**: In order to protect its neutrality, a party may mobilize its forces to prevent troops of any party to a conflict from entering its territory, to intern or otherwise detain those members of belligerent forces as may be permitted to enter, and generally to carry out its duties of neutrality. Mobilizing and deploying such forces by the neutral party should not be considered as a hostile act by belligerents. If in spite of the preceding, upon a belligerent's incursion into the territory of a neutral party, such neutral party should:
   (a) File a formal protest to the transgressing force's government and senior military commander (if known) and request withdrawal or cessation of hostile actions by the transgressing force;
   (b) Notify the transgressing belligerent's enemy that a hostile incursion has occurred and the neutral party will make all reasonable efforts to cause the transgressing belligerent to withdraw its forces and cease other hostile actions affecting the neutral party and the transgressing party's enemy;
   (c) If the cause of a transgressing force's presence is due to the violation of the neutral party's territory by the enemy of the transgressing force, the neutral party should file a formal protest with all transgressing parties and their local military commands if known) and request immediate withdrawal and cessation of hostilities by all transgressing forces;
   (d) Request assistance from international organizations, other neutral parties, allies of the transgressing belligerent(s), and others to cause the withdrawal or cessation of hostile actions by all transgressing belligerents;
   (e) If deemed in the best interest of the neutral party, take military action to force a withdrawal of forces and cessation of hostile actions, although to do so may be perceived by the transgressing belligerent(s) as a declaration of war (even though legally it is not) with the balance of the neutral party's territory then possibly subject to attack or occupation;
   (f) If a transgressing belligerent cannot be convinced or forced to withdraw or discontinue hostile actions in the neutral party's territory, work with the transgressor to minimize damage, loss, and suffering within the affected territory; and
   (g) Seek to recover restitution for any financial, physical, environmental, or human loss or injury caused by or as a result of the presence of a transgressing belligerent.

3. ***Enemy of Transgressing Belligerent*** **(possibly consistent)**: In the event a belligerent violates the territory of a neutral party, the enemy of that belligerent should:
   (a) Determine whether such violation is of sufficient seriousness to its own interests to warrant a diplomatic, economic, military, or other response;
   (b) If so determined, file a formal request to the neutral party to require (to include the use of force) the transgressing party to immediately exit the territory of the neutral party;
   (c) If the neutral party is unwilling or unable to require the transgressing party to exit the territory of the neutral party, take what action it deems necessary, up to and including military action, against the transgressing belligerent in the territory of the affected neutral party;
   (d) Inform international organizations, other neutral parties, its own allies, and the affected neutral party of its intentions at a time deemed appropriate by the belligerent responding to the transgression;

(e) Do all within its power to minimize the damage, loss, and injury to neutral party citizens, structures, facilities, infrastructure, crops, livestock, and the natural environment found within the neutral territory;
(f) Treat with all neutral party citizens, officials, and military forces which pose no threat to the responding belligerent in a respectful and peaceful manner; and
(g) Provided the preceding is adhered to, not be responsible for any restitution for damage, loss, and suffering caused by its actions to dislodge or destroy the forces of the transgressing belligerent, for which the transgressing belligerent or neutral party itself should be responsible if such payments are to be made.

If, while engaged in active combat in non-neutral territory, a belligerent crosses into neutral territory, the other belligerent may, within reason, pursue the forces of its enemy. "Within reason" is assumed to mean within 25 miles (40 kilometers) of the border, or until the forces pursued position themselves such that neutral residents and property might be harmed. In such circumstances, the pursuing belligerent should halt pursuit and initiate communications with the neutral to capture or expel the transgressing belligerent.

12.1.5 Movement of Troops and Convoys of Munitions and Supplies

a. FM 27-10

516. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power [or party]. *(49.V, art. A).*

517. A distinction must be drawn between the official acts of the belligerent State [or party] *in convoying or shipping munitions and supplies through neutral territory as part of an expedition and the shipment of such supplies by private persons. The former is forbidden while the latter is not.*

b. Position of This Manual (inconsistent with respect to private parties)

The movement of troops and convoys of munitions and supplies by a State or non-State belligerent across neutral territory should not occur without authorization from the neutral party and, if approval is not granted, may be reasonably viewed as an illegal incursion into the neutral party's territory with 12.1.4 of this Manual applicable to the transgressing belligerent, the neutral party, and the enemy of the transgressing belligerent. No distinction should be made as to whether convoys of munitions or supplies destined for an enemy belligerent are made by the military of that belligerent or by private persons, companies, or other parties acting on its behalf or in their own self-interest. With respect to the latter, a neutral party is responsible not just for the acts of its government or leadership but also for that of private persons living or operating in its territory even if not citizens or members of the neutral party.

12.2 Recruiting, Training, and Transit in Neutral Territory

a. FM 27-10

522. …Corps of combatants cannot [should not] *be formed nor recruiting agencies opened on the territory of a neutral Power* [or party] *to assist the belligerents. (B.V, art. A) …The establishment of recruiting agencies, the enlistment of men, the formation and organization of hostile expeditions on neutral territory, and the passage across its frontiers of organized bodies of men intending to enlist are prohibited. …This prohibition does not extend to medical personnel and units of a voluntary aid society duly authorized to join one of the belligerents. (See GWS, art. 37; par. 229 herein.)*

523. …The responsibility of a neutral Power [or party] *is not* [automatically] *engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents. (H.V, art. 6.)*

524. …The prohibition in Article 4, H. V (par. 522), is directed against organized bodies which only require to be armed to become an immediate fighting force. Neutral States [or non-State parties] *are not*

required to enact legislation forbidding their nationals [or members] *to join the armed forces of the belligerents. Individuals crossing the frontier singly or in small bands that are unorganized similarly create no obligation on the neutral State* [or party]. *The foregoing rules do not, however, permit a State* [or party] *professing to be neutral to send regularly constituted military units across the frontier in the guise of "volunteers" or small unorganized bands. ...Nationals of a belligerent State* [or members of a belligerent non-State party] *are permitted freely to leave neutral territory to join the armies of their country*[, movement, or cause].

***b. Position of This Manual* (somewhat inconsistent)**

If a neutral state can reasonably identify recruiting offices or activities, or individuals or small bands moving through its territory to join the forces of a belligerent, it has the responsibility to detain such persons and, if appropriate, expel such persons back to the country from which they arrived if neutrality is to be maintained. When recruiting in or traversing the territory of a neutral party and not wounded or otherwise incapacitated, individuals and groups, if armed or otherwise obviously intent on supporting a belligerent are legitimate targets of belligerents which are the enemy of the State or non-State party of which they are citizens or members if the neutral party chooses to take no action against their presence.]

12.3 Trade and Communications with and in Territory of Neutral Parties

12.3.1 Trade

a. FM 27-10

525. ...A neutral Power [or party] *is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet. (8.V, art. 7.)*

526. ... Although a neutral State [or non-State party] *is not required to prohibit the shipment by private persons of supplies or munitions of war, the neutral State* [or party]*, as such, is prohibited from furnishing such supplies or munitions and from making loans to a belligerent. It is also forbidden to permit the use of its territory for the fitting out of hostile expeditions.*

527. ... Commercial transactions with belligerents by neutral corporations, companies, citizens, or persons resident in neutral territory are not prohibited. A belligerent may purchase from such persons supplies, munitions, or anything that may be of use to an army or fleet, which can be exported or transported without involving the neutral State [or non-State party].

***b. Position of this Manual* (often inconsistent except possibly last paragraph below)**

Neutral parties (State and non-State) can engage in trade with belligerents while understanding:

a. A belligerent may impose a blockade, embargo, or other action against its opposing belligerent intended to prevent military and non-military funds and goods, to include food, medicines, and other items intended for civilians, from being received and, with prior notification to neutral parties, reserves the right to take whatever actions necessary to prevent such items from reaching its enemy, to include the destruction or confiscation without compensation to any party for the loss of such funds or goods or for any transporting ships, aircraft, vehicles or other modes of transportation lost;
b. The preceding also applies to any funds or goods leaving the country of a belligerent bound for a neutral party;
c. A belligerent may formally announce that the sale of weapons, munitions, or other war materiel to its enemy, regardless of how transported by whom, may be considered a violation of neutrality even to the extent the neutral party is no longer recognized as neutral by the belligerent;

d. The preceding applies not only to sale by a neutral government or non-State party of such items to the belligerent's enemy but also to that by the neutral party's members, citizens, residents, and companies, as well as by any representatives of the neutral party or its citizens, residents, and companies, if it is known or can reasonably become known, to the neutral party that such persons or entities are involved in such transactions with belligerents and have a reasonable ability to control or prevent these sales;
e. Food, medicines, and other non-military goods may be sold by a neutral party to a belligerent without this being considered a violation of neutrality although, once such goods leave the territory or territorial waters of the selling party, the enemy of the purchasing belligerent may choose to take action to prevent their reaching the intended destination without compensation to any party associated with the transaction for lost goods or means of transportation; and
f. Funds and other financial instruments of a belligerent held by neutral party institutions are legitimate targets for enemies of that belligerent so long as no harm is done to other assets, personnel, or facilities of such holding institutions. Additionally, loans or other financing should not be provided by a neutral party to a belligerent if the former wishes to maintain its neutral status.

Other commercial transactions between neutral and belligerent parties, public and private, are not automatically disallowed. However, a neutral party may legislate that some or all such transactions are not permissible. Likewise, a belligerent party should notify affected neutral party(s) prior to any adverse action being taken that certain commercial or financial transactions previously allowed no longer are or require authorization if they are not to be potentially targeted. Finally, if a belligerent is engaged in an unjust war under the law of war, it does not have the rights delineated in a. through f.

12.3.2 Communications Capabilities

a. FM 27-10

528. ...Belligerents are likewise forbidden:

a. To erect on the territory of a neutral Power [or party] *a wireless telegraphy station or any apparatus for the purpose of communicating with belligerent forces on land or sea;*

b. To use any installation of this kind established by them before the war on the territory of a neutral Power [or party] *for purely military purposes, and which has not been opened for the service of public messages. (E.V, art. 3.)*

529. ...A neutral Power [or party] *is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it*[, i.e., the neutral Power/party] *or to Companies or private individuals. (8.V, art. 8.)*

530. ...The liberty of a neutral State or non-State party]*, if it so desires, to transmit messages by means of its telegraph, telephone, cable, radio, or other telecommunications facilities does not imply the power so to use them or to permit their use as to lend assistance to the belligerents on one side only. Every measure of restriction or prohibition taken by a neutral Power*[/party] *in regard to the matters referred to in Articles VII and VIII must* [should] *be impartially applied by it to both belligerents. A neutral Power*[/party] *must* [should] *see to the same obligation being observed by Companies or private individuals* [in its own territory] *owning telegraph or telephone cables or wireless telegraphy apparatus. (8.V, art. 9.)*

b. Position of this Manual (generally consistent)

This Manual concurs with the preceding but would add or rephrase as follows:

- The preceding and that which follows is applicable to neutral parties and their territories.
- A neutral party is not called upon to forbid or restrict the use by belligerents of telephone, cellular, internet, "ham" radio, or other such transmitting and receiving equipment or systems of communications belonging to the neutral party, its companies, or its private persons.
- The liberty of a neutral party, if it so desires, to transmit or allow to be transmitted messages by such means does not imply the power to use them or to permit their use as to lend assistance to the belligerents on one side only. Any measure of restriction taken by a neutral party in regard to this matter must be impartially applied to all opposing belligerents. A neutral party should ensure the same obligation being observed by companies and private individuals within its control which own or operate such means of communication.
- A belligerent, or its companies and private persons, which own or operate such communications capabilities in the territory of a neutral party which is not under the belligerent's control, have no proprietary rights to such capabilities for its own military, diplomatic, commercial, or other purposes, and if used in such a manner, are subject to being closed down by the neutral party or attacked and destroyed by their enemy.

12.4 Internment of Belligerent Forces and Tending of Wounded and Sick in Neutral Territory

12.4.1 Internment [or Other Form of Detention]

a. FM 27-10

532. ...A neutral Power [or party] *which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war. It may keep them in camps and even confine them in fortresses or in places set apart for this purpose. It shall decide whether officers* [or others] *can be left at liberty on giving their parole not to leave the neutral territory without permission. (E.V, art. 11)*

533. ...A neutral is not bound to permit belligerent troops to enter its territory. On the other hand, it may permit them to do so without violating its neutrality, but the troops must be interned or confined in places designated by the neutral. They must be disarmed and appropriate measures must [should] *be taken to prevent their leaving the neutral country. In those cases in which the States concerned are parties to CPW, Article 4, paragraph R(2), thereof requires that such persons, provided they are otherwise entitled to be treated as prisoners of war, are, as a minimum but subject to certain exceptions, to receive the benefit of treatment as prisoners of war under GPW (see par. 61).*

535. Officers and men interned in a neutral State[non-State party] *may in the discretion of that State*[/party] *be released on their parole under conditions to be prescribed by the neutral* State[/party]. *If such persons leave the neutral* State[/party] *in violation of their parole, the* State[/party] *in whose armed forces they serve is* [generally] *obliged to return them to the neutral* State[/party] *at its request.*

*536. ...The munitions, arms, vehicles, equipment, and other supplies which the interned troops are allowed to bring with them into neutral territory are likewise detained by the neutral State[/*party]. *They are restored to the State*[/party] *whose property they are at the termination of the war.*

537. ...In the absence of a special Convention[,] *the neutral Power* [or party] *shall supply the interned with the food, clothing, and relief required by humanity. At the conclusion of peace the expenses caused by the internment shall be made good (B.V,art. 19).*

b. Position of This Manual (consistent and inconsistent)

A neutral party is not bound to permit belligerent troops voluntarily to enter its territory. On the other hand, it may permit them to do so without violating its neutrality, but the troops must be interned or otherwise confined in places designated by the neutral party. They should be disarmed and appropriate measures taken to prevent them from leaving the neutral territory unless appropriate agreements have been reached with the belligerents and the receiving party, whether or not a belligerent. As a minimum, any belligerent troops interned or held by a neutral party shall have the rights of prisoners of war as prescribed in this Manual. **(consistent except for reference to this Manual)**

Belligerent soldiers interned by a neutral party, at the discretion of that party, may be released on their parole under conditions to be prescribed by the neutral party. Interned or paroled persons should not engage in hostile actions in the neutral territory on behalf of their own forces, to include intelligence gathering, securing military or financial support, recruitment, and the planning of operations. It such persons violate their parole and are taken into custody by the neutral party, the neutral party may imprison or otherwise punish the parolees, return them to their own territory, or turn them over to their enemy, provided it is reasonably believed they will be treated as prisoners of war as permissible under this Manual **(inconsistent)**.

The munitions, arms, vehicles, equipment, and other supplies which the interned troops are allowed to bring with them into neutral territories are likewise detained by the neutral party **(consistent)**. If not needed for the security of the detaining neutral party or for the generation of funds for the maintenance of the interned troops, the disposition of this property will be determined by appropriate parties at the termination of the war **(inconsistent)**.

In the absence of a special convention, the neutral party should provide the interned with food, clothing, and accommodations within its capabilities of doing so. At the conclusion of war, the expenses caused by this internment should be made good by the belligerent of which the interned persons are members if that party has the capacity to do so **(generally consistent)**.

If, at some point, the neutral party no longer has the resources or willingness to provide maintenance for the interned troops, such responsibility should be transferred to an international organization or other neutral party willing and able to accept this responsibility. If no international organization or other neutral party is willing and able to accept the interned troops, the detaining neutral party can release the interned troops and force them back to the country or territory from which they arrived **(inconsistent)**.

The provision of Article 535 that a belligerent should return to the neutral party those of its forces who have been interned and paroled by the neutral party, and then violated that parole by leaving the neutral territory, is unreasonable. There is no way to enforce this requirement without possibly the neutral party declaring war on or taking hostile action against the belligerent which refuses to do so. At most, the neutral party could confiscate the property of a parole violator left in the neutral territory, prevent their return, or turn them over to their enemy or arrest and imprison them if they return. **(inconsistent)**

12.4.2 Refuge (consistent)

534. If troops or soldiers of a belligerent are permitted to seek refuge in neutral territory, the neutral is authorized to impose the terms upon which they may do so. In case of large bodies of troops seeking refuge in neutral territory, these conditions will [should] *usually be stipulated in a convention drawn up by the representatives of the neutral power and the senior officer of the troops* [FM 27-10].

12.4.3 Prisoners of War

a. FM 27-10

538. …A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory, it may assign them a place of residence. The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power. (8.V, art. 13.)

b. Position of this Manual **(inconsistent)**

A neutral party which receives escaped prisoners who arrive on their own capacity and not through official channels will decide whether such former prisoners are:

a. Allowed to remain at liberty
b. Allowed to proceed to the territory of another party,
c. Transferred to an international organization, relief society, or other neutral party, or
d. Interned or paroled

Prisoners who have successfully escaped their captors and made it to neutral territory should not be transferred back to their former captors.

12.5 Passage and Presence of Wounded and Sick

12.5.1 FM 27-10

539. ***Passage of Sick and Wounded:*** *A neutral Power may authorize the passage over its territory of wounded or sick belonging to the belligerent armies, on condition that the trains*[/transportation] *bringing them shall carry neither* [able, non-medical] *personnel or material of war. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose. The wounded or sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must* [should] *be guarded by the neutral Power so as to ensure their not taking part again in the operations of the war. The same duty shall* [should] *devolve on the neutral State with regard*[s] *to wounded or sick of the other army who may be committed to its care. (B.V)art. 14.)*

540. ***Passage and Landing of Medical Aircraft:*** *Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers*[or parties], *land on it in case of necessity, or use it as a port of call. They shall give the neutral Powers*[/parties] *previous notice of their passage over the said territory and obey all summons to* [replace "alight, on land or water*"* with "land"]*. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power*[/party] *concerned.*

The neutral Powers[/party] *may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.*

Unless agreed otherwise between the neutral Power[/party] *and the Parties to the conflict, the wounded and sick who are disembarked, with the consent of the local authorities, on neutral territory by medical aircraft, shall be detained by the neutral* [party]*, where so required by international law, in such a manner that they cannot again take part in operations of war. The* [c]*ost of their accommodation and internment shall be borne by the Power*[/party] *on which they depend. (GVS, art. 37.)*

542. ***Internment of Sick and Wounded Passing Through Neutral States*** **[or Parties]** *The sick and wounded of a belligerent may be carried through neutral territory to the territory of the belligerent State* [or non-State party]*. If, however, they are left in the neutral's territory, they must be interned so as to insure their not taking part again in the war.*

543. ***Sick and Wounded Prisoners of War Brought into Neutral State*** **[or Party]** ***by Captor*** *Sick and wounded prisoners of war brought into neutral territory by the Detaining Power as part of a convoy of evacuation granted right of passage through neutral territory may not be transported to their own*

country or liberated, as are prisoners of war escaping into, or brought by troops seeking asylum in neutral territory, but must be detained by the neutral power, subject to the provisions contained in paragraphs 188 through 196 [of FM 27-10].

544. ***Wounded, Sick, and Shipwrecked Persons in Maritime Warfare*** *If wounded, sick or shipwrecked persons are taken on board a neutral warship or a neutral military aircraft, it shall be ensured, where so required by international law, that they can take no further part in operations of war. (GWS sea, art. 15.)*

…Wounded, sick or shipwrecked persons who are landed in neutral ports with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent Powers, be so guarded by the neutral Power, where so required by international law, that the said persons cannot again take part in operations of war. The costs of hospital accommodation and internment shall [should] *be borne by the Power on whom the wounded, sick or shipwrecked persons depend. (GWS sea, art. 17.)*

545. ***Medical Personnel*** **[and Chaplains]** *The medical personnel and chaplains (as defined in GWS, art. 24; par. 67 herein) belonging to belligerent forces who have sought asylum under Article 11,H. V (par. 532), may be retained and are required to be released as prescribed in Articles 28 and 30, QWS (pars. 230 and 231). Medical personnel and materials necessary for the care of the sick and wounded of a convoy of evacuation, permitted to pass through neutral territory under Article 14, V (par. 539), may be permitted to accompany the convoy. Subject to the provisions of Articles 28 and 30, BWS, the neutral State may retain the necessary medical personnel and materiel for the care of the sick and wounded left in its care. Failing this, it must* [should] *furnish such personnel and materiel, and the expense thereof must be refunded by the belligerent concerned not later than at the termination of the war.*

546. ***Accommodation in Neutral Territory of the Wounded, Sick, and Prisoners of War Who Have Long Been in Captivity*** *Articles 109 through 117, GPW, authorize parties to the conflict to conclude arrangements with neutral States* [or parties] *for the accommodation of the seriously wounded and sick and persons who have undergone a long period of captivity. See paragraphs 188 through 196 for provisions in this regard, including direct repatriation of certain wounded and sick from the neutral country* [or territory].

12.5.2 Position of this Manual

While this Manual generally concurs with the preceding, it has summarized and adjusted certain articles as follows, while others have not been addressed as this has been done elsewhere, e.g., medical aircraft.

a. Obligation of Neutral Party: A neutral party is under no obligation to permit the passage of a convoy of sick and wounded of a belligerent army through its territory or to accept such wounded and sick for a more extended period **(generally consistent)**.

When a neutral party does authorize the passage of wounded and sick belonging to a belligerent army, it does so on condition that the transportation carrying them should not also carry non-injured or sick combatants or materiel of war but only that required for the care of the sick and wounded being transported. In such case, the neutral party should take whatever measures of safety and control are necessary for this purpose **(consistent)**.

In the event the wounded and sick of a belligerent army do not simply pass through the neutral territory but remain for any reason, the neutral party may intern or otherwise control such persons and ensure they do not become reengaged in the war while residing in the territory **(consistent)**. At such times as these sick and wounded troops are able to return to active duty, their ability or inability to do so will be subject to political and military conditions and agreements between international organizations, the belligerents, and the neutral party in whose territory the formerly sick and wounded are located **(inconsistent)**.

b. Wounded and Sick Prisoners of War Brought into Neutral Territory: Wounded and sick prisoners of war brought into neutral territory by their captor as part of a convoy of evacuation granted rights of passage through said territory who come into control of the neutral party for whatever reason other than having escaped their captor, should be returned, paroled, interned or otherwise held as outlined in the preceding paragraph **(somewhat consistent)**. As to those who have escaped their captor in neutral territory and come under the control of the authorities of the neutral party, such authorities shall decide the disposition of such persons as per 12.4.3 **(inconsistent)**.

c. Accommodation of Wounded, Sick, and Prisoners of War Long in Captivity **(generally consistent):** Parties to the conflict may conclude arrangements with neutral parties for accommodation of the seriously wounded and sick and persons who have undergone long periods of captivity and may include direct repatriation from the neutral territory.

d. Wounded, Sick, Shipwrecked, or Crashed Persons in Neutral Territory (inconsistent): If wounded, sick, or shipwrecked persons, and those whose aircrafts crash in neutral territory, taken aboard a neutral warship or neutral military aircraft, or landed in neutral ports with the consent of the local authorities, such persons should be held as outlined in the preceding three paragraphs.

e. Medical Personnel and Materials **(somewhat consistent)**: Medical personnel and materials necessary for the care of the sick and wounded permitted to pass through neutral territory should be allowed to accompany the convoy. The neutral party may retain such medical personnel and materials as required to care for any sick and wounded left in its care, not just those of the forces of which the medical personnel are members. If this is not possible or is insufficient, within its resources and those required for its own citizens, the neutral party should provide such medical personnel and materials. If it cannot, it should make arrangements with international organizations, aid societies, and other neutral parties to transfer the responsibility for the care of these sick and wounded. Medical personnel and chaplains accompanying the sick and wounded allowed to pass through the territory of a neutral party should refrain from any political, military, or intelligence activities and, if so engaged, may be imprisoned or otherwise handled as the neutral party considers appropriate to the seriousness of the circumstances **(possibly inconsistent)**.

f. Costs of Care **(somewhat inconsistent)**: The neutral party may seek compensation from the responsible belligerent for any hospital care, internment, or other costs incurred as the result of the authorized passage or presence of sick and wounded in its territory to be paid no later than one year after the termination of the war provided the responsible belligerent is fiscally able to do so. If not paid, the neutral party may appropriate in its territory assets of the responsible belligerent to cover such costs.

g. Protection of Passage and Presence of Wounded and Sick Belligerents in Neutral Territory **(inconsistent)**: Convoys of wounded and sick belligerents passing through neutral territory, and permanent locations for such wounded and sick, should not be attacked by other belligerents to the conflict except as otherwise allowed in this Manual regarding permitted actions against medical personnel, facilities, and transport.

12.6 Neutral Persons

12.6.1 FM 27-10

547. ***Neutral Persons*** *The nationals of a State which is not taking part in the war are considered as neutrals. (H. V, art. 16.)*

550. ***Forfeiture of Rights by Neutral*** **[Persons]**

Treaty Provisions. A neutral cannot avail himself of his neutrality:

a. If he commits hostile acts against a belligerent.

b. If he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral [person] *shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act. (H. V, art. 17.)*

551. ***Acts Not Favorable to One Belligerent*** *The following acts shall not be considered as committed in favour of one belligerent in the sense of Article XVII, letter b:*

a. Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;

b. Services rendered in matters of police or civil administration. (a.V, art. 18.)

12.6.2 Position of this Manual

a. ***Definition*** **(consistent except addition of "non-State party"):** The citizens or members of a State or non-State party which is not taking part in the war are considered neutral persons.

b. ***Acts Not Favorable to One Belligerent*****:** Services rendered in matters of normal police and civil administration should not be considered as committed in favor of one belligerent so as to constitute a violation of neutrality **(consistent)**. However, unlike FM 27-10, supplies furnished or loans made to one of the belligerents by a person within the control or jurisdiction of a neutral party would be considered as committed in favor of one belligerent and, therefore, constitute a violation of neutrality **(inconsistent)**.

12.7 Railway and Other Transportation Material

12.7.1 FM 27-10

552. **…** *Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of Companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin. A neutral Power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent Power. Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage. (8.V, art. 19.)*

12.7.2 Position of this Manual:

Transportation rolling stock and equipment (rail, trucking) coming from the territory of neutral parties, to or through the territory of a belligerent, whether it be the property of the neutral parties, or their companies or private persons, and recognizable as such, should not be requisitioned or utilized by the belligerent except where and to the extent absolutely necessary. In such event, it should be released as soon as possible to the territory of the party of origin. Any cost to the neutral party, or its companies and private persons, because of this delay, should be reimbursed if reasonably possible by the belligerent **(consistent)**.

Nonetheless, as which goods and personnel such transportation and rolling stock and equipment carry in or from a belligerent's territory cannot always be reasonably known by the enemy of this belligerent, the enemy of this belligerent has the right to delay, sabotage, attack, and destroy all such rolling stock, equipment, and transported materiel suspected of being military in nature regardless of ownership and without compensation being paid by said enemy **(likely consistent).**

CHAPTER 13
Enforcement

There is a higher court than courts of justice, and that is the court of conscience. It supersedes all other courts.

Mahatma Gandhi

[T]he treaty regime as a whole need not nor should be held to a standard of strict compliance but to a level of overall compliance that is "acceptable" in the light of the interests and concerns the treaty is designed to safeguard.

Abram and Antonia Handler Chayes
"On Compliance," *International Organizations, 1993*

Justice isn't always about the law. Full disclosure doesn't always reveal the deeper truth.

Maybe they weren't innocents in the eyes of the law, but there's something more important than the law, and that is simply compassion.

William Kent Krueger
Sulphur Springs

What those in power, and those who elect, appoint, and advise those in power, should understand and never forget is that when you send soldiers into war with no reasonable expectation other than they will often violate the law of war and truly believe it the only right thing to have done, you are as responsible for what they do as they are themselves.

Vietnam Combat Veteran

Detached reflection cannot be demanded in the face of an uplifted knife.

Oliver Wendall Holmes, Jr.
Brown vs. United States (1921)

Oh judgment, thou art fled to brutish beasts, and men have lost their reason.

William Shakespeare
Julius Caesar

13.1 Introduction

Whether one follows this Manual or official doctrine, possible violations of the law of war by most U.S. combatants will be investigated, charges brought, judicial jurisdiction determined, prosecution and defense cases developed, and judicial and non-judicial punishments imposed based on the DOD Law of War Manual, FM 6-27, UCMJ, and related manuals and issued directives. As a consequence, it is important each combatant understands the currently existing legal structure and process if their actions come under scrutiny. To that end, most of Chapter 8 of FM 6-27 (War Crimes and Enforcement of the Law of Armed Conflict) has been included below in italics.

13.2 Guidance for Commanders and Soldiers

8-1. Commanders must [should] *exercise leadership to ensure that the forces under their command comply with LOAC. In addition to being legally required, compliance with LOAC: reinforces military effectiveness; helps maintain public support and political legitimacy; and can encourage reciprocal*

adherence by the adversary or adherence by adversaries in future conflicts (see DOD Law of War Manual, 18.2). As a matter of policy, commanders should encourage allies and partners to comply with LOAC.

[While strict compliance with the formal law of war may do that which is indicated in 8-1, it can also undermine military effectiveness. Additionally, as is evident in all wars in which the United States has become engaged since the adoption of the 1949 Geneva Conventions and subsequent related treaties, adversaries have often chosen to violate the formal law of war even when the U.S. is compliant. Further, strict adherence to the law may not be the best option for reducing unnecessary death, injury, suffering, and destruction and for respecting human rights of combatants **(inconsistent)**.]

8-2. Commanders have a duty to take appropriate measures…within their power to control the forces under their command for the prevention of violations of LOAC (DOD Law of War Manual, 18.4). Appropriate measures may include: training subordinates[;] *issuing command guidance or procedures; investigating allegations or incidents; instituting administrative or disciplinary action; and taking other appropriate corrective action.*

[While this Manual believes that most elements of the formal law of war are generally that to which combatants should aspire in most situations, the first responsibility of commanders is for their forces to accomplish their missions while minimizing unnecessary death, injury, suffering, and destruction, both of non-combatants and their own unit. Regardless of whether fully compliant with LOAC, provided it furthers the purpose of the law, that is what commanders have a duty to do with respect to the forces under their command and the measures taken to increase the probability of this occurring **(inconsistent)**.

8-3. Commanders must [should generally] *report "Reportable Incidents" (defined as possible, alleged or suspected violations of LOAC) (see DODD 2311.01E), including Reportable Incidents committed by enemy personnel or by personnel belonging to allied or partner forces (see DODD 2311.01E).*

[Commanders "must" do nothing. What they "should" do is that which is morally right, accomplishes their mission, and best achieves the purposes of the law of war. If this is reporting an incident, that is what should be done. If it is handling this differently, that also is what should be done. **(inconsistent)** This is addressed in more detail below.]

8-4. Commanders may need to direct the investigations of allegations or to refer matters to investigatory authorities in accordance with DOD procedures, such as procedures applicable to a command-directed investigation (for example, Army Regulation 15-6) or to an investigation by a military criminal investigative service (for example, Army Regulation 195-2).

[Again, commanders should proceed as they determine most appropriate for doing that which is moral, supportive of their mission, protective of those they command, and best accomplishes the purposes of the law of war **(inconsistent)**.]

8-5. Commanders should take appropriate action with regard to Reportable Incidents of LOAC in accordance with the UCMJ and the Manual for Courts-Martial. Under international law, commanders must consider whether disciplinary action is warranted in the case of serious violations of LOAC, but there is no absolute or automatic requirement under international law to punish particular offenders within their armed forces in a specific way. Commanders have discretion about how to implement and enforce LOAC in accordance with U.S. domestic law and applicable DOD procedures.

[Other than the first sentence and last clause, the balance of 8-5 is consistent with this Manual and what the commentary and differences after each of the preceding four paragraphs was meant to convey, i.e., commanders should "consider whether disciplinary action is warranted;" commanders should understand

there is "no absolute or automatic requirement…to punish…in a particular way;" and commanders may use "discretion about how to implement and enforce LOAC" **(consistent except as indicated)**.]

8-6. All Soldiers and Marines must [should]*: (1) comply with LOAC in good faith; and (2) refuse to comply with clearly illegal orders to commit violations of LOAC (see DOD Law of War Manual, 18.3).*

[The preceding would be better written as: "All Soldiers, sailors, aircrews, and Marines should: (1) attempt to comply with LOAC in good faith whenever moral and reasonably possible; and (2) refuse to comply with clearly illegal, immoral, and unreasonable orders to commit acts which will cause unnecessary death, injury, suffering, and destruction or otherwise undermine the purposes of the law of war **(somewhat inconsistent)**."]

8-7. When appropriate, Soldiers[, sailors, aircrews,] *and Marines should ask questions through appropriate channels and consult with the command legal adviser on issues relating to LOAC (see DOD Law of War Manual, 18.3.1.2).*

[Generally, such questions should be asked before or after an active combat situation, not during a firefight or fluid combat situation. Queries should be asked respectfully and not as a challenge to authority but to gain a better understanding of what is legal, moral, responsible, and reasonable. However, not being a challenge to authority does not mean issues of morality and reasonableness should not be raised if that being required under the law does not seem to be either of these. Such issues should be openly discussed during training. If they are not, there is a greater likelihood the law will be violated, not just when it should be, but also when it should not, if combatants are not able to work through in advance why a law, which seems unreasonable, actually is that with which they should comply for reasons beyond simply "it is the law." It should be understood that, when such interactions occur during training, it may become evident that the basic premise of this Manual is legitimate and that there is not a strong moral, operational, or responsible reason why a particular element of the law should be complied with in every situation. When such situations arise in fact, not theory, when and whether a combatant should discuss contemplated or actual actions with judge advocates and those superior in rank is addressed in the following chapter on compliance. **(unclear with last two sentences inconsistent)**

8-8. Soldiers and Marines should adhere to regulations, procedures, and training, as these policies and doctrinal materials have been reviewed for consistency with LOAC (see DOD Law of War Manual, 18.3.1.2, 18.6.2).

[Again, this is a position that those who drafted and approved such regulations, procedures, and training are essentially forced to take when setting policies and preparing doctrinal materials. However, just as deciding what is a legal order, each Soldier, sailor, aircrew, and Marine should have agency to make decisions as to what is moral, honorable, and reasonable and would be considered responsible custom or practice by ethical combatants **(inconsistent)**.]

8-9. Commands and orders should not be understood as implicitly authorizing violations of LOAC where other interpretations are reasonably available (see DOD Law of War Manual, 18.3.2.2).

[Conversely, commands and orders should not be understood as implicitly requiring compliance with LOAC when it may be immoral, irresponsible, and unreasonable to do so **(inconsistent)**.]

13.3 Violations of the Law of War

8-10. For purposes of this publication, a violation of LOAC is an act or omission that contravenes a rule of international law applicable to the conduct of hostilities or the protection of war victims. Depending on

the context, violations of the law of neutrality, jus ad bellum, or occupation law may also be considered to be violations of LOAC.

[Under this Manual, a violation of the law of war is when an act or omission undermines the achievement of the purposes of the law by unnecessarily increasing death, injury, suffering, and destruction of property and the natural environment, preventing a critical mission for the successful execution of the war from being accomplished, or delaying or undermining a sustainable peace **(inconsistent)**.]

13.4 Belligerent Responsibility

8-11. Each State Party to the 1949 Geneva Conventions is obligated "to respect and to ensure respect" for the Conventions "in all circumstances" (Common Article 1 of GWS, GWS Sea, GPW and GC). Although this provision does not reflect an obligation to ensure implementation of the conventions by other States or parties to a conflict, the United States, as a matter of policy, often seeks to promote adherence to LOAC by others (see DOD Law of War Manual, 18.1.2.1). Additionally, a State is responsible for ensuring that its armed forces and others acting on its behalf comply with LOAC (Hague IV art. 3; consider AP I art. 91). Compensation referred to in these references is a matter to be determined between States; compensation of individual victims is not an obligation of LOAC (see DOD Law of War Manual, 18.9, 18.16). Note that the ex gratia *payments that commanders may be authorized to provide in accordance with DOD policy and domestic fiscal authorities are not payments that are required by LOAC. The obligation to ensure LOAC compliance applies* [the following might be inserted to make this sentence clearer: "to one's own forces"] *even if the enemy fails to comply with LOAC.*

[FM 6-27 and the DOD Law of War Manual are a bit disingenuous in the second and third sentences of 8-11. Based on experience during and since World War II through the Afghanistan, Iraq, and Syria conflicts, the United States only "ensures that its armed forces and other acting on its behalf comply with LOAC" until it chooses not to. The preceding (8-11) is the standard to which the United States would like the world, as well as its own citizens and most soldiers, to believe it makes every effort to comply. The reality is that the United States will comply with the formal law of war until it determines it is not in its best interest to do so based on the beliefs of those in command or in power, or until domestic political sentiment allows or encourages them to do differently. In some cases, just as with individual soldiers and field commanders, their doing so is moral and responsible. Other times it is not. It is the position of this Manual that, if morally and responsibly applied, the approach the United States generally follows is the one which it should rather than the one it wishes to believe, or at least publicly states, is its policy. **(inconsistent with the formal law of war; consistent with responsible custom as generally practiced by the United States)**

[With respect to compensation, while this may not be required under international law of war, it is the position of this Manual that, if a belligerent is financially able to assist those who have experienced lost homes, businesses, farms, family providers, and otherwise suffered from the devastation of war, it should do so for its own people, its allies, and enemy populations **(partially consistent with U.S. policy)**.]

13.5 Enforcement

8-12. International law authorizes an injured State to seek redress for violations of LOAC against it (see Hague IV art. 3; DOD Law of War Manual, 18.10). States are not limited solely to judicial redress and may avail themselves of the full panoply of enforcement mechanisms, including reprisals, reparation payments, diplomatic negotiations, arbitration, and voluntarily constituted claims commissions. Individuals may, in certain circumstances, also be prosecuted for LOAC violations, as discussed in greater detail below. **(consistent if allowed for all injured parties, not just States, to seek redress for violations)**

13.6 War Crimes

8-13. For purposes of this publication, war crimes are serious violations of LOAC that are punishable by criminal sanctions. The definition of "war crimes" often depends on the legal purpose at issue, and different definitions of "war crimes" are used. Under the Geneva Conventions, States have a responsibility to search for and prosecute those alleged to have committed "grave breaches," of the Conventions. In addition, the United States interprets the penal sanction provisions of the Geneva Conventions (see GC arts. 146, 147) in accordance with its longstanding practice. In order for commanders to exercise appropriate command supervision, prompt reporting and investigation of alleged war crimes and other LOAC violations are essential. These other LOAC violations may not necessarily merit characterization as "war crimes," but the conduct may still be subject to criminal prosecution under U.S. law. In addition to obligations with respect to grave breaches, the United States is responsible for taking all measures necessary to suppress other violations of the Geneva Conventions (see, for example, GC art. 146).

[Unlike FM 6-27, under this Manual the definition of "war crimes" should never depend on the "legal purpose at issue," or that different definitions of "war crimes" should exist.

[Under this Manual and FM 6-27, actions are considered "war crimes" when they are *serious* violations of the law of war, but not those less serious. War crimes should be only those acts which are "grave breaches" of the law. Those which are "grave breaches" should be clearly identified and delineated. **(consistent)**

[Nonetheless, there are those who would call anything that violates any article of the formal law of war a "war crime." While technically both "grave breaches" and lessor infractions are violations and, thus, crimes under the law of war, there is obviously a difference between genocide and failing to provide an identity card to a POW that meets the precise requirements of the Geneva Conventions. As the term "war crimes" generally engenders a highly visceral negative response against those who allegedly, or actually, violated one of the hundreds of articles of the law of war, this term (as opposed to a "crime under the law of war") should be used with care and discretion only for the most serious violations **(likely consistent)**.

[What is needed is a better classification of violations in war such as found in domestic law. Under the latter, there are civil and criminal, felonies and misdemeanors, capital and non-capital crimes, criminal and civil violations. There are gradations of these. For example, with respect to the killing of others, there is murder, manslaughter, and justifiable homicide, with murder being of varying degrees. Under the law of war, there is not this greater delineation, only the ill- or differently defined "grave breaches" with non-exhaustive examples provided, with all else apparently being something less than a "grave breach." **(consistent)**

[An effort should be undertaken to clarify better that which a violation would constitute, e.g., felony vs. misdemeanor, criminal vs. civil or administrative. Until then, it is important that "war crimes" should only be considered "grave breaches" and that a better job is done in delineating those which constitute a "grave breach." This concept is supported in the following five paragraphs of FM 6-27. **(consistent)**

[The primary difference between FM 6-27 and this Manual is when the latter allows certain violations which would be considered grave breaches under the formal law of war. Additionally, it should be reiterated that this Manual does not recognize that there should be distinction as to that which may or may not constitute a war crime depending on whether by a State or non-State party, or the conflict is international or non-international. **(inconsistent)**

["Grave breaches" consistent with this Manual are listed below in 13.6.5, as well as others not included as grave breaches although considered as such in paragraphs 8-15 through 8-19 of FM 6-27.]

13.6.1 Grave Breaches of the Geneva Conventions

8-15. To reflect the particular seriousness of some violations, the Geneva Conventions characterize certain breaches as "grave." These include willful killing of protected persons; engaging in torture or inhuman treatment, such as biological experiments; willfully causing great suffering or serious injury to body or health; unlawfully deporting, transferring, or confining a protected person; compelling a protected person to serve in the forces of a hostile power; willfully depriving a protected person of the rights of fair and regular trial; taking of hostages; and causing extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (GWS art. 50; GWS Sea art. 51; GPW art. 130; GC art. 147; consider AP I art. 85). Under the Geneva Conventions, grave breaches involve violations against the person or property of persons specifically protected by the four conventions. Though not binding on the United States, under Additional Protocol I to the Geneva Conventions, the concept of a grave breach is expanded to include violations against civilian persons and property generally. As a matter of international law, the grave breach regime (with its obligation to search for and prosecute) only applies in an international armed conflict, as defined by Common Article 2 of the Geneva Conventions (see GWS art. 2, GWS Sea art. 2, GPW art. 2 and GC art. 2).

[The preceding is **somewhat inconsistent** with this Manual with respect to what is considered a grave breach and what is implied with the reference to Common Article 2. See 13.6.5 for specific differences and Chapters 4 (Conduct of Hostilities), Chapter 6 (Interrogation), Chapter 7 (Prisoners of War), and Chapter 9 (Civilians).]

13.6.2 Other Violations

8-16. Other LOAC violations that are punishable and may be serious enough to merit characterization as "war crimes" include, but are not limited to, using poisonous weapons or weapons calculated to cause unnecessary suffering; attack or bombardment of undefended cities, towns or villages; pillage of public or private property; maltreatment of dead bodies; poisoning of wells or streams; resorting to perfidy (for example, using a white flag to conduct an attack treacherously); abusing or intentionally firing on a flag of truce; intentionally targeting protected places, objects, or protected persons (HR art. 23a, 23g, 25, 28, 47; War Crimes Act, 18 U.S.C. § 2441; consider AP I art. 85).

[The preceding is **somewhat inconsistent** with that considered to be a grave breach under this Manual as addressed in 13.6.5 and Chapters 4 (Conduct of Hostilities) and 5 (Weapons).

13.6.3 Minimum Standards

8-17. Common Article 3 provides minimum standards that parties to a conflict are bound to apply in a non-international armed conflict, and its standards are widely considered to apply to all armed conflicts. It explicitly prohibits violence to life and person for those taking no active part in hostilities and protects them from murder; mutilation; cruel treatment; torture; being taken hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment; and sentences passed and executions carried out without a judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples (see GWS art. 3, GWS Sea art. 3, GPW art. 3 and GC art. 3). Conduct that violates Common Article 3 can be punished by a State competent to exercise jurisdiction with respect to that conduct.

8-18. While nothing in Common Article 3 specifically requires that States impose individual criminal liability for violation of its standards, other treaties and domestic statutes do make reference to Common

Article 3 in defining what constitutes a war crime. For example, in the United States, the War Crimes Act and the Military Commissions Act of 2006 criminalize certain violations of Common Article 3 (see, for example, 18 U.S.C. § 2441(c)(3) (War Crimes Act, as amended by the Military Commissions Act of 2006)).

[To summarize this Manual's position related to 8-17 and 8-18, (1) that found under Common Article 3 is conduct to which combatants should aspire; (2) there will be situations where this may not be reasonable or moral; (3) individuals who inappropriately violate that found under Common Article 3 should be criminally liable even if this is not explicit in the language of the article; and (4) non-State parties can also be considered competent to exercise jurisdiction over those who violate Common Article 3 **(inconsistent)**.]

13.6.4 Violations Not War Crimes

8-19. …Violations of LOAC that are not sufficiently serious are generally not characterized as "war crimes," but typically may be prosecuted under a State's domestic law or addressed via administrative measures. In the United States, this may include referring charges to a court-martial under the UCMJ (see, for example, UCMJ art. 93, Cruelty and Maltreatment) or taking other actions, such as changing doctrine or tactics, providing additional training, taking administrative or corrective measures, imposing non-judicial punishment, or initiating prosecution before a civilian court, as appropriate. **(consistent)**

13.6.5 Grave Breaches under This Manual

Unless legitimately done to better achieve the purposes of the law of war, the following are serious violations of the law, i.e., "war crimes" or "grave breaches," based on the positions of this Manual **(consistent and inconsistent)**. They are grave breaches whether carried out during an international or non-international conflict, or by individuals, States, or non-State parties **(somewhat inconsistent)**.

Fundamental

1. Initiation of an unjust war or aggressive action which causes material harm to the attacked party
2. Genocide
3. Forced service of enemy or neutral persons in the armed forces of the compelling party
4. Material, intentional violation of important surrender or capitulation terms
5. Material, intentional violation of the terms of an armistice, especially if an unjustified attack which was not accidental
6. Forced deportation or transfer of communities, ethnic groups, or other persons or populations away from their home country or territory, except temporarily for their safety and well-being
7. Material wanton or militarily unjustified destruction or looting of public and private property or harm to the natural environment
8. Material non-essential use of protected objects and property for military purposes
9. Use of Occupying Power rights and responsibilities that unnecessarily harm the non-combatant local populace financially or otherwise, or inappropriately enrich persons, businesses, governments, or other entities
10. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission whose responsibilities or missions have been agreed to by all relevant belligerents

Weapons and Tactics

1. First use, or overwhelming response using, nuclear weapons.
2. Use of weapons or tactics whose physical harm (death, injury, suffering, destruction) unreasonably extends beyond a legitimate target

3. Use of weapons whose impact area cannot be reasonably defined or controlled, e.g., certain nuclear, biological, and chemical weapons but not limited to these, and can include conventional weapons if used inappropriately
4. Use of weapons or tactics whose specific intent is to inflict unnecessary suffering
5. Attacks on, or bombardments of, known undefended cities, towns, villages, and places
6. Pillage or seizure without fair compensation of public and private property not essential to the war effort or occupation
7. Reasonably avoidable, material, long-lasting, and spillover damage to the natural environment
8. Treacherous use or other material violations of a white flag
9. Seizure, unauthorized control over, destruction, or endangerment of the safe navigation or transit of a vessel, aircraft, or public transport that is not a legitimate military target

Targeting

1. Intentionally targeting known non-combatants who do not pose a security threat, or causing incidental harm to such non-combatants not proportionate to the military or political advantage achieved
2. Illegal taking of hostages or use of reprisals
3. Unauthorized or inappropriate targeting of locations, sites, facilities, and transport marked with recognized protective emblems, markings, or signage
4. Unauthorized targeting of medical personnel, the wounded and sick, and related facilities which are reasonably identifiable, pose no security risk, are not supporting actions harmful to their enemy, and are not proportionately incidental to a legitimate target or mission

Treatment of Persons

1. Inadequate care and security of detained persons (e.g., POWs, non-combatant civilians) when resources and conditions exist to do otherwise
2. Disproportionate, non-essential, or gratuitous use of material physical or psychological harm or interrogation, especially if of an extreme/enhanced nature
3. Physical sexual violation of any person
4. Use of child combatants (with "child" culturally and situationally determined) except as essential for survival of the child, family, or community
5. Recruitment, training, integration, or compensation of combatants employing violence, threats of violence to persons, or appropriation or destruction of private property
6. Involuntary, coerced biological or other potentially harmful experiments on any person
7. Sentences passed, and executions carried out, without a judgement pronounced by a legally constituted court affording reasonable judicial rights to the accused consistent with available resources and combat conditions
8. Extended detention of non-combatant civilians not required for security requirements or their personal safety
9. Use of non-combatants (civilian, military) as human shields

While the preceding are generally consistent with the formal law of war, in some instances, there are nuanced differences, or they fall short of that intended under formal law.

The following are referenced in FM 6-27 (8-15 through 8-17) as grave breaches of the formal law of war which were ***not*** included in the preceding list or, if included, did ***not*** use the precise wording found in FM 6-27 **(somewhat inconsistent)**:

1. Willful killing of protected persons

2. Engaging in torture or inhuman treatment
3. Willfully causing great suffering or serious injury to body or health
4. Unlawfully deporting, transferring, or confining a protected person
5. Willfully depriving a protected person of the rights of fair and regular trial
6. Taking hostages
7. Maltreatment of dead bodies
8. Poisoning of wells and streams
9. Resorting to perfidy
10. Outrages upon personal dignity, in particular, humiliating and degrading treatment

In addition to the preceding list of grave breaches referenced in FM 6-27, this Manual has not included the following other types of war crimes specifically referenced in FM 27-10, Article 504 **(inconsistent)**:

1. Treacherous request for quarter
2. Misuse of the Red Cross emblem
3. Use of civilian clothing to conceal their military character during battle
4. Improper use of privileged buildings for military purposes
5. Compelling prisoners of war to perform prohibited labor
6. Compelling civilians to perform prohibited labor

Further, there are a number of violations designated as war crimes under the Rome Statute which have not been included in the preceding list (see 13.10.3). However, as the United States and this Manual do not recognize the jurisdiction of the ICC for belligerents not a party to that treaty, these differences have not been reflected. Nonetheless, a combatant should be aware a State under whose control he or she might fall may be a party to the Rome Statute and bring charges, and initiate legal proceedings for acts considered legal under U.S. policy and that of this Manual.

The decision not to include the violations, or violations as worded, in the preceding two lists as being "grave breaches" under this Manual, should ***not*** be interpreted that to commit such acts is not wrong or punishable in possibly most situations. Rather their exclusion is due to the reality that their application in all situations is not as black letter as the formal law of war would suggest, that their wording is not consistent with that which is legally allowed elsewhere under the formal law of war, that less "resourced" belligerents may have no other reasonable option than to utilize the act, or that their commission is not always sufficiently serious to be considered a grave breach/war crime **(inconsistent)**.

13.7 United States Obligations (first three bullets inconsistent; last two consistent)

8-20. The United States has certain treaty obligations with respect to LOAC violations, including the following obligations:

- *To enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed and of the grave breaches of the Geneva Conventions;*
- *To search for persons alleged to have committed, or have ordered to be committed, grave breaches of the Geneva Conventions, and bring such persons regardless of their nationality, before its own courts;*
- *To take measures necessary for the suppression of all acts contrary to the provisions of the 1949 Geneva Conventions other than grave breaches;*
- *To provide persons accused of violations of the Geneva Conventions the safeguards of a proper trial and defense (GWS art. 49; GWS Sea art. 50; GPW art. 129; GC art. 146); and*
- *To pay compensation, when appropriate, for violations of LOAC for which the United States is responsible (see DOD Law of War Manual, 18.16).*

[If the first four bullets were rewritten to replace "the Geneva Conventions" with "this Manual," all five would be consistent with this Manual rather than just the last two.]

8-21. The United States has enacted domestic laws to help meet these obligations (see generally paragraphs 8-22 to 8-56, "Reporting and Investigating LOAC Violations"). U.S. law provides general courts-martial with the requisite authority to try, convict, and punish individuals who commit conduct punishable under LOAC, including war crimes. In addition, the 1996 War Crimes Act establishes federal jurisdiction over certain war crimes when the alleged perpetrator or victim is a U.S. person or member of the U.S. Armed Forces.

13.8 Reporting and Investigating Law of War Violations (see 13.16 for position of Manual)

8-22. DOD Directive 2311.01E, DOD Law of War Program, requires all military and U.S. civilian employees, contractors, and subcontractors assigned to or accompanying the Armed Forces to report LOAC violations ("reportable incidents" as defined by the Directive; see also para. 8-3, above) through their chain of command (contractors must report reportable incidents to the commander of the unit they are accompanying or the installation to which they are assigned or to the Combatant Commander) (DODD 2311.01E). Such reports also may be made through other channels, such as the military police, a judge advocate, or an inspector general. A report to these other entities, however, must be forwarded to the recipient's chain of command. A commander who obtains information about a reportable incident must immediately report the incident through the applicable operational chain of command. Department of Defense policy requires higher authorities receiving an initial report of any reportable incident to submit the report through command channels to the applicable combatant commander by the most expeditious means available (DODD 2311.01E).

[It is this Manual's position that only violations of its positions should be reported, and then only if it is felt they will be handled responsibly by those to whom the information is reported **(inconsistent).**]

13.8.1 Reportable Incidents (inconsistent due to reference to this Manual; see Section 13.16)

8-23. A "reportable incident" is defined as "a possible, suspected, or alleged violation of the law of war[, as defined in this Manual,] *for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict" (DODD 2311.01E para. 3.2; CJCSI 5810.01D para. 5b). Supplemental Service guidance provides for reporting of war crimes, or serious LOAC violations, as well as other "serious" incidents that may generate adverse publicity or have serious international consequences (see, for example, AR 190-45 para. 8-1; MCO 3300.4A, Enclosure 6). A commander need not determine that a potential violation occurred, but only that credible information merits further review of the incident. Commanders should* [may] *consult with their assigned judge advocate for advice as to whether an alleged violation is a reportable incident.*

13.8.2 Investigations (inconsistent; see Section 13.16)

8-24. Department of Defense policy requires that reportable incidents be thoroughly investigated. Under DOD policy, commanders receiving an initial report of a reportable incident are also required to request a formal investigation by the appropriate military criminal investigative organization ("MCIO," for example CID, Air Force Office of Special Investigations [OSI], or the Naval Criminal Investigative Service [NCIS]). If, in the course of the investigation, it is determined that U.S. persons are not involved in a reportable incident, any U.S. investigation continues only at the direction of the appropriate combatant commander. Even when U.S. personnel are not involved, reporting of the information through the chain of command may nevertheless be required by DODD 2311.01E.

13.8.3 Command Response (inconsistent due to reference to this Manual)

8-25. Commanders receiving information about an alleged LOAC violation involving a member of their command, either as a victim or a perpetrator, may conduct an informal or formal administrative investigation to collect evidence and assess the credibility of the allegations and the involvement of U.S. personnel **(consistent)** *(AR 15-6; Chapter II of the Manual of the Judge Advocate General of the Navy [JAGMAN]). A commander's decision to direct such an investigation, however, should not delay further reporting up the chain of command or, when appropriate, referral to CID or the NCIS* **(sometimes inconsistent; see Section 13.16)**. *Further, if a commander's investigation determines there is credible evidence a crime has been committed* [under this Manual]*, the commander should* [may] *consult the command's judge advocate for advice on determining the appropriate disposition of the charges (Rules for Courts-Martial [RCM] 303, 306)* **(sometimes inconsistent; see Section 3.16)**.

13.8.4 Department of Justice Involvement (somewhat consistent if for Manual violations)

8-26. It is DOD Policy to maintain effective working relationships with the Department of Justice (DOJ) in the investigation and prosecution of crimes involving DOD programs, operations and personnel, including the investigation of some alleged violations of LOAC. DOD and DOJ policy with regard to the investigation and prosecution of criminal matter is set forth in a Memorandum of Understanding (MOU) between the DOD and DOJ (implemented by DODI 5525.07). The MOU is a general policy and not specific to LOAC violations. Under the MOU, DOD generally will investigate most crimes committed on a military installation or during military operations. If the crime was committed by a person subject to the UCMJ, the Military Department concerned generally will take the lead in prosecuting the offender. DOJ is responsible for prosecution when the perpetrator is not subject to the UCMJ. Commanders should consult with a judge advocate and adhere to applicable DOD policies regarding DOJ involvement in a particular matter.

[Under this Manual, if the alleged violation was by a person who was in the military when the act occurred but is no longer under military control when charged, the legal process should still remain under the military department concerned **(possibly inconsistent).]**

13.9 Who May Be Held Accountable

8-27. Those personnel who commit a war crime may be held individually responsible. In addition to the individual, others may be held responsible, such as the commander, those who aided and abetted an offense, and those who conspired with them to commit the crime—and even those who conspire to commit a war crime that does not occur. Other theories of criminal responsibility under international law include joint criminal enterprise responsibility, command responsibility[,] *and responsibility for planning, instigating, or ordering the crime. Under the UCMJ, a person who aids, abets, counsels, commands, or procures the commission of an offense may be punishable (see UCMJ, art. 77).*

[In addition to those persons referenced in 8-27, others may be held accountable. These may include (1) those who are responsible for ensuring all combatants have received adequate law of war training taught by qualified instructors using appropriate training materials, yet failed in these duties leading fully, or in part, to a grave breach of the law of war; (2) civilian or military leaders who placed combatants in untenable situations where violations of the law of war might reasonably be expected to occur; and (3) a command structure which has been inconsistent in, or ignored the need for, investigating, bringing charges, or taking other administrative or non-judicial action when obvious violations of the law of war occurred with no reasonable justification for the law to have been violated. As will be discussed in Chapter 14, many if not most violations of the law of war by combatants are for reasons other than the

combatant having gone "rogue." If combatants are to be held legally responsible for violations, so should those who fail in their responsibilities throughout the chain of command, to include both military and civilian leadership, regarding training and strategic and tactical decisions **(generally consistent although the command structure may not wish accountability to be spread this widely).**]

13.9.1 Individual Responsibility

8-28. ...Even if the act [committed by a combatant] *is not punishable as a crime in the person's own State, the individual is not relieved from criminal responsibility under international law (see DOD Law of War Manual, 18.22.2). Further, a person acting pursuant to an order of their government or of a superior is not relieved from responsibility…for acts that constitute a crime under international law, provided it was possible in fact for the person to make a moral choice (see DOD Law of War Manual, 18.22.4; but see para. 8-67(describing when superior orders might constitute a legitimate defense)).*

[With respect to the first sentence in the preceding paragraph, there are times a party, including the United States, may not concur. As a minimum, the sentence should be amended to include the following at its conclusion: *", provided the State (or non-State party) of which the person is a member has ratified the international treaty which makes the alleged act a crime and within the jurisdiction of a party of which the person is not a member* **(consistent)**." Any State or non-State party who accepts the language as written here must realize it is a two-edged sword. While it allows a party to take legal action against persons of another party which fails to act, it also allows other parties to take action against members of one's own State or non-State party. With respect to the second sentence, this also is not as black and white as it might at first seem and is recognized by FM 6-27 with its mistaken reference to 8-67 (as opposed to 8-75) describing when superior orders might constitute a defense **(consistent)**.]

13.9.2 Command Responsibility

8-29. Commanders have a duty to maintain order and discipline within their command and to ensure compliance with applicable law by those under their command or control. Commanders, therefore, may be liable for the criminal acts of their subordinates or other persons subject to their control even if the commander did not directly participate in the underlying offenses (see DOD Law of War Manual, 18.23.3). In order for the commander to be liable, however, the commander's personal dereliction must have contributed to or failed to prevent the offense; the commander is required to take necessary and reasonable measures to [help] *ensure that their subordinates do not commit violations of LOAC.*

[This Manual concurs with the preceding with the exception of the last clause referencing "ensure that their subordinates do not commit violations of LOAC." Had it read "this Manual" and included the word "help," the entire paragraph would be acceptable **(somewhat consistent)**. The reason "help" should be included as it is beyond the ability of any commander to "ensure" their subordinates do not commit violations even if the best measures to prevent have been implemented (see Chapter 14).]

8-30. For instance, if soldiers commit massacres or atrocities against POWs or against the civilian population of occupied territory, the responsibility may rest not only with the actual perpetrators, but also with the commander if the commander's dereliction contributed to the offense. If the commander concerned ordered such acts be carried out, then the commander would have direct criminal responsibility (UCMJ, Art. 77). **(consistent)**

8-31. Under international law, criminal responsibility may also fall on commanders or certain civilian superiors with similar authorities and responsibilities as military commanders if they had actual ...or constructive knowledge of their subordinates' actions and failed to take "necessary and reasonable" measures to prevent or repress those violations. That is, commanders may be held responsible if they

knew or should have known, through reports received by them or by other means, that troops or other persons subject to their control were about to commit or have committed a war crime and did nothing to prevent such crimes or punish the violators. Once established that a commander has knowledge (actual or constructive) of a subordinates' actions, the commander may be liable under international law only where failure to supervise subordinates properly constitutes criminal negligence on the commander's part. That is, the commander may be criminally liable where there is personal neglect amounting to a wanton, immoral disregard of the action of the commander's subordinates that amounts to acquiescence in the crimes.

[The preceding paragraph is **generally consistent** with the positions of this Manual when augmented by the commentary following 8-27 above.]

13.9.3 Aiding and Abetting (consistent)

8-32. …Aiding and abetting liability for an offense can be usefully analyzed by evaluating: (1) knowledge of the illegal activity being aided, abetted, or counseled; (2) a desire to help the activity succeed; and (3) some act of helping (see DOD Law of War Manual, 18.23.4).

13.9.4 Conspiracy

8-33. …Under U.S. law, conspiracy can take one of two forms. First, it can be based on a completed crime, such as the murder of civilians. Conspiracy entails intentional participation in a common plan to complete a war crime. The individual need not engage in the physical act of the war crime. He or she must intentionally participate in the common plan, although the role can be relatively minor. To be found guilty under U.S. law, an accused need not have prior knowledge of a particular crime, as long as the accused intended to aid acts of similar character, such as the murder of civilians. Second, conspiracy can be charged as a separate, stand-alone offense requiring only an agreement and some overt act furthering the agreement (also known as inchoate conspiracy). **(consistent)**

8-34. …Defendants have argued in litigation that the Constitution does not allow for the offense of conspiracy to be tried by military commission because it is not an offense under the international law of war. The Government has responded to that argument by, among other things, noting that U.S. military commissions tried and convicted a number of defendants on conspiracy charges during the Civil War and World War II. Current appellate litigation in the Military Commissions may afford U.S. practitioners with clarity on this issue. (Compare UCMJ art. 81, 10 U.S.C. § 881, with 10 U.S.C. § 950t (29)).

[If an alleged conspiracy relates to a violation of the law of war by a combatant in violation of the positions of this Manual, the preceding is **consistent**; otherwise, it is **inconsistent** with the Manual.]

13.10 Prosecution of War Crimes

[Most of this section describes how the United States prosecutes alleged violations of the formal law of war. When positions as to proper conduct under the formal law of war and this Manual align, this Manual concurs with what has been delineated. Problems arise when this Manual (1) allows as permissible certain actions which would be considered violations requiring prosecution under the formal law of war, (2) provides for certain rights and protections not recognized by the United States as required under the law of war, or (3) considers an action to be a violation but is not considered as such under the formal law of war as accepted/interpreted by the United States. In such situations, this Manual may not recognize as appropriate the below process and authority for handling violations. However, as this Manual is unauthorized and unofficial, there presently exists no formal legal process for reporting and handling violations of its positions. All that might exist for those who concur with non-compliant positions of this Manual is that found in 13.16.]

8-37. Prosecution of war crimes requires individual States [and non-State parties] *with competent authority, or international courts granted authority by competent States, to assert jurisdiction, provide a venue, and authorize punishment in order to try those who violate LOAC. This section examines jurisdiction and venue issues, penalties, and defenses from a U.S. perspective.*

[As is found throughout FM 6-27, conduct is viewed through the lens of the formal law of war as it relates to States and authority granted by States to others. It all too frequently ignores that non-State parties can often play a major role in certain conflicts and that even U.S. forces, to include individuals of those forces, may have to operate for extended periods outside the formal structures within which combatants are expected to function according to black letter standards. The prosecution of war crimes is one of these. For example, the United States has allied itself with the Kurds in northern Iraq, which is not a State party. Yet, it should be the United States' position and standards that the Kurds conduct any prosecution of war crimes as is required under the law of war. During World War II in the Philippines, U.S. troops who evaded capture, or escaped from captivity, continued to operate militarily against the Japanese. During that time, such U.S. combatants would be expected to continue to operate according to the law of war to the best of their ability given available resources and the combat situation, and attempt to influence Filipinos with whom they were operating to do the same. In such situations, these combatants may still find it necessary to conduct judicial proceedings related to possible violations of the law of war by fellow Americans, their Filipino allies, and captured Japanese or collaborating Filipinos without the capacity to follow precisely the procedures required in U.S. manuals and the formal law of war.

[In both these and other type situations, non-State parties and even individual soldiers and smaller units, not just States and State-authorized bodies, should attempt to conduct investigations and prosecution of alleged war crimes in a manner as similar as possible given time and resources available to that which would be done by States and international courts. **(uncertain)**]

13.10.1 Uniform Code of Military Justice Applicable to Civilians During Military Operations (consistent)

8-51. Commanders have disciplinary authority pursuant to the UCMJ over civilians accompanying the Armed Forces overseas during military operations. "In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field" are subject to the UCMJ (UCMJ art. 2(a)(10)). It is DOD policy that the requirement for good order and discipline of the Armed Forces outside the United States extends to civilians employed by or accompanying the Armed Forces, and that such persons who engage in conduct constituting criminal offenses shall be held accountable for their actions, as appropriate (DODI 5525.11).

8-52. When an offense alleged to have been committed by a civilian that violates U.S. federal criminal law occurs, DOD policies may provide for notification of responsible DOJ authorities to afford DOJ the opportunity to pursue prosecution of the case in federal district court (Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations," March 10, 2008). While the notification and decision process is [are] *pending, commanders and military criminal investigators should continue to take appropriate action to address the alleged crime. Commanders should also ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction continue to be accomplished during the concurrent DOJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.*

13.10.2 U.S. Military Commissions

8-53. In the past, military commissions have been used by the United States and other States to prosecute enemy belligerents for violations of the law of war and for acts of unprivileged belligerency. Military commissions have also been used for the trial of offenses under U.S. law where local courts were not open and functioning, such as when martial law applies, and for the trial of violations of occupation ordinances (DOD Law of War Manual, 18.19.3.7) **(consistent)**.

8-54. Generally, courts-martial may be used in lieu of military commissions to try POWs in U.S. military custody (GPW art. 102; UCMJ art. 2(a)(9)). Military commissions are used to try others, including alien unprivileged belligerents, for LOAC violations and other offenses. Procedures for military commissions are similar to those for general courts-martial under the UCMJ (see, for example, 10 U.S.C. § 948b(c); Manual for Military Commissions (MMC)).

[This Manual does not recognize that there are unprivileged belligerents. Rather all combatants are generally considered to have the same rights with the exception of treason when a belligerent has not openly renounced their former affiliation with a State or non-State party. While this Manual does not preclude the use of military commissions to try what are considered by the U.S. to be unprivileged belligerents, it is not because that is a legitimate distinction to make under this Manual. **(somewhat consistent)**]

8-55. Under the MCA, thirty-two substantive crimes are triable by military commission (10 U.S.C. § 950t). [Note: While perhaps there is a different or amended version than the one referenced, the crimes triable by military commission fall under 950v, not 950t, and there seem to be only twenty-eight, not thirty-two (see below).] *The jurisdiction of military commissions under the MCA is limited to individuals who are alien unprivileged enemy belligerents (10 U.S.C. §948c). The term "unprivileged enemy belligerent," for purposes of the statute, means an individual (other than a privileged belligerent) who:*

- *Has engaged in hostilities against the United States or its coalition partners;*
- *Has purposefully and materially supported hostilities against the United States or its coalition partners; or*
- *Was a part of al Qaeda at the time of the alleged offense under the MCA (10 U.S.C. § 948a(7)) (compare to paragraph 1-64).*

[Again, this Manual does not recognize the term "unprivileged enemy belligerent" for those part of al Qaeda or any other similar non-State party. As a consequence, any alien belligerent who meets one or all of the preceding three criteria has not necessarily committed a law of war violation and should not be tried by any court or commission unless there is an alleged violation of that found in this Manual when engaged in such hostilities, or support of hostilities. This is no different than any other belligerent who engaged in similar alleged violations. **(inconsistent)**]

8-56. Under the MCA, an individual subject to a military commission is entitled to fair trial guarantees, including defense counsel; notice of charges alleged; the exclusion of evidence obtained by torture or cruel, inhumane, or degrading treatment; protection against self-incrimination and the inappropriate admission of hearsay evidence; the right to be present at proceedings, offer evidence, and confront witnesses; and to protection against former jeopardy. Procedures for military commissions also address the treatment, admissibility, and discovery of classified information, limits on sentencing, the execution of confinement, and post-trial review procedures (10 U.S.C. §948q(b)- 950j).

[While this Manual does allow the use of interrogation that would be considered violations of the formal law of war, it does not allow such interrogation to extract confessions or to secure information to be used in a court of law to convict that or other person. Rather such interrogations are to secure vital information

essential to the successful conduct of a just war or vital mission, or which might reduce unnecessary death, injury, suffering, and destruction. **(inconsistent)**]

The following are offenses triable under military commissions and may result in the death penalty if a person subject to the act is convicted, the violation is determined sufficiently serious, and the commission so decides. While not specifically stated in the act, the first twenty-five of these may be reflective of what the United States considers severe breaches of the law of war, i.e., a war crime. Lesser violations of the law of war would generally not be considered "war crimes." The latter three would be violations of the UCMJ and domestic law.

(1) MURDER OF PROTECTED PERSONS. …kills one or more protected persons…
(2) ATTACKING CIVILIANS. …engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities…
(3) ATTACKING CIVILIAN OBJECTS. …engages in an attack upon a civilian object that is not a military objective…
(4) ATTACKING PROTECTED PROPERTY. … engages in an attack upon protected property…
(5) PILLAGING. … in the absence of military necessity, appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure,
(6) DENYING QUARTER. …Any person…with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted… [Note: This does not seem to preclude an individual from denying quarter in combat, just a commander who declares, orders or indicates to his or her subordinates that quarter should be denied.]
(7) TAKING HOSTAGES. …knowingly seizes or detains one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons…
(8) EMPLOYING POISON OR SIMILAR WEAPONS. … employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic…
(9) USING PROTECTED PERSONS AS A SHIELD. … positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack, or to shield, favor, or impede military operations…
(10) USING PROTECTED PROPERTY AS A SHIELD. … positions, or otherwise takes advantage of the location of, protected property with the intent to shield a military objective from attack, or to shield, favor, or impede military operations…
(11) TORTURE. … commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind…
(12) CRUEL OR INHUMAN TREATMENT. … commits an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control … i) The term 'serious physical pain or suffering' means bodily injury that involves— ''(I) a substantial risk of death; ''(II) extreme physical pain; ''(III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or ''(IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty…

(13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY. … causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war… In this paragraph, the term 'serious bodily injury' means bodily injury which involves— ''(i) a substantial risk of death; ''(ii) extreme physical pain; ''(iii) protracted and obvious disfigurement; or ''(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.
(14) MUTILATING OR MAIMING. … injures one or more protected persons by disfiguring the person or persons by any mutilation of the person or persons, or by permanently disabling any member, limb, or organ of the body of the person or persons, without any legitimate medical or dental purpose…
(15) MURDER IN VIOLATION OF THE LAW OF WAR. …kills one or more persons, including lawful combatants, in violation of the law of war…
(16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR. …destroys property belonging to another person in violation of the law of war…
(17) USING TREACHERY OR PERFIDY. …after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons…
(18) IMPROPERLY USING A FLAG OF TRUCE. …uses a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention…
(19) IMPROPERLY USING A DISTINCTIVE EMBLEM. …uses a distinctive emblem recognized by the law of war for combatant purposes in a manner prohibited by the law of war…
(20) INTENTIONALLY MISTREATING A DEAD BODY. …mistreats the body of a dead person, without justification by legitimate military necessity…
(21) RAPE. …forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object…
(22) SEXUAL ASSAULT OR ABUSE. …forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact…
(23) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT. …seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective…
(24) TERRORISM. …kills or inflicts great bodily harm on one or more protected persons, or…engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct…
(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM. …provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism…
(26) WRONGFULLY AIDING THE ENEMY. …in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy…
(27) SPYING. …with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy…
(28) CONSPIRACY. …conspires to commit one or more substantive offenses triable by military commission… does any overt act to effect the object of the conspiracy…

It is interesting to note, and relevant to the position of this Manual's position, that the formal law can and should on occasion be violated in certain situations and the U.S. position as to what is or is not legal in some of the above is in violation of treaties it has ratified, e.g., that which constitutes torture, cruel or inhuman treatment; intentionally causing bodily harm. In doing so, it is providing latitude for those tried by military commissions to have legally committed acts which most Americans would not agree are acceptable if employed against its military and civilian personnel (although often accepting if used against enemy persons, especially if terrorists) and considered illegal by most nations.

13.10.3 International Tribunals

8-58. In 1998, 120 Nations at a Diplomatic Conference in Rome voted to approve the final text of the Rome Statute, adopting a treaty that establishes an International Criminal Court (ICC). The Rome Statute entered into force on July 1, 2002. Although the United States did not vote in favor of the treaty and has indicated that it does not intend to become a party to the Rome Statute, the U.S. delegation contributed significantly to its development, including the drafting of the elements of crimes and the inclusion of fundamental due process protections.

8-59. Unlike tribunals that were established for specific conflicts, the ICC, which is located in The Hague, is intended to apply to situations after the establishment of the ICC. The Rome Statute provides that the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern" and "shall be complementary to national criminal jurisdictions" (Rome Statute art. 1). The latter principle that the ICC's jurisdiction is "complementary" means that the ICC should not investigate or prosecute allegations when a State is or has already genuinely done so. The Rome Statute provides that the ICC has jurisdiction with respect to:

- *The crime of genocide,*
- *Crimes against humanity,*
- *War crimes, and*
- *The crime of aggression.*

[The Rome Statue includes the following as violations of the formal law of war over which it believes it has jurisdiction. They are violations which the ICC considers grave breaches of the formal law of war and constitute a "war crime." However, others are considered only "serious violations," not "war crimes" per se, even though many of these would be war crimes under this Manual.

2. For the purpose of this Statute, "war crimes" means:

> *(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*
>
> > *(i) Wilful killing;*
> > *(ii) Torture or inhuman treatment, including biological experiments;*
> > *(iii) Wilfully causing great suffering, or serious injury to body or health;*
> > *(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*
> > *(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;*
> > *(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial*
> > *(vii) Unlawful deportation or transfer or unlawful confinement;*
> > *(viii) Taking of hostages.*

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy…, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

While not necessarily employing precisely the same language and numbers of violations, the Rome Statue essentially seems to consider all the above applicable to armed conflicts not of an international character.

8-60. The Rome Statute generally only confers jurisdiction on the ICC when the accused is a national of a Rome Statute Party; when the conduct occurs on the territory of a Rome Statute Party; or when the conduct occurs in a situation that has been referred to the ICC by the UN Security Council. The ICC will not prosecute an individual when a State has exercised or is in the process of exercising jurisdiction over the matter, unless that State is unwilling or unable to genuinely investigate or prosecute the case (Rome Statute art. 17). While the ICC purports to exercise jurisdiction over non-State Parties to the Rome Statute, the United States has a longstanding and continuing objection to any assertion of jurisdiction by the ICC with respect to nationals of States not Party to the Rome Statute in the absence of consent from such States or a referral by the Security Council (see DOD Law of War Manual, 18.20.3.1). [Note: The preceding sentence seems to be improperly constructed. The opening clause refers to jurisdiction over non-State parties; the sentence proper, to States not party to the Rome Statute. The two are quite different. It would seem as if the clause should be a separate sentence.] *Further, the U.S. Government has negotiated SOFAs and other agreements with many countries, which under a provision of the Rome Statute (art. 98) clarify that U.S. personnel may not be turned over to the ICC by those countries absent U.S. consent. Moreover, in multinational operations or peace operations*[,] *U.S. personnel may be asked to cooperate with ICC prosecutors who are investigating allegations of genocide, crimes against humanity, or war crimes. Any requests for cooperation by the ICC should be forwarded to DOD because such requests implicate U.S. policy toward the ICC and U.S. law, including the American Service Members' Protection Act, imposes certain restrictions on any support to the ICC.*

[This Manual generally concurs with the U.S. position regarding the lack of ICC jurisdiction, without U.S. approval, over U.S. persons alleged to have committed war crimes **(consistent)**. Nonetheless, on 5 March 2020, an appeals court in the Hague overruled a pre-trial court's decision that the ICC prosecutor could not initiate an investigation into alleged war crimes by the armed forces and/or intelligence agencies of the United States, Afghanistan, and Taliban. Apparently, the initiation request and reversal were based on the appeals court interpretation that investigations are legally permissible if acts took place in the territory of a signatory to the Rome Statute, which Afghanistan is, and as are Poland, Romania, and Lithuania where illegal interrogation was allegedly conducted, even if an alleged perpetrator of the acts is the citizen of a country which has not ratified the Statute, e.g., a citizen of the United States. While the United States rejects this position, this has not prevented the ICC from proceeding with its investigation and possibly bringing charges against U.S. citizens, and holding trials of these citizens, even if only in absentia.

[There is a somewhat corollary situation where it is not the ICC but an individual State that may bring charges and try U.S. citizens for war-related actions in their country whereby such citizens were acting on behalf and with the authority of the United States but in violation of that State's laws. An example is an event in Italy in February 2003 when a suspected terrorist, Abu Omar (Hassan Mustafa Osama Nasr), a Muslim cleric who held an Italian asylum passport, was abducted by the CIA working with Italian military intelligence, and transferred to Germany, then Egypt, where he was interrogated and allegedly tortured. In late 2005-early 2006, indictments were issued against 26 members of the CIA and the U.S. military and tried in absentia. Twenty-three of the 26 were convicted and given sentences of five to eight years. In 2012, Italy's highest court confirmed the convictions of the lower courts. The Italian government refused to request extradition. Nonetheless, European warrants were issued which resulted in the Portuguese government arresting one of the 23 in 2015, a Portuguese-American alleged CIA officer visiting her mother in Lisbon. After extradition to Italy was approved by the Portuguese high court, it was not carried out after a modification of sentence was agreed to by the president of Italy apparently at the request of President Obama. During these legal proceedings, the DOD made requests that the trial of the U.S. military officer be transferred to the United States as "the Italian court has no jurisdiction…and should have immediately dismissed the charges." The Italian judge refused the requests.

[It is the position of this Manual that a State or non-State party which does not recognize the judicial authority of a foreign or international court over its citizens or members has the right to act in the following manner if one of its citizens or members is indicted or brought to trial, in fact or in absentia, without the consent of that State or non-State party:

a. The State or non-State party should request from the court, prosecutor, and/or government which has brought the indictment all information upon which the indictment is based.
b. If that State or non-State party feels there is sufficient evidence to proceed with a trial, that party may then conduct such trial if it does not wish the original indicting party to handle the case.
c. If there is felt to be insufficient evidence, the State or non-State party will notify the indicting party of the results of the former's investigation and that charges are to be dismissed.
d. If the indicting court, prosecutor, and/or government does not accept such dismissal, trial, trial verdict, and/or punishment levied and chooses to proceed with its own trial and implement the outcomes of that trial, all those who participate in such a trial and any ensuing actions upon a verdict on behalf the prosecution or the court which conducts the trial may be held in contempt of the State or non-State party whose citizen's or member's indictment was not dismissed, and a warrant issued for their arrest and extradition. If such persons come under the control of the party issuing the warrant, they may be tried and punishments carried out.

e. Those who still choose to prosecute, preside over trials, convict, confirm convictions, impose and carry out punishments, or issue warrants and extradition orders against persons who are citizens or members of State and non-State parties who do not recognize their jurisdiction, can face similar actions and punishments by those parties who do not recognize their right to have done so.
f. Such State or non-State parties, as a minimum, can issue arrest warrants and initiate extradition proceedings against these persons; freeze their assets or arrest on entry into one's territory; or take into custody wherever they might be located and carry out trials and punishments.
g. In all situations where the citizens or members of the State or non-State party which does not recognize the authority of the unrecognized judicial process conducted by international bodies or other State or non-State parties, have been harmed by the actions of the extra-judicial process, such party should only after thoughtful deliberation carry out actions as outlined in e. and f.

[**Most of the preceding actions are inconsistent with international law, the DOD Law of War Manual, FM 6-27, and current U.S. policy.**]

13.10.4 Forum Considerations Connected to the Status of the Accused

8-61. Ordinarily, U.S. service members should be tried by courts-martial under appropriate provisions of the UCMJ or, if separated from the military, in Federal court pursuant to MEJA [Military Extraterritorial Jurisdiction Act] *(see paragraphs 8-37 and 8-50).*

[Unless agreed to by the charged person, it is the position of this Manual that combatants, if separated from the service of which they were a part when the alleged violation of the law of war occurred, should not be tried in a civilian court but tried by courts-martial under appropriate provisions of UCMJ or other relevant military law, i.e., they have the right to be tried by military peers **(inconsistent)**.]

8-62. Civilians who commit war crimes while serving with or accompanying U.S. forces outside the United States face prosecution in Federal court under the War Crimes Act or other Federal law. Additionally, civilians serving with or accompanying the Armed Forces in the field are subject to trial by court-martial for violations of the UCMJ as long as the DOJ does not assert jurisdiction to prosecute in Federal court. The United States may prosecute enemy POWs or retained personnel captured in an international armed conflict who commit war crimes (either pre-capture or while detained) in courts-martial or other proceedings, provided the requirements of the GPW are met (see DOD Law of War Manual, 9.28; see paragraph 8-54). **(consistent)**

8-63. An accused who is not a U.S. citizen and who meets the definition of an unprivileged enemy belligerent under the terms of the MCA is subject to trial before a military commission or in Federal court pursuant to U.S. law (see paragraph 8-55).

[This Manual does not recognize the term "unprivileged enemy belligerent." Any violation of the law of war by a non-U.S. citizen who is a combatant should be tried before an appropriate military commission or court and its proceedings carried out as required under this Manual. **(inconsistent)**]

13.10.5 Sanctions Against Misconduct in Other Military Operations

8-64. When war crimes [replace "war crimes" with "violations of the law of war"] *are charged as "war crimes," the applicable criminal statutes generally also provide a requirement that the conduct occur in the context of and in association with an "armed conflict" (see, 18 U.S.C. § 2441). While U.S. military personnel may engage in operations that do not involve armed conflict, it is DOD policy to comply with LOAC in all military operations regardless of how they are characterized (DODD 2311.01E para. 4.1).* [Note: The preceding sentence might inappropriately be interpreted that all military operations, even those related to natural disasters, civil disobedience, and civil protests in the U.S., would be conducted

under the law of war which is not U.S. law or policy nor the position of this Manual.] *The specific criminal sanctions available to enforce compliance with these standards may vary, however, depending on the relationship with other sovereign States in any given operation, especially the host nation. The United States always abides by the "law of the flag"—the legal standards and enforcement mechanisms it brings with the force. Sometimes U.S. service members engaged in peace operations or other military operations short of armed conflict are subject to the laws of the nation in which the activity is conducted, which laws may be more restrictive concerning the use of force than may be permitted under multinational force rules of engagement (JP 3-07.3 para. 3(h)). In general, the application of host-nation law to these other operations is governed by an international agreement, such as a status-of-forces agreement or, for United Nations operations, a status of mission agreement (JP 3-07.3 para. 7(b)). These agreements define the circumstances under which the host nation may exercise jurisdiction over peace operations personnel (both military and civilian) who commit crimes in the host nation. In all cases, however, the UCMJ will apply to the activities of U.S. service members, regardless of the nature of the operation or where the potential crime occurs (RCM 203).* **(consistent)**

13.11 Penalties

8-65. Penalties vary depending on the war crime committed and the law pursuant to which the crime is being prosecuted. Authorized punishments can range from fines or letters of reprimand to death. For instance, for the offense of murder under the UCMJ, the accused may be subject to death or life imprisonment (UCMJ, art. 118). Crimes under the War Crimes Act, the MCA, or other U.S. law also carry significant penalties. Generally, violations of the War Crimes Act that result in the death of a victim may be punishable by death (18 U.S.C. § 2441(a)). Grave breaches that authorize the death penalty include willful killing, torture, inhumane treatment, or willfully causing great suffering or injury (GWS art. 50; GWS Sea art. 51; GPW art. 130; GC art. 147) **(last sentence can be inconsistent with this Manual)**.

[The preceding paragraph references primarily violations for which the death penalty may be imposed with little explanation. It should be materially expanded to provide better understanding for, and guidance to, commanders, judge advocates, and courts-martial regarding appropriate punitive or other actions for other types of violations. The last clause of the last sentence is inappropriately couched (as it is in violations triable by the ICC). What is likely meant is that injury and suffering is not the primary intent of the use of force rather than the achieving of a legitimate military purpose.]

13.12 Defenses

8-66. The availability of legal defenses to charges of war crimes may depend on the specific jurisdiction and forum in which charges are brought. The following general information regarding affirmative defenses that negate criminal responsibility under general principles of criminal law and war crimes may be helpful, but commanders should request legal advice if they have specific questions.

[While legal defenses may vary dependent on the specific jurisdiction and forum in which charges are brought, that which are considered legitimate defenses should be the same in all jurisdictions and courts and consistent with this Manual **(inconsistent)**.]

13.12.1 Justification (consistent)

8-68. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. This includes a privileged belligerent's killing of an enemy combatant in combat and other acts that would otherwise be offenses under local criminal law (RCM 916I Discussion; MMC, pt. II, Rule 916(c)).

13.12.2 Self-Defense (possibly inconsistent)

8-69. Self-defense generally requires the accused to demonstrate an apprehension, on reasonable grounds, that death or bodily harm was about to be wrongfully inflicted and that the force used by the accused was necessary for protection against such death or bodily harm (RCM 916(e)). The plea of self-defense has been recognized in war crimes trials under much the same circumstances as in trials held under ordinary criminal law (see, for example, MMC pt. II, Rule 916(e)).

[It is unclear what "wrongfully inflicted" encompasses. Under this Manual, force protection/resource preservation, if essential to survive, carry out a mission, or maintain operational effectiveness, is considered a legal form of self-defense in situations it may not be under the formal law of war.]

13.12.3 Accident (consistent)

8-70. Death, injury, or damage that occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner (for example, conduct of military operations in accordance with LOAC) is an accident and is excusable. The defense is not available when the act that caused the death, injury, or damage was a [truly and materially] *negligent act (RCM 916(f); MMC pt. II, Rule 916(f)).*

13.12.4 Ignorance or Mistake of Fact (consistent)

8-71. It is generally a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense (RCM 916(j); MMC pt. II, Rule 916(j)).

13.12.5 LOAC-Specific Discussion of Defenses (inconsistent)

8-72. There may be specific LOAC issues with respect to arguments that military necessity, lawful reprisals, superior orders, government officials, or ignorance or mistake of law constitute a valid defense.

8-73. …One may not justify LOAC violations by invoking the need to win the war.

[This Manual takes exception to the preceding two sentences. While military necessity, to include the need for winning the war, may by itself justify violations of the law of war, that is not an absolute when the violation may reduce overall death, injury, suffering, and destruction. It is said that Genghis Khan would inform in advance those he wished to conquer that if they did not resist, he would kill no one; if they did, he would kill everyone. Against, an enemy such as this, or the Nazis about whom it was eventually known were exterminating certain groups of people, military necessity may override some of the niceties of the formal law of war. In such situations, it should be legally acceptable to do what is necessary militarily to survive, prevail, or prevent irreparable harm to non-combatants. Further, the United States' use of nuclear weapons to destroy Hiroshima and Nagasaki was done based on military necessity and the need to win the war as soon as possible to reduce casualties, with this believed to provide sufficient justification for violating proscriptions against the targeting of civilians.

[For further background on legitimate defenses, refer to Section 13.15 on the War Crimes Act of 1996.]

13.12.6 Lawful Reprisals (consistent)

8-74. Reprisals are acts taken against a party that are otherwise unlawful under LOAC in order to persuade that party to cease violating the law. A reprisal is considered lawful, provided that the stringent conditions for lawful reprisal have been met, including complying with any applicable prohibitions against reprisal. The fact that the conduct was part of a lawful reprisal action thus means that would not need to [be] *part of a valid defense (see paras. 8-80 to 8-86 for additional information).*

13.12.7 Superior Orders (partially inconsistent)

8-75. The fact that a person acted pursuant to orders of his or her Government or of a superior does not relieve that person from responsibility under international law, provided it was possible in fact for that person to make a moral choice (see DOD Law of War Manual, 18.22.4). Under the RCM and MMC, it is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful (RCM 916(d); MMC pt. II, Rule 916(d)). An order requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime (for example, an order directing the murder of a civilian, a noncombatant, or a combatant who is hors de combat, or the abuse or torture of a prisoner) (see, for example, MCM pt. IV, para. 14c(2)(a)(i)). The fact that an offense was committed pursuant to superior orders may also be considered as mitigation to reduce the level of punishment (see, for example, United States v. Sawada, V U.N. Law Reports 7-8, 13-22; ICTY art. 7(4)).

[While this Manual agrees with the principles of the preceding, situations may exist where the examples provided would not always be illegal under this Manual. It should be noted that in the first sentence above, the person is expected to be able to understand and make moral choices. That is the position of this Manual that persons are capable of making the correct moral choices even if it violates the law.]

13.12.8 Government Officials (consistent)

8-76. The fact that a person who committed an act that constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him or her of responsibility under international law (see DOD Law of War Manual, 18.22.3). Most war crimes tribunals have held that the fact a person acted as a Head of State or as a government official is not a defense to prosecution and punishment for war crimes, nor has acting as such been considered as a factor in mitigating punishment (see, for example, Charter of the International Military Tribunal art. 7). Although status as a government official is not a substantive defense to liability under international law, government officials may receive immunities or other procedural protections from a foreign State's exercise of jurisdiction. For example, a Status of Forces Agreement could provide that it is for the sending State to exercise jurisdiction, rather than the host State, in respect of allegations that the sending State's forces had committed war crimes. [The last two sentences together are not relevant. Under the example given as it seems to read, the government official is still liable for an illegal act by the sending State, even if not that of the host State. So, their immunity is not for a possible crime but from a host State being responsible for the legal process for bringing charges and trying the alleged violation.]

13.12.9 Ignorance or Mistake of the Law (consistent with respect to intent)

8-77. Ignorance or mistake of law ordinarily is not a defense (RCM 916(l)(1); MMC [Manual for Courts-Martial] *pt. II, Rule 916(l)(1)). Individuals are expected to ascertain and conduct themselves within applicable law (see, for example, United States v. Flick (The Flick Case), VI Trials of War Criminals 1208). Ignorance or mistake of law may be a defense in certain circumstances, such as when the mistake relates to a separate non-penal law or potentially when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency (RCM 916(l)(1) Discussion). For example, ignorance of international law may serve as a defense when the accused acts pursuant to superior orders and cannot, under the conditions of military discipline and operations, be expected to weigh scrupulously the legal merits of the order received (Trial of Karl Buck and Ten Others, V U.N. Law Reports, 39, 44).*

Ignorance of international law may also be a mitigating factor in considering punishment (see, for example, United States v. Sawada, V U.N. Law Reports 7-8).

[The first sentence of the preceding paragraph would be better written as "*Ignorance or mistake of the law may or may not be a legal defense.*" That it may be a legal defense is made evident in the balance of the paragraph. In fact, given the length and complexity of this Manual, FM 6-27, DOD Law of War Manual, and the myriad U.S. acts, policies, and ratified treaties, it is most likely the typical combatant and field commander may not reasonably know or fully understand the proper application of every article of law or policy which relates to his or her conduct. Thus, combatants should only be expected to comply with that law (1) in which they have been thoroughly trained, (2) which the command structure actually enforces and public statements of civilian leadership do not undermine, and (3) whose violation in a particular situation is patently clear as morally wrong, unreasonable, and irresponsible.]

13.13 Remedies for Violations of the Law of War

8-78. In the event of a LOAC violation, it may be possible for an injured State[, non-State party, or person] *to seek to resort to one or more of the following remedies:*

- *A formal or informal complaint to the offending belligerent through the protecting power or neutral States;*
- *Publication of the facts, with a view to shaping public opinion against the offending belligerent;*
- *A formal inquiry among the parties into alleged violations (see paragraph 8-79);*
- *A UN Security Council resolution to take appropriate action under the UN Charter (UN Charter art. 34);*
- *Complaints to the offending belligerent, including protest and demand for compensation or punishment of individuals responsible for the violation (Hague IV art. 3; consider AP I art. 91);*
- *Solicitation of the good offices (that is, the diplomatic assistance), mediation, or intervention of neutral States for purposes of making the offending belligerent observe its obligations under LOAC;*
- *Punishment of captured individual offenders as war criminals, either by tribunals of the aggrieved belligerent or its co-belligerents, or by international tribunals, if such tribunals have jurisdiction; or*
- *Reprisals against the offending belligerent in order to pressure it to desist from violations of LOAC (see paragraphs 8-80 to 8-86).*

[This paragraph is relevant and should be applicable in each instance to States, non-State parties, and individual persons, not just States **(inconsistent)**. With respect to the first bullet, in addition to a protecting power or neutral State, a complaint to the offending belligerent can also be made through other parties such as an international or humanitarian organization, an ally of the offending belligerent, or even individuals who may have relationships or influence with the offending belligerent **(inconsistent but likely not in an objectionable way)**.]

13.14 Inquiries Under the Geneva Conventions (inconsistent due to reference to this Manual)

8-79. The 1949 Geneva Conventions provide that, at the request of a party to the conflict, an inquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the 1949 Geneva Convention (DOD Law of War Manual, 18.14.1). If agreement has not been reached concerning the procedure for the inquiry, the Parties should agree on the choice of an "umpire" who will decide upon the procedure to be followed. The Conventions further provide that if the inquiry establishes that a violation has occurred, the parties to the conflict are to put an end to the violation and to repress the violation with the least possible delay (GWS art. 52; GWS Sea art. 53; GPW art. 132; GC art. 149).

Article 90 of AP I establishes an International Fact-Finding Commission, which operates on the basis of mutual consent (see DOD Law of War Manual, 18.14.1.1). Although many nations have accepted this provision, the commission has yet to conduct an inquiry. The United States, which is not a party to AP I[,] *has not recognized the competence of this Commission.* [The preceding would only be consistent with this Manual if the alleged violation were a violation under the Manual, which is often different than alleged violations under the 1949 Geneva Conventions and other ratified law of war treaties.]

13.15 War Crimes Act, Statute of Limitations, and Defenses for U.S. Personnel

The following is from *The War Crimes Act: Current Issues*, Michael John Garcia, Congressional Research Service, January 22, 2009*:*

Summary

The War Crimes Act of 1996, as amended, makes it a criminal offense to commit certain violations of the law of war when such offenses are committed by or against U.S. nationals or Armed Service members...

As amended by the Military Commissions Act of 2006…, the War Crimes Act now criminalizes only specified Common Article 3 violations labeled as "grave breaches." Previously, any violation of Common Article 3 constituted a criminal offense. Both the MCA and the Detainee Treatment Act of 2005…also afford U.S. personnel who engaged in the authorized interrogation of suspected terrorists with a statutory defense in any subsequent prosecution under the War Crimes Act or other criminal laws. These statutory protections, along with a number of other available defenses, appear to make it unlikely that U.S. personnel could be convicted under the War Crimes Act for any authorized conduct which was undertaken with the reasonable (though mistaken) belief that such conduct was legal.

Although not immune from prosecution, U.S. personnel who could be charged with violating the War Crimes Act would have several possible defenses to criminal liability, so long as their activities were conducted with the authorization of the Administration and under the reasonable (though mistaken) belief that their actions were lawful. Section 1004(a) of the Detainee Treatment Act of 2005…, provides that

> *In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States ... and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that ... [the] agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available ... or to provide immunity from prosecution for any criminal offense by the proper authorities.*

The statutory defense provided by the DTA appears to apply only to U.S. personnel who were "engaging in specific operational practices" that had been officially authorized. The defense would not apply to unauthorized conduct. The statute also does not appear applicable to higher level U.S. officials who may have authorized, but did not directly engage in, specific operational practices involving detention or interrogation. As discussed later, the Military Commissions Act of 2006…subsequently made expressly clear that this defense extends to activities that occurred prior to enactment of the DTA and following September 11, 2001.

In addition to this statutory defense, a number of other legal defenses could be raised by U.S. personnel charged with War Crimes Act offenses based on conduct that had been authorized, assuming the defendants acted with government sanction and/or had been erroneously informed by responsible authorities that their conduct was legal. Although "mistake of law" defenses are generally rejected, such defenses have been recognized by courts in certain cases where defendants have acted with government sanction or after being erroneously informed by responsible authorities that their conduct was legal. These defenses can be divided into three overlapping categories: (1) defense of entrapment by estoppel[, i.e., the principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that or other person,] *available when a defendant is informed by a government official that certain conduct is legal, and thereafter commits what would otherwise constitute a criminal offense in reasonable reliance of this representation; (2) defense of public authority, available when a defendant reasonably relies on the authority of a government official to authorize otherwise illegal conduct, and the official has actual authority to sanction the defendant to perform such conduct; and (3) defense of apparent public authority, which is recognized by some (but not all) federal circuits, and is similar to the defense of public authority, except that the official only needs to have apparent authority to sanction the defendant's conduct. Similar defenses may exist for military personnel in courts-martial proceedings. Additionally, prosecution of U.S. personnel may be precluded by the federal statute of limitations, which limits the period for prosecution under the War Crimes Act and most other federal offenses to five years from the date the offense occurs, except in the case of a capital offense (in which case there is no temporal bar to the prosecution of the offender).*

[Put simply, with respect to the last sentence, if one violates what is prohibited as a *capital offense* under the War Crimes Act, regardless of whether still in government service and even though this Manual may allow violations under certain circumstances, there is no statute of limitations preventing prosecution.

[The language immediately preceding the last sentence would seem to provide a defense for persons who violate the formal law of war when following provisions of this Manual subject to an appropriate authority having ordered them to do so and the recipient of that order having no reasonable basis for disbelieving the legitimacy of the order.

[While the DTA seems to focus on acts of a certain type occurring between 9/11 and when the act was passed, that outlined seems reasonable regardless of when such an act occurs. Under this Manual, the ability of a defendant to present, and it to be considered a legitimate defense by a court, should not be confined to acts only within that time frame or related only to terrorism **(possibly inconsistent)**.]

13.16 Additional Guidance of This Manual

13.16.1 Categorizations (uncertain)

Possible infractions of conduct during war should be categorized as violations of either:

- Relevant domestic law, or international law ratified or otherwise legally accepted by the United States, to include U.S. interpretation of the language of that law; or
- Military rules, regulations, or orders which are not reflected in such domestic or international law of war, e.g., rules of engagement which can be more stringent than the law.

Only the former should be considered possible violations of the law of war and legally addressed, reported, and adjudicated as such. The latter are possible violations of orders not based on specific law of war provisions and would be legally handled within the judicial system of the military no differently than violations of orders, laws, or regulations which occur outside of war.

13.16.2 General Guidance for Combatants as to Judge Advocates (inconsistent)

The following is guidance as to how combatants and field commanders should interact with judge advocates under the *current* military judicial system and its approach to compliance with the law:

1. A combatant's corollary to the advice of a senior judge advocate (a speaker at the 25th LENS conference held at the Duke School of Law in 2020) to aspiring and junior judge advocates that "judge advocates should not fall in love with the client" is that a combatant should not assume judge advocates [JAs] have his or her best personal interests at heart.
2. Unless assigned as a combatant's personal counsel in a legal proceeding, a JA's responsibility is not to individual combatants and field commanders. They are agents of the organization and, as such, are obligated to put its interests, rules, regulations, and interpretations of the law first.
3. Unless a JA has been formally assigned as personal counsel, care should be taken in consulting with JAs when seeking advice in advance of a decision unless the combatant is willing to follow the legal advice provided.
4. If a combatant believes his or her actions, those of fellow combatants, or those he or she commands may be in violation of the formal law of war but were moral, reasonable, and responsible after applying the principles of the law of war and, thereby may be inclined to handle such situations differently than outlined in FM 6-27, such persons should not report or discuss such actions in advance or afterwards with JAs or others that are not explicitly trusted.
5. Combatants and especially commanders should become knowledgeable of the law as it relates to one's responsibilities so there is less need to consider seeking counsel from JAs.
6. To the degree possible, in advance of having to make such decisions, combatants and commanders should work through how certain violations will be handled if they were to arise, become known personally, or are reported.
7. If legal direction is sought and counsel has not yet been assigned to the combatant personally, if possible, do so with private attorneys or JAs who are not doctrinaire but understand the challenges faced by combatants and will help find the best legal option or interpretation to do that which is moral, responsible, reasonable, and best achieves the purposes of the law of war.
8. It is sometimes better to ask forgiveness than permission, especially if there is a moral, reasonable, responsible basis for that which is in violation of the formal law of war and the legal structure in place to address such violations.

To make this a more effective system that may help better achieve the purposes of the law of war than that which is now in place, commanders should ideally have (a) a JA assigned to them as their personal counsel for law of war matters at the battalion and above level, and (b) a JA made available to company grade combatants for personal counsel on law of war issues. In both instances, confidentiality would be in place for anything discussed. This would not preclude the assignment of other JAs to units who function on behalf of the organization, not individuals within that organization. (See further discussion 14.5.3.12 in Chapter 14 on improving compliance.)

13.16.3 Summary of Possible Legal Defenses (partially inconsistent)

That which follows is a summary (1-8) and expansion (9-13) of that found in FM 6-27 which may or may not be valid for all situations in which such defenses might be invoked:

1. Legally permissible under formal law of war
2. Not bound by formal law of war
3. Self-defense
4. Accident
5. Ignorance or mistake of fact, e.g., fog of war
6. Lawful reprisal
7. Order of superior
8. Order of government official

9. Uncharged or seldom charge accepted practice (similar actions, multiple dissimilar actions)
10. Uncharged persons who are equally if not more responsible for action having occurred, especially if these are more senior in rank
11. Temporary insanity, "shell shock," "combat fatigue," post-traumatic stress disorder (PTSD)
12. Conscientious effort to have done that which is humane, honorable, moral, and responsible while accomplishing one's mission and protecting one's comrades and forces
13. Better achieves the purposes of the law of war than may have occurred with compliance

13.16.4 Actions of Knowledgeable Person, Investigating Officer, and Convening Authority

13.16.4.1 Informing Person of Authority (generally consistent)

If it is believed a violation of the law of war (formal, or under this Manual) may have occurred, this should be brought to the attention of an appropriate person of authority (e.g., senior NCO, commander, convening authority, judge advocate) by the person(s) knowledgeable of the possible violation. Unless a unit is operating separately or cut off from its main forces and this would not be possible, reported infractions should at least reach battalion (or battalion equivalent level), which can then decide whether there is sufficient evidence for it to be reported to a higher level.

13.16.4.2 Investigating Officer (consistent and inconsistent)

The convening authority, in coordination with his or her next highest superior, should appoint an investigating officer. If possible given combat conditions, investigative resource availability, and any time-sensitive nature of addressing the matter, the investigating officer should:

- Not be under the direct command of the convening authority
- Not in the unit at the level where the infraction was alleged to have occurred
- Not have a personal relationship with the party who is alleged to have committed the infraction
- Have training and experience similar to the party who is alleged to have committed the infraction, and/or similar to the conditions under which the infraction is said to have occurred, e.g., an infantry officer with combat experience if the alleged infraction was by an infantry soldier during active combat, a military police officer with conflict detention experience if the alleged infraction was in a prisoner of war camp, a similar pilot if related to attacks by aircraft.

If available, judge advocate and criminal investigative resources should be made available to the investigating officer. Additionally, the command structure should ensure that all those who may have knowledge of the alleged infraction are made accessible to the investigating officer within a reasonable time given ongoing operations. Throughout the process, no undue command influence should be present.

The investigating officer is not to make judgements as to guilt or innocence but to provide information and recommendations whereby the convening authority can reasonably determine whether there is a sufficient basis to proceed with the appropriate legal or administrative process.

Those areas the investigating officer should address and report on include but need not be limited to:

- Was the alleged infraction a violation of domestic or international law of war, or a violation of rules, regulations, or orders which would not be a violation of the law of war?
- Was the alleged violation what a reasonable person would consider a felony, misdemeanor, or administrative infraction?
- Was an order given by a senior person to carry out the act being investigated and was such senior person reasonably perceived as authorized to give such an order?
- Should the party being investigated have been reasonably aware of the law, rule, or order which they may have violated?

- If so, was the law, rule, or order sufficiently clear as to the conduct expected or precluded in the circumstances under which the alleged infraction occurred?
- If neither of the preceding, should it have been clear as to that conduct expected or precluded as the professional, societal, or cultural norm of which the party of the alleged violator is a member?
- Did the person alleged to have committed the infraction attempt to reasonably apply and weigh the principles of the law of war?
- If the infraction actually occurred, was the decision to take that action done for personal benefit, indulgence, or irresponsibly, or was it taken due to a perceived need to accomplish a mission, survive, or protect others than those who may have been harmed?
- If the infraction actually occurred, was the harm material to others or the mission?
- If the infraction actually occurred, did it seem to reduce death, injury, suffering, and/or destruction greater than that which would have occurred had the law, rule, regulation, or order been complied with explicitly and/or was that reasonably believed to be the intent of the action taken?
- What were the conditions under which the decision was taken, to include the time available to weigh the decision made, imminent dangers and risks to self or fellow combatants and those commanded, information available on which to make a decision, and the availability of resources (e.g., weapons, food, medical supplies or personnel, guards, means to secure prisoners) which might have made an alternative compliant decision more or less possible?

13.16.4.3 Action by Convening Authority (generally consistent)

If possible under operating conditions, the information gathered by the investigating officer should be presented in a written report followed by an in-depth discussion of that report between the convening authority, the investigating officer, and others the convening authority may wish to include.

If there seems a reasonable certainty that the infraction occurred, the convening authority should make a determination as to whether the matter is best addressed through one or a combination of the following:

- Counseling
- Oral and written warning
- Training
- Change of orders/rules of engagement/regulations
- Compensatory work, apologies, or other appropriate indemnification
- Removal from position of responsibility
- Reassignment to another unit with investigating officer's report and any actions taken by the convening authority provided to the new commander
- Non-judicial punishment
- Administrative action
- Court martial

Public opinion, media coverage, political pressure, and personal career considerations should ***not*** influence the determination made by the convening authority as to what action is taken, guilt or innocence during a court martial, or punishment in the event of a conviction. These should be based on the facts of the situation, the nature and severity of the alleged violation, the knowledge available when the action occurred, the reason for the action being taken, and the relevant training, responsibilities, character, and record of the alleged offender.

CHAPTER 14

Compliance

If I trust my team, I'll do what is right. If I don't, I'll do what is legal.

Sergeant (E-5)
Georgia National Guard

Our young men had to harden their hearts to kill proficiently, without allowing indifference to non-combatant suffering to form a callus on their souls. I had to understand the light and the dark competing in their hearts, because we needed lads who could do grim, violent work without becoming evil in the process, lads who could do hard things yet not lose their humanity.

James Mattis
U.S. Marine General & Secretary of Defense
Call Sign Chaos (2019)

Culture eats strategy for breakfast..

Alleged quip by Peter Drucker

There is no substitute for honor as a medium of enforcing decency on the battlefield, never has been, never will be. There are no judges, more to the point, no policemen at the place where death is done in combat.

John Keegan
British Historian

I'd once believed human beings were intrinsically good. But now I knew decency and goodness were things you had to fight for, cultivate and protect, precious crops you had to water and guard and feed and nourish, to absorb the soulless viciousness that also lay dormant in the human breast.

Marina Makarova in Janet Fitch's
Chimes of a Lost Cathedral

Although FM 6-27 and the DOD Law of War Manual do not include a chapter on compliance, this Manual does. Helping militaries and their combatants better achieve compliance is highly relevant for manuals on ethical conduct in war.

14.1 Compliance Beliefs

Antonio F. Perez and Robert J. Delahunty, in *War: International Law, International Relations, and Just War Theory*, *An Interdisciplinary Approach* (2017), pose the following:

> *Is it in fact correct to say that deviation from unqualified [i.e., black letter] jus en bello rules in the name of military necessity are never permissible?*

The authors, both law professors, offer four observations:

> *First, the reasoning in support of the view that deviations from unqualified rules are always impermissible seems to be strongest in the case of treaty rules, which ordinarily are carefully negotiated, with the participation of the armed forces of the states involved, and thus reflect the careful weighing of military and humanitarian interests.* [Note: While the general perception is that treaties have been drafted after a careful weighing of military and humanitarian

interests, it has been the consistent position of this Manual that it has not or, if attempted, has not been successful. Nonetheless, this does not detract from Perez's and Delahunty's reasoned response to the posed question.]

Second, jus en bello *includes exceptional clauses for the sake of humanitarian interests as well as for military ones. So, if deviations from unqualified rules are impermissible in the name of military necessity, then they should also be impermissible in the name of humanitarianism: both types of interests have been balanced together in unqualified rules. Yet that conclusion seems uncertain, because deviation from unqualified rules for humanitarian reasons, in proper cases, should be permissible. If unqualified treaty rules are allowable for humanitarian reasons, why should they not be allowable in equally compelling cases of military necessity?*

Third, even when considerations of "military necessity" are reflected in an unqualified rule, different interpretations of that rule may legitimately giver greater (or lesser) weight to those interests. In such cases, when interpreting what appears to be an "unqualified" rule, military practice may (reasonably) calibrate the balance between military necessity and humanitarian concerns in a way that gives greater weight to the former.

Fourth and most controversially, it is arguable that deviations from unqualified jus en bello *rules in the name of military necessity might be permissible in certain unusually compelling circumstances, especially when the humanitarian purposes of the* jus en bello *would also be promoted by such deviations.*

This question, these four observations, and which of them a person believes as legally or morally legitimate are the crux of this Manual. Acceptance of the latter three are the foundation upon which this Manual is based.

As alluded to elsewhere in this Manual, there are many who would posit that, in the United States, only a small portion of the population would support the Manual's underlying premise that, during conflicts, the formal law of war legitimately can and should be set aside in certain situations without criminal charges and punishment ensuing. There is also a related perception by some that most soldiers, especially officers, believe they should comply with the formal law of war.

Evidence does not effectively support these beliefs. Rather, indications are that within the military and among veterans, to include officers, a significant majority would accept that the formal law of war should not always be followed explicitly. Further, and equally important, a significant level of civilians believe the same and, if a violation does occur, charges should not always be brought against the offending person.

In 2014, in the *International Studies Quarterly* article, "Martial Law? Military Experience, International Law, and Support for Torture," Geoffrey Wallace, published findings from his survey in 2008 of 6,101 U.S. respondents which examined the effect of international law and military experience on attitudes toward torture of captured insurgents who might have information about possible future attacks. Wallace selected torture as the survey focus given the prominence of the ongoing conflicts in Iraq and Afghanistan, the relatively recent Abu Gharib scandal which became public in 2004, and the ongoing national debate as to the use of "enhanced interrogation."

Wallace found that 46% of all respondents would employ torture in a scenario without great urgency or indication of the potential damage to our own forces or nation that might result if information could not be secured in any other way. Among respondents who were veterans, 57% would support the use of

torture. Even when it was made clear that torture was against the law and one could be prosecuted for its use, only 6% of veterans and 4% of civilians changed their position.

In November 2019, the President Donald Trump pardoned a U.S. Army officer who had served six years of a nineteen-year sentence after having been convicted on two counts of second-degree murder for violations of the law of war in Afghanistan in 2008. The President also restored the rank of a Navy SEAL who had been convicted of taking inappropriate pictures of enemy dead and demoted one rank for having done so, while being acquitted of a murder charge and not charged for a number of other alleged violations of the law of war. Further, the President pardoned a second army officer before legal proceedings against him could be concluded for an alleged extrajudicial killing of a suspected Taliban bombmaker in 2010.

In a February 2020 op-ed in *Military Times* ("On the Anniversary of My Lai: Do Americans Really Care if We Fight Honorably?)," Steven Katz includes the following:

- "In April 1971, after a jury of six military officers found Calley [the platoon leader in command at My Lai] guilty of premeditated murder of at least 22 civilians, 79 percent of Americans disagreed with the jury verdict and open letters to the White House were 100 to 1 in favor of the perpetrators."
- "In 2016, the Red Cross reported that Americans 'are substantially more comfortable with war crimes than are populations of other Western countries like the United Kingdom, France, Switzerland, and even Russia.'"
- "[A]ccording to a Reuters/Ipso poll conducted the same year, nearly two-thirds of Americans believe torture can be justified to extract information from suspected terrorists..."
- "[C]urrently…over three-quarters of Americans believe that U.S. service members shouldn't be prosecuted for overseas war crimes because 'war is a stressful situation and allowances should be made.'"
- "[A]ccording to a recent Carnegie Council study, more than a third of Americans believe that soldiers who executed unarmed women and children 'acted ethically' if the overall reason for waging the war is just."
- "But most revealingly is the large proportion of all veterans, roughly 40 percent, who also support the pardons of service members who have already been convicted or are guilty of war crimes."

Given the basic premise of this Manual, the survey data presented and the actions of the President would seemingly be welcomed given such broad support among civilians and veterans and at the highest level of government for the legitimacy of violating the law of war and not being punished. Nonetheless, these positions and attitudes are troubling and antithetical to the purpose and principles of this Manual.

Yes, the formal law of war should be violated in certain situations. Yes, it is important to provide combatants appropriate moral and legal agency to make reflective decisions regarding compliance with that law. And, yes, the legal system should treat such combatants fairly and appropriately when they make horrendously difficult decisions and, in good conscience, choose to violate the law of war. Unfortunately, the surveys referenced and the actions of the President represent a threefold problem.

First, laws of war are being violated, not just when it may be reasonable to do so, but also when there is no moral or militarily justifiable reason. Second, there seems to be broad support among veterans and civilians, even sometimes up to the Presidency, that such violations are acceptable due to the pressures and nature of war, or the rightness of why the war is being fought, and there should be few if any consequences to those who violate the law even when it would seem clear that it should not have been. This leads to the third problem. These attitudes and beliefs may result in certain combatants feeling

impowered to ignore the law and, thereby, more frequently commit violations that are not morally and militarily justifiable.

While concern and support for combatants by the public, veterans, and the President may be well-intended, it is being improperly channeled. Rather than condoning, accepting, or allowing that to occur which should not, our citizens, veterans, and the President as commander in chief should be insistent that:

(1) combatants be provided agency to violate the law only for military and political necessity and, when doing so, may better achieve the purposes of the law of war,
(2) combatants be properly trained to be able to do this morally, responsibly, and effectively,
(3) our military treats fairly and appropriately combatants who conscientiously try to make the best decisions possible and, in doing so, sometimes determine intentionally or through ignorance that violating the formal law of war is morally and operationally necessary, and
(4) the system fairly punishes combatants who allow their darker sides and weaknesses to prevail when there is no compelling moral, military, or other reasonable basis for having done so.

The challenge faced is how the military and the law of war can accommodate such moral agency and reflective compliance while reducing non-compliance when there should be no reasonable alternative than to have complied.

The first steps in meeting this challenge are to understand:

(1) the types of decisions combatants are regularly forced to make;
(2) the factors which come into play as to whether that combatant complies with what is expected of them, regardless of whether under this Manual or the formal law of war; and
(3) how such compliance might be better achieved.

14.2 Combat Decision Making

During the drafting of this Manual, a small sample "indicator" survey was conducted to gain a sense of how those with and without military backgrounds might make decisions with law of war and distinction-proportionality implications. The following summarizes the design and results of the survey (see Appendix for the survey form).

Survey Participants

Total: 30 Male (no military background): 10 Female (no military background): 10 Male (military background): 10; Combat Experience: 7; Officer/Enlisted: 6/4; Rank: Sergeant (4), Captain (3), Lieutenant Colonel (2), General (1); Age (all respondents): ≤29: 12 30-49: 6 ≥50: 12; Foreign: 2 (Korea, Canada); University Students: 12; Bachelor/Master/PhD: 14

Survey Composition

Combat Decision Situations: 8

Decision Options Provided for Each Situation: 3-4, plus Other with respondents filling in alternative decision of their own if they wished

Type Situations:

1. Greater Risk to Civilians vs. Reduced Risk to Combatants: 2
2. Nature and Degree of Treatment/Care in Field of Severely Wounded Prisoners: 2
3. Interrogation Intensity to Secure Vital Information at Two Levels of Criticality (High, Extremely High): 2
4. Uncertainty as to Civilian or Enemy Status as Whether to Engage vs. Degree of Risk to Soldiers Commanded Depending on Decision Made: 2

The first three involved decisions that have law of war implications; the fourth involved weighing risk to possible civilians vs. protection of one's soldiers with the decision made not a law of war consideration due to rules of engagement and prior civilian notification in place when the act occurred.

Two Stage Decision Process:

1. First Stage: Respondents provided general guidance to treat civilians well and not place in danger as they are potential sources of information and support, and not mistreat or torture prisoners as this is dishonorable, a punishable offense, and increases likelihood the enemy will resist more strongly and make their defeat/capture more costly.
2. Second Stage: Respondents provided 11 articles of FM 27-10 (FM 6-27 had not been released when the survey was conducted) with each relevant to at least one situation. (One of the 8 situations [ticking bomb] had only second stage whereby the law was known before decision was made.)

Time Allowed to Complete: Unlimited (at discretion of respondent)

Survey Results

The results from such a small sample size cannot obviously be assumed as necessarily reflective of a larger, randomly selected survey population. Nonetheless, the survey had somewhat similar results regarding torture as the Wallace study. Additionally, it provides possible insights into behavior related to (1) various intensities of interrogation, most of which would be violations of the law, (2) varying levels of support for unlawful interrogation depending on the importance of the information sought, (3) varying acceptance of violation of the law across four types of combat situations, and (4) willingness to increase personal risk and that of those commanded to reduce the risk of accidently killing civilians.

As females participating in the survey with no military background were somewhat more compliant with the law overall than males without military background, the following table compares female respondent decisions to males with military backgrounds as whether under certain situations it is (1) acceptable to violate the law of war, or (2) reasonable to assume greater risk to one's self and unit to reduce the risk of mistakenly killing civilians.

The following reflects those who *would violate* the formal law of war, or *increase risk* to civilians to protect one's own forces, for the range of situations in the survey. As not all respondents answered every question, percentages are based on those who responded.

	Limited Legal Knowledge		**Greater Legal Knowledge**	
	Military	**Female**	**Military**	**Female**
All Law of War Decisions (6)	74%	57%	70%	40%
Non-Interrogation Decisions (4)	66%	58%	59%	36%
Interrogation Decisions (2)	93%	56%	93%	47%
Civilian-Combatant Status Uncertain (2)	25%	25%	25%	27%

Consistent with the Wallace survey, a significant percentage of those with and without military backgrounds were open to the use of illegal interrogation, with those with military backgrounds more accepting than those without. Also consistent with the Wallace survey, greater knowledge of the law has some effect on influencing those with and without military backgrounds to become more compliant with the law. The exception was illegal interrogation measures where those with military backgrounds were not more compliant with greater knowledge.

While not reflected in the above table, only one of all 30 respondents would not violate the law of war in at least one of the scenarios presented.

With respect to decisions when there was uncertainty as to whether observed persons were civilians or military but no law of war issue involved, both those with and without military backgrounds were significantly and equally willing to increase the risk to themselves and those they commanded in order to reduce the likelihood civilians would accidently be harmed. As there is no law requiring such a choice in the two survey situations, this is an encouraging outcome that may indicate combatants are capable of making reflective moral decisions benefitting others even when it increases personal risk.

The following table indicates that even when the law was considered acceptable to violate, the willingness to do so varied depending on the situation and the degree to which the law was violated.

Willingness to Violate the Law of War

Interrogation: Importance of information being sought	**Military**	**Female**
Critical to securing bridge essential for success of major operation	88%	44%
Critical to locating nuclear device in major city before detonation	100%	71%
Intensity of interrogation in bridge scenario		
No physical or mental coercion	25%	63%
Use of threats (e.g., threat of rape)	0	0
Use of mock killing of one prisoner to induce another prisoner to talk	50%	25%
Use of whatever force necessary, even if death or serious injury results	25%	12%
Horrendously injured prisoner with little chance to live during active combat situation [1]		
Provide first aid, inject with morphine, and leave[2]	25%	38%
Provide first aid and leave (violation as morphine was not administered)	25%	25%
End suffering as painlessly as possible, i.e., mercy killing	38%	25%

[1] One respondent with military background and one female gave a response other than the three provided.

[2] Even this could be considered a violation as the injured prisoner was not taken to a medical facility. Given the combat situation described, apparently no respondent felt this a viable option.

What is especially relevant about the Wallace and indicator surveys is that, in both, civilians with no military backgrounds in 36-50% of the non-ticking bomb scenarios were willing to violate the law even when they knew the law, and 51-93% of those with military backgrounds were. With respect to the ticking bomb scenario (not part of the Wallace survey) and the use of illegal interrogation to include torture, 71% of women and 100% of those with military backgrounds were willing to violate the law, again knowing it was illegal.

These respondents were not making such decisions to violate the law due to ignorance of the law, because their fellow soldiers had just been killed or wounded, or accidently in the heat of battle where decisions must be made quickly with little time to reflect. They were made with time to reflect and as they apparently believed the decisions made were the right thing to have done given the situations faced. While the civilians did not have background in applying the principles of the law of war, most seemed to be weighing military necessity, to include force protection, in relation to that which they thought was humane, responsible, and honorable.

What the preceding may demonstrate is that if the law of war is rigidly enforced and the law of war requirements to report and prosecute violations of the law always followed, it is not unlikely that more frontline combatants than not will be charged with law of war violations. This would occur, even when

those charged believed, as would most of their fellow combatants and a significant portion of the civilian population, that they had done what was right and best in the situation they found themselves.

14.3 Factors Influencing Compliance

That which follows is a list of factors which can influence compliance with the law of war. Anyone who has served in combat, is a scholar in the field, or has been involved in enforcement of the law of war can easily add to the list or reasonably move an influencing variable from one category to another. Thus, the list is not meant to be exhaustive or structurally definitive. Rather it is intended to demonstrate the complexity of the challenge of achieving compliance with whatever standards of conduct we wish combatants to comply. The challenge is staggering. If any one of the following goes awry, or has not been adequately considered, anticipated, implemented, or trained for, violations of desired conduct will more likely occur.

LEGAL STANDARD OF CONDUCT

1. Actual/formal existence of legal standard
2. Precision/clarity of language
3. Consistency of interpretation
4. Consistency w/other related laws/standards
5. Reasonableness
6. Stated and clear consequences if violated
7. Provided/accessible to combatants (relevant language, hard copy/electronic availability)
8. Whether legally binding (e.g., ratified, exceptions, agreement as to customary law)
9. Complexity of standard
10. Number of such standards requiring compliance

NATIONAL/CAUSE LEVEL

1. Generally accepted as applicable
2. Culturally consistent
3. Leadership support vs. leadership opposition or adverse intervention
4. Public/political support vs. public/political opposition or adverse intervention
5. Willingness to enforce
6. Military strength and resource availability required for compliance
7. Stage of conflict and/or belligerent's organizational evolution
8. Stability/control of power structure (government, military, non-State movement)

ORGANIZATIONAL LEVEL

1. Nature of combatant recruitment
2. Initial combatant indoctrination
3. Type, quality, and consistency of training
4. Process for combatant's integration into unit
5. Adequacy and form of combatant compensation
6. Existence, structure, and fairness of legal system handling possible violations
7. Appropriate or inappropriate command influence/involvement
8. Enforcement consistency
9. Likelihood and severity of punishments for non-compliance
10. Clarity and communication of expectations and punishments for non-compliance
11. Actual and perceived organizational support and concern for well-being of combat units and individual combatants

COMMANDER LEVEL

1. Combat experience
2. Respect of and for subordinates
3. Nature of personal example
4. Ability to communicate effectively
5. Consistency in expectations/enforcement
6. Empathy-discipline balance
7. Personal values
8. Career implications/sensitivity
9. NCO buy-in/support
10. Sense of responsibility for the welfare of those commanded

OPERATIONAL LEVEL

1. Intensity/nature/frequency of combat
2. Importance of violating law (e.g., force protection, mission criticality)
3. Nature or degree of violation
4. Distinguishability of enemy
5. Availability of clear targets
6. Cultural, racial, ethnic, class differences with enemy
7. Perceived perfidy of enemy
8. Availability of compliance-critical resources (financial, weapons, personnel)
9. Magnitude/nature of unit casualties

PERSONAL LEVEL

1. Intelligence/common sense/reflective ability
2. Personal values
3. Events back home
4. Sociopath/psychopath/character flaws
5. Leader vs. follower
6. Personal benefit, e.g., survival, financial, sexual, respect, reputation
7. Resulting personal risk-reward downside-upside
8. Degree of or cumulative stress
9. Loss of fellow combatants, especially those who are close
10. Bad day
11. Self-imposed protective hardness/indifference/rationalization/compartmentalization
12. Acquired callousness from repeated exposure to carnage and destruction

14.4 Windows into the Minds of the People

With respect to compliance, the focus is generally—and understandably—on those who make and carry out decisions that comply with or violate the law of war. Yet, it is also important to understand how protected persons view both legal and illegal actions of combatants. There may be actions which are legal under the law of war which may still be viewed as non-essential or immoral by one's enemy or the people in whose territory the war is fought. Conversely, there may be violations of the law which may be viewed by the enemy or local populace as generally understandable, acceptable, or immaterial.

Understanding such distinctions, attitudes, and beliefs is essential, especially in asymmetric conflicts. While such views are often thought of as less important in conventional warfare, they may still be

important to militarily prevail and achieve a peace which can be effectively maintained. It can also be critical for gaining or maintaining support for the conflict of one's own citizens, leadership, and allies.

In order to understand such things, it is necessary to open windows into the minds of the people against whom one fights; of one's citizens, leaders, and allies; and of civilians most likely to suffer the consequences of decisions made on the battlefield. With this knowledge, it is possible to improve training for one's own forces, and information initiatives directed at civilians and enemy combatants.

In 2019, Dr. Janina Dill, Co-Director of the Oxford Institute of Ethics, Law, and Armed Conflict, published a paper in *Ethics & International Affairs*, entitled "Distinction, Necessity, and Proportionality: Afghan Civilians' Attitudes Towards Wartime Harm," based on in-depth interviews in 2015 with eighty-seven displaced Afghan civilians who were harmed in attacks carried out by coalition forces. The findings of her work demonstrate the importance of such research. It can help improve training, after-action responses, future battlefield decisions, and public information initiatives. All can potentially improve civilian relations and benefit the war effort and any peace which follows. Dr. Dill describes this process as viewing the violence of war "through the eyes of the population," something that may too seldom be done. Rather, we often only judge through the eyes of our own people, lawyers, scholars, and the media as to whether what is done is acceptable.

The following from Dr. Dill's study demonstrates a more nuanced understanding and appreciation of the nature of violence to civilians in war than might have been expected from those who are harmed.

	Allocation of Blame			
	Coalition Only	*Other Side Only*	*Both Sides*	*Unsure*
Perceived Intentionality (n = 87)				
Unintentional (n = 70)	2	24	41	3
Intentional (n = 14)	6	0	6	2
Unsure (n = 3)	0	0	2	1
Perceived Necessity (n = 70)				
Necessary (n = 17)	0	10	6	1
Avoidable (n = 51)	2	14	35	0
Unsure (n = 2)	0	0	0	2

What is important to note is that:

- only 8 perceived the coalition intentionally or unintentionally to blame for the harm suffered while 24 believed the other side was responsible
- only 14 thought the harm intentional although 6 of these believed the coalition solely to blame and none thought the other side was solely to blame
- only 17 believed the harm necessary while 51 believed it avoidable
- only 2 believed the coalition alone was to blame regardless of whether necessary or avoidable while 24 believed the other side solely to blame

For a foreign military of a generally different religion and culture in an asymmetrical war, these would seem to be generally positive responses where the local adversary is seen as more to blame for the harm caused than the outside force. Nonetheless, when solely or partially to blame, the difference is less striking: 57 for the coalition; 73 for its local adversary.

What is troubling is why 51 out of 87 believed the harm to have been avoidable. Additionally, it is important to understand why 14 believed the harm was intentional with the coalition being all or partially responsible in 12 of those 14 instances.

The interviews provided insights into this. With respect to the latter, those who believed the harm was intentional by the coalition made comments like: "Americans are against Muslims. For them, Taliban and civilians are the same." "They are here to kill and destroy our houses." "They think we are animals." "They think we are helping the Taliban, so they want to punish us." "They said we are Taliban. They suspect everyone." Dr. Dill describes these as "anti-Muslim" and "unfair punishment" narratives.

As for why there is such a strong belief that the harm was avoidable, the following was said: "We have been told the American technology is so advanced that they can see a needle from the air. Why then don't they distinguish civilians from Talib." "Americans are able to recognize black and white chickens from the air, how come they can't recognize women and children." "[The Americans] were defending themselves. They didn't mean to kill us. The Taliban were fighting them in the village, but what I blame them for [the Americans] is the airstrike. They could have used a bomb with less fire."

Other responses of relevance include: "If the Americans brought peace, everyone would praise and pray for them in spite of what has happened." "I accept that some ordinary people will die in war. If it ends in peace and removes the Taliban, I would accept this." "People in Helmand are ready to sacrifice people. I would sacrifice my sons for peace, but their [the coalition's] purpose is not peace." "There are more [than] 50,000 people [who] were living in Sangin district. Nearly one-fourth were killed and even more are displaced, yet there is no peace."

These survey results provide opportunities for better training one's forces and informing local populations. It demonstrates the value of seeking windows into that which people believe, with this likely different between conflicts and those engaged in those conflicts. If such information is not sought regularly from civilians in war zones, enemy prisoners, and one's own people and leaders and then integrating this into training and public information programs, wars may drag on, lost, or unnecessary harm occur. Bottom line, research like Dr. Dill's, and that of the ICRC which follows, is essential.

14.5 Improving Compliance

14.5.1 *The Roots of Restraint in War*

The following in italics is from the executive summary of *The Roots of Restraint in War (*ICRC, 2018). Reading the publication's full 53 pages is worthwhile to better understand and influence proper conduct in war, whether based on the formal law of war, this Manual, another approach, or a combination.

The report, based on two years of research by a group of distinguished scholars, sets out to identify the various sources of influence on the behaviour of those bearing arms in different types of armed forces and armed groups. To date, the bulk of the ICRC's work in this domain has centred on State armed forces and on ensuring that IHL is incorporated into their doctrine and directives, into the regular training of soldiers and into the disciplinary mechanisms designed to enforce compliance with the rules. As such, it has focused predominantly on the formal norms prescribed by IHL.

The ICRC has also engaged with many non-State armed groups, encouraging them to adopt codes of conduct to align the behaviour of their fighters with the norms of IHL. But the nature of armed conflict has changed over the last decade, particularly in the proliferation of non-State armed groups that do not have a central hierarchical structure through which to transmit, and train members in the rules of IHL. [Note: While this perception is common, non-State armed groups are more the norm historically in conflicts than those which are solely State vs. State.] *This has necessitated new research into how both formal and informal norms condition behaviour in the wide array of armed groups encountered in the ICRC's work, and how ICRC staff might promote restraint within their ranks.*

…Two constants stand out: first, there is considerable variation in the patterns of violence and restraint between and within armed organizations, and in the beliefs, mechanisms, resources and people that

influence their behaviour; second, those variations may also change over time. Therefore, rather than formulating new directives for the ICRC to adopt in its dealings with armed forces and armed groups, the report offers a framework of analysis to assist its staff in situating armed groups on a spectrum according to their organizational structure....

MAJOR FINDINGS

1. Integrating the law into doctrine, training and compliance mechanisms in centrally structured armed forces and armed groups increases restraint on the battlefield. The intensity of training and how norms are taught make a difference, and adherence is best tested under duress.

2. ***An exclusive focus on the law is not as effective at influencing behaviour as a combination of the law and the values underpinning it. Linking the law to local norms and values gives it greater traction. The role of law is vital in setting standards, but encouraging individuals to internalize the values it represents through socialization is a more durable way of promoting restraint.*** [Emphasis added]

3. Understanding the structure of armed groups is a first step in identifying potential sources of influence over their behaviour. The more decentralized the armed group, the more the sources of influence are external to the group. [While this often may be the case, it is believed the opposite may also occur as a function of the strengths and beliefs of the person or persons leading the decentralized group.]

4. By focusing on restraint as well as violence, we broaden our understanding of who or what influences behaviour. Analysing patterns of violence can help to pinpoint instances where restraint has been exercised, i.e., identifying the "positive deviance" which can help guide training and leadership oversight].

5. Youth make up the bulk of present and future fighters. Finding innovative and locally adapted ways to reinforce norms of humanity among them, including via digital media, is essential.

6. External entities are able to influence the behaviour of armed forces and armed groups. Making it a criminal offence for humanitarian organizations and local communities to interact with armed groups is counterproductive and hampers efforts to promote respect for humanitarian norms.

14.5.2 Blueprints for Engagement (from *The Roots of Restraint in War*)

The following "blueprints for engagement" summarize the main insights from the research on each category of armed force or armed group, and the questions we should ask ourselves when designing an engagement approach. They constitute a starting point for analysing armed groups without being a substitute for detailed and contextualized examination of their particularities.

[While these blueprints are oriented to the ICRC assisting an armed force or group in improving restraint in the use of inappropriate violence and better complying with the law of war, that which is outlined is also helpful for any military force endeavoring to improve such behavior internally and with its State and non-State allies. Additionally, it can be potentially useful in trying to better understand why one's enemy may not be compliant with the law of war, and how one might go about trying to improve such behavior.]

INTEGRATED STATE ARMED FORCES

CHARACTERISTICS

- *Strictly hierarchical decision-making and authority* [Theoretically, this is the case. In reality, with respect to conduct in war, many such decisions are made at company and below levels and is especially common in asymmetrical warfare.]
- *Codified, observable rules that are consistently applied* [Unfortunately, this is not always consistent.]

- *Observable signs of discipline (professionalism in uniforms, saluting, routines)*
- *Separation from civilian life when on duty* [In asymmetrical warfare, this is not necessarily the norm, as "integrated state armed forces" are often working or interacting with civilian defense forces and communities during combat, occupations, and intelligence operations.]

SOURCES OF AUTHORITY AND RESTRAINT

- *Senior leadership*
- *Junior officers and non-commissioned officers*
- *Doctrine, standard operating procedures, rules of engagement and informal norms and values*
- *Threat of punishment*
- [Dominant/respected fellow combatants]

SOCIALIZATION PROCESSES

- *Formal training, hierarchy and discipline*
- *Informal values and rituals (e.g. hazing, marching songs)*

INSIGHTS

- *The intensity of training in IHL (frequency, methods) makes a difference to battlefield conduct.*
- *The trainer must be credible with the audience, whether through experience or expertise.*
- *Training effectiveness is best tested under battlefield-like conditions.*
- *Norms of restraint need to be reinforced at critical moments by the immediate superior.*
- *Formal socialization can be reinforced or undermined by informal socialization processes.*
- ***Norms of restraint are more likely to hold if they are internalized as part of a soldier's identity – beyond "it is against the law" to "it is not who we are"*** [emphasis added].

CONSIDERATIONS

- *What events, legends, personalities and values form part of the armed force's identity? How do these shape formal and informal socialization?*
- *How much influence do junior and non-commissioned officers have on unit members' behaviour and viewpoints?*
- *What intersecting identities (e.g. religious, ethnic) do members of the armed force have?*
- *Do they create other entry points for messages on restraint?*
- *Do monitoring mechanisms weaken with distance from central command? How does this affect behaviour?*
- *What profile of trainer would be most credible with particular audiences?*

APPROACHES

- *Advise and assist in the integration of IHL into national laws and into military doctrine at all levels.*
- *Assist in the development of IHL training* [and instructors] *tailored to the audience.*
- *Find references that resonate with participants.*
- *Recommend that training be tested under duress.*
- *Promote the socialization of values related to IHL by supporting its integration into organizational culture.*
- *Track patterns of violence and identify instances of restraint. Investigate the sources of influence on restraint.*
- *Distinguish between violence as a policy and as a practice.*

- *Encourage States allying with other State and non-State forces to ensure that their partners socialize norms of restraint among their soldiers or fighters.*

CENTRALIZED NON-STATE ARMED GROUPS

CHARACTERISTICS

- *Leadership exercises tight command and control over subordinates through a strict hierarchy, but monitoring mechanisms may be weak*
- *A prominent doctrine or ideology outlines goals, approaches and world view*
- *Observable signs of discipline (professionalism in uniforms, saluting, routines)*
- *Isolated from civilian population (housed in camps or barracks)* [although actual operations may involve, or be directed as much at, the civilian population as at opposing forces]

SOURCES OF AUTHORITY AND RESTRAINT

- *Senior leaders and commanders of sub-units*
- *Group ideologues and codes of conduct*
- *Ideology, codes of conduct, discipline*
- *Threat of punishment*

SOCIALIZATION PROCESSES

- *Immersive regime (e.g. controlling all aspects of the daily routine)*
- *Initiation rituals and informal bonds*

INSIGHTS

- *Groups espouse an elaborate doctrine or ideology that specifies goals. They regularly publish or broadcast the group's ideas and values to a wider public.*
- *The rules stipulate the parameters and targets of permissible violence.*
- *A weak capacity to monitor the behaviour of fighting units leaves unit commanders with scope to interpret how norms are understood and applied.*
- *Group loyalty is forged through intense socialization practices that aim to reshape members' identities.*

CONSIDERATIONS

- *What is the group's ideology? What does its code of conduct say about violence and restraint? Where are the overlaps with IHL?*
- *Who articulates or interprets the group's doctrine or ideology? How are group beliefs and rules socialized among members?*
- *Are there variations in patterns of violence between different units of the same group? What does this convey about command and control?* [This can also be the case in integrated State armed forces.]
- *What is the relationship between the armed group and local communities?* [This is also especially crucial for integrated State armed forces in asymmetrical warfare.]
- *Are communities able to resist being drawn into the conflict?*
- *What profile of trainer is most credible with particular audiences?*

APPROACHES

- *Track patterns of violence and identify instances of restraint. Investigate the sources of influence on restraint. Distinguish between violence as a policy and as a practice.*

- *Discuss parallels between the group's doctrine and IHL, and seek further alignment. Discuss with the leadership any disparities between the rules and observed behaviour. Advise on ambiguities that allow different interpretations of the rules.*
- *Discuss with the leadership the informal norms that may undermine formal rules, and the strength of monitoring mechanisms.*
- *Discuss with communities ways in which they engage with an armed group and how they shield community members from violence and recruitment.*

DECENTRALIZED NON-STATE ARMED GROUPS

CHARACTERISTICS

- *Fluid alliances of small armed groups*
- *Individual commanders retain decision-making power over group members*
- *Units may break away to join new associations, without compromising group cohesion*
- *Multiple decentralized groups can work in a broader movement, giving local, regional and global reach*
- *Loose coordination within the alliance, including in military planning and operations*
- *Few observable signs of military discipline.*

SOURCES OF AUTHORITY AND RESTRAINT

- *Unit commanders*
- *Local business, religious or cultural elites*
- *Senior leadership*
- *Ideological and religious texts*
- *Threat of punishment*

SOCIALIZATION PROCESSES

- *Extremely varied*
- *Can be based on local culture and customs*
- *Could include military and ideological training*
- *Strong informal socialization in the peer group*

INSIGHTS

- *The more decentralized the armed group, the more its behaviour is influenced by sources external to the group.* [Unclear. The reverse would seem similarly common (see following).]
- *The conduct of individual units depends heavily on the commander's preferences.*
- *Groups are integrated into local social networks (e.g. communities, local notables) and can retain links to regional or global armed groups.*
- *The influence of local actors on the behaviour of the armed group fluctuates over time and in response to events.*
- *Group values and rules can promote restraint, even in the absence of monitoring systems.*

CONSIDERATIONS

- *How does the alliance of armed groups fit together?*
- *What is the nature of the relationships between small-group leaders and alliance leaders?*
- *What is the relationship between the armed group and the local community?*
- *Do community/business/religious leaders exert influence on armed-group behaviour?*

- *Does the group draw on socialization processes based on local customs or traditions (e.g. coming-of-age rituals)?*
- *How has the influence of key actors in an armed group changed over time, and why? What is the source of their influence (e.g. religious, financial, political or social).*
- *What are the customary rules on warfare? What parallels are found in IHL?*

APPROACHES

- *Track patterns of violence and identify instances of restraint. Investigate the sources of influence on restraint. Distinguish between violence as a policy and as a practice*].
- *Prioritize dialogue with local commanders. These may change regularly.*
- *Develop a nuanced understanding of the most important sources of influence over an armed group's behaviour, noting the type of authority they draw on.*
- *Engagement strategies need to mirror the structure of the alliance, interacting at the local, national, regional and global levels.*
- *The ICRC must be consistent, predictable and transparent in all that it says and does.*

COMMUNITY-EMBEDDED ARMED GROUPS

CHARACTERISTICS

- *Comprise 10–50* [generally] *young men, and in some cases women, from a local community*
- *Formed to defend community interests*
- *Flat hierarchical structure*
- *Mobilized to fight by community notables or politicians*
- *Initiation rituals forge group cohesion*
- *Mobilization is temporary* [although need may persist]
- *Codes of conduct are unwritten and reflect local values, customary law and traditions*

SOURCES OF AUTHORITY AND RESTRAINT

- *Traditional leaders*
- *Local politicians*
- *Local religious leaders*
- *Local business elite*
- *Leaders of local youth fighters*
- *Community norms and values*
- *Community debates over interpretation of norms*

SOCIALIZATION PROCESSES

- *Community coming-of-age rituals*
- *Local religious and customary practices*
- [Unit "traditions" which have evolved]

INSIGHTS

- *Group members do not remain mobilized, but return to their roles in the community.*
- *Community-embedded groups may not choose when, where or how they fight.*
- *Local, regional and national actors may compete for influence and control over such groups.*
- *Traditional norms regulating violence and restraint may be subject to community debate.*
- *The image of chaotic, uncontrolled violence by these groups may mask who is really in control.*

CONSIDERATIONS

- *How do community-embedded armed groups fit into their communities?*
- *How do group leaders emerge? On what does their authority lie?*
- *What is the extent of their direct influence over the group?*
- *Who influences when and how a group fights?*
- *What are the customary rules on warfare?*
- *What parallels are found in IHL? How does the ICRC engage with group members when they are in their community role? Can we use this engagement to indirectly discuss behaviour during armed conflict?*

APPROACHES

- *Track patterns of violence and identify instances of restraint. Investigate the sources of influence on restraint. Distinguish between violence as a policy and as a practice.*
- *Acquire a deeper understanding of how community-embedded groups relate to different types of local and national authority figures.*
- *Promote restraint through community norms, customary law or other legal frameworks (e.g. IHL and Islam).*
- *Pursue a cross-sectoral approach to understanding and engaging with communities.*

14.5.3 Further Guidance

As indicated by the ICRC, the above blueprints are not meant to be a substitute "*for* [a] *detailed and contextualized examination of* [the] *particularities"* of a military force or group which one is trying to influence to have greater restraint and compliance. Ideally, there would be a manual dedicated to this purpose which might easily be longer than this Manual if it were to cover all relevant variables and how these might be effectively addressed. While that is not the purpose of the Manual, a number of guidelines have been included below which have the potential to improve compliance.

14.5.3.1 Genesis

One of the first things a newcomer notices on the ridgeline above the Georgian capital city of Tbilisi in the Caucuses is the towering statue of a woman holding a sword in one hand and a chalice in the other. She is Mother Georgia with wine if you come in peace; a sword if you do not. General Mattis, in his book, *Call Sign Chaos*, wrote that he shared with local leaders in whose lands his Marines operated that his forces could be either their best friend or worst enemy. Our own national seal has an eagle with arrows in one talon and an olive branch in the other.

All three are reflective of what our combatants must be trained for and expected to be:

- competent, efficient, effective fighters who can kill and destroy when necessary, and
- caring, empathetic, helpful humanitarians and seekers of peace when not.

An absolute belief that this is what our combatants should be is the first step for actually having a fighting force which can be given moral and operational agency for properly exercising reflective compliance with the law of war. If there is any wavering in this fundamental belief at any level of the chain of command, other efforts to achieve compliance with the law will be undermined and greater violations will likely occur.

14.5.3.2 Initial Recruitment

This same belief or philosophy should exist and readily apparent during the recruitment of new combatants. If recruiting materials and advertising are used, they should not avoid the violence of war

but make it clear that the role of a protector of the weak, helpless, and those in need is equally and sometimes even more important. The same should be evident when contact is made with the recruiter. It should be made clear that if the reason for joining is solely to engage in violence, these are not the type of soldiers sought if options exist as to how to man one's forces. If they do not, then training must address these pre-existing attitudes which can undermine compliance.

Throughout the world, military units enter villages and neighborhoods to brutalize, steal from, and destroy the property of the residents while seizing their young men and women, as well as children, to augment their ranks. When this occurs, such units and their commanders have already undermined any moral standing with those they recruit when the decision as to proper conduct devolves to that of individual combatants and small units which is common in war. Thus, even if recruitment is forced (which includes a draft), it should be done in a manner which shows respect for the person and their community and a model for the type of person the recruit is expected to be or become.

14.5.3.3 Indoctrination/Training

While currently many States may do a better job in law of war training and indoctrination than in the past, there remain shortfalls, oversights, and missed opportunities. Thus, it is imperative that one not be satisfied with what has been accomplished. If the following have already been incorporated into a force's training and indoctrination regimens, this is validation that which is being done is sound. Yet opportunities likely still exist for how proper conduct in war might be strengthened.

Useful reference texts for enhancing training are: *The Law of Armed Conflict, International Humanitarian Law in War,* Gary D. Solis (2018); *International Law and Armed Conflict, Fundamental Principles and Contemporary Challenges in the Law of War,* Laurie R. Blank, Gregory P. Noone (2013); *The Law of Armed Conflict, An Operational Approach,* Geoffrey S. Corn et al (2012); *The Handbook of the International Law of Military Operations,* Terry D. Gill, Dieter Fleck (2016)*;* and *Handbook on International Rules Governing Military Operations,* ICRC (2013). All are by those with legal backgrounds (several with military experience) and often include firsthand accounts, historical examples, and legal cases related to the application of the law of war. Sections sometimes include a series of relevant questions which cannot be avoided when combatants, judge advocates, and others make conduct in war decisions. While their texts are oriented towards compliance with the formal law of war as written, they can still be used effectively with this Manual.

A further resource is the *Routledge Handbook of Military Ethics* (2015) edited by George Lucas, Jr. Its authors, to include contributors with relevant military background, provide worthwhile insights into how and why people violate desired conduct regardless of the rules and standards of compliance sought. Put simply, if those responsible for training do not understand what causes combatants to deviate from desired conduct, training will likely be ineffective. This book contributes to such understanding.

a. Orientation

In the first remarks by a training commander to new recruits on their first day in the military, before the first instruction in the arts of killing and destruction are ever given, it should be unequivocally clear to new recruits what is expected of them, that they are not just to be fighters but also humanitarians, that it is possible and essential to be both, and that it may be the hardest thing they will ever do, but the most satisfying if they succeed in balancing both well.

b. Code of Conduct

One of the first classes for new recruits should be instruction on the code of conduct all combatants are expected to follow, similar to the one found at the beginning of this Manual. This should provide a concise, understandable foundation which can guide instruction and discussion in other training classes

and field exercises. Upon completion of a new recruit's initial training, he or she should be able to cite each of the code's principles and have a basic understanding of their application to the military responsibilities with which they will be tasked, e.g., infantry, armor, artillery, engineers, air missions, intelligence, civil affairs/civic action, military police. Additionally, they should understand, in both practical and moral terms, why this code is not simply platitudes but important, essential, right, and just.

c. Constant Integration/Assessment

Law of war considerations should be present in some manner, even if not highlighted or always apparent, in virtually every facet of training. Those developing and conducting training classes and courses, without detracting from their primary purpose, should assess whether there are law of war considerations and principles which can be included in each. A small example, and one of the starting points for new recruits, can be on the rifle range with popup targets. Except for specialized combat courses often used when preparing for clearing buildings, basic training rifle ranges are often laid out where any target that pops up is to be engaged. On these ranges, it would be appropriate to have some targets be non-combatant or friendly targets which should not be fired upon.

Associated with incorporation of law of war elements into training manuals, live fire exercises, field training, exams, and other materials and activities is the need to constantly take the opportunity to hold after-action assessments with trainees as to law of war compliance. These are especially relevant after multi-unit field exercises, practice patrols and ambushes, and SERE (survival, evasion, resistance, escape) courses. Just as one would address the tactical, force selection, communications, security, logistics, and other essential military considerations after completion of such training exercises, it is essential to review how one's actions might have adversely or beneficially affected non-combatants, their property, and their attitudes towards your forces and cause. Depending on the exercise, a similar assessment may be appropriate with respect to conduct towards aggressor force combatants.

d. Operational Relevance

The law of war is often violated because it is perceived to place greater value on other people's lives than it does the combatant's, that it may cause more harm personally or among one's unit than necessary, that an essential mission cannot be achieved, and other similar beliefs and perceptions. For many honorable, responsible combatants, what is often expected of them is honestly viewed as unreasonable and irrelevant. Thus, it is important that such issues be addressed during training.

Even if one does not concur with that presented in this Manual, its positions will often be those which many combatants believe, support, and act upon. If one does not wish them to do so, it is not enough simply to say that the law is the law and they must comply. Rather these differences should be openly confronted with it being demonstrated that there is a greater relevance and reasonableness for obeying formal law than violating it. If this is not done, most combatants will do as the national guard sergeant was quoted as saying at the beginning of this chapter, "If I trust my team, I will do what is right. If I don't, I will do what is legal." And they will also do what they believe is right when by themselves and believe no one will learn what they have done. The goal should be that combatants will always do what is right whether or not they trust their team or acting when others may never know what was done. That will never consistently occur unless combatants believe in that which is expected of them.

e. Command Training

Generally, training in the law of war naturally focuses on that which is expected of combatants in certain situations. What may be equally important is training commanders and NCOs, not just in the law and rules, but how to more effectively achieve conduct desired of their combatants. This is not something one necessarily knows intuitively. It includes how to lead by example, be clear and consistent with respect to

expectations of conduct and consequences of non-compliance, and be better attuned to determining whether things might be going awry. It includes how best to determine whether to counsel, take administrative non-judicial measures, or proceed with charges and courts-martial; or to understand how to turn around a new unit to which one has been assigned which has little respect for that which is expected conduct. It includes teaching a junior officer or NCO who has never seen combat to be able effectively to communicate and achieve essential conduct from hardcore veterans who may have little tolerance for being instructed by someone less experienced and unproven placed over them.

f. Combatant/Unit Diversity Tailoring

Just as the ICRC found a different blueprint was needed for different categories of military entities, a different training blueprint is required for different categories of combatants and units within the same military force. One size does not fit all. This will require not only a broad range of different types of training regimens as to proper conduct but also a range of different types of instructors. With respect to the former, conduct in war training for an infantryman will obviously be different than for military police which will be different than that of pilots and naval personnel. Even within an infantry unit, the most effective training may be a function of the responsibilities of personnel within that unit. Further, an instructor for special operations personnel will likely require someone with different credentials than the instructor for new recruits in more conventional units. Essentially, to be as effective as possible, each class/course and those who teach them needs to be tailored to the targeted combatants, units, and functions and responsibilities within units.

g. Virtual Role-Playing Games/Training

The Roots of Restraint in War includes as one of its key findings:

> *Youth make up the bulk of present and future fighters. Finding innovative and locally adapted ways to reinforce norms of humanity among them, including via digital media, is essential.*

Throughout the world, even in less-wealthy nations, young people, especially boys and young men, increasingly play video games with those of war being among the most popular. Thus, one of the more powerful and effective means for increasing compliance with the law of war may be the development, use, and dissemination of video role-playing games, not just as part of training by those presently in the military but also to young people who may one day find themselves in the military, in a conflict zone, or a civilian leader/influencer of those in the military.

The world's militaries should work with humanitarian organizations, international organizations, law schools, charitable foundations, the diplomatic corps, and others to develop such games/training tools that do not simply parrot the formal law of war but place the role players into a broad range of realistic situations, some of which may suggest that violation of the law is the most reasonable, moral, responsible option. Roles would include: new recruits soon to be in a combat unit, platoon/special operation team leaders, higher level commanders, those responsible for prisoner of war, advisors to senior civilian leaders, judge advocates, diplomats, members of humanitarian and advocacy organizations, civilians caught up in war, members of international organizations, the media, enemy propagandists, information operation specialists, and others. Games can be tailored to specific groups and roles as well as into a comprehensive single game with multiple players interacting directly and indirectly with other relevant players. Eventually, such games/training tools should be in multiple languages and for a range of conflict types and belligerents. Strategies should be developed to get these into the hands of those in the military but, equally importantly, into those of young people who may one day become engaged in war, address the fallout of war, prosecute or defend war crimes, report on war, or vote on or make policy decisions related to involvement and proper conduct in war.

14.5.3.4 Cadence Calls/Marching Songs

Cadence calls and marching songs play a valuable role when moving troops in formation by foot from one point to another. They provide humor and relief from an often tedious, tiresome but essential exercise; help maintain esprit de corps; and foster unit cohesion. Yet in doing so, calls and lyrics can unintentionally and subliminally undermine certain principles one is trying to instill in one's combatants, to include undermining compliance with the law of war.

During the Vietnam war, the anti-war movement often hurled epithets at soldiers, one of which was accusing them of being baby killers. As a result, certain cadence calls sarcastically included that as a trait of elite troops. While those at the time may have understood why and in what vein this was being done, decades later a similar cadence call was still being used with airborne trainees at Fort Benning, trainees who likely had no idea as to the origins of what was being said. Many cadence calls and marching songs understandably stress the kick-ass, hard core, "meanest mother fucker in the valley" characteristics as to that which the trainee should aspire to be when he or she joins their unit. Thus, care should always be exercised, not just in the selection of cadence calls and lyrics commonly used, but also being consciously aware of the ongoing use of small, seemingly innocuous phrases, examples, and images which may inadvertently and subliminally create a sense of license for combatants to conduct themselves contrary to the values and principles expected of them.

14.5.3.5 Integration

Once training is completed and/or when personnel are assigned to their operational unit, there is an integration process that occurs both formally and informally in the units to which they are assigned. The formal portion has been touched on above. The informal portion has not. With respect to the latter, there are at least two types found, that which essentially is tradition within a unit, and that which is more erratic and individualized. Tradition can be as simple as hazing or initiations not dissimilar to that which occur in fraternities. However, tradition can also be much more brutal and callous. For example, it could include the murder of a civilian, the brutalization or group rape of someone who has been detained. The more erratic, individualized integration is generally by smaller subgroups or individuals within the unit who have their own values and ideas as to what is required to become an accepted member of that subgroup or follower of that individual. It is often here where one may find individuals who will actively ignore or undermine organizational standards for personal reasons, to include simply that they can. At all levels, but especially at the company and other lower operational levels, commanders and NCOs, as well as individual combatants, must be consciously aware of the potential for the preceding possibilities. As a consequence, each should work to insure that, within their command, unit, or subgroup, the process of integration of new personnel into a unit is not blatantly or subtly creating an environment where it is acceptable to violate the law of war when there is no moral, military, or other responsible and rational reason for doing so.

14.5.3.6 Interpreters/Translators

If combatants cannot effectively communicate with enemy combatants and noncombatants, there is a far greater likelihood of frustrations and misunderstandings on both sides which can result in violations of the law which need not have occurred. Often when two belligerents speak totally different languages, especially if one of those languages is not widely spoken around the world, one often finds that competent interpreters/translators may only be available at the company or even battalion level. However, when planning personnel logistics for a conflict, and definitely if it is expected to be or has become an extended conflict, every reasonable effort should be made to have competent interpreters/translators down to combat platoons and units operating independently. Not only will this reduce conduct violations, it will allow a unit to be more operationally effective.

14.5.3.7 Zip Ties/Flex Cuffs, Gags, Hoods

As minor as it may seem, equipping all fire team and squad sized units, if not every individual combatant in the field, with zip ties/flex cuffs, gags, and hoods may reduce certain violations of the law of war. Some of the most egregious violations can occur when combatants are captured or non-combatants detained during higher risk combat operations. If there is no way to safely and quickly secure and possibly quiet such persons or keep them from observing that of intelligence value, in the heat of a firefight or when making decisions as to whether to release, kill, or force accompaniment vs. the relative effect on a mission's success and the survival of one's self and unit, the decision may legitimately be to choose to kill the detained person in order to reduce or eliminate these risks. Ensuring all combatants have ready access to a lightweight effective means to secure, keep quiet, and blindfold detained persons in such situations provides a fourth option over the greater risk of release or forced accompaniment, or the tragic but possibly essential killing of the detained person.

14.5.3.8 Command Direction

While the ultimate responsibility remains theirs, special operations and company grade officers and NCOs will have an easier job of improving compliance with desired conduct if field grade and higher commanders make clear their expectations when they first assume command of a unit or when new units or key personnel are assigned to their command. Variations of Mattis's "no better friend, no worse enemy" is a good starting point for doing this.

It should be made clear to those to whom the commander speaks that this "best friend-worst enemy" mantra is as relevant to each of those he commands as it is to the people in whose territory they operate. Basically, soldiers from the lowest ranks up should understand that if they do what is asked of them, their commander will always have their back, will go to the wall for them no matter what the issue, but if they do not, they could have no worse enemy, one who will tear them a new asshole without a moment's hesitation for having endangered their mission and their fellow combatants.

This first conveying of expectations as to conduct can often be more effective if done by the field grade commander directly rather than through the distribution of written orders or copies of a speech delivered to others. While that in writing may be helpful in conveying details and for future reference, it can be more impactful for combatants to hear what is expected directly from someone several ranks higher who thinks enough of his or her troops to come to the field to convey personally what is important, what is a priority. Finally, having this come from a more senior officer, provides company level officers and NCOs a degree of cover when they have to enforce rules on the battlefield.

14.5.3.9 Clarity, Example, and Consistency

It is the responsibility of commanders and NCOs at all levels to be clear and consistent with respect to expectations within their command and areas of responsibility as to conduct and how this might vary based on applications of the principles found in Chapter 3. As Mattis related in *Call Sign Chaos*, they need to know and understand the "flat-ass rules."

Equally as important as communicating this, commanders and NCOs must consistently lead by example. If at any time a commander or NCO acts in a manner that seems inconsistent, clarity should be conveyed as to why it was not inappropriate in that situation.

Further, there should be clarity and consistency, not just by commanders and NCOs, but throughout the review and enforcement process, as to the consequences of noncompliance if these principles are ignored or there is a breakdown in discipline.

Without clarity, example, and consistency, those at the tip of the spear, those pulling the trigger, dropping the bomb, handling prisoners, conducting interrogations, and making decisions as to when and how all this should and should not be done, will not have an effective and understandable framework within which to guide their decisions as to proper conduct.

14.5.3.10 NCO Support

No efforts to improve compliance with the law of war no matter how one defines that law will be successful without the buy-in, support, guidance, and influence of NCOs. If you lose your NCOs, you have lost this battle and possibly its war. The challenge, however, is that NCOs are not new recruits whose molding necessarily began as early as the recruitment process. NCOs often already have strong beliefs and experiences which could be highly supportive of compliance, especially if it is based on responsible custom and practice. But such beliefs and experience may also have led them to believe the only way to be effective is by some variation of the following unfortunate adage from the Vietnam war, that "If you grab them by the balls, their hearts and minds will follow." They may honestly believe for practical reasons that the sword and chalice approach is BS and will cost lives of their men unnecessarily and not achieve victory on the battlefield. Thus, it is essential that one of the first things which must be done to improve compliance with the conduct desired is to secure NCO buy-in if it does not already exist, remove the NCO from the unit or positions of combatant influence, or be acutely aware of and control their worst inclinations if their continued presence remains essential or otherwise cannot be avoided.

14.5.3.11 Unit/Personal Judge Advocates

It the preceding chapter, it was referenced that a senior judge advocate advised JAs not to fall in love with their clients. As a judge advocate's first obligation is to the military of which he or she is a part unless specifically assigned to represent someone in a legal proceeding, such advice is understandable. Yet, it is also understandable that unless a JA has been assigned to them as their personal counsel, combatants should not assume judge advocates have their best interest at heart, and should not seek their counsel unless willing to follow the advice received, or risk being reported or testified against if they do not.

While the preceding is reasonable given how the military legal system is currently structured, an unfortunate situation exists in war not present in civil and criminal law where one can generally consult a private practice attorney and be protected in what is shared through privileged communication. While one could argue that, just as with civil and criminal law, any combatant has the right to secure their own private counsel, this is generally not realistic in the midst of a conflict. As a consequence, there will be instances where a commander or individual soldier might wish to secure legal counsel before or after a combat operation, but chooses not to because of the uncertain legal risks to self, those he or she commands, or fellow combatants.

There is a solution. A corps of JA specialists should be created to provide legal counsel to military personnel in the field on matters related to their professional responsibilities, which would include law of war matters. Appropriately trained judge advocates from this corps would be assigned at battalion and below prior to and during deployment to conflict areas. Their legal responsibility would be to those in the unit to which they are assigned, not to the larger organization and command structure. They would adhere to a militarily appropriate confidentiality code made available and explained by the JA to those who might seek their counsel. Of course, even under professional standards on confidentiality, there are situations in which counsel is obligated to report certain information shared by a client. The client combatant should be made aware of such possibilities before sharing information with or asking questions of counsel.

Within the battalion, this specialized judge advocate would be rotated between frontline units, both in the field and at static locations. This would provide the JA a greater appreciation of the realities of combat,

increase respect from those they assist for having shared their dangers, and greater access opportunities for individual combatants to consult with and be influenced by the JA. Under the law of war, judge advocates should have similar responsibilities and protections during conflicts as certain medical and religious personnel and wear designating insignia.

With confidentiality, more commanders and individual combatants are likely to consult (1) in advance of an anticipated action or possible action, (2) concerning a decision made during an operation as to whether it was the legally, morally, and militarily best decision, and (3) whether an action by another combatant was appropriate given the circumstances faced and information known. In all these situations, regardless of what the judge advocate advises as being appropriate, it would be the decision of the individual commander or combatant as to appropriate conduct in the field or the reporting of an incident.

Sometimes this approach may result in unjustifiable acts going unreported or unpunished. More often, after discussing a matter confidentially with a judge advocate bound by confidentiality, combatants and commanders will be better equipped to make sounder decisions. Hopefully, as a result, fewer unjustified violations will occur, and more unjustified violations reported than is now the case.

14.5.3.12 Code of Silence

Within social cultures, codes of silence are common whereby certain information is not shared with "outsiders" to protect members of that culture, the culture as a whole, and even those from whom the information is withheld. The military is a network of such cultures. Its codes of silence can exist between small cliques and those in authority; lower-level enlisted personnel and NOCs/officers; field troops and those in the rear; lower and higher levels of command; the military and civilians; the military and the media; soldiers and their families; and combatants and the military's legal system. The reasons for silence range from well-intentioned to self-serving; ethically justifiable to morally corrupt; soundly reasoned to misguided.

With respect to violation of the law of war, there is generally a strong ethos of silence for commanders to protect their careers, support for the war and the official narrative for that war, and those they command. A similar ethos exists among individual combatants to order to protect themselves and their comrades from possible negative fallout. While there are those who would disagree, there are times when silence can be justified. There are others when it cannot. The challenge is how to work within codes of silence to achieve what Chayes and Chayes have indicated as reasonable with respect to treaties, that their "*regimes as a whole need not nor should be held to a standard of strict compliance but to a level of overall compliance that is "acceptable.'"* Doing so is especially critical if one accepts the basic premise of this Manual.

What complicates the issue further is the matter of transparency. The media, families of those who have died, politicians and supporters of parties not in power, and those who are more politically liberal generally press for greater and even absolute transparency for any act which may potentially have violated the law of war or involved fratricide (i.e., death by friendly fire). Yet, a policy of absolute transparency in all such situations increases the probability that at some, if not all, levels of the chain of command, information may be suppressed or altered and/or the investigative process undermined.

What exists are tensions between (1) the public's and combatants' families right to know, (2) bringing to trial and punishing those who violate the law of war, domestic law, and rules of engagement, and (3) learning from whatever occurred—whether accidental, an error of judgement, or malicious intent—to reduce the likelihood of its recurrence in the future. Ideally, each would reenforce and not negatively affect the other. Unfortunately, this is not reality. The greater the emphasis on the first two, the less likely efforts to achieve the latter will be as effective as they might otherwise have been. Focusing primarily on the latter, can sometimes unnecessarily or inappropriately undermine the right to know and

the proper punishment of those who have committed an actual war crime. Nonetheless, decisions have to be made as to which will be the higher priority across widely varying situations.

Under this Manual, their importance would generally be in reverse order of that indicated above: first, learning from the past to do better in the future through appropriate counseling, disciplining, and training; second, punishing those who committed war crimes; and, third, providing an unfettered right to know by those outside the military **(likely inconsistent)**. While there should be no coverups within the military, full public disclosure of every possible violation and all details of a violation is not always in the best interest of winning the war, good order and discipline within the war, or the psychological healing, improved future behavior, and/or professional development of combatants who may have erred but did not commit a war crime.

With respect to the "right to know," it should be understood that under the law of war and international human rights law, censorship is permissible during national emergencies such as war. Additionally, under the U.S. Supreme Court decision on Parker vs. Levy (1974), individual soldiers do not have full First Amendment rights. Justice Rehnquist "*noted that the 'fundamental necessity for obedience and…the imposition of discipline' might require greater limitations of First Amendment rights than are tolerable within civilian society. These necessities arise from the fact that the military is 'a specialized society separate from civilian society,' ready to fight wars and act without question in response to orders* (First Amendment Encyclopedia, 2019)."

This limitation of First Amendment rights would also preclude those in the military from making "*false speech about fictitious battlefield accounts*" (2013 opinion of The Judge Advocate General of the Air Force based on review of legal precedence) such as occurred in 2003 regarding the actions and capture of Jessica Lynch in Iraq and in 2004 regarding the events surrounding the death of Patrick Tillman in Afghanistan. While those in the military may legally withhold information from the public and families in certain situations, they should not provide false narratives, nor by extension, can personnel legally be ordered to do so. Put simply, either be silent or be truthful.

Thus, it can be legally permissible to withhold information from the public and the families of those who are killed, to issue orders not to share certain information to those outside and who oversee the military, but not to disseminate false information on matters related to possible law of war infractions and friendly fire incidents. This should never be done to protect careers, avoid charges or courts-martial when they should have occurred, or undermine revisions in policy, training, and counseling which might result in improved conduct throughout combat units.

Returning to the Patrick Tillman affair, based on Krakhauer's book, beyond the accidental death of two soldiers and serious injury of two others by friendly fire (neither of which is an infrequent occurrence in war), an additional tragedy is that the only ones to be truly disciplined and suffer material consequences for what occurred were four enlisted personnel and their platoon leader (who became a scapegoat for poor decisions of his superiors). Of those higher in the chain of command, from captains through the Secretary of Defense, the Army took action against only six of the many who had made a poor tactical decision, or attempted to cover up and/or lied about what occurred. Actions against these officers only happened after the fifth investigation by the Army and a Congressional hearing three years later. None of the actions taken were severe. The worst apparently were a censure and two memoranda of concern.

Yet many of the actions of these officers and possibly the Secretary of Defense and other DOD civilian personnel should have resulted in charges and courts-martial. Nonetheless, what occurred is common with respect to most law of war violations: those above company level seldom face or suffer material consequences.

Keys to increasing the likelihood serious violations will be made known and handled appropriately include:

- Having training and discussions at all levels and in all units which focus on the natural inclination to protect those one commands and with whom one is close while still doing that which is moral and essential, with such training and discussion appropriately nuanced to the range of situations that may be encountered, not simply black letter law and legal processes with which one is expected to comply
- Making available, at the company and operational team level, legal counsel to individual commanders and combatants bound by confidentiality, protecting those who report violations, and punishing those who maliciously make false allegations
- Limiting courts-martial to more egregious violations, e.g., those found in Section 13.6 as "Grave Breaches of This Manual," while handling other violations using alternatives referenced in 13.16.4.3 (Action by Convening Authority)
- Making it clear throughout the chain of command and among incident investigators that if anyone—officer or enlisted, lowest ranks or highest— knowingly and inappropriately subverts the process or covers up what should be known within the military, and by those who oversee the military, related to a possible violation of acceptable conduct, he or she will be charged and appear before a court-martial.
- Restructuring the terminology and tailoring the investigative process to whether possible conduct infractions relate to administrative procedures, incidental/excessive harm, friendly fire, or tactical/operational decisions, rather than referencing all as possible war crimes from the outset. If the investigative process determines the conduct may have been an actual war crime, it can then be handled as such at that time and referred to accordingly.

While each of the preceding is important, for those on the front lines, the most critical may be the need for confidentiality if something is reported. If the person who reports a possible violation is known to have done so by the alleged perpetrator, friends of the alleged perpetrator, a commander who may be directly or indirectly responsible, or fellow combatants who disrespect a "snitch" or disagree a reported offense was, in fact, an offense, repercussions may follow. These can include a loss of respect, oral attacks, shunning/ostracization, extra duty, inappropriately dangerous assignments, lack of promotion, physical abuse, and even being killed (which can be done more easily in combat zones without detection). Thus, it is essential that a process be in place which appropriately shields persons who report possible violations. In doing so, it is also important the process provides severe penalties to the reporting party if it becomes clear the accusation was false and made for personal antagonisms against the accused or personal benefits to the accuser.

14.3.5.13 Media-Military Relationship/Responsibilities

The media considers itself a positive force performing an essential role during conflicts. Often this is the case. Other times it is not and can be the cause of avoidable harm to well-meaning and possibly innocent combatants, non-combatants, and belligerents fighting a just war. For this and other reasons, censorship is permissible under the law of war, and the ICCPR during national emergencies such as war, with the media sometimes playing an essential role in the war efforts of the belligerent of which they are a part.

Reasons why the media, when not working in concert with the belligerent of which they are citizens or members, may intentionally or unintentionally cause harm include:

1. Belief that transparency, i.e., the right of the public to know, is paramount to most other considerations with the concomitant right of the media to have virtually unlimited access to information trumping any possible merits of lesser transparency and a more ignorant public

2. Use of the media as a political weapon to gain or keep power by slanting news, leaving out essential information, conveying known lies, and spreading unsubstantiated theories
3. Failure to follow the media goal and responsibility of not only "getting it first, but first getting it right" when knowing all sides, to include affected civilians in war zones, are incentivized to feed false/incomplete information to the media
4. Failure to appreciate the ramifications that often "first reports from the field are never correct" and the military fully understands this even when they make early reports public
5. Media access to conflict areas and, thus, information as to civilian casualties, destruction, and possible law of war violations not always available to attacking forces after air/artillery strikes and their forces' withdrawal after a battle or other kinetic engagement
6. "If it bleeds, it leads," "bad news bias," and variations thereof
7. Drive to increase readership/viewership for financial benefit or personal acclaim
8. Lack of understanding of the law of war by those who report from the field, edit copy, and determine what is reported

All the preceding has relevance with respect to improving compliance with the law of war by combatants and reducing combatant and non-combatant casualties, whether law of war or friendly/accidental fire related. While the media may not realize it, each of the above can cause an increase in law of war violations and unintended casualties rather than their reduction if everything surrounding possible incidents is always and completely brought to the publics and civilian leadership's attention through the media.

Before proceeding, it is important to understand this Manual's belief as to the paramount purpose of the appropriate level of transparency by the media when knowledge of possible law of war violations or friendly/accidental fire incidents are learned of:

> *If this knowledge is made available first, and possibly only, by the media to appropriate persons in the military as to what is believed to have occurred, lessons can be learned and steps taken to reduce the likelihood of future recurrence.*

To do otherwise, i.e., total transparency, can often unfairly or incorrectly destroy careers and reputations, cause severe unnecessary personal harm to individuals and their families, and result in civilian leaders making poor decisions driven by public opinion based on flawed information. This increases the likelihood the code of silence addressed in 14.3.5.12 will continue to prevail to avoid such consequences at all levels of the military. The challenge, then, is how to get knowledge of possible violations of the law of war and accidental harm to soldiers and civilians into the hands of those who will treat responsibly and help move the process forward fairly, justly, and in a way future recurrence might be reduced.

This potentially can be done through an improved relationship of the media and military which respects their respective goals and principles. The following are steps which should be considered to allow this better to occur:

Military

1. Establish an outside-of-the-normal chain of command contact point in all field and coordinating commands of each branch of the military to receive, process, and advise upon confidential reports from the media and others as to possible law of war violations and accidental casualty incidents
2. Provide confidential updates to the reporting entity(s) as to results of investigations; charges or other actions considered, brought, or dropped; and coordination, training, oversight, and other steps being implemented to reduce recurrence if reasonably believed to be a violation

3. In addition to open media briefings, hold periodic confidential briefings for cooperating media organizations as to possible law of war and accidental fire incidents which are not yet public, fully addressed by the military, or yet known to the media
4. Notify first the media organization which confidentially reported the possible incident when it is appropriate for information to be publicly released by the military on that incident
5. Unless part of a legitimate ruse under the law of war, either decline to comment, or convey only that believed to be truth as known to it, when addressing possible law of war violations or accidental casualty incidents regardless of whether in a public or confidential briefing, release of information to the media, or under the Freedom of Information Act
6. If a media organization or its staff fail to meet the following standards, consider denying them complete access to briefings or one's forces

Media

1. Unless so egregious as to be an obvious flaunting of the need to comply with the law of war or unless already part of public statements or print, electronic, social media, or television releases/programs, report all information uncovered related to possible law of war violations and accidental fire incidents only to the contact point designated by the military for receipt of such information (Note: This is especially important when a media organization has access to impacted areas not accessible to the military-being-reported due to battlefield conditions.)
2. Publicly and responsibly release information without prior military approval only if the military fails to act responsibly in a reasonable period of time on information confidentially reported to it
3. Do not include names of persons actually or potentially involved in possible law of war violations and accidental fire incidents until such time as investigations are completed, needed actions have been or are in the process of being taken, the identity of that person is essential to be known publicly, or it is believed actions taken or not taken against persons involved (both combatants and non-combatants) are not compliant with the law of war or relevant moral/ethical considerations
4. Ensure those reporting from the field, editors, and content-verification personnel generating, reviewing, or making decisions on conflict-related content, are sufficiently knowledgeable of the law of war and that which can accidentally but understandably/legitimately go wrong in combat

Jointly **(media, military, ICRC, academics, veterans [media, military] with relevant experience)**

1. Develop and make available to professionals from domestic and international media organizations, courses and programs on portions of the law of war most relevant to their work

Realistically, much of the preceding will not be done, or only partially done. Thus, military-media relations will not be what they ideally would be in order to help reduce law of war violations and accidental fire. Thus, the code of silence addressed previously will continue as few who are doing their best in trying conditions will want their names and actions minutely dissected by the media and become the world's headlines. Yet, progress in any of the above is better than nothing if some beneficial effects may result.

Ultimately, those in the media reporting on war must determine whether their moral and professional priority and obligation is to report all news in war as quickly and widely as possible, or whether it is to be a constructive part of the process to help reduce unnecessary death, injury, and suffering of those caught up in war, and unnecessary destruction to the worlds in which they live. In essence, whether it recognizes or accepts this responsibility, the media should follow the same law of war principles as combatants and be judged on how well they do this no differently than those combatants.

EPILOGUE

Weary is he, and sick of the sorrow of war,
Hating the shriek of loud music, the beat of the drum;
Is this the shadow called glory men sell themselves for?
The pangs in his heart they have paled him, and stricken him dumb!
Oh! yes, the soldier is home!

He was caught with the valour of music, the glory of kings,
The diplomat's delicate lying, the cheers of a crowd,
And now does he hate the dull tempest, the shrill vapourings—
He who was proud, and no beggar now waits for his shroud!
Oh! yes, the soldier is home!

John Shaw Neilson
(1872-1942)

War is an instrument entirely inefficient toward redressing wrong; and multiplies, instead of indemnifying losses.

Thomas Jefferson

One evening an old Cherokee told his grandson about a battle that goes on inside all people. He said, "My son, the battle is between two wolves. One is evil. It is anger, envy, jealousy, greed, arrogance, self-pity, resentment, inferiority, lies, false pride, superiority, and ego. The other is good. It is joy, peace, love, hope, serenity, humility, kindness, benevolence, empathy, generosity, truth, compassion, and faith." The grandson thought about it for a moment then asked, "Which wolf wins?" His grandfather replied, "The one you feed."

A Cherokee Tale

"…You're half Ojibwe. Do you know the Ojibwe word ogichidaa*?"*
"Warrior," he said.
"That's one way to translate it. I prefer the more complex interpretation. One who stands between evil and his people. I think in your heart you're ogichidaa. *I think it's what you were born to be…"*

William Kent Kreuger
Sulfur Springs

That is what a true soldier is born to be, *ogichidaa,* not just a warrior, but the one who stands between evil and his people, with this evil not just of people not one's own but also that which resides in self and fellow warriors. Within each warrior, the right wolf must be fed, that of good, not evil. If we do not, we will be no more than Nielson's soldier come home, once proud but now with no beggar awaiting our shroud, one who has multiplied instead of indemnifying the tragedy that is war, simply a destroyer, not the protector and ethical warrior we are meant to be.

:

It is one thing to study war and another to live the warrior's life.

Telamon of Arcadia
Mercenary of the Fifth Century B.C.

APPENDIX

COMBAT DECISION-MAKING SURVEY

Number _____ **Date: _____**

Gender: Male ___ **Age: _____**

Female___ **Race/Ethnicity: _____**

Other___ **Occupation: _____**

Nationality: _____ **If Student: Undergraduate ____ Year _____**

Parents' Nationality: _____ **Masters Program _____**

Military Experience: Yes __ No __ If yes, **PhD Program ____**

Combat Experience: Yes ___ No ___ **Other_____**

Combat Location _____ **Major_____**

Branch _____ **Education: High school degree or less ___**

Years: Active ___ Reserves/Guard ___ **Bachelor degree ___**

Military Specialty _____ **Graduate degree ___**

Rank _____

General Conduct Guidance

Civilians: Civilians are to be treated well and not placed in danger if at all possible. Their support is essential to our success. They can provide information and support to the enemy, or they can provide it to us. We want it to be us.

Prisoners: Mistreatment of prisoners is a criminal offense. Every soldier is responsible personally for the enemy in his hands. It is both dishonorable and foolish to mistreat a prisoner. It also is a punishable offense. Not even a beaten enemy will surrender if he knows his captors will torture or kill him. He will resist and make his capture more costly. Fair treatment of prisoners encourages the enemy to surrender.

Decisions in Combat

First indicate your decision in the following seven situations based solely on information provided under each and your personal belief as to what you should do. Once you have done that, read the list of related articles of law in the appendix. Then go back and answer the Alternative Decision question at the end of each situation. When you do, base your decision not just on the law but on what you personally would do even if it were in violation of the law.

Situation 1: Company B has been ordered to search a large village. As there is insufficient time and manpower to search thoroughly before nightfall, your company commander intends to conduct a sweep rather than search; 1st Platoon will move along the outside of the village as a reaction force if enemy units are encountered during the sweep; 3rd Platoon will move through the middle of the village conducting the

primary sweep; your platoon, the 2nd, will move up a narrow dirt road along the river on the right and search for weapons caches and entrances to underground tunnels or bunkers in the river bank.

A half hour into the sweep, there is a large explosion on your left. The company radios come to life. Booby trap. Call a medivac? No, he's dead. Who was it? No one knows. They're picking up pieces in a poncho to send back home.

Move out. Two minutes later another explosion. This time the man is alive. Both legs and an arm gone; his groin ripped open. In spite of these injuries, he is still alive when medivac picks him up twenty minutes later. Everyone is afraid to move, to put a foot down, not wanting to be the next to die, to lose three limbs.

Several villagers stood watching as the second man tripped the booby trap and did nothing. Yet they had to know where the booby traps were whether they had placed them or not. Otherwise they, their families, and neighbors could not move about the village without being killed.

The company commander orders 3rd Platoon out of the village. Your platoon is told to continue up the dirt road to the bridge a half mile away. As 3rd Platoon is no longer on your flank, you need to put out security in the village so that if an ambush has been put in place by the enemy further up the road, it can be detected and flanked. But all those booby traps. What do you do?

a. Do not put out flank security and risk an undetected ambush with potentially major casualties for your platoon. ___

b. Put out flank security with a likely high risk of further booby trap deaths. ___

c. Have a villager guide/lead your flank security through the village. ___

d. Other?_____

Possible Alternative Decision (based on information in appendix): No Change___

a. ___ b. ___ c. ___ Other _____

Situation 2: Your company is breaking into 10-15 man elements and inserted by helicopter near abandoned villages often sheltering NVA and VC to set ambushes during the day, move and ambush at night. The nearest friendly forces will be miles away although artillery support can be called upon if needed. During the day, backup units can be brought in if a large enemy element is engaged; at night, this is problematic.

Your 10-man element is dropped off in a graveyard just outside one of the abandoned villages. Upon moving into the village to its far tip, you encounter several farmers and children tending small gardens in the ruins. They are detained. One of the farmers seemed quite angry that his work has been interrupted or that he has otherwise been inconvenienced. You and your men share C-rations with those detained and wait until just before dusk to release them so they can make it home before the nighttime curfew knowing they may tell any VC elements encountered the size, armaments, and last location of your unit.

At dusk you move out into a small, harvested rice paddy surrounded on three sides by the village, immediately encounter six enemy, and respond quicker than they. Two are killed, three captured (one man, two women) with a sixth possibly wounded but escaping into the nearby treeline. None of your men are hurt. A quick search for their sixth finds nothing as dark closes in. Is he/she fleeing, waiting to fire a burst, dead, or unable to continue due to the severity of his/her wounds? You have no idea. Now this person and the civilians just released know where you are. Any nearby enemy elements would know as well because of the short violent firefight.

Of the three captured, the man's arm is shattered; his knee shattered; his foot hit; his neck torn somewhere beneath the blood; shrapnel protrudes from his cheek. The one woman…three fingers are torn off; on one leg, part of her calf blown away; the other leg, horribly broken. The second woman has a sprained ankle.

It is possible a nearby enemy unit could even now be moving against you. It is unlikely you will be extracted at this stage of your operation as it is now night with no immediate threat. You cannot move far with two so severely wounded prisoners. You have no medic who can treat the injured prisoners. No one in your unit knows anything beyond basic combat first aid. Yet, maybe with just that, they could survive until morning. If you keep them with you, their moans and cries of pain could inform the enemy where you are. If you are discovered and attacked because you cannot travel far and are easily detectable, you have no way to secure the prisoners and would have to use part of your limited manpower to guard at least the woman with the sprained ankle. You can leave the two wounded and come back in the morning to see if they are still alive and, if so, call in a chopper to take them away. If they live, they can also tell others information about you. If you kill them, as several in your unit suggest, some of these risks and uncertainties are eliminated. What should you do?

a. **Leave the two wounded, let higher command know where they are, and move to a safer location with the third prisoner. ___**
b. **Kill the two wounded and move to a safer location with the third prisoner. ___**
c. **Carrying the two wounded, move as far as possible in hopes of finding a somewhat safer location and try to provide what first aid you can. ___**
d. **Other? _____**

Possible Alternative Decision (based on information in appendix): No Change___

a. ___ b. ___ c. ___ Other _____

Situation 3: It is no pleasant thing to fight the enemy and when moving up you find them like this man before you, horribly mutilated, dying, making pitiful animal sounds, with no hope to live, his body horribly ripped and torn, entrails spilling out. How can he even be breathing? You looked at his terrible pain, his suffering. You've seen enough wounded men to know there is little if any chance he will live. A medivac chopper with its six crew members will not be risked to transport him to a hospital with enemy in the area. You have no doctor, no nearby medical facilities, no way to treat someone this badly injured. If you leave him here in the middle of the day, his comrades cannot come to his aid with your gunships about. The morphine your medic has might ease his pain, but if used for this likely dying man, your platoon will not have if one of your men is badly wounded and needs before your next resupply. What should you do?

a. **Treat his wounds as best you can and leave him. ___**
b. **Treat his wounds the best you can, inject him with morphine, and leave him. ___**
c. **End his suffering as painlessly as you can. ___**
d. **Other?_____**

Possible Alternative Decision (based on information in appendix): No Change___

a. ___ b. ___ c. ___ Other _____

Situation 4: Your platoon is helping guard a bridge. It is 2200 hours, long after the night curfew is in place. Just outside the perimeter at the edge of the neighboring village music had been heard earlier.

Now there is movement. Soon it is evident there may be 15-20 people, maybe more, moving about just beyond the perimeter. In the dark, it is hard to make out if they are enemy soldiers or civilians, but civilians know they can be fired upon if moving about outside their homes after dark. Only two nights before, the perimeter had been fired upon from this location. Was the music a cover for an assault team about to try to cut or blow the wire, opening up a point of entry? Were other enemy troops massing behind these if the assault team is able to breach the wire? You have no one to contact in the village to see if they know what might be happening. If you wait too long and it is the enemy and they bring up more firepower, your ability to repulse them decreases…yet something seems off, the music, the people not seemingly trying to hide nor acting furtively, but again, these could all be a ruse. What do you do?

a. **Bring immediate significant deadly fire on those you see to insure your perimeter is not breached and the bridge possibly lost. ___**
b. **Wait until fired upon before firing but risk more enemy massing outside your perimeter. ___**
c. **Try to find the company interpreter to communicate with whoever it is although this will also give additional time for more troops and firepower to be moved up if it is not civilians. ___**
d. **Other? _____**

Possible Alternative Decision (based on information in appendix): No Change___

a. ___ b. ___ c. ___ Other _____

Situation 5: Just after dark you set up your ten-man ambush in the edge of a woodline along a major trail across a rice paddy stretching into the distance. Minutes later, a hundred meters away, you see six lights in a line bobbing along as if small lanterns or candles are being carried. It is after dark. Curfew is in place. Anything moving that is not your own forces can be assumed as enemy and fired upon. The lights continue towards you. Their pace is measured, moving almost ceremoniously, as if they did not have a care in the world. You can begin to make out each figure carrying something longish in one hand, perhaps lengths of bamboo, bamboo like that used to hurl satchel charges. Perhaps RPGs or bangalore torpedoes. Yet, why would they be moving about with lights making no effort to conceal themselves…but it is after dark and anything that moves after dark is the enemy. What should you do?

a. **Stop and search them although, if six enemy soldiers and they are armed, they might choose to fight rather than surrender, and some of your men may be killed or wounded. ___**
b. **Ambush them as your right after dark and the reason you are at this location, with less risk to your men and yourself than attempting to verify their identity. ___**
c. **Wait until they pass to see if you can better determine whether civilians or enemy soldiers without the risk of revealing yourself, but if you make the decision too late, and they are soldiers, you may only kill or capture one or two and the others could move on to complete their mission or fire on you from the darkness. ___**
d. **Other? _____**

Possible Alternative Decision (based on information in appendix): No Change___

a. ___ b. ___ c. ___ Other _____

Situation 6: You are on a nighttime patrol of three Americans (including yourself) and six Vietnamese and have disguised yourself to appear as VC. You have traveled 6 kilometers along the inland waterway on dikes with water on both sides. The people build their homes on the dikes with only a few feet to spare on each side.

As you move down the dike, you come to a break where the sea flows through the opening. The Vietnamese with you say "beaucoup nuoc (much water)" and indicate the 20-30 meters of water before the dike resumes is neck deep, maybe deeper. What do you do?

a. **Return the way you came even though your patrol may have been observed in one of the "villages" you passed with that information conveyed to local VC who now know a small patrol is going to find itself unable to continue once it reaches the end of the dike and have to return the way they had come, and may now be laying an ambush if you return that way. ___**

b. **Try to cross the break in the dike with possibly someone drowning or losing their weapon if the water is deeper than thought or if the tide is flowing in or out. ___**

c. **Return to the closest house and have them take you across the gap in their sampan to continue your mission. ___**

d. **Other? _____**

Possible Alternative Decision (based on information in appendix): No Change___

a. ___ b. ___ c. ___ Other _____

Situation 7: The night before, two special ops teams were inserted by HALO (high altitude, low opening) parachute drop on both sides of a river and moved into hidden observations positions above each end of a bridge across the river. You are in command. Your mission is to take the bridge before explosives can be detonated making the bridge unusable. From drone observations, it is known some explosives have been placed where they cannot be disarmed from the river but only from rappelling down which is not possible without first securing the bridge. What could not be ascertained by the drone was whether the explosives are remotely detonated or by a trigger connected by wires to the explosives. The latter was hoped for as if someone could slip onto the bridge undetected, they could cut the wires before any attack was initiated. While your force should be able to overcome the 20-30 men guarding each side, if remote detonation is possible, it is likely the defenders have orders to blow the bridge before all are killed or captured.

This bridge is essential to the success of a major offensive which might contribute greatly to ending the war. It is the only bridge for miles in either direction capable of sustaining the weight of tanks and artillery which need to cross it. The local terrain on both sides of the river is too steep for a pontoon bridge to be transported down to the river and installed. Thus, if this bridge is lost, the offensive will likely stall, or limited to only units which can be transported across the river by helicopter under heavy fire. Major casualties would likely ensue, and the more limited friendly forces placed on that side of the river could more easily be cut off, killed, or captured. Whatever your two teams are going to do has to be accomplished by the next morning when the offensive begins. You begin preparations to take the bridge as quickly and quietly as possible once it seems most enemy personnel are asleep and hopefully secure the triggers (remote or wired) before they are used.

Late that afternoon, two soldiers and a woman are observed climbing into a vehicle outside one of the bridge's defensive bunkers. Rather than crossing the bridge, the vehicle turns onto the road in your direction. Rather than continuing on to the nearby village, the vehicle turns almost immediately onto a

gravel road which ends at an overlook not many meters from where your team is located. Upon the vehicle's arrival, two men and a woman exit. The driver spreads a blanket. The other man, an officer, carries a picnic hamper from the vehicle. He instructs the driver to come back after sunset. The officer and woman settle on the blanket, open a bottle of wine, and toast one another.

You decide that here is a potential source of information as to the bridge's defenses and how the explosives are connected. When the couple becomes oblivious to anything but the other, your men take them prisoner and move out of sight into the woods. You leave three men to secure the driver upon his return.

The officer and woman are questioned separately. He will only provide name, rank, service number, and date of birth. The woman gives her name and that she lives in the nearby village. She said she knows nothing else but reveals that her family does not expect her home until late that evening. When the driver returns, he is easily captured.

Time is now working against you. While the three might not be missed for some hours, eventually they will. If you cannot get the driver or officer to talk, not only would you not have obtained useful information for your attack and disabling the explosives, as time passes, those at the bridge might become concerned that something is wrong and go on full alert making any attempts on the bridge more difficult. What do you do?

a. **Continue to try to get the officer and driver to provide the needed information without any mental or physical coercion. ___**
b. **Threaten the woman with rape or death if the two soldiers do not talk. ___**
c. **Tell the driver if he does not talk, he will be killed; if he still doesn't talk, instruct two of your men to take him further into the woods and cut his throat; have your men take him away and come back without the driver having gagged, bound, and left him with another of your men; then tell the officer, the woman is next if he doesn't talk. ___**
d. **Use whatever force necessary, regardless of the pain or that it might result in death, to try to extract needed information from at least one of the three. ___**
e. **Other? _____**

Possible Alternative Decision (based on information in appendix): No Change___

a. ___ b. ___ c. ___ Other _____

If the situation had been a nuclear devise set to be detonated in a major city and you had two men and a woman in custody who had knowledge of the impending disaster, would your answer be different? Yes ___ No___ If yes, what would you do? _____

_____

U.S. Army Field Manual FM 27-10
The Law of Land Warfare

Do not read the following until first indicating your decision for each situation based only on previously provided information.

Chapter 2, Article 41: …loss of life and damage to property must not be out of proportion to the military advantage to be gained…

Chapter 2, Article 42: There is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate military targets.

Chapter 3. Article 74: Members of the armed forces… and militias or volunteer corps…lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or…waging war. Putting on civilian clothes or the uniform of the enemy are examples of concealment…

Chapter 3, Article 75: Any person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information…with the intention of communicating it to the hostile party…

Chapter 3, Article 85: A commander may not put his prisoners to death because their presence retards his movement or diminishes his power of resistance… It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operation…

Chapter 3, Article 89: Any unlawful act…causing death…of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.

Chapter 3, Article 93: Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth and army regimental, personal or serial number, or failing this, equivalent information... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Chapter 3, Article 107: Prisoners of war…whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given…

Chapter 5, Article 266: Protected persons [civilians] are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.

Chapter 5, Article 267: The presence of a protected person [civilians] may not be used to render certain points or areas immune from military operations.

Chapter 5, Article 270b: No physical or moral coercion shall be exercised against protected persons [civilians], in particular to obtain information from them or from third parties. Among the forms of coercion prohibited is the impressment of guides from the local inhabitants.

INDEX

The following index is not meant to be exhaustive. All possible topics, and page locations of every included topic, have not been included. Nonetheless, its approximately 750 topic headings, and over 1,000 page-references provide a resource not available in the DOD Law of War Manual and more extensive than in FM 6-27.

The index focuses on alphabetizing major sections and subsections of the Manual; key definitions and explanations of important terminology or concepts; individuals quoted; authors of referenced publications; certain relevant U.S. domestic laws; and other selected topics. Pages referenced are often the first, more important, or explanatory for a topic. Due to the process of ongoing revisions, referenced page numbers may sometimes be off by a page.

C

I

Q-R

X-Y-Z

ACKNOWLEDGEMENTS

For their inspiration, encouragement, support, classroom instruction, opposing views, kindnesses, windows and doors opened, opportunities provided, guidance, assistance, perspectives, and insights, the following deserve special recognition and appreciation: Bob Babcock, Chad Clay, Geofrey Corn, Mark Dakar, Lane Dennard, Austin Doctor, Jamie Shane, Charles Garraway, Dave Graham, Roger Hill, Steve Huggins, Young Sang Kim, Matt King, Brian Magee, John Norton Moore, Ed Morton, Amanda Murdie, Andy Osiak, Tony Perez, Vanja Petricevic, Gary Solis, Bob Turner, and Steve Whitcomb; active-duty personnel necessarily left unnamed; veterans young and old; friends and fellow students; the author's two sons and grandson; an older brother who lost a hand saving lives in the service of his country as a medivac pilot and awarded the Distinguished Flying Cross; and, most especially, the author's childhood sweetheart and wife of fifty-five years who has always been there when needed as a moral compass, best friend, refuge, confidante, and critic.

Any shortcomings of the Manual are solely the author's.

AUTHOR BACKGROUND

Those who write official military manuals are generally not recognized as the authors, nor are their bona fides provided. They are simply assumed to be qualified on the topics addressed. As this is an unauthorized manual, appropriate author background should not be assumed and a summary follows.

The author is not a lawyer, academic, or career military.

After high school, he matriculated at Virginia Military Institute, the alma mater of a cousin who became commandant of the Marine Corps. After three days, perhaps the first of his class to do so, he quit. Twenty months later, to include a year of college and ROTC, he enlisted in the Army as a private. He finished infantry basic training as outstanding trainee of his company and battalion. Upon completion of infantry advanced individual training, he attended Infantry Officer Candidate School where he was a Distinguished Graduate and commissioned a second lieutenant. Subsequent training and courses included airborne, jumpmaster, special forces operations, psychological operations, counterinsurgency operations, civil affairs, jungle warfare operations, and military assistance training advisor.

Assignments included the U.S. Army Special Warfare School (Counterinsurgency/Internal Defense & Development Department); 101st Airborne (Airmobile) Division (combat infantry companies); the 3rd, 6th, and 20th Special Forces Groups (civil affairs company, civic action mobile training team in West Africa, A and B teams); and periodically as defense and trial counsel in units of which he was a part.

In 1968, the author served in I Corps in Vietnam with the 101st as an infantry platoon leader, executive officer, and company commander. He was awarded the Silver Star, Bronze Star for Valor, Bronze Star with Oak Leaf Cluster, Air Medal, Vietnamese Cross of Gallantry with Silver Star, and Purple Heart.

During that year, over 90% of his battalion serving in the field became casualties; nearly 1 in 6 were dead. Four months after arriving in country, the battalion's infantry platoon leader positions had experienced over 100% casualties. The battalion alone had nearly the same killed that year as all U.S. forces in the first Gulf War. US military deaths in 1968 were 50% greater than any other year of the war and nearly 2 ½ times all American military personnel killed in Afghanistan, Iraq, and Syria over 20 years. During its years in Vietnam, the 101st had twice the casualties as in World War II. Civilian and military deaths on both sides during U.S. involvement have been estimated between 1.1 and 3.2 million.

After returning stateside, the author was promoted to captain at age twenty-three. Twenty months later, he left active duty, completed a bachelor's degree while serving with a Special Forces national guard unit, and earned a master's degree.

He has worked in 20 countries in the Caribbean, Latin America, Africa, Middle East, Caucuses, and Asia, primarily in economic development (strategy, policy, project/program feasibility) with assignments for the World Bank, United Nations Development Programme, U.S. Agency for International Development, Inter-American Development Bank, educational institutions, national governments, and corporations. In two countries, the author led teams drafting 5- and 10-year national sectoral development plans; for three others, he worked on pre- and post-conflict/disaster assignments. For the six-nation Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, UAE), he led a U.S.-British consortium that

designed and assessed the feasibility of a regional food reserve in the event of embargo, blockade, or armed conflict which might interrupt food imports upon which member nations were heavily dependent.

The author has helped found and served on boards of non-profits which assist the economic disadvantaged in the U.S. and abroad. He has chaired state-wide industry organizations; received gubernatorial appointments to a five-state advisory commission addressing environmental challenges in the Gulf of Mexico and to a state commission advising on greenways; and testified before Congress, negotiated with the U.S. trade ambassador, and lobbied Congress on the North American Free Trade Agreement on behalf of farmers. He was president of the agribusiness group of a private company overseeing operations on 150,000 acres and later founded and headed a solid waste management company sold to a national corporation. As a member of city and county advisory boards and commissions, he has reviewed and helped draft local ordinances and regulations.

To aid in writing this Manual, the author attended undergraduate, graduate, and law school courses, classes, and conferences at the universities of Georgia, Virginia, Duke, and Emory, and portions of a virtual course through the International Institute of Humanitarian Law (San Remo, Italy). Subject matter included national security law, military law, international humanitarian law, human rights, international conflict, terrorism, war and human security, international organizations, the future of NATO, internet governance, and legal and policy issues of the Indochina war.

While he has read numerous works on the history and conduct of the war in Vietnam, he has never seen a movie nor read a novel whose focus was that which he and others on the frontlines experienced in that war. Over fifty years later, he still feels a tightening in his chest when he hears the thwock-thwock-thwock of chopper blades sounding like the Hueys which carried him and his fellow soldiers into combat, provided logistical and fire support, and took away their dead and wounded.