

# Read-Ahead Packet

# Law of Armed Conflict

## 5 January 2024

### Instructions

- Read para. 1.3.1.2 (bottom of this page – footnotes omitted)
- Read paras. 2.1 – 2.5 (pgs. 50-66)
- Para. 2.6 (pgs. 66-70) is optional
- All footnotes are optional

All readings are excerpts from the Department of Defense (DoD) Law of War Manual, June 2015 (updated July 2023). The full manual is available [here](#). Please note that this manual reflects the views of the U.S. DoD, and it is neither a reflection of international consensus nor a substitute for primary source documents. It is used here to expose you to the basic concepts of the Law of Armed Conflict in preparation for our simulation exercise.

**Para. 1.3.1.2:** *Law of War Versus International Humanitarian Law and Law of Armed Conflict.* The *law of war* is often called the *law of armed conflict*. Both terms can be found in DoD directives and training materials. *International humanitarian law* is an alternative term for the law of war that may be understood to have the same substantive meaning as the law of war. In other cases, international humanitarian law is understood more narrowly than the law of war (e.g., by understanding international humanitarian law not to include the law of neutrality).

## II – Principles

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#### 2.1 INTRODUCTION

Three interdependent principles – *military necessity*, *humanity*, and *honor* – provide the foundation for other law of war principles, such as *proportionality* and *distinction*, and most of the treaty and customary rules of the law of war.

This Chapter briefly addresses certain specific rules to illustrate these foundational principles. For more information about a specific rule, practitioners should refer to the cross-referenced section that addresses that rule.<sup>1</sup>

2.1.1 Legal Principles as Part of International Law. General principles of law common to the major legal systems of the world are a recognized part of international law.<sup>2</sup> Law of war principles have been understood to be included in this category of international law.<sup>3</sup>

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<sup>1</sup> Refer to § 1.2.3 (Use of Cross-References in This Manual).

<sup>2</sup> See ICJ STATUTE art. 38(1)(c) (providing that “the general principles of law recognized by civilized nations” are a source of applicable law for the court); I RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 24 (§102(1)(c)(4)) (1987) (including “general principles common to the major legal systems of the world,” among sources of international law); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 198 (1815) (Marshall, C.J.) (ascertaining international law includes “resort to the great principles of reason and justice”).

<sup>3</sup> See BOTHE, PARTSCH, & SOLF, NEW RULES 44 (AP I art. 1, ¶2.10) (“Following the original clause in the preamble of the 1899 IV. Hague Convention on Land Warfare (para. 9) and para. 4 of the denunciation clause in the Conventions (63/62/142/158) these principles are stated in the present text to be *part of* international law. They are ‘general principles of law’ in the sense of Art. 38 of the Statute of the ICJ.”); *Speech by Baron Descamps on the Rules of Law to be applied*, Annex No. 1 to 14th Meeting (Private), held at the Peace Palace, the Hague, on July 2nd, 1920, PERMANENT COURT OF INTERNATIONAL JUSTICE, ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE: JUNE 16TH – JULY 24TH 1920 WITH ANNEXES 322, 323-24 (1920) (“The only question is, -- how to make unerring rules for the judge’s guidance. ... I allow him to take into consideration the legal conscience of civilised nations, which is illustrated so strikingly on certain occasions. ... [L]isten to this solemn declaration of the Powers, placed at the beginning of the Convention dealing with laws and customs of war on land: ‘Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.’ ... I am convinced that the assembly of all the States does not and cannot intend, in dealing with the state of peace, to abjure principles which are clearly intended to be applied in war.”).

2.1.2 Uses of Law of War Principles. Law of war principles provide the foundation for the specific law of war rules. Legal principles, however, are not as specific as rules, and thus interpretations of how principles apply to a given situation may vary.

Law of war principles: (1) help practitioners interpret and apply specific treaty or customary rules; (2) provide a general guide for conduct during war when no specific rule applies; and (3) work as interdependent and reinforcing parts of a coherent system.

2.1.2.1 Law of War Principles as an Aid in Interpreting and Applying Law of War Rules. Understanding law of war principles helps practitioners interpret and apply specific law of war rules. For example, the principle of *military necessity* has been incorporated into specific law of war rules.<sup>4</sup> Similarly, the principle of *humanity* can assist in the proper interpretation and application of law of war rules that are based on humanitarian considerations.<sup>5</sup>

2.1.2.2 Law of War Principles as a General Guide. When no specific rule applies, the principles of the law of war form the general guide for conduct during war.

States have reflected this idea in certain treaty provisions, including the “Martens Clause,” which make clear that situations not covered by the treaty remain governed by principles of international law.<sup>6</sup>

The considerable progress States have made in developing specific law of war rules, however, has lessened the need to rely solely on these principles to guide conduct during war.<sup>7</sup>

2.1.2.3 Law of War Principles as a Coherent System. Law of war principles work as interdependent and reinforcing parts of a coherent system.

*Military necessity* justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible.<sup>8</sup> Conversely, *humanity* forbids actions unnecessary to achieve that object.<sup>9</sup> *Proportionality* requires that even when actions may be justified by *military necessity*, such actions not be unreasonable or excessive.<sup>10</sup> *Distinction* underpins the parties’ responsibility to comport their behavior with *military necessity*, *humanity*, and *proportionality* by requiring

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<sup>4</sup> Refer to § 2.2.2.2 (Incorporation of Military Necessity Into Law of War Rules).

<sup>5</sup> Refer to § 2.3.2 (Humanity and Law of War Rules).

<sup>6</sup> Refer to § 19.8.3 (Martens Clause).

<sup>7</sup> TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 46-47 (“Where the general principles of the law of war have received—through the agreement of states—detailed application in the form of specific rules, the question of the proper interpretation of these general principles can only be answered by an examination of the former. Hence, to the extent that the conduct of war is increasingly subjected to such regulation resort to the general principles of the law of war must become, in turn, correspondingly less frequent. The reason for this is simply that the essential function of these general principles is to provide a guide for determining the legal status of weapons and methods of warfare *where no more specific rule is applicable.*”).

<sup>8</sup> Refer to § 2.2 (Military Necessity).

<sup>9</sup> Refer to § 2.3 (Humanity).

<sup>10</sup> Refer to § 2.4 (Proportionality).

parties to a conflict to apply certain legal categories, principally the distinction between the armed forces and the civilian population.<sup>11</sup> Lastly, *honor* supports the entire system and gives parties confidence in it.<sup>12</sup>

## 2.2 MILITARY NECESSITY

*Military necessity* may be defined 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 the law of war. *Military necessity* has been defined in military publications,<sup>13</sup> judicial decisions,<sup>14</sup> and scholarly works.<sup>15</sup>

2.2.1 Military Necessity as a Justification. *Military necessity* justifies actions, such as destroying and seizing persons and property.<sup>16</sup> Thus, *military necessity* underlies law of war

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<sup>11</sup> Refer to § 2.5 (Distinction).

<sup>12</sup> Refer to § 2.6 (Honor).

<sup>13</sup> See LIEBER CODE art. 14 (“Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”); 1914 RULES OF LAND WARFARE ¶¶9-11 (“a belligerent is justified in applying any amount and any kind of force which is necessary for the purpose of the war; that is, the complete submission of the enemy at the earliest possible moment with the least expenditure of men and money. ... Military necessity justifies a resort to all measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war.”); 1940 RULES OF LAND WARFARE ¶4a (“a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”); 1956 FM 27-10 (Change No. 1 1976) ¶3 (“that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”); 1958 UK MANUAL ¶3 (“a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources, and money.”); 2004 UK MANUAL ¶2.2 (“Military necessity is now defined as ‘the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war.’ Put another way, a state engaged in an armed conflict may use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”); NATO, Glossary of Terms and Definitions, AAP-6 at 2-M-6 (2009) (defining military necessity as “the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war.”).

<sup>14</sup> See *United States v. List, et al.* (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1253 (“Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”).

<sup>15</sup> See GREENSPAN, MODERN LAW OF LAND WARFARE 313-14 (military necessity is “the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life, and money”); CHARLES HENRY HYDE, II INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 299-300 (1922) (“Military necessity, as understood by the United States, justifies a resort to all measures which are indispensable to bring about the complete submission of the enemy by means of regulated violence and which are not forbidden by the modern laws and customs of war.”); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 63 (§17) (A. Pearce Higgins, ed., 7th ed., 1917) (“When violence is permitted at all, the amount which is permissible is that which is necessary to attain the object proposed. The measure of the violence which is permitted in war is therefore that which is required to reduce the enemy to terms.”).

<sup>16</sup> See LIEBER CODE art. 15 (“Military necessity admits of all destruction of life or limb of armed enemies, ... it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of

concepts that explain when persons and property may be the object of attack, *e.g.*, the concepts of “taking a direct part in hostilities”<sup>17</sup> and “military objective.”<sup>18</sup>

*Military necessity* may justify not only violence and destruction, but also alternative means of subduing the enemy.<sup>19</sup> For example, military necessity may justify the capture of enemy persons,<sup>20</sup> or non-forcible measures, such as propaganda and intelligence-gathering.<sup>21</sup>

*Military necessity* also justifies certain incidental harms that inevitably result from the actions it justifies.<sup>22</sup> The extent to which *military necessity* justifies such harms is addressed by the principle of proportionality.<sup>23</sup>

## 2.2.2 Military Necessity and Law of War Rules.

2.2.2.1 *Military Necessity Does Not Justify Actions Prohibited by the Law of War.*  
*Military necessity* does not justify actions that are prohibited by the law of war.

From the late 19th Century through World War II, Germany asserted that *military necessity* could override specific law of war rules (*Kriegsraison geht vor Kriegsmanier* –

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peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist.”); *United States v. List, et al. (The Hostage Case)*, XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1253-54 (“In general, [military necessity] sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger . . . . It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations.”).

<sup>17</sup> *Refer to* § 5.8 (Civilians Taking a Direct Part in Hostilities).

<sup>18</sup> *Refer to* § 5.6 (Military Objective).

<sup>19</sup> *For example*, Abraham Lincoln, The Emancipation Proclamation, Jan. 1, 1863, *reprinted in* 12 STAT. 1268 (justifying emancipation of slaves held in rebellious states as “warranted by the Constitution, upon military necessity”).

<sup>20</sup> *Refer to* § 8.1.3.1 (Detention Authority).

<sup>21</sup> *Refer to* § 5.26 (Non-Forcible Means and Methods of Warfare).

<sup>22</sup> *See* LIEBER CODE art. 15 (“Military necessity admits of all destruction of life or limb of . . . persons whose destruction is incidentally unavoidable in the armed contests of the war;”); *United States v. List, et al. (The Hostage Case)*, XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1253-54 (military necessity “permits the destruction of life of . . . persons whose destruction is incidentally unavoidable by the armed conflicts of the war;”).

<sup>23</sup> *Refer to* § 2.4 (Proportionality).

“necessity in war overrules the manner of warfare”).<sup>24</sup> This view was strongly criticized.<sup>25</sup> Post-World War II war crimes tribunals rejected it as well.<sup>26</sup>

*Military necessity* cannot justify departures from the law of war because States have crafted the law of war specifically with war’s exigencies in mind.<sup>27</sup> In devising law of war rules,

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<sup>24</sup> See LAUTERPACHT, II OPPENHEIM’S INTERNATIONAL LAW 231-32 (§69) (“In accordance with the German proverb, *Kriegsraison geht vor Kriegsmanier* (*necessity in war overrules the manner of warfare*), many German authors before the First World War were maintaining that the laws of war lose their binding force in case of extreme necessity.”); United States, *et al.* v. Göring, *et al.*, *Judgment*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE IMT 227 (“The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. ... There can be no doubt that the majority of them arose from the Nazi conception of ‘total war’, with which the aggressive wars were waged. For in this conception of ‘total war’, the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous.”).

<sup>25</sup> See, e.g., Elihu Root, *Opening Address*, 15 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 2 (1921) (“More important still is a fact which threatens the foundation of all international law. The doctrine of *kriegsraison* has not been destroyed. It was asserted by Bethman Hollweg at the beginning of the war when he sought to justify the plain and acknowledged violation of international law in the invasion of Belgium upon the ground of military necessity. The doctrine practically is that if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible. As the belligerent is to be the sole judge of the necessity, the doctrine really is that a belligerent may violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage. The alleged necessity in the case of the German invasion of Belgium was simply that Belgium was deemed to be the most advantageous avenue through which to attack France. Of course, if that doctrine is to be maintained, there is no more international law, for the doctrine cannot be confined to the laws specifically relating to war on land and sea. With a nation at liberty to declare war, there are few rules of peaceful intercourse, the violation of which may not be alleged to have some possible bearing upon a military advantage, and a law which may rightfully be set aside by those whom it is intended to restrain is no law at all.”).

<sup>26</sup> See, e.g., United States v. List, *et al.* (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1255-56 (“It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules.”); United States v. Krupp, *et al.*, IX TRIALS OF WAR CRIMINALS BEFORE THE NMT 1340 (rejecting defense counsel argument that Hague IV and Hague IV Reg. rules did not apply in cases of “total war”). See also Trial of Gunther Thiele and Georg Steinert, III U.N. LAW REPORTS 58-59 (U.S. Military Commission, Augsburg, Germany, Jun. 13, 1945) (rejecting military necessity as a defense to the murder of a prisoner of war); United States v. Milch, II TRIALS OF WAR CRIMINALS BEFORE THE NMT 849-50 (Musmanno, J., concurring) (rejecting defense counsel argument that “total warfare” allowed suspension or abrogation of law of war rules).

<sup>27</sup> 1956 FM 27-10 (Change No. 1 1976) ¶3a (“Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.”); United States v. Krupp, *et al.*, IX TRIALS OF WAR CRIMINALS BEFORE THE NMT 1347 (“In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency.”); Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America, art. 24, Sept. 10, 1785, 18 STAT. 641, 647 (declaring that “neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and next preceding article; but on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.”).

States considered military requirements.<sup>28</sup> Thus, prohibitions on conduct in the law of war may be understood to reflect States' determinations that such conduct is militarily unnecessary *per se*.

The fact that law of war rules are formulated specifically with military requirements in mind has played an important part in the doctrine that the law of war is the *lex specialis* governing armed conflict.<sup>29</sup>

2.2.2.2 *Incorporation of Military Necessity Into Law of War Rules.* Although *military necessity* cannot justify actions that have been prohibited by the law of war, some law of war rules expressly incorporate *military necessity*.

For example, certain law of war rules specify that departures from what would otherwise be the rule are permissible when *absolutely* or *imperatively* necessary. In these cases, *military necessity* must not be conflated with mere convenience.<sup>30</sup> Examples of rules incorporating the concept of *absolute* or *imperative* necessity include the following:

- The activities of the representatives or delegates of the Protecting Powers shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.<sup>31</sup>
- The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.<sup>32</sup>
- If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.<sup>33</sup>
- The seizure or destruction of enemy property must be imperatively demanded by the

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<sup>28</sup> See, e.g., HAGUE IV preamble ¶5 (“these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.”) (emphasis added).

<sup>29</sup> Refer to § 1.3.2.1 (The Law of War as the Lex Specialis Governing Armed Conflict).

<sup>30</sup> See United States v. List, *et al.* (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1252 (rejecting defendants’ “plea of military necessity, a term which they confuse with convenience and strategical interests.”); General Dwight D. Eisenhower, Commander-in-Chief, U.S. Army, *Memorandum Regarding the Protection of Historical Monuments in Italy*, Dec. 29, 1943, X WHITEMAN’S DIGEST 438 (§13) (explaining that although “the phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even personal convenience,” *military necessity* should not “cloak slackness or indifference” to discerning whether law of war obligations, such as the protection of cultural property, may be fulfilled without any detriment to operational needs).

<sup>31</sup> Refer to § 4.25.3 (Restrictions on Representatives of the Protecting Powers).

<sup>32</sup> Refer to § 10.9.2.1 (Internment or Assigned Residence Only if Absolutely Necessary).

<sup>33</sup> Refer to § 10.9.3.1 (Internment or Assigned Residence for Imperative Reasons of Security).

necessities of war.<sup>34</sup>

Certain law of war rules may direct that persons comply with an obligation, but only to the extent feasible or consistent with *military necessity*. Examples of rules incorporating the concept of *feasibility* or *necessity* include the following:

- Certain affirmative duties to take feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects.<sup>35</sup>
- Military medical and religious personnel, if their retention is not indispensable, are to be returned to the party to the conflict to which they belong as soon as a road is open for their return and military requirements permit.<sup>36</sup>
- Whenever military considerations permit, POW camps shall be indicated in the day time by the letters PW or PG, placed so as to be clearly visible from the air.<sup>37</sup>
- Should military necessity require the quantity of relief shipments to civilian internees to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.<sup>38</sup>

2.2.3 Applying Military Necessity. *Military necessity* is a difficult concept to define and apply.<sup>39</sup> 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 nature of information available during war compounds this difficulty in evaluating what is necessary.<sup>40</sup> This difficulty runs throughout the law of war, since *military necessity* is itself important and is an element of many other 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 they cannot be judged based on information that subsequently comes to light.

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<sup>34</sup> Refer to § 5.17.2 (Enemy Property – Military Necessity Standard); § 11.18.2 (Seizure or Destruction of Property During Occupation – Application of the Military Necessity Standard).

<sup>35</sup> Refer to § 5.2.3 (Affirmative Duties to Take Feasible Precautions for the Protection of Civilians and Other Protected Persons and Objects).

<sup>36</sup> Refer to § 7.9.4 (Return of Personnel Whose Retention Is Not Indispensable).

<sup>37</sup> Refer to § 9.11.4.3 (Marking of POW Camps).

<sup>38</sup> Refer to § 10.23.3 (Receipt of Individual and Collective Relief Shipments for Internees).

<sup>39</sup> See SPAIGHT, WAR RIGHTS ON LAND 113 (“There is no conception in International Law more elusive, protean, wholly unsatisfactory, than that of war necessity.”).

<sup>40</sup> Refer to § 1.4.2.2 (Nature of War – Limited and Unreliable Information – “Fog of War”).



2.2.3.1 *Consideration of the Broader Imperatives of Winning the War.* In evaluating *military necessity*, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

Some commentators 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 to make them the object of attack.<sup>44</sup> This interpretation, however, does not reflect customary international law or treaty law applicable to DoD personnel.<sup>45</sup> For example, the law of war does

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<sup>41</sup> Refer to § 1.4.1 (Object of War).

<sup>42</sup> Refer to § 5.6.7.3 (Definite Military Advantage); § 5.12.2.1 (Considering the Advantage From the Attack as a Whole – In the Operational and Strategic Context).

<sup>43</sup> See, e.g., Department of Defense, *National Military Strategy of the United States*, 10 (Jan. 1992) (“Once a decision for military action has been made, half-measures and confused objectives extract a severe price in the form of a protracted conflict which can cause needless waste of human lives and material resources, a divided nation at home, and defeat. Therefore, one of the essential elements of our national military strategy is the ability to rapidly assemble the forces needed to win -- the concept of applying decisive force to overwhelm our adversaries and thereby terminate conflicts swiftly with a minimum loss of life.”); LIEBER CODE art. 29 (“The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”); Count von Moltke, letter to Professor Bluntschli, Dec. 11, 1880, *reprinted in* G. SHERSTON BAKER, II HALLECK’S INTERNATIONAL LAW 19 footnote 1 (1908) (“The greatest kindness in war is to bring it to a speedy conclusion.”).

<sup>44</sup> See, e.g., Nils Melzer, Legal Adviser, International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 79 (May 2009) (“In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.”) (emphasis added); JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75-76 (1985) (“If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him.”).

<sup>45</sup> See, e.g., W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, *Executive Order 12333 and Assassination*, Nov. 2, 1989, III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3411, 3419 (“In the employment of military forces, the phrase ‘capture or kill’ carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture, e.g., a known terrorist. However, where the risk to U.S. forces is deemed too great, if the President has determined that the individual[s] in question pose such a threat to U.S. citizens or the national security interests of the United States as to require the use of military force, it would be legally permissible to employ, e.g., an airstrike against that individual or group rather than attempt his, her, or their capture, and would not violate the prohibition on assassination.”).

not require that enemy combatants be warned before being made the object of attack, nor does the law of war require that enemy combatants be given an opportunity to surrender before being made the object of attack.<sup>46</sup> Moreover, the law of war may justify the use of overwhelming force against enemy military objectives.<sup>47</sup>

2.2.3.2 Recognizing Certain Types of Actions as Generally Inherently Militarily Necessary. The law of war recognizes that certain types of actions are, as a general matter, inherently militarily necessary.<sup>48</sup> For example, attacking enemy combatants is generally lawful.<sup>49</sup> Similarly, the internment of enemy POWs is generally lawful.<sup>50</sup> Such rules may be viewed as an example of how, when specific rules are applicable, there is less need to resort to fundamental law of war principles as a general guide for conduct during war.<sup>51</sup>

2.2.3.3 Good Faith Evaluation of Military Necessity Based on the Available Information. In what is sometimes called the “Rendulic Rule,” the law of war recognizes that persons must assess the *military necessity* of an action based on the information available to them at that time; they cannot be judged based on information that subsequently comes to light.<sup>52</sup>

## 2.3 HUMANITY

*Humanity* may be defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.<sup>53</sup>

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<sup>46</sup> Refer to § 5.4.6.1 (Surprise Attacks); § 5.4.6.2 (Attacks on Retreating Forces).

<sup>47</sup> Refer to § 5.4.6 (Force That May Be Applied Against Military Objectives).

<sup>48</sup> See VATTEL, THE LAW OF NATIONS 295 (3.9.173) (explaining that the law of war seeks to avoid contentious disputes between belligerents about whether actions are militarily necessary by establishing “general rules independent of circumstances and of certain and easy application” and thus “permits or tolerates every act which in its essential nature is adapted to attaining the end of war; and it does not stop to consider whether the act was unnecessary, useless, or superfluous in a given case unless there is the clearest evidence that an exception should be made in that instance”).

<sup>49</sup> Refer to § 5.5.1 (Persons, Objects, and Locations That Are Not Protected From Being Made the Object of Attack).

<sup>50</sup> Refer to § 9.11.1 (Internment in POW Camps).

<sup>51</sup> Refer to § 2.1.2.2 (Law of War Principles as a General Guide).

<sup>52</sup> Refer to § 5.3 (Assessing Information Under the Law of War).

<sup>53</sup> See, e.g., 2001 CANADIAN MANUAL ¶202(6) (humanity “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.”); 2004 UK MANUAL ¶2.4 (“Humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes.”); GREENSPAN, MODERN LAW OF LAND WARFARE 315 (humanity “forbids the employment of all such kinds and degrees of violence as are not necessary for the purpose of the war”); 1958 UK MANUAL ¶3 (humanity is the principle “according to which kinds and degrees of violence which are not necessary for the purpose of war are not permitted to a belligerent.”); LAUTERPACHT, II OPPENHEIM’S INTERNATIONAL LAW 227 (§67) (Humanity “postulates that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to a belligerent.”); 1940 RULES OF LAND WARFARE ¶4b (defining the principle of humanity as “prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war”); 1914 RULES OF LAND WARFARE ¶9 (The principle of humanity “says that all such kinds and degrees of violence as are not necessary for the purpose of war are not permitted to a belligerent.”).

2.3.1 Humanity as a Prohibition. Although *military necessity* justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible, *military necessity* cannot justify actions not necessary to achieve this purpose, such as cruelty or wanton violence.<sup>54</sup> Moreover, once a military purpose has been achieved, inflicting more suffering is unnecessary and should be avoided. For example, if an enemy combatant has been placed *hors de combat* (e.g., incapacitated by being severely wounded or captured), no military purpose is served by continuing to attack him or her.<sup>55</sup> Thus, the principle of *humanity* forbids making enemy combatants who have been placed *hors de combat* the object of attack.<sup>56</sup> Similarly, the principle of *humanity* has been viewed as the source of the civilian population's immunity from being made the object of attack because their inoffensive and harmless character means that there is no military purpose served by attacking them.<sup>57</sup>

2.3.1.1 Relationship Between the Principles of Humanity and Military Necessity. Humanity is related to military necessity, and these principles logically complement one another.

Humanity may be viewed as the logical inverse of the principle of military necessity. If certain necessary actions are justified, then certain unnecessary actions are prohibited. The principle of humanity is an example of how the concept of necessity can function as a limitation as well as a justification.<sup>58</sup>

Because humanity forbids those actions that are unnecessary, the principle of humanity is not in tension with military effectiveness, but instead reinforces military effectiveness.<sup>59</sup>

2.3.2 Humanity and Law of War Rules. *Humanity* animates certain law of war rules, including:

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<sup>54</sup> United States v. List, *et al.* (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1253-54 (“[Military necessity] does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. ... It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.”); LIEBER CODE art. 16 (“Military necessity does not admit to cruelty -- that is, the infliction of suffering for the sake of suffering or for revenge, ...”).

<sup>55</sup> See 2004 UK MANUAL ¶2.4.1 (“The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary. Thus, if an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him. For the same reason, the principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action.”).

<sup>56</sup> Refer to § 5.9 (Persons Placed *Hors de Combat*).

<sup>57</sup> Refer to § 4.2.1 (Development of the Distinction Between the Armed Forces and the Civilian Population).

<sup>58</sup> Cf. *Ex parte Milligan*, 71 U.S. 2, 127 (1866) (“If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for, if this government is continued after the courts are reinstated, it is a gross usurpation of power.”) (emphasis added).

<sup>59</sup> Refer to § 18.2.1 (Reinforcing Military Effectiveness).

- fundamental safeguards for persons who fall into the hands of the enemy;<sup>60</sup>
- protections for the civilian population and civilian objects;<sup>61</sup>
- protections for military medical personnel, units, and transports;<sup>62</sup>
- prohibitions on weapons that are calculated to cause superfluous injury;<sup>63</sup> and
- prohibitions on weapons that are inherently indiscriminate.<sup>64</sup>

The principle of *humanity* may help interpret or apply these and other law of war rules. For example, the requirement that POWs be interned only in premises located on land has been understood not to prohibit POW detention aboard ships pending the establishment of suitable facilities on land, if detention aboard ships provides the most appropriate living conditions for POWs.<sup>65</sup> Similarly, the U.S. reservation to CCW Protocol III on Incendiary Weapons makes clear that U.S. forces may use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons.<sup>66</sup>

## 2.4 PROPORTIONALITY

*Proportionality* may be defined as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.<sup>67</sup>

*Proportionality* has also been viewed as a legal restatement of the military concept of

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<sup>60</sup> Refer to § 8.2 (Humane Treatment of Detainees); § 9.5 (Humane Treatment and Basic Protections for POWs); § 10.5 (Humane Treatment and Other Basic Protections for Protected Persons).

<sup>61</sup> Refer to § 5.2 (Overview of Rules for the Protection of Civilians).

<sup>62</sup> Refer to § 7.8 (Respect and Protection of Categories of Medical and Religious Personnel); § 7.10 (Military Medical Units and Facilities); § 7.11 (Ground Transport); § 7.12 (Hospital Ships, Sick-Bays in Warships, and Coastal Rescue Craft); § 7.14 (Military Medical Aircraft).

<sup>63</sup> Refer to § 6.6 (Weapons Calculated to Cause Superfluous Injury).

<sup>64</sup> Refer to § 6.7 (Inherently Indiscriminate Weapons).

<sup>65</sup> Refer to § 9.11.3.1 (Location on Land).

<sup>66</sup> Refer to § 6.14.3.2 (U.S. Reservation to CCW Protocol III on Incendiary Weapons).

<sup>67</sup> See Daniel Webster, *Letter to Mr. Fox*, Apr. 24, 1841, reprinted in DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 110 (1848) (explaining that even actions taken in self-defense should not be “unreasonable or excessive” since such actions “justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it”). See also GROTIUS, LAW OF WAR & PEACE 601 (3.1.4.2) (“we must also beware of what happens, and what we foresee may happen, beyond our purpose, unless the good which our action has in view is much greater than the evil which is feared, or, greater than the fear of the evil.”); VATTTEL, THE LAW OF NATIONS 279 (3.8.137) (explaining that a Sovereign has “the right to make war upon his fellow-men as a matter of necessity, and as a remedy,” but the Sovereign should not “push the remedy beyond its just limits,” and should “be careful not to make it more severe or more disastrous to mankind than the care of his own safety and the defense of his rights require.”).

economy of force.<sup>68</sup>

#### 2.4.1 Proportionality as a Limit on the Exercise of a Right.

2.4.1.1 *Justification in Acting.* *Proportionality* is implicated in cases in which one is justified in acting. In *jus in bello*, for example, *military necessity* justifies making military objectives, such as enemy combatants, the object of attack. So, an attack on enemy combatants that incidentally damages civilian property would raise *proportionality* considerations. On the other hand, where there is no justification for acting, such as unlawful attacks directed against the civilian population, a *proportionality* analysis would not be necessary to reach the conclusion that the attack would be unlawful.

2.4.1.2 *Unreasonable or Excessive.* *Proportionality* generally weighs the justification for acting against the expected harms to determine whether the latter are disproportionate in comparison to the former. In war, incidental damage to the civilian population and civilian objects is unfortunate and tragic, but inevitable.<sup>69</sup> Thus, applying the principle of proportionality in conducting attacks does not require that no incidental damage result from attacks.<sup>70</sup> Rather, this principle creates obligations to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained and to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.<sup>71</sup>

Under the law of war, judgments of *proportionality* often involve difficult and subjective comparisons.<sup>72</sup> Recognizing these difficulties, States have declined to use the term “proportionality” in law of war treaties because it could incorrectly imply an equilibrium between considerations or suggest that a precise comparison between them is possible.<sup>73</sup>

2.4.2 Examples Where Proportionality Is Reflected in Law of War Rules. The principle of proportionality is reflected in many areas in the law of war.

*Proportionality* is often used to refer to the *jus in bello* prohibition on attacks expected to cause excessive incidental harm.<sup>74</sup> However, the principle of proportionality described in a more

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<sup>68</sup> Refer to § 5.12.3.1 (The Military Concept of Economy of Force).

<sup>69</sup> Refer to § 1.4.2 (Nature of War).

<sup>70</sup> Refer to § 5.10 (Proportionality in Conducting Attacks).

<sup>71</sup> Refer to § 5.12 (Proportionality – Prohibition on Attacks Expected to Cause Excessive Incidental Harm); § 5.11 (Proportionality – Feasible Precautions in Planning and Conducting Attacks to Reduce the Risk of Harm to Protected Persons and Objects).

<sup>72</sup> Refer to § 5.10.2.3 (Subjective Aspects of the Decisions and Judgments Required by the Principle of Proportionality). Compare § 2.2.3 (Applying *Military Necessity*).

<sup>73</sup> See, e.g., BOTHE, PARTSCH, & SOLF, NEW RULES 309-10 (AP I art. 51, ¶2.6.2) (describing how some government delegations in the 1974-1977 Diplomatic Conference opposed incorporation of the term “proportionality” or acknowledgement of a law of war “rule” of proportionality in AP I and AP II).

<sup>74</sup> Refer to § 5.12 (Proportionality – Prohibition on Attacks Expected to Cause Excessive Incidental Harm).

general sense in this section also underlies the affirmative duties to take feasible precautions for the protection of civilians and other protected persons and objects.<sup>75</sup> These obligations apply both in conducting attacks and to the party subject to attack.<sup>76</sup> *Proportionality* also plays a role in assessing whether weapons are prohibited because they are calculated to cause unnecessary suffering.<sup>77</sup>

In *jus ad bellum*, *proportionality* requires that the State's means in resorting to force be proportionate to its just cause in using force, such as the threat that the State seeks to address.<sup>78</sup> *Proportionality* is also a requirement for reprisals, which must respond in a proportionate manner to the preceding illegal act by the party against which they are taken.<sup>79</sup>

## 2.5 DISTINCTION

*Distinction*, sometimes called *discrimination*, obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects.<sup>80</sup>

*Distinction* may be understood as encompassing two sets of reinforcing duties. Parties to a conflict must apply a framework of legal classes for persons and objects by: (1) discriminating in conducting attacks against the enemy; and (2) distinguishing a party's own persons and objects.

**2.5.1 Distinction as a Framework of Legal Classes.** *Distinction* requires parties to a conflict to apply a framework of legal classes for persons and objects, each class characterized

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<sup>75</sup> Refer to § 5.2.3 (Affirmative Duties to Take Feasible Precautions for the Protection of Civilians and Other Protected Persons and Objects).

<sup>76</sup> Refer to § 5.11 (Proportionality – Feasible Precautions in Planning and Conducting Attacks to Reduce the Risk of Harm to Protected Persons and Objects); § 5.14 (Feasible Precautions to Reduce the Risk of Harm to Protected Persons and Objects by the Party Subject to Attack).

<sup>77</sup> Refer to § 6.6.3.3 (Clearly Disproportionate).

<sup>78</sup> Refer to § 1.11.1.2 (The Means Must Be Proportionate to the Just Cause (Proportionality – Jus ad Bellum)).

<sup>79</sup> Refer to § 18.18.2.4 (Proportionality in Reprisal).

<sup>80</sup> See, e.g., J. Fred Buzhardt, General Counsel, Department of Defense, Letter to Senator Edward Kennedy, Sept. 22, 1972, reprinted in 67 AJIL 122 (1973) (“A summary of the laws of armed conflict, in the broadest terms, reveals certain general principles including the following: ... (c). That a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible. These general principles were recognized in a resolution unanimously adopted by the United Nations General Assembly in its Resolution dated 13 January 1969 (Resolution 2444 (XXIII)). We regard them as declaratory of existing customary international law.”); Ex parte Quirin, 317 U.S. 1, 30 (1942) (“By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations.”); 2004 UK MANUAL ¶2.5 (“Since military operations are to be conducted only against the enemy’s armed forces and military objectives, there must be a clear distinction between the armed forces and civilians, or between combatants and non-combatants, and between objects that might legitimately be attacked and those that are protected from attack.”). Consider AP I art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

by different rights, duties, and liabilities.

Principally, *distinction* seeks to separate the armed forces and the civilian population.<sup>81</sup> There are, however, certain special cases, such as military medical and religious personnel, who may be treated like a combatant for one purpose (*e.g.*, detention) but like a civilian for another purpose (*e.g.*, not being made the object of attack).<sup>82</sup> However, for any particular legal purpose, a person may not claim the distinct rights afforded to both combatants and civilians at the same time.<sup>83</sup>

**2.5.2 Discriminating in Conducting Attacks Against the Enemy.** *Distinction* requires parties to a conflict to discriminate in conducting attacks against the enemy.<sup>84</sup> On the one hand, consistent with *military necessity*, parties may make enemy combatants and other military objectives the object of attack.<sup>85</sup> On the other hand, consistent with *humanity*, parties may not make the civilian population and other protected persons and objects the object of attack.<sup>86</sup> Moreover, persons using force must discriminate between legitimate and illegitimate objects of attack in good faith based on the information available to them at the time.<sup>87</sup>

**2.5.3 Distinguishing a Party's Own Persons and Objects.** *Distinction* enjoins the party controlling the population<sup>88</sup> to use its best efforts to distinguish or separate its military forces and war-making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives will be minimized as much as possible.<sup>89</sup>

Parties to a conflict must: (1) take certain measures to help ensure that military forces and civilians can be visually distinguished from one another; (2) physically separate, as feasible,

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<sup>81</sup> Refer to § 4.2 (The Armed Forces and the Civilian Population).

<sup>82</sup> Refer to § 4.2.3 (Mixed Cases).

<sup>83</sup> Refer to § 4.2.2 (No Person May Claim the Distinct Rights Afforded to Both Combatants and Civilians at the Same Time).

<sup>84</sup> Refer to § 5.5 (Discrimination in Conducting Attacks).

<sup>85</sup> Refer to § 5.5.1 (Persons, Objects, and Locations That Are Not Protected From Being Made the Object of Attack).

<sup>86</sup> Refer to § 5.5.2 (Persons, Objects, and Locations That Are Protected From Being Made the Object of Attack).

<sup>87</sup> Refer to § 5.4.3.2 (Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks).

<sup>88</sup> Refer to § 5.2.1 (Responsibility of the Party Controlling Civilian Persons and Objects).

<sup>89</sup> See J. Fred Buzhardt, General Counsel, Department of Defense, Letter to Senator Edward Kennedy, Sept. 22, 1972, *reprinted in* 67 AJIL 122 (1973) ("A summary of the laws of armed conflict, in the broadest terms, reveals certain general principles including the following: ... (c). That a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible. ... The principle in (c) addresses primarily the Party exercising control over members of the civilian population. This principle recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives, will be minimized as much as possible.").

their military objectives from the civilian population and other protected persons and objects; and (3) refrain from the misuse of protected persons and objects to shield military objectives.

2.5.3.1 Measures to Help Ensure That Military Forces and Civilians Are Visually Distinguishable From One Another. Parties to a conflict must take certain measures, in offense or defense, to help ensure that military forces and civilians can be visually distinguished from one another.

First, parties to a conflict must not disguise their armed forces as civilians or as other protected categories of persons in order to kill or wound opposing forces.<sup>90</sup> Second, other rules obligate parties to mark protected persons and objects to help ensure they receive the protections of that status.<sup>91</sup> Third, certain rules encourage parties to a conflict to identify certain persons and objects as unprotected. For example, during international armed conflict, members of organized resistance movements must, *inter alia*, wear fixed distinctive signs visible at a distance and carry arms openly to distinguish themselves from the civilian population in order for members of their group to receive POW status.<sup>92</sup>

2.5.3.2 Feasible Measures to Separate Physically a Party's Own Military Objectives From the Civilian Population and Other Protected Persons and Objects. Distinction also creates obligations for parties to a conflict to take feasible measures to separate physically their own military objectives from the civilian population and other protected persons and objects.<sup>93</sup>

For example, it may be appropriate to evacuate civilians from danger areas.<sup>94</sup> Similarly, if feasible, military commanders should avoid placing military objectives in densely populated areas.<sup>95</sup> In addition, it may be appropriate to establish zones where civilians and other protected persons may seek refuge.<sup>96</sup>

2.5.3.3 Refrain From the Misuse of Protected Persons and Objects to Shield Military Objectives. Parties to a conflict must refrain from the misuse of civilians and other protected persons and objects to shield their own military objectives.<sup>97</sup> For example, it is prohibited to take hostages or otherwise to endanger deliberately protected persons or objects for the purpose of deterring enemy military operations.

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<sup>90</sup> Refer to § 5.22 (Treachery or Perfidy Used to Kill or Wound).

<sup>91</sup> Refer to § 5.14.4 (Using Distinctive and Visible Signs to Identify Protected Persons and Objects as Such).

<sup>92</sup> Refer to § 4.6.4 (Having a Fixed Distinctive Sign Recognizable at a Distance); § 4.6.5 (Carrying Arms Openly).

<sup>93</sup> Refer to § 5.14 (Feasible Precautions to Reduce the Risk of Harm to Protected Persons and Objects by the Party Subject to Attack).

<sup>94</sup> Refer to § 5.14.2 (Removing Civilians and Civilian Objects From the Vicinity of Military Objectives).

<sup>95</sup> Refer to § 5.14.1 (Refraining From Placing Military Objectives in Densely Populated Areas).

<sup>96</sup> Refer to § 5.14.3 (Establishing Areas Where Civilians or the Wounded and Sick Are Protected).

<sup>97</sup> Refer to § 5.16 (Prohibition on Using Protected Persons and Objects to Shield, Favor, or Impede Military Operations).



Misusing protected persons and objects to shield military objectives also offends *honor* because it constitutes a breach of trust with the enemy and thus undermines respect for the law of war.<sup>98</sup>

2.5.4 Misconceptions About Distinction. *Distinction* seeks to ensure that protected and unprotected categories are distinct from one another, not distinct in the abstract. For example, using camouflage is consistent with *distinction* because foliage is not a protected category and because civilians generally do not wear camouflage.<sup>99</sup> Similarly, U.S. forces have worn non-standard uniforms to blend with local forces while remaining distinct from the civilian population.<sup>100</sup>

*Distinction* addresses the different rights, duties, and liabilities of the categories; it does not require that a particular person or object fall within a particular category. For example, the principle of *distinction* does not prohibit an otherwise civilian object from being used for military purposes, thereby turning it into a military objective.<sup>101</sup> However, if such an object were seized from the enemy, such seizure would have to have been imperatively demanded by the necessities of war.<sup>102</sup> Similarly, persons with medical training or who provide medical care on the battlefield are not necessarily military medical personnel and need not be identified as such.<sup>103</sup> Rather, a State may reserve the ability to use these persons as combatants by refraining from designating them as exclusively engaged in medical activities.

2.5.5 Reinforcing Duties – Discriminating in Conducting Attacks and Distinguishing a Party’s Own Persons and Objects. Discriminating in conducting attacks against the enemy and distinguishing a party’s own persons and objects reinforce one another.

A party is not relieved of its obligations to discriminate in conducting attacks by the failures of its adversary to distinguish its military objectives from protected persons and objects.<sup>104</sup> Nonetheless, the practical ability of a party to a conflict to discriminate in conducting attacks often depends on the degree to which its enemy has distinguished its military objectives from its protected persons and objects. For example, if enemy forces intermingle with civilians, then a party may be less able to avoid incidentally harming the civilian population.

In addition, the degree to which an enemy force in fact discriminates in conducting attacks may affect whether a party distinguishes its protected persons and objects from its military objectives. For example, if enemy forces do not respect the red cross emblem, but instead specifically attack persons wearing it, then the party receiving these attacks is less likely

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<sup>98</sup> Refer to § 2.6.2 (Certain Amount of Fairness in Offense and Defense).

<sup>99</sup> Refer to § 5.25.2 (Examples of Ruses), footnote 849 and accompanying text.

<sup>100</sup> Refer to § 5.25.2.1 (Mimicking Other Friendly Forces).

<sup>101</sup> Refer to § 5.16.1 (Protected Persons and Objects).

<sup>102</sup> Refer to § 5.17.2.2 (Seizure or Destruction of Enemy Property to Support Military Operations).

<sup>103</sup> Refer to § 4.9.2 (Requirements for Military Medical and Religious Status).

<sup>104</sup> Refer to § 5.4.4 (Failure by the Defender to Separate or Distinguish Does Not Relieve the Attacker of the Duty to Discriminate in Conducting Attacks).

to distinguish its medical personnel and transports.<sup>105</sup> Similarly, if insurgents seek to attack civilians in a non-international armed conflict, positioning military forces near the civilian population may be essential to protecting the civilian population.<sup>106</sup>

## 2.6 HONOR

\*\*\*\*OPTIONAL FROM HERE ON\*\*\*\*

*Honor* demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing military forces.<sup>107</sup>

2.6.1 Honor – Background and Notes on Terminology. *Honor* has been vital to the development of the law of war, which was preceded by warriors' codes of ethical behavior.<sup>108</sup> U.S. military canons of personal conduct continue to emphasize the importance of honor as a core value. Honor as a core value and other ethical norms continue to be vital as a medium for the implementation of the law of war.<sup>109</sup>

<sup>105</sup> Refer to § 7.15.2.1 (Removal or Obscuration of the Distinctive Emblem).

<sup>106</sup> Refer to § 17.5.2.1 (Positioning Military Forces Near the Civilian Population to Win Their Support and to Protect Them).

<sup>107</sup> See, e.g., LAUTERPACHT, II OPPENHEIM'S INTERNATIONAL LAW 227 (§67) (chivalry "arose in the Middle Ages and introduced a certain amount of fairness in offence and defence, and a certain mutual respect"); 1958 UK MANUAL ¶3 ("The development of the law of war has been determined by three principles: ... and thirdly, the principle of chivalry, which demands a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces."); 1914 RULES OF LAND WARFARE ¶9 ("The development of the laws and usages of war is determined by three principles. ... Third, the principle of chivalry, which demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces."); UNITED KINGDOM WAR OFFICE, MANUAL OF MILITARY LAW, Chapter XIV, *The Laws and Usages of War on Land*, 234 (¶3) (1914) ("The development of the laws and usages of war is determined by three principles. ... And there is, thirdly, the principle of chivalry, which demands a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces.").

<sup>108</sup> See, e.g., LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 20-23 (2000) (describing references to warrior codes from ancient Israel, China, India, Greece, Rome, and Islam).

<sup>109</sup> John Keegan, *If you won't, we won't: Honour and the decencies of battle*, THE TIMES LITERARY SUPPLEMENT, Issue 4834, 11 (Nov. 24, 1995; London, England) ("In the most perceptive sentence in *The Laws of War*, Adam Roberts observes, during his survey of the effect of the Hague Conventions of 1895 and 1907, that 'the experience of land war in two world wars must raise a question as to whether formal legal codification is necessarily superior to notions of custom, honour, professional standards, and natural law' in making for battlefield decencies. He might have made his point more emphatically. There is no substitute for honour as a medium of enforcing decency on the battlefield, never has been and never will be. There are no judges, more to the point, no policemen at the place where death is done in combat; that may be, in fact, the intended and all too often true, meaning of 'silent leges inter arma'. All turns on the values of the junior leader present at the moment when the opponent's capacity or will to resist fails, he ceases to be a combatant and he must hope for the mercy of the suddenly stronger."); for example, MORAL COURAGE IN COMBAT: THE MY LAI STORY, *Lecture by Hugh Thompson*, 26 (U.S. Naval Academy Center for Professional Military Ethics 2003) ("**Question** Do you attribute your ability to see through the moral fog that day, better than those who made the massacre at My Lai happen, to any prior military training or experience? **Mr. Thompson** No, I don't believe it was any military training, because I had been through the training that everybody else had been. We had a 50-minute class of instruction on the Geneva Convention, a 50-minute class of instruction on the Code of Conduct, and a 50-minute class of instruction on the rules of engagement. ... But [my parents] always taught me to help the underdog. Don't be a bully and live by the golden rule. That golden rule says so much, and it's so simple and so basic. You know, I can't say it was a leadership 405 or whatever. I just think it was my parents, and they taught me right from wrong.").

*Honor* has also been called *chivalry*. *Chivalry* is often associated with a specific historical context—a code of behavior for knights in Europe during the Middle Ages. Rather than refer to this specific context, the term *honor* is used in this manual to indicate more clearly that the law of war principle of *honor* draws from warriors’ codes from a variety of cultures and time periods.

2.6.2 Certain Amount of Fairness in Offense and Defense. *Honor* requires a certain amount of fairness in offense and defense. *Honor* forbids resort to means, expedients, or conduct that would constitute a breach of trust with the enemy.<sup>110</sup>

2.6.2.1 Acceptance That Belligerent Rights Are Not Unlimited. In requiring a certain amount of fairness in offense and defense, *honor* reflects the principle that parties to a conflict must accept that certain limits exist on their ability to conduct hostilities. For example, parties to the conflict must accept that the right of belligerents to adopt means of injuring the enemy is not unlimited.<sup>111</sup> Here, *honor* does not address what those limits are so much as requires that parties accept that there are legal limits that govern their conduct of hostilities.<sup>112</sup> This acceptance is a prerequisite for the existence and operation of the law of war in the way that the principle of *pacta sunt servanda* (treaties are binding on parties and must be performed by them in good faith) provides a necessary foundation for treaties to exist and operate as instruments that are legally binding on States.<sup>113</sup>

Thus, *honor* may be understood to provide a foundation for obligations that help enforce and implement the law of war or special agreements between belligerents during armed conflict.<sup>114</sup> For example, *honor* may be understood to provide the foundation for the requirement for persons to comply with the law of war in good faith.<sup>115</sup> Similarly, POWs are bound to adhere to paroles on their personal honor.<sup>116</sup>

2.6.2.2 Prohibition on Conduct That Breaches Trust With the Enemy. In requiring a certain amount of fairness in offense and defense, *honor* also forbids resort to means,

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<sup>110</sup> 1940 RULES OF LAND WARFARE ¶4(c) (chivalry “denounces and forbids resort to dishonorable means, expedients, or conduct”); 2001 CANADIAN MANUAL ¶202(7) (“An armed conflict is rarely a polite contest. Nevertheless, the concept of chivalry is reflected in specific prohibitions such as those against dishonourable or treacherous conduct and against misuse of enemy flags or flags of truce.”).

<sup>111</sup> See, e.g., 1899 HAGUE II REG. art. 22 (“The right of belligerents to adopt means of injuring the enemy is not unlimited.”); HAGUE IV REG. art. 22 (same); CCW preamble (noting “the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited”). Consider AP I art. 35(1) (“In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”).

<sup>112</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 583, 585 (¶11) (Dissenting Opinion of Judge Higgins) (“The legal principle by which parties to an armed conflict do not have an unlimited choice of weapons or of methods of warfare... [is intended] to ensure that weapons, both in the context of their use, and in the methods of warfare, must comply with the other substantive rules.”).

<sup>113</sup> Refer to § 1.10.1.1 (Legal Force of Treaties Among States).

<sup>114</sup> Refer to § 18.1.2 (National Obligations to Implement and Enforce the Law of War).

<sup>115</sup> Refer to § 18.3 (Duties of Individual Members of the Armed Forces).

<sup>116</sup> Refer to § 9.11.2 (Parole of POWs).

expedients, or conduct that would constitute a breach of trust with the enemy. In particular, *honor* requires a party to a conflict to refrain from taking advantage of its opponent's adherence to the law by falsely claiming the law's protections.

*Honor* forbids such conduct because it may: (1) undermine the protections afforded by the law of war; (2) impair non-hostile relations between opposing belligerents; and (3) damage the basis for the restoration of peace short of complete annihilation of one belligerent by another.<sup>117</sup>

For example, enemies must deal with one another in good faith in their non-hostile relations.<sup>118</sup> And even in the conduct of hostilities, good faith prohibits: (1) killing or wounding enemy persons by resort to perfidy; (2) misusing certain signs; (3) fighting in the enemy's uniform; (4) feigning non-hostile relations in order to seek a military advantage; and (5) compelling nationals of a hostile party to take part in the operations of war directed against their own country.<sup>119</sup> *Honor*, however, does not forbid parties from using ruses and other lawful deceptions against which the enemy ought to take measures to protect itself.<sup>120</sup>

**2.6.3 Certain Mutual Respect Between Opposing Military Forces.** *Honor* demands a certain mutual respect between opposing military forces.

Opposing military forces should respect one another outside of the fighting because they share a profession and they fight one another on behalf of their respective States and not out of personal hostility.<sup>121</sup> For example, this principle is reflected in the rule that POWs are legally in the hands of the enemy State and not the individuals or military units who have captured them.<sup>122</sup>

**2.6.3.1 Honor and Rules for POW Captivity.** In demanding a certain mutual respect between opposing military forces, *honor* animates rules that relate to the treatment of POWs. For example, *honor* is one of the foundations for the humane treatment of POWs.<sup>123</sup> The

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<sup>117</sup> Refer to § 5.21.1 (Harms From Breaches of Good Faith).

<sup>118</sup> Refer to § 12.2 (Principle of Good Faith in Non-Hostile Relations).

<sup>119</sup> Refer to § 5.21 (Overview of Good Faith, Perfidy, and Ruses).

<sup>120</sup> Refer to § 5.25 (Ruses of War and Other Lawful Deceptions).

<sup>121</sup> See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT & DISCOURSES 12 (1920) ("The object of war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take.").

<sup>122</sup> Refer to § 9.2.2 (Responsibility of the Detaining Power).

<sup>123</sup> See, e.g., Samuel Falle, *Chivalry*, 113 Proceedings Magazine, Jan. 1987 ("During World War II, the Japanese were portrayed as brutal, subhuman savages—the hordes of Attila or Genghis Khan. Certainly they did terrible things, but I was fortunate enough to see something different. It is called 'chivalry,' which the Oxford Dictionary defines as a 'medieval knightly system, with its religious, moral, and social code; ideal knight's characteristics.' I see it as compassion and magnanimity toward a beaten enemy."); United States, *et al. v. Göring, et al., Judgment, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE IMT* 289 ("When, on 8 September 1941, OKW issued its ruthless regulations for Soviet POW's, Canaris wrote to [the defendant] Keitel that under international law the SD should have nothing to do with this matter. On this memorandum, in Keitel's handwriting, dated 23 September and

principle of *honor* is also reflected in rules that require POWs and their captors to treat one another with respect. For example, POWs must be treated with respect for their honor and person.<sup>124</sup> As another example, POWs, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.<sup>125</sup> In addition, capitulations agreed upon between belligerents must take into account the rules of military honor.<sup>126</sup>

2.6.3.2 *Honor and the Class of Military Forces*. In demanding a certain mutual respect between opposing military forces, *honor* also reflects the premise that military forces are a common class of professionals who have undertaken to comport themselves honorably.<sup>127</sup>

*Honor* thus animates the rules that determine who qualifies for privileges of combatant status. For example, an armed group must, *inter alia*, be organized under a responsible command and conduct its operations in accordance with the law of war in order for its members to be entitled to POW status during international armed conflict.<sup>128</sup> On the other hand, private persons are generally denied the privileges of combatant status because they do not belong to this class of combatants.<sup>129</sup>

The principle that combatants share a common class has also been a foundation for the trial of enemy combatants by military tribunals.<sup>130</sup> For example, the GPW expresses a

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initiated by him, is the statement: ‘The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.’”).

<sup>124</sup> Refer to § 9.5.1 (Respect for Their Persons and Honor).

<sup>125</sup> Refer to § 9.22.3 (Saluting Between POWs and Officers of the Detaining Power).

<sup>126</sup> Refer to § 12.8.3 (Rules of Military Honor).

<sup>127</sup> SPAIGHT, AIR POWER AND WAR RIGHTS 109-10 (“Chivalry is difficult to define but it means broadly, the waging of war in accordance with certain well-recognised formalities and courtesies. It is an influence quite distinct from the humanitarian one; indeed, it prevailed in its full vigour at a time in which humanitarian interests were otherwise entirely disregarded: witness the cruelty of the Black Prince to the people of Limoges. It is against free from any necessary connection with Christianity; Saladin was a chivalrous as Coeur-de-Lion. It is, indeed, the spirit pure and simple, of knighthood. It expresses in effect the feeling of the combatants that they belong to a caste, that their encounter in arms is a high ceremonial, that an opponent is entitled to all honour and respect, that your enemy, though he is your enemy, is at the same time a brother in the same noble family of knights-at-arms. Until gunpowder came to democratise war, chivalry and chivalry alone was an influence making for moderation in war. It was the first motive power for the creation of a restrictive law of war.”).

<sup>128</sup> Refer to § 4.6.1 (GPW 4A(2) Conditions in General).

<sup>129</sup> Refer to § 4.18.3 (Private Persons Who Engage in Hostilities – Lack of the Privileges of Combatant Status).

<sup>130</sup> General Douglas MacArthur, *Action of the Confirming Authority*, Feb. 7, 1946, United States v. Yamashita (U.S. Military Commission, Manila, Dec. 7, 1945), LEVIE, DOCUMENTS ON POWs 298 (“It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze. Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits, - sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has

preference for POWs to be tried by military courts rather than civilian courts.<sup>131</sup>

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failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten. Peculiarly callous and purposeless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.”).

<sup>131</sup> *Refer to § 9.26.3 (Trial by Military Courts).*