

NEW ZEALAND  
**DEFENCE FORCE**  
TE OPE KAATUA O AOTEAROA



DM 69 (2 ed) **Volume 4**

# MANUAL OF ARMED FORCES LAW

**Volume 4**

Law of Armed Conflict

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# INTRODUCTION

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## SECTION 1 – THE LAW OF ARMED CONFLICT

- 1.1.1** DM 69 (2 ed) *Manual of Armed Forces Law, Volume 4 Law of Armed Conflict* is promulgated for use by members of the New Zealand Defence Force (NZDF). This volume replaces DM 112 *Interim Law of Armed Conflict Manual*.
- 1.1.2** The contents of this volume are Defence Force Orders (DFO) issued pursuant to the Defence Act 1990 (DA) s 27, and come into force on the date of signature.
- 1.1.3** The text is authoritative to the extent that it is consistent with treaties to which New Zealand is a party, rules of customary international law, Acts of Parliament, statutory instruments and relevant judicial decisions. In the event of any inconsistency, the provision of the treaty, customary law, Act, statutory instrument or judicial decision is to prevail. However, where a minimum standard of conduct has been established in law, these orders may require a higher standard of behaviour of members of the NZDF than that prescribed elsewhere. No provision of this volume is to be taken to prevail over the direction or order of a judge.
- 1.1.4** In the event of any conflict between the provisions of this volume and any other orders, manuals or procedures issued within the NZDF, or issued for the use of NZDF personnel, this volume is to prevail. Any such conflict is to be reported through command channels to the Chief of Defence Force (CDF), for the attention of the Director of Defence Legal Services (D DLS), without delay. Any errors or omissions are to be similarly reported.
- 1.1.5** Terms used in this manual take their meanings from the Armed Forces Discipline Act 1971 (AFDA) s 2 and DA s 2 unless otherwise indicated. A glossary of terms is prescribed in DM 69, Volume 1 *Commander's Handbook on Military Law* at page 1–4. A glossary of additional terms and other reference material are contained in Chapter 1 of this volume.
- 1.1.6** DM 69, Volume 4 is administered by the Directorate of Legal Services (DLS), Headquarters New Zealand Defence Force (HQNZDF), Wellington.

07 August 2017

By order of



T.J. Keating  
Lieutenant General  
Chief of Defence Force



**SECTION 2 – PURPOSE AND SCOPE OF THIS MANUAL****PURPOSE****1.2.1** This manual:

- a.** prescribes orders implementing New Zealand’s Law of Armed Conflict (LOAC) obligations;
- b.** prescribes the rights and obligations of members of the NZDF under LOAC;
- c.** provides explanations of and guidance on those rights and obligations; and
- d.** provides the basis for the content of all LOAC training in the NZDF.

**SCOPE****1.2.2** This manual is for the use of the NZDF. It consolidates, explains and converts into orders the LOAC obligations binding any member of the NZDF by virtue of New Zealand’s treaty obligations and customary international law.<sup>1</sup> It is not a general text on LOAC and should not be regarded as setting out the LOAC obligations of forces from other States.<sup>2</sup>**1.2.3** This manual also addresses:

- a.** legislation and common law provisions that implement LOAC into New Zealand law;
- b.** prevention, suppression and punishment of international crimes in the context of armed conflict;<sup>3</sup> and
- c.** LOAC training and dissemination obligations.

**DEFINITIONS****1.2.4** Definitions used in this manual are derived from international and domestic law interpreted consistently with New Zealand’s understandings of the meaning of those terms.**PRINCIPLES****1.2.5** Certain principles of LOAC are set out in this manual and are not expressed in mandatory language because their general nature means that they are not appropriate for translation into orders. These principles are to be used as a guide to understanding the orders.**ORDERS****1.2.6** The orders in this manual give effect to NZDF’s international and domestic legal obligations as well as applicable command decisions of the CDF supplementing or expanding those legal obligations. All orders in this manual must be complied with and a failure to so will constitute a breach of AFDA.<sup>4</sup>

<sup>1</sup> For an explanation of the sources of LOAC see Chapter 3.

<sup>2</sup> For LOAC application among other States see Chapter 6.

<sup>3</sup> See Chapter 17.

<sup>4</sup> **AFDA** s 39(a).

- 1.2.7** Nothing in this manual, nor any command or directive, may authorise an action that breaches LOAC. CDF may issue orders which constrain the actions of the NZDF to a greater degree than strictly required by LOAC. Where a rule of LOAC is controversial or provides for a range of standards, the standard decided upon by CDF is the one prescribed in this manual.

## SECTION 3 – APPLICATION OF THIS MANUAL

### ALL OPERATIONAL ENVIRONMENTS

- 1.3.1** This manual sets out rights and obligations that apply in the maritime, land and air environments. Since NZDF operations will often be of a joint nature, it is essential that members of all three Services understand LOAC in a comprehensive manner. Rules that only apply in one environment are dealt with under the appropriate subject heading.<sup>5</sup>

### DIFFERENT TYPES OF CONFLICT

- 1.3.2** This manual applies to all armed conflicts in which a New Zealand force or a member of the NZDF is participating.
- 1.3.3** Some elements of LOAC draw distinctions between international armed conflict (IAC) and non-international armed conflict (NIAC).<sup>6</sup> In this manual, all orders are applicable to both forms of armed conflict unless otherwise stated. Where LOAC rules are still governed by IAC and NIAC distinctions, the nature of the difference is explained in the text of this manual. Where an obligation or right does not apply, or is applied differently, in a NIAC environment, that distinction will be explained in the text.
- 1.3.4** This manual is also to be applied, subject to any necessary modification, in respect of NZDF involvement in peace support operations.<sup>7</sup>

### MEMBERS OF THE ARMED FORCES

- 1.3.5** All parts of this manual apply to all members of the Armed Forces as constituted under DA s 11. It also applies to other persons subject to the AFDA, namely:
- a.** members of other forces attached to the Armed Forces,<sup>8</sup>
  - b.** volunteers,<sup>9</sup> and
  - c.** trainees.<sup>10</sup>
- 1.3.6** Members of the NZDF remain subject to LOAC, the AFDA and this manual even if they are serving as part of a foreign force.

### MEMBERS OF THE CIVIL STAFF

- 1.3.7** Members of the Civil Staff are required to comply with this manual, subject to necessary modifications, as a condition of employment with the NZDF. Members of the Civil Staff are not entitled to combatant status.<sup>11</sup> Therefore provisions of this manual that permit the use of weapons and munitions,<sup>12</sup> or that permit certain methods of combat,<sup>13</sup> are not authority for members of the Civil Staff to take a direct part in hostilities.

5 For particular rules applying in the maritime and air environments see Chapter 10.

6 For IAC and NIAC see Chapter 5, Section 4 and Section 5.

7 For peace support operations see Chapter 5, Section 6.

8 AFDA s 9 and DA s 23A.

9 AFDA s 10.

10 AFDA s 11.

11 For combatant status see Chapter 6, Section 3.

12 For weapons and munitions see Chapter 7.

13 For methods of combat see Chapter 8.

**OTHER CIVILIANS ACCOMPANYING A NEW ZEALAND FORCE<sup>14</sup>**

- 1.3.8** The Commander Joint Forces New Zealand (COMJFNZ) is to ensure that civilians employed by or accompanying a New Zealand force during armed conflict or peace support operations are required to comply with this manual, subject to necessary modifications, in the employment agreement establishing their employment.<sup>15</sup> The expression ‘member of the NZDF’ is to be interpreted to include any civilian employed by or accompanying a New Zealand force.
- 1.3.9** Provisions of this manual that permit the use of weapons and munitions,<sup>16</sup> or that permit certain methods of combat,<sup>17</sup> are not authority for civilians accompanying a New Zealand force to take a direct part in hostilities.

**OTHER PERSONS**

- 1.3.10** Relevant provisions of this manual also apply to other persons subject to the AFDA, including:
- a.** enemy prisoners of war (PWs);<sup>18</sup>
  - b.** persons alleged to be spies;<sup>19</sup> and
  - c.** passengers in NZDF warships, NZDF aircraft and NZDF vehicles.<sup>20</sup>

14 This provision relates to persons who are employed by a force but who are not members of the Civil Staff, eg locally employed civilians employed under **DA** s 90A.

15 For application of LOAC to private companies see Chapter 6, Section 8.

16 For combatant status see Chapter 6, Section 3.

17 For weapons and munitions see Chapter 7.

18 **AFDA** s 12: PWs in the control of the NZDF become subject to the AFDA. Although their compliance with LOAC up until the time of capture is governed by the obligations applicable to the armed force in which they serve, while in New Zealand hands their compliance with LOAC also becomes an NZDF responsibility.

19 **AFDA** s 13.

20 **AFDA** s 15. For NZDF warships and aircraft see Chapter 10, Section 1.

## ANNEX A – ABBREVIATIONS AND ACRONYMS

Abbreviations and Acronyms	
APM	anti-personnel mine
art	article (of a treaty, etc.)
AXO	abandoned explosive ordnance
CDF	Chief of Defence Force
CO	commanding officer
COI	Court of Inquiry
COMJFNZ	Commander Joint Forces New Zealand
Court Martial	Court Martial of New Zealand
D DLS	Director of Defence Legal Services
DFO	Defence Force Order(s)
DISCO	disciplinary officer
DLS	Defence Legal Services
DMP	Director of Military Prosecutions
DU	depleted uranium
EEZ	Exclusive Economic Zone
ERW	explosive remnants of war
FIBUA	fighting in built up areas
HQ JFNZ	Headquarters Joint Forces New Zealand
HQNZDF	Headquarters New Zealand Defence Force
IAC	international armed conflict
IC	internment camp
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IED	improvised explosive device

Abbreviations and Acronyms	
IHL	international humanitarian law
IHRL	international human rights law
ILC	International Law Commission
IMAS	International Mine Action standards
LEGAD	NZDF Legal Adviser
LOAC	Law of Armed Conflict
MOTAPM	mines other than anti-personnel mines
NATO	North Atlantic Treaty Organisation
NCO	non-commissioned officer
NGO	non-governmental organisation
NIAC	non-international armed conflict
NZDF	New Zealand Defence Force
PDT	pre-deployment training
PMSC	private military and security company/companies
PW	prisoner of war
ROE	rules of engagement
RNZAF	Royal New Zealand Air Force
RNZN	Royal New Zealand Navy
RPAS	remotely piloted aerial system
RPV	remotely piloted vehicle
s	section (of an Act, etc)
SOFA	status of forces agreement
UAS	unmanned aircraft system
UAV	unmanned aerial vehicle
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNGAR	United Nations General Assembly Resolution or resolution

Abbreviations and Acronyms	
UNHCR	United Nations High Commission for Refugees
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UXO	unexploded ordnance
VCDF	Vice Chief of Defence Force
WMD	weapon(s) of mass destruction

## ANNEX B – GLOSSARY OF TERMS

Term	Meaning	Authority
<i>hors de combat</i>	In French means ‘out of combat’, a situation in which a combatant has ceased to take part in hostilities through being wounded, sick, shipwrecked or deprived of liberty.	Geneva Protocol I art 41(2)
international armed conflict	Armed conflict occurring between two or more States. It includes occupation of foreign territory even when it meets with no resistance.	Geneva Convention Common Article 2
international humanitarian law	A body of law that protects persons who are not, or who are no longer participating in hostilities, and restricts the means and methods of warfare; another term for Law of Armed Conflict.	
international human rights law	Part of international law concerned with the legal protection of human beings from the actions of their own State authorities, or the authorities of the State in which they may be located.	
New Zealand force	A force comprising a part, or parts, of the Armed Forces. There is no minimum size or capability inherent in the use of this term.	Defence Act s 2
New Zealand naval ship	Any of Her Majesty’s New Zealand ships, including any ship used or set aside for the purposes of the Navy.	Defence Act s 2
non-international armed conflict	A conflict fought within the territory of a State between government forces and forces in rebellion against that government, or amongst armed groups, none of which qualify as a legitimate government. May also apply to an armed conflict between a State and a non-State entity.	Geneva Convention Common Article 3 and Geneva Protocol II
NZDF commander	Any member of the NZDF entrusted with the power of command at any level. It includes any person who has the duty to plan, decide upon or execute an attack or operation, regardless of rank.	



Term	Meaning	Authority
NZDF Legal Adviser (see LEGAD)	The legally qualified officer posted to, attached to or serving with NZDF Defence Legal Services who is responsible for providing legal advice to the part of the NZDF in question.	
opposing force	Any force or group against which the NZDF is engaged in combat operations. It includes: <ul style="list-style-type: none"> <li>• combatants of the armed forces of a State with which New Zealand is at war;</li> <li>• members of armed groups and dissident forces in both IAC and NIAC;</li> <li>• persons taking a direct part in hostilities against a New Zealand force or its coalition partners in armed conflict; and</li> <li>• persons attacking such a force during peace support operations</li> </ul>	
party to a treaty	A State that has ratified or acceded to a treaty.	
party to the conflict	Any State or non-State actor that is actively involved in the conduct of an armed conflict. Also known as a 'belligerent'. <sup>21</sup>	
rules of engagement	Directives issued by the highest level of military command which specify the circumstances and manner under which force will be used in execution of the mission.	NZDDP-06.1
small arms	Revolvers and self-loading pistols, rifles, sub-machine guns and light machine guns.	UN Panel of Governmental Experts Report 1997
war crimes	Serious violations of LOAC giving rise to individual criminal responsibility. <sup>22</sup>	Rome Statute art 8

21 Because NIAC does not involve conflict between two States, the expression 'parties to the conflict' must not be read to imply that armed groups or dissident armed forces have a particular status under international law. The term 'belligerent' is not used in this manual because it is seldom used in common speech.

22 See Chapter 17.

**ANNEX C – TREATIES**

Citation name	Full title
Antarctic Treaty	Antarctic Treaty (Washington, 1 December 1959; 402 UNTS 71; NZTS 1961, 12) See Antarctica Act 1960, Schedule 1
Bacteriological Weapons Convention	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (London, Moscow and Washington, 10 April 1972, 26 March 1975; 1015 UNTS 163) See New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987, Schedule 5
Chemical Weapons Convention	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Paris, 13 January 1993; 32 ILM 800) See Chemical Weapons (Prohibition) Act 1996, Schedule
Chicago Convention	Convention on International Civil Aviation (Chicago, 7 December 1944; 15 UNTS 295)
Cluster Munitions Convention	Convention on Cluster Munitions (Oslo, 30 May 2008) Entered into force for New Zealand 22 December 2009 See Cluster Munitions Prohibition Act 2009, Schedule
COLREGs	Convention on the International Regulations for Preventing Collisions at Sea, 1972
Conventional Weapons Convention	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or have Indiscriminate Effects (Geneva, 10 October 1980; 1342 UNTS 137) Entered into force for New Zealand 18 April 1994
Conventional Weapons Protocol I	Protocol on Non-Detectable Fragments (Protocol I), 10 October 1980
Conventional Weapons Protocol II	Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (as amended on 3 May 1996), 10 October 1980
Conventional Weapons Protocol III	Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980
Conventional Weapons Protocol IV	Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995
Conventional Weapons Protocol V	Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003
Enforced Disappearance Convention	International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006) New Zealand is not a party to this convention

Citation name	Full title
Environmental Modification Convention	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976; UNTS 1105; NZTS 1984 11) Entered into force for New Zealand 7 September 1984
Geneva Convention Common Article 3	Article 3 common to the Geneva Conventions of 1949 relevant to armed conflict not of an international character
Geneva Convention I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick and Armed Forces in the Field (Geneva, 12 August 1949; UNTS 75 p 31; NZTS 1963 No 3) See Geneva Conventions Act 1958, Schedule 1
Geneva Convention II	Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949; UNTS 75 p 85; NZTS 1963 No 3) See Geneva Conventions Act 1958, Schedule 2
Geneva Convention III	Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949; UNTS 75 p 135; NZTS 1963 No 3) See Geneva Conventions Act 1958, Schedule 3
Geneva Convention IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949; UNTS 75 p 287; NZTS 1963 No 3) See Geneva Conventions Act 1958, Schedule 4
Geneva Gas Protocol	Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva, 1925) Accession (with reservations) 22 January 1930; reservations withdrawn 1989
Geneva Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977; 1125 UNTS 4) See Geneva Conventions Act 1958, Schedule 5
Geneva Protocol I New Zealand Declaration	<i>New Zealand Declaration on Ratification of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts</i> , 23 December 1987
Geneva Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977; 1125 UNTS 610) See Geneva Conventions Act 1958, Schedule 6
Geneva Protocol III	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (Geneva, 8 December 2005) See Geneva Conventions Act 1958, Schedule 7

Citation name	Full title
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; 1120 UNTS, 433)
Hague Convention I	International Convention (I) for the Pacific Settlement of International Disputes (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; not ratified by New Zealand
Hague Convention II	International Convention (II) respecting the Limitations of the Employment of Force for Recovery of Contract Debts (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; not ratified by New Zealand
Hague Convention III	International Convention relative to the Opening of Hostilities (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; ratified for New Zealand 27 November 1909
Hague Convention IV	International Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; ratified for New Zealand 27 November 1909
Hague Convention V	International Convention relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; not ratified by New Zealand
Hague Convention VI	International Convention relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; ratified for New Zealand 27 November 1909
Hague Convention VIII	International Convention relative to the Laying of Automatic Submarine Contact Mines (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; ratified for New Zealand 27 November 1909
Hague Convention IX	International Convention concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; ratified for New Zealand 27 November 1909
Hague Convention XIII	International Convention concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, 18 October 1907) Signed for New Zealand by the United Kingdom 18 October 1907; not ratified by New Zealand

Citation name	Full title
Hague Cultural Property Convention	Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954; 249 UNTS 240) See Cultural Property (Protection in Armed Conflict) Act 2012, Schedule 1
Hague Cultural Property Protocol II	Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999) See Cultural Property (Protection in Armed Conflict) Act 2012, Schedule 3
Hague Declaration III	Declaration (IV,3) concerning Expanding Bullets (The Hague, 29 July 1899; UKTS 32)
Hague Draft Air Rules	The 1923 Draft Hague Rules of Aerial Warfare (Not in force; generally declarative of customary rules governing warfare in the air)
Hague Regulations	Regulations annexed to the International Convention concerning the Laws and Customs of War on Land (Hague IV)
Hostages Convention	International Convention Against the Taking of Hostages (New York, 17 December 1979; 316 UNTS, 205; NZTS 1985, No 8) Entered into force for New Zealand 12 December 1985
ICCPR	International Covenant on Civil and Political Rights (New York, 16 December 1966; UNTS 999; NZTS 1978, No 19) Entered into force for New Zealand 28 March 1979
ICCPR Protocol II	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989; NZTS 1991, No 13) Entered into force for New Zealand 11 July 1991
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i> (16 December 1966)
ICJ Statute	Statute of the International Court of Justice (San Francisco, 26 June 1945; UKTS 67 1946) Entered into force for New Zealand 24 October 1945
ILO Convention 182	International Labour Organisation Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Geneva, 17 June 1999; M1999/47) Entered into force for New Zealand 14 June 2001
Kellogg–Briand Pact	General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg–Briand Pact) (Pact of Paris) (Paris, 27 August 1928; 128 BSP)

Citation name	Full title
Limited Test Ban Treaty	Treaty banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water (Moscow, 5 August 1963)
London Procès Verbal	Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930 (London, 6 November 1936)
Mercenaries Convention	International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989) Entered into force on 22 October 2004 Incorporated into Mercenary Activities (Prohibition) Act 2004
Moon Treaty	Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (5 December 1979; 1363 UNTS 3)
Nuremberg Charter	The Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the Military Tribunal (London, 8 August 1945; UKTS (1947); 82 UNTS, 280) Entered into force for New Zealand 19 November 1945
Nyon Agreement	The Nyon Agreement (Nyon, 14 September 1937; 181 LNTS)
Ottawa Convention	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention) (Oslo, 18 September 1997) Entered into force for New Zealand 27 January 1999 Incorporated into Anti-Personnel Mines Prohibition Act 1998
Outer Space Treaty	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Washington, Moscow, London, 27 January 1967; 610 UNTS 205) Entered into force for New Zealand 27 January 1967
Refugee Convention	Convention relating to the Status of Refugees (Geneva, 28 July 1951; NZTS 1961, No 1), Article 1 as modified by the Protocol relating to the Status of Refugees (New York, 31 January 1967; NZTS 1973, No 21) Entered into force for New Zealand 28 September 1960 (Convention), 6 August 1973 (Protocol)
Rome Elements	Elements of Crimes under article 9 of the Rome Statute adopted by the Assembly of States Parties (New York, 3–10 September 2001 – ICC-ASP/1/3).
Rome Statute	Rome Statute of the International Criminal Court as amended at Kampala, 11 June 2010 (17 July 1998; 2187 UNTS 3) Entered into force for New Zealand 1 July 2002 – Crimes and International Criminal Court Act 2000, Schedule

Citation name	Full title
Safety of Peacekeepers Convention	Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994; UNTS 2051; Doc A/49/742) Entered into force for New Zealand 16 December 1998
Safety of Peacekeepers Protocol	Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005; UN Doc A/RES/60/42) Entered into force for New Zealand 7 July 2010
Saint Petersburg Declaration	Declaration Renouncing the Use, in Times of War, of Explosive Projectiles Under 400 Grammes Weight (Saint Petersburg, 11 December 1868) Signed for New Zealand by the United Kingdom
Seabed Treaty	Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and Ocean Floor and in the Subsoil Thereof (New York, 11 February 1971; 955 UNTS 115) Entered into force for New Zealand 24 February 1972
Slavery Convention	Convention to Suppress the Slave Trade and Slavery (Geneva, 25 September 1926; 60 UNTS 253)
Stateless Persons Convention	Convention relating to the Status of Stateless Persons (New York, 28 September 1954; 360 UNTS 117) Not ratified by New Zealand
Stolen Cultural Property Convention	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995; 34 ILM 1326) See Protected Objects Act 1975, Schedule 3
Supplementary Slavery Convention	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956; 266 UNTS 3)
Terrorism Financing Convention	International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999; No 38349, UNGAR A/RES/54/109) See Terrorism Suppression Act 2002, Schedule 2
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (New York, 10 December 1984; NZTS 1989 No 14) See Crimes of Torture Act 1989, Schedule 1
Treaty on the Non-Proliferation of Nuclear Weapons	Treaty on the Non-Proliferation of Nuclear Weapons (1970), United Nations Office for Disarmament Affairs
Nuclear Weapon Ban Treaty	Treaty on the Prohibition of Nuclear Weapons (New York, 7 July 2017) Ratified by New Zealand 31 July 2018

Citation name	Full title
UN Charter	Charter of the United Nations (San Francisco, 26 June 1945; UKTS (1946)) Entered into force for New Zealand 24 October 1945
UNCLOS	United Nations Convention on the Law of the Sea (UNCLOS) (Montego Bay, 10 December 1982; 1833 UNTS 3) Entered into force for New Zealand 18 August 1996
UNCROC	Convention on the Rights of the Child (New York, 20 November 1989; NZTS 1993 No 3) Entered into force for New Zealand 6 May 1993
UNCROC Protocol I	Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict (UNCROC Protocol I) (New York, 25 May 2000; M2000/03) Entered into force for New Zealand 12 February 2002
Vienna Convention	Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; NZTS 1971 No 4; UNTS 1155 p 331) Entered into force for New Zealand 4 August 1971



## ANNEX D – NEW ZEALAND LEGISLATION

Citation name	Full title
Abolition of the Death Penalty Act 1989	Abolition of the Death Penalty Act 1989
Admiralty Act 1973	Admiralty Act 1973
AFDA	Armed Forces Discipline Act 1971
Age of Majority Act 1970	Age of Majority Act 1970
Anti-Personnel Mines Prohibition Act 1998	Anti-Personnel Mines Prohibition Act 1998
Chemical Weapons (Prohibition) Act 1996	Chemical Weapons (Prohibition) Act 1996
Cluster Munitions Prohibition Act 2009	Cluster Munitions Prohibition Act 2009
CMA	Court Martial Act 2007
Continental Shelf Act 1964	Continental Shelf Act 1964
Crimes Act 1961	Crimes Act 1961
Crimes of Torture Act 1989	Crimes of Torture Act 1989
Crimes (IPP, UN and AP, and Hostages) Act 1980	Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980
Criminal Procedure Act 2011	Criminal Procedure Act 2011
Cultural Property (Protection in Armed Conflict) Act 2012	Cultural Property (Protection in Armed Conflict) Act 2012
DA	Defence Act 1990
Defence Amendment Act 2001	Defence Amendment Act 2001
Flags, Emblems, and Names Protection Act 1981	Flags, Emblems, and Names Protection Act 1981
Geneva Conventions Act 1958	Geneva Conventions Act 1958
Health Act 1956	Health Act 1956
Human Rights (Women in Armed Forces) Amendment Act 2007	Human Rights (Women in Armed Forces) Amendment Act 2007
IC & ICC Act 2000	International Crimes and International Criminal Court Act 2000

Citation name	Full title
Immigration Act 2009	Immigration Act 2009
International War Crimes Tribunals Act 1995	International War Crimes Tribunals Act 1995
Mental Health (Compulsory Assessment and Treatment) Act 1992	Mental Health (Compulsory Assessment and Treatment) Act 1992
Mercenary Activities (Prohibition) Act 2004	Mercenary Activities (Prohibition) Act 2004
NZBORA	New Zealand Bill of Rights Act 1990
NZNFZDAC Act 1987	New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987
RP	Armed Forces Discipline Rules of Procedure 2008
Sentencing Act 2002	Sentencing Act 2002
Smoke-free Environments Act 1990	Smoke-free Environments Act 1990
Summary Offences Act 1981	Summary Offences Act 1981
Terrorism Suppression Act 2002	Terrorism Suppression Act 2002
TS, CZ, and EEZ Act 1977	Territorial Sea, Contiguous Zone, and the Exclusive Economic Zone Act 1977
United Nations Act 1946	United Nations Act 1946
Wills Act 2007	Wills Act 2007

## ANNEX E – CASES

Citation name	Full title
<i>Akayesu Trial</i>	<i>Prosecutor v Jean-Paul Akayesu</i> (Judgment), International Criminal Tribunal for Rwanda, ICTR-96-4-T, 2 September 1998
<i>Al Bashir Indictment</i>	<i>Prosecutor v Omar Hassan Ahmad Al Bashir</i> , International Criminal Court, ICC-02/05-01/09, 4 March 2009
<i>Al-Jedda Appeal</i>	<i>R (Al-Jedda) v Secretary of State for Defence</i> [2007] UKHL 58
<i>Al-Skeini</i>	<i>Al-Skeini v United Kingdom</i> , European Court of Human Rights Grand Chamber, Case No. 55721/07, 7 July 2011
<i>Aleksovski Appeal</i>	<i>Prosecutor v Zlatko Aleksovski</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-14/1-A, 24 March 2000
<i>Aleksovski Trial</i>	<i>Prosecutor v Zlatko Aleksovski</i> , International Criminal Tribunal for the former Yugoslavia, IT-95-14/1-T, 25 June 1999
<i>Almelo Trial</i>	<i>Trial of Otto Sandrock and Three Others</i> (1947) 1 LRTWC 35
<i>Arrest Warrant Case</i>	<i>Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)</i> (Judgment) (2002) ICJ Reports 3
<i>Asano Trial</i>	United States of America v. Yukio Asano et al, U.S. Military Commission, Yokohama (1947)
<i>Attorney-General v Nissan</i>	<i>Attorney-General v Nissan</i> [1970] AC 179
<i>Awochi Trial</i>	<i>Trial of Washio Awochi</i> (1949) 13 LRTWC 122
<i>Banković</i>	<i>Banković and Others v Belgium and 16 other States</i> (dec), no. 52207/99, ECHR 2001-XII
<i>Battat v R</i>	<i>Battat v R</i> [1951] AC 519
<i>Blaškić Appeal</i>	<i>Prosecutor v Tihomir Blaškić</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-14-A, 29 July 2004
<i>Bosnian Genocide Case</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)</i> (Judgment), (2007) ICJ Reports 43
<i>Brđanin Trial</i>	<i>Prosecutor v Radoslav Brđanin</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-99-36-T, 1 September 2004
<i>Brima, Kamara and Kanu Trial</i>	<i>Prosecutor v Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Kanu</i> (Judgment), Special Court for Sierra Leone, SCSL-04-16-T, 20 June 2007

Citation name	Full title
<i>Bruns Appeal</i>	<i>Trial of Kriminalsekretär Richard Wilhelm Hermann Bruns and two others</i> (1948) 3 LRTWC 15
<i>Calley Appeal</i>	<i>United States v Calley</i> , 22 USCMA 534, 21 December 1973
<i>Calley Trial</i>	<i>United States v Calley</i> , 46 CMR 1131, 1183 (ACMR 1973)
<i>Celibići Appeal</i>	<i>Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-96-21-A, 20 February 2001
<i>Celibići Trial</i>	<i>Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-96-21-T, 16 November 1998
<i>Certain Expenses of the United Nations Opinion</i>	<i>Certain Expenses of the United Nations</i> (Article 17, paragraph 2, of the Charter) (Advisory Opinion) (1962) ICJ Reports 151
<i>Charles Taylor Immunity Decision</i>	<i>Prosecutor v Charles Chankay Taylor</i> (Decision on Immunity from Jurisdiction), Special Court for Sierra Leone, SCSL-03-01-T, 31 May 2004
<i>Charles Taylor Trial</i>	<i>Prosecutor v Charles Chankay Taylor</i> , Special Court for Sierra Leone, SCSL-03-01-T, 18 May 2012
<i>Commercial and Estates v Ball</i>	<i>Commercial and Estates Co of Egypt v Ball</i> [1920] 36 TLR 526
<i>Commercial and Estates v Board of Trade</i>	<i>Commercial and Estates Co of Egypt v Board of Trade</i> [1925] 1 KB 271 (CA)
<i>Corfu Channel Case</i>	<i>Corfu Channel Case</i> [1949] ICJ Reports 4
<i>Dostler Trial</i>	<i>Trial of Anton Dostler</i> [1947] 1 LRTWC 22
<i>Dreierwalde Trial</i>	<i>Trial of Karl Amberger</i> [1947] 1 LRTWC 81
<i>Eichmann Appeal</i>	<i>Adolf Eichmann v Attorney General of the Government of Israel</i> (1961) 3 ILRS
<i>Einsatzgruppen Trial</i>	<i>Trial of Otto Ohlendorf and Others</i> (1948) 4 LRTWC 493
<i>Erdemović Appeal</i>	<i>Prosecutor v Dražen Erdemović</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-96-22-A, 7 October 1997
<i>Erdemović Appeal (Separate Opinion)</i>	<i>Prosecutor v Dražen Erdemović</i> (Joint Separate Opinion of Judge McDonald and Judge Vohrah), International Criminal Tribunal for the former Yugoslavia, IT-96-22-A, 7 October 1997
<i>Erdemović Sentencing Judgment</i>	<i>Prosecutor v Dražen Erdemović</i> (Sentencing Judgment), International Criminal Tribunal for the former Yugoslavia, IT-96-22, 5 March 1998

Citation name	Full title
<i>Erdemović Trial</i>	<i>Prosecutor v Dražen Erdemović</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-96-22-T, 29 November 1996
<i>Essen Lynching Trial</i>	<i>Trial of Erich Heyer and Six Others</i> (1947) 1 LRTWC 88
<i>Falkenhorst Trial</i>	<i>Trial of Nikolaus von Falkenhorst</i> (1949) 9 LRTWC 18
<i>Feurstein Trial</i>	<i>Trial of Valentin Feurstein and Others</i> (1948) 15 LRTWC 173
<i>Finta Appeal</i>	<i>R v Finta</i> [1994] 1 SCR 701
<i>Fisheries Case</i>	<i>United Kingdom v Norway</i> (Fisheries Case) (1951) ICJ Reports 116
<i>Flick Trial</i>	<i>Trial of Friedrich Flick and Others</i> (1949) 9 LRTWC 1
<i>Furundžija Appeal</i>	<i>Prosecutor v Anto Furundžija</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-17/1-A, 21 July 2000
<i>Furundžija Trial</i>	<i>Prosecutor v Anto Furundžija</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-17/1-T, 10 December 1988
<i>Gabčíkovo-Nagymaros Project</i>	<i>Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment</i> , ICJ Reports 1997 p7
<i>Galić Appeal</i>	<i>Prosecutor v Stanislav Galić</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-98-29-A, 30 November 2006
<i>Galić Trial</i>	<i>Prosecutor v Stanislav Galić</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-98-29-T, 5 December 2003
<i>Geipel v Smith</i>	<i>Geipel v Smith</i> (1872) LR 7 QB 404
<i>Germany v Denmark and the Netherlands</i>	<i>North Sea Continental Shelf</i> , Judgment, ICJ Reports 1969, p 3
<i>Gotovina Appeal</i>	<i>Prosecutor v Ante Gotovina and Mladen Markač</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-06-90-A, 16 November 2012
<i>Hadamar Trial</i>	<i>Trial of Alfons Klein and Six Others</i> (1947) 1 LRTWC 46
<i>Halilović Trial</i>	<i>Prosecutor v Halilović</i> , International Criminal Tribunal for the former Yugoslavia, IT-01-48-T, 16 November 2005
<i>Hamdan v Rumsfeld</i>	<i>Hamdan v Rumsfeld</i> , 548 US 557
<i>High Command Trial</i>	<i>Trial of Wilhelm von Leeb and Thirteen Others</i> (1949) 12 LRTWC 1

Citation name	Full title
<i>Hinga Norman Decision</i>	<i>Prosecutor v Sam Hinga Norman</i> (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)), Special Court for Sierra Leone, SCSL-2004-14-AR72(E), 31 May 2004
<i>Hirabayashi v US</i>	<i>Hirabayashi v United States</i> (1943) 320 US 81
<i>Holzer Trial</i>	<i>Trial of Robert Holzer</i> (1946) 5 LRTWC 15 and 21
<i>Hostages Trial</i>	<i>The United States of America v Wilhelm List, et al</i> (1949) 8 LRTWC 34
<i>Ireland v UK</i>	<i>The Republic of Ireland v United Kingdom</i> (1978) 2 EHRR 25
<i>Jelisić Trial</i>	<i>Prosecutor v Goran Jelisić</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-10-T, 14 Demeber 1999
<i>Justice Case</i>	<i>United States v Josef Altstoetter et al</i> (1948) 3 LRTWC 1
<i>Kambanda Trial</i>	<i>Prosecutor v Jean Kambanda</i> (Judgment and Sentence), International Criminal Tribunal for Rwanda, ICTR 97-23-S, 4 September 1998
<i>Kappler Trial</i>	<i>Trial of Herbert Kappler</i> (1948) Tribunale Militare Territoriale di Roma 631
<i>Kawasaki v Bantham</i>	<i>Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co LTD</i> (No 2) [1939] 2 KB 544
<i>Kesselring Case</i>	<i>Trial of Albert Kesselring</i> (1949) 8 LRTWC 9
<i>Killingier Trial</i>	<i>Trial of Erich Killingier and Four Others</i> (1948) 3 LRTWC 67
<i>Klinge Trial</i>	<i>Trial of Karl-Hans Hermann Klinge</i> (1948) 3 LRTWC 1
<i>Kordić &amp; Čerkez Appeal</i>	<i>Prosecutor v Dario Kordić and Mario Čerkez</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-14/2-A, 17 December 2004
<i>Kordić &amp; Čerkez Trial</i>	<i>Prosecutor v Dario Kordić and Mario Čerkez</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-14/2-T, 26 February 2001
<i>Korematsu v USA</i>	<i>Korematsu v United States Supreme Court</i> (1944) 323 US 214
<i>Krajišnik Trial</i>	<i>Prosecutor v Momčilo Krajišnik</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-00-39-T, 27 September 2006
<i>Kronjelic Appeal</i>	<i>Prosecutor v Milorad Kronjelic</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-97-25-A, 17 September 2003

Citation name	Full title
<i>Kronjelic Trial</i>	<i>Prosecutor v Milorad Kronjelic</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-97-25, 15 March 2002
<i>Krupp Trial</i>	<i>Trial of Alfried Krupp and Others</i> [1949] 9 LRTWC 177
<i>Kunarac Appeal</i>	<i>Prosecutor v Dragoljub Kunarac and two others</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-96-23 and IT-96-23/1-A, 12 June 2002
<i>Kunarac Trial</i>	<i>Prosecutor v Dragoljub Kunarac and two others</i>
<i>Kupreškić Trial</i>	<i>Prosecutor v Zoran Kupreškić and Others</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-16-T, 14 January 2000
<i>Kvočka Appeal</i>	<i>Prosecutor v Miroslav Kvočka and Others</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, 14 January 2000
<i>Limaj Trial</i>	<i>Prosecutor v Fatmir Limaj and others</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-03-66-T, 30 November 2005
<i>Liversidge v Anderson</i>	<i>Liversidge v Anderson</i> [1941] UKHL 1
<i>Llandovery Castle Trial</i>	<i>Prosecutor v Ludwig Dithmar and John Boldt</i> (German Reichsgericht), 16 July 1921, reprinted in 16 AJIL 708
<i>Lotus Case</i>	<i>The Case of of the S.S. "Lotus"</i> , Permanent Court of International Justice, Series A, No 10, 7 September 1927
<i>Lubanga Trial</i>	<i>Prosecutor v Thomas Lubanga Dyilo</i> , International Criminal Court, ICC-01/04-01/06-2842, 14 March 2012
<i>Major War Criminals Trial</i>	<i>United States of America, United Kingdom, France, China and Union of Soviet Socialist Republics v Hermann Goering and 21 Others</i> (1947) 1 LRTWC 1
<i>Martić Appeal</i>	<i>Prosecutor v Milan Martić</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-11-A, 8 October 2008
<i>Max Schmid Trial</i>	<i>Trial of Max Schmid</i> [1949] 13 LRTWC 151
<i>Medical Trial</i>	<i>Trial of Karl Brandt and Others</i> (1947) 4 LRTWC 91
<i>Milch Trial</i>	<i>United States of America v Erhard Milch</i> (1947) 2 LRTWC 44
<i>Milošević Appeal</i>	<i>Prosecutor v Dragomir Milošević</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-98-29-1/A, 12 November 2009

Citation name	Full title
<i>Milošević Decision</i>	<i>Prosecutor v Slobodan Milošević</i> (Preliminary Motions Decision), International Criminal Tribunal for the former Yugoslavia, IT-02-54-T, 8 November 2001
<i>Moehle Trial</i>	<i>Trial of Karl-Heinz Moehle</i> (1949) 9 LRTWC 75
<i>Mohamed Ali Appeal</i>	<i>Ben Haji Mohamed Ali and Another v Public Prosecutor</i> [1968] 3 All ER 488
<i>Nahimana Trial</i>	<i>Prosecutor v Ferdinand Nahimana</i> (Trial Judgment), International Criminal Tribunal for Rwanda, ICTR-99-52-T, 3 December 2003
<i>Namibia Opinion</i>	<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)</i> , Advisory Opinion, ICJ Reports 1971 p 16
<i>Naulilaa Case</i>	<i>The Naulilaa Case (Portugal v Germany)</i> 8 Trib Arb Mixtes 409 (1928)
<i>Nicaragua v USA</i>	<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)</i> Merits, Judgment, ICJ Reports 1986, p 14
<i>Nikolić Jurisdiction Decision</i>	<i>Prosecutor v Dragan Nikolić</i> (Challenge to Jurisdiction), International Criminal Tribunal for the former Yugoslavia, IT-94-2-PT, 9 October 2002
<i>Nottebohm Case</i>	<i>Nottebohm Case</i> (second phase), Judgment of April 16th, 1955, ICJ Reports 1955, p 4
<i>Nuclear Weapons Opinion</i>	<i>Legality of the Threat or Use of Nuclear Weapons</i> , Advisory Opinion. ICJ Reports 1996, p 226
<i>Orić Trial</i>	<i>Prosecutor v Naser Orić</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-03-68-T, 30 June 2006
<i>Peleus Trial</i>	<i>Trial of Heinz Eck and Four Others</i> (1947) 1 LRTWC 1
<i>Peacock Case</i>	<i>The Peacock</i> [1802] 4 C Rob 185
<i>Pinochet Case</i>	<i>R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet</i> (No. 3) [2000] 1 AC 147
<i>Pohl Trial</i>	<i>USA v Pohl and Seventeen Others</i> (1948) 5 LRTWC 958
<i>Public Committee Against Torture v Israel</i>	<i>Public Committee Against Torture in Israel v The State of Israel</i> , Supreme Court of Israel, HC 5100/94, 26 May 1999
<i>Public Prosecutor v Koi</i>	<i>Public Prosecutor v Oie Hee Koi</i> [1968] 1 All ER 419 (PC)
<i>Quirin Appeal</i>	<i>Ex parte Quirin et al</i> [1942] 63 S Ct 2
<i>R v Bottrill</i>	<i>R v Bottrill, Ex Parte Kuechenmeister</i> [1947] 1 KB 41



Citation name	Full title
<i>R v Hartley</i>	<i>R v Hartley</i> [1978] 2 NZLR 199 (CA)
<i>R v Jones</i>	<i>R v Jones</i> [2006] UKHL 16
<i>R v Kamipeli</i>	<i>R v Kamipeli</i> [1975] 2 NZLR 610 (CA)
<i>Rainbow Warrior Ruling</i>	<i>Case concerning the differences between New Zealand and France arising from the Rainbow Warrior Affair</i> (1986), 19 Reports of International Arbitral Awards 199
<i>Rasul v Bush</i>	<i>Rasul v Bush</i> , (2002) 215 F. Supp. 2d 55 (D.C.)
<i>Reservations to the Genocide Convention Opinion</i>	<i>Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide</i> , ICJ, 28 May 1951
<i>Re Yamashita</i>	<i>Re Tomoyuki Yamashita</i> , United States Supreme Court, 327 US 1 (1946)
<i>Roehling Trial</i>	<i>Trial of Hermann Roehling and Others</i> , (1948) 15 LRWC, Appendix B 1061
<i>Scuttled U-Boats Case</i>	<i>Trial of Gerhard Grumpelt</i> (1947) 1 LRTWC 55
<i>Sellers v MSI</i>	<i>Sellers v Maritime Safety Inspector</i> [1999] 2 NZLR 44 (CA)
<i>Selmouni v France</i>	<i>Selmouni v France</i> (1999) 29 EHRR 403, 25803/94
<i>Serdar Mohammed v Ministry of Defence</i>	<i>Mohammed v Ministry of Defence</i> [2017] UKSC 1 & [2017] UKSC 2
<i>Sesay Trial</i>	<i>Prosecutor v Issa Hassan Sesay and Two Others</i> (Judgment), Special Court for Sierra Leone, SCSL-04-15-T, 2 March 2009
<i>Shimoda Case</i>	<i>Shimoda Case (Compensation claim against Japan brought by the residents of Hiroshima and Nagasaki)</i> (1964) 8 Jap Ann Int'l L 231
<i>Simić Decision</i>	<i>Prosecutor v Blagoje Simić and others</i> (Decision Concerning the Testimony of a Witness), International Criminal Tribunal for the former Yugoslavia, IT-95-9-T, 27 July 1999
<i>Simić Trial</i>	<i>Prosecutor v Blagoje Simić and Two Others</i> (Judgment), International Criminal Tribunal for the former Yugoslavia, IT-95-9-T, 17 October 2003
<i>Skorzeny Trial</i>	<i>Trial of Otto Skorzeny and Others</i> (1949) 9 LRTWC 90
<i>Stalag Luft III Trial</i>	<i>Trial of Max Wielen and 17 Others</i> (The Stalag Luft III Case) (1949) 11 LRTWC 31
<i>Strugar Trial</i>	<i>Prosecutor v Pavle Strugar</i> (Trial Judgment), International Criminal Tribunal for the former Yugoslavia, IT-01-42-T, 31 January 2005

Citation name	Full title
<i>Suzuki Motosuke Trial</i>	<i>Trial of Suzuki Motosuke</i> (1949) 13 LRTWC 126
<i>Tadić Appeal</i>	<i>Prosecutor v Duško Tadić</i> (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia, IT-94-1-A, 15 July 1999
<i>Tadić Jurisdiction Appeal</i>	<i>Prosecutor v Duško Tadić</i> (Decision on Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the former Yugoslavia, IT-94-1, 2 October 1995
<i>Targeted Killings Case</i>	<i>Public Committee Against Torture in Israel v The Government of Israel</i> , Supreme Court of Israel, Case No. HCJ 769/02, 13 December 2006
<i>Temple of Preah Vihear Case</i>	<i>Case Concerning the Temple of Preah Vihear</i> (Cambodia v Thailand), Merits ICJ Reports 1962, p 17
<i>Tifaga v Dept of Labour</i>	<i>Tifaga v Department of Labour</i> [1980] 2 NZLR 235, 243 (CA)
<i>Tokyo War Crimes Trial</i>	<i>United States of America v Sadao Araki and 27 Others</i> , International Military Tribunal for the Far East, The Tokyo War Crimes Trial, Vol 22, 4 November 1948
<i>Vialle v Police</i>	<i>Police v Vialle</i> [1989] 1 NZLR 521
<i>Von Ruchteschell Trial</i>	<i>Trial of Helmuth von Ruchteschell</i> (1949) 9 LRTWC 82
<i>Wakim v Ya'alon</i>	<i>Wakim v Ya'alon</i> , DC Auckland CIV-2006-004, 27 November 2006 and 29 November 2006
<i>Wall on Palestinian Territory Advisory Opinion</i>	<i>Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory</i> , Advisory Opinion, ICJ Reports 2004, p 136
<i>Zuehlke Trial</i>	<i>Trial of Willy Zuehlke</i> (1949) 14 LRTWC 139
<i>Zyklon B Trial</i>	<i>Trial of Bruno Tesch and Two Others</i> (The Zyklon B Case) (1949) 9 LRTWC 93

**ANNEX F – RESOLUTIONS, REPORTS, MANUALS AND OTHER INSTRUMENTS**

Citation name	Full title
Copenhagen Process	Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations, Ministry of Foreign Affairs of Denmark, 2012
Declaration on Anti-Vehicle Mines	<i>Declaration on Anti-Vehicle Mines, presented by Denmark, Australia, Bulgaria, Canada, Croatia, El Salvador, Estonia, France, Israel, Latvia, Lithuania, Netherlands, New Zealand, Norway, Republic of Korea, Romania, Serbia, Slovenia, United Kingdom of Britain and Northern Ireland and the United States of America (CCW/CONF.III/WP.16, Geneva, 16 November 2006)</i>
Depleted Uranium Report	<i>Depleted Uranium Report, World Health Organisation (WHO/SDE/PHE/01.1, Geneva, April 2001)</i>
Flotilla Report	<i>Reports of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on flotilla of ships carrying humanitarian assistance (A/HRC/15/21, 27 September 2010)</i>
Guidelines for Protecting Schools	<i>Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict (Global Coalition to Protect Education from Attack), 22 October 2014</i>
HPCR Air and Missile Manual	<i>Manual on International Law Applicable to Air and Missile Warfare (Bern, 15 May 2009)</i>
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda (UN, S/RES/955 (1994))
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia (UN, S/RES/827 (1993))
ILC Articles on State Responsibility	<i>Responsibility of States for Internationally Wrongful Acts (UN, A/RES/56/83, 12 December 2001)</i>
Kahan Report	<i>Report by the Commission of Inquiry into the Events at Refugee Camps in Beirut (Israel Ministry of Foreign Affairs, 8 February 1983)</i>
Kampala Amendment	<i>Amendments to article 8 of the Rome Statute (Resolution RC/Res.5, Kampala, 10 June 2010)</i>
Kampala Resolution	<i>The crime of aggression (Resolution RC/Res.6, Kampala, 11 June 2010)</i>
Montreux Document	<i>The Montreux Document – On pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict (Swiss Federal Department of Foreign Affairs and International Committee of the Red Cross, Montreux, 17 September 2008)</i>

Citation name	Full title
NATO Bombing Campaign Report	Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (NATO 061300, The Hague, 13 June 2000)
Nuremberg Principles	<i>Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal</i> (text adopted by the ILC at its second session, 1950)
Paris Principles	<i>Paris Principles; The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups</i> , Paris, 2007
Proliferation Security Initiative	Proliferation Security Initiative (31 May 2003), United States Department of State
San Remo Manual	Louise Doswalk-Beck (ed), <i>San Remo Manual on International Law Applicable to Armed Conflicts at Sea</i> (Cambridge University Press, Cambridge, 1994)
Taguba Report	<i>Investigation of the 800th Military Police Brigade</i> , 'The Taguba Report', conducted in accordance with US Army Regulations Article 15-6 orders, 19 January 2004
Tallinn Manual	Michael N. Schmitt (ed), <i>Tallinn Manual on the International Law Applicable to Cyber Warfare</i> (Cambridge University Press, Cambridge, 2nd ed. 2017)
Tokyo Charter	Special Proclamation on the Establishment of an International Military Tribunal for the Far East (26 April 1946)
UN Declaration on the Rights of Indigenous Peoples	UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295, 13 September 2007)
UN Flag Code and Regulations 1947	United Nations Flag Code and Regulations 1947
UNGAR 43/173	<i>Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment</i> (A/RES/43/173, 9 December 1988)
UNGAR 92 (I)	<i>Official Seal and Emblem of the United Nations</i> (A/RES/92(I), 7 December 1946)
UNGAR 167 (II)	<i>United Nations Flag</i> (A/RES/167(II), 20 October 1947)
UNGAR 377 (V)	<i>Uniting for Peace</i> (A/RES/5/377, 3 November 1950)
UNGAR 1514 (XV)	<i>Declaration on the Granting of Independence to Colonial Countries and Peoples</i> (A/RES/1514(XV), 14 December 1960)

Citation name	Full title
UNGAR 2625	<i>Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations</i> (A/RES/2625, 24 October 1970)
UNGAR 3314	<i>Definition of Aggression</i> (A/RES/3314, 14 December 1974)
UN Secretary-General's Bulletin No. 13 (1999)	<i>Observances by United Nations forces of international humanitarian law</i> (UN Secretary-General's Bulletin No. 13, ST/SGB/1999/13, 6 August 1999)
UN Secretary-General's Bulletin No. 13 (2003)	Special measures for protection from sexual exploitation and sexual abuse (UN Secretary-General's Bulletin No. 13, ST/SGB/2003/13, 9 October 2003)
UNSCR 827	<i>Establishment of the International Criminal Tribunal for the former Yugoslavia</i> (S/RES/827, 25 May 1993)
UNSCR 955	<i>Establishment of the International Criminal Tribunal for Rwanda</i> (S/RES/955, 8 November 1994)
UNSCR 1264	<i>Timor</i> (S/RES/1264, 15 September 1999)
UNSCR 1272	<i>Timor</i> (S/RES/1272, 25 October 1999)
UNSCR 1325	<i>Women and Peace and Security</i> (S/RES/1325, 31 October 2000)
UNSCR 1373	<i>Threats to International Peace and Security caused by Terrorist Acts</i> (S/RES/1373, 28 September 2001)
UNSCR 1539	<i>Children in Armed Conflict</i> (S/RES/1539, 22 April 2004)
UNSCR 1593	<i>Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan</i> (S/RES/1593, 31 March 2005)
UNSCR 1612	<i>Children in Armed Conflict</i> (S/RES/1612, 26 July 2005)
UNSCR 1674	<i>Protection of Civilians in Armed Conflict</i> (S/RES/1674, 28 April 2006)
UNSCR 1989	<i>Threats to International Peace and Security Caused by Terrorist Acts</i> (S/RES/1989, 17 June 2011)
UNSCR 2170	<i>Threats to International Peace and Security caused by Terrorist Acts by Al-Qaida</i> (S/RES/2170, 15 August 2014)

## ANNEX G – BOOKS AND ARTICLES

Citation name	Full title
<i>Commentaries on the Laws of England</i>	Sir William Blackstone, <i>Commentaries on the Laws of England</i> (16th ed, volume 1, 1825)
Crawford State Responsibility	James Crawford, <i>The International Law Commission's Articles on State Responsibility, Text and Commentaries</i> (Cambridge University Press, Cambridge, 2002)
Defence: Warfare	Kevin Riordan, "Defence: Warfare" in <i>Laws of New Zealand</i> (LexisNexis, Wellington)
DFO 3	<i>New Zealand Defence Force Human Resource Manual</i>
DM 69	Manual of Armed Forces Law (2 ed) (Volumes 1–4)
Grotius	Hugo Grotius, <i>The Rights of War and Peace</i> (reprint) (Indianapolis, Liberty Fund, 2005)
ICRC Customary IHL	Henckaerts and Doswald-Beck, <i>Customary International Humanitarian Law</i> (Cambridge University Press, Cambridge, 2005)
NZDDP–06.1	New Zealand Defence Doctrine Publication, <i>Rules of Engagement</i> (2nd Edition)
<i>Roberts and Guelff</i>	Adam Roberts and Richard Guelff, <i>Documents on the Laws of War</i> (3rd ed, Oxford University Press, Oxford, 2002)
<i>Starke's International Law</i>	JG Starke and IA Shearer (eds), <i>Starke's International Law</i> (11th ed, LexisNexis UK, 1994)

## Chapter 2

# NEW ZEALAND DEFENCE FORCE COMPLIANCE WITH LAW OF ARMED CONFLICT

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## SECTION 1 – INTRODUCTION

- 2.1.1** The purpose of this chapter is to set out the legal nature of Law of Armed Conflict (LOAC) and the way that it obliges members of the New Zealand Defence Force (NZDF) to implement the rules set out in greater detail in the succeeding chapters.



## SECTION 2 – THE NATURE OF LAW OF ARMED CONFLICT

### THE SCOPE OF LAW OF ARMED CONFLICT

**2.2.1** For the purposes of this manual, LOAC is all international law governing the conduct of armed conflict and includes all domestic law which gives it legal effect in New Zealand. LOAC is sometimes known as the Law of War or international humanitarian law.<sup>1</sup> It covers:

- a. restrictions and limitations on weapons and munitions,<sup>2</sup>
- b. restrictions and limitations on methods of combat,<sup>3</sup>
- c. protection of the victims of armed conflict,<sup>4</sup>
- d. protection of certain objects and property from the effects of armed conflict,<sup>5</sup>
- e. protection of the environment from the effects of armed conflict,<sup>6</sup>
- f. relations between opposing forces,<sup>7</sup> and
- g. neutrality.<sup>8</sup>

**2.2.2** LOAC obligations as expressed in this manual may include aspects of other obligations under international law applicable in armed conflict, for example the prohibition of genocide and crimes against humanity, as well as arms control and international human rights law (IHRL).<sup>9</sup>

### THE PURPOSE OF LAW OF ARMED CONFLICT

**2.2.3** The purpose of LOAC is to:

- a. limit, as much as possible, the suffering, loss and damage caused by armed conflict;
- b. protect persons who do not take a direct part in the conflict and, in particular, safeguard the fundamental rights of:
  - (1) the wounded, sick and shipwrecked;<sup>10</sup>

1 The term 'law of armed conflict' is preferred over 'Law of War', 'international humanitarian law' and 'jus in bello'. LOAC does not carry the implication that a formal state of war must exist before the rules in question apply. Furthermore, not all rules relating to armed conflict are necessarily humanitarian in nature.

2 See Chapter 7.

3 See Chapter 8.

4 See Chapter 11 through Chapter 14.

5 See Chapter 14.

6 See Chapter 8 and Chapter 14.

7 See Chapter 15.

8 See Chapter 16.

9 See Chapter 3.

10 See Chapter 11.

(2) persons who are deprived of their liberty as a result of armed conflict, particularly prisoners of war (PWs), retained personnel, internees and detainees;<sup>11</sup> and

(3) civilians;<sup>12</sup> and

c. facilitate the restoration of peace.

**2.2.4** Adherence to LOAC is essential to the successful conduct of NZDF operations. Knowledge of, and compliance with, LOAC will enhance rather than impede military efficiency.

### LAW OF ARMED CONFLICT IS LEGALLY BINDING

**2.2.5** LOAC is legally binding on New Zealand,<sup>13</sup> and on members of the NZDF.<sup>14</sup> Members of the NZDF are to comply with all LOAC obligations binding on New Zealand and on them as individuals.

**2.2.6** Members of the NZDF are not to assist or encourage any person to commit any breach of LOAC whether or not that person is a member of the NZDF.<sup>15</sup>

### CONSEQUENCES OF FAILURE TO OBEY LAW OF ARMED CONFLICT

**2.2.7** Failure to understand and comply with LOAC by members of the NZDF may give rise to the following consequences:

- a. State responsibility on the part of New Zealand, including liability to pay compensation to affected parties.<sup>16</sup>
- b. Responsibility of commanders at all levels for breaches by subordinates which they failed to prevent or punish.<sup>17</sup>
- c. Individual criminal responsibility of members of NZDF before the Court Martial of New Zealand (Court Martial), a domestic court or an international court or tribunal for breaches of LOAC that they commit.<sup>18</sup>

11 See Chapter 12.

12 See Chapter 13.

13 See Chapter 3.

14 For personal application see Chapter 6. For war crimes see Chapter 17.

15 See for example, **Environmental Modification Convention** art 1(2): "Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in prohibited activities." See also **Ottawa Convention** art 1(c), **Anti-Personnel Mines Prohibition Act 1998** s 7(1)(e), **Chemical Weapons Convention** art 1(1) (c), **Chemical Weapons (Prohibition) Act 1996** s 6(1)(e), **Cluster Munitions Convention** art 1(1)(c), **Cluster Munitions Prohibition Act 2009** s 10(1)(e) and **ICRC Customary IHL** rule 144. In *Nicaragua v USA* at [255–256] Dissemination of a publication that encouraged breaches of LOAC was a breach of general principles of LOAC.

16 See **ILC Articles on State Responsibility**: A State is responsible for violations of LOAC attributable to it including: art 4 – violations committed by its organs, (which includes its armed forces); art 5 – violations committed by persons or entities it empowered to exercise elements of governmental authority; art 8 – violations committed by persons or groups acting on its instructions, or under its direction or control; and art 11 – violations committed by private persons or groups which it acknowledges and adopts as its own conduct. **Hague Convention IV** art 3 and **Geneva Protocol I** art 91. See also **ICRC Customary IHL** rules 149 and 150

17 See Section 3.

18 See Chapter 17.

- d. Damage to the international reputation of the NZDF and New Zealand.
- e. Loss of public and political support for the operation in New Zealand and overseas.

## RULES THAT ARE ABSOLUTE

- 2.2.8** Rules that are absolute impose obligations that must be obeyed even when not doing so offers a definite advantage. Breaches cannot be justified as an exercise of military necessity.<sup>19</sup> For example, it is absolutely prohibited to torture a person, even if the information sought is regarded as vital.<sup>20</sup> Similarly, where a weapon is prohibited by a comprehensive treaty, the advantage that it might offer cannot be balanced against the prohibition.<sup>21</sup>

## RULES REQUIRING THE EXERCISE OF JUDGEMENT

- 2.2.9** Where conduct is not absolutely prohibited, members of the NZDF may be required to exercise judgement to give effect to LOAC. For example, balancing military necessity with humanity in accordance with the principle of proportionality may necessitate weighing the concrete and direct overall benefit of the military action proposed against the collateral or incidental damage and loss of civilian lives which may occur as a result.<sup>22</sup>
- 2.2.10** Some rules require a person to do what is 'feasible'<sup>23</sup> or to do all that is 'practicable'.<sup>24</sup> Although not stated in absolute terms, these rules nevertheless set a legally measurable standard that must be met by members of the NZDF. Failure to do so constitutes a breach of LOAC.

## LAW OF ARMED CONFLICT IS NOT BASED ON RECIPROCITY

- 2.2.11** An underlying basis of LOAC is self-interest.<sup>25</sup> For example, a force that commits atrocities on enemy PWs faces the risk that the opposing force will do the same thing in response, albeit unlawfully.<sup>26</sup> Reciprocity, in this sense, remains an influence on LOAC.

19 For military necessity see Chapter 4 and Chapter 17.

20 See **Public Committee Against Torture v Israel** at [23]: "These prohibitions [against torture] are "absolute". There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable." For the defence of necessity and the prohibition on torture see Chapter 17.

21 For weapons see Chapter 7.

22 For the principle of proportionality see Chapter 4. For precautions in attack see Chapter 8. For protection of civilians see Chapter 13.

23 For example, **Conventional Weapons Protocol IV** art 2 requires the taking of "all feasible precautions to avoid the incidence of permanent blindness" from certain lasers. **Conventional Weapons Protocol III** art 2(3) requires "all feasible precautions are taken with a view to limiting the incendiary effects to the military objective." **Conventional Weapons Protocol V** art 5(1): "Feasible precautions are those precautions which are practicable or practicably possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."

24 See for example, **Conventional Weapons Protocol V** art 4(1): "High contracting parties and parties to an armed conflict shall to the maximum extent possible and as far as practicable record and retain information on the use of explosive ordnance or abandonment of explosive ordnance." For ERW see Chapter 7.

25 See Chapter 4.

26 For reprisals see Chapter 17. The crimes of others do not provide an excuse for unlawful acts.

- 2.2.12** However, the obligation to respect LOAC does not depend on reciprocity.<sup>27</sup> Non-compliance by the enemy does not provide a justification for members of the NZDF to do likewise.<sup>28</sup> While the general rule remains that treaty obligations apply only between its parties,<sup>29</sup> members of the NZDF are to regard the major humanitarian obligations of LOAC treaties as legally binding whether or not the enemy is bound by those treaties or complies with them.<sup>30</sup>
- 2.2.13** Reciprocity is clearly not necessary in respect of obligations under customary international law or where a treaty is so generally accepted that its obligations have the status of customary international law.<sup>31</sup> This is particularly so in respect of those obligations that have criminal consequences under New Zealand law (eg prohibited weapons).<sup>32</sup>
- 2.2.14** LOAC obligations in respect of non-international armed conflict (NIAC) are likely to be one-sided, since the opposing force is not a State and cannot become a party to a treaty of its own initiative. The opposing forces are bound by the treaty obligations of the State in whose territory they operate. Members of the NZDF are to regard Geneva Convention Common Articles and Geneva Protocol II as binding on them in all NIACs regardless of the LOAC obligations recognised or practised by the opposing force.

## LAW OF ARMED CONFLICT AND NEW ZEALAND DEFENCE FORCE ETHOS AND VALUES

- 2.2.15** Respect for LOAC fundamentally supports the ethos and values of the NZDF. Members of the NZDF must display:
- a. the **courage** to act in a humane and professional manner in times of danger and stress, even when others do not;
  - b. the **commitment** to respect the rules of LOAC, even in demanding and difficult circumstances or when it might not seem to be in our short-term interest to do so;
  - c. **comradeship** in making sure that other members of the NZDF do not do things that they and their country will later feel ashamed of; and
  - d. the **integrity** to observe the rules of LOAC even when law and order have broken down and it seems like there is no one to judge their actions, other than themselves.
- 2.2.16** The way that members of the NZDF conduct themselves in combat and how they treat those people who it is their duty to protect is the ultimate standard by which their military professionalism is judged.

<sup>27</sup> See **ICRC Customary IHL** rule 140.

<sup>28</sup> In **Kupreškić Trial** the ICTY Trial Chamber noted that the bulk of the obligations under LOAC are unconditional and not based on reciprocity (see [515–520]).

<sup>29</sup> **Vienna Convention** art 34: “A treaty does not create either obligations or rights for a third State without its consent.”

<sup>30</sup> See for example, **Geneva Convention Common Article 1**. The Geneva Conventions apply in “all circumstances”, which include situations where the opposing force breaches LOAC. All States are now parties to the Geneva Conventions.

<sup>31</sup> For example, **Hague Regulations** and the **Geneva Conventions**. For customary international law see Chapter 3.

<sup>32</sup> For weapons and munitions see Chapter 7.

## SECTION 3 – DUTY TO PREVENT BREACHES OF LAW OF ARMED CONFLICT

### DUTIES OF COMMANDERS

**2.3.1** NZDF commanders are responsible not only for breaches of LOAC that they commit personally, but also for acts in breach of LOAC that:

- a. they order; or
- b. were committed under their control or command if:
  - (1) they knew or ought to have known that members of the NZDF under their command were committing or about to commit a crime; and
  - (2) they failed to take all necessary and reasonable steps within their power to stop the crime or cause it to be investigated and prosecuted.<sup>33</sup>

**2.3.2** NZDF commanders are to:

- a. ensure that they are familiar with the rules of LOAC that apply to themselves and to persons under their command;
- b. ensure respect for LOAC by all persons under their command;
- c. take all steps with their lawful power to prevent the commission of breaches of LOAC;
- d. report violations of LOAC to the Chief of Defence Force (CDF), through the Commander Joint Forces New Zealand (COMJFNZ), without delay; and
- e. investigate and, where empowered to do so, punish breaches of LOAC in accordance with the Armed Forces Discipline Act 1971 (AFDA).

**2.3.3** Officers and non-commissioned officers (NCOs) have a duty to maintain good order and discipline.<sup>34</sup> This duty is of vital importance when it comes to the prevention of breaches of LOAC. As well as being a dereliction of the fundamental duties inherent in command, encouraging, condoning or ignoring breaches of LOAC renders commanders at all levels criminally responsible for the resulting acts or omissions.<sup>35</sup>

**2.3.4** **Duty to seek legal advice.** In both international and domestic law, the duty of legal compliance implies that decision-makers will seek qualified and expert legal advice on matters of legal importance.<sup>36</sup> Commanders are required to seek legal advice from an NZDF Legal Adviser (LEGAD) in respect of issues that are legally complex or that have serious legal consequences. Such advice is to be obtained unless it is not practicable to do so. If a commander makes a decision that is in breach of LOAC and that commander has not taken legal advice when it was available, the commander will be accountable for that failure.

33 For command responsibility see Chapter 17.

34 See **DM 69** (2 ed) Volume 1, Chapter 1, Section 2.

35 For command responsibility see Chapter 17.

36 See **Geneva Protocol I** art 82.

- 2.3.5** Ultimate responsibility for compliance with LOAC remains at all times with NZDF commanders. The duties placed on a commander by LOAC cannot be abrogated. For example, it is for the commander to decide how and when an attack is to be launched, not a LEGAD. Similarly a commander's responsibility to ensure that persons deprived of liberty are treated humanely must be met by inspections, monitoring and action, not simply by seeking legal advice.

## DUTIES OF ALL MEMBERS OF THE NEW ZEALAND DEFENCE FORCE

- 2.3.6** Subject to orders, members of the NZDF are to take all reasonable steps within their lawful power to prevent breaches of LOAC. This may include:
- a.** telling a person committing or about to commit a breach of LOAC that their actions are unacceptable and unlawful and that the matter will be reported;
  - b.** arresting or detaining persons committing or about to commit a breach of LOAC where:
    - (1)** the person is subject to the AFDA; or
    - (2)** the member of the NZDF has powers of arrest or detention under domestic or international law<sup>37</sup>; or
  - c.** providing physical security to persons such as persons deprived of their liberty, wounded, sick or shipwrecked, or civilians who may be in danger.<sup>38</sup>
- 2.3.7** If practicable, the advice of an NZDF LEGAD is to be obtained before taking the actions above. Such actions are to be reported to CDF, through COMJFNZ, without delay.

## ALLEGED BREACHES OF LAW OF ARMED CONFLICT MUST BE REPORTED AND INVESTIGATED

- 2.3.8** Any member of the NZDF who witnesses or becomes aware of any act or omission that may constitute a breach of LOAC is to report that matter to his or her superior officer without delay. Such reports are to be made regardless of whether breaches are committed by a member of the NZDF or other forces and regardless of where they occur.
- 2.3.9** Any officer or NCO who receives a report that a breach of LOAC has occurred is to:
- a.** report the allegation without delay to the commander of the New Zealand force; and
  - b.** preserve any evidence relevant to the alleged offence.
- 2.3.10** The commander of any New Zealand force who becomes aware of an allegation of a breach of LOAC is to:
- a.** inform CDF, through COMJFNZ, without delay;

37  
38

*Serdar Mohammed v Ministry of Defence* [2017] UKSC 2 at [12–16].  
See Chapter 11 through Chapter 13.

- b.** seek advice from an NZDF LEGAD;
- c.** carry out such investigations as are necessary to ascertain the facts of the matter;
- d.** if the allegation is well-founded, and concerns one or more persons subject to the AFDA, proceed in accordance with AFDA s 102; and
- e.** if the allegation concerns a person who is not subject to AFDA, report the matter to the appropriate civil or military authority without delay.

**2.3.11** Members of the NZDF are not to conceal or ignore allegations of a breach of LOAC. Any action intended to defeat the proper investigation of such crimes is a serious offence.<sup>39</sup>

## SECTION 4 – ORDERS TO BREACH LAW OF ARMED CONFLICT ARE UNLAWFUL

### UNLAWFUL ORDERS MUST NOT BE OBEYED

**2.4.1** Members of the NZDF must comply with all lawful orders that are given to them by any means.<sup>40</sup> However, an order to breach LOAC is an unlawful order and members of the NZDF are not to comply with any order that requires them to breach LOAC.<sup>41</sup> The existence of such an order:

- a. does not excuse persons receiving it from criminal responsibility if he or she knew that the order was unlawful, or if the order was manifestly unlawful;<sup>42</sup> and
- b. renders the person giving the order criminally responsible for any breach of LOAC which occurs as a result.

**2.4.2** NZDF commanders are not to give any order that is contrary to any of the orders in this manual or is otherwise in breach of LOAC.

### MANIFESTLY UNLAWFUL ORDERS

**2.4.3** For the purposes of LOAC, an order is unlawful if it is manifestly unlawful, that is, if it would appear to a person of ordinary sense and understanding to be clearly illegal.<sup>43</sup> It is not possible to give a complete list of orders that are manifestly unlawful, but all orders to commit genocide and crimes against humanity are manifestly unlawful. Other well-established examples include, but are not limited to:<sup>44</sup>

- a. murder of any protected person;
- b. that no prisoners be taken (no quarter);
- c. torture of any person, regardless of the reason;
- d. cruel or inhuman treatment, such as mutilation or beating;
- e. rape or other sexual violence against any person;
- f. wanton destruction of property clearly not of any military significance; and
- g. use of unlawful weapons and munitions.

40 See **AFDA** s 38(1).

41 See **ICRC Customary IHL** rule 154.

42 For defence of superior orders see Chapter 17.

43 The standard is whether a person 'of ordinary sense and understanding' would have known the order to be unlawful. **Calley Appeal** at [9]: "In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement." **Finta Appeal** at 92: "The identifying mark of a 'manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: 'forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of 'manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions."

44 That a particular order does not appear on this list does not mean that it is not manifestly unlawful.



**ACTION IN CASES OF DOUBT**

- 2.4.4** Orders that are not known to be unlawful (and are not manifestly unlawful) may require more information than is available to the decision-maker before their legality can be known. For example, the question of whether a particular building is a military objective may rely on intelligence or information which is not known to the member of the NZDF ordered to attack it.
- 2.4.5** If a member of the NZDF receives an order which he or she thinks may conflict with LOAC, he or she may raise the matter with the commander who gave the order. This may be done either orally, or in writing if there is no urgency.
- 2.4.6** If the member of the NZDF is then directed to obey the order, he or she is to do so. The member may subsequently make a complaint about the matter under the Defence Act 1990 (DA) s 49 or report it through the chain of command. Under no circumstances is any member of the NZDF to be penalised for reporting his or her concerns.
- 2.4.7** Where a member of the NZDF seeks confirmation of the legality of an order, the commander who gave it is to seek the advice of an NZDF LEGAD without delay. The commander is not to confirm the order without legal advice, except in cases of utmost urgency. Every officer or NCO who has the legality of an order challenged in this manner is to record in writing the circumstances of the order, the nature of the challenge and the outcome. The report is to be provided to COMJFNZ.

## SECTION 5 – THE RELATIONSHIP BETWEEN LAW OF ARMED CONFLICT AND RULES OF ENGAGEMENT

- 2.5.1** Rules of engagement (ROE) are directives issued by the highest level of military command which specify the circumstances and manner under which force will be used in execution of the mission.<sup>45</sup> NZDF ROE are orders issued by CDF and are written orders for the purposes of AFDA s 39(b). They are approved by the New Zealand Government.
- 2.5.2** ROE reflect the law; they are not a separate source of law. A permitted use of force must be read subject to the particular ROE or other applicable orders. However, ROE may not authorise a use of force that is in contravention of LOAC. Therefore, ROE do not relieve commanders or other members of the NZDF of their personal legal responsibilities and ROE do not require or entitle a member of the NZDF to comply with an unlawful command. Rather, ROE are used to reiterate LOAC in a form that provides concrete direction to commanders and members of a New Zealand force on the application of those principles in the context of the particular operation.
- 2.5.3** ROE may restrict the use of force to a level that is lower than that which is lawful under LOAC. Restraint may be demanded for political or military reasons even though it is not demanded by LOAC. For example, lawfully available targets may be excluded from attack because attacking them will adversely affect public or international opinion, or escalate the conflict.
- 2.5.4** Commanders and other members of the NZDF responsible for planning, drafting and evaluation of ROE are to consider the effect of LOAC on ROE at all times. The advice of the Director of Defence Legal Services (D DLS) is to be obtained before any ROE are presented to CDF for approval. No ROE are to be issued if they do not pass DLS review of LOAC compliance.
- 2.5.5** D DLS is to vet every request for amendment to ROE to ensure compliance with LOAC. The results of all reviews are to be provided to CDF.

## Chapter 3

# INTERNATIONAL LAW AND LAW OF ARMED CONFLICT

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## SECTION 1 – INTRODUCTION

- 3.1.1** This chapter provides a brief overview of international law. As Law of Armed Conflict (LOAC) is a part of international law, it is essential to understand how this body of law operates in its regulation of the conduct of both States and individuals.

## SECTION 2 – GENERAL OUTLINE OF INTERNATIONAL LAW

### THE NATURE OF INTERNATIONAL LAW

**3.2.1** LOAC is a field of international law,<sup>1</sup> ie the body of law that governs:

- a. the international conduct of States;
- b. relations between States;
- c. the constitution and conduct of international organisations; and
- d. the criminal conduct of individuals where that conduct is of international significance (known as ‘international criminal law’).<sup>2</sup>

### SOURCES OF INTERNATIONAL LAW

**3.2.2** The sources of international law are treaties, customary international law, general principles of law practiced by nations, and judicial decisions and writings of experts.<sup>3</sup> Each of these sources, and its application to LOAC, is described in the subsequent sections.

### INTERNATIONAL LAW OBLIGATIONS

**3.2.3** International law applies both in times of war and peace. In addition to LOAC, many other parts of international law impose obligations or create rights that impinge upon the conduct of operations. Some of the more important aspects are dealt with below.

### THE CHARTER OF THE UNITED NATIONS

**3.2.4** The provisions of the Charter of the United Nations (UN Charter) prevail over all other treaty obligations.<sup>4</sup> The principal focus of the UN Charter is to bring to an end the use of force by States to resolve their differences. It preserves the right of States to use force in individual and collective self-defence and empowers them to use force for the purposes of the United Nations (UN). Although the UN Charter does not set out any rules of LOAC, the application of international law relating to armed conflict must be guided by the UN Charter’s emphasis on the maintenance of peace and respect for humanity.<sup>5</sup>

**3.2.5** The UN Charter gives the UN Security Council (UNSC) power to pass resolutions to authorise the use of armed force for the maintenance of international peace and security.<sup>6</sup> Demand for respect of LOAC has featured in almost every major UN Security Council resolution (UNSCR) relating to armed conflict in recent

1 This term refers to public international law or the ‘law of nations’, not private international law or ‘conflict of laws’ which provides rules to determine which legal system applies to private disputes between parties located in different States.

2 See Chapter 17.

3 New Zealand Law Commission, *A New Zealand Guide to International Law and its Sources* NZLC R 34 Wellington 1996 at [5]. See also **ICJ Statute** art 38 and **Rome Statute** art 21.

4 **UN Charter** art 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

5 See **UN Charter** Preamble.

6 See **UN Charter**, Chapter VII, especially art 42. Of note also is that in **UNGAR 377 (V)** (1950) (at Section A), the ‘Uniting for Peace’ Resolution, the UNGA stated that, where the UNSC, by virtue of a lack of unanimity among permanent members, failed to exercise its primary responsibility for the maintenance of international peace and security, the UNGA shall seize itself of the matter.

decades. Widespread breaches of LOAC are increasingly regarded as per se evidence of a ‘threat to peace and security’.<sup>7</sup> The UNSC has also issued thematic resolutions that impact on LOAC.<sup>8</sup> It plays a major role in referring those persons accused of international crimes for trial before international courts or tribunals.<sup>9</sup> Lastly, the UNSC, UN General Assembly (UNGA) and Secretary-General play a major role in initiating and supporting the creation of treaties dealing with LOAC.<sup>10</sup>

## THE LAW RELATING TO THE USE OF FORCE IN INTERNATIONAL LAW

**3.2.6** The law relating to the use of force in international affairs<sup>11</sup> is quite distinct from that which governs the conduct of armed conflict when it occurs.<sup>12</sup> This manual is primarily concerned with the latter field.

**3.2.7** Although members of the armed forces are the ones who must fight in the event of conflict, they generally have little to do with the decisions by which a State becomes involved in conflict in the first place. High-ranking officers involved in planning attacks may, however, face individual criminal liability if the use of force is unlawful. A brief outline of the law relating to the unlawful use of force in international law (known as ‘aggression’) is therefore included in this manual.<sup>13</sup>

## INTERNATIONAL HUMAN RIGHTS LAW

**3.2.8** International human rights law (IHRL), like LOAC, is concerned with the legal protection of human beings. IHRL, however, extends beyond the context of an armed conflict. The main focus of IHRL is on protecting individuals from the actions of the authorities of the State on which that person relies, whereas LOAC protects individuals from the actions of an opposing force.

**3.2.9** These bodies of law overlap. For example, Geneva Protocol I article 77 and Protocol II article 4(3)(c) prohibit the use of children in hostilities. The UN Convention on the Rights of the Child (UNCROC) article 38, and its Optional Protocol (UNCROC Protocol I) also prohibit recruitment of child soldiers, as does article 3 of the International Labour Organisation Convention No. 182 on the Worst Forms of Child Labour (ILO Convention 182). Only Geneva Protocols I and II are LOAC treaties, the others being concerned with human rights and workers’ rights. Yet provisions of all these treaties cover the same subject and New Zealand is bound by them all.

**3.2.10** Because LOAC is the law that specifically addresses the situation of armed conflict, it must be taken to prevail when its provisions are clearly applicable to an issue (known as the *lex specialis* rule).<sup>14</sup> In the case of inconsistency between LOAC and IHRL, provisions relating to persons deprived of liberty, for example, the rules of Geneva Convention III prevail in respect of prisoners of war (PWs)

7 See for example, **UNSCR 2170** (2014): “Acting under Chapter VII of the Charter of the United Nations [the Security Council] (1) *Deplors and condemns* in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law.”

8 For example, **UNSCR 1325** (2000) on women, peace and security; **UNSCR 1612** (2005) on children and armed conflict; and **UNSCR 1674** (2006) on protection of civilians in armed conflict.

9 See Chapter 17.

10 For example, **UNGAR 64/56**.

11 In Latin: *jus ad bellum*.

12 In Latin: *jus in bello*.

13 See Chapter 17.

14 See **Nuclear Weapons Opinion** at [25].

since that treaty is specifically addressed to their situation. This may produce very different results relating to how long a person may be held without trial, but not to the standards of humane treatment to which they are entitled. Where overlapping provisions all bind New Zealand, this manual recognises the need for compliance with those other standards as well as LOAC. While the distinction between LOAC and IHRL is still important, it is not wise to ignore the significance of IHRL since one act or omission can transgress both areas of law and international courts have displayed willingness to borrow concepts from each.<sup>15</sup>

- 3.2.11** IHRL standards continue to protect persons under the control of a New Zealand force and in respect of the population in occupied territory.<sup>16</sup> For example, where an IHRL obligation has penal consequences in New Zealand law (eg the prohibition of torture<sup>17</sup>), it will apply to members of the New Zealand Defence Force (NZDF) who are overseas by virtue of the Armed Forces Discipline Act 1971 (AFDA) s 74(1).
- 3.2.12** Although a State may derogate from some IHRL obligations in case of armed conflict or emergency, the most important rights, including those prohibiting arbitrary deprivation of life, enslavement or torture are ‘non-derogable’ and cannot be ignored even in times of emergency or war.<sup>18</sup>

## THE LAW OF THE SEA

- 3.2.13** The UN Convention of the Law of the Sea (UNCLOS) expressly applies to the peaceful uses of the sea and does not address LOAC in the maritime environment.<sup>19</sup> Nevertheless, many rules set out in UNCLOS are of vital importance to the conduct of armed conflict at sea. For example, the limits of the territorial sea governs issues such as the inviolability of neutral waters.<sup>20</sup>

## ENVIRONMENTAL LAW

- 3.2.14** The treaties that make up international environmental law were not drafted in contemplation of armed conflict and so cannot be said to directly impact on its conduct. There is, however, a general obligation to protect the natural environment and prevent widespread, long-term and severe environmental damage. Methods and means of warfare that are intended, or may be expected, to cause such damage are prohibited, as are attacks against the natural environment by way of reprisals.<sup>21</sup>

15 See for example, the *Galić Trial* where breaches of LOAC relating to deliberate and indiscriminate attacks were subsumed within the crime against humanity of murder. War crimes are derived from LOAC, while crimes against humanity are generally derived from IHRL.

16 See *Banković, Al Skeini and Al-Jedda Appeal*. In the *Wall on Palestinian Territory Advisory Opinion* the ICJ decided that Israeli occupying forces must apply the ICCPR in occupied areas (see [111–112]). For occupation see Chapter 9.

17 See *Crimes of Torture Act 1989*.

18 *ICCPR* art 4(1): “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” Art 4(2) states: “No derogation from Arts 6 [inherent right to life], 7 [prohibition of torture or cruel, inhuman, or degrading treatment], 8 (paragraphs 1 and 2) [prohibition of slavery or servitude], 11 [no imprisonment for inability to fulfil a contractual obligation], 15 [no retrospective offences/penalties], 16 [right to recognition as a person before the law] and 18 [right to freedom of thought, conscience and religion] may be made under this provision.”

19 *UNCLOS* art 88: The high seas shall be reserved for peaceful purposes.

20 For LOAC in the maritime environment see Chapter 10. For neutrality see Chapter 16.

21 *Nuclear Weapons Opinion* at [30]: “[...] States must take environmental considerations into

## THE ENFORCEMENT OF LAW OF ARMED CONFLICT THROUGH INTERNATIONAL LAW

**3.2.15** International law relies on a variety of enforcement mechanisms. A State Party or the UNSC may refer a situation to the prosecutor of the International Criminal Court (ICC).<sup>22</sup> The UNSC may establish ad hoc tribunals to try individuals whose breaches of LOAC constitute a threat to international peace and security.<sup>23</sup> The UNSC can pass resolutions under article 41 of the UN Charter to apply economic sanctions and arms embargoes against States that breach its rules. The UNSC may also take action under article 42 to enforce compliance through military action. The UNSC or (rarely) the UNGA may also authorise peace support operations.<sup>24</sup>

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account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”

22 **Rome Statute** art 13(a) and (b). See for example, **UNSCR 1593** (2005) referring the situation in Sudan to the prosecutor. ICJ cases and opinions concerning LOAC include **Nicaragua v USA**, **Nuclear Weapons Opinion** and **Wall on Palestinian Territory Opinion**. See also Chapter 17.

23 See for example, **UNSCR 827** (1993) which established the ICTY with jurisdiction to prosecute persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia. In the **Tadić Jurisdiction Appeal**, the ICTY found that its establishment falls squarely within the powers of the UNSC under **UN Charter** art 41.

24 **UNGAR 377(V)** (1950), the ‘Uniting for Peace’ Resolution, provided legal authority for the continuance of military action in Korea in 1949, thereby sidestepping a Soviet veto in the UNSC. It has been used by the UNGA to discuss threats to international peace and security on 10 occasions.



## SECTION 3 – TREATIES

### DEFINITIONS

- 3.3.1** A **treaty** is an agreement concluded between States by which those States accept legal obligations and gain international rights.<sup>25</sup> Treaties are also called **pacts** or **international agreements**.
- 3.3.2** A **convention** is a multilateral treaty, usually with a significant number of parties.
- 3.3.3** A **protocol** is an addition or amendment to a treaty that, like the treaty itself, is binding on its parties. Parties to the original treaty can choose whether or not to become bound to a subsequent protocol.<sup>26</sup>

### TREATIES MUST BE COMPLIED WITH

- 3.3.4** A treaty is binding on every State that is a party to it and must be complied with in good faith by all members of the armed forces of that State.<sup>27</sup> Failure to comply with treaty obligations cannot be excused by resort to technicalities. Where the text is silent or ambiguous on a point, the spirit or intent of the treaty may, nevertheless, dictate a course of action.<sup>28</sup> The fact that an action is not banned by treaty law does not necessarily imply that it is permitted. Gaps in the provisions of a treaty may be filled by reference to customary international law, the principles of humanity and the public conscience.<sup>29</sup>
- 3.3.5** Because the terms of a treaty are only binding upon States that are party to it,<sup>30</sup> it is not unusual to find an inequality of obligations between opposing parties to any armed conflict, or amongst coalition partners.<sup>31</sup> The fact that other States do not have the same obligations as New Zealand, however, does not relieve members of the NZDF of obligations under treaty law.<sup>32</sup>
- 3.3.6** Multilateral treaties, such as the Hague Convention and Regulations and the Geneva Conventions, are now so generally adhered to that they are regarded as declarative of customary international law and are binding even on States that are not a party to them.<sup>33</sup>

25 **Vienna Convention** art 2(1)(a): “‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Treaties may also be entered into by major international organisations such as the UN.

26 For example, the **Conventional Weapons Convention** requires parties to ratify at least one of its protocols. Protocols to other LOAC treaties are expressly ‘optional’ or ‘additional’.

27 **Vienna Convention** art 26: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

28 **Vienna Convention** art 32 (Supplementary Means of Interpretation): “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion” when applying art 31 (General Rule of Interpretation).

29 See the ‘Martens Clause’ in the preamble to **Hague Conventions II** (1899) and **IV** (1907). The Martens Clause is restated in similar language in **Geneva Convention I** art 63, **Geneva Convention II** art 62, **Geneva Convention III** art 142, and **Geneva Convention IV** art 158 and **Geneva Protocol I** art 1(2).

30 **Vienna Convention** art 34: “A treaty does not create either obligations or rights for a third State without its consent.”

31 For application of LOAC to coalition operations see Chapter 6.

32 For reciprocity see Chapter 2.

33 See **Vienna Convention** art 38. In addition, the Geneva Conventions now have universal application having been ratified by every existing State.

- 3.3.7** A State,<sup>34</sup> or even a non-State actor,<sup>35</sup> can effectively bind itself to LOAC treaty obligations if it formally states or agrees that it will comply with them, even though not actually a party to the treaty. This does not create any status for an entity that binds itself in this way.

### BECOMING BOUND BY A TREATY

- 3.3.8** The process by which a State becomes bound by a treaty is as follows:

- a. Signature.** When the text of a treaty has been decided, it is then opened for a period of time for the representatives of States to sign the document. Although the treaty is not binding at that time, a signatory State must not do anything that would defeat the treaty's object and purpose.<sup>36</sup> A State consents to be bound by a treaty on signature.<sup>37</sup>
- b. Ratification.** When a State accepts the legally binding nature of a treaty, it will ratify it.<sup>38</sup> New Zealand treaty practice on ratification is dealt with further in this section.
- c. Accession.** After a treaty has come into force, a State that wishes to become a party is said to accede to it (also known as 'adherence' or 'acceptance'). The legal effect of accession is the same as ratification.<sup>39</sup>
- d. Succession.** A colonial possession may 'succeed'<sup>40</sup> to the treaty obligations of the former colonial power on gaining independence where the treaties in question are generally accepted as declaratory of international law.<sup>41</sup>

### RESERVATIONS

- 3.3.9** When signing, ratifying, or acceding to a treaty, a State may make a formal statement or 'reservation', stipulating that as a condition of becoming a party:<sup>42</sup>

- a.** it exempts itself from certain provisions;

34 Japan signed Geneva Convention III (treatment of PWs) but did not ratify it prior to the opening of hostilities in WWII. At that time it advised that, although not formally bound, it would apply the Convention with all necessary modifications. In the *Tokyo War Crimes Trial*, Japan then submitted that the method by which it had indicated its intentions to comply with the Convention enabled it to breach those obligations. The court rejected that submission. Similarly, the parties to the conflict in the former Yugoslavia committed themselves to comply with LOAC and signed an agreement to that effect. The appellant's argument in the *Galić Appeal* (at [86]) that the agreement was not binding on the parties, and even if binding did not give rise to individual criminal responsibility, was rejected.

35 **Geneva Protocol I** art 96(3): "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4 [colonial domination, alien occupation or a racist regime], may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration". This provision has never been successfully applied and is not customary law.

36 See **Vienna Convention** art 18. A treaty may become binding on signature if it so provides. This procedure is rare and has not been used in recent LOAC treaties.

37 See **Vienna Convention** art 12.

38 See **Vienna Convention** art 14.

39 See **Vienna Convention** art 15.

40 Succession is optional. General succession is not a principle of international law.

41 See **Vienna Convention** art 73. On gaining independent treaty-making capacity in 1919, New Zealand succeeded to the **Saint Petersburg Declaration**, **Geneva Convention 1906** and **Hague Convention 1907**.

42 See **Vienna Convention** art 2(1)(d); for rules relating to reservations see arts 19–23.

- b. its signature, ratification or accession does not apply in respect of certain of its territories or to other States in close legal association or under its protection;<sup>43</sup>
- c. that certain provisions apply with modifications or only in certain circumstances;<sup>44</sup>
- d. that it interprets provisions of the treaty in a particular way; or
- e. that it considers the treaty to have a particular effect on international law.<sup>45</sup>

**3.3.10** For example, on signing Geneva Convention IV on 11 February 1950, New Zealand reserved the right:

- a. to impose the death penalty regardless of the law of the occupied territory (withdrawn on 2 March 1976);<sup>46</sup> and
- b. to punish war criminals in accordance with the Nuremberg Principles,<sup>47</sup> notwithstanding art 70(1) (withdrawn on ratification).

**3.3.11** A reservation is not legally effective where:

- a. reservations are prohibited by the terms of the treaty;<sup>48</sup>
- b. the treaty allows only a type of reservation other than that which is sought to be made;<sup>49</sup> or
- c. the reservation is incompatible with the treaty's object and purpose.<sup>50</sup>

**3.3.12** A State that is a party to a treaty may object to a reservation made by another State.

43 In its reservations to **Geneva Protocol I** and **II**, New Zealand declared that its ratification does not extend to the Cook Islands, Niue and Tokelau.

44 New Zealand's reservations to the **Geneva Gas Protocol** were that the Protocol's obligations were only binding as regards other signatories or parties and that New Zealand would cease to be bound in respect of any state which failed to respect the prohibitions in the Protocol. The reservations were withdrawn on 6 January 1989.

45 **Environmental Modification Convention**: New Zealand declared that nothing in the Convention detracts from or limits the obligations of states to refrain from military or any other hostile use of modification techniques that are contrary to international law.

46 As New Zealand has abolished the death penalty, the provision in question has no practical effect for the NZDF.

47 For trial of war criminals see Chapter 17.

48 See **Vienna Convention** art 19(a). For example, **Chemical Weapons Convention** art 22: "The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose." See also **Ottawa Convention** art 19, **Rome Statute** art 120, **Cluster Munitions Convention** art 19.

49 See **Vienna Convention** art 19(b).

50 See **Vienna Convention** art 19(c). In the **Reservations to the Genocide Convention Opinion** (at [24]), the ICJ stated that the criterion to determine whether a State reservation is legally consistent with it still being a party to the treaty is the compatibility of the reservation with the object and purpose of the Convention.

## DECLARATIONS AND UNDERSTANDINGS

- 3.3.13** When signing, ratifying or acceding to a treaty, a State may make a formal statement by which it:
- a. states its intention to be bound by provisions that are optional;<sup>51</sup>
  - b. provides information relating to the meeting of its obligations;<sup>52</sup> or
  - c. states that it interprets provisions in a particular way (an ‘understanding’).<sup>53</sup>
- 3.3.14** The first two types of declaration may establish binding obligations, whereas an understanding merely expresses the view of a State as to the meaning of an obligation and how it intends to apply it. Generally agreed understandings may also be appended to a treaty to indicate the views of experts as to the meaning of terms contained in the treaty text.<sup>54</sup>
- 3.3.15** There is an overlap between declarations, understandings and reservations. Some declarations are indistinguishable from reservations, in which case they may be regarded as being reservations by other States.<sup>55</sup>

## DEROGATIONS

- 3.3.16** A treaty may allow parties to indicate their intention not to be bound by certain obligations where they find it necessary to do so because of an emergency or a threat to security. Because LOAC is intended to be applied in emergencies, few of its provisions allow derogation.<sup>56</sup> It is not possible to derogate from the most important humanitarian obligations.<sup>57</sup> Derogation from a provision does not relieve a State of its other obligations under international law, particularly those arising under customary international law.

51 For example, **Geneva Protocol I** art 90(2): “[States may] declare that they recognize [...] the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article.” New Zealand made such a declaration. See also **Rome Statute** art 124: “[...] a State may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court [the ICC] with respect to [war] crimes”. New Zealand entered no such declaration.

52 For example, in accordance with **Chemical Weapons Convention** art 3, not less than 30 days after the Convention came into force, Parties had to submit to the Organization for the Prohibition of Chemical Weapons declarations of their holdings of chemical weapons, a general plan for the destruction of such weapons, the existence of weapons production facilities, etc.

53 For example, in its **Geneva Protocol I New Zealand Declaration**, New Zealand stated its understanding in respect of art 44 relating to the situations in which armed combatants cannot distinguish themselves by wearing uniform and on the meaning of the words ‘visible to the adversary’.

54 See for example, the ‘Understandings’ annex to the **Environmental Modification Convention** defining ‘widespread’, ‘long-lasting’ and ‘severe’.

55 In ratifying the **Rome Statute**, France declared that art 8(2)(b) applies only to conventional weapons and cannot regulate or prohibit the use of nuclear weapons nor other weapons necessary to France’s inherent right of self-defence, unless nuclear weapons and other weapons become subject to a comprehensive ban and are specified in the annex to the Rome Statute. New Zealand entered a contrary declaration in response. For nuclear weapons see Chapter 7.

56 However, **Geneva Protocol I** art 54(5) allows derogation from art 54(2) (destruction of necessities of life) where required by imperative military necessity. For military necessity see Chapter 4. For prohibition on starvation tactics see Chapter 8.

57 See for example **ICCPR** art 4.

## TERMINATION AND SUSPENSION

- 3.3.17** A State can terminate its obligations under a treaty by denouncing it in whole or in part, or by withdrawing from it.<sup>58</sup> A State may also suspend its obligations under a treaty.<sup>59</sup>
- 3.3.18** Denunciation is permitted where performance is impossible or where there has been a fundamental change in circumstances.<sup>60</sup> The fact that LOAC obligations were entered into in times of peace does not give grounds for denunciation when armed conflict arises since this was the very circumstance inherent in the decision to become bound by the treaty. Similarly, a party to a conflict cannot use the results of its own breach of LOAC as a ground for saying that compliance with LOAC is rendered impossible.<sup>61</sup>
- 3.3.19** Most LOAC treaties provide for denunciation or withdrawal to take effect only after the conclusion of hostilities or when certain obligations have been fulfilled, for example after the repatriation of PWs.<sup>62</sup> Denunciation affects only the party making it and does not relieve other parties to a conflict of their treaty obligations.<sup>63</sup> It does not have retrospective effect and States remain bound in respect of acts done by them prior to denunciation.
- 3.3.20** Termination or suspension do not excuse a State of its obligations under customary international law and cannot be used to avoid humanitarian obligations.<sup>64</sup> For example, a State that denounces the obligations of the

58 **Vienna Convention** art 54: “The termination of a treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the treaty; or (b) At any time by consent of all the parties after consultation with the other contracting States.” The **Bacteriological Weapons Convention** art 13(2) allows withdrawal if a party decides that extraordinary events have jeopardised its supreme interests. A statement of the extraordinary events must be given to all other parties and to the UNSC three months in advance. See also **Ottawa Convention** art 20(2). Note also **Vienna Convention** art 56(1): “A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty.” New Zealand has not denounced an obligation under an LOAC treaty. However, **Hague Convention VI** was denounced on behalf of the British Empire with effect from 14 November 1926.

59 **Vienna Convention** art 58 provides for the suspension of the operation of a multilateral treaty by agreement between two or more parties in certain circumstances only; for consequences of suspension see art 72. The USA suspended its security obligations to New Zealand under the ANZUS treaty in 1986 in response to New Zealand’s nuclear-free policy.

60 See **Vienna Convention** art 62. In particular, art 62(1) states: “A fundamental change of circumstances [...] which was not foreseen by the parties may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”

61 See **Vienna Convention** art 61(2).

62 **Geneva Convention I** art 63, **Geneva Convention II** art 62, **Geneva Convention III** art 143, **Geneva Convention IV** art 158 and **Geneva Protocol I** art 99 all provide that denunciation shall only take effect one year after receipt, except where the party is involved in armed conflict when it shall not take effect until peace has been concluded and release, repatriation and reestablishment of protected persons has been completed. **Hague Cultural Property Convention** art 37 delays the effect of denunciation until the operations of repatriating cultural property are concluded. **Conventional Weapons Convention** art 9(2) provides that denunciation does not take effect until the termination of any armed conflict or of any peacekeeping, observation or similar functions performed by UN forces or missions in the area concerned. See also **Ottawa Convention** art 20(3), **Rome Statute** art 127 and **Cluster Munitions Convention** art 20(3).

63 See for example, **Geneva Protocol I** art 99(3).

64 See however, **Vienna Convention** art 60(2): “A material breach of a multilateral treaty by one of

Geneva Conventions will still be bound by those rules as part of customary international law.<sup>65</sup>

**3.3.21** No State has ever denounced any of the major LOAC treaties.<sup>66</sup>

### THE IMPLEMENTATION OF LAW OF ARMED CONFLICT TREATIES INTO NEW ZEALAND LAW

**3.3.22** Some treaties require parties to enact legislation or to take administrative steps to ensure compliance.<sup>67</sup> Other treaties leave it to the State to decide how to implement the treaty within its jurisdiction. New Zealand practice is to ratify a treaty only after necessary steps to give it effect in New Zealand law are completed.<sup>68</sup>

**3.3.23** When the Government decides to become a party to an LOAC treaty, it will also decide whether or not legislation is required.<sup>69</sup> Legislation is generally needed where the treaty will change the rights and obligations of individuals or enhance the powers of the Crown.<sup>70</sup> The following approaches are available:

- a. An Act with the treaty attached as a Schedule gives direct effect to the treaty by providing it has the force of law in New Zealand.<sup>71</sup>
- b. An Act incorporates some of the wording of the treaty or indicates in some other way its treaty origins.<sup>72</sup>

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the parties entitles: (a) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it [...]; (b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.” Nevertheless, in accordance with art 60(5), parties’ termination rights do not apply to the protection of persons under humanitarian treaties and do not allow reprisals against protected persons. In its *Namibia Opinion* (at [96]), the ICJ held that the right to terminate a treaty on account of breach is a general principle of law, except in the case of provisions relating to the protection of persons in treaties of a humanitarian nature. The silence of a treaty on the subject does not imply the exclusion of the right to terminate.

65 See **Geneva Convention I** art 63, **Geneva Convention II** art 62, **Geneva Convention III** art 142, **Geneva Convention IV** art 158.

66 *Nuclear Weapons Opinion* at [82]: “The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that denunciation clauses listed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles.”

67 For example, **Geneva Convention I** art 49, **Geneva Convention II** art 50, **Geneva Convention III** art 129, **Geneva Convention IV** art 146, **Geneva Protocol I** art 80 and **Hague Cultural Property Convention** art 28 all require parties to enact any legislation necessary to provide effective penal sanctions for persons who breach the conventions. **Environmental Modification Convention** art IV requires each State Party to take measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the convention. See also **Bacteriological Weapons Convention** art 4, **Ottawa Convention** art 9, **Chemical Weapons Convention** art 7, **Cluster Munitions Convention** art 9 and **Mercenaries Convention** arts 5(3) and 6(a).

68 See *Cabinet Manual*, Cabinet Office, Department of Prime Minister and Cabinet, Wellington, 2008, Chapter 7.

69 For example, New Zealand criminalised the use of chemical weapons and APMs by legislation. However, it did not statutorily prohibit the use of expanding bullets or blinding laser weapons because New Zealand meets those obligations through its weapons procurement and development policies and DFOs without the need to formally incorporate them in an Act. Similarly, legislation was not enacted in respect of the **Environmental Modification Convention** as it imposes duties which could be effected through defence policy.

70 See New Zealand Law Commission, *A New Zealand Guide to International Law and its Sources*, NZLC R 34 Wellington 1996 and *R v Jones*.

71 For example, **IC & ICC Act 2000** s 6 provides that the Rome Statute has force of law in New Zealand.

72 For example, the **Anti-Personnel Mines Prohibition Act 1998**.



- c. The substance of the treaty is incorporated into the body of the Act, without any obvious indication of the fact.<sup>73</sup>
- d. An Act authorises the making of regulations or rules that give effect to identified treaties or at least take cognisance of them.<sup>74</sup>

**3.3.24** LOAC treaty obligations incorporated into New Zealand law by statute may include punishment for non-compliance.<sup>75</sup> In other cases, amendments have been made without creating penal provisions. Treaties that are not incorporated into statute govern New Zealand's conduct in respect of other States, but may not create legal rights for individuals before New Zealand courts.

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73 For example, **DA s 33**, substituted by the **Defence Amendment Act 2001**, gives effect to UNCROC Protocol I, by raising the age at which members of the Armed Forces can lawfully take part in active service.

74 See for example, the provisions of **Conventional Weapons Protocol V** that were incorporated by DFOs.

75 See Chapter 17.

## SECTION 4 – CUSTOMARY INTERNATIONAL LAW

### BASIS OF CUSTOMARY INTERNATIONAL LAW

- 3.4.1** **Customary international law** is law derived from the practice of States in accordance with their sense of legal obligation.<sup>76</sup>
- 3.4.2** To become a rule of customary international law, States must follow a practice because they accept that they are legally obliged to, not just because it suits their interests on a particular occasion. A practice that is generally followed, but which States feel legally free to disregard, does not constitute customary law.
- 3.4.3** The existence of customary law is dependent on general recognition by States, but does not require unanimous recognition. The accused at Nuremberg, for example, could not excuse their actions on the basis of Nazi interpretations of international obligations.<sup>77</sup>

### PEREMPTORY NORMS

- 3.4.4** Some rules are referred to as ‘super-strong’ or ‘peremptory’ norms (in Latin, *jus cogens*). The Vienna Convention article 53 describes a peremptory norm thus: “For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”
- 3.4.5** Peremptory norms prevail over any circumstances, excuse or treaty obligation.<sup>78</sup> Breach of such obligations, therefore, can never be justified. The prohibitions against aggression, torture, slavery, apartheid and genocide are generally regarded as falling into this category,<sup>79</sup> but it is not clear which other rules of LOAC do.<sup>80</sup>

### PRACTICE OF STATES

- 3.4.6** The practice of States is one of the sources of customary international law. The views of States that are specially affected by the developing rule in question is of particular importance. Therefore the views of States actively involved in international security must be regarded as more authoritative than States that are not when a rule of customary international law is developing in this area. In addition, a principle of customary law (other than for a peremptory norm) is that a rule is not binding on a State that persistently objects to it during its

76 See New Zealand Law Commission, *A New Zealand Guide to International Law and its Sources*, NZLC R 34 Wellington 1996 pp 31–32.

77 See *Justice Case* at 20.

78 **Vienna Convention** art 53: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” See also art 64: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

79 In the *Pinochet Case* (at [156]), the House of Lords held that “the prohibition against torture has the status of *jus cogens*”. See also *Furundžija Trial* at [144].

80 In the *Nuclear Weapons Opinion* (see [83]), the ICJ noted that the question of whether a norm is part of *jus cogens* relates to the legal character of the norm. But the question the UNGA asked the ICJ to address did not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons, so it was not necessary for the ICJ to decide whether the principles and laws of humanitarian law as codified in the major treaties amounted to *jus cogens*.



development.<sup>81</sup> The principle is, however, of doubtful value in respect of the important and generally accepted rules of LOAC, and has rarely been invoked. New Zealand has never formally objected to the development of any customary rule.

- 3.4.7** Because customary law is derived from State practice, its exact content is sometimes hard to establish and may be controversial.<sup>82</sup> In 2005, the International Committee of the Red Cross (ICRC) published Customary Rules of International Humanitarian Law. Although it has no legal status, this detailed study provides useful material on which an assessment can be made. Rules from the study are referred to in this manual where they considered helpful. Omission of reference to a rule does not mean, however, that the NZDF does not accept the validity of that rule.

## DEVELOPING RULES

- 3.4.8** Customary law is constantly evolving and its obligations may change without any formal notification.<sup>83</sup> Because most important customary rules also appear in treaty law to which New Zealand is a party, the content of customary law is unlikely to cause significant practical issues of compliance for the NZDF. In case of doubt, advice is to be sought from an NZDF Legal Adviser (LEGAD).

## RELATIONSHIP WITH TREATY LAW

- 3.4.9** Treaties such as the Geneva Conventions and the Hague Regulations have become so generally adhered to as to be regarded as customary international law.<sup>84</sup> They are therefore regarded as binding even on States that are not a party. This customary nature includes Common Article 3 of the Geneva Conventions governing non-international armed conflict (NIAC).<sup>85</sup> Particular provisions may be regarded as being part of customary law even if other parts are not. For example, Geneva Protocol I article 75, which provides for fundamental guarantees of humane treatment, is now regarded as being declarative of customary law regardless of the acceptance of the Protocol in its entirety.<sup>86</sup>

81 See *Temple of Preah Vihear Case* at [32], *Nuclear Weapons Opinion* at [67] and *Germany v Denmark and the Netherlands* at [73]. Nevertheless, persistent objection does not exclude the applicability of peremptory norms (*jus cogens*).

82 See for example, *Hinga Norman Decision* dissenting judgment of Justice Robertson.

83 See *Sellers v MSI* at [62].

84 See *Vienna Convention* art 38. In its *Major War Criminals Trial* decision (at [497]), the International Military Tribunal noted that war crimes, as defined in the International Military Tribunal Charter, the Geneva Conventions and Hague Convention IV were “already recognized as War Crimes under international law”.

85 In *Nicaragua v USA* (at [218]), the ICJ was of the view that the Geneva Conventions are a development and an expression of the principles of humanitarian law. See also *Aleksovski Trial* at [49].

86 In *Hamdan v Rumsfeld* (at [71]), Steven J of the US Supreme Court noted that the principles articulated in Geneva Protocol I art 75 are indisputably part of customary international law.

**CUSTOMARY INTERNATIONAL LAW AS PART OF NEW ZEALAND LAW**

**3.4.10** Customary international law is generally accepted to be part of the common law of New Zealand.<sup>87</sup> This means that the rules of LOAC that are not created by treaty, and not covered by statute, are nevertheless part of New Zealand law.<sup>88</sup> As customary law develops over time, the common law develops along with it. Therefore customary international law can be argued before New Zealand courts and may have constitutional importance. Although there are no common law offences in New Zealand,<sup>89</sup> customary international law may be used to interpret a statutory war crime such as those set out in the International Crimes and International Criminal Court Act 2000 (IC & ICC Act 2000).

87 See *Commentaries on the Laws of England* at [10712 62]. There is, however, no New Zealand authority on this point.

88 *Sellers v MSI* at [62]: “For centuries national law in respect of the law of the sea has been essentially governed by, and derived from, international law, with the consequence that national law is to be read, if at all possible, consistently with the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change.”

89 See *Crimes Act 1961* s 9 and *R v Jones*.

## SECTION 5 – THE NATURE OF GENERAL PRINCIPLES OF LAW

- 3.5.1** **General principles of law** means those principles that are so common in the various legal systems of the international community that they can be considered to be generally recognised by all nations.<sup>90</sup>
- 3.5.2** General principles of law provide guidance on points of international law. There is a significant overlap between international law and domestic law, and a great many of the prohibited acts under LOAC, if committed domestically, would be crimes under the general law. For example, the murder of PWs is clearly a type of murder – a crime that every properly functioning legal system in the world prohibits. Similarly, since all properly functioning States treat rape as a crime, it follows that rape will also be treated by an international court as a war crime.
- 3.5.3** However, the exact elements of such crimes under different jurisdictions may not be so easy to determine.<sup>91</sup> Persons accused of crimes at international law may argue the applicability of defences or justification available under domestic law.<sup>92</sup> Similarly, an international court may look to the domestic law of various countries in order to assist it in determining procedural or jurisdictional issues.<sup>93</sup>

90 See *Hostages Trial* at [53–54].

91 See *Furundžija Trial* at [174–181], in particular, at [181]: “Noting that no definition of rape existed in international law, the ICTY undertook a detailed comparative analysis of the principles of criminal law common to the major legal systems of the world. It found considerable discrepancies amongst domestic jurisdictions but determined that most systems defined rape as the forcible sexual penetration of the human body by the penis or the forcible insertion of any object into either the vagina or anus.”

92 In the *Kordić & Čerkez Trial* (at [448–452]), the defendants’ claim of self-defence to excuse their actions in the Ahmići Massacre was rejected. In the *Celebići Appeal* (at [590]), the ICTY Appeals Chamber accepted that the “relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant’s diminished mental responsibility is relevant to the sentence imposed and is not a defence leading to an acquittal in the true sense”.

93 In the *Nikolić Jurisdiction Decision*, the ICTY Appeal Chamber referred to the New Zealand case of *R v Hartley* on whether forcible abduction of an accused prevents his or her subsequent trial.

## SECTION 6 – SUBSIDIARY METHODS OF DETERMINING THE LAW OF ARMED CONFLICT

### JUDICIAL DECISIONS

- 3.6.1** Judicial decisions are a subsidiary method of determining rules of LOAC.<sup>94</sup> Rules of LOAC may be determined from decisions or advisory opinions of the International Court of Justice (ICJ),<sup>95</sup> the decisions of the Nuremberg and Tokyo Trials,<sup>96</sup> the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>97</sup> or International Criminal Tribunal for Rwanda (ICTR),<sup>98</sup> and subsequent ‘hybrid’ tribunals such as those for Sierra Leone<sup>99</sup> and Cambodia.<sup>100</sup> Jurisprudence now arises from the ICC. Finally, domestic trials may also provide authority for a particular point of law.<sup>101</sup>
- 3.6.2** Decisions of courts are not generally binding on subsequent courts in international law, the way that they are in common law jurisdictions.<sup>102</sup> However, the rulings of previous cases may be highly persuasive.

### WRITINGS OF EXPERTS

- 3.6.3** The writings of experts are useful in bringing before a court the various relevant sources of law, and in helping to create opinions that influence the attitudes of governments. However, courts have found in many instances these pronouncements must be regarded as views as to what ought to be rather than the enunciation of a rule or practice as universally approved or assented to by States.<sup>103</sup> Furthermore, although early scholars such as Grotius, Vattel and Lieber can provide guidance on long-standing rules, their work pre-dates modern LOAC treaties and must be treated with caution as the rules they set out will often have been overtaken by modern developments in the law.
- 3.6.4** Although military law manuals of various States may also be consulted, these too must be treated with caution as they necessarily set out the law as understood by the State to which they pertain. This understanding may be quite different from State to State.

94 **ICJ Statute** art 38(1)(d): “Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

95 See for example, *Nicaragua v USA*, *Nuclear Weapons Opinion*, *Wall on Palestinian Territory Opinion*.

96 See for example, *High Command Trial*, *Major War Criminals Trial*, *Tokyo War Crimes Trial*.

97 See for example, *Tadić Jurisdiction Appeal* and *Celibići Trial*.

98 See for example, *Akayesu Trial*.

99 The Special Court of Sierra Leone was particularly influential in the recognition of the crime of forced marriage. See *Brima, Kamara and Kanu Trial*.

100 The Extraordinary Chambers in the Courts of Cambodia.

101 See for example, *Calley Appeal*, *Eichmann Appeal*, *Targeted Killings Case*.

102 **ICJ Statute** art 59: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” **Rome Statute** art 21(2): “The Court may apply principles and rules of law as interpreted in its previous decisions.”

103 In *Finta Appeal* (at [73]), the Supreme Court of Canada affirmed dicta of Lord Alverstone in *West Rand Central Gold Mining Co. v The King* [1905] 2 KB 391 at 402 where he noted that “in many instances their [learned writers on international law] pronouncements must be regarded rather as the embodiments of their views as to what ought to be [...] the conduct of nations *inter se*, than the enunciation of a rule or practice as universally approved or assented to [by nations states] as to be fairly termed [...] ‘law’”.

## OTHER SOURCES

- 3.6.5** Reference may be made to well-researched and authoritative documents such as the San Remo Manual. Such documents do not have the weight of treaties, but are nevertheless drafted by international experts and specialists who contribute in their personal capacity. It is necessary to ensure that such documents enjoy general support amongst the international legal community before weight can be placed on their content.
- 3.6.6** The military manuals of other States may also be very useful, particularly when considering the content of customary international law. However, a great deal of caution is necessary. Military manuals often contain policy as well as law (as does this manual). It is the acceptability and legality of the actions of the NZDF by New Zealand standards which is determinative, not the views of other States. This is particularly so when other States are not party to treaties that bind New Zealand (especially Geneva Protocol I) or set a lower standard for the conduct of their armed forces.<sup>104</sup>
- 3.6.7** The content of LOAC may also be guided or elaborated by reference to UNSCRs.<sup>105</sup> UNGARs are not binding at international law per se, but when carried by a very substantial majority may be regarded in whole or in part as declaratory of customary international law.<sup>106</sup> Documents such as bulletins issued by the UN Secretary-General<sup>107</sup> and the opinions of the International Law Commission,<sup>108</sup> while not binding, are also useful as a guide to establishing the content of customary international law.

104 For coalition forces see Chapter 6.

105 See for example, **UNSCR 1325** (2000) on women, peace and security and **UNSCR 1539** (2004) on the protection of children in armed conflict.

106 See for example, **UNGAR 56/217** (2001) on the safety and security of humanitarian personnel and protection of UN personnel. The need to uphold LOAC appears in at least 36 UNGA resolutions.

107 See for example, **UN Secretary-General's Bulletin No. 13 (1999)** relating to Observance by UN Forces of international humanitarian law. Bulletins fall within the authority of the Secretary-General under UN Charter, Chapter XV. Although binding on members of the UN staff they are not binding per se on members of military contingents. Much of Bulletin No. 13 is, however, consistent with customary international law (see Chapter 5).

108 See for example, **Nuremberg Principles** and the **ILC Articles on State Responsibility**.

# BASIC PRINCIPLES

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## SECTION 1 – INTRODUCTION

- 4.1.1** The purpose of this chapter is to explain the major concepts that influence the development and application of Law of Armed Conflict (LOAC). These concepts must be understood in order to properly implement the rules set out in greater detail in the succeeding chapters.
- 4.1.2** The means and methods of warfare are continually developing as security threats and the measures necessary to deal with them change. LOAC continues to evolve to meet humanitarian imperatives that arise from these changes. However, there are fundamental concepts that remain constant and which can guide our understanding of the law. Authorities differ on the number and names of these various concepts, however, the basic principles set out in this chapter encapsulate those that are generally accepted as shaping LOAC.

## SECTION 2 – MILITARY NECESSITY

- 4.2.1** The principle of **military necessity** holds that a State involved in armed conflict is justified in using such lawful force as is necessary to bring about the submission of the enemy at the earliest possible moment and with the least possible cost to itself in terms of lives and resources. LOAC does not require a State to allow itself to be destroyed.<sup>1</sup> Until the point when armed conflict is finally dispensed with by humankind, the law recognises that States will find it necessary to employ certain means and methods of warfare in their own defence and in international collective self-defence. Therefore, military necessity is a part of LOAC.<sup>2</sup>
- 4.2.2** The New Zealand Defence Force (NZDF) has a duty to defend the nation and protect New Zealand's interests whether in New Zealand or elsewhere.<sup>3</sup> That duty may require members of the Armed Forces to kill or capture New Zealand's enemies and to destroy their combat power. Members of the Armed Forces are lawfully empowered by LOAC to do so.
- 4.2.3** The natural corollary of the legal power to use force to defeat an enemy is that only those acts of destruction directed at military objectives are justified.<sup>4</sup> Unnecessary acts of violence motivated by spite, revenge or profit do not have the protection of LOAC. The means and methods of defeating the enemy are not unlimited.<sup>5</sup> Military necessity does not justify violation of LOAC.<sup>6</sup>

1 In the **Nuclear Weapons Opinion**, at [97] The Court could not reach a definitive conclusion as the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake. New Zealand, however, regards the use of nuclear weapons to be absolutely prohibited. **Einsatzgruppen Trial** (at [463]) Breaches of LOAC cannot be justified by every far-fetched link to the survival of the state. It observed that "it takes no great amount of foresight to see that with such facile disregarding of restrictions, the rules of war would quickly disappear". For nuclear weapons, see Chapter 7.

2 See for example, **Hague Regulations** art 23(g) which forbids destruction or seizure of the enemy's property, unless such destruction or seizure is imperatively demanded by the necessities of war. **Hague Cultural Property Protocol II** art 6(b) allows for waiver of the protection of cultural property in case of imperative military necessity. **Geneva Protocol I** art 54(5) allows derogation from provisions protecting objects indispensable to the survival of the civilian population where required by imperative military necessity. Art 56(2) allows attacks on works containing dangerous forces supporting enemy operation where such attacks are the only feasible way to terminate such support. For derogation see Chapter 3. For prohibited starvation tactics see Chapter 8. For installations containing dangerous forces see Chapter 14.

3 See **DA** s 5.

4 See Chapter 8.

5 **Hostages Trial** at [66] Gaining a military advantage does not justify breaches of LOAC, such as killing of innocent civilians and destruction of property without a reasonable connection between the destruction and overcoming the enemy.

6 The principle of military necessity is not the same thing as the nineteenth-century doctrine, 'necessity in war overrules the manner of warfare', which held that any measure was justified in order to defeat the enemy. In German: '*Kriegsraison geht vor Kriegsmanier*'. These views, not unique to the German states, find much support in the writings of other military theorists, generals, admirals and jurists. Nor is modern military necessity to be confused with military expediency or convenience.



### SECTION 3 – HUMANITY

- 4.3.1** The principle of humanity holds that not even armed conflict releases humankind from the most basic of obligations in respect of fellow human beings.<sup>7</sup> The principle forbids the infliction of suffering or destruction not necessary for the accomplishment of legitimate military purposes.
- 4.3.2** Regard for the principle of humanity has resulted in the banning of certain weapons that are indiscriminate or that cause unnecessary suffering or superfluous injury.<sup>8</sup> It demands protection for those persons who are out of battle (*hors de combat*) due to wounds, sickness or shipwreck.<sup>9</sup> Further, it requires protection for prisoners of war (PWs) and other persons deprived of their liberty,<sup>10</sup> and for civilians.<sup>11</sup> Finally, it underpins rules for the protection of the cultural heritage of humankind<sup>12</sup> and the natural environment in which all humankind lives and survives.<sup>13</sup>

7 This fundamental obligation is expressed in the **UN Charter** Preamble which reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

8 See Chapter 7.

9 See Chapter 11.

10 See Chapter 12.

11 See Chapter 13.

12 See Chapter 14.

13 See Chapter 14.

## SECTION 4 – PROPORTIONALITY

### PROPORTIONALITY MUST BE ACHIEVED

- 4.4.1** The rules of LOAC are founded on striking a balance between military necessity and humanity. **Proportionality** works in two related but distinct ways:
- a. as a factor in the formulation of rules of LOAC, and
  - b. as an element of how *some* rules of LOAC are applied.<sup>14</sup>

### PROPORTIONALITY IN THE FORMULATION OF RULES OF LAW OF ARMED CONFLICT

- 4.4.2** In writing LOAC treaties, States seek to establish a balance between the military utility of the weapon or tactic in question, and its humanitarian cost. Similar principles drive the development of customary international law. However, once the rule is set in a treaty or is recognised as customary law, that balance has been defined and the rule cannot be ignored simply because there would be a military advantage in doing so. For example, parties to the Ottawa Convention are not at liberty to use anti-personnel mines (APMs), even if in the particular circumstances they perceive that the military advantage of doing so outweighs any possible humanitarian cost.<sup>15</sup>

### PROPORTIONALITY IN THE APPLICATION OF LAW OF ARMED CONFLICT

- 4.4.3** Some LOAC rules require a commander to balance military necessity against humanity. In planning an attack, the overall benefit of the military action proposed must be balanced against the potential effects on civilians, civilian objects, cultural property and the environment. Even where the object of the attack is legitimate, an attack is unlawful if the destruction it is likely to cause to protected persons and objects is too great in proportion to the overall military benefit anticipated.<sup>16</sup>
- 4.4.4** The fact that some civilian casualties or damage will occur from an attack on a military objective, although always regrettable in humanitarian terms, does not in itself render an attack unlawful. Only when likely cost in civilian lives and civilian property damage outweighs the genuinely anticipated overall military advantage from the attack is LOAC breached.

### PROPORTIONALITY DOES NOT GOVERN COMBATANT CASUALTIES

- 4.4.5** The term ‘proportionality’ is sometimes misused to suggest that it is unlawful to use force against enemy combatants that exceeds the minimum force necessary to achieve their submission. This would make it unlawful to use air attack against enemy infantry armed only with small arms. No such rule of LOAC exists. Armed forces are entitled, and expected, to use their numerical, tactical and/or technical superiority to achieve victory. Attacks only become unlawful when the force used against enemy combatants is so great that it offends against the rule prohibiting indiscriminate attacks<sup>17</sup> or causes disproportionate incidental civilian casualties and damage.<sup>18</sup>

14 See **ICRC Customary IHL** rule 14.

15 For rules that are absolute see Chapter 3.

16 See Chapter 8.

17 See Chapter 8.

18 See Chapter 8.

## SECTION 5 – DISTINCTION

- 4.5.1** The principle of distinction (also known as ‘discrimination’ or ‘identification’) requires members of the NZDF to distinguish between:
- a. objects and people open to attack**, eg military objectives, enemy combatants and persons taking a direct part in hostilities against the force; and
  - b. objects and people immune from attack**, eg civilians, the civilian population and civilian objects, persons *hors de combat* (ie wounded, sick, shipwrecked or deprived of liberty); cultural property, schools, mosques, churches, monuments; medical personnel, facilities, vehicles, ships and aircraft; journalists; civil defence workers; and peacekeepers.<sup>19</sup>
- 4.5.2** The obligation is dependent upon the information available to the commander at the time an attack is decided upon or launched.<sup>20</sup> The commander’s decision will not be unlawful if it transpires that a place honestly believed to be a legitimate military target later turns out to be a civilian object. However, the political and public-relations effects of a mistaken attack may be extremely damaging. Commanders have a legal duty to take practicable steps to gather information and intelligence about the targets they are about to attack and the likely incidental consequences of the means and methods of combat they intend to employ. Wilful blindness to facts that argue against an attack does not provide an excuse for the resulting death and destruction.
- 4.5.3** The principle also requires combatants to distinguish themselves from civilians.<sup>21</sup> In armed conflict against the regular forces of another State, the question of whether a person is an enemy combatant is generally not hard to determine. He or she will be wearing the uniform of the opposing force and, if not wearing a protective emblem such as the Red Cross, is subject to attack.
- 4.5.4** Such simple identification is often not possible where opposing forces include mercenaries, armed members of the civilian population, tribal fighters, or even bandits, none of whom are entitled to combatant status but who nevertheless take a direct part in hostilities.<sup>22</sup> Distinguishing such people from the civilian population may pose significant difficulties for the force.

19 See **ICRC Customary IHL** rule 1. For precautions in attack see Chapter 8. For combatant and civilian status see Chapter 6. For protections applicable to civilians and civilian objects see Chapter 13.

20 In the **Hostages Trial**, Rendulic’s (the defendant), claim of military necessity had to be judged against the commander’s knowledge of the strategic situation at the time, not the true situation as it later emerged. Rendulic’s knowledge was based in part on Allied disinformation.

21 **Geneva Protocol I** art 44(3): “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”

22 For ‘direct part in hostilities’ see Chapter 6.

## SECTION 6 – NON-DISCRIMINATION

- 4.6.1** The principle of **non-discrimination** ensures that the rights, obligations and protections of LOAC apply to all persons affected by armed conflict regardless of who they may be. This means that:
- a.** LOAC binds all parties to a conflict; the fact that one side may be an aggressor, invader or occupier does not entitle the aggrieved State or its people to not apply the law;
  - b.** LOAC is binding on a party to the conflict even if the opposing force engages in breaches of LOAC;<sup>23</sup>
  - c.** LOAC must be applied in favour of all victims of armed conflict without any adverse distinction based on race, colour, religion or faith, sex, birth, ethnic origin, political opinion or wealth, sexual orientation<sup>24</sup> or any similar criteria;<sup>25</sup> and
  - d.** medical treatment of the wounded, sick and shipwrecked is determined solely on medical grounds, not on the basis of whether the individual is from a friendly or opposing force, or on how it was the individual came to be incapacitated.<sup>26</sup>

23 For reprisals see Chapter 17.

24 Prohibition of discrimination on the grounds of sexual orientation is an emerging norm which is not accepted by all nations. It is, however, NZDF policy.

25 **Geneva Convention I** art 12 and **Geneva Convention II** art 12: The wounded, sick and shipwrecked must be treated humanely and cared for without any adverse distinction founded on sex, race, nationality, religion, political opinions or any other similar criteria. **Geneva Convention III** art 16: While a PW's rank, sex, age or health may justify privileged treatment, PWs shall be treated alike "without any adverse distinction based on race, nationality, religious belief, political opinions or any other distinction founded on similar criteria". **Geneva Convention IV** art 27(3) prohibits adverse distinction in the treatment of civilians without prejudice to the provisions relating to their state of health, age and sex. **Geneva Protocol I** arts 9(1) and 75(1), **Geneva Protocol II** art 2, **Geneva Convention Common Article 3** and **Rome Statute** art 21(3). See also **ICRC Customary IHL** rule 88.

26 See for example, **Cluster Munitions Convention** art 5(2)(e): State Parties shall "not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs."

## SECTION 7 – OTHER INFLUENCES

### CHIVALRY

- 4.7.1** Chivalry is a largely historic concept based on the notion that persons who are engaged in the profession of arms should treat each other with certain courtesy and fairness even as enemies.<sup>27</sup> Although eroded by the rise of irregular armed forces and ideology-based warfare, certain rules of modern LOAC preserve elements of chivalry, in particular those rules that prohibit treachery<sup>28</sup> and those that relate to communications with the enemy.<sup>29</sup> Even when the enemy does not conduct itself in accordance with notions of chivalry, members of the NZDF are still to uphold the highest standards of military professionalism, of which compliance with LOAC is a part.

### RESTORATION OF PEACE

- 4.7.2** Armed conflicts do not last forever. It is in the interests of everyone to bring such conflicts to a rapid conclusion. Brutality and treachery will inevitably hinder the restoration of peace. Attacks on cultural and religious objects cause bitterness which often leads to a return to conflict. Failure to protect children and their right to education can produce conflicts that descend from generation to generation.

### SELF-INTEREST

- 4.7.3** Many of the rules set out in this manual contain within them sound practical rationales as well as rules of law. For example, in addition to being unlawful, tampering with ammunition to produce ‘dum-dum’ bullets is both unnecessary and dangerous.<sup>30</sup> Brutality towards captured enemy personnel is likely to make their comrades reluctant to surrender, as well as giving the enemy an excuse to do the same to our personnel.<sup>31</sup> Failure to mark explosive remnants of war (ERW) creates a danger to friendly forces as well as civilians.<sup>32</sup> However, even in cases where a ‘common-sense’ rationale for a rule of LOAC is not easily identified, or adherence produces no short-term advantage, these rules nevertheless have the status of law and must be complied with.

### MORAL ASPECTS

- 4.7.4** The modern battle space is keenly watched by the world’s media, interested States, regional organisations, non-governmental organisations (NGOs), human rights interests groups and the various other organs of the United Nations (UN). Breaches of LOAC have high newsworthiness and are also the frequent subject of propaganda campaigns. Confidence that military activities comply with LOAC is essential from many points of view, including:
- a.** being an increasingly important element in ensuring public support at home for a deployment, without which democratic nations soon find it difficult to sustain military activity;

27 In the *Major War Criminals Trial*, Keitel overrode protests that the orders for ruthless treatment of Soviet PWs breached international law, writing: “The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.” He was convicted of war crimes.

28 See Chapter 8.

29 See Chapter 16.

30 See Chapter 7.

31 See Chapter 12.

32 See Chapter 7.

- b. playing a major role in assuring members of armed forces of the rightness of their mission, which is now an essential element of morale; and
- c. maintaining international and regional support for the operation, without which very little of lasting importance can be achieved.

**4.7.5** These considerations are amongst those described as ‘the dictates of the public conscience’<sup>33</sup> and are a persuasive factor for LOAC compliance. On occasion, public sentiment may not condemn breaches of LOAC, particularly where opinion has been inflamed with a spirit of revenge or retaliation.<sup>34</sup> However, the fact that a breach of LOAC enjoys a degree of short-term public acceptance does not, however, diminish its illegality.

33 See Preamble to **Hague Convention IV**.

34 See for example, **Essen Lynching Trial**.

# MATERIAL FIELD OF APPLICATION

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## SECTION 1 – INTRODUCTION

- 5.1.1** This chapter deals with the various factual situations in which members of the New Zealand Defence Force (NZDF) may find their operations governed by Law of Armed Conflict (LOAC). This subject is also referred to as ‘material field of application’.
- 5.1.2** There is, by necessity, a degree of overlap between this chapter and the substantive rules set out in the subsequent chapters. In the event of inconsistency, the orders set out in the more detailed chapters are to prevail.



## SECTION 2 – THE LEGAL NATURE OF ARMED CONFLICT

### DETERMINING THE EXISTENCE AND NATURE OF ARMED CONFLICT

- 5.2.1** The principal field of application of LOAC is armed conflict. The existence and nature of an armed conflict for the purpose of LOAC is a question of fact and law. There is, however, no conclusive definition of armed conflict in international or New Zealand law. The most influential definition, however, is known as the Tadić Formulation, which holds that an armed conflict exists where there is a resort to armed force between States, or protracted armed violence between governmental authorities and organised armed groups, or between such groups within a State.<sup>1</sup>
- 5.2.2** Since much of international law is founded on the practice of States, the question of whether a conflict exists is still, to a large degree, to be decided by the State or States most affected. However, a State cannot avoid its legal obligations by denying the existence or nature of an armed conflict contrary to the fact.<sup>2</sup> Expressions such as ‘policing action’, ‘enforcement action’, ‘emergency’ or ‘confrontation’ do not change the legal nature of a conflict or the applicable law.
- 5.2.3** The existence and nature of a conflict may ultimately be determined by the United Nations Security Council (UNSC), the International Court of Justice (ICJ),<sup>3</sup> an ad hoc tribunal established by the United Nations (UN),<sup>4</sup> the International Criminal Court (ICC), or a domestic court, including the Court Martial of New Zealand (Court Martial). The attitude of other States and the international community generally will also be important as they may recognise the existence of an armed conflict even though one of States involved denies its existence.

### ARMED CONFLICT DOES NOT HAVE TO AMOUNT TO ‘WAR’

- 5.2.4** Earlier authorities distinguished between war and other armed conflicts, with the term ‘war’ being reserved exclusively for conflicts between States. This distinction is no longer relevant to the application of LOAC. Where the term ‘war’ is used in this manual, it has the same meaning as ‘armed conflict’ unless otherwise stated.<sup>5</sup>

### DECLARATION OF WAR IS NOT RELEVANT TO THE APPLICATION OF LAW OF ARMED CONFLICT

- 5.2.5** Although Hague Convention III requires that hostilities between States must not begin without a previous and explicit warning, no true declaration of war has been made by any State since the end of World War II.<sup>6</sup>

<sup>1</sup> *Tadić Jurisdiction Appeal* at [70].

<sup>2</sup> **Geneva Convention Common Article 2** states that the Conventions “shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”. See *Akayesu Trial* at [603]: whether an armed conflict exists does not depend on the subjective judgment of the parties. Rather, the presence of armed conflict is to be ascertained on the basis of objective criteria. See also *Kawasaki v Bantham*.

<sup>3</sup> See for example, ICJ cases such as *Corfu Channel Case*, *Nicaragua v USA*, *Wall on Palestinian Territory Opinion*, *Bosnian Genocide Case*.

<sup>4</sup> See for example, *Tadić Jurisdiction Appeal*.

<sup>5</sup> For example, the term ‘war crime’ applies to both IAC and NIAC; see **Rome Statute** art 8.

<sup>6</sup> **UN Charter** art 2(4) effectively prohibits war as an element of state policy, making such declarations undesirable. New Zealand’s only declarations of war were during WWII.

The existence or otherwise of a declaration of war does not make any difference to the application of LOAC.<sup>7</sup>

## WHAT CONSTITUTES ARMED CONFLICT

- 5.2.6** Armed conflict exists where there is deliberate, organised and sustained armed violence. No set number of casualties, level of damage or duration is determinative. Fleeting military encounters that cause few casualties and little damage, however, are seldom recognised by the parties involved as armed conflict. The fundamental rules of LOAC, such as those protecting persons deprived of their liberty in such engagements, must still be complied with.
- 5.2.7** There may be considerable tension between opposing States, including incidents of use of armed force, or substantial amount of unorganised or sporadic violence occurring within the territory of a State, without reaching the threshold of armed conflict. For LOAC to apply, a genuine armed conflict must exist, not simply cross-border incursions, acts of banditry or unorganised and short-lived rebellion.
- 5.2.8** Conversely, once a legal state of armed conflict has been recognised, it may persist even if little actual violence is occurring, for example, unopposed occupation of foreign territory<sup>8</sup> or a general armistice that has never resulted in a peace settlement.<sup>9</sup>
- 5.2.9** The following circumstances, although not exhaustive, may, alone or in combination, give rise to the presumption that an armed conflict exists for the purposes of LOAC:
- a.** Elements of armed forces of two or more States are intentionally engaged in military operations against each other.<sup>10</sup>
  - b.** The population, property or territory of a State is intentionally attacked by the armed forces of another State.
  - c.** The merchant ships of a State or its civilian aircraft come under sustained attack by the armed forces of another State.
  - d.** A State is the subject of a blockade.
  - e.** There is an armed occupation of the territory of another State, even when that occupation meets with no armed resistance.<sup>11</sup>

7 See **Geneva Convention Common Article 2** and **Geneva Protocol I** art 1(3).

8 For occupation see Chapter 9.

9 For example, a legal state of armed conflict persists on the Korean peninsula despite the general armistice of 1953.

10 Forces have, on occasion, engaged with each other by accident rather than intentionally. Military action might also be taken by units without the necessary authority of the State to which they belong. Neither situation is regarded as being armed conflict.

11 **Geneva Convention Common Article 2**: “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Power, even if the said occupation meets with no armed resistance.”

- f. A State is subjected to attack by non-State actors of such intensity, coordination and duration as to constitute an armed attack,<sup>12</sup> or the attackers are acting as the agents of another State.<sup>13</sup>
- g. Armed groups or dissident forces within the State are intentionally engaged in protracted, sustained and organised military operations against government forces or against each other.<sup>14</sup>

#### WHEN LAW OF ARMED CONFLICT DOES NOT APPLY

**5.2.10** Except for those rules that apply in all circumstances, the provisions of LOAC expressly do not apply:

- a. in conditions of peace;
- b. to internal disturbances and tensions such as riots and isolated and sporadic acts of violence;<sup>15</sup>
- c. to policing or law enforcement activities, including by the armed forces when providing assistance to the civil power;<sup>16</sup> or
- d. to counter-terrorist operations unless the nature of terrorists attacks and/or the response to them is of such intensity and duration to qualify as an armed attack under international law, or the terrorist act takes place in the course of an existing armed conflict.

**5.2.11** LOAC does not affect the sovereignty of a State or the responsibility of its government to use all legitimate means to maintain or re-establish law and order, or defend its national unity and territorial integrity.

#### INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

**5.2.12** The formulation of LOAC is still to a large degree divided between:

- a. international armed conflict (IAC); and
- b. non-international armed conflict (NIAC).

**5.2.13** There is no intermediate ground between these two situations by which protected persons can be deprived of their rights.<sup>17</sup> The legal regime in respect of each of these types of conflict is explained further below.

12 **UNSCR 1373** (2001) reaffirmed that acts such as the 11 September 2001 attacks on the US constituted a threat to international peace and security, and reaffirmed the inherent right of individual or collective self-defence as recognised by the UN Charter. Characterisation of such attacks as 'armed conflict', or 'war', is controversial. The US and coalition partners, including New Zealand, initiated operations in Afghanistan and elsewhere against those responsible for the attacks and the regimes supporting them. Although referred to as a 'global war on terror', it is doubtful that this operation in its totality amounts to a 'war'. Significant elements of the campaign, nevertheless, qualified as armed conflict.

13 For example, mercenaries (see Chapter 8).

14 See **Geneva Protocol II** art 1 and **Rome Statute** art 8(2)(f). In the *Tadić Jurisdiction Appeal* (at [70]), the Appeals Chamber held that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".

15 See **Geneva Protocol II** art 1(2), **Conventional Weapons Convention** art 1 and **Rome Statute** art 8(2)(d).

16 See **Geneva Protocol II** art 1(2), **Conventional Weapons Convention** art 1 and **Rome Statute** art 8(2)(d).

17 See for example, *Hamdan v Rumsfeld* at 2756–57.

## MOST LAW OF ARMED CONFLICT APPLIES TO BOTH INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

**5.2.14** The most important rules of LOAC are to be found both in the law governing IAC and that governing NIAC, particularly those rules that relate to:

- a. humane treatment of persons taking no direct part in the hostilities,
- b. protection of civilians and civilian property, and
- c. permissible means and methods of warfare.

**5.2.15** Recent experience is that NIACs are not only more common than IACs but are also bloodier. It is no longer appropriate to treat such conflicts as a field of limited applicability. While obligations applicable to IAC are more numerous and detailed, provisions applicable to NIAC are written in broader terms. The decisions of international criminal tribunals show that distinguishing between the two types of conflict may be of little practical value to members of forces conducting their duties.<sup>18</sup>

## TYPES OF CONFLICT MAY BE MIXED

**5.2.16** An armed conflict may involve both international and non-international aspects.<sup>19</sup> An armed conflict may start out as being of international character. If the enemy government falls and the subsequent government faces an insurrection, the conflict might then transform into a non-international one.<sup>20</sup> Similarly, a NIAC may become internationalised if foreign forces or surrogates for foreign States become involved.<sup>21</sup> Furthermore, an armed conflict within a territory may coexist with other violence (eg drug-running, banditry or gang violence) which does not qualify as armed conflict, even though in some cases it may be conducted by persons who are also involved in the conflict.

**5.2.17** Because of the fluidity of modern conflict, it is common to refer to a 'spectrum of conflict' starting at a low level of organised violence at a national or international level and moving through various degrees of intensity until all-out war is reached. How LOAC applies at each point along the spectrum will need to be the subject of specific legal advice.

**5.2.18** In every case, the nature of an armed conflict will be advised to members of the NZDF in orders. In case of doubt, the advice of an NZDF Legal Adviser (LEGAD) is to be sought.

## ASYMMETRIC WARFARE

**5.2.19** Asymmetric warfare means warfare between forces whose military power or whose strategy or tactics vary significantly. The weaker force may aim to achieve

18 See *Tadić Jurisdiction Appeal* at [119]: "What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife." For application of this manual to IAC and NIAC, see Chapter 1.

19 The conflicts in Vietnam (1962–1975) and the former Yugoslavia (1991–1995) had both internal and international aspects. See *Tadić Jurisdiction Appeal* at [119].

20 The war in Afghanistan started in 2001 as an IAC but transformed into a NIAC notwithstanding the presence of coalition forces and transnational terrorist organisations.

21 Involvement of foreign armed forces in an internal conflict does not, in itself, convert the hostility into an IAC. For example, from 1955 to 1960, New Zealand Forces assisted the Government of Malaya to suppress an insurgency. The conflict was not, for legal purposes, an international one simply because Commonwealth forces were involved.

disproportionately destructive effects with the intention of undermining the opponent's will to continue fighting. The term may include 'guerrilla warfare', 'insurgency', 'sabotage' and 'terrorism' but none of these expressions of themselves change the legal nature of the conflict.

- 5.2.20** Asymmetric warfare can be employed in both IAC and NIAC, but may involve aspects that do not qualify as armed conflict, for example domestic crime, drug-trafficking and terrorism. Respect for LOAC amongst forces engaged in asymmetric warfare is often weak, including the use of unlawful means and methods of warfare, attacks on civilians and civilian objects, use of terror tactics and mistreatment of prisoners. This is often intended to provoke a disproportionate or illegal response from the stronger force, which in turn undermines its popular support.
- 5.2.21** It is sometimes asserted that asymmetric tactics have rendered important rules of LOAC inappropriate or unworkable. However, the NZDF continues to apply LOAC to all forms of armed conflict.

## CYBER OPERATIONS

- 5.2.22** Cyber warfare is the use of computers and other devices to achieve an effect by which to obtain a military advantage. It is has yet to be determined whether actions such as cyber attacks come within the definition of armed conflict given the fact that such conflict is not, in the strict sense, 'armed'.<sup>22</sup>
- 5.2.23** In this manual, LOAC is applied by law or analogy to cyber operations that occur in the context of armed conflict or which have effect comparable to armed conflict.<sup>23</sup> LOAC does not regulate cyber operations that fall outside of an armed conflict situation. Cyber espionage, cyber crimes and other malicious cyber activity directed against business entities or governments for gain or private reasons must be dealt with under a different legal structure.

## ARMED CONFLICT UNDER NEW ZEALAND LAW

- 5.2.24** The legal nature of any armed conflict situation to which the NZDF is committed will be determined by the New Zealand Government. A certificate as to the existence or nature of an armed conflict issued by the Minister of Foreign Affairs is conclusive proof of these facts unless the contrary is shown. However, should it be necessary, an international court or tribunal would makes its own judgment as to the presence or otherwise of armed conflict.<sup>24</sup>
- 5.2.25** The Commander Joint Forces New Zealand (COMJFNZ) is to ensure that members of the NZDF are advised of the applicable law at the earliest opportunity in order for them to train, plan and conduct operations lawfully.

<sup>22</sup> For cyber attack see Chapter 8.

<sup>23</sup> See **Tallinn Manual** rule 20. It is not yet determined whether a cyber attack alone constitutes armed conflict, given the fact that such an attack may not use arms in the conventional sense.

<sup>24</sup> See **Geneva Conventions Act 1958** s 3(7) for proceedings in respect of grave breaches of the Geneva Conventions or Protocol I. See also *Kawasaki v Bantham* at 544 and *R v Bottrill* at 41.

### SECTION 3 – INTERNATIONAL ARMED CONFLICT

**5.3.1** International armed conflict means a situation where:

- a. an armed conflict is fought between two or more States, even if the existence of armed conflict is not recognised by one of them;<sup>25</sup>
- b. there is a partial or total occupation of the territory of another State, even if that occupation meets with no armed resistance.<sup>26</sup>

**5.3.2** An IAC may also be recognised where:

- a. peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination;<sup>27</sup> or
- b. one or more parties in a NIAC are under the effective control of, or work as the agents of, another State.<sup>28</sup>

**5.3.3** If a New Zealand force is committed to an armed conflict which New Zealand accepts is of an international character, COMJFNZ is to ensure that all affected members of the NZDF are advised of that fact in orders.

### THE APPLICATION OF LAW OF ARMED CONFLICT DURING INTERNATIONAL ARMED CONFLICT

**5.3.4** During IAC, in addition to the obligations that apply in all circumstances, the actions of members of the NZDF will be governed by:

- a. all customary international law relating to the means and methods of warfare and the protection of the victims of war in IAC;<sup>29</sup>
- b. all relevant treaties including, but not limited to, the Hague Conventions, the Geneva Conventions, Geneva Protocols I and III, the Environmental Modification Convention, the Ottawa Convention, the Chemical Weapons Convention, the Bacteriological Weapons Convention, the Conventional Weapons Convention and Protocols, Hague Cultural Property Convention and Protocols and the Cluster Munitions Convention; and
- c. provisions for the trial and punishment of persons committing war crimes during an IAC.<sup>30</sup>

25 **Geneva Convention Common Article 2** and **Geneva Protocol I** art 1(3) provide that their provisions apply to all cases of declared war and/or any other armed conflict which may arise between two or more of the parties, even if the state of war is not recognised by one of them.

26 See **Geneva Convention Common Article 2**.

27 See **Geneva Protocol I** art 1(4). An authority capable of representing the peoples in question must undertake to apply the Geneva Convention and Geneva Protocol I. This provision only applies in the territory of parties to Geneva Protocol I and is not yet accepted as customary law. There is no recorded example of this provision being applied. See also the **UN Charter**, especially art 1(2), and **UNGAR 2625** (1970) art 1.

28 See **Nicaragua v USA**, reaffirmed in the **Bosnian Genocide Case**, where financing, organising, training, supplying and equipping contra paramilitaries, selection of their targets, and planning their operations were insufficient in themselves to allow attribution to the US of the breaches of LOAC by the contras. See, by contrast, the **Tadić Jurisdiction Appeal** where continued involvement of the Former Yugoslav Army and the control influenced over the Bosnian Serb forces by Belgrade was such that an IAC was found to exist in Bosnia Herzegovina. At [70]: The so called 'tu quoque' or 'you also' rule is now recognised as inadmissible in international law. See **Prosecutor v Kupreškic (Judgment)** ICTY Appeals Chamber IT-95-16-A, 23 October 2001 at [25] and **Prosecutor v Milošević (Judgment)** ICTY Appeals Chamber IT-98-29/1-A 12 November 2009 at [250].

29 For customary international law see Chapter 3.

30 See **Rome Statute** arts 8(2)(a) and (b).



## SECTION 4 – NON-INTERNATIONAL ARMED CONFLICT

- 5.4.1** A non-international armed conflict exists where the conflict is fought within a State:
- a. between the government forces and dissident forces or armed groups opposed to that government; or
  - b. amongst dissident forces or armed groups, none of whom qualify as a legitimate government.<sup>31</sup>
- 5.4.2** NIAC is also known as ‘armed conflict not of an international character’, ‘internal conflict’, or ‘intra-State conflict’. It includes conflicts described as ‘civil war’, ‘insurgency’ or ‘rebellion’ and may include any other kind of armed conflict which does not involve a clash between nations.
- 5.4.3** If a NIAC reaches a certain degree of intensity, a government may decide to apply the full body of LOAC to the conflict, including granting prisoner of war (PW) status to captured personnel.<sup>32</sup>

### THE APPLICATION OF LAW OF ARMED CONFLICT DURING NON-INTERNATIONAL ARMED CONFLICT

- 5.4.4** During NIAC, in addition to the obligations that apply in all circumstances, actions of members of the NZDF are governed by:
- a. all customary international law relating to the means and methods of warfare and the protection of the victims of war in NIAC;<sup>33</sup>
  - b. all relevant treaties including the Geneva Convention Common Article 3,<sup>34</sup> Geneva Protocols II and III, Hague Cultural Property Convention and Protocols,<sup>35</sup> Environmental Modification Convention,<sup>36</sup> Ottawa Convention,<sup>37</sup> Chemical Weapons Convention,<sup>38</sup> Bacteriological Weapons Convention,<sup>39</sup> Conventional Weapons Convention and Protocols,<sup>40</sup> and the Cluster Munitions Convention;<sup>41</sup>

31 **Geneva Convention Common Article 3** lists minimum protections applicable in the case of NIAC occurring on the territory of a party to the Geneva Convention. **Geneva Protocol II** deals specifically with protection of victims in NIAC. See also **Tallinn Manual** rule 23.

32 See Chapter 12.

33 For customary international law see Chapter 3.

34 **Geneva Convention Common Article 3** applies to NIAC and also “constitute a minimum yardstick in addition to the more elaborate rules which are also to apply to international conflicts” (see **Nicaragua v USA** at [218]).

35 **Hague Cultural Property Convention** art 19(1): “In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provision of the Hague Cultural Property Convention which relate to respect for cultural property.”

36 This Convention does not distinguish between IAC and NIAC (see art 1).

37 **Ottawa Convention** art 1(1) requires that Parties will “never under any circumstances” engage in prohibited activities in relation to APMs.

38 **Chemical Weapons Convention** art 1(1) requires that Parties will “never under any circumstances” engage in prohibited activities in relation to chemical weapons.

39 **Bacteriological Weapons Convention** art 1 requires that Parties will “never in any circumstances” engage in prohibited activities in relation to biological weapons.

40 **Conventional Weapons Convention** art 1 (amended 2001) states that the Convention and its Protocols shall also apply to situations referred to in **Geneva Convention Common Article 3**.

41 **Cluster Munitions Convention** art 1(1) requires that Parties will “never under any circumstances” engage in activities prohibited by the Convention.

- c. provisions for the trial and punishment of persons committing war crimes in a NIAC;<sup>42</sup> and
- d. such other rules of LOAC which New Zealand has agreed or declared to be applicable.<sup>43</sup>

**5.4.5** Geneva Protocol II differs from Geneva Convention Common Article 3 in requiring that armed groups or dissident forces exercise control over territory and that they be engaged in conflict with the government, not solely with each other. Given the fundamental nature of the rules in both instruments, all of which are part of customary international law, differentiating between two types of internal conflict is not useful. In this manual, Geneva Protocol II is treated as applicable to all NIAC unless otherwise stated.<sup>44</sup>

**5.4.6** The existence of NIAC does not provide justification for other states to interfere in the internal or external affairs of the State in the territory of which the conflict is occurring.

42 According to the **Rome Statute** art 8(2)(c), the ICC shall have jurisdiction in respect of serious violations of Geneva Convention Common Article 3. Art 8(2)(e) lists other acts which constitute serious violations of the laws and customs of armed conflict in the NIAC context, and over which the ICC has jurisdiction.

43 For example, **Hague Cultural Property Convention** art 19(2) requires that, in NIAC, “Parties to the Conflict shall endeavour to bring into force, by means of special agreements, all or part of the provisions of the Convention”.

44 **Rome Statute** art 8(2)(f) applies war crimes provisions to non-international armed conflict without the need for armed groups or dissident armed forces to control territory.



## SECTION 5 – TIME AND PLACE

## DURATION OF THE APPLICATION OF LAW OF ARMED CONFLICT

- 5.5.1** In addition to the rules that apply in all circumstances, LOAC applies from the initiation of armed conflicts and extends beyond the cessation of hostilities until:
- a. in the case of IAC:
    - (1) in respect of those provisions relating to protected persons in the hands of the opposing force all those protected persons are released, repatriated or re-established; or
    - (2) in respect of other obligations a general conclusion of peace is reached;
  - b. in the case of NIAC, a peaceful settlement is achieved.<sup>45</sup>

## GEOGRAPHICAL APPLICATION OF LAW OF ARMED CONFLICT

- 5.5.2** LOAC applies to the whole territory of the parties to the conflict and wherever else they may conduct hostilities or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>46</sup>
- 5.5.3** A State may legally be in a condition of peace within its own territory and yet be involved in armed combat operations in the territory of another State when it is assisting the government of that State to deal with an insurrection.<sup>47</sup>

## THE APPLICATION OF LAW OF ARMED CONFLICT WITHIN ZONES

- 5.5.4** An operational zone is an area of territory, sea (including the high seas) or airspace over which a party to the conflict seeks to impose a policy of denial or restriction of entry to vessels and aircraft, or personnel of the opposing force, and/or neutrals and/or civilians.
- 5.5.5** Members of the NZDF are to apply LOAC to the same extent and in the same manner inside any operational zone established by New Zealand or any other State, as outside it.<sup>48</sup>
- 5.5.6** The application of LOAC cannot be excluded by the imposition of artificial zones. Although such zones can perform a useful humanitarian purpose by reducing the risks to civilian and neutral persons by excluding them from coming into the area of operations, they do not operate as ‘free fire’ zones in which the principles of LOAC can be ignored. LOAC applies inside a zone every bit as much as it does outside of it.

45 See *Tadić Jurisdiction Appeal* at [70].

46 See *Tadić Jurisdiction Appeal* at [70].

47 For example, New Zealand operations assisting the Government of Malaya in dealing with insurgency from 1949 to 1960.

48 See *San Remo Manual* rule 105: “A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.” Rule 106(a): “Should a belligerent, as an exceptional measure, establish such a zone the same body of law applies both inside and outside the zone.”

## SECTION 6 – THE APPLICATION OF LAW OF ARMED CONFLICT TO PEACE SUPPORT OPERATIONS

### THE NATURE OF PEACE SUPPORT OPERATIONS

- 5.6.1** Peace support operations include military observer missions, experts on mission, de-mining and training teams, forces supporting humanitarian projects, special commissions, missions to re-establish failed States or supervise democratic elections, provision of a safe environment for the conduct of peace talks and enforcement of UN sanctions.
- 5.6.2** They include missions authorised and controlled by the UN itself,<sup>49</sup> and those raised for the purposes of the UN under treaty or regional arrangements.<sup>50</sup> Also included are peace enforcement operations authorised by the UNSC under Chapter VII of the UN Charter.<sup>51</sup>

### DIFFERENT BASIS FOR USE OF FORCE

- 5.6.3** There is one major legal distinction between armed conflict and peace support operations. Whereas the use of force in armed conflict is based on the right of combatants to attack enemy combatants, military objectives and persons taking a direct part in hostilities, the use of force in peace support operations is governed by principles of self-defence and the use of force permitted by the mandate of the operation.

### THE EXISTENCE OF ARMED CONFLICT IS AN ESSENTIAL ELEMENT OF WAR CRIMES

- 5.6.4** If a member of the NZDF engaged in peace support operations is alleged to have committed an offence against the Geneva Conventions Act 1958 or the International Crimes and International Criminal Court Act 2000 (IC & ICC Act 2000), the existence of a state of armed conflict is an essential element of the charge.<sup>52</sup> In case of doubt as to whether a particular rule of LOAC is applicable to peace support operations, a charge alleging a breach of the Armed Forces Discipline Act 1971 (AFDA) or a general criminal charge may need to be preferred.<sup>53</sup>

### THE NEW ZEALAND DEFENCE FORCE IS TO COMPLY WITH LAW OF ARMED CONFLICT DURING PEACE SUPPORT MISSIONS

- 5.6.5** Members of the NZDF deployed on peace support operations remain subject to all applicable obligations of LOAC and New Zealand law. They are not relieved of those obligations by virtue of participation in a UN or other international force.<sup>54</sup>

49 See *Certain Expenses of the United Nations Opinion*.

50 For example, INTERFET (International Force for East Timor), an Australian-led force in East Timor, was raised under **UNSCR 1264** (1999).

51 Such operations may amount to armed conflict per se in which case they do not enjoy the protection of the **Safety of Peacekeepers Convention**. See Chapter 14.

52 **Geneva Conventions Act 1958** s 3(7): “If in any proceedings in respect of a grave breach of any of the Conventions any question arises under Article 2 of that Convention (which relates to the circumstances in which the Convention applies); or in any proceedings under this section in respect of a grave breach of the First Protocol any question arises under paragraph 3 or paragraph 4 of Article 1 of that Protocol or under Article 3 of that Protocol (which relate to the circumstances in which that Protocol applies), that question shall be determined by the Minister of Foreign Affairs and Trade, and a certificate purporting to set out any such determination and to be signed by or on behalf of that Minister shall be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown.”

53 See Chapter 17.

54 **Attorney General v Nissan** at 223: the House of Lords stated that the UN is a unique legal person based on the sovereignty of its respective members, but it is not a principal carrying out its policy through States acting as agents. Rather it is an instrument of collective policy which it enforces

- 5.6.6** The fundamental principles of LOAC are to be applied by members of the NZDF deployed on peace support operations, modified as necessary to meet the circumstances. Where no specific rule is applicable, they are to apply the principles of military necessity, humanity, distinction, proportionality, and non-discrimination as discussed in Chapter 4 of this manual. Members of the NZDF are to comply with the obligations applicable to combatants for such time as they are involved in combat.<sup>55</sup>
- 5.6.7** In addition to obligations that apply in all circumstances, members of the NZDF deployed on peace support operations are to comply with the rules of LOAC that:
- a. prohibit or restrict the use of certain weapons and methods of combat;<sup>56</sup>
  - b. prohibit methods of warfare of a nature to cause superfluous injury or unnecessary suffering, or widespread, long-term and severe damage to the natural environment;<sup>57</sup>
  - c. require distinction between combatants and civilians, and between military objectives and civilian objects;<sup>58</sup>
  - d. require avoidance and minimisation of incidental loss of civilian life, injury to civilians or damage to civilian property;<sup>59</sup>
  - e. relate to the placement of military objectives to protect the civilians and civilian objects against the dangers resulting from military operations;<sup>60</sup>
  - f. prohibit indiscriminate attacks;<sup>61</sup>
  - g. prohibit reprisals against protected persons and objects;<sup>62</sup>
  - h. prohibit the conduct of operations on the basis that there shall be no survivors (no quarter);<sup>63</sup>

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using the sovereignty of its members, but in carrying out these policies each member retains its own sovereignty, just as any State retains its sovereignty while acting under treaty obligations to another State. See also **DA** s 22(3).

55 **UN Secretary-General's Bulletin No. 13** (1999) at [1.1]: "The fundamental principles and rules of international humanitarian law are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable to enforcement actions, or in peacekeeping operations when the use of force is permissible in self-defence."

56 See **UN Secretary-General's Bulletin No. 13** (1999) s 6.2. For weapons see Chapter 7. For methods of combat see Chapter 8.

57 See **UN Secretary-General's Bulletin No. 13** (1999) s 6.3. For weapons see Chapter 7.

58 See **UN Secretary-General's Bulletin No. 13** (1999) s 5.1. For the principle of distinction see Chapter 4. For combatant status see Chapter 6. For protection of civilians see Chapter 13.

59 See **UN Secretary-General's Bulletin No. 13** (1999) s 5.3. For protection of civilians and civilian objects see Chapter 13.

60 See **UN Secretary-General's Bulletin No. 13** (1999) s 5.4. For protection of civilians and civilian objects see Chapter 13.

61 See **UN Secretary-General's Bulletin No. 13** (1999) s 5.5.

62 See **UN Secretary-General's Bulletin No. 13** (1999) s 5.6. For reprisal see Chapter 17.

63 See **UN Secretary-General's Bulletin No. 13** (1999) s 6.5. For denial of quarter see Chapter 8.

- i. relate to the protection of cultural property;<sup>64</sup>
- j. prohibit starvation as a method of warfare;<sup>65</sup>
- k. restrict attacks on installations containing dangerous forces;<sup>66</sup>
- l. require humane treatment of all persons not taking part in military operations, including civilians and persons placed *hors de combat* by reason of surrender, sickness, wounds or detention;<sup>67</sup>
- m. prohibit violence to life, murder, cruel treatment, torture, mutilation, corporal punishment, collective punishment, reprisals, taking of hostages, rape, enforced prostitution, sexual assault, humiliation and degrading treatment, enslavement and pillage of protected persons;<sup>68</sup>
- n. protect women and children against any attack, in particular against rape, enforced prostitution or any other form of indecent assault;<sup>69</sup>
- o. require humane treatment of any person detained by the force, whether they are members of the armed forces of a party to the conflict or any other person detained for any reason;<sup>70</sup>
- p. require respect and protection of the wounded, sick or shipwrecked;<sup>71</sup>
- q. relate to the search for and identification of the wounded, sick, shipwrecked, and the dead;<sup>72</sup>
- r. prohibit attacks on medical establishments or mobile medical units;<sup>73</sup>
- s. require respect and protection of medical personnel and religious personnel;<sup>74</sup>

64 See **UN Secretary-General's Bulletin No. 13** (1999) s 6.6. For the protection of cultural property see Chapter 14.

65 See **UN Secretary-General's Bulletin No. 13** (1999) s 6.7. For prohibition on starvation tactics against civilians see Chapter 8.

66 See **UN Secretary-General's Bulletin No. 13** (1999) s 6.8. For installations containing dangerous forces (eg dams, dykes and nuclear power stations) see Chapter 14.

67 See **UN Secretary-General's Bulletin No. 13** (1999) s 7.1. For PWs, retained personnel, internees and detainees see Chapter 12. For wounded, sick and shipwrecked see Chapter 11. For protection of civilians see Chapter 13. For principle of non-discrimination see Chapter 4.

68 See **UN Secretary-General's Bulletin No. 13** (1999) at s 7.2. For humane treatment of persons deprived of liberty see Chapter 12. For prohibition on pillage see Chapter 8. For protection of women see Chapter 14.

69 See **UN Secretary-General's Bulletin No. 13** (1999) at ss 7.3 and 7.4. For special protections applicable to women see Chapter 14. For special protections applicable to children see Chapter 14, Section 3.

70 See **UN Secretary-General's Bulletin No. 13** (1999) at s 8. For humane treatment of persons deprived of liberty see Chapter 12.

71 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.1. For treatment of the wounded, sick and shipwrecked see Chapter 11.

72 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.2. For treatment of the wounded, sick and shipwrecked see Chapter 11.

73 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.3. For protection of medical establishments or mobile medical units see Chapter 11.

74 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.4. For protection of medical personnel see Chapter 11.

- t. protect the transportation of the wounded and sick and medical equipment;<sup>75</sup>
- u. respect the Red Cross, Red Crescent and Red Crystal emblems;<sup>76</sup>
- v. relate to the right of the families to know about the fate of their sick, wounded and deceased relatives, and facilitate the work of the International Committee of the Red Cross (ICRC) Central Tracing Agency;<sup>77</sup> and
- w. relate to facilitation of the work of humanitarian relief operations.<sup>78</sup>

75 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.5.

76 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.7.

77 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.8.

78 See **UN Secretary-General's Bulletin No. 13** (1999) at s 9.9.

## SECTION 7 – THE LAW OF ARMED CONFLICT THAT APPLIES IN ALL CIRCUMSTANCES

- 5.7.1** Certain rules set out in this manual apply regardless of whether or not there is an armed conflict. For example, torture and inhuman treatment are always prohibited because they are unlawful under international human rights law (IHL) and New Zealand criminal law, as well as LOAC.<sup>79</sup>
- 5.7.2** Some rules of LOAC expressly apply at all times. Members of the NZDF are at all times to apply the rules that:
- a. require the dissemination of LOAC to members the NZDF;<sup>80</sup>
  - b. require the provision of LEGADs to advise commanders on the contents of LOAC and on appropriate instruction to be given to members of the NZDF;<sup>81</sup>
  - c. relate to the treatment of PWs, internees and detainees still in New Zealand's power after a conflict has ceased;<sup>82</sup>
  - d. require assistance to the International Fact-Finding Commission,<sup>83</sup> or other such investigatory bodies;<sup>84</sup>
  - e. oblige New Zealand to search for and bring to justice persons alleged to have committed international crimes and to cooperate and assist in the investigation, prosecution, extradition or surrender of those persons;<sup>85</sup>
  - f. prohibit development, use, stockpiling and transfer of bacteriological and chemical weapons, blinding laser weapons, anti-personnel mines (APMs) and cluster munitions;<sup>86</sup>
  - g. require assessment of new weapons, means or methods of warfare for compliance with LOAC<sup>87</sup> or require training of members of the Armed Forces to comply with restrictions and limitations;<sup>88</sup>

79 For example, the **Torture Convention** is technically an international human rights treaty.  
 80 See **Geneva Convention I** art 47, **Geneva Convention II** art 48, **Geneva Convention III** art 127, **Geneva Convention IV** art 144, **Geneva Protocol I** art 83, **Geneva Protocol II** art 19, **Hague Convention IV** art 1, **Hague Cultural Property Convention** art 25, **ICRC Customary IHL** rule 142, **Conventional Weapons Convention** art 6 and **Torture Convention** art 10. For NZDF LOAC Training Programme see Chapter 18.

81 See **Geneva Protocol I** art 82. See Chapter 2.

82 See **Geneva Convention III** art 5(1). See Chapter 12.

83 See **Geneva Protocol I** art 90.

84 See for example, **Environmental Modification Convention** art 5(2), **Chemical Weapons Convention** art 8 and **Ottawa Convention** art 8.

85 See **Geneva Convention I** art 49, **Geneva Convention II** art 50, **Geneva Convention III** art 129, **Geneva Convention IV** art 146, **Geneva Protocol I** arts 88–89, **Torture Convention** arts 6–9 and Chapter 17. The **International War Crimes Tribunals Act 1995** ss 4 and 61 provides for New Zealand to assist ICTY and ICTR and any other ad hoc tribunal that may be established by the UNSC. **Rome Statute** art 86 requires States to cooperate fully with the ICC in its investigation and prosecution.

86 See **Ottawa Convention** art 1, **Chemical Weapons Convention** art 1 and **Bacteriological Weapons Convention** art 1 all require that parties must never under any circumstances use, develop, produce, otherwise acquire, stockpile, retain or transfer the weapon in question.

87 See **Geneva Protocol I** art 36, and Chapter 7 and Chapter 8.

88 See for example, **Conventional Weapons Protocol IV** art 2.

- h. prohibit military or hostile uses of environmental modification techniques;<sup>89</sup>
- i. require assistance for clearance of APMs, rehabilitation of victims, dealing with problems posed by explosive remnants of war (ERW) and protection against the use or threat of use chemical weapons;<sup>90</sup>
- j. require reporting, inspection or other transparency measures relating to certain weapons;<sup>91</sup>
- k. apply measures for the safeguarding of cultural property;<sup>92</sup>
- l. relate to ERW and cluster munitions remnants in affected territories under the control of the NZDF, or require generic preventative measures;<sup>93</sup>
- m. protect the distinctive emblems of LOAC;<sup>94</sup>
- n. impose duties in respect of protected persons received or interned within New Zealand territory;<sup>95</sup> and
- o. relate to the treatment of the remains of the dead, maintenance of grave sites and access to grave sites.<sup>96</sup>

89 See for example, **Environmental Modification Convention** art 1(1). For environmental warfare see Chapter 8.

90 See for example, **Ottawa Convention** art 6, **Chemical Weapons Convention** art 10(8), **Conventional Weapons Protocol V** art 7, and Chapter 7.

91 See for example, **Ottawa Convention** art 7, **Chemical Weapons Convention** art 3 and **Bacteriological Weapons Convention** art 6(2).

92 **Hague Cultural Property Convention** art 3: "The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate." See also Chapter 14.

93 See **Conventional Weapons Protocol V** art 9 and Technical Annex Part 3.

94 **Geneva Convention I** Chapter VII, especially art 44, **Geneva Convention II** Chapter VI, especially arts 44 and 45 and **Geneva Protocol III** arts 1 and 2. For misuse of LOAC emblems see Chapter 8.

95 See for example, **Geneva Protocol I** art 19: "Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part [wounded, sick or shipwrecked and medical personnel] who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find."

96 **Geneva Protocol I** art 34 provides for agreements to facilitate access to grave sites by relatives of the deceased and war grave officials, to protect and maintain the grave sites permanently, and the return of the remains and personal effects of the deceased to their home country. See also Chapter 11.



## Chapter 6

# HOW LAW OF ARMED CONFLICT APPLIES TO PERSONS AND ORGANISATIONS (PERSONAL FIELD OF APPLICATION)

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## SECTION 1 – INTRODUCTION

- 6.1.1** This chapter sets out the way in which the rights and obligations of Law of Armed Conflict (LOAC) apply to different classes of person, including the armed forces of the parties to the conflict, the victims of armed conflict and other persons who may be involved in or affected by warfare.
- 6.1.2** This chapter also describes the concept of direct participation in hostilities, a topic of vital significance in determining the rights and obligations of persons who have joined the conflict other than as combatants.
- 6.1.3** There is, by necessity, a degree of overlap between this chapter and the substantive rules set out in other chapters. In the event of inconsistency, the orders set out in the more detailed chapters are to prevail.

## SECTION 2 – THE GENERAL APPLICATION OF LAW OF ARMED CONFLICT TO DIFFERENT CLASSES OF PERSONS

### LAW OF ARMED CONFLICT APPLIES TO PERSONS AS WELL AS STATES

- 6.2.1** In addition to the rights and obligations applicable to States, LOAC also creates rights and imposes obligations applicable to all persons affected by armed conflict.<sup>1</sup>

### TREATY-BASED OBLIGATIONS ON PERSONS MAY VARY

- 6.2.2** A person is generally only required to comply with treaty-based LOAC as it applies:

- a. to his or her State of nationality;<sup>2</sup> and
- b. to the State in which he or she is resident.

- 6.2.3** Variations in State obligation produce important differences in the application of LOAC to persons. For example, while members of the New Zealand Defence Force (NZDF) are bound by the Ottawa Convention not to use anti-personnel mines (APMs), members of forces from States that are not a party to that treaty, whether enemy or coalition partners, do not breach LOAC if they do.<sup>3</sup> However, all people, regardless of nationality, must comply with the obligations of treaties that have universal application, such as the Geneva Conventions, or have reached the status of customary international law.<sup>4</sup>

- 6.2.4** Foreign citizens who join the NZDF, members of forces attached to the NZDF,<sup>5</sup> volunteers<sup>6</sup> and trainees<sup>7</sup> must comply with New Zealand's treaty obligations, regardless of the treaty obligation of their State of nationality.

### THE FUNDAMENTAL RIGHTS AND OBLIGATIONS OF LAW OF ARMED CONFLICT APPLY TO ALL PEOPLE

- 6.2.5** All people are bound by the rules of customary international law, regardless of the treaty obligations of their State of nationality or residence.<sup>8</sup> The most important rights and obligations of LOAC therefore apply equally to all persons involved in or affected by armed conflict and are not reliant on treaty relationships for their effect.<sup>9</sup>

- 6.2.6** Although some treaties provide that only nationals of other parties to the treaty can benefit from its provisions,<sup>10</sup> this principle does not apply in respect of the fundamental rules of LOAC, which demand humane treatment of victims of war regardless of nationality.

1 In these orders, the word 'person' means a natural person. The question of holding corporate persons such as companies responsible for breaches of LOAC is outside the scope of this manual.

2 For nationality in international law see **Nottebohm Case** at 26.

3 For treaties see Chapter 3. For APMs see Chapter 7.

4 See Chapter 3.

5 See **DA** s 23A.

6 See **AFDA** s 10.

7 See **AFDA** s 11.

8 For customary international law see Chapter 3.

9 For fundamental guarantees of humane treatment see **Geneva Protocol I** art 75. See also Chapter 12.

10 See for example, **Geneva Convention IV** art 4(2): "Nationals of a State which is not bound by the Convention are not protected by it." However, it should be noted that there are now no States that are not a party to Geneva Convention IV.

- 6.2.7** The rules of LOAC apply to persons regardless of race, colour, sex, language, religion, belief, political or other opinion, national or social origin, wealth, birth or other status or similar criteria. They apply regardless of whether the cause for which persons fight is just or where fault for causing the conflict lies.<sup>11</sup>

#### PEOPLE MAY BE TREATED DIFFERENTLY UNDER DOMESTIC LAW AND LAW OF ARMED CONFLICT

- 6.2.8** LOAC may apply to persons and to their actions in a different way from domestic law. For example, spies may be tried for their actions under the law of the capturing power even though they have committed no offence under the law of their own State or under LOAC.<sup>12</sup> Persons who rebel against the authority of their own State in the course of a non-international armed conflict (NIAC) commit no breach of LOAC but are liable to be tried by their own authorities for offences such as treason.<sup>13</sup>

11 LOAC is distinguished from international law governing the use of force (see Chapter 3). For the crime of aggression see Chapter 17.

12 **Hostages Trial** at [58]: “Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain criminals in the eyes of the enemy and may be treated as such.”

13 **Geneva Protocol II** art 6(5) urges States to grant the broadest possible amnesty to persons who have participated in armed conflict on this basis. See **Serdar Mohammed v Ministry of Defence** [2017] UKSC 2 at [114].

## SECTION 3 – COMBATANT STATUS

### ARMED FORCES

- 6.3.1** **Armed forces of a State** means all organised armed forces, groups and units that:
- a. are under a commander responsible to the government or authorities of that State for their conduct (even if New Zealand does not recognise that government or those authorities);
  - b. are subject to an internal discipline system which enforces compliance with LOAC; and
  - c. wear a uniform or distinctive emblem or carry their arms openly.
- 6.3.2** The armed forces of a State include:
- a. members of all regular, reserve and territorial forces;
  - b. members of militia, volunteer corps and other organised armed groups;<sup>14</sup> and
  - c. members of paramilitary or armed law enforcement personnel incorporated into the armed forces provided that the other parties to the conflict have been notified of that incorporation.<sup>15</sup>
- 6.3.3** **Combatants** are all members of the armed forces of a State that is a party to an international armed conflict (IAC) except for **non-combatant members of the armed forces**, which includes:
- a. medical personnel, and
  - b. religious personnel.<sup>16</sup>
- 6.3.4** In this manual, the term ‘combatant’ also applies to:
- a. a member of the armed forces of a State involved in combat operations as part of a NIAC; and
  - b. any person or class of persons to whom combatant status has been granted by the New Zealand Government, either by agreement or unilaterally.<sup>17</sup>

14 **Hague Regulations** art 1, to qualify as combatants, militia and volunteer corps must be commanded by a person responsible for their subordinates, have a fixed distinctive emblem recognisable at a distance, carry arms openly and conduct their operations in accordance with the laws and customs of war. **Geneva Convention III** art 4A(2) and **ICRC Customary IHL** rule 4.

15 See **Geneva Protocol I** art 43(3).

16 See **Geneva Protocol I** art 43(2): “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.” See also **ICRC Customary IHL** rule 3. For medical and religious personnel see Chapter 11.

17 For example, the New Zealand Government deemed the Viet Cong to be combatants during the Vietnam War.

## COMBATANTS HAVE THE RIGHT TO PARTICIPATE IN HOSTILITIES

**6.3.5** There is a vital distinction between those people who have the legal right to participate in hostilities and those who do not. It operates as follows:

- a. Combatants** have the complete legal right to participate in hostilities, ie subject to LOAC and their orders, they have the right to attack opposing forces and military objectives, but they also face the liability to be attacked by enemy combatants.<sup>18</sup>
- b. Non-combatant members of the armed forces** (medical and religious personnel) do not have a general legal right to directly participate in hostilities. They do not have the right to attack opposing forces and nor may they be attacked. They do, however, have the right to protect themselves and their patients from an unlawful use of force against them.<sup>19</sup>
- c. Civilians** do not have the legal right to directly participate in hostilities. They may not attack opposing forces or military objectives, and they may not be attacked if, and for so long as, they do not directly participate in hostilities.<sup>20</sup>

**6.3.6** ‘Combatant’ and ‘Civilian’ status are mutually exclusive. Aside from non-combatant members of the armed forces, every person affected by armed conflict is either one or the other.<sup>21</sup> By taking a direct part in hostilities, civilians lose their immunity from attack, but they do not become combatants as a result. The distinction cannot be used in order to deny humane treatment to any person regardless of status.<sup>22</sup>

## MEMBERS OF THE NEW ZEALAND ARMED FORCES

**6.3.7** All members of the New Zealand Armed Forces<sup>23</sup> involved in armed conflict, other than medical and religious personnel, are combatants.

**6.3.8** Provided they act in accordance with LOAC and their orders, members of the Armed Forces have the lawful right and duty to carry out attacks on opposing forces and on military objectives. They bear no criminal responsibility or civil liability for:

- a.** killing or injuring combatant members of the opposing force,
- b.** killing or injuring other persons directly participating in hostilities against them or their coalition partners,
- c.** causing damage or destruction to property that is a military objective,<sup>24</sup> or

18 For ‘attack’ see Chapter 8.

19 See **Geneva Convention I** art 22(1) and Chapter 11.

20 For protection of civilians see Chapter 13. For protection of civilians in occupied territory see Chapter 9. For specifically protected persons see Chapter 14.

21 Within the category of ‘civilian’ there are a number of classes of person in respect of whom a specific status applies. These distinctions are dealt with in the subsequent chapters.

22 See Chapter 12.

23 For definition of Armed Forces see **DA** s 11.

24 **Geneva Protocol I** art 43(2): “Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in the hostilities.”

- d. causing incidental death or injury or damage or destruction to property provided that those effects are proportionate.<sup>25</sup>

**6.3.9** This is the only situation recognised in New Zealand law by which deadly force can be used against persons because of their status, rather than their actions. The right to attack enemy combatants is not based on individual self-defence – they need not pose an immediate threat or even be conducting effective military operations to be a lawful target of attack. They may be attacked in circumstances of surprise, or if they are retreating or fleeing.<sup>26</sup> Unless rendered *hors de combat* through wounds or sickness, it is only through surrender or truce that combatants can voluntarily remove themselves from liability to attack.

**6.3.10** Where New Zealand is committed to armed conflict, the Commander Joint Forces New Zealand (COMJFNZ) is to ensure that members of the NZDF are informed in orders of the forces who are considered by New Zealand to have enemy combatant status.

### MEMBERS OF NEW ZEALAND ARMED FORCES ARE LIABLE TO BE ATTACKED

**6.3.11** Members of the New Zealand Armed Forces are liable to be lawfully attacked by combatant members of opposing forces during IAC. They are entitled, if captured, to prisoner of war (PW) status.<sup>27</sup>

### NON-INTERNATIONAL ARMED CONFLICT

**6.3.12** Combatant status strictly only applies in IAC.<sup>28</sup> Members of armed forces who are deployed by the government during NIAC are generally regarded as enjoying combatant immunity even though there is no treaty provision establishing this as such.

**6.3.13** Members of armed groups<sup>29</sup> or dissident armed forces<sup>30</sup> in NIAC have certain rights and obligations under LOAC, but are not combatants and are subject to the criminal law of that State for the consequences of their attacks. Governments may, however, confer combatant status on members of dissident armed forces or armed groups.

### SPONTANEOUS POPULAR DEFENCE AGAINST INVASION

**6.3.14** Members of the population of a territory that has not yet been occupied, who take up arms to resist invading forces without having time to organise themselves into regular armed units (a *levee en masse*), are also recognised as having combatant status.<sup>31</sup> Such spontaneous popular defence is very rare.

**6.3.15** Combatant status does not apply to persons involved in a popular uprising that occurs after occupation has been established.

25 For proportionality see Chapter 4.

26 In the **Calley Appeal** (at [538]) the US Court of Military Appeals stated that the “killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war”.

27 See Chapter 12.

28 See **ICRC Customary IHL** rule 3.

29 For armed groups see Section 5.

30 For dissident armed forces see Section 5.

31 See **Geneva Convention III** art 4(A)(6).

- 6.3.16** Should a New Zealand force be required to deal with a popular uprising, members of the NZDF will be advised of the status of persons taking up arms against them in orders. In cases of doubt, persons who are captured are to be treated as PWs until proved otherwise.

#### THE EFFECT ON COMBATANT STATUS OF NON-COMPLIANCE WITH LAW OF ARMED CONFLICT

- 6.3.17** All combatants must comply with LOAC and may be punished for their failure to do so.<sup>32</sup> Violations of LOAC by individuals, however, do not deprive members of the force generally of combatant status.<sup>33</sup>
- 6.3.18** Where an opposing force engages in widespread or general disregard for LOAC, this may indicate that it does not have an internal discipline system which enforces respect for LOAC. In an extreme case, that may mean that the group cannot be regarded as an armed force for legal purposes. This decision may only be made by the Government, not by members of the NZDF. Members of the NZDF will be advised of the status of any such group in orders.

#### COMBATANTS MUST DISTINGUISH THEMSELVES FROM CIVILIANS – GENERAL RULE

- 6.3.19** Distinction between combatants and the civilian population is essential in order to protect civilians from attack. The accepted practice of States is that combatant members of the armed forces distinguish themselves from civilians by wearing uniform while engaged in their duties.<sup>34</sup> Combatants must, at the least, distinguish themselves from the civilian population:
- a. while engaged in armed combat operations, and
  - b. while they are engaged in an attack or in a military operation preparatory to an attack.
- 6.3.20** Where combatants fail to distinguish themselves from civilians, they may be denied PW status but must still be treated humanely if captured.<sup>35</sup>

#### COMBATANTS MUST DISTINGUISH THEMSELVES FROM CIVILIANS – EXCEPTIONAL CIRCUMSTANCES

- 6.3.21** Notwithstanding the rule set out above, there are situations where, owing to the nature of the hostilities, combatants cannot distinguish themselves by wearing uniforms or badges, or by carrying their weapons openly. They remain entitled to combatant status provided that they carry their weapons openly during:
- a. each military engagement; or

<sup>32</sup> See Chapter 17.

<sup>33</sup> **Geneva Protocol I** art 44(2) states that violations of LOAC shall not deprive combatants of their right to be combatants or, if they fall into the power of an adverse Party, of their right to be a prisoner, except as provided in **Geneva Protocol I** art 44(3),(4), which relate to the failure to distinguish themselves from the civilian population.

<sup>34</sup> **Geneva Protocol I** art 44(7): "This article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict."

<sup>35</sup> Under **Geneva Protocol I** art 44(4), even though in that circumstance persons forfeit their right to be a PW, they shall nevertheless "be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this protocol".



- b. while they are visible (including with the aid of electronic or other surveillance) to the opposing force while:
  - (1) engaged in military deployment preceding the launching of their attack, and
  - (2) moving towards the place from which the attack will be launched.<sup>36</sup>

**6.3.22** Such exceptional situations will only arise:

- a. in occupied territory, or
- b. where peoples are fighting against colonial domination and alien occupation, or against racist regimes.<sup>37</sup>

**6.3.23** Even in those circumstances, combatants will often be able to distinguish themselves from the civilian population and, if they are able to do so, they will not be able to benefit from the exception.

**6.3.24** If such exceptional circumstances apply, COMJFNZ is to ensure that members of the NZDF are advised of that fact in orders. This issue could only arise for a New Zealand force during occupation operations,<sup>38</sup> since providing military support for colonial domination or a racist regime is contrary to New Zealand foreign policy and would breach its international law obligations.

#### COMBATANT STATUS REMAINS UNTIL A PERSON IS OUT-OF-COMBAT OR DEMOBILISED

**6.3.25** A person who has combatant status retains that status throughout the armed conflict until he or she is:

- a. rendered *hors de combat*<sup>39</sup> by:
  - (1) surrender or capture;incapacitation through being wounded, sick or shipwrecked; or
  - (2) parachuting from an aircraft in distress; or
- b. properly demobilised, discharged or released from the armed forces.

#### TRAITORS WHO HAVE GONE OVER TO THE OPPOSING FORCE

**6.3.26** Combatant status cannot be claimed by members of the armed forces who go over to the enemy and are subsequently captured by the force to which they belong.<sup>40</sup> If captured, however, they remain entitled to humane treatment.<sup>41</sup>

36 **Geneva Protocol I New Zealand Declaration:** "The Government of New Zealand will interpret the word 'deployment' as meaning any movement towards the place from which an attack is to be launched. New Zealand will interpret the words 'visible to the adversary' in the same paragraph as including visible with the aid of any form of surveillance, electronic or otherwise, available to help keep a member of the armed forces of the adversary under observation."

37 **Geneva Protocol I New Zealand Declaration:** "Situations in which an armed combatant cannot distinguish himself by wearing a uniform can only exist in occupied territory or where peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

38 For occupation see Chapter 9.

39 For *hors de combat* see Chapter 8.

40 See **Public Prosecutor v Koi** at 425.

41 **Geneva Protocol I** art 75.

## SECTION 4 – CIVILIAN STATUS

## DEFINITIONS

**6.4.1** A **civilian** is any person who is neither a combatant<sup>42</sup> nor a non-combatant member of the armed forces.<sup>43</sup>

**6.4.2** **Civilian population** means all persons who are civilians, even if within that population there are individuals who do not qualify as civilians.<sup>44</sup>

## RIGHTS AND OBLIGATIONS OF CIVILIANS

**6.4.3** Civilians:

- a. are not entitled to take a direct part in hostilities;<sup>45</sup>
- b. are immune from attack for so long as they do not take a direct part in hostilities;
- c. bear criminal responsibility for unlawfully killing or injuring combatants or civilians or for causing damage or destruction to property;
- d. if captured, interned or detained:
  - (1) are not generally entitled to PW status;<sup>46</sup> but
  - (2) are entitled to fundamental guarantees of humane treatment.<sup>47</sup>

## RIGHTS AND OBLIGATIONS OF CIVILIANS ACCOMPANYING THE ARMED FORCES

**6.4.4** **Civilians accompanying a force** include civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units and welfare personnel.<sup>48</sup>

**6.4.5** Civilians accompanying a force:

- a. are not entitled to take a direct part in hostilities;<sup>49</sup>

42 **Geneva Protocol I** art 50(1): “A civilian is any person who does not belong to one of the categories of persons referred to in Articles 4(A)(1),(2),(3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” See also **ICRC Customary IHL** rule 5.

43 See **Geneva Protocol I** art 43(2) and **ICRC Customary IHL** rule 3.

44 See **Geneva Protocol I** arts 50(2) and (3) and **ICRC Customary IHL** rule 5.

45 In the *Hostages Trial* (at [58]), the tribunal held that “a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war”.

46 For PW status see Chapter 12. Civilians may be entitled to PW status if they are accompanying a force.

47 See Chapter 12.

48 See **Hague Regulations** art 13. **Geneva Convention III** art 4(A)(4) provides that authorised 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” are entitled to protection as PWs if captured.

49 For direct participation in hostilities see Section 5.

- b. may not be the object of an attack, except for so long as they take a direct part in hostilities;<sup>50</sup>
- c. bear criminal responsibility for killing or injuring members of the opposing force, or civilians, or for causing damage or destruction to property; and
- d. if captured, interned or detained, are entitled to PW status.<sup>51</sup>

**6.4.6** Although civilians accompanying a force may not be deliberately attacked, they will often be on or near military objectives during their employment. This renders them liable to become incidental casualties in the event of an attack.

#### **CIVILIANS ACCOMPANYING A NEW ZEALAND FORCE**

**6.4.7** Civilians accompanying a New Zealand force include members of the Civil Staff and other persons such as contractors, members of the Public Service or New Zealand Police.

**6.4.8** The commander of a New Zealand force is to ensure that accompanying civilians do not take a direct part in hostilities. Civilians may form part of the crew of a military aircraft or serve on a warship without breaching this order. They are not, however, to operate weapons systems. Members of the Civil Staff may also be employed in planning operations and other staff activities.

**6.4.9** Civilians accompanying a New Zealand force are bound by LOAC and may be held individually criminally liable for breaches. They may also be subject to the Armed Forces Discipline Act 1971 (AFDA).<sup>52</sup> If captured during IAC, they are entitled to PW status.<sup>53</sup>

**6.4.10** The commander is to take all feasible precautions to protect civilians accompanying the force from the effects of armed conflict. It may be necessary to remove them from the area of operations if the risk to their safety becomes too great.<sup>54</sup>

50 See **Geneva Protocol I** art 51(3) and **Geneva Protocol II** art 13(3).

51 See **Hague Regulations** art 13. **Geneva Convention III** art 4(A)(4).

52 See **AFDA** s 16 and Schedule 1.

53 See **Geneva Convention III** art 4(A)(4).

54 **Geneva Protocol I** art 58: "The Parties to the conflict shall, to the maximum extent feasible: [...] endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives [...] and 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."

## SECTION 5 – DIRECT PARTICIPATION IN HOSTILITIES

### INTRODUCTION

- 6.5.1** As warfare between armed forces of opposing States has become the exception rather than the rule, armed conflict is increasingly conducted by persons legally defined as civilians. Effectively combating such fighters poses one of the most significant challenges to any force that conducts its operations in accordance with LOAC. This is particularly so if they do not distinguish themselves by wearing uniforms.
- 6.5.2** The force runs the risk of heavy casualties amongst its own members and the civilian population it is protecting if it is not sufficiently aggressive in the conduct of its operations. Yet it runs the risk of inflicting unjustified civilian casualties, with a commensurate loss of legality, moral authority and public support, if it becomes too aggressive. NZDF commanders, therefore, are to ensure that the rights and obligations of persons who take a direct part in the hostilities<sup>55</sup> are understood by all members of the NZDF.

### DIRECT PARTICIPATION IS NOT A STATUS

- 6.5.3** ‘Direct participation in hostilities’ refers to the actions of a person; it does not confer a separate legal status. Some of New Zealand’s coalition partners use the terms **unlawful combatants** or **unprivileged belligerents** to describe persons who are not combatants but who take a direct part in hostilities. These terms are not used in this manual to avoid any suggestion that such persons fall between combatant and civilian status and can be denied fundamental rights as a result. Terms such as ‘insurgent’, ‘freedom-fighter’, ‘jihadi’, ‘terrorist’ or ‘rebel’ are commonly used to describe persons who do not have combatant status but who take a direct part in the hostilities. None of these terms define the legal status of the person concerned under LOAC. Terms such as ‘counter-insurgency operations’ relate to a method of operation rather than the legal status of the persons concerned.

### DIRECT PARTICIPATION IS NOT RELEVANT TO COMBATANT STATUS

- 6.5.4** Combatants in IAC are liable to attack at all times unless they are *hors de combat*. It is not necessary, therefore, to apply to combatants any of the tests relating to direct participation in hostilities.

### CONSEQUENCES OF DIRECT PARTICIPATION IN HOSTILITIES

- 6.5.5** Direct participation in hostilities has legal consequences in a number of contexts, for example, establishing the existence of mercenary activity,<sup>56</sup> establishing the status of child soldiers and the criminal responsibility of persons who recruit them,<sup>57</sup> and governing the status of United Nations (UN) personnel or associated personnel.<sup>58</sup>

55 **Geneva Convention Common Article 3** uses the term ‘active part in the hostilities’. **Geneva Protocol I** arts 43(2) and 67(1)(e) use the term ‘participate directly in hostilities’. **Geneva Protocol II** art 13(3) uses ‘take a direct part in hostilities’. The equally authentic French texts use ‘*participer directement*’ to cover both the terms ‘direct’ and ‘active’. See also **Lubanga Trial** at [627].

56 For application of LOAC to mercenaries see Section 6.

57 See Chapter 8 and Chapter 14.

58 See Chapter 14.

**6.5.6** Of particular importance is loss of immunity from attack for:

- a. civilians;<sup>59</sup> and
- b. specifically protected persons, including non-combatants, members of civilian civil defence organisations, medical and religious personnel, journalists<sup>60</sup> and neutral persons.<sup>61</sup>

**6.5.7** Persons who are not combatants, but who take a direct part in hostilities:

- a. are not lawfully entitled to carry out attacks on people or property;
- b. bear criminal responsibility for killing or injuring members of the opposing force or civilians or for causing damage or destruction to property;
- c. may be arrested and tried for offences, including breaches of LOAC, committed while under arms; and
- d. if detained, are not entitled to PW status but remain entitled to humane treatment.

**6.5.8** Although direct participation in hostilities deprives civilians and protected persons of immunity from attack, they do not lose protected status as civilians per se.<sup>62</sup>

#### DETERMINING DIRECT PARTICIPATION

**6.5.9** Responsibility for determining whether a person or group of persons is taking a direct part in hostilities may lie with:

- a. the commander of a New Zealand force, eg when conducting, targeting or planning, or executing operations; or
- b. a member of the NZDF confronted by the person or group in a situation where there is a potential for combat.

**6.5.10** A person in the latter category has little time for deliberation and may be in a situation of considerable danger. COMJFNZ therefore, is to ensure that:

- a. all members of the NZDF are adequately trained on what constitutes direct participation in hostilities in the context of the operation in which they are involved;
- b. training is routinely updated and re-assessed;
- c. the concept of direct participation in hostilities is adequately covered in rules of engagement (ROE); and
- d. the advice of an NZDF Legal Adviser (LEGAD) is obtained wherever practicable before conducting an attack or operation.

59 **Geneva Protocol I** art 51(3)4: "Civilians shall enjoy the protection afforded by this Section [Section II], unless and for such time as they take a direct part in the hostilities." **Geneva Protocol II** art 13(3): "Civilians shall enjoy the protection afforded by this Part [Part IV], unless and for such time as they take a direct part in the hostilities."

60 See Chapter 14.

61 See Chapter 16.

62 See Chapter 12.

- 6.5.11** Since the likely consequence of deciding that a person is taking a direct part in hostilities is that he or she will be engaged with deadly force, if there is any reasonable doubt about that fact, the person is not to be attacked until that doubt is resolved.
- 6.5.12** The question of whether a person is taking a direct part in hostilities is to be determined in good faith on the basis of information available to the decision-maker at the time. This includes:
- a. information or intelligence on the methods of attack armament, movement, manoeuvre and deployment, motivation or activity consistent with an intention and capability to carry out an attack in the context of the operation;
  - b. the activity, weapons (if visible), clothing, gender and age of the individual;<sup>63</sup> and/or
  - c. known membership of an armed group which engages in combat operations in a persistent campaign.

#### WHAT CONSTITUTES DIRECT PARTICIPATION IN HOSTILITIES

- 6.5.13** ‘Direct participation in hostilities’ means any deliberate action of a fundamentally military nature, which is intended or likely to:
- a. cause death or injury to members of a New Zealand force or to coalition partners;
  - b. destroy or damage the property of a New Zealand force, coalition partners, or any other military objective;
  - c. substantially hinder the operations of a New Zealand force or its coalition partners;
  - d. materially assist an opposing force; or
  - e. cause death or injury to members of the civilian population or other protected persons, or destroy or damage civilian objects or other protected objects that it is the duty of the force to protect.
- 6.5.14** Actions that are geographically removed from the hostile act may still qualify as being a part of direct hostilities if they are an integral part of that act, for example, intelligence-gathering, command and control, recruiting people to attack a force, or cyber attack.
- 6.5.15** Examples of activities that constitute direct participation in hostilities include:
- a. armed attack by whatever means, including shelling, bombardment, missile launch and small-arms fire;

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*Halilović Trial* at [34]: A very young child or an old woman is unlikely to be taking a direct part in hostilities. This is not to say that persons who are unlikely to directly participate will never do so. Conversely it is not allowable to target every ‘military-aged male’ on that basis alone.

- b.** aggressive manoeuvring, such as positioning and registration of mortars, taking up firing positions or moving in military configuration towards an objective;
- c.** positioning, emplacement and/or detonation of mines, booby traps or emplaced munitions;
- d.** conducting reconnaissance, surveillance or espionage on behalf of an opposing force;<sup>64</sup>
- e.** passing targeting information to an opposing force or acting as a look-out or scout;
- f.** interdiction of logistic support;
- g.** deliberate interference with command, control, communications, computers or intelligence systems, whether by direct physical means, through information operations or cyber warfare;<sup>65</sup>
- h.** interfering with lines of communication, eg by destroying roads, bridges, railway lines, etc;
- i.** clearing mines and other obstacles laid by a force (other than for humanitarian purposes) while they are of tactical importance;<sup>66</sup>
- j.** capturing, holding and guarding PWs, detainees<sup>67</sup> or hostages;<sup>68</sup>
- k.** attempting to liberate PWs or detainees held by the force;
- l.** providing direct logistic support to an opposing force, eg carrying ammunition or other material, constructing and providing improvised explosive devices (IEDs);
- m.** denying access to military objectives or interfering with manoeuvre, eg deliberately blocking roads or bridges;
- n.** defending military objectives against attack;
- o.** commanding, directing or controlling military operations, including issuing orders and directives and making operational or tactical decisions;
- p.** planning military operations; and
- q.** gathering, analysing and transmitting tactical intelligence to an opposing force.

**6.5.16** All of these examples are to be understood in the context that the action must be of a fundamentally military nature. For example, deliberately blocking a road with explosive barriers to slow down an advance is direct participation in hostilities. Blocking the same road with burning tyres to protest against food shortages is not.

64 For espionage see Chapter 8.

65 For information operations see Chapter 8.

66 This criterion does not apply to legitimate mine clearance activities by civilian organisations.

67 For PWs and detainees see Chapter 12.

68 For hostages see Chapter 8.



**ACTIVITIES NOT AMOUNTING TO DIRECT PARTICIPATION**

**6.5.17** The following activities do not amount to direct participation in hostilities:

- a. Provision of general support and comfort to opposing forces, such as food and shelter or financial resources, or expressing support for them.
- b. Refusal to assist a New Zealand force, eg failure to provide information about the location of the enemy, or refusal to act as a guide.
- c. Theft of property or violence by bandits, criminals, or pirates.
- d. Rioting, looting or civil disobedience, or other random or arbitrary acts of violence.

**6.5.18** Many of these actions not amounting to direct participation in hostilities may nevertheless render the person liable to be arrested and tried for offences against the criminal law of the territory, or any laws imposed by an occupying force.<sup>69</sup> However, such persons do not lose their immunity from attack. If they commit acts of violence or other crimes the use of force against them is to be:

- a. governed by the rules relating to self-defence;
- b. no more than is necessary to arrest or detain them to be tried in accordance with the applicable criminal law.

**TERRORISM AND DIRECT PARTICIPATION IN HOSTILITIES**

**6.5.19** Acts of terrorism may amount to direct participation in hostility, depending on the method involved in the attack. In most cases, however, terrorism will be regarded as a crime to be dealt with under criminal law. The test remains whether the attack is an act of a fundamentally military nature. The designation of a group of individuals as ‘terrorists’ (either for domestic or international purposes)<sup>70</sup> does not necessarily mean the group is taking a direct part in hostilities for the purposes of LOAC.

**6.5.20** Where the activities of any group involved in terrorism are regarded as constituting direct participation in hostilities, members of the NZDF will be advised of that fact in orders.

**DURATION OF LOSS OF IMMUNITY FROM ATTACK**

**6.5.21** Civilians who directly participate in hostilities lose immunity from attack only for such time as the participation lasts. Persons who put aside their weapons and return to peaceful pursuits may no longer be the subject of attack. When participation starts and finishes is a matter for judgement by the NZDF commander or the member of the NZDF concerned.

**6.5.22** Direct participation is not limited, however, to the very instant of an attack; activities before and after the attack form part of what is known as a ‘continuum’ of participation. Clearly included are planning, preparing and training for a hostile act, deployment to the scene of the attack and return from it. The length of the continuum will depend on the nature of the action. For example,

<sup>69</sup> For powers of an occupying force see Chapter 9.

<sup>70</sup> For New Zealand terrorism designations see **Terrorism Suppression Act 2002**. International designations are made pursuant to **UNSCR 1989** (2011).



participation in emplacing an IED runs considerably longer than simply moving to or from the place of detonation. It starts when explosives are obtained and continues through to removal of the residue of an explosion. An assessment that a person's actions are part of a continuum of direct participation is to include intelligence such as:

- a. the person's previous actions;
- b. how recently the person displayed behaviour consistent with direct participation;
- c. how enduring the nature of the action is; and
- d. the extent to which the actions are intended to have an effect at some point in the future.

**6.5.23** If there is reasonable doubt as to whether a person has ceased to take a direct part in hostilities, the person is to be given the benefit of the doubt and is not to be attacked until the doubt is resolved. The advice of an NZDF LEGAD is to be obtained wherever practicable.

#### MEMBERSHIP OF ARMED GROUP MAY AMOUNT TO CONTINUOUS PARTICIPATION

**6.5.24** An **organised armed group** is a group of civilians who are armed and equipped for combat operations. The group must have a sufficient degree of military organisation to conduct sustained hostilities, even though it may not be as well-armed, trained or capable as the forces of a State. The types of armed group are:

- a. Armed groups in IAC that are under a command responsible to a party to the conflict and who, therefore, qualify as combatants.<sup>71</sup>
- b. Armed groups in IAC that are not under a command responsible to a party to the conflict and who, therefore, do not qualify as combatants.
- c. Armed groups in NIAC who, therefore, do not qualify as combatants.

**6.5.25** **Member of an organised armed group** means any person whose integration into an armed group is of such a level that he or she can be regarded as making a direct contribution to the combat effectiveness of that group.

**6.5.26** Members of an organised armed group may, in some circumstances, be regarded as being involved in continuous direct participation in hostilities. The fact that a person is acting under effective command and control, and is subject to some form of discipline, is a strong indication that the person is taking a direct part in hostilities, even if the person is not actually fighting at that particular point in time. Where New Zealand considers that membership of an armed group constitutes direct participation in hostilities, members of the NZDF will be advised of that fact in orders.

**DETERMINATION OF MEMBERSHIP OF AN ARMED GROUP**

- 6.5.27** The question of who is, or is not, a member of an armed group is a critical LOAC decision. Unlike regular armed forces, such persons will usually not have uniforms, identification cards, authentic ranks or serial numbers and probably have not had any formal enlistment. Even their names, and the name of the group to which they belong, may be in considerable doubt.
- 6.5.28** Determination of membership of an armed group is to be based on a good-faith interpretation of information and intelligence available to the decision-maker at the time. Care is to be taken to identify the nature of discrete armed groups that may be present in any conflict. Many groups of armed individuals will not meet the criteria necessary for their actions to constitute direct participation. They cannot be lumped together as a single 'enemy' force.

**DISSIDENT ARMED FORCES**

- 6.5.29** **Dissident armed forces** means forces fighting against the government in a NIAC.<sup>72</sup> The term is understood to particularly apply to a part of a State's armed forces that have turned against the government. If the dissident soldiers remain in uniform, distinguish themselves from loyalist forces, maintain formed units under responsible command and conduct their operations in accordance with LOAC, it may be appropriate to grant them combatant status. However, this is purely a matter of discretion for the government of the State in question.
- 6.5.30** If a New Zealand force is involved in operations in which an opposing force qualifies as a dissident armed force, members of the NZDF will be advised of the status of members of that force in orders.

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72This term is used in **Geneva Protocol II** art 1 but is not defined.

## SECTION 6 – MERCENARIES

### INTRODUCTION

- 6.6.1** Mercenary activity undermines the principles of combatant status. The fact that combatants have the legal right to engage in combat and the duty to comply with LOAC produces both individual and State responsibility. Mercenaries, on the other hand, are often hired in an attempt to avoid a State's LOAC obligations. An underpinning purpose of LOAC is the restoration of peace. This principle is unlikely to be advanced by persons with a financial interest in the continuation of violence.
- 6.6.2** New Zealand is, at present, one of only a relatively small number of States that are party to the Mercenaries Convention. For other States, mercenary activity remains lawful, although it is generally regarded with distaste.

### DEFINITION

- 6.6.3** A **mercenary** is a person who is not a citizen or resident of a party to a conflict or a member of its armed forces, who has been specially recruited to:
- a.** fight in an armed conflict under the control of a party; or
  - b.** overthrow a government, or undermine the constitutional order of a State or its territorial integrity.
- 6.6.4** A mercenary is motivated by the desire for private gain and is promised substantially more pay than combatants of the armed forces.<sup>73</sup> Simply fighting in the armed forces of another State (eg Ghurkhas or French Foreign Legion) does not qualify as mercenary activity. Members of private military and security companies (PMSC)<sup>74</sup> or individuals providing commercial logistic support, security functions, convoy guard duties etc are not mercenaries provided that they are not hired to take a direct part in hostilities; nor are military advisers sent by a State on official duties. Personnel involved in fundamentally humanitarian tasks (eg peace support,<sup>75</sup> mine-clearance, aid delivery etc) or policing duties are not included.

### RIGHTS AND OBLIGATIONS OF MERCENARIES

- 6.6.5** Mercenaries, by definition, are regarded as directly participating in hostilities throughout their employment, notwithstanding the fact that they do not have a legal right to do so. Mercenaries:
- a.** bear criminal responsibility for killing or injuring members of the opposing force or civilian population, or for causing damage or destruction to property;
  - b.** may be tried before a fair and regular trial for offences relating to mercenary activity in accordance with the domestic law of the State in which their activity takes place, or the law of an occupying power;<sup>76</sup>

73 For the definition of 'mercenary' see **Geneva Protocol I** art 47(2), **Mercenaries Convention** art 1 and **Mercenary Activities (Prohibition) Act 2004** s 5.

74 For PMSC see Section 8.

75 The mission must be for any of the purposes of the UN, or undertaken in accordance with the principles of the UN Charter (see Chapter 14).

76 For example, in New Zealand under **Mercenary Activities (Prohibition) Act 2004** s 12, conviction for being a mercenary is punishable by a term not exceeding 14 years' imprisonment.

- c. if captured or apprehended by a New Zealand force:
  - (1) are not entitled to PW status,<sup>77</sup> and are to be treated as detainees (eg no recognition should be given to any rank that they purport to hold); but
  - (2) are entitled to fundamental guarantees of humane treatment; and
- d. may, subject to LOAC and orders, be attacked by a New Zealand force at any time unless they surrender or are *hors de combat*.

### MERCENARY ACTIVITIES ARE PROHIBITED

#### 6.6.6 Members of the NZDF are not to:

- a. recruit, train, finance or use mercenaries or prospective mercenaries;<sup>78</sup> or
- b. engage in mercenary activities.<sup>79</sup>

<sup>77</sup> See **Geneva Protocol I** art 47(1). For rights of mercenaries if captured see Chapter 12.

<sup>78</sup> See **Mercenary Activities (Prohibition) Act 2004** ss 7–11. Offences relating to mercenary activity are punishable by up to 14 years' imprisonment. See also **Mercenaries Convention** art 2: "Any person who recruits, uses, finances or trains mercenaries [...] commits an offence for the purposes of this Convention." Art 5(1) requires that "States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities".

<sup>79</sup> See **Mercenary Activities (Prohibition) Act 2004** s 12.

## SECTION 7 – SPIES

## DEFINITION

- 6.7.1** A **spy**<sup>80</sup> is a person who, while operating within the territory or area of operations of a force, acts clandestinely or on false pretences in order to obtain information with the intention of passing it to the opposing force.
- 6.7.2** **Espionage** is the practice of spying.<sup>81</sup> The term includes **cyber espionage**.<sup>82</sup>
- 6.7.3** The terms ‘spy’ and ‘espionage’ do not apply to:
- a. members of the armed forces engaged in gathering information in enemy territory provided they wear the uniform of the armed forces to which they belong;<sup>83</sup> or
  - b. messengers and dispatch riders who carry out their tasks openly.<sup>84</sup>

## RIGHTS AND OBLIGATIONS OF SPIES

- 6.7.4** Spies:
- a. bear criminal responsibility for killing or injuring members of the opposing force or civilians or for causing damage or destruction to property;
  - b. may be tried in a fair and proper trial for offences relating to espionage in accordance with the domestic law of the State in which their activity takes place, or the law of an occupying power;<sup>85</sup> and

80 See **Hague Regulations** art 29.

81 See **Hague Regulations** art 29 and **Hague Draft Air Rules** rule 27.

82 See **Tallinn Manual** rule 66.

83 Under **Hague Regulations** art 24, “the employment of measure necessary for obtaining information about the enemy and the country are considered permissible”. Under art 29, “soldiers not wearing a disguise, who have penetrated into the zone of operations of the hostile army, for the purposes of obtaining information, are not considered spies”.

84 **Hague Regulations** art 29: “Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or the enemy’s army” are not considered spies.

85 **Hague Regulations** art 30: “A spy taken in the act shall not be punished without previous trial.” **Geneva Convention IV** art 5: “[...] Where in occupied territory an individual 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, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of a fair and regular trial prescribed by the present Convention.” See also **Crimes Act 1961** s 78 and **AFDA** ss 13 and 26. For fair and proper trial see Chapter 17.

- c. if captured, interned or detained are not entitled to PW status,<sup>86</sup> but remain entitled to fundamental guarantees of humane treatment.<sup>87</sup>

**6.7.5** A person engaged in espionage who returns to his or her own forces cannot be denied PW status or tried for that act of espionage if subsequently captured.<sup>88</sup>

**6.7.6** Espionage is not prohibited by LOAC but is prohibited under the domestic law of most States, including New Zealand.<sup>89</sup> Spies captured by a New Zealand force overseas may be tried before the Court Martial of New Zealand (Court Martial).<sup>90</sup> If there is doubt as to the status of a person suspected of being a spy, he or she is to be treated as a PW until his or her status is determined by a competent tribunal.<sup>91</sup> He or she is to be treated humanely and is not to be executed.<sup>92</sup> The use, by spies, of the uniforms, emblems and insignia of the opposing force or a neutral force does not technically amount to treachery or perfidy.<sup>93</sup>

**6.7.7** Members of the NZDF who capture suspected spies:

- a. are to grant them quarter and treat them humanely;<sup>94</sup> and
- b. are not to punish them.<sup>95</sup>

86 **Geneva Protocol I** art 46(1) states that “any member of the armed forces of a Party to the conflict who falls into the hands of an adverse party while engaging in espionage shall not have the right to status of prisoner and may be treated as a spy”. See **Geneva Convention IV** art 5: “Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under Geneva Convention IV. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the right to a fair and regular trial. The protections of Geneva Convention IV shall be granted at the earliest date consistent with the security of the state or occupying power.” **Geneva Protocol I** art 46(1) states that “any member of the armed forces of a Party to the conflict who falls into the hands of an adverse Power while engaging in espionage shall not have the right to the status of prisoner and may be treated as a spy”. See also **Tallinn Manual** rule 66(b) with respect to cyber espionage.

87 **Geneva Protocol I** art 75 provides fundamental protections for persons not entitled to higher protection under the Geneva Conventions or Geneva Protocol I. See also **Geneva Convention IV** art 5.

88 **Hague Regulations** art 31: “A spy who, after re-joining 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.” See also **Geneva Protocol I** art 46(4).

89 **AFDA** s 13 confers jurisdiction to try a person who spies for the enemy; s 26 creates the offence of spying in a defence area or on a naval ship outside New Zealand; s 27 creates the offence, in a defence area or on a naval ship outside New Zealand, of seducing any person subject to the AFDA from his or her duty or allegiance; and s 90 concerns the arrest abroad of spies and persons seducing or endeavouring to seduce persons from their duty or allegiance. See **Crimes Act 1961** s 78 with respect to espionage committed by a person owing allegiance to the sovereign of New Zealand and **AFDA** ss 13 and 26.

90 See **DM 69** (2 ed) Volume 1, Chapter 2, Section 5, referring to **AFDA** s 13.

91 **Geneva Protocol I** art 46(1): “Any member of the armed forces of a Party to the conflict who falls into the hands of an adverse party while engaging in espionage shall not have the right to status of prisoner and may be treated as a spy”.

92 In the **Almelo Trial**, the British Military Court held that even if the British pilot captured in civilian clothes was considered to be a spy, it was nevertheless necessary to give him the benefit of a fair trial. The execution of the pilot in the absence of such a trial was a war crime. Note that New Zealand has abolished the death penalty (see **Abolition of the Death Penalty Act 1989**).

93 **Geneva Protocol I** art 39(3) states that nothing in art 39 or in art 37(1)(d) “shall affect the existing generally recognized rules of international law applicable to espionage”.

94 **Geneva Protocol I** art 75 provides fundamental protections for persons not entitled to higher protection under the Geneva Conventions or Geneva Protocol I.

95 For fair and proper trial see Chapter 17.

- 6.7.8** If members of the NZDF are required to conduct operations that may be regarded by the opposing force as espionage, the commander responsible for the mission is to ensure that they are fully informed of their rights and obligations under LOAC and the risks inherent in the operation.

## SECTION 8 – PRIVATE MILITARY AND SECURITY COMPANIES

### DEFINITION

**6.8.1** **Private military and security companies** are private business entities that provide military and/or security services, including:

- a. armed guarding and protection of persons, objects, convoys etc;
- b. maritime security tasks, including ship protection and harbour and wharf security;
- c. maintenance and operation of weapons systems;
- d. prisoner detention; and
- e. advice to or training of local forces and security personnel.

### RIGHTS AND OBLIGATIONS RELATING TO PRIVATE MILITARY AND SECURITY COMPANIES

**6.8.2** States retain their LOAC obligations even if they contract PMSC to perform certain activities.<sup>96</sup> LOAC obligations that must be performed by a State agent or authority cannot be contracted to PMSC.

**6.8.3** Merely contracting PMSC does not engage State responsibility for LOAC breaches committed by its personnel. The State is, however, responsible for violations attributable to it under customary international law. This is particularly so if PMSC personnel are:

- a. incorporated by the State into its regular armed forces;
- b. members of organised armed forces, groups or units under a command responsible to the State;
- c. formally authorised to carry out functions normally conducted by organs of the State; or
- d. acting on the specific instructions of the State or under its direction or control.

**6.8.4** States must provide reparations for violations of LOAC and international human rights law (IHRL) caused by wrongful conduct of PMSC personnel when such conduct is attributable to the State.

### RIGHTS AND OBLIGATIONS OF PERSONNEL OF PRIVATE MILITARY AND SECURITY COMPANIES

**6.8.5** PMSC personnel are:

- a. bound by LOAC, regardless of their status;
- b. protected as civilians unless they are incorporated into the armed forces or are members of organised armed groups under a command responsible to a State;

96

See **Montreux Document**.



- c. immune from attack unless they take a direct part in hostilities;<sup>97</sup>
- d. entitled to PW status in IAC if they are persons accompanying the armed forces;<sup>98</sup>
- e. bound by IHRL to the extent that they exercise governmental authority; and
- f. face individual criminal liabilities for breaches of LOAC.

### OBLIGATIONS IN RESPECT OF ENGAGING PRIVATE MILITARY AND SECURITY COMPANIES

**6.8.6** Nothing in this manual provides authority for any member of the NZDF to engage the services of PMSC. PMSC are not to be engaged without the specific authority of the Chief of Defence Force (CDF). If permission has been given to engage PMSC, members of the NZDF responsible for selecting and engaging the PMSC are to:

- a. ensure the contract of engagement is not concluded unless it is cleared by the Director of Defence Legal Services (D DLS);
- b. have regard to the 'Good Practices for Contracting States';<sup>99</sup>
- c. ensure that PMSC are not contracted to perform duties that LOAC explicitly assigns to New Zealand, eg powers of responsible officer over PW camps or internment camps (ICs);<sup>100</sup>
- d. ensure the contract does not require PMSC personnel to directly participate in hostilities;
- e. assess the capacity of the PMSC to carry out its activities in conformity with New Zealand law, LOAC and IHRL;
- f. examine the past conduct of the PMSC and its personnel, to ensure that it has either:
  - (1) no record of involvement in serious, organised or violent crime, sexual offences, LOAC violation, or corruption; or
  - (2) appropriately remedied involvement in serious crime by effectively cooperating with authorities, taking disciplinary measures against those involved, and providing victims with appropriate reparation;
- g. conduct comprehensive inquiries as to whether personnel, particularly those who will be armed, have a record of involvement in serious crime or have been dishonourably discharged from armed or security forces;
- h. establish whether the PMSC have been rejected from contracts due to misconduct of the PMSC or their personnel;

<sup>97</sup> See Section 5.

<sup>98</sup> See **Geneva Convention III** art 4(A)(4).

<sup>99</sup> See **Montreux Document**.

<sup>100</sup> See Chapter 12.

- i. examine the financial and economic capacity of the PMSC, including for liabilities that it may incur;
- j. determine whether the PMSC and their personnel possess or are in the process of obtaining requisite registrations, licences or authorisations; and
- k. determine whether the PMSC maintain accurate and up to date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the contracting State and other appropriate authorities.

**6.8.7** The commander of a New Zealand force that employs PMSC is to ensure that they respect LOAC. In particular, members of the NZDF responsible for engaging, managing or dealing with PMSC are to:

- a. ensure that PMSC and their personnel are aware of their obligations under LOAC and are trained accordingly;
- b. not encourage or assist violations of LOAC by PMSC personnel;
- c. take appropriate measures to prevent any violations of LOAC by PMSC personnel;
- d. take all feasible measures to suppress violations of LOAC committed by PMSC personnel through the application of this manual and the AFDA;<sup>101</sup>
- e. ensure that the PMSC respect New Zealand's obligation under IHRL;
- f. take all necessary steps to prevent, investigate and provide effective remedies for misconduct of PMSC and their personnel; and
- g. investigate and prosecute, extradite or surrender PMSC personnel suspected of international crimes.<sup>102</sup>

**6.8.8** In the event of improper or unlawful conduct, members of the NZDF responsible for managing the PMSC are to impose appropriate contractual sanctions, including:

- a. immediate or graduated termination of the contract;
- b. financial penalties;
- c. removal from consideration for future contracts; and/or
- d. removal of individual wrongdoers from the performance of the contract.

101 See **AFDA** s 16 covering jurisdiction over civilians in the employment of a New Zealand force on active service.

102 See Chapter 17.

## SECTION 9 – THE APPLICATION OF LAW OF ARMED CONFLICT TO COALITION FORCES

### DEFINITION

**6.9.1 Coalition force** means any force of one or more States with which a New Zealand force operates in partnership. It includes an international force, a UN-mandated force, a regional arrangement, or an exercise of collective self-defence. It also includes NZDF assistance to foreign armed forces or police forces.

### NEW ZEALAND DEFENCE FORCE OBLIGATIONS WITHIN COALITION OPERATIONS

**6.9.2** Whatever its legal basis, membership of a coalition force does not relieve members of the NZDF of their LOAC obligations. The legality of their actions will be determined against the LOAC obligations of New Zealand, not those of its coalition partners. This remains the case even when operating under the mandate of an international organisation such as the UN.<sup>103</sup>

**6.9.3** Members of the NZDF serving in coalition operations:

- a. are to comply with LOAC obligations applicable to New Zealand, regardless of the obligations of coalition partners; and
- b. are not to aid or abet, incite or conspire with members of another force to perform acts which breach the LOAC obligations of New Zealand.

### LEGAL INTEROPERABILITY ARRANGEMENTS

**6.9.4** Coalition operations generally involve a disparity of LOAC obligations amongst coalition partners. Complex questions may arise as to the legal responsibility of different contingents and the effect of legal obligations on the exercise of command and control. This situation is known as ‘legal interoperability’.

**6.9.5** Because of the serious implications for members of the NZDF and for New Zealand of any lack of clarity concerning legal interoperability, members of the NZDF responsible for planning or executing New Zealand involvement in coalition operations are to ensure that D DLS is engaged from the outset. Wherever practicable, an NZDF LEGAD is to be provided to the coalition force headquarters, at least for the initial phases of the operation.

**6.9.6** Treaties may specifically address interoperability between States Parties and non-Parties,<sup>104</sup> or the matter may be dealt with by domestic legislation<sup>105</sup> or in coalition agreements or arrangements.

103 See *Attorney General v Nissan*. The **UN Charter** prevails over all treaties including those concerning LOAC (see art 103). No UN resolution has ever conflicted with LOAC.

104 **Cluster Munitions Convention** art 21(3) states that “States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to the Convention that might engage in activities prohibited to a State Party.” Nevertheless, art 21(4) states that nothing in art 21(3) “shall authorise a State Party: (a) To develop, produce or otherwise acquire cluster munitions; (b) To itself stockpile or transfer cluster munitions; (c) To itself use cluster munitions; or (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control”. See also **Cluster Munitions Prohibition Act 2009** s 11(6) and Chapter 7.

105 **Anti-Personnel Mines Prohibition Act 1998** s 8(d) states that “a member of the Armed Forces may, in the course of his or her duties, participate in operations, exercises, or other military activities with armed forces of a State not a party to the [Ottawa] Convention that engage in conduct prohibited by section 7(1), if that participation does not amount to active assistance”. See also Chapter 7.

## LEGAL INTEROPERABILITY MATRIX

- 6.9.7** Disparity of legal obligations may necessitate the drawing-up of a detailed ‘interoperability matrix’ setting out the respective legal positions of coalition States. Variables which may legally constrain the coalition commander’s freedom to act include the following:
- a.** All contingents are governed by the peremptory norms of customary international law (*jus cogens*), eg those that prohibit genocide, torture, slavery and crimes against humanity.<sup>106</sup>
  - b.** Contingents are governed by the rules of customary international law. Some, however, may object to particular rules or may disagree that certain rules form part of customary international law, or that those rules apply to the circumstances in question.<sup>107</sup>
  - c.** All contingents are governed by the provisions of treaties having the status of customary international law, in particular the Geneva Conventions and Hague Regulations.
  - d.** All contingents are governed by Geneva Convention Common Article 3 during NIAC.
  - e.** Contingents from most States, including New Zealand, are parties to Geneva Protocol I and will, subject to any reservations, apply it in its entirety.<sup>108</sup> Many States will, even if not party to Geneva Protocol I, regard its most important provisions as declaratory of customary international law and will apply it accordingly.
  - f.** Many States will apply Geneva Protocol II to such a conflict, but not all States will agree on the threshold for application to a particular conflict.
  - g.** Contingents will be bound by the treaty obligations entered into by their sending State. These obligations may, however, be subject to differing reservations or understandings.<sup>109</sup> Not all parties to a treaty will necessarily have the same obligations under it.
  - h.** Contingents from some States will only apply treaty obligations in respect of an opposing force which is also a party, or a party that accepts and applies them. Many other States, including New Zealand, will apply treaty obligations regardless of the obligations of the opposing force.
  - i.** States sometimes apply, for policy reasons, the terms of a treaty to which they are not a party. A State that declares that it will apply the terms of a treaty cannot avoid its responsibilities by reference to the technical question of legal applicability.<sup>110</sup> A State that is a signatory to a

106 For *jus cogens* rules see Chapter 3. Not all States will agree that a particular obligation has *jus cogens* status.

107 For customary international law see Chapter 3.

108 For reservations and understandings see Chapter 3, Section 4.

109 For reservations and understandings see Chapter 3, Section 4.

110 **Tokyo War Crimes Trial** at p503: Japan had declared that, although not formally bound by the Geneva Conventions of 1929, they would apply with all necessary modification. Japan was therefore bound to comply with the most important provisions.

treaty but has not ratified it must not do anything inconsistent with the terms of that treaty.<sup>111</sup>

- j. States may unilaterally renounce the use of a weapon or impose limitations on its use outside of any treaty framework.<sup>112</sup>

**6.9.8** Disparities in obligations are compounded by national, political and military requirements, ROE and restrictions on tasks and missions. For example, a coalition headquarters may issue coalition ROE, but troop-contributing nations may constrain those ROE further to meet their own LOAC obligations.<sup>113</sup>

**6.9.9** A coalition commander may find that certain tasks can be conducted by some national elements but not by others. Because coalition command can only be exercised through the commanders of national elements, it is essential that coalition commanders are aware of the legal rights and obligations which govern each member of the coalition. A disparity in obligations, however, cannot be used by a commander to circumvent legal obligations.<sup>114</sup> It is unlawful to ask another force to perform acts that breach LOAC.<sup>115</sup> For example, it is illegal to hand a detainee over to another contingent in the coalition in the expectation that the person will be tortured, or to ask a force from a non-party to the Ottawa Convention to lay APMs on its behalf.<sup>116</sup>

## INTEROPERABILITY IN COUNTRIES WITH POOR HUMAN RIGHTS RECORDS

**6.9.10** Members of the NZDF may be required to cooperate with the armed forces or police forces of States in which respect for LOAC or human rights law is weak. This is often the case in countries involved in NIAC. Cooperation with the forces of such States may be necessary for them to develop capability and professionalism. In such cases, members of the NZDF are to:

- a. use every reasonable opportunity to disseminate LOAC standards and encourage host-State forces to comply with those standards;
- b. report all breaches of LOAC that they observe;
- c. refuse to assist any person to commit a breach of LOAC;
- d. report any information or well-founded suspicion relating to the potential for the force that they are assisting to breach LOAC.<sup>117</sup>

<sup>111</sup> See **Vienna Convention** art 18 and Chapter 3.

<sup>112</sup> See for example, **Declaration on Anti-Vehicle Mines** by New Zealand and 10 other States.

<sup>113</sup> For ROE see Chapter 2.

<sup>114</sup> **Geneva Convention IV** art 48: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or another High Contracting Party in respect of the preceding Article [grave breaches]." See also **Geneva Convention I** art 51, **Geneva Convention II** art 52 and **Geneva Convention III** art 131.

<sup>115</sup> **Environmental Modification Convention** art 1(2): "Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in [prohibited activities]." **Nicaragua v USA**: Dissemination of a publication which advocated breaches of LOAC, was a breach of general principles of humanitarian law. See also **Ottawa Convention** art 1(1)(c), **Chemical Weapons Convention** art 1(1)(c), **ILC Articles on State Responsibility** art 16, and Chapter 17.

<sup>116</sup> See **Anti-Personnel Mines Prohibition Act 1998** s 8(d). For rules relating to the prohibition on APMs, see Chapter 7.

<sup>117</sup> This is particularly important where persons deprived of their liberty are required to be surrendered to a coalition partner. See Chapter 12.

# WEAPONS AND MUNITIONS

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## SECTION 1 – INTRODUCTION

- 7.1.1** This chapter deals with the rules of Law of Armed Conflict (LOAC) applicable to the 'means of warfare', ie weapons and munitions that are prohibited under LOAC or in respect of which restrictions or special obligations apply.
- 7.1.2** LOAC allows that the only legitimate purpose for which weapons and munitions can be used is to weaken opposing forces and bring about their submission. The rules relating to means of combat are intended to ensure that to the greatest extent possible the effects of military action are limited to defeating the combat capability of the opposing force and that warfare does not involve unnecessary cruelty or indiscriminate destruction, which only serves to prolong conflict or increase its brutality.
- 7.1.3** Some weapons and munitions are prohibited outright and may not be used in any circumstances. Nor may they be possessed, manufactured, stockpiled or transferred, even in times of peace. In many cases, however, the use of particular weapons or munitions has not been banned, but has rather been restricted to limit their potentially inhumane or indiscriminate effects.
- 7.1.4** Humanitarian concerns have also produced rules dealing with the deadly legacy of armed conflict, namely explosive remnants of war (ERW) which pose a threat to civilians who may later come into contact with them.
- 7.1.5** The rules set out in this chapter relate to the characteristics of weapons and munitions, not the use to which they are put. A completely lawful weapon can still be used in an unlawful way. The rules of LOAC which deal with the way that weapons and munitions are used are set out in Chapter 8.
- 7.1.6** **New Zealand Defence Force (NZDF) Code of Conduct** rules that relate to this chapter are:

*Do not use weapons that are prohibited.*

*Do not alter your weapons or ammunition.*



## SECTION 2 – FUNDAMENTAL RULES

## DEFINITIONS

- 7.2.1 Weapons and munitions** means every device designed or adapted to cause harm to the opposing force including all arms, firearms, systems, explosive ordnance, projectiles, ammunition, rockets, mines, explosive devices, bombs, and missiles, including experimental weapons and munitions not yet in use.
- 7.2.2 Concrete and direct military advantage anticipated** means a good-faith expectation that the use of the weapon or munition will make a relevant and proportional contribution to the objective of the military attack involved. The term ‘military advantage’ involves a number of considerations, including the security of the force.<sup>1</sup>

## THE RIGHT TO CHOOSE THE MEANS OF COMBAT IS NOT UNLIMITED

- 7.2.3** The right of parties to an armed conflict to choose means of combat is not unlimited.<sup>2</sup> It is prohibited to use weapons or munitions that are:
- a. of a nature to cause superfluous injury or unnecessary suffering;<sup>3</sup>
  - b. indiscriminate in their effect; or
  - c. intended or likely to cause widespread, long-term and severe damage to the natural environment.
- 7.2.4** Although the general principles upon which weapons are considered to be unlawful are clear, States generally prohibit or restrict the use of a weapon or munition only when it is dealt with specifically in a treaty.
- 7.2.5** The international regulation of weapons and munitions involves balancing military necessity against humanitarian concerns. Once a weapon or munition is subject to comprehensive prohibition, however, members of the NZDF are no longer entitled to take military necessity into account as the proportionality balance has already been established. The weapon cannot be used even if to do so offers a definite military advantage which, in the view of the combatant, outweighs the humanitarian concerns arising from it. For example, a member of the NZDF cannot decide that in the circumstances the use of poisonous gas produces a more humane or effective result than high explosive, because chemical weapons are banned outright and must not be used at all.

<sup>1</sup> **Geneva Protocol I New Zealand Declaration**, New Zealand understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of that attack and that the term ‘military advantage’ involves a variety of considerations, including the security of attacking forces. It is further understood that the term “concrete and direct military advantage anticipated” [...] means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

<sup>2</sup> See **Geneva Protocol I** art 35(1), **Conventional Weapons Convention** Preamble and, in respect of armed conflict at sea, **San Remo Manual** rule 38. In its **Nuclear Weapons Opinion** (at [77]) the ICJ stated that “the conduct of military operations is governed by a body of legal presumptions [...] because the right of belligerents to adopt means of injuring the enemy is not unlimited”.

<sup>3</sup> See **ICRC Customary IHL** rule 70.

- 7.2.6** In deciding whether a weapon or munition is prohibited or restricted by customary international law, reference must be made to the practice of States.<sup>4</sup> A weapon or munition type that is widely used by a number of States is unlikely to offend against LOAC.

### WEAPONS OR MUNITIONS CAUSING SUPERFLUOUS INJURY AND UNNECESSARY SUFFERING ARE PROHIBITED

- 7.2.7** All weapons and munitions are designed to render members of the opposing force unable to continue to fight or to degrade that force's equipment or other property. This is done to gain a concrete and direct military advantage. Although regrettable in humanitarian terms, suffering and injury is an inevitable part of armed conflict and is not unlawful when it results from an attack with lawful weapons directed against a military objective. There is no LOAC obligation to refrain from using a lawful, but highly destructive, weapon against members of the opposing force in favour of one that is less effective. Being better armed than the enemy is not a breach of LOAC.<sup>5</sup>
- 7.2.8** A weapon is not unlawful simply because it is liable to cause large numbers of casualties amongst the opposing force, or large numbers of fatalities amongst those casualties. Large projectiles used to destroy materiel will almost certainly kill outright any person hit by one. However, the effect on persons does not render the munition unlawful since it is designed to achieve its lawful purpose and no more.
- 7.2.9** By contrast, some weapons or munitions cause superfluous injury and unnecessary suffering or uselessly aggravate suffering or the wounding effect to an extent that goes beyond that demanded by military necessity. Such weapons and munitions are prohibited.<sup>6</sup> Weapons or munitions likely to be in breach of this principle are those that:
- a.** deliberately ensure infection of the wound, cause wound shapes that are unusually difficult to suture or heal, or employ fragments or projectiles that are difficult to locate or remove from the human body;
  - b.** are intended to render death inevitable;<sup>7</sup> and
  - c.** are intended to cause pain or long-term effects beyond that which is a natural incident of being injured or disabled.

4 For customary international law see Chapter 3.

5 Nor does it breach the principle of proportionality, which protects civilians, not persons who are the lawful subject of attack. For proportionality see Chapter 4.

6 The **Saint Petersburg Declaration** provides that the employment of arms which uselessly aggravate the sufferings of disabled men would be contrary to the laws of humanity. **Hague Regulations** art 23(e) states that is "especially forbidden [...] to employ arms, projectiles, or material calculated to cause unnecessary suffering". **Geneva Protocol I** art 35(2) extends the term to cover "superfluous injury or unnecessary suffering." **Rome Statute** art 8(2)(b)(xx) states that the following is a war crime: "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 and are included in an annex to this Statute [...]." No such annex has been brought into effect. See also **Conventional Weapons Convention** Preamble and **ICRC Customary IHL** rule 70. For 'military necessity' see Chapter 4.

7 **Saint Petersburg Declaration** states that arms that render the death of enemy combatants inevitable would be contrary to the laws of humanity.

- 7.2.10** Members of the NZDF are not to use weapons or munitions that are of a nature to cause superfluous injury or unnecessary suffering.

#### INDISCRIMINATE WEAPONS AND MUNITIONS ARE PROHIBITED

- 7.2.11** **Indiscriminate weapons and munitions** are weapons and munitions that, because of their physical characteristics:

- a. cannot be directed at specific military objectives;<sup>8</sup> or
- b. cannot be limited in their destructive effects as required by LOAC.<sup>9</sup>

- 7.2.12** Members of the NZDF are not to use weapons or munitions that are indiscriminate.<sup>10</sup>

- 7.2.13** A weapon or munition is not unlawful simply because it may cause injury or damage beyond the limits of the military objective against which it is directed. Almost all weapons and munitions have this capacity. LOAC is only breached when the propensity of a weapon or munition to cause civilian casualties and damage cannot be controlled. Any weapon or munition that is of a nature to strike both military objectives and civilians or civilian objects without distinction, is inherently indiscriminate. Weapons that produce destructive effects which spread unchecked (such as bacteria or radiation) also breach this principle.

- 7.2.14** A breach of the distinction obligation may also arise because the weapon is not accurate enough to be aimed discriminately. How accurate a weapon must be to comply with LOAC is determined by the circumstances and the state of available technology. Weapons that cannot be effectively aimed, such as free rockets, are regarded as indiscriminate if they are used in areas in which there are likely to be civilians and civilian objects as well as military objectives. They may still be lawful if used in the increasingly rare circumstances where only military objectives exist within the area of attack. Even guided weapons can be indiscriminate if used at extreme range such that the capacity to effectively aim them degrades.<sup>11</sup> A weapon that is inherently accurate can still be employed in an indiscriminate manner that renders the use unlawful, not the weapon.<sup>12</sup>

- 7.2.15** Development of ‘smart weapons’, such as highly accurate missiles, does not mean that such weapons, available only to the wealthier nations, can alone satisfy the test of discrimination. The arsenals of other nations are not rendered unlawful per se. However, the circumstances in which ‘dumb weapons’ can be used lawfully may be greatly limited. Common sense and a realistic analysis of the facts must guide the application of this test.

8 See **Geneva Protocol I** Art 51(4)(b).

9 See **Geneva Protocol I** Art 51(4)(c).

10 See **Martić Appeal** at [247]. The Appeals Chamber held that the M-87 Orkan was an indiscriminate weapon. It was incapable of hitting specific targets in the circumstances of the case, namely being fired into the city of Zagreb, a densely populated urban area, at maximum range of 50 km, producing a dispersion error of up to 1,000 metres in any direction and an area of dispersion of bomblets on the ground of 2 hectares. See also **San Remo Manual** rule 42 in respect of armed conflict at sea and **ICRC Customary IHL** rule 71.

11 In the **Strugar Trial** (see [345]) the use of Maljutka rockets at extreme range against the Old Town of Dubrovnik was held to be indiscriminate.

12 **Galić Trial** at [648–699] where artillery was found to have been used indiscriminately.

- 7.2.16** Some weapons, such as anti-personnel mines (APMs), are banned because they easily lend themselves to indiscriminate use.<sup>13</sup> Other weapons and munitions have been subject to restrictions to limit their inherent propensity for indiscriminate use, eg anti-vehicle mines<sup>14</sup> and incendiary weapons.<sup>15</sup>

#### **WEAPONS OR MUNITIONS CAUSING WIDESPREAD, LONG-TERM AND SEVERE DAMAGE TO THE NATURAL ENVIRONMENT ARE PROHIBITED**

- 7.2.17** Members of the NZDF are not to use weapons or munitions that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.<sup>16</sup> There is no equivalent provision in respect of non-international armed conflict (NIAC). However, this rule is to be applied by members of the NZDF in all operations.
- 7.2.18** Although there is no general definition of ‘widespread’, ‘long-term’ or ‘severe’,<sup>17</sup> these terms must be applied in a common-sense way. Any weapon or munition of sufficient destructive force to neutralise military objectives, such as defensive positions, warships or aircraft, is likely to cause damage to the natural environment as a result. This fact alone does not render a weapon unlawful. The prohibition clearly does not apply to weapons causing only a transitory effect or one that extends to only a limited area.
- 7.2.19** The choice of weapons, however, is governed by the fundamental rule that environmental damage or destruction must be limited by the greatest extent possible to that which is demanded by military necessity.<sup>18</sup> Where such damage is clearly beyond that demanded by military necessity, the use of such a weapon will be a war crime.

<sup>13</sup> For APMs see Section 6.

<sup>14</sup> **Conventional Weapons Protocol II** art 3(8) states that indiscriminate use of mines, booby-traps and other devices is prohibited. For mines other than APMs see Section 7.

<sup>15</sup> For incendiary weapons see Section 7.

<sup>16</sup> **Geneva Protocol I** art 35(3): “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” **Environmental Modification Convention** art 1(1): “Each State Party to this Convention undertakes 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.” **Rome Statute** art 8(2)(b)(iv) states that “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 to be anticipated” is a war crime. **Nuclear Weapons Opinion** at [30]: States must take environmental considerations into account when assessing what is necessary and proportionate. See also **Conventional Weapons Convention** Preamble, **San Remo Manual** rule 44 in respect of armed conflict at sea, **ICRC Customary IHL** rule 45 and **Conventional Weapons Protocol III** art 2(4).

<sup>17</sup> **Environmental Modification Convention** Understandings defines ‘widespread’, ‘long-lasting’ and ‘severe’. The interpretation is intended exclusively for that Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connection with any other international agreement. For environmental warfare see Chapter 8.

<sup>18</sup> See **ICRC Customary IHL** rule 44. For environmental warfare see Chapter 8.

**SECTION 3 – NEW ZEALAND DEFENCE FORCE WEAPONS POLICY****UNAUTHORISED MODIFICATION, ADAPTATION OR ACQUISITION IS PROHIBITED****7.3.1** Members of the NZDF are not to:

- a.** modify any weapon or munition in any manner intended or likely to cause superfluous injury or unnecessary suffering, or render it indiscriminate or liable to cause widespread, long-term and severe damage to the natural environment;
- b.** use any weapon or munition in a method other than as they have been trained with the intention of causing superfluous injury or unnecessary suffering, or of rendering the weapon or munition indiscriminate or liable to cause widespread, long-term and severe damage to the natural environment; or
- c.** acquire or use any weapon or munition other than that which has been issued for their use unless specifically authorised to do so.

**7.3.2** The weapons and munitions acquired for use by the NZDF are effective and lawful in their existing form when issued. Altered or non-issue weapons or munitions are likely to be inaccurate and unsafe or malfunction at a critical moment. It is, therefore, neither lawful nor necessary for members of the NZDF to modify, adapt or acquire weapons and munitions to produce any other effect.

**7.3.3** Members of the Armed Forces are permitted to use captured enemy weapons and munitions when emergency circumstances make it necessary to do so. However, they are not to acquire enemy weapons that are known to breach LOAC for the purpose of avoiding the obligations set out in this chapter.

**7.3.4** Use of privately acquired weapons or munitions presents the risk of introducing weapons and munitions that breach LOAC. It also has the potential to undermine the NZDF's capacity to conduct forensic examination of shooting incidents.

## SECTION 4 – WEAPONS AND MUNITIONS REVIEW

**7.4.1** Members of the NZDF responsible for the development, acquisition or bringing into service of weapons and munitions for use by the NZDF are to ensure that those weapons and munitions comply with LOAC. As early as possible in the project, the programme sponsor is to ensure that a legal review of the weapon or munition is obtained from the Director of Defence Legal Services (D DLS) in order to ensure LOAC compliance.<sup>19</sup> The following information is to be provided to D DLS:

- a. Full description of the weapon or munition, including trade names or other names by which it is known.
- b. Name and address of manufacturer(s).
- c. Reason for acquiring.
- d. Intended and likely use of the weapon or munition.
- e. General technical data available on the weapon or munition.
- f. Intended and likely effect of the weapon or munition on materiel and personnel against which it is used, including the results of ballistic and other scientific analysis (if any).
- g. Reports (if any) on the nature of injuries that have been encountered from use of the weapon or munition.
- h. Use by other armed forces or by agencies in New Zealand or overseas.
- i. Any other information likely to be of relevance to the assessment of the legality of the weapon or munition.

**7.4.2** The review is to identify NZDF's obligations under Geneva Protocol I, other relevant treaties and customary international law and is to consider the use of the weapon in all likely operational environments. Vetting of munitions is to include, where appropriate, regard to technical measures to minimise the occurrence of ERW.<sup>20</sup> Likely developments in LOAC are also to be considered.<sup>21</sup>

**7.4.3** The results of all reviews are to be provided to the Chief of Defence Force (CDF) as well as the member of the NZDF responsible for the acquisition. No weapon or munition is to be developed, acquired or brought into service if it does not pass D DLS review.

19 **Geneva Protocol I** art 36: "In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

20 See **Conventional Weapons Protocol V** art 9 and Technical Annex Part 3. Generic preventative measures include production processes designed to achieve the greatest reliability of munitions and subject to certified quality control measures. Internationally recognised quality assurance standards should be used with live-firing acceptance testing over a range of conditions or other validation procedures. High reliability standards should be required in the course of explosive ordnance transactions and transfers.

21 An international trend towards the prohibition of a particular weapon or munition may be discernible before a comprehensive ban comes into effect.

- 7.4.4** Use of the weapon or munition by other States and reviews of legality conducted by those States are to be taken into account. However, given the disparate treaty obligations and understandings amongst States, legality under New Zealand's obligations is to be determinative.
- 7.4.5** By this process, members of the NZDF can be confident that all weapons and munitions issued for their use are lawful.

#### NEWLY DEVELOPING WEAPONS

- 7.4.6** The means of warfare are not unlimited; developing technologies produce the possibility of means of warfare as yet not known.<sup>22</sup> The principles of LOAC apply to all potential technology available for military use, including:
- a.** electromagnetic and radiation weapons;
  - b.** kinetic energy and hypervelocity weapons;
  - c.** laser weapons (blinding laser weapons are already prohibited);<sup>23</sup>
  - d.** particle beam weapons;
  - e.** sound weapons;
  - f.** explosive proximity weapons;
  - g.** robotic weapons; and
  - h.** weapons with artificial intelligence.

<sup>22</sup> *Nuclear Weapons Opinion* at [86]: LOAC applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.

<sup>23</sup> See Section 6.



## SECTION 5 – WEAPONS OF MASS DESTRUCTION

### WEAPONS OF MASS DESTRUCTION ARE PROHIBITED

**7.5.1** A **weapon of mass destruction** (WMD) is any weapon that is intended or likely to cause widespread and indiscriminate destruction and loss of life, regardless of how that effect is created. WMD is a generic term which is not precisely defined by any treaty. WMDs include nuclear, radiological, biological and chemical weapons, and include any other weapons with similar destructive effects. These are discussed below.

**7.5.2** WMD are inherently indiscriminate. They may also be causative of superfluous injury and unnecessary suffering and are likely to cause widespread, long-term and severe damage to the natural environment. In addition to the rules of LOAC that prohibit the use of WMD, there are also international law rules prohibiting the proliferation, transfer and trafficking of such weapons.<sup>24</sup>

**7.5.3** Members of the NZDF are not to:

- a. use, manufacture, acquire or possess WMDs;<sup>25</sup> or
- b. assist, encourage or induce anyone to use, develop, produce, acquire, stockpile, retain or transfer WMDs.

### NUCLEAR WEAPONS ARE PROHIBITED

**7.5.4** A **nuclear weapon** is any weapon or explosive device capable of releasing nuclear energy.<sup>26</sup> For the purposes of these orders, the term includes radiological weapons that cause casualties through the release of radiation, rather than through explosive effect.<sup>27</sup> Depleted uranium (DU) munitions<sup>28</sup> are not nuclear weapons because they are only weakly radioactive and do not employ an explosive effect.

**7.5.5** While use or threat of use of nuclear weapons is generally unlawful under international law,<sup>29</sup> it is completely unlawful under New Zealand

24 See **Treaty of the Non-Proliferation of Nuclear Weapons** and the **Proliferation Security Initiative**.

25 Deployment of WMDs is outside the current capabilities of the NZDF. Actively assisting in such activities would clearly be in breach of New Zealand's international law obligations.

26 **NZNFZDAC Act 1987** s 2: "Nuclear explosive device means any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used, whether assembled, partly assembled, or unassembled; but does not include the means of transport or delivery of such a weapon if separable from and not an indivisible part of it."

27 So-called 'dirty bombs' fit within this category. Radiological weapons are not 'nuclear explosive devices' since they do not release energy as a result of nuclear fission or fusion.

28 For DU see Section 8.

29 In **Nuclear Weapons Opinion** (at [105(2)(E)]) the ICJ concluded that the "threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". The Court held that it was not possible to say, in the then state of international law, whether the use of nuclear weapons is unlawful in an extreme case of self-defence where the survival of the state itself is at stake. See also **Shimoda Case** where the Tokyo District Court declined to comment on the legality of nuclear weapons in general, but held that the bombs dropped on Hiroshima and Nagasaki caused such indiscriminate and severe suffering that they violate the laws of war. Most States consider that nuclear weapons offend against customary law in that they cause unnecessary suffering or superfluous injury, are indiscriminate and cause widespread long-term and serious damage to the natural environment. Some nuclear powers agreed to **Geneva Protocol I** on the understanding that its rules applied exclusively to conventional weapons. In ratifying the **Rome Statute**, France declared that art 8(2)(b) applies only to conventional weapons and cannot regulate or prohibit the use of nuclear weapons unless they become subject to a comprehensive ban and are specified



law.<sup>30</sup> In addition, warships of other States must satisfy the Government that they are not carrying a nuclear-explosive device in order to gain permission to enter New Zealand's internal waters<sup>31</sup>, as must aircraft to land in New Zealand.<sup>32</sup>

**7.5.6** New Zealand ratified the Nuclear Weapon Ban Treaty. When the treaty comes into force, it will prohibit development, testing, production, stockpiling, stationing, transfer, and use of nuclear weapons.<sup>33</sup> It will also prohibit the 'threat of use' of nuclear weapons; an issue which strikes at the heart of nuclear deterrence. Any "direct or indirect" control over nuclear weapons or other nuclear explosive devices is forbidden.

**7.5.7** Members of the NZDF are not to:

- a. use or threaten to use nuclear weapons;<sup>34</sup>
- b. manufacture, acquire, possess or have control over nuclear weapons;<sup>35</sup>
- c. aid, abet or procure any person to manufacture, acquire, possess or have control over nuclear weapons;<sup>36</sup> or
- d. emplace nuclear weapons on the seabed.<sup>37</sup>

## BIOLOGICAL WEAPONS ARE PROHIBITED

**7.5.8** A biological weapon (also known as 'bacteriological', 'microbial' or 'germ' weapons) is a quantity of biological agents or toxins not justified for peaceful or protective purposes. The term includes weapons and equipment designed to use these agents or toxins in armed conflict.<sup>38</sup>

**7.5.9** Biological weapons in themselves are absolutely prohibited. Possession of agents or toxins is not prohibited to the extent that it can be justified for some lawful purpose, for example medical treatment or scientific research. However, the mere fact that a biological agent, which is being used in a weaponised form or held in quantities in excess of that required for legitimate purposes, may also have peaceful applications does not remove it from this prohibition.

**7.5.10** Members of the NZDF are not to:

in the annex to the Rome Statute. New Zealand declared that art 8(2)(b) applies to all weapons including nuclear ones.

30 **NZNFZDAC Act 1987** ss 5 and 14(2) provide that a person who manufactures, acquires, possesses or has control over a nuclear explosive device or aids, abets or procures any person to manufacture, acquire, possess or have control over any nuclear explosive device within the New Zealand Nuclear Free Zone, or in the case of a servant or agent of the Crown, anywhere in the world, is liable on conviction or indictment to imprisonment for a term not exceeding 10 years.

31 See **NZNFZDAC Act 1987** s 9.

32 See **NZNFZDAC Act 1987** s 10.

33 **Nuclear Weapon Ban Treaty** art 1.

34 See **NZNFZDAC Act 1987** ss 5 and 14(2).

35 See **NZNFZDAC Act 1987** ss 5 and 14(2).

36 See **NZNFZDAC Act 1987** ss 5 and 14(2).

37 In accordance with the **Seabed Treaty** art 1(1), Parties must not emplace nuclear weapons or other WMDs on the seabed at the ocean floor, and the subsoil thereof, beyond their territorial sea. **NZNFZDAC Act 1987** incorporates the Seabed Treaty at Schedule 4.

38 **Bacteriological Weapons Convention** art 1 defines 'biological weapon'. This is the same definition used in the **NZNFZDAC Act 1987** s 2 and the Bacteriological Weapons Convention is incorporated at Schedule 5 of the Act.

- a. use biological weapons;<sup>39</sup>
- b. develop, produce, stockpile, acquire, possess or retain biological agents or toxins other than for peaceful use;<sup>40</sup>
- c. develop, produce, stockpile, acquire, possess or retain weapons, equipment or delivery systems for biological agents or toxins;<sup>41</sup>
- d. transfer biological toxins, agents, weapons, equipment or delivery systems to any person whatsoever;<sup>42</sup> or
- e. assist, encourage or induce any State or international organisation to manufacture or acquire biological toxins, agents, weapons, equipment or delivery systems.<sup>43</sup>

## CHEMICAL WEAPONS ARE PROHIBITED

**7.5.11** **Chemical weapon**<sup>44</sup> means a munition or device specifically designed to cause death, temporary incapacitation or permanent harm to animals or humans through the release of toxic chemicals. The chemicals and their precursors are also considered to be chemical weapons, as are munitions and devices used to deliver the chemicals to a target and other equipment designed to be used in connection with such munitions and devices. The term includes ‘poisonous gas’. It does not apply to toxic chemicals and equipment used for peaceful purposes that are produced and stockpiled in amounts appropriate to their peaceful use.<sup>45</sup>

**7.5.12** Chemical weapons can be categorised as choking agents (eg chlorine and phosgene), blister agents (mustard gas and lewisite), blood agents (hydrogen cyanide), or nerve agents (sarin and soman).

39 The **Geneva Gas Protocol** prohibits the use of bacteriological methods of warfare. **NZNFZDAC Act 1987** ss 8 and 14(2) provide that any person who manufactures, stations, acquires or possesses, or has control over any biological weapon within the New Zealand Nuclear Free Zone is liable on conviction or indictment to imprisonment for a term not exceeding 10 years. See also **ICRC Customary IHL** rule 73.

40 See **Bacteriological Weapons Convention** art 1(1).

41 See **Bacteriological Weapons Convention** art 1(2).

42 See **Bacteriological Weapons Convention** art 3.

43 See **Bacteriological Weapons Convention** art 3.

44 **Chemical Weapons Convention** art 2(1): “‘Chemical Weapons’ means 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; and (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

45 See **Chemical Weapons Convention** art 2(1) and (2).

**7.5.13** Members of the NZDF are not to:<sup>46</sup>

- a. use poisonous or asphyxiating gas,<sup>47</sup> or any other chemical weapon;<sup>48</sup>
- b. conduct military preparations to use chemical weapons;<sup>49</sup>
- c. develop, produce, acquire, stockpile, or transfer chemical weapons;<sup>50</sup>  
or
- d. assist, encourage or induce any person to engage in such activities.<sup>51</sup>

**INTEROPERABILITY PROVISIONS**

**7.5.14** During coalition force operations or exercises, members of the NZDF may be required to participate with forces from nuclear-capable States. Members of the NZDF do not breach LOAC or New Zealand law simply by operating or exercising with forces of such States. However, members of the NZDF are not to directly support the use or threat of use of nuclear weapons, for example by providing security to nuclear weapons facilities or by serving onboard nuclear-armed vessels or aircraft<sup>52</sup>. Commanders are to advise CDF, through the Commander Joint Forces New Zealand (COMJFNZ), where there is the prospect of personnel being required to provide direct support to a nuclear-armed force. Wherever possible, the advice of an NZDF Legal Adviser (LEGAD) is to be obtained.

46 **Chemical Weapons (Prohibition) Act 1996** s 6(1): “Every person commits an offence who, intentionally or recklessly: (a) develops, produces, otherwise acquires, stockpiles, or retains chemical weapons; or (b) transfers, directly or indirectly, chemical weapons on another person; or (c) uses chemical weapons; or (d) engages in military preparations to use chemical weapons; or (e) assists, encourages or induces, in any way, any person to engage in any activity prohibited to a State Party under the Convention, and is liable on conviction to imprisonment for life or a fine not exceeding \$1,000,000.”

47 It is prohibited to use asphyxiating, poisonous or other gases and all analogous liquids, materials or devices (see **Geneva Gas Protocol**). See also **Rome Statute** art 8(2)(b)(xviii).

48 **Chemical Weapons Convention** art 1(1)(b) prohibits the use of chemical weapons “under any circumstances”. See also **ICRC Customary IHL** rule 74.

49 See **Chemical Weapons Convention** art 1(1)(c).

50 See **Chemical Weapon Convention** art 1(1)(a).

51 See **Chemical Weapons Convention** art 1(1)(d).

52 See **NZNFZDAC Act 1987** ss 5 (1)(b) and (2)(b).

## SECTION 6 – WEAPONS AND MUNITIONS THAT ARE THE SUBJECT OF A COMPREHENSIVE PROHIBITION

### THE USE OF EXPLODING BULLETS AGAINST PERSONNEL IS PROHIBITED

**7.6.1** An **exploding bullet** is a small-arms round intended to cause injury through its explosive effect within the human body. The term does not include exploding anti-aircraft or anti-vehicle rounds, even though such rounds may incidentally hit personnel as well as the intended target. Also not included are tracer bullets that have a small pyrotechnic charge in their base to make them visible in flight. Tracers are not intended to injure through incendiary effect.<sup>53</sup>

**7.6.2** Members of the NZDF are not to use exploding bullets against personnel.<sup>54</sup>

### THE USE OF EXPANDING BULLETS AGAINST PERSONNEL IS PROHIBITED

**7.6.3** An **expanding bullet** is a small-arms round that expands or flattens easily in the human body, for example a bullet with a hard envelope that does not entirely cover the core, or is pierced with incisions. The term covers ‘dum-dum bullets’, ‘soft-nose bullets’ and ‘hollow-point bullets’. It also includes otherwise lawful rounds that have been converted into expanding bullets by scoring into their tips or by otherwise exposing the soft core. The term does not apply to full-jacketed rounds having a small aperture in the point to increase stability and accuracy, but not to produce expansion.<sup>55</sup>

**7.6.4** Members of the NZDF are not to:<sup>56</sup>

- a. use expanding bullets against personnel in armed conflict;
- b. modify ammunition so as to cause it to expand or flatten easily in the human body<sup>57</sup>; or
- c. possess expanding bullets while deployed on armed conflict operations.

**7.6.5** Members of the Armed Forces may use expanding bullets that have been issued for their use in law enforcement operations or hostage rescues, provided that:

- a. the ammunition is only used in the context for which it was issued;<sup>58</sup> and

53 For incendiary weapons see Section 7.

54 **Saint Petersburg Declaration:** “The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.” (The prescription ‘400 grammes’ in weight has become obsolete due to developments in weapons technology.) See also **ICRC Customary IHL** rule 78.

55 Such apertures are used in some match-grade ammunition to increase its stability.

56 **Hague Declaration III:** It is prohibited to use bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions. **Rome Statute** art 8(2)(b)(xix). See **ICRC Customary IHL** rule 77.

57 Expanding rounds create larger wounds but lack the penetration of full-jacketed rounds. In an armed conflict, penetration is an essential characteristic of small arms ammunition effectiveness. In addition to being unlawful, tampering with ammunition is also unnecessary and dangerous.

58 The commentary to **ICRC Customary IHL** rule 78 acknowledges that expanding rounds are commonly used in law enforcement in order to remove a threat with the least risk of incidental injury to others through over-penetration or ricochet. The commentary also notes that Police use pistols, which have a lower velocity than assault rifles and therefore law enforcement personnel do not use the type of expanding bullets that is prohibited for military rifles.

- b. it is not used to uselessly aggravate suffering or the wounding effect of the bullets.<sup>59</sup>

**7.6.6** Armed combat operations may overlap with law enforcement operations, especially in NIAC where agents of the opposing force carry out criminal attacks. Members of the NZDF operating in environments involving both armed conflict and law enforcement are to ensure that use of expanding bullets is strictly limited to the tasks for which it has been issued and that such ammunition is removed from magazines before operations of an armed conflict nature.

### BLINDING LASER WEAPONS ARE PROHIBITED

**7.6.7** A **blinding laser weapon** is a weapon that is designed to cause permanent blindness to unenhanced vision.<sup>60</sup> The term does not apply to battlefield laser systems such as range finders and target designators.

**7.6.8** Members of the NZDF are not to use blinding laser weapons.<sup>61</sup>

**7.6.9** Development, acquisition and use of laser systems such as range finders and target designators is not prohibited, and blinding as an incidental effect of legitimate use of these devices, including against optical equipment, is not prohibited. Such systems are not to be used, however, to intentionally blind members of the opposing force or any other person. All feasible precautions are to be taken to avoid causing permanent blindness with lasers. ‘Eye-safe’ laser devices are to be preferred wherever possible. COMJFNZ is to ensure that members of the NZDF are trained in the safe employment of battlefield laser systems in order to avoid or minimise the risk of causing blindness.<sup>62</sup>

### ANTI-PERSONNEL MINES ARE PROHIBITED

**7.6.10** An **anti-personnel mine** is a munition designed to be placed under, on, or near the ground or other surface and to be exploded by the presence, proximity or contact of a person in order to incapacitate, injure or kill.<sup>63</sup> An anti-vehicle mine with an anti-handling device is not an APM.<sup>64</sup> However, any mine that has a fuse so sensitive that it will be detonated by the presence, proximity or contact of a person, is an APM, regardless of its explosive force. Directional charges are not APM if operated in the command-detonated mode. If rigged to be detonated by

59 **Rome Elements** states that element 3 of **Rome Statute** art 8(2)(b)(xix) applies in IAC and requires that “the perpetrator was aware that the nature of the bullets was such that their use would uselessly aggravate suffering or the wounding effect”. The **Kampala Resolution** made the use of such bullets a war crime in NIAC as well, with the addition of s 8(2)(e)xv to the **Rome Statute** (see **Kampala Amendment** Annex I) and the addition of a similar element of the crime pertaining to awareness of uselessness (see **Kampala Amendment** Annex II). Thus, using a soft nosed bullet to kill a terrorist in a crowded market is not a war crime because it does not uselessly aggravate the suffering of the terrorist; rather it usefully does so. For non-application of LOAC to law enforcement situations, see Chapter 5.

60 **Conventional Weapons Protocol IV** art 1: “It is prohibited to use laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.” Permanent blindness is defined at art 4 as “irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery”.

61 See **Conventional Weapons Protocol IV** art 1 and **ICRC Customary IHL** rule 86.

62 **Conventional Weapons Protocol IV** art 2: “In the employment of laser systems, High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures.”

63 See **Ottawa Convention** art 2(1).

64 See **Ottawa Convention** art 2(1).

the presence, proximity or contact of a person (eg set off by a trip wire) it will qualify as an APM.<sup>65</sup>

**7.6.11** APMs are prohibited because of the ease with which they can be used indiscriminately to harm civilians and cause other harmful effects to reconstruction.<sup>66</sup>

**7.6.12** Members of the NZDF are not to:

- a. use APMs;<sup>67</sup>
- b. develop, produce, or acquire APMs;<sup>68</sup>
- c. stockpile, retain or transfer APMs;<sup>69</sup> or
- d. assist, encourage or induce any person to engage in such activities.<sup>70</sup>

**7.6.13** Members of the NZDF may take possession of APMs where it is necessary to do so as part of their duties relating to mine clearance or training.<sup>71</sup>

#### INTEROPERABILITY PROVISIONS RELATED TO ANTI-PERSONNEL MINES

**7.6.14** During coalition force operations or exercises, members of the NZDF may be required to cooperate with forces from States that are not parties to the Ottawa Convention.<sup>72</sup> Such coalition partners may engage in activities prohibited to members of the NZDF, including use of APMs. Members of the NZDF are not prohibited from continuing to carry out their duties in support of the operation or exercise in such circumstances provided that participation does not amount to

65 For manually emplaced munitions see Section 7.

66 See **Ottawa Convention** Preamble.

67 **Ottawa Convention** art 1(1)(a) prohibits the use of APMs under any circumstances. **Anti-Personnel Mines Prohibition Act 1998** ss 7(1)(a) and (3) provide that every person who uses an APM is liable on conviction to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000.

68 **Anti-Personnel Mines Prohibition Act 1998** ss 7(1)(b) and (3) provide that every person who develops, produces or otherwise acquires an APM is liable on conviction to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000. See also **Ottawa Convention** art 1(1)(b).

69 **Anti-Personnel Mines Prohibition Act 1998** ss 7(1)(c) and (3) provide that every person who possesses, retains or stockpiles an APM is liable to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000. See also **Ottawa Convention** art 1(1)(b).

70 **Anti-Personnel Mines Prohibition Act 1998** ss 7(1)(e) and (3) provide that every person who assists, encourages or induces, in any way, anyone to engage in the conduct prohibited by the Act is liable to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000. See also **Ottawa Convention** art 1(1)(c).

71 **Anti-Personnel Mines Prohibition Act 1998** s 8(a) provides that a member of the Armed Forces, as an officer (defined in s 4(1)(b)), “may, in the course of his or her employment or duties, use, develop, produce, otherwise acquire, possess, retain, or transfer an authorised anti-personnel mine for the purposes of developing, or training persons in, techniques of mine detection, mine clearance, mine deactivation, or mine destruction”; s 8(c) provides that “an officer may, in the course of his or her employment or duties, seize, receive, or acquire an anti-personnel mine for the purposes of deactivating or destroying the mine, or retain an anti-personnel mine pending the deactivation or destruction of the mine, or transfer an anti-personnel mine for the purposes of deactivating or destroying the mine, or deactivate or destroy an anti-personnel mine”.

72 States that are not party to the **Ottawa Convention** may, nevertheless, be bound by **Conventional Weapons Protocol II** art 5, which requires that APMs that are not remotely delivered must comply with the Technical Annex unless they are placed within a perimeter-marked area monitored by military personnel and fenced off to effectively exclude civilians, and unless such weapons are cleared before the area is abandoned or handed over to another State to protect and clear.



active assistance in the prohibited conduct.<sup>73</sup> They are not obliged to prevent the use of APMs by a partner or incur the risk of casualties by making unnecessary tactical decisions in response to the existence of established anti-personnel minefields.

**7.6.15** However, members of the NZDF are not to:

- a. do anything which has the effect of breaching the prohibition set out in this section, and/or
- b. encourage, in any way, the use of APMs.

**7.6.16** If it becomes apparent that a coalition partner is likely to use APMs, or has used APMs, the commander of the New Zealand force is to advise CDF, through COMJFNZ, without delay. The advice of an NZDF LEGAD is to be sought wherever practicable.<sup>74</sup> New Zealand will encourage its coalition partners to comply with the Ottawa Convention, however, this will be done at the strategic and diplomatic level.

**7.6.17** States that are a party to the Ottawa Convention and are in a position to do so must provide assistance for mine clearance and related activities.<sup>75</sup>

#### CLUSTER MUNITIONS PROHIBITED

**7.6.18** A **cluster munition**<sup>76</sup> is a conventional munition designed to disperse or release explosive sub-munitions each weighing less than 20 kilograms.<sup>77</sup> The term includes the sub-munitions themselves. It also applies to explosive bomblets dispersed from a dispenser on an aircraft.<sup>78</sup>

**7.6.19** The definition includes all cluster munitions regardless of whether they are of the older generation of unreliable cluster munitions or newer generation munitions which may have a self-destruction/self-deactivation mechanism.

73 **Anti-Personnel Mines Prohibition Act 1998** s 8(d) provides that “a member of the Armed Forces may, in the course of his or her duties, participate in operations, exercises, or other military activities with armed forces of a State not a party to the Convention that engage in conduct prohibited by section 7(1), if that participation does not amount to active assistance in the prohibited conduct.”

74 For application of LOAC to coalition operations see Chapter 6.

75 See **Ottawa Convention** art 6. New Zealand meets its obligations under the Ottawa Convention by, amongst other things, providing specialist expertise in mine clearance to the UN.

76 See definitions at **Cluster Munitions Convention** art 2(1) and **Cluster Munitions Prohibition Act 2009** s 6.

77 **Cluster Munitions Convention** art 2(3): “‘Explosive submunition’ means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact”; art 2(13): “‘Explosive bomblet means a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact’; art 2(14): “‘Dispenser’ means a container that is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release.” See also **Cluster Munitions Prohibition Act 2009** s 5(1).

78 **Cluster Munitions Convention** art 1(2): “Paragraph 1 of this Article [regarding prohibitions] applies, *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.” **Cluster Munitions Prohibition Act 2009** s 12: “[The provisions of subpart 1 of part 2 the Act] apply, with any necessary modifications, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft, as if those explosive bomblets were cluster munitions.”

**7.6.20** ‘Cluster munition’ *does not* mean the following:<sup>79</sup>

- a. A mine.<sup>80</sup>
- b. A munition or sub-munition designed to dispense flares, smoke, pyrotechnics or chaff, or a munition designed exclusively for an air defence role.
- c. A munition or sub-munition designed to produce electrical or electronic effects.
- d. A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded sub-munitions, has all of the following characteristics:<sup>81</sup>
  - (1) Each munition contains fewer than 10 explosive sub-munitions.
  - (2) Each explosive sub-munition weighs more than four kilograms.
  - (3) Each explosive sub-munition is designed to detect and engage a single target object.
  - (4) Each explosive sub-munition is equipped with an electronic self-destruction mechanism.<sup>82</sup>
  - (5) Each explosive sub-munition is equipped with an electronic self-deactivating feature.<sup>83</sup>

**7.6.21** Cluster munitions are prohibited because of the ease with which they can be used to indiscriminately strike combatants and civilians alike and their propensity to leave large numbers of unexploded bomblets which detonate easily and take a particularly high toll amongst children. Members of the NZDF are not to:<sup>84</sup>

- a. use cluster munitions;

<sup>79</sup> See **Cluster Munitions Convention** art 2 and **Cluster Munitions Prohibition Act 2009** s 6(b).  
<sup>80</sup> **Cluster Munitions Convention** art 1(3) provides that the Convention does not apply to mines, as defined by art 2(12), ie “a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle. See also **Cluster Munitions Prohibition Act 2009** s 6(b)(i).

<sup>81</sup> For example, munitions designed to sense and destroy armoured vehicles. Such munitions have advanced sensors, autonomous guidance packages and can loiter above a target. They are capable of independently sensing and attacking specific targets such as armoured vehicles. The number of sub-munitions may be as low as two. If the sub-munition is unable to identify, characterise and engage its target type, it is typically equipped with a self-destruct or self-neutralising capability.

<sup>82</sup> **Cluster Munitions Convention** art 2(9): “‘Self-destruction mechanism’ means an incorporated automatically-functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated.” See also **Cluster Munitions Prohibition Act 2009** s 5(1).

<sup>83</sup> **Cluster Munitions Convention** art 2(10): “‘Self-deactivating’ means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, eg a battery, that is essential to the operation of the munition.” See also **Cluster Munitions Prohibition Act 2009** s 5(1).

<sup>84</sup> **Cluster Munitions Prohibition Act 2009** s 10(4) provides that a person who uses, develops, possesses, transfers etc a cluster munition is liable on conviction to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000, or both. See also **Cluster Munitions Convention** art 1(1).



- b. develop, produce, otherwise acquire, stockpile, retain or transfer<sup>85</sup> to anyone, directly or indirectly, cluster munitions; or
- c. assist, encourage or induce anyone to use, develop, produce, acquire, stockpile, retain or transfer cluster munitions.

**7.6.22** Members of the NZDF may take possession of cluster munitions where it is necessary to do so as part of their duties when involved in the clearance of cluster munition remnants.<sup>86</sup> They may also possess cluster munitions for training in detection, clearance or destruction where these have been properly authorised and issued specifically for this purpose.<sup>87</sup>

#### INTEROPERABILITY PROVISIONS RELATED TO CLUSTER MUNITIONS

**7.6.23** During coalition force operations or exercises members of the NZDF may be required to cooperate with forces from States that are not parties to the Cluster Munitions Convention. CDF will notify, in writing, the appropriate authorities of such States of New Zealand's obligations under the Convention. Such notification may occur during coalition agreement negotiations or when the New Zealand force joins the coalition force. New Zealand must also:

- a. encourage non-party States to ratify, accept, approve or accede to the Convention, with the goal of attracting the adherence of all States;<sup>88</sup>
- b. promote the norms the convention establishes;<sup>89</sup> and
- c. make best efforts to discourage non-party States from using cluster munitions.<sup>90</sup>

**7.6.24** If coalition partners who are not party to the Convention continue to use and transfer cluster munitions, members of the NZDF are to continue to carry out their duties in accordance with their orders.<sup>91</sup> However, in doing so members of the NZDF are not to:

- a. breach the prohibitions set out in this chapter;

85 **Cluster Munitions Convention** art 2(8): "'Transfer' involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants."

86 See **Cluster Munitions Prohibition Act 2009** s 11(2). For cluster munition remnants see Section 9.

87 **Cluster Munitions Convention** art 3(6): "[...] the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired must not exceed the minimum number absolutely necessary for these purposes." **Cluster Munitions Prohibition Act 2009** s 15(1): "For the purposes of developing, or training persons in, techniques of cluster munition detection, clearance, or destruction, the Minister [for Disarmament] may from time to time, by notice in writing, authorise cluster munitions to be used, acquired, possessed, retained, or transferred."

88 See **Cluster Munitions Convention** art 21(1).

89 See **Cluster Munitions Convention** art 21(2).

90 See **Cluster Munitions Convention** art 21(2).

91 **Cluster Munitions Prohibition Act 2009** s 11(6): "A member of the Armed Forces does not commit an offence against s 10(1) merely by engaging, in the course of his or her duties, in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention and that has the capability to engage in conduct prohibited by s 10(1)."

- b. encourage the use of cluster munitions in any way; and/or
- c. request the use of cluster munitions.<sup>92</sup>

**7.6.25** If the commander of a New Zealand force involved in coalition operations, or a member of the NZDF serving in such a force, becomes aware that a coalition partner is likely to use cluster munitions, or has used cluster munitions, CDF is to be advised, through COMJFNZ, without delay.<sup>93</sup>

**7.6.26** Members of the NZDF do not breach the law if they have requested an attack on a target (specifying an effect, not a weapon) and it transpires that the supporting force delivers cluster munitions. To ask for the delivery of cluster munitions in a circumstance where the choice of munitions used is within the exclusive control of the New Zealand force would clearly be in breach of the Convention and the Cluster Munitions Prohibition Act 2009.

**7.6.27** Provision of general logistic support to coalition partners possessing cluster munitions (eg aircraft/vehicle refuelling) is not prohibited. Helping to load cluster munitions onto an aircraft that will deliver them is clearly a breach because it would be ‘assisting’ in prohibited conduct. Members of the NZDF serving on coalition headquarters must decline to be involved in any planning activity for delivery of cluster munitions. However, mere participation in a coalition headquarters is not, by itself, a breach. There may come a point where cooperation becomes untenable. Members of the NZDF are to seek clearance from COMJFNZ when potential issues of interoperability arise. Wherever practicable, the advice of an NZDF LEGAD is to be obtained.

**7.6.28** Parties that are in a position to do so must provide assistance for clearance and destruction activities.<sup>94</sup> States must also take steps to clear and destroy cluster munition remnants in areas under their control or jurisdiction.

## **WEAPONS AND MUNITIONS EMPLOYING NON-DETECTABLE FRAGMENTS ARE PROHIBITED**

**7.6.29** A **non-detectable fragment** is a fragment that x-rays of the human body would be unable to detect.<sup>95</sup> The term does not include non-detectable fragments that are incidental to a weapon’s principal design, for example plastic casings of anti-vehicle mines.

**7.6.30** Members of the NZDF are not to use any weapon or munition the primary effect of which is to injure by non-detectable fragments.

92 **Cluster Munitions Prohibition Act 2009** s 10(3): “A member of the Armed Forces also commits an offence if he or she expressly requests the use of cluster munitions when (a) he or she is engaged in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention; and (b) the choice of munitions used is within the exclusive control of the Armed Forces.” A member of the Armed Forces who commits this offence is liable to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000, or both (s 104)). See also **Cluster Munitions Convention** art 21.

93 For application of LOAC to coalition operations see Chapter 6.

94 See **Cluster Munitions Convention** art 6. New Zealand meets its obligations by, amongst other things, providing specialist expertise in clearance of ERW.

95 **Conventional Weapons Protocol I**: “It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.” See also **ICRC Customary IHL** rule 79.

- 7.6.31** The prohibition on the use of non-detectable fragments exemplifies the humanitarian basis of the ban on weapons that cause unnecessary suffering and superfluous injury. Although such fragments will place a greater burden on the medical resources of an opposing force, the suffering caused to the victim is greatly out of proportion to any military advantage. Almost all fragments that cannot be detected by x-ray can, however, now be detected by ultrasound.

#### USE OF POISON AND POISONED WEAPONS ARE PROHIBITED

- 7.6.32** Members of the NZDF are not to use poison or poisoned weapons.<sup>96</sup>
- 7.6.33** The prohibition of the use of poison and poisoned weapons draws on widely held ethical beliefs and is also founded on the inherently indiscriminate nature of poison. A poisoned water source is as likely to kill a civilian as a combatant. However, poisoning of sources of water or food is prohibited even if the force is certain that only enemy combatants will use it or if warnings are given. Poisons and poisoned weapons are causative of superfluous injury or unnecessary suffering – especially since they are likely to render death inevitable.<sup>97</sup>
- 7.6.34** The poison need not be chemical; the prohibition includes use of the bodies of dead animals or people, faeces or any other material that will render water or foodstuff poisonous.

#### RIOT CONTROL AGENTS ARE PROHIBITED AS A METHOD OF WARFARE

- 7.6.35** A **riot control agent** is a chemical which can rapidly produce irritation of the senses or disabling physical effects which disappear within a short time after exposure. The term includes ‘tear gas’ and agents such as ‘CS’.<sup>98</sup> Riot control agents that are not chemical (eg cayenne pepper spray) are not covered, but are unlikely to have practical use as a method of warfare. The term does not include chemical weapons, which are prohibited outright.<sup>99</sup>
- 7.6.36** Members of the NZDF are not to use riot control agents as a ‘method of warfare’,<sup>100</sup> even where the use of riot control agents may present itself as more proportionate and more humane than alternatives such as direct attack or indirect fire.<sup>101</sup>

96 **Hague Regulations** art 23(a) states that it is especially forbidden to employ poison or poisoned weapons. **Rome Statute** art 8(2)(b)(xvii) provides that employing poison and poisoned weapons is a war crime. In the **Skorzeny Trial** no conviction was brought in for possession of poisoned bullets as it was accepted they were to be used by German agents to kill themselves if faced with capture – not the enemy. See also **ICRC Customary IHL** rule 72.

97 For unnecessary suffering and superfluous injury see Section 2.

98 CS is an aerosol 2-Chlorobenzalmalononitrile or O-Chlorobenzylidene Malononitrile. When used in strong concentrations CS is debilitating to an unprotected person and may even be lethal.

99 **Chemical Weapons Convention** art 2(7): “‘Riot Control Agent’ means [a]ny chemical not listed in a Schedule [to the Convention], which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.”

100 ‘Method of warfare’ is not defined so an ordinary common sense interpretation is to be applied. For methods of combat see Chapter 8.

101 **Chemical Weapons (Prohibition) Act 1996** s 8: “Every person commits an offence who intentionally or recklessly uses riot control agents as a method of warfare, and is liable on conviction to imprisonment for life or a fine not exceeding \$1,000,000.” See also **Chemical Weapons Convention** art 1(5) and **ICRC Customary IHL** rule 75.

- 7.6.37** Subject to orders, members of the NZDF may use riot control agents that have been issued for their use to suppress riots, rescue hostages, perform law enforcement tasks or assist the civil authorities. Because factual situations may overlap, NZDF commanders are to exercise care in the decision to use riot control agents during armed conflict, even though their use may not obviously be a 'method of warfare'. Authority is to be obtained from COMJFNZ before riot control agents are issued unless this is not possible. Wherever practicable, the advice of an NZDF LEGAD is to be obtained before use.

## SECTION 7 – WEAPONS IN RESPECT OF WHICH SPECIFIC RESTRICTIONS OR LIMITATIONS APPLY

### HERBICIDES – RESTRICTIONS ON USE

- 7.7.1** Members of the NZDF are not to use herbicides without the express authority of COMJFNZ. Wherever practicable, COMJFNZ is to obtain the advice of an NZDF LEGAD before granting such authority.
- 7.7.2** Members of the NZDF are not to use herbicides as a means of warfare if those herbicides:<sup>102</sup>
- a. are, in fact, chemical weapons or biological weapons;<sup>103</sup>
  - b. are used to destroy vegetation that is not a military objective;<sup>104</sup>
  - c. are indiscriminate in their effect;<sup>105</sup> or
  - d. would cause widespread, long-term and severe damage to the natural environment.<sup>106</sup>
- 7.7.3** Herbicides such as ‘Agent Orange’ were used in the 1970s to deny cover to insurgents by destroying the jungle in which they operated. They were dropped in large amounts with little regard to the effects on the health of civilians in the area, own forces, or the long-term effect on the environment. Although not specifically banned under any treaty, indiscriminate use of herbicides in this manner would now breach LOAC.

### INCENDIARY WEAPONS – RESTRICTIONS ON USE

- 7.7.4** An **incendiary weapon** is any weapon or munition primarily designed to set fire to objects or to cause burn injury to persons.<sup>107</sup> The term includes air-delivered weapons, for example napalm and incendiary bombs, as well as flame-throwers and white phosphorus grenades/shells. The term does not apply to:
- a. weapons or munitions having an incidental incendiary effect, eg tracer rounds, smoke canisters, illumination rounds and flares; and
  - b. weapons that combine penetration, blast or fragmentation effects with incendiary effects, eg armour-piercing rounds, or explosive charges.
- 7.7.5** Members of the NZDF are not to use incendiary weapons without the express authority of COMJFNZ. Wherever practicable, COMJFNZ is to obtain the advice of an NZDF LEGAD before granting such authority. If authority is granted, members of the NZDF may use incendiary weapons that have been issued for their use

102 **Chemical Weapons Convention** Preamble refers to the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare. See also **ICRC Customary IHL** rule 76.

103 See Section 5.

104 For ‘military objective’ see Chapter 8.

105 For ‘disproportionate incidental civilian casualties’ see Chapter 8.

106 For widespread and long-term damage to the environment see Section 2. For environmental warfare see Chapter 8.

107 **Conventional Weapons Protocol III** art 1(1): “‘Incendiary weapon’ means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on a target.”

only against legitimate military objectives.<sup>108</sup> Members of the NZDF are not to use incendiary weapons against:<sup>109</sup>

- a. the civilian population and individual civilians, or
- b. civilian objects.

**7.7.6** If incendiary weapons are used, particular care is to be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>110</sup> Members of the NZDF are not to use:

- a. air-delivered incendiary weapons to attack military objectives within a concentration of civilians;<sup>111</sup>
- b. incendiary weapons other than air-delivered ones, to attack military objectives within a concentration of civilians unless:
  - (1) there is a clear separation between the military objective and the civilian population; and
  - (2) all feasible precautions are taken to limit incidental civilian casualties and damage;<sup>112</sup>
- c. incendiary weapons against forest and plant cover, except where it is being used to cover, conceal or camouflage combatants or other military objectives, or the forest or plant cover constitutes a military objective itself.<sup>113</sup>

**7.7.7** Deliberate use of incendiary weapons, such as flame-throwers and white phosphorous grenades, against members of the opposing force with the intention of causing them burn injuries is likely to breach the prohibition against causing superfluous injury and unnecessary suffering unless a clear military necessity for such use exists.<sup>114</sup> Such weapons should be reserved for use against bunkers, buildings and vehicles.

**7.7.8** The NZDF does not currently possess flame-throwers or similar incendiary weapons. White phosphorous munitions are employed principally for their smoke-creating properties, not as anti-personnel weapons.

108 For 'military objective' see Chapter 8.

109 **Conventional Weapons Protocol III** art 2(1): "It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons."

110 See **ICRC Customary IHL** rule 84.

111 **Conventional Weapons Protocol III** art 2(2): "It is prohibited in all circumstances to make any military objective within a concentration of civilians the object of attack by air-delivered incendiary weapons." This covers any permanent or temporary concentration of civilians, eg inhabited parts of cities, or inhabited towns or villages, camps or columns of refugees or evacuees, or groups of nomads.

112 See **Conventional Weapons Protocol III** art 2(3). For precautions in attack see Chapter 8.

113 **Conventional Weapons Protocol III** art 2(4): "It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives."

114 **ICRC Customary IHL** rule 85: "The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat." It is questionable whether this rule has yet become part of customary law, and little State practice is cited in support of it.

**BOOBY TRAPS AND MANUALLY EMPLACED MUNITIONS – RESTRICTIONS ON USE**

- 7.7.9** A **booby trap** is a device designed, constructed or adapted to kill or injure a person who disturbs or approaches an apparently harmless object or performs an apparently safe act.<sup>115</sup> They may be designed explosive switches, or improvised devices made from grenades, explosives or even sharpened stakes.
- 7.7.10** Any booby trap that is designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person is in fact an APM and is therefore completely banned.<sup>116</sup> The term ‘booby trap’ is used in this manual to mean devices other than APMs.
- 7.7.11** ‘Other devices’ means **manually emplaced munitions** designed to kill, injure or damage and which are activated manually, by remote control, or automatically after a lapse of time.<sup>117</sup> The term includes roadside bombs and other improvised explosive devices (IEDs), time bombs and remotely activated demolitions. Directional charges are dealt with separately.
- 7.7.12** Members of the NZDF are not to use booby traps or manually emplaced munitions without the express authority of COMJFNZ. Wherever practicable, COMJFNZ is to obtain the advice of an NZDF LEGAD before granting such authority. If authority is granted, members of the NZDF are not to use booby traps or manually emplaced munitions:
- a. against the civilian population or individual civilians;<sup>118</sup>
  - b. in a way that cannot be directed at a specific military objective;<sup>119</sup>
  - c. in cities, towns or villages or other areas containing a similar concentration of civilians, in which combat between ground forces is not taking place or does not appear to be imminent, unless they are placed on or in the vicinity of a military objective, or unless measures are taken to protect civilians from their effect, eg posting sentries, issuing of warnings or the provision of fences;<sup>120</sup>
  - d. in a manner that is deemed to be indiscriminate use<sup>121</sup> such as:
    - (1) by placement that is not on, or directed against, a military objective;<sup>122</sup> or
    - (2) in a manner that can be expected to cause incidental loss of civilian life, injury or damage which would be excessive in relation to the military advantage anticipated.<sup>123</sup>

- 7.7.13** Members of the NZDF are not to use booby traps or manually emplaced munitions that:

115 See **Conventional Weapons Protocol II** art 2(4).

116 For APMs see Section 6.

117 See **Conventional Weapons Protocol II** art 2(5).

118 See **Conventional Weapons Protocol II** art 3(7).

119 See **Conventional Weapons Protocol II** art 3(8)(b).

120 See **Conventional Weapons Protocol II** art 7(3)(b).

121 See **Conventional Weapons Protocol II** art 3(8).

122 **Conventional Weapons Protocol II** art 3(8)(a) states in part that: “In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling, or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

123 See **Conventional Weapons Protocol II** art 3(8)(c).



- a. are designed and constructed to contain explosive material and are made to look like harmless portable objects, such as mobile phones or cigarette lighters;<sup>124</sup>
- b. designed or of a nature to cause superfluous injury or unnecessary suffering;<sup>125</sup>
- c. use fragments which cannot be detected by x-rays;<sup>126</sup> or
- d. are designed to be detonated by mine detectors.<sup>127</sup>

**7.7.14** Members of the NZDF are not to booby-trap or place manually emplaced munitions on objects or persons protected under LOAC or objects that are likely to attract civilians.<sup>128</sup> In particular, they are not to use such devices on:<sup>129</sup>

- a. recognised protective emblems, signs or signals;<sup>130</sup>
- b. sick, wounded or dead persons;<sup>131</sup>
- c. burial or cremation sites or graves;<sup>132</sup>
- d. medical facilities, equipment, supplies or transportation;<sup>133</sup>
- e. children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;<sup>134</sup>
- f. food or drink;<sup>135</sup>
- g. kitchen utensils or appliances except in military establishments, military locations or military supply depots;<sup>136</sup>
- h. objects clearly of a religious nature;<sup>137</sup>
- i. historic monuments, works of art or places of worship that constitute the cultural or spiritual heritage of peoples;<sup>138</sup> or
- j. animals or their carcasses.

124 See **Conventional Weapons Protocol II** art 7(2).

125 See **Conventional Weapons Protocol II** art 3(3).

126 See **Conventional Weapons Protocol I**.

127 See **Conventional Weapons Protocol II** art 3(5).

128 See **ICRC Customary IHL** rule 80. For civilians see Chapter 13. For specifically protected persons and objects see Chapter 14.

129 See **Conventional Weapons Protocol II** art 7(1).

130 For internationally recognised signs and symbols see Chapter 14.

131 See Chapter 11.

132 See Chapter 11.

133 See Chapter 11.

134 For protection of children see Chapter 14.

135 For prohibition on starvation of civilians see Chapter 8.

136 For prohibition on starvation of civilians see Chapter 8.

137 See Chapter 14.

138 See Chapter 14.



**7.7.15** Booby traps and manually emplaced munitions that are left unattended are inherently indiscriminate since they are as likely to kill civilians as the opposing force. Restrictions on booby traps are such that they can only lawfully be used in very constrained circumstances. Authorisation is likely to be restricted to special operations. Such use will always be subject to other rules of LOAC. For example, a withdrawing force may wish to booby-trap abandoned munitions to deny them to the enemy. Although warning signs may be left telling the civilian population to stay away, the munitions are now ERW governed by Conventional Weapons Protocol V, meaning that there is a legal duty to clear such ordnance. Booby-trapping ERW, the opposing force's IEDs or enemy mines creates a hazard to own-force members, civilians and aid workers who are later required to disarm such devices. Members of the NZDF are therefore prohibited from such acts on both common sense and legal grounds.

### PROTECTION OF CIVILIAN POPULATION FROM BOOBY TRAPS AND MANUALLY EMPLACED MUNITIONS

**7.7.16** If authorised to use booby traps or manually emplaced munitions, members of the NZDF are to accurately and permanently record the precise location and operating mechanism of each device.<sup>139</sup>

**7.7.17** Members of the NZDF are to take all feasible precautions to protect civilians from the effects of any booby traps and manually emplaced munitions they have employed. They must consider:

- a. the effect on the local civilian population for the duration of their employment;
- b. possible measures to protect civilians (eg warning and monitoring);
- c. the availability and feasibility of using other means or methods of warfare to achieve the objective; and/or
- d. the military requirement for those booby traps or munitions.<sup>140</sup>

**7.7.18** Unless circumstances do not permit, members of the NZDF are to provide effective advance warning of any emplacement of booby traps and manually emplaced munition which may affect the civilian population.<sup>141</sup>

139 **Conventional Weapons Protocol II** art 9: (1) "All information concerning [...] booby-traps and other devices shall be recorded in accordance with the Technical Annex." Technical Annex art 1: "(a)(i) the location of [...] booby-traps and other devices shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points; (ii) maps, diagrams or other records shall be made in such a way as to indicate the location of [...] booby-traps and other devices in relation to reference points, and these records shall also indicate their perimeters and extent; (iii) for purposes of detection and clearance [...] maps, diagrams or other records shall contain complete information on the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all [such] weapons laid. The precise location and operating mechanism of each booby-trap laid shall be individually recorded; [...] (c) Copies of records shall be held at a level of command sufficient to guarantee their safety as far as possible."

140 **Conventional Weapons Protocol II** art 3(10): "[...] Feasible precautions are those which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to: (a) the short- and long-term effect [of the booby-traps or other devices] upon the local civilian population [...]; (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring); (c) the availability and feasibility of using alternatives; and (d) the short- and long-term military requirements for a minefield." For feasible precautions see Chapter 8.

141 See **Conventional Weapons Protocol II** art 3(11). For warnings to the civilian population generally

- 7.7.19** At the end of active hostilities, the commander of any New Zealand force that has used booby traps or manually emplaced munitions is to ensure that they are removed or rendered harmless to civilians, or is to facilitate their removal.<sup>142</sup>

#### ANTI-VEHICLE MINES – RESTRICTIONS ON USE

- 7.7.20** An **anti-vehicle mine** is any munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a vehicle.<sup>143</sup> The term includes ‘anti-armour mines’ or ‘anti-tank mines’. They are also called ‘mines other than anti-personnel mines’ (MOTAPM). The term includes mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to anti-ship mines at sea or in inland waterways.<sup>144</sup>
- 7.7.21** A **remotely delivered mine** is a mine delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.<sup>145</sup>
- 7.7.22** Members of the NZDF are not to use anti-vehicle mines without the express authority of COMJFNZ. Wherever practicable, COMJFNZ is to obtain the advice of an NZDF LEGAD before granting such authority. If authority is granted, members of the NZDF are to take particular care to minimise the indiscriminate effects of MOTAPM.<sup>146</sup>
- 7.7.23** Members of the NZDF are not to use anti-vehicle mines:
- a. against the civilian population, individual civilians, or civilian objects;<sup>147</sup>
  - b. using a method or means of delivery or placement that cannot be directed at a specific military objective;<sup>148</sup>
  - c. that can be expected to cause incidental loss of civilian life, injury to civilians and/or damage that would be excessive in relation to the direct military advantage anticipated;<sup>149</sup>
  - d. that are designed or of a nature to cause superfluous injury or unnecessary suffering;<sup>150</sup>

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see Chapter 8.

142 **Conventional Weapons Protocol II** art 10: “(1) Without delay after the cessation of active hostilities, all [...] booby-traps and other devices shall be cleared, removed, destroyed or maintained [...]; (2) High Contracting Parties and parties to a conflict bear such responsibility with respect to [...] booby-traps and other devices in areas under their control; (3) With respect to [...] booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 10 of this article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility; (4) At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.”

143 See **Conventional Weapons Protocol II** art 2(1).

144 See **Conventional Weapons Protocol II** art 1(1).

145 See **Conventional Weapons Protocol II** art 2(2).

146 See **ICRC Customary IHL** rule 81.

147 See **Conventional Weapons Protocol II** art 3(7).

148 See **Conventional Weapons Protocol II** art 3(8)(b).

149 See **Conventional Weapons Protocol II** art 3(8)(c).

150 See **Conventional Weapons Protocol II** art 3(3).

- e. that use, for their primary effect, fragments to wound that are not able to be detected in the body by x-rays;<sup>151</sup>
- f. that are designed to detonate by the presence of a mine detector;<sup>152</sup> or
- g. that use an anti-handling device that is capable of functioning after the mine has ceased to be capable of functioning.<sup>153</sup>

## PROTECTION OF CIVILIAN POPULATION FROM ANTI-VEHICLE MINEFIELDS

**7.7.24** Members of the NZDF who lay anti-vehicle mines are to accurately record:

- a. the location of the minefield; and
- b. the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on mines laid.<sup>154</sup>

**7.7.25** Records are to be held at the headquarters of the New Zealand force. A copy is to be sent to Headquarters Joint Forces New Zealand (HQ JFNZ).

**7.7.26** Members of the NZDF are to use only mines that are visibly and permanently marked with:

- a. the name of the country of origin;
- b. the month and year of production; and
- c. the serial number or lot number.<sup>155</sup>

**7.7.27** Members of the NZDF who lay anti-vehicle mines are to take all feasible precautions to protect civilians from their effects, taking in to account humanitarian and military considerations such as:

- a. the effect of mines upon the local civilian population for the duration of the minefield;
- b. possible measures to protect civilians (eg fencing, signs, warning and monitoring);

151 See **Conventional Weapons Protocol I**.

152 See **Conventional Weapons Protocol II** art 3(5).

153 See **Conventional Weapons Convention** art 3(6).

154 **Conventional Weapons Protocol II** art 9: (1) "All information concerning minefields, mined areas, mines [...] shall be recorded in accordance with the Technical Annex." Technical Annex art 1: "(a)(i) the location of minefields, mined areas [other than remotely delivered mines ...] shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points; (ii) maps, diagrams or other records shall be made in such a way as to indicate the location of minefields, mined areas [...] in relation to reference points, and these records shall also indicate their perimeters and extent; (iii) for purposes of detection and clearance of mines [...] maps, diagrams or other records shall contain complete information on the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all [such] weapons laid. Whenever feasible, the minefield record shall show the exact location of every mine, except in row minefields where the row location is sufficient. [...] (c) Copies of records shall be held at a level of command sufficient to guarantee their safety as far as possible." See also **ICRC Customary IHL** rule 82.

155 See **Conventional Weapons Protocol II** Technical Annex art 1(d).

- c. the availability and feasibility of using other means or methods of warfare to achieve the objective; and
- d. the military requirements for a minefield.<sup>156</sup>

**7.7.28** The NZDF employs the principle that anti-vehicle minefields are used to channel and obstruct enemy forces. Unmarked ‘nuisance’ minefields have little military value in proportion to the humanitarian danger that they present. Only in limited circumstances, such as special forces operations, is use of mines outside of marked fields likely to be authorised. If authorised to use anti-vehicles mines outside a perimeter-marked area, members of the NZDF may only do so where the mines:

- a. are detectable and contain a self-destruction or self-neutralisation mechanism designed to ensure that no more than 10 per cent of activated mines fail to self-destruct within 45 days; and
- b. contain a back-up self-deactivation feature.<sup>157</sup>

**7.7.29** Unless circumstances do not permit them to do so, members of the NZDF are to give effective advance warning of any emplacement of mines, which may affect the civilian population.<sup>158</sup> An example warning sign is shown at Figure 1.



**Figure 1** Warning sign for mines.

To be written in English and the language used by the local civilian population.

156 **Conventional Weapons Protocol II** art 3(10): “[...] Feasible precautions are those which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to: (a) the short- and long-term effect [of the mines] upon the local civilian population [...]; (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring); (c) the availability and feasibility of using alternatives; and (d) the short- and long-term military requirements for a minefield.” For feasible precautions see Chapter 8.

157 See the **Anti-Vehicle Mines Declaration**.

158 See **Conventional Weapons Convention Protocol II** art 3(11).

- 7.7.30** At the end of active hostilities, the commander of any New Zealand force that has used anti-vehicle mines is to ensure that they are removed or otherwise rendered harmless to civilians, or is to facilitate their removal.<sup>159</sup>

#### REMOTELY DELIVERED ANTI-VEHICLE MINES – ADDITIONAL ORDERS

- 7.7.31** Members of the NZDF are not to use remotely delivered anti-vehicle mines unless:
- a.** the location of those mines can be accurately recorded; and
  - b.** the mines are equipped with an effective self-destruction/self-neutralisation mechanism and self-deactivation feature so that they do not function when they no longer serve the military purpose for which they were emplaced.<sup>160</sup>
- 7.7.32** Unless circumstances do not permit them to do so, members of the NZDF are to give effective advance warning of any delivery or dropping of remotely delivered mines that may affect the civilian population.<sup>161</sup>
- 7.7.33** As a Party to the Ottawa Convention, New Zealand must not use APMs. Thus, members of the NZDF are not to use remotely delivered ‘mixed’ minefields containing APMs as well as anti-vehicle mines.

#### SEA MINES – RESTRICTIONS ON USE

- 7.7.34** A **sea mine** is any mine laid or released at sea, whether it is anchored or free-floating.
- 7.7.35** Sea mines continue to fulfil an important role in denying areas to the enemy as well as weakening the enemy through inflicting material damage. Such mines also have the capacity, however, to inflict indiscriminate damage on civilian vessels and neutral shipping alike. Mines lost at sea can drift for great distances and remain a danger for shipping for extensive periods. For these reasons, forces that use sea mines must take steps to ensure that the location of mined areas is known and that mines remain lethal for only so long as is demanded by military necessity.

159 **Conventional Weapons Protocol II** art 10: “(1) Without delay after the cessation of active hostilities, all minefields, mined areas and mines [...] shall be cleared, removed, destroyed or maintained [...]; (2) High Contracting Parties and parties to a conflict bear such responsibility with respect to [...] in areas under their control; (3) With respect to minefields, mined areas and mines [...] laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 10 of this article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility; (4) At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.” See also **ICRC Customary IHL** rule 83.

160 **Conventional Weapons Protocol II** art 6(1): “It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph 1 (b) of the Technical Annex [to the Protocol].” Technical Annex art 1(b): “The estimated location and area of remotely-delivered mines shall be specified by coordinates of reference points (normally corner points) and shall be ascertained and when feasible marked on the ground at the earliest opportunity. The total number and types of mines laid, the date and time of laying and the self-destruction time periods shall also be recorded.”

161 See **Conventional Weapons Convention Protocol II** art 6(4).

**7.7.36** Members of the NZDF are not to use sea mines without the express authority of COMJFNZ. Wherever practicable, COMJFNZ is to obtain the advice of an NZDF LEGAD before granting such authority. If authority is granted, members of the NZDF may employ sea mines against legitimate military targets and to deny sea areas to the enemy subject to restrictions.<sup>162</sup> Specifically, members of the NZDF are not to:

- a. lay anchored sea mines unless effective neutralisation occurs when they have become detached or control over them is lost;<sup>163</sup>
- b. use free-floating mines unless they:
  - (1) are directed against a military objective;<sup>164</sup> and
  - (2) become harmless within an hour after control of them is lost;<sup>165</sup>
- c. lay mines in neutral waters;<sup>166</sup>
- d. lay mines or arm pre-laid mines without warning or notification to all affected parties, unless the mines can detonate only against vessels that are a military objective, or are under surveillance;<sup>167</sup> or
- e. lay mines in a manner preventing passage between neutral waters and international waters.<sup>168</sup>

**7.7.37** The commander of a New Zealand force that lays sea mines is to ensure that:

- a. the location of all mines is recorded and reported to COMJFNZ;<sup>169</sup>
- b. laying of mines in New Zealand internal waters or territorial sea allows for free exit of shipping of neutral States;<sup>170</sup>

162 **San Remo Manual** rule 80: "Mines may only be used for legitimate military purposes including the denial of sea areas to the enemy." See also Chapter 10.

163 In its prohibitions, **Hague Convention VIII** specifies 'automatic submarine contact mines'. However, it is accepted that these rules apply to all sea mines however activated. **San Remo Manual** rule 81: "[...] The parties to the conflict shall not lay mines unless effective neutralization occurs when they have become detached or control over them is otherwise lost."

164 **Hague Convention VIII** art 2: "It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of interrupting commercial shipping." Art 3: "When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping." In *Nicaragua v USA* laying mines outside the ports and harbours of Nicaragua was held to be a breach of LOAC.

165 **Hague Convention VIII** art 1(1): "It is forbidden to lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them." See also **San Remo Manual** rule 82(b).

166 See **San Remo Manual** rule 86.

167 **Hague Convention VIII** art 3: "When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping." **San Remo Manual** rule 83: "The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives." In the *Corfu Channel Case* Albania's failure to notify shipping of the existence of a minefield within its territorial waters was held to be a breach of international law. In *Nicaragua v USA* laying mines in the waters of another State without warning or notification was held to breach the principles of LOAC.

168 **San Remo Manual** art 87: "Mining shall not have the practical effect of preventing passage between neutral waters and international waters." This obligation is implied from **Hague Convention XIII** art 2.

169 See **San Remo Manual** rule 84.

170 **San Remo Manual** rule 85: "Mining operations in the internal waters, territorial sea or archipelagic

- c. laying of mines in the high seas pays due regard to the legitimate uses of the sea by neutral<sup>171</sup> shipping, eg by providing safe alternative routes; and
- d. transit passage through international straits and passage through archipelagic sea-lanes is not impeded unless safe and convenient alternative routes are provided.<sup>172</sup>

**7.7.38** At the cessation of hostilities, a New Zealand force that has laid sea mines must do its utmost to remove or render those mines harmless.<sup>173</sup> If the mines are laid in the territorial sea of an enemy State, COMJFNZ is to ensure that the position of the mines is made available for transmission to that State. States must remove mines from their own waters as soon as possible.<sup>174</sup>

**7.7.39** Neutral States do not breach neutrality by clearing mines that have been laid in violation of international law.<sup>175</sup>

## TORPEDOES

**7.7.40** Members of the NZDF are not to use torpedoes that do not sink or otherwise become harmless when they have missed their mark and completed their run.<sup>176</sup>

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waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.”

171 See **San Remo Manual** rule 88. For neutrality see Chapter 16.

172 See **San Remo Manual** rule 89. See also Chapter 10 and **San Remo Manual** rule 85.

173 **San Remo Manual** rule 90: “After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines.” Rule 91: “Parties to the conflict shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance, including in appropriate circumstances joint operations, necessary to remove minefields or otherwise render them harmless.” See also **Hague Convention VIII** art 5.

174 See **Hague Convention VIII** art 5 and **San Remo Manual** rule 90.

175 See **San Remo Manual** rule 92. For neutrality see Chapter 16.

176 See **Hague Convention VIII** art 1(3), **San Remo Manual** rule 79, and Chapter 10.



## SECTION 8 – THE APPLICATION OF LAW OF ARMED CONFLICT TO OTHER WEAPONS

### DEPLETED URANIUM

- 7.8.1** **Depleted uranium** means uranium with lower than natural amounts of isotope uranium-238 (U-238).
- 7.8.2** DU munitions are not covered by the prohibition of nuclear weapons in New Zealand law because they are only weakly radioactive and do not employ an explosive effect.<sup>177</sup> They are not banned by any treaty. DU is used in munitions because of its weight and density, not any residual radioactive properties. DU weapons are, nevertheless, controversial due to concerns that they may produce toxic residue.<sup>178</sup> No consensus exists on the dangers of DU at the promulgation of this manual, so DU weapons cannot therefore be regarded as unlawful until that position is further clarified.<sup>179</sup>
- 7.8.3** As a matter of policy, the NZDF does not currently employ DU munitions. Members of the NZDF are therefore not to use DU weapons or munitions. This policy does not affect the interoperability of a New Zealand force with armed forces that continue to use DU munitions.

### SHOTGUNS AND SHOTGUN AMMUNITION

- 7.8.4** Shotguns provide a versatile response, particularly where either lethal or less-lethal force may be required, or for use in fighting in built up areas (FIBUA), where over-penetration and ricochet must be avoided. Subject to LOAC and their orders, members of the Armed Forces are permitted to use shotguns where these have been issued for their use.<sup>180</sup>
- 7.8.5** Members of the Armed Forces are permitted to use the following shotgun ammunition types:
- a. Buckshot.** Large diameter shot ranging from 6 mm to 15.24 mm. Buckshot may be used where it has been issued.
  - b. Birdshot.** Small diameter shot ranging from 2.03 mm to 5.84 mm. Because of its tendency to cause numerous small wounds birdshot is not to be used as a means of warfare or in riot control. It may be used for target practice only.
  - c. Breaching round.** Shells made for the purpose of door breaching. Typically fired at a range of 15 cm or less and designed to destroy the object and disperse into harmless powder. Breaching rounds may be used where they have been issued provided that the round:
    - (1)** is used only for breaching purposes against military objectives; and

177 For nuclear weapons see Section 5.

178 See **Depleted Uranium Report**.

179 The use of DU projectiles in the NATO bombing campaign in Yugoslavia was investigated by a committee which did not recommend further investigation by the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (see **NATO Bombing Campaign Report**).

180 Very few States have historically regarded shotgun ammunition as breaching the prohibition against expanding bullets. This is not accepted by New Zealand. Shotgun ammunition is not inherently indiscriminate or more likely to cause superfluous injury or unnecessary suffering than other weapons which cause multiple wounds (eg machine-guns) and fragmentation weapons.



(2) is not intentionally used as an anti-personnel weapon.

- d. **Solid slug.** A single heavy projectile, usually with pre-cut rifling. Solid slugs may be used where they have been issued, however, any slug designed or intended to expand or flatten in the human body is not to be used.<sup>181</sup>
- e. **CS rounds.** CS rounds may be used in a riot control role, law enforcement, or assistance to the civil power, subject to authorisation by COMJFNZ. CS gas rounds are not to be used as a means of warfare.<sup>182</sup>
- f. **Less-lethal shotgun rounds.** Bean bag, baton and ‘stinger’ rounds may be used where they have been issued.

## WEAPONS AND AMMUNITION OF .50 CALIBRE

**7.8.6** Calibre .50 (12.7 x 99 mm) weapons are designed to be used against both materiel and personnel. Subject to LOAC and their orders, members of the Armed Forces are permitted to use .50 calibre weapons and ammunition.<sup>183</sup>

**7.8.7** Although .50 calibre ammunition is primarily designed to be used in an anti-materiel role, members of the Armed Forces must be able to retain the ability to change targets in the course of combat without having to change ammunition. Although .50 calibre ammunition will cause very serious injury due to the size of the round, provided that it is neither expanding nor explosive, the round is not unlawful.

## LESS-LETHAL WEAPONS

**7.8.8** **Less-lethal weapons** are weapons, systems, devices and munitions designed and employed to incapacitate targeted persons or material while minimising fatalities, permanent injury to persons and damage to property in the target area or environment. Less-lethal systems are intended to have reversible effects. Most less-lethal systems still have the capacity to kill or seriously injure in certain circumstances, for example when used at very close range or used against people who cannot move away. For this reason the term ‘non-lethal weapons’ is not used. Examples of less-lethal weapons include:

- a. riot batons, riot control agents,<sup>184</sup> and riot control equipment such as water cannon;
- b. sticky foam;
- c. bean bag rounds;
- d. rubber bullets and baton rounds;
- e. devices that employ directed energy, such as sound or microwaves;

181 For expanding bullets see Section 6.

182 For riot control agents see Section 6.

183 Some controversy exists over rounds that are frangible or explosive. Ballistic tests indicate that if fired against a person the round will not explode until after leaving the body. At the time of promulgation of this manual, the NZDF does not possess such rounds.

184 See Section 6.

- f. electro-shock devices, such as tasers; and
- g. gases and chemicals intended to induce unconsciousness or disorientation.

**7.8.9** Less-lethal weapons provide a more humane and less extreme response than standard military weapons which are almost certain to kill or cause serious injury. They offer the possibility of immobilising or incapacitating an opponent for a period of time in order to obtain a tactical advantage. They are of particular value in peace support operations, law enforcement, riot suppression, and operations where it is more advantageous to capture than to kill a person. Subject to LOAC and their orders, members of the Armed Forces may use less-lethal systems where they have been issued.

**7.8.10** The principles of LOAC apply to less-lethal weapons as much as to those intended to kill. Members of the NZDF are not to develop, issue or use less-lethal systems that:

- a. cause superfluous injury or unnecessary suffering;<sup>185</sup>
- b. are indiscriminate in their effect;<sup>186</sup>
- c. cause widespread and long-lasting damage to the environment;<sup>187</sup> or
- d. are, in effect, chemical weapons.<sup>188</sup>

**7.8.11** Members of the NZDF are not to:

- a. use less-lethal weapons in a way that is intended to increase the suffering or injury that they cause; or
- b. modify any less-lethal weapon so as to increase its capacity to cause suffering or injury.

**7.8.12** There is no principle of LOAC that requires the use of less-lethal weapons in armed conflict in preference to standard weapons. When engaged against enemy combatants, less-lethal weapons would only rarely, if ever, be employed.

## **KNIVES, BAYONETS AND OTHER EDGED WEAPONS**

**7.8.13** The utility of knives, bayonets and other edged weapons in modern warfare is limited. Subject to LOAC and their orders, members of the NZDF may use knives, bayonets and other edged weapons that have been issued for their use.

185 See Section 2. The blinding laser weapon, for example, is designed to incapacitate a person through total and irreparable blindness. Although less lethal than an assault rifle it has, nevertheless, been banned. For blinding laser weapons see Section 6.

186 See Section 2.

187 See Section 2.

188 See Section 5.

- 7.8.14** Members of the NZDF are not to use knives, bayonets and other edged weapons that are designed or are of a nature to cause superfluous injury or unnecessary suffering.<sup>189</sup> Bayonets with a serrated back edge are lawful provided the saw is incorporated as a tool and does not aggravate the wound that the weapon causes.
- 7.8.15** Edged weapons are not be used in a cruel manner or to commit other breaches of LOAC, such as bayoneting the wounded. They must not be modified in a way that needlessly increases suffering.

## SECTION 9 – EXPLOSIVE REMNANTS OF WAR AND CLUSTER MUNITION REMNANTS

### INTRODUCTION

- 7.9.1** Humanitarian concern to reduce the suffering caused to civilians by armed conflict has extended to the creation of obligations applicable to all weapons that leave dangerous explosive remnants once fired or abandoned. Such remnants produce a significant risk to the civilian population persisting long after the cessation of hostilities. LOAC, therefore, imposes duties on parties to a conflict to take steps to minimise the incidental suffering caused by the deadly by-products of armed conflict.
- 7.9.2** Although cluster munition remnants are a particular type of ERW, parties to the Cluster Munitions Convention have assumed additional specific duties in respect of these remnants.

### DEFINITIONS

- 7.9.3** **Explosive remnants of war** means unexploded ordnance (UXO) and abandoned explosive ordnance (AXO).<sup>190</sup> It includes cluster munition remnants (except where otherwise specified). It does not include mines, booby traps and manually emplaced munitions.<sup>191</sup>
- 7.9.4** **Unexploded ordnance** means explosive ordnance that has been primed, fused, armed or otherwise prepared for use, and used in an armed conflict. It may have been fired, dropped, launched or projected, and should have exploded but failed to do so.<sup>192</sup>
- 7.9.5** **Abandoned explosive ordnance** means explosive ordnance that has not been used during an armed conflict, which has been left behind or dumped by a party to an armed conflict and which is no longer under the control of the party who abandoned or dumped it. It may or may not have been primed, fused, armed or otherwise prepared for use.<sup>193</sup>
- 7.9.6** **Cluster munition remnants** means failed cluster munitions, abandoned cluster munitions, unexploded sub-munitions and unexploded bomblets.<sup>194</sup>

### MUNITIONS STORAGE

- 7.9.7** Members of the NZDF are to ensure that explosive ordnance is stored, transported and handled so as to ensure the best possible long-term reliability.<sup>195</sup>
- 7.9.8** The commander responsible for training is to ensure that members of the NZDF are adequately trained in the use, storage and transportation of explosive ordnance in order to minimise the occurrence of ERW.

190 See **Conventional Weapons Protocol V** art 2(4).

191 See **Conventional Weapons Protocol V** art 2(1).

192 See **Conventional Weapons Protocol V** art 2(2).

193 See **Conventional Weapons Protocol V** art 2(3).

194 **Cluster Munitions Convention** art 2(5): “‘Unexploded submunition’ means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended.”

195 See **Conventional Weapons Protocol V** Technical Annex Part 3(b).

## CIVILIAN POPULATION MUST BE PROTECTED FROM EXPLOSIVE REMNANTS OF WAR AND CLUSTER MUNITIONS REMNANTS

**7.9.9** The commander of a New Zealand force that controls any territory at the end of active hostilities is to ensure that as soon as is feasible:

- a. the risk posed by ERW and cluster munition remnants is reduced by:
  - (1) surveying and assessing the threat posed by ERW,<sup>196</sup> cluster munitions remnants and cluster munition-contaminated areas;<sup>197</sup>
  - (2) assessing and prioritising needs and the practicability of marking and clearing, removing or destroying ERW<sup>198</sup> and cluster munitions remnants;<sup>199</sup> and
  - (3) marking and clearing, removing and/or destroying ERW<sup>200</sup> and cluster munitions remnants,<sup>201</sup> giving highest priority to those assessed as posing a serious humanitarian risk;
- b. all feasible measures are taken to protect the civilian population, individual civilians and civilian objects from the risks and effect of ERW and cluster munitions remnants including warnings (see Figure 2), risk education, appropriate marking, fencing and monitoring of territory affected by ERW<sup>202</sup> and cluster munition remnants;<sup>203</sup>

196 See **Conventional Weapons Protocol V** art 3(3)(a). Under **Cluster Munitions Convention** art 4(3) account must be taken of international standards, including the IMAS.

197 **Cluster Munitions Convention** art 2(11): “Cluster munition contaminated area’ means an area known or suspected to contain cluster munition remnants.”

198 See **Conventional Weapons Protocol V** art 3(3)(b).

199 **Cluster Munitions Convention** art 4(2)(b): “[P]arties must assess and prioritise needs in terms of marking, protection of civilians, clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies.”

200 **Conventional Weapons Protocol V** art 3(3)(c): “After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall [...] mark and clear, remove or destroy ERW in affected territories under its control.” Areas affected by ERW which are assessed pursuant to art 3(3) as posing a serious humanitarian risk shall be accorded priority status for clearance, removal or destruction (art 3(2)).

201 **Cluster Munitions Convention** art 4(1): “Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control [...]; (b) [...] such clearance and destruction must be completed as soon as possible but not later than ten years after the end of the active hostilities during which such cluster munitions became cluster munition remnants.”

202 **Conventional Weapons Protocol V** art 5(1): Parties “shall take all feasible precautions in the territory under their control affected by explosive remnants of war to protect the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war. Feasible precautions are those which are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military consideration. These precautions include warnings, risk education to the civilian population, marking, fences and monitoring of territory affected by explosive remnants of war, as set out in Part 2 of the Technical Annex.” **Cluster Munitions Convention** art 4(2)(e): Parties must “conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants”. **Cluster Munitions Convention** art 4(2)(c): “[...] Warning signs based on methods of marking readily recognisable by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the cluster munition contaminated areas and which side is considered to be safe.”

203 **Cluster Munitions Convention** art 4(2)(c) states in part that a Party must take “all feasible steps to ensure that all cluster munition contaminated areas under its jurisdiction or control are

- c. within the resources of the force, assistance is provided to victims of ERW and cluster munitions,<sup>204</sup> including medical care and rehabilitation;<sup>205</sup>
- d. humanitarian missions and organisations are protected from the effects of ERW;<sup>206</sup> and
- e. humanitarian missions and organisations are provided with the location of all ERW the New Zealand force knows of in the territory the mission or organisation will operate or is operating.<sup>207</sup>



**Figure 2** Warning sign for explosive remnants of war and cluster munition remnants. To be written in English and the language used by the local civilian population.

**7.9.10** Major clearance, removal or destruction obligations fall upon a State that is both a party to an armed conflict and controls the territory in which ERW are located. This will arise for the NZDF if:

- a. New Zealand or a State for which New Zealand has defence responsibilities becomes a theatre of hostilities; or
- b. New Zealand forces become part of a force of occupation.<sup>208</sup>

perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians”.

204 **Cluster Munitions Convention** art 2(1): “Cluster munition victims’ means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities.”

205 **Cluster Munitions Convention** art 5(1): “Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.”

206 **Conventional Weapons Protocol V** art 6(1)(a): “Each High Contracting party and party to an armed conflict shall protect as far as feasible, from the effects of explosive remnants of war, humanitarian missions and organisations that are or will be operating in the area under the control of the State Party or party to an armed conflict and with that party’s consent.”

207 **Conventional Weapons Protocol V** art 6(1)(b): “Each High Contracting party and party to an armed conflict shall, upon request by [...] a humanitarian mission or organisation provide, as far as feasible, information on the location of all explosive remnants of war that it is aware of in territory where the requesting humanitarian mission or organisation will operate or is operating.”

208 For occupation of foreign territory see Chapter 9.

- 7.9.11** Temporary presence in another State's territory does not give rise to these obligations, in particular those arising on cessation of active hostilities. Taking part in a peace support operation will not involve New Zealand in being a party to an armed conflict. Even when a New Zealand force is in foreign territory in circumstances less than occupation, however, the commander is to take all reasonable steps within available resources to protect the civilian population from the effect of ERW wherever it is feasible to do so.
- 7.9.12** Clearance, removal and destruction is likely to be expensive, time-consuming and dangerous, particularly when the affected area is large, the environment harsh and ERW come from other forces. It is not an obligation a New Zealand force could usually meet unilaterally. If the NZDF is called upon to exercise control over territory at the cessation of active hostilities, responsibility for complying with these obligations must form part of coalition arrangements from the outset.

### RECORDING OF EXPLOSIVE REMNANTS OF WAR

- 7.9.13** A New Zealand force does not have an absolute obligation to precisely record each and every instance of ERW as it arises regardless of the risk to itself. It must, however, do its best to record such details as accurately as possible in the circumstances. In some environments, affected areas may be identified in broad terms, for example, by recording map references of where a contact took place and the bearings on which the force had engaged the opposing force. This information is commonly recorded in contact reports, patrol reports etc. Where more detail is available or can be reasonably obtained, for example through a global positioning system, the most accurate report possible is to be made.
- 7.9.14** Although a force will not always know whether it has created isolated or sporadic ERW, if it becomes apparent that shells, missiles, grenades or bombs are not exploding that fact must be recorded. The NZDF would typically do so in any event, especially given the fact that in addition to civilians, other friendly force elements may subsequently move through that area and thereby face the risks associated with UXO themselves.
- 7.9.15** The commander of a New Zealand force is to ensure that, to the maximum extent possible, information on explosive ordnance used or abandoned by the force is recorded and retained. The force is to record as accurately as possible:
- a. the location of areas targeted using explosive ordnance,
  - b. approximate number of shells or projectiles used,
  - c. the type and nature of the ordnance used, and
  - d. the general location of known and probable ERW.<sup>209</sup>

### RECORDING OF ABANDONED EXPLOSIVE ORDNANCE

- 7.9.16** If a New Zealand force needs to abandon explosive ordnance, the commander is to take all reasonable steps to ensure that it is left in a safe and secure manner. The commander is to record:
- a. the location of the AXO,



- b. the approximate amount of AXO at each site, and
- c. the types of AXO at each site.

## REPORTING OF EXPLOSIVE REMNANTS OF WAR

**7.9.17** NZDF commanders are to send all recorded details relating to ERW to CDF, through COMJFNZ, without delay. HQ JFNZ is to compile this information in an accessible, useful and durable format. CDF will provide that information to the party in control of the affected territory at the end of hostilities, even if that party is the opposing force.<sup>210</sup> This will facilitate marking, clearance, removal or destruction of ERW and risk education. CDF will not provide information, however, likely to damage New Zealand's legitimate security interests, for example details of the capabilities or characteristics of NZDF weapons that could disadvantage NZDF in the event that hostilities renew.

**7.9.18** If the NZDF has produced ERW, but does not control the area in which they are located, the New Zealand Government will provide, where feasible, technical, financial assistance and personnel to facilitate the marking and clearing, removal or destruction ERW.<sup>211</sup> New Zealand must also:

- a. cooperate with other States and organisations, such as the United Nations (UN), by providing technical, financial, material and human resources assistance including joint operations;<sup>212</sup> and
- b. assist other States to conduct risk education, marking and clearance, removal or destruction of ERW.

**7.9.19** If New Zealand is not a party to a conflict, it will, if in a position to do so:

- a. assist in marking and clearance, removal or destruction of ERW, and in risk education;
- b. assist in the care and rehabilitation of victims of ERW;
- c. make contributions to trust funds;
- d. engage in the exchange of equipment, scientific and technological information (other than weapons-related technology); and
- e. provide lists of experts and expert agencies etc.

210 This may be done directly or through an intermediary such as the UN or ICRC.

211 See **Conventional Weapons Protocol V** art 3(1).

212 **Conventional Weapons Protocol V** art 8(1): "Each High Contracting Party in a position to do so shall provide assistance for the marking and clearance, removal and destruction of explosive remnants of war, and for risk education to civilian populations and related activities *inter alia* through the UN system, other relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis."



# METHODS OF COMBAT

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## SECTION 1 – INTRODUCTION

- 8.1.1** This chapter deals with the rules of Law of Armed Conflict (LOAC) governing the methods of combat, ie the tactics and techniques of warfare that are either prohibited under LOAC or in respect of which restrictions or special obligations apply.
- 8.1.2** The rules of LOAC governing methods of combat are intended to ensure that the destructive effects of warfare are limited as much as possible to enemy combatants and property of military significance. As populations grow and with the rise of asymmetric warfare, the prospect of conducting operations in areas empty of civilians, in all three environments, has greatly decreased. The risk of some level of civilian casualties may be unavoidable, particularly where civilians take part in hostilities.
- 8.1.3** These rules also ensure that forces do not employ treacherous tactics that encourage disrespect for LOAC thereby prolonging conflict, or other practices, such as the denial of quarter, which increase warfare's brutality. Combat in certain environments is also regulated so as to ensure the protection and survival of the habitat in which all humankind lives and survives.
- 8.1.4** Many of the rules set out in this chapter overlap with the protections afforded to persons such as civilians and persons *hors de combat*, or with the rules relating to the means of warfare. They are consolidated here to ensure members of the New Zealand Defence Force (NZDF) understand the duties which apply to them as they engage in combat.
- 8.1.5** **NZDF Code of Conduct** rules that relate to this chapter are:

*Fight only opposing forces or persons taking a direct part in hostilities.*

*Attack only military objectives and destroy no more than the mission requires.*

*When attacking military objectives, take care to minimise incidental civilian casualties and property damage.*

*Do not fight treacherously by falsely using the protections of LOAC to harm the opposing force.*

## SECTION 2 – FUNDAMENTAL RULES

## DEFINITIONS

- 8.2.1** **Attack** means any act of violence against the opposing force, and includes offensive and defensive operations.<sup>1</sup> The term may also apply to an unlawful act of violence against protected persons and objects.<sup>2</sup>
- 8.2.2** **Concrete and direct military advantage anticipated** means a good-faith expectation that the attack will make a relevant and proportional contribution to the objective of the attack. The ‘military advantage anticipated’ refers to the attack as a whole and not just from isolated or particular parts of that attack. It involves a number of considerations, including the security of attacking forces.<sup>3</sup> It is not limited to the physical effects of the attack and can include features such as the anticipated effect on the morale of the opposing force.
- 8.2.3** **Incidental loss of life or injury** (also known as ‘collateral casualties’) means loss of life or injury to civilians or other protected persons which is not the intended result of an attack on a military objective, but which is a consequence of that attack.<sup>4</sup>
- 8.2.4** **Incidental damage** (also known as ‘collateral damage’) means damage to or destruction of civilian objects or the natural environment which is not the intended result of an attack on a military objective, but which is a consequence of that attack.<sup>5</sup>
- 8.2.5** **Feasible** means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.<sup>6</sup>

## RIGHT TO CHOOSE METHODS OF COMBAT IS NOT UNLIMITED

- 8.2.6** The right of parties to an armed conflict to choose methods of combat is not unlimited.<sup>7</sup> In particular, it is prohibited to use methods of combat that:
- a. target civilians or civilian objects;

1 See **Geneva Protocol I** art 49(1), **San Remo Manual** rule 13(b) and **HPCR Air and Missile Manual** rule 1(e). Attack is not limited to direct physical force, but can include cyber attack (see **Tallinn Manual** rule 30). In this manual, the term ‘defence’ is sometimes used to avoid doubt as to the breadth of application of a particular obligation.

2 As a crime against humanity, ‘attack’ can encompass any widespread and systematic mistreatment of the civil population. See **Galić Trial** at [141], **Kunarac Appeal** at [86], **Limaj Trial** at [194]. For crimes against humanity see Chapter 17.

3 **Geneva Protocol I New Zealand Declaration**: “[...] the Government of New Zealand understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and the term “military advantage” involves a variety of considerations, including the security of attacking forces. It is further the understanding of the Government of New Zealand that the term “concrete and direct military advantage anticipated” [...] means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.”

4 See **San Remo Manual** rule 13(c) and **HPCR Air and Missile Manual** rule 1(l).

5 See **San Remo Manual** rule 13(c) and **HPCR Air and Missile Manual** rule 1(l).

6 See **Conventional Weapons Protocol III** art 1(5) and **HPCR Air and Missile Manual** rule 1(q). This definition is applied in this manual as guidance with respect to all similar tests of feasibility.

7 See **Hague Regulations** art 22, **Geneva Protocol I** art 35(1), **San Remo Manual** rule 38 in respect of armed conflict at sea and **Nuclear Weapons Opinion** at [77].

- b.** do not discriminate between military objectives, and civilians and civilian objects;
- c.** are likely to cause incidental loss of life or injury to civilians or incidental damage to civilian objects which is disproportionate to the concrete and direct military advantage anticipated;
- d.** are treacherous; or
- e.** are conducted in prohibited environments.

### SECTION 3 – DISTINCTION IN ATTACK

**8.3.1** Members of the NZDF are at all times to distinguish between:

- a. objects and people immune from attack**, ie civilians, the civilian population and civilian objects, non-combatants,<sup>8</sup> persons *hors de combat*; cultural property, schools, mosques, churches, monuments; medical personnel and facilities; vehicles, ships and aircraft; journalists; civil defence workers; and peacekeepers;<sup>9</sup> and
- b. objects and people open to attack**, ie military objectives, enemy combatants<sup>10</sup> and persons taking a direct part in hostilities against the New Zealand force or coalition partners.

**8.3.2** There are three overlapping but discrete elements of the distinction obligation, namely the prohibitions on:

- a. deliberately targeting** civilians, the civilian population, civilian objects and other protected persons and objects, for so long as they do not take a direct part in the hostilities and the objects do not become military objectives;
- b. indiscriminate attacks** that make no distinction between persons and objects which may lawfully be attacked, and those which may not; and
- c. disproportionate attacks** where attacks on military objectives which can be expected to result in loss of life or injury to civilians or damage to civilian objects or other protected person or objects which is out of proportion to the concrete and direct military advantage anticipated.<sup>11</sup>

<sup>8</sup> For non-combatant status see Chapter 6.

<sup>9</sup> **ICRC Customary IHL rule 1**: “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks must only be directed against combatants. Attacks must not be directed against civilians.” For precautions in attack see Section 7. For civilian status see Chapter 6. For protections applicable to civilians and civilian objects see Chapter 13.

<sup>10</sup> For combatant status see Chapter 6.

<sup>11</sup> Disproportionate attacks are an example of indiscriminate attacks, however, the two types of attack are generally treated as distinct, though related, subjects (see **Geneva Protocol I** art 51(5)(b)).

## SECTION 4 – PEOPLE AND OBJECTS IMMUNE FROM ATTACK

### DEFINITIONS

- 8.4.1** **Civilian** means any person who is not a member of the armed forces.<sup>12</sup>
- 8.4.2** **Civilian object** means any object that is not a military objective.<sup>13</sup>
- 8.4.3** **Civilian population** means all persons who are civilians. The presence within the civilian population of persons who do not come within the definition of civilians, for example individual combatants or persons directly participating in hostilities, does not deprive the population of its civilian character.<sup>14</sup>

### ATTACKS ON CIVILIANS PROHIBITED

- 8.4.4** Members of the NZDF are not to:
- a. attack a civilian population; or
  - b. attack any individual civilian<sup>15</sup> unless that person forfeits immunity from attack by taking a direct part in hostilities.<sup>16</sup>
- 8.4.5** **Cases of doubt.** If there is any doubt whether or not a person is a civilian, members of the NZDF are to treat that person as being entitled to civilian protection until they are sure that he or she is not.<sup>17</sup>
- 8.4.6** In giving effect to this order, members of the NZDF are not to act recklessly as to their own safety. In assessing whether there is doubt as to the true status of a person, members of the NZDF are to take into account intelligence or information as to the way the opposing force conducts operations, the way that the person is behaving, the clothes that the person is wearing, in some cases his

12 **Geneva Protocol I** art 50(1): “A civilian is any person who does not belong to one of the categories of persons referred to in [Geneva Convention III] Article 4(A)(1),(2),(3) and (6) and in Geneva Protocol I Article 43 [...]” See also **ICRC Customary IHL** rule 5. The term ‘civilian’ includes any person entitled to additional protection, eg combatants who are wounded, sick or shipwrecked (see Chapter 11), persons deprived of liberty (see Chapter 12), medical personnel (see Chapter 11), neutral persons (see Chapter 16), and the personnel of UN operations and civil defence organisations (see Chapter 14). For civilian status see Chapter 6. For protection of civilians see Chapter 13.

13 See **ICRC Customary IHL** rule 9 and Chapter 14. ‘Civilian objects’ includes any object entitled to additional protection, eg cultural and religious property, installations containing dangerous forces, the property of UN and civil defence organisations, safety zones, and other places protected by agreement.

14 See **Geneva Protocol I** arts 50(2) and (3) and **ICRC Customary IHL** rule 5.

15 **Geneva Protocol I** art 51(2) and **Geneva Protocol II** art 13(2): “The civilian population as such, as well as individual civilians, shall not be the object of attack.” Under **Geneva Protocol I** art 85(3)(a) making the civilian population or individual civilians the object of attack is a grave breach. In the **Strugar Trial** judgment at [240] the Trial Chamber held that civilian deaths resulting from deliberate shelling can form the basis for charges of murder and wilful killing. See also **Rome Statute** arts 8(2)(b)(i) and (e)(i) and **HPCR Air and Missile Manual** rule 11.

16 See **Geneva Protocol I** art 51(3), **Geneva Protocol II** art 4(1), **ICRC Customary IHL** rule 6. For ‘direct part in hostilities’ see Chapter 6.

17 **Geneva Protocol I** art 50(1): “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” This was tested in the ICTY in the **Galić Trial** where the Trial Chamber held that, in cases of doubt as to the status of a person, “the Prosecution must show that in the given circumstances a reasonable person could not have believed that the person he or she attacked was a combatant” (quoted and affirmed in **Halilović Trial** at [36]). Further at [36]: “[...] the prosecution must show that the perpetrator was aware or should have been aware of this status of the victim”. See also **HPCR Air and Missile Manual** rule 12(a).

or her gender and age,<sup>18</sup> the extent to which he or she is equipped for combat action, and the way he or she reacts to the presence of the New Zealand force.

## ATTACKS ON CIVILIAN OBJECTS PROHIBITED

**8.4.7** Members of the NZDF are not to attack civilian objects.<sup>19</sup>

**8.4.8 Presumption as to normal use in cases of doubt.** Members of the NZDF are to conduct operations on the presumption that objects which are normally dedicated for civilian purposes, such as places of worship, houses and schools, are not military objectives, unless it is clear that they are being used by the opposing force to make an effective contribution to their military effort, for example where enemy forces are using the buildings as part of their defences.<sup>20</sup>

**8.4.9 Loss of immunity from attack.** A civilian object only loses its immunity from attack if it becomes a military objective as described in the next section.

## NO JUSTIFICATION FOR DELIBERATE ATTACKS ON CIVILIANS OR CIVILIAN OBJECTS

**8.4.10** Nothing in this manual is to be read to suggest that it is ever legal to deliberately attack:

- a. civilians who are not taking a direct part in hostilities,
- b. the civilian population, or
- c. civilian objects which have not become military objectives.<sup>21</sup>

**8.4.11** The prohibition is absolute even if deliberate attack offers a military advantage.<sup>22</sup> There can be no lawful argument that such attacks will ‘break the will of the enemy to fight’ or that the entire population is of an ‘enemy nature’ because it supports the opposing force. It is not permissible to attack civilian objects even if to do so offers an indirect military advantage such as drawing away resources from the enemy’s war effort.

18 This is not to say that all military-aged men should be treated as combatants or that combatants will be exclusively male and of a certain age. It is less likely, however, that the very young and the very old will be direct participants in combat, and the issue of gender may be relevant in some societies where combat is a predominantly male activity. In no case should presumptions for or against civilian status be made on these criteria alone.

19 **Geneva Protocol I** art 52(1): “Civilian objects shall not be the subject of attack or of reprisals.” See also **ICRC Customary IHL** rule 7.

20 See **Geneva Protocol I** art 52(3) and **HPCR Air and Missile Manual** rule 12(b). **Galić Trial** at [51]: “[... a civilian] object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including information available to the latter, that the object is being used to make an effective contribution to military action”. **Kordić & Čerkez Appeal** at [53]: In assessing criminal responsibility, “the burden of proof as to whether an object is a civilian one rests on the Prosecution”.

21 **Geneva Protocol I** art 57(5): “No provision in this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.”

22 **Galić Appeal** at [130]: “The Trial Chamber was therefore correct to hold that the prohibition of attacks against civilians and the civilian population ‘does not mention any exceptions [and] does not contemplate derogating for this rule by invoking military necessity’.” **Blaškić Appeal** at [109]: “The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.”



## SECTION 5 – OBJECTS AND PEOPLE OPEN TO ATTACK

### MILITARY OBJECTIVES

**8.5.1** A **military objective** is an object, including a specific area of land:<sup>23</sup>

- a. which by its nature, location, purpose or use makes an **effective contribution** to military action; and
- b. the total or partial destruction, capture or neutralisation of which, in the circumstances ruling at the time, offers a definite military advantage.

**8.5.2** Enemy combatants may be described as a ‘military objective’, however, in this manual, attacks on persons are dealt with separately from attacks on objects.

### NEW ZEALAND DEFENCE FORCE MAY ONLY ATTACK MILITARY OBJECTIVES

**8.5.3** Subject to LOAC and their orders, members of the NZDF may attack only military objectives.<sup>24</sup>

### RESPONSIBILITY FOR DETERMINING WHAT IS A MILITARY OBJECTIVE

**8.5.4** The responsibility for determining whether an object or place is a military objective may lie with:

- a. NZDF commanders, eg when conducting targeting, or planning or executing operations; or
- b. members of the NZDF at any level in a combat situation.

**8.5.5** Because the person making the decision may have little time for deliberation and may be in a situation of considerable danger, Commander Joint Forces New Zealand (COMJFNZ) is to ensure that:

- a. all members of the NZDF are adequately trained on what constitutes a military objective in the context of the operation in which they are involved;
- b. training is routinely updated and refreshed;
- c. the concept of military objectives is adequately covered in rules of engagement (ROE); and
- d. the advice of an NZDF Legal Adviser (LEGAD) is obtained wherever practicable before conducting an attack or operation.

**8.5.6** Determination of whether an object or place is a military objective is to be made in good faith on the basis of information available at the time. This includes information or intelligence on opposing force actions and intentions.

23 **Geneva Protocol I** art 52(2). **Geneva Protocol I New Zealand Declaration**: “[...] a specific area of land may be a military objective if, because of its location or other reasons specified in art 52, its total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage.”

24 **Geneva Protocol I** art 52(2): Attacks must be limited strictly to military objectives. See also **HPCR Air and Missile Manual** rules 22–27.. **ICRC Customary IHL** rule 7.

**WHAT IS EFFECTIVE CONTRIBUTION?**

**8.5.7** The factors that determine whether an object or place makes an effective contribution to military action are as follows:<sup>25</sup>

- a. Nature.** Objects that are designed to be used to assist the opposing force or to harm a New Zealand force intrinsically make an effective contribution to military action, eg headquarters, barracks, fortifications, military airfields, military equipment, transport, aircraft, weapons, warships and other military materiel.
- b. Location.** Military value is inherent in a place or object that is of strategic or tactical importance to either the New Zealand force or to the opposing force, eg hills that constitute vital ground, transport hubs, beachheads, or valleys or narrow straits which form chokepoints. An object or place near the centre of battle or lying on an axis of advance is likely to be a military objective whereas it might not be if located at a distance from combat action. It is not only by direct enemy occupation that an object becomes a military objective; positions can be denied to the opposing force and may be attacked to contain enemy movement or to interdict logistic resupply.
- c. Purpose.** Purpose and nature overlap to a large degree. Anything that has a military purpose is likely to make an effective contribution to military action. Some places and objects may not have an overtly military nature, but may nevertheless have a purpose that supports the enemy, eg factories that produce military equipment.
- d. Use.** Objects and places that are not of military value by their fundamental nature become military objectives while they are being used by the opposing force to make an effective contribution to its combat effort. Examples include railyards used for transporting troops, bridges along lines of attack and supply and dual-use airports.

**OBJECTS AND PLACES THAT ARE MILITARY OBJECTIVES**

**8.5.8** The following are to be regarded as military objectives at any time during armed conflict:

- a.** Places occupied or defended by combatants of the opposing force.<sup>26</sup>
- b.** Places occupied or defended by persons taking a direct part in hostilities against a New Zealand force or coalition partners.<sup>27</sup>
- c.** Warships, military vehicles and military aircraft of the opposing force (except for medical equipment, medical transports, hospital ships, medical aircraft, or other specifically protected vessels, vehicles or aircraft).<sup>28</sup>

25 **Geneva Protocol I** art 52(2). These factors overlap and it may not be possible to definitively set out whether an object or place is a military objective purely based on any one of them. The various elements may work in combination. The essential duty, however, is to consider the need to attack an object or place on the basis of a rational assessment of its contribution to the conduct of the operation.

26 This does not include medical and religious personnel (see Chapter 11).

27 For meaning of 'direct part in hostilities' see Chapter 6.

28 For medical equipment and transport, hospital ships or medical aircraft see Chapter 11.

- d. Materiel, installations, headquarters, camps, bases of the opposing force (except medical facilities, prisoner of war (PW) camps and internment camps (ICs), or other specifically protected objects).
- e. Weapons, communications systems, computers and logistic support of the opposing force.
- f. Munitions factories and industrial facilities directly supporting the opposing force.

### **OBJECTS AND PLACES THAT MAY BECOME MILITARY OBJECTIVES**

**8.5.9** Civilian objects and places may become military objectives if used by the opposing force to make an effective contribution to military action. Such use deprives the object or place of immunity from attack. Subject to LOAC and their orders, members of the NZDF may lawfully attack:

- a. bridges, roads, railways, airports and other transport systems being used by the opposing force for transport of personnel or materiel;
- b. civilian communication and computer facilities being used by the opposing force for command, control or intelligence purposes;
- c. electrical power sources directly supporting the units or headquarters of the opposing force;
- d. wharves, docks, ports and depots supporting and resupplying the opposing force or its warships; and
- e. an area of tactical or strategic importance that needs to be captured by a New Zealand force or denied to the opposing force.

### **ATTACK MUST OFFER DEFINITE MILITARY ADVANTAGE**

**8.5.10** Once it is determined that the object or place is a military objective, the commander must consider whether destroying it in whole or in part, or capturing or neutralising it offers a definite military advantage. This may be obvious from the nature of its contribution to the opposing force's military action. In some cases, however, an object or place may technically qualify on the above criteria, but attacking it offers no advantage. It is, therefore, not to be attacked.

**8.5.11** It must be remembered, however, that the rule requires definite advantage, not necessarily an immediate advantage. Destroying enemy materiel at a distance from combat, for example, may be justified on the basis that it will be eventually used to the opposing force's advantage, even if it is not at the time of attack.

### **NOT EVERY ACT HARMFUL TO THE ENEMY IS PERMITTED**

**8.5.12** A civilian object does not become a military objective simply because attacking it may harm the enemy in some way. On that basis, almost all objects could be viewed as military objectives and the principle of distinction would disappear. Members of the NZDF are to apply the underlying principles of LOAC in assessing fact situations.<sup>29</sup>

29 For basic principles, see Chapter 4.

- 8.5.13** For example, subject to other rules of LOAC, buildings within a town may be shelled if the opposing force uses them as part of its defensive position. They may not be shelled in order to drive the civilian inhabitants into the path of advancing enemy armour to slow them down. The latter clearly produces a military advantage, but the attack is not directed against an object which, at the time the attack is made, effectively contributes to military action.

#### COMBATANTS OF THE OPPOSING FORCE AND OTHER PERSONS TAKING A DIRECT PART IN HOSTILITIES MAY BE ATTACKED

- 8.5.14** Subject to LOAC and their orders, it is the lawful right and duty of members of a New Zealand force to attack:
- a. combatants of the opposing force,<sup>30</sup> and
  - b. persons who are taking a direct part in hostilities against a New Zealand force or coalition force partners.<sup>31</sup>

#### INDISCRIMINATE ATTACKS

- 8.5.15** 'Indiscriminate attacks' are attacks that are of a nature to strike military objectives and civilians and civilian objects alike because they:
- a. are not directed at a specific military objective;
  - b. employ methods or means of combat that cannot be directed at a specific military objective; or
  - c. employ methods of combat, the effects of which cannot be limited as required by LOAC.
- 8.5.16** Indiscriminate attacks may be wilful or simply reckless as to the consequences for civilians or civilian objects. Although such attacks may also inflict damage on the opposing force, the relationship of that damage to the civilian suffering caused is not calculated. The fact that some legitimate military targets might also be hit by such attacks does make them lawful.

30 **Geneva Protocol I** art 48. See **ICRC Customary IHL** rule 7. For combatant status see Chapter 6. The right to attack enemy combatants is subject to other LOAC rules, ie they must not be attacked if they are *hors de combat*, surrendering, or the subject of a truce or ceasefire. Medical and religious personnel must not be attacked (see Chapter 11).

31 For the meaning of 'direct part in hostilities' see Chapter 6. The right to attack persons taking a direct part in hostilities is subject to other LOAC rules, ie they must not be attacked if they are *hors de combat*, surrendering, are the subject of a truce or ceasefire, or are medical and religious personnel (see Chapter 11).

**INDISCRIMINATE ATTACKS ARE PROHIBITED**

**8.5.17** Members of the NZDF are not to order or carry out indiscriminate attacks.<sup>32</sup>

**8.5.18** Examples of indiscriminate methods of combat include:

- a. 'free fire zones' in which any person encountered is presumed to be enemy;
- b. indirect fire missions directed into an area at random without regard as to who may be there;
- c. attacks that employ effects that cannot be controlled once started, eg incendiary attack in an urban environment; or
- d. attacks that treat entire areas containing both military and civilian persons and objects as a single target, eg 'carpet bombing' towns.

32

**Geneva Protocol I** art 51(4). See art 85(3)(b) for grave breach. **Rome Statute** art 8(2)(b) (xx). While there is no treaty-based prohibition on indiscriminate attack in non-international armed conflict, the rule prohibiting such an attack in all forms of conflict arises from customary international law, see *Galić Trial* at [57]. members of the NZDF are therefore to apply the prohibition against indiscriminate attack in all operations. See **San Remo Manual** rule 42(b). See also **ICRC Customary IHL** rule 11.

## SECTION 6 – PROPORTIONALITY IN ATTACK

### DISPROPORTIONATE ATTACKS ARE PROHIBITED

**8.6.1** Members of the NZDF are not to order or carry out any attack that may be expected to cause:

- a. incidental loss of life or injury to civilians; and/or
- b. incidental damage to civilian objects or the natural environment;

which would be excessive in relation to the concrete and direct military advantage anticipated from the **operation as a whole**.<sup>33</sup>

**8.6.2** The advice of an NZDF LEGAD is to be obtained before an attack is made wherever practicable.

### ASSESSMENT OF PROPORTIONALITY

**8.6.3** NZDF commanders assessing the proportionality of an attack are to consider the following factors:

- a. The value of the military objective.
- b. Whether any LOAC protection applies to it, eg the likelihood of releasing dangerous forces if destroyed,<sup>34</sup> its cultural or religious significance,<sup>35</sup> its use by the civilian population, or the presence of medical facilities.<sup>36</sup>
- c. The nature and capabilities of weapons available to the force, in particular their range, accuracy and radius of effect, as well as the available methods of attack.
- d. Natural, environmental or logistic constraints.
- e. The number of civilians in the vicinity and how close they are to the objective.
- f. The number and nature of civilian objects in the vicinity, whether they are inhabited, and how close they are to the objective.
- g. The risks to the New Zealand force and its coalition partners of the various options.<sup>37</sup>

33 **Geneva Protocol I** arts 51(5)(b) and 57(2)(a)(iii). See art 85(3)(b) for grave breach. **Rome Statute** art 8(2)(b)(iv). While there is no treaty-based prohibition on disproportionate attack in non-international armed conflict, the rule prohibiting such an attack in all forms of conflict arises from customary international law and must apply in all operations. See *Galić Trial* (at [59]), To be disproportionate the attack must be “launched wilfully and in the knowledge of circumstances giving rise to the expectation of excessive civilian casualties”. See also **San Remo Manual** rule 46(d) and **ICRC Customary IHL** rule 14. For the principle of proportionality see Chapter 4.

34 For installations containing dangerous forces see Chapter 14.

35 For objects of cultural or religious significance see Chapter 14.

36 For medical and religious facilities see Chapter 11.

37 **Geneva Protocol I New Zealand Declaration**: “[...] the Government of New Zealand understand that [...] the term “military advantage” involves a variety of considerations, including the security of attacking forces.”

### THE MEANING OF ‘OPERATION AS A WHOLE’

- 8.6.4** An NZDF commander assessing the proportionality of an attack is to do so in the context of any larger operational plan of which the attack is a part.<sup>38</sup> If an attack might cause disproportionate incidental civilian casualties or damage when judged against local military advantage gained from it, the commander is to consider the military value of the objective in relation to the overall aim of the operation. For example, a minor objective such as an isolated bridge may in fact be a significant chokepoint for large formations.
- 8.6.5** The term ‘operation as a whole’ is to be assessed realistically and in good faith. It is not to be expanded to routinely refer to the entire war or campaign. To do so would render the principle of proportionality meaningless as almost any target could be justified against such a balance. To constitute a war crime, the disproportionate effects of an attack must be ‘clearly excessive’.<sup>39</sup> Thus, to be criminal, the disproportion of civilian casualties to military advantage must amount to more than a finely balanced calculation.

### CASUALTIES AMONGST ENEMY COMBATANTS NOT PART OF PROPORTIONALITY

- 8.6.6** Attacking an opposing force with greater force than the minimum strictly necessary is not a disproportionate attack.<sup>40</sup> A New Zealand force is not required to forego the advantage of being numerically stronger, better armed, better placed strategically or tactically or enjoying the element of surprise. Proportionality relates solely to the incidental loss of life or injury to civilians, and incidental damage to civilian objects and the natural environment caused by an attack – not the number of enemy combatants killed.
- 8.6.7** Use of highly destructive force against an unsophisticated, ill-armed or fleeing force may, however, affect the international or domestic palatability of an attack from a political or moral perspective. NZDF commanders are to ensure that COMJFNZ is made aware of the prospect of such attacks.

38 **Geneva Protocol I New Zealand Declaration:** “[T]he military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack”. See also **Rome Statute** art 8(2)(b)(iv).

39 See **Rome Statute** art 8(2)(b)(iv).

40 ‘Minimum force’ is a concept applicable to peace support operations and aid to the civil authorities, not to armed conflict.



## SECTION 7 – PRECAUTIONS FOR THE PROTECTION OF THE CIVILIAN POPULATION, PROTECTED PERSONS AND OBJECTS

### PRECAUTIONS MUST BE TAKEN TO AVOID CIVILIAN CASUALTIES OR DAMAGE TO CIVILIAN OBJECTS

- 8.7.1** Members of the NZDF are to take constant care to spare the civilian population, civilians and civilian objects from the destruction and suffering caused by armed conflict.<sup>41</sup> NZDF commanders are to take all feasible precautions in the choice of methods of attack to avoid, and in any event to minimise, incidental loss of life or injury to civilians and incidental damage to civilian objects.<sup>42</sup>
- 8.7.2** Commanders must rely on their assessment of the information from all sources that are reasonably available to them at the time.<sup>43</sup> This may include intelligence reports, aerial or satellite reconnaissance images and other information about the proposed target. Commanders are to keep themselves informed of all material necessary to protect civilians and civilian objects, and must not ignore information or refrain from looking at it.<sup>44</sup> The legality of their decisions will be judged by what they knew, or could reasonably have found out, at the time – not what might come to light later.<sup>45</sup>
- 8.7.3** All members of the NZDF are to bring to the attention of their superiors any information that will reduce incidental casualties or damage.
- 8.7.4** The advice of an NZDF LEGAD is to be obtained wherever practicable in assessing feasible precautions.

### THE OBJECTIVE LEAST LIKELY TO CAUSE CIVILIAN SUFFERING MUST BE SELECTED

- 8.7.5** If it is possible for an NZDF commander to make a choice between military objectives offering similar military advantage, the one expected to cause the least incidental loss of life or injury to civilians, or incidental damage to civilian objects is to be chosen.<sup>46</sup>
- 8.7.6** In meeting this obligation, a commander is not to expose the force to unnecessary casualties or risk the success of the mission. A complete choice of objectives will only rarely be available. They will usually be set in accordance

41 See **Geneva Protocol I** art 57(1) and **ICRC Customary IHL** rule 15.

42 **Geneva Protocol I** arts 57(2)(a)(i) and (ii), **San Remo Manual** rules 46(a), (b) and (c), **HPCR Air and Missile Manual** rules 31 and 32 and **ICRC Customary IHL** rule 17.

43 **Geneva Protocol I New Zealand Declaration**: “In relation to Articles 51 to 58 inclusive, it is the understanding of the Government of New Zealand that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.” In the *Hostages Trial* (at 71), the tribunal held that it is within the power of a commander “to require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to appraise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence”.

44 See *Hostages Trial* at 70.

45 *Hostages Trial* (at 68–69): “But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal”.

46 See **Geneva Protocol I** art 57(3), **ICRC Customary IHL** rule 21 and **HPCR Air and Missile Manual** rule 33.



with command, strategic and tactical considerations, as well as practical issues such as capability and resources, many of which the commander will be unable to change. Where the opportunity arises to achieve the mission in a number of different ways, the one that causes the least incidental civilian loss and damage is to be selected.

- 8.7.7** The advice of an NZDF LEGAD is to be obtained wherever practicable in assessing the choice of objectives.

#### **OBJECTIVE MUST BE VERIFIED**

- 8.7.8** NZDF commanders are to do everything feasible to verify that the places or objects to be attacked:

- a. are military objectives – not civilians or civilian objects;<sup>47</sup> and
- b. are not subject to special protection under LOAC, eg hospitals, medical treatment centres, religious or cultural property, or places containing dangerous forces.<sup>48</sup>

- 8.7.9** In deciding whether everything feasible has been done to verify the nature of an objective, a commander is to take into account:

- a. availability of reconnaissance and intelligence resources;
- b. completeness and reliability of information already held; and
- c. the risk to the force involved in gathering more information.

- 8.7.10** Such considerations do not, however, provide a licence for a commander to attack in a manner that disregards the prospect of civilian casualties. In the absence of adequate verification, the attack may have to be cancelled or suspended until verification can be achieved.

#### **PRECAUTIONS MUST BE TAKEN AGAINST THE EFFECT OF ATTACKS**

- 8.7.11** To the maximum extent feasible, NZDF commanders are to take precautions against the effects of an attack on the civilian population by:

- a. removing the civilian population, individual civilians and civilian objects under the control<sup>49</sup> of the New Zealand force from the vicinity of military objectives;<sup>50</sup>
- b. avoiding locating military objectives within or near densely populated areas;<sup>51</sup>
- c. avoiding placing protected objects, such as medical facilities and refugee camps, in close proximity to military objectives;

47 See **ICRC Customary IHL** rule 16, **San Remo Manual** rule 46(a), and **HPCR Air and Missile Manual** rule 32(a).

48 See **Geneva Protocol I** art 57(2)(a)(i).

49 For control of territory see Chapter 9.

50 See **Geneva Protocol I** art 58(a) and **ICRC Customary IHL** rule 24.

51 See **Geneva Protocol I** art 58(b) and **ICRC Customary IHL** rule 23.

- d. declaring, where approved, that certain areas are undefended, or setting up demilitarised or safety zones or, in the maritime environment, exclusion zones; and
- e. taking other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control, against the dangers resulting from military operations.<sup>52</sup>

**8.7.12** Members of the NZDF are not to allow this duty to be misused in order to effect forcible transfers or deportations of civilians.<sup>53</sup> The civilian population must be allowed to return to their homes once the attack is over or as soon as it is safe to do so.

**8.7.13** Although commanders must avoid placing military objectives in densely populated areas, LOAC does not prohibit use of urban areas as part of military operations where such use is unavoidable. In such cases, however, the potential danger to the civilian population and civilian objects is to be considered to the greatest degree possible in deciding dispositions of units and weapons.

**8.7.14** In planning operations, commanders are to bear in mind the following:

- a. Operations frequently occur around transport lines that are essential to civilians just as they are to armed forces, eg roads, airports and straits at sea.
- b. Civilians and civilian objects may be unlawfully located in close proximity to military objectives, either by the opposing force ('human shields') or voluntarily.
- c. Civilians may be unavoidably present within a military objective for reasons unconnected to NZDF operations, eg refugees seeking to flee across a border.

**8.7.15** Where feasible, NZDF commanders are to engage with the following in order to assist in coordination and conduct of activities for the protection of the civilian population from the effects of combat:

- a. Civilian leaders at national and local level who have the primary obligation to ensure the safety and welfare of the civilian population.
- b. International organisations such as the United Nations (UN), in particular the UN High Commissioner for Refugees (UNHCR).
- c. The International Committee of the Red Cross (ICRC) and national Red Cross/Red Crescent societies.

<sup>52</sup> See **Geneva Protocol I** art 58(c) and **ICRC Customary IHL** rule 22.

<sup>53</sup> Under **Geneva Protocol I** art 58(a) removal of the civilian population, individual civilians and civilian objects from the vicinity of military objectives is to take place without prejudice to art 49 of Geneva Convention IV, which provides that forcible transfers and deportations are prohibited and evacuations are permissible only for the security of the population or for imperative military reasons.

- d. Non-governmental organisations (NGOs) dedicated to the relief of suffering of the civilian population.
- e. Civil defence organisations.

**8.7.16** The advice of an NZDF LEGAD is to be obtained wherever practicable.

#### **ATTACK MAY NEED TO BE CANCELLED OR SUSPENDED**

**8.7.17** NZDF commanders are to constantly review target lists and likely military objectives as new information and intelligence becomes available and as circumstances change. All members of the NZDF are to inform their commanders of facts suggesting that earlier information on whether an object is a military objective is wrong, or that new circumstances apply.

**8.7.18** An NZDF commander is to cancel or suspend an attack if it becomes apparent that:

- a. the information upon which he or she concluded that the attack complied with LOAC is inaccurate or incomplete;
- b. the target is no longer a military objective;
- c. the objective is subject to special protection; or
- d. the planned attack is no longer proportionate because circumstances upon which proportionality was assessed have changed, for example:
  - (1) the military value of the objective has decreased (eg the enemy has withdrawn forces from it); or
  - (2) the risk of civilian casualties or damage has increased (eg refugees have moved onto the objective).

**8.7.19** If an attack must be cancelled, the commander is to do everything feasible<sup>54</sup> to stop it. What is feasible is to be assessed in light of:

- a. the effective state of command, control and communications; and
- b. the need to break off combat at a time and in a manner that does not cause an unacceptable risk of casualties to the New Zealand force or coalition partners.

**8.7.20** If it is not feasible to cancel an attack, the commander is to assess whether it is possible to suspend it. For example, an attack at night may cause fewer casualties amongst civilians using bridges or roads than one during the day.

**8.7.21** The advice of an NZDF LEGAD is to be obtained wherever practicable.

**A WARNING OF ATTACK MUST BE GIVEN TO THE CIVILIAN POPULATION IF POSSIBLE**

**8.7.22** Unless circumstances do not permit, the NZDF commander responsible is to give effective advance warning to the affected civilian population of any impending attack.<sup>55</sup>

**8.7.23** In deciding whether circumstances permit, factors to be considered by the commander concerned include:

- a.** the vital humanitarian duty to spare lives and avoid unnecessary suffering by giving civilians the opportunity to move away from the danger or to at least take measures to protect themselves;
- b.** whether the attack relies on the element of surprise for its effectiveness;
- c.** the tactical situation of the New Zealand force, including whether it is itself under attack; and
- d.** whether the force has the resources or time necessary to communicate with the civilian population.

**8.7.24** When given, warnings are to be in a language that the population will understand and are to be distributed as widely as possible, including over electronic and print media, and by pamphlets, word of mouth, social media, mass rapid communications or telephone.

55

**Geneva Protocol I** art 57(2)(c) requires that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit”. See also **ICRC Customary IHL** rule 20. For providing specific warnings about the use of remotely delivered mines see **Conventional Weapons Protocol II** art 6(4); for booby traps see **Conventional Weapons Protocol II** art 7(3)(b). See also Chapter 7.

## SECTION 8 – PROHIBITED METHODS OF COMBAT

ATTACKS ON PERSONS *HORS DE COMBAT* IS PROHIBITED

- 8.8.1** A person is *hors de combat* (out of combat)<sup>56</sup> if he or she:
- a. is in the power of an adverse party, eg has been captured or detained;
  - b. clearly expresses an intention to surrender;
  - c. is unconscious or incapacitated by wounds or sickness, and is therefore incapable of defending himself or herself; or
  - d. is shipwrecked.<sup>57</sup>
- 8.8.2** Members of the NZDF are not to attack a person who is *hors de combat* or should, in the circumstances, be recognised as being *hors de combat*.<sup>58</sup>
- 8.8.3** **Loss of protection.** A person who is *hors de combat* is immune from attack only for such time as the person does not:
- a. commit any hostile act, or
  - b. attempt to escape or resist capture.
- 8.8.4** The immunity of persons *hors de combat* does not apply to opposing forces who are retreating or fleeing. They are not ‘defenceless’ because they may subsequently rally to fight again. Nor does it apply to opposing forces that are for the moment unable to defend themselves because they have been caught by surprise. Sleeping enemy combatants are liable to attack, as are enemy patrols that walk into an ambush. It is only by surrender that enemy combatants can deliberately remove themselves from being a lawful target of attack.
- 8.8.5** In applying this rule, members of the NZDF are to be guided by the following:
- a. A person who wishes to surrender must make his or her intentions clear. Ambiguity in that person’s actions can be taken by the capturing force to mean that the person is not, in fact, surrendering.
  - b. Members of the NZDF are to take necessary precautions when dealing with an enemy known to conduct treacherous, false surrenders or feign injury. Persons who fail to stop at a safe distance from the capturing force when ordered to do so, refuse to raise their hands, refuse to drop weapons or suspicious items, or make any sudden movement inconsistent with surrender or injury, may lawfully be attacked if the circumstances so demand.

56 See **Geneva Protocol I** art 41(2) and **ICRC Customary IHL** rule 47. For the rules pertaining to persons at sea, see **Geneva Convention II** arts 3(1) and 12.

57 For protections of shipwrecked persons, see Chapter 11.

58 **Hague Regulations** art 23(c). **Geneva Convention Common Article 3(1)**. **Geneva Protocol I** art 41: A person who is, or should be recognised as, *hors de combat* shall not be made the object of attack. **Geneva Protocol II** arts 4(1) and 7. **Rome Statute** arts 8(2)(b)(vi) and 8(2)(c). See also **ICRC Customary IHL** rule 47.

- c. A person's failure to immediately comply with instructions may be due to fatigue, inability to understand, or injury, rather than treachery. A reasonable attempt to get persons wishing to surrender to comply with instructions must be made before concluding that the surrender is false.

#### ATTACKS ON PERSONS PARACHUTING FROM AIRCRAFT IN DISTRESS IS PROHIBITED

**8.8.6** Members of the NZDF are not to attack persons parachuting from an aircraft in distress during their descent.<sup>59</sup> They are to be given the opportunity to surrender, but may be attacked if they carry out any hostile act, including attempting to escape or resisting capture.<sup>60</sup>

**8.8.7** Immunity from attack does not apply to enemy paratroopers<sup>61</sup>. Subject to their orders and LOAC, members of the NZDF may attack airborne troops of the opposing force descending into combat by parachute. Enemy combatants who land behind their own lines remain combatants and may be attacked by members of the NZDF unless they are otherwise *hors de combat* through wounds, sickness or capture.

**8.8.8** Although persons shipwrecked at sea are similarly protected from attack, there is no equivalent rule protecting persons on land, for example crew escaping from burning armoured fighting vehicles. Only if those persons are rendered *hors de combat* because they are wounded or surrendering, are they protected from attack.

#### ATTACKS ON OTHER SPECIFICALLY PROTECTED PERSONS AND OBJECTS ARE PROHIBITED

**8.8.9** Members of the NZDF are not to attack:

- a. medical units, transport and personnel;<sup>62</sup>
- b. cultural and religious property;<sup>63</sup>
- c. installations containing dangerous forces;<sup>64</sup>
- d. the personnel and property of the UN,<sup>65</sup> civil defence organisations,<sup>66</sup> or neutral persons;<sup>67</sup>
- e. demilitarised and other safety zones,<sup>68</sup> undefended localities and other places or persons protected by agreement or by truce;<sup>69</sup>

59 See **Geneva Protocol I** art 42(1), **ICRC Customary IHL** rule 48 and **HPCR Air and Missile Manual** rule 132(a).

60 See **Geneva Protocol I** art 42(2) and **HPCR Air and Missile Manual** rule 132(b).

61 See **Geneva Protocol I** art 42(3).

62 See Chapter 11.

63 See Chapter 14.

64 See Chapter 14.

65 See Chapter 14.

66 See Chapter 14.

67 See Chapter 16.

68 See Chapter 14.

69 See Chapter 15.

- f. journalists;<sup>70</sup> or
- g. personnel and property of neutral and humanitarian organisations.<sup>71</sup>

### THE DENIAL OF QUARTER IS PROHIBITED

**8.8.10** An order of **no quarter** means that a force does not intend that any prisoners be taken. An order that there will be 'no survivors' or 'no prisoners' is a denial of quarter.

**8.8.11** An NZDF commander is not to:

- a. declare or order that no quarter will be given;
- b. threaten an opposing force that such an order will be given; or
- c. conduct hostilities on the basis that no prisoners will be taken or that there will be no survivors.<sup>72</sup>

**8.8.12** The prohibition of 'no quarter' orders is absolute. Such orders cannot be justified by:

- a. refusal of the opposing force to grant quarter;
- b. previous actions of the opposing force, eg treachery, mistreatment of prisoners or other breaches of LOAC;
- c. the actions of the person prior to capture;
- d. the role, function, unit or legal status of the person, eg snipers, special operations forces or political officers, spies, saboteurs or insurgents; or
- e. unlawful grounds of discrimination.<sup>73</sup>

**8.8.13** NZDF commanders are to always contemplate that prisoners will arise from an operation, regardless of its nature, and are to plan for that eventuality.

**8.8.14** Some forms of attack, for example bombardment, do not easily allow for the surrender of individuals while the attack is taking place. This is not a denial of quarter. It does not diminish the duty to accept surrenders as soon as members of the opposing force are able to make clear their intention to do so.

**8.8.15** A person who surrenders to any member of the NZDF must be taken prisoner, respected and protected. If prisoners are taken in circumstances where, for

70 See Chapter 14.

71 See Chapter 16.

72 **Hague Regulations** art 23(c). The expression 'surrender at discretion' is a remnant of an archaic distinction between conditional and unconditional surrenders. **Geneva Protocol I** art 40, **Geneva Protocol II** art 4(1) and **Rome Statute** arts 8(2)(b)(xii) and 8(2)(e)(x). **Major War Criminal Trial** at 228: Hitler's order denying quarter to commandos was illegal; as was the order prohibiting the taking of Soviet political officers as prisoners. **Falkenhorst Trial** at 23: Officers who passed on the 'Commando Order' or complied with it committed war crimes. See **San Remo Manual** rule 43. See also **ICRC Customary IHL** rule 46.

73 For unlawful discrimination see Chapter 4.

example it is not practical to detain them, they will slow down an attack or they will place unacceptable burden on the resources of the force, members of the NZDF are to:

- a. disarm and release those persons, and
- b. take all feasible precautions to ensure the safety of those persons.<sup>74</sup>

### THE TAKING OF HOSTAGES IS PROHIBITED

**8.8.16** A **hostage** is a person taken into custody from the civilian population or from amongst other protected persons (eg persons deprived of their liberty or the wounded, sick or shipwrecked, or UN personnel) under threat of death, other harm, or continued detention for the purposes of:

- a. guaranteeing the good conduct of the civilian population; or
- b. forcing the opposing power, or any other government or authority, to take a course of action.

**8.8.17** The taking of hostages, or the use of threats against them, is absolutely prohibited.<sup>75</sup> Such actions cannot be justified on the basis of breaches of LOAC by the opposing force or civilian population, or the actions of the hostage before capture.<sup>76</sup>

**8.8.18** Members of the NZDF are not to:

- a. take hostages; or
- b. kill, abuse or mistreat persons deprived of liberty in response to the actions of the civilian population or to compel future good behaviour.

74 **Geneva Protocol I** art 41(3): “When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in **Geneva Convention III** Part III, Section I, they shall be released and all feasible precautions shall be taken to ensure their safety.”

75 **Geneva Convention IV** art 34: “taking of hostages from among protected persons is prohibited”. See art 147 for grave breach. **Geneva Convention Common** art 3: In a NIAC the taking of hostages is prohibited. **Geneva Protocol I** art 75(2)(c): Taking of hostages amongst persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment is prohibited. **Geneva Protocol II** art 4(2)(c): the taking of hostages from amongst persons who do not take part in the hostilities or who have ceased to take part in hostilities in NIAC is prohibited. **Rome Statute** arts 8(2)(a)(viii) and 8(2)(c)(iii). See also **Crimes (IPP, UN & AP&H) Act** s 8. The **Hostages Trial** at [61]: Arbitrary or disproportionate killing of hostages was found to be a war crime. See also **ICRC Customary IHL** rule 96.

76 The rights and obligations of members of the NZDF who have been taken hostage are dealt with in Chapter 12.



## THE USE OF HUMAN SHIELDS IS PROHIBITED

- 8.8.19** Members of the NZDF are not to use civilians or other protected persons to render places or military forces immune from attack or other military operations, or to shield military objectives from attacks, or to shield, favour or impede military operations.<sup>77</sup>

## TARGETED KILLING IS SUBJECT TO LAW OF ARMED CONFLICT

- 8.8.20** **Targeted killing** means the employment of weapons systems, such as remotely piloted aerial vehicles (RPAV), to deliver guided missiles enabling attack on particular individuals who might otherwise be inaccessible as targets.
- 8.8.21** Targeted attacks on enemy combatants or persons taking a direct part in hostilities are subject to the same rules of the LOAC as any other method of attack and must, in particular, comply with the principles of distinction and proportionality.<sup>78</sup>

## OFFERING A BOUNTY IS PROHIBITED

- 8.8.22** **Bounty** is the offer of a price or reward for the killing of an individual member of the opposing force or a protected person.<sup>79</sup>
- 8.8.23** Members of the NZDF are not to:
- a. place a bounty on any person; or
  - b. pay or offer to pay for the delivery of trophies such as scalps or ears as proof of death.<sup>80</sup>
- 8.8.24** There is no prohibition in international law against the offering of a reward for the apprehension of a criminal, including a war criminal or terrorist.

## THE STARVATION OF CIVILIANS IS PROHIBITED

- 8.8.25** Subject to LOAC and their orders, members of the NZDF may attack the logistic support of the opposing force, including food and other essentials of life, except when doing so also brings about conditions of starvation to members of the civilian population. Particular care is to be taken when members of the opposing force and the civilian population are reliant on the same sources of food and other essentials.

77 **Geneva Convention IV** art 28: “The presence of a protected person may not be used to render certain points or areas immune from military operations.” **Geneva Protocol I** art 51(7): “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or of individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.” **Geneva Protocol II** Use of human shields is effectively prohibited by art 13(1). **Rome Statute** art 8(2) b) xxiii) the use of human shields in IAC is a war crime. **Blaškić Appeal** at [670]. See also **ICRC Customary IHL** rule 97.

78 **Targeted Killings Case**: “The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it” (per Beinisch P). For distinction and proportionality see Chapter 4.

79 There is no treaty-based definition of bounty. The use of bounties such as ‘a price on the head’ of an individual is effectively a denial of quarter. For denial of quarter see above in this section.

80 Such barbaric practices breach duties relating to the protection of bodies of the dead (see Chapter 11).

**8.8.26** Members of the NZDF are not to order or carry out activities intended to deprive the civilian population of the essentials of life. In particular, members of the NZDF are not to:

- a. attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, eg food, crops, livestock, drinking water, irrigation systems, medical supplies; vital utilities and commodities such as fuel in winter, electricity and sewerage systems;<sup>81</sup>
- b. establish a blockade for the sole purpose of starving the civilian population or denying it other objects essential to its survival;<sup>82</sup>
- c. impede relief supplies;<sup>83</sup> or
- d. booby-trap food or drink likely to be used by the civilian population.<sup>84</sup>

**8.8.27** Starvation of the civilian population is not to be used to put pressure on the resources of the opposing force or to cause the civilian population to move away. NZDF commanders are to allow the flow of humanitarian relief to members of the civilian population, subject to certain conditions.<sup>85</sup>

**8.8.28** A force defending its national territory against invasion can destroy foodstuffs and other necessities in order to deny those resources to the enemy if this is demanded by imperative military necessity.<sup>86</sup> In modern conflict, an invading force is likely to have its own logistic support making such ‘scorched-earth tactics’ unjustified. These tactics are not permissible on foreign territory. Members of the NZDF are not to assume that any such derogation applies unless conveyed to them by an order from the Chief of Defence Force (CDF).

## TERROR ATTACKS ARE PROHIBITED

**8.8.29** **Terror attack** means an attack intended to spread terror amongst the civilian population.

81 **Geneva Protocol I** art 54(1) states that “[s]tarvation of civilians as a method of warfare is prohibited”. Art 54(2) further states: “It is prohibited to attack, destroy or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether to starve out civilians, to cause them to move away, or for any other motive.” These prohibitions do not apply to such objects used by an adverse party as sustenance solely for the members of its armed forces or in direct support of military action (see art 54(3)). See also **Geneva Protocol II** art 14 and **ICRC Customary IHL** rule 54. See **Rome Statute** arts 7(1)(b) and 7(2)(b) for the crime against humanity of extermination, and art 8(2)(b)(xxv) for the intentional starvation of civilians or depriving them of objects indispensable to their survival as a war crime.

82 See **San Remo Manual** rule 102(a).

83 **ICRC Customary IHL** rule 55: “The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.”

84 See Chapter 7.

85 See Chapter 14.

86 See **Geneva Protocol I** art 54(5). For military necessity see Chapter 4. For derogation see Chapter 3.

- 8.8.30** **Terrorism** is the carrying out of attacks against the civilian population or civilian objects or any other persons not taking a direct part in hostilities with the intention of intimidating the population, or compelling a government or an international organisation to do or to abstain from doing any act.
- 8.8.31** Terror attacks and terrorism are prohibited. Members of the NZDF are not to:
- a. threaten or carry out terror attacks against the civilian population;<sup>87</sup> or
  - b. conduct or finance acts of terrorism.<sup>88</sup>
- 8.8.32** Almost all methods of combat are likely to cause great fear to civilians in the vicinity. This rule is directed at actions calculated and committed to generate such fear, for example issuing threats of death or mutilation,<sup>89</sup> placement of improvised explosive devices (IEDs) in places where civilians are expected to gather, and indiscriminate shelling or sniping.
- 8.8.33** Terror attacks cannot be justified on the basis that some elements are against military objectives. If the predominant aim of an attack is to cause terror amongst the civilian population, the attack is unlawful and the fact that it might also strike some legitimate targets does not provide an excuse.
- 8.8.34** Care is to be taken when issuing warnings to the civilian population to enable them to avoid the effects of impending combat action.<sup>90</sup> The wording of the warning cannot have the effect of instilling terror amongst the recipients.

87 **Geneva Protocol I** art 51(2): “[...] Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” **Geneva Protocol II** arts 4(1) and 44(2)(d) state that, in NIAC, acts of terrorism against persons who do not take or who have ceased to take a direct part in hostilities are prohibited. In the *Major War Criminals Trial* the systematic rule of violence and brutality intended to terrorise the civilian population practiced in the territories occupied by Germany was held to be a war crime. In the *Galić Trial* indiscriminate shelling and sniping used during the siege of Sarajevo was characterised as a terror campaign; see [133] of the judgment for the elements of the crime of terror against the civilian population. See also **ICRC Customary IHL** rule 2 and **Hague Draft Air Rules** rule 22.

88 See **Terrorism Financing Convention** art 2(1) and **Terrorism Suppression Act 2002** ss 7–9.

89 In the *Sesay Trial* the Trial Chamber found that acts including unlawful killings, physical and sexual violence, mutilations, abductions and destruction of property were part of a campaign to terrorise the civilian population of Sierra Leone, and did terrorise that population.

90 See Chapter 7.

## SECTION 9 – DECEPTION, TREACHERY AND ESPIONAGE

### RUSES OF WAR ARE PERMISSIBLE

**8.9.1** A **ruse of war** is a trick intended to confuse or mislead members of the opposing force or cause them to act recklessly. Ruses of war are not prohibited provided they are not perfidious and do not infringe another rule of LOAC.<sup>91</sup>

**8.9.2** Members of the NZDF may employ ruses of war provided that:

- a. the trick is not intended to lead the opposing force to believe that a protection under LOAC is being relied upon; and
- b. the trick is not treacherous, such as the use of the uniforms of the enemy.

**8.9.3** A New Zealand force may employ ruses. This includes misleading the enemy as to intended NZDF courses of action, for example constructing dummy positions or formations of vehicles, supplying disinformation as to the time or place of an attack, making use of the enemy's passwords, codes or radio frequencies to find out details of their plans, publishing false news or social media reports, dropping falsely marked maps or notebooks, leading the enemy to believe that NZDF forces are either stronger or weaker than they actually are, or shifting landmarks or road signs or laying dummy minefields.

**8.9.4** To cause an opposing force to cease fighting because they believe that they are outnumbered, outgunned or surrounded, when in fact they are not, is permissible.<sup>92</sup> To call upon them to cease fighting on the grounds that a general armistice had been announced, when it had not, would be treachery.

### TREACHEROUS ATTACKS ARE PROHIBITED

**8.9.5** **Treachery** (also known as 'perfidy'<sup>93</sup>) is an act inviting the confidence of an adversary to lead them to believe that they are entitled to, or obliged to accord, protection under the rules of international law applicable to armed conflict, with intent to betray that confidence.

**8.9.6** Killing, injuring or capturing an adversary by resorting to treachery is prohibited.<sup>94</sup> Members of the NZDF are not to commit, encourage or assist in killing, injuring

91 **Geneva Protocol I** art 37(2): "Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law." **Geneva Protocol I** art 37(2) gives examples of ruses as use of camouflage, decoys, mock operations and misinformation. See also **Hague Regulations** art 24, **San Remo Manual** rule 110 and **ICRC Customary IHL** rule 57.

92 This ruse was employed by the naval force, including the New Zealand warship HMS ACHILLES, to cause the ADMIRAL GRAF SPEE to scuttle in the aftermath of the Battle of the River Plate in 1939.

93 See **Geneva Protocol I** art 37(1). The elements of 'treachery' in the **Hague Regulations** and the **Rome Statute** are substantially the same as the definition of 'perfidy' set out in **Geneva Protocol I** art 37(1). See also **San Remo Manual** rule 111.

94 See **Geneva Protocol I** art 37(1). Although there are no equivalent provisions in Geneva Protocol II such acts of treachery are breaches of customary international law. See also **Hague Regulations** art 23(b), **ICRC Customary IHL** rule 65 and **San Remo Manual** rule 111. Under **Rome Statute** art 8(2)(b)(xi) "[k]illing or wounding treacherously individuals belonging to the hostile nation or army [in IAC] is a war crime" and under art 8(2)(e)(ix) "[k]illing or wounding treacherously a combatant adversary in a non-international armed conflict is a war crime".

or capturing a member of the opposing force by treachery. In particular, they are not to pretend:

- a. an intent to negotiate under a flag of truce;<sup>95</sup>
- b. incapacitation through wounds, sickness, or shipwreck;<sup>96</sup>
- c. distress at sea, eg sending emergency signals or taking to life rafts;<sup>97</sup>
- d. civilian or non-combatant status;<sup>98</sup>
- e. protected status, eg by use of signs, emblems or uniforms of the UN or of neutral states,<sup>99</sup> the Red Cross or Red Crescent, or humanitarian missions or vessels.<sup>100</sup>

**8.9.7** ‘Kill or capture missions’ are lawful provided that they are directed at enemy combatants or persons who are directly participating in hostilities, do not employ treacherous tactics and do not involve a denial of quarter to achieve their aim.

**8.9.8** Pretending to be dead to avoid capture is not unlawful. Nor is the wearing of civilian clothes to escape from captivity. However, any person captured wearing such disguise runs the risk of being tried as a spy under the domestic law of the capturing force.

**8.9.9** New Zealand naval ships are not to conduct operations while pretending to have the status of:

- a. hospital ships, small coastal rescue craft or medical transports;<sup>101</sup>
- b. vessels on humanitarian missions;<sup>102</sup>

95 Under **Hague Regulations** art 23(f) it is especially forbidden “[t]o make improper use of a flag of truce”. In accordance with art 32, the flag of truce is a white flag, and under art 34, a *parlementaire* bearing a white flag who takes advantage of his or her privileged position to commit war treason loses his or her inviolability. See also **Geneva Protocol I** art 37(1)(a) and **ICRC Customary IHL** rule 58. Under **Rome Statute** art 8(2)(b)(vii) making improper use of a flag of truce where death or serious injury results is a war crime. For truce see Chapter 15.

96 Under **Geneva Protocol I** art 37(1)(b) feigning of incapacitation by wounds or sickness with intent to kill, injure or capture an adversary is perfidy.

97 See **San Remo Manual** rule 111(b).

98 See **Geneva Protocol I** art 37(1)(c). However, art 44(3) allows for situations in which a combatant cannot distinguish himself by wearing a uniform. Such acts are not considered as perfidy as long as the combatant carries arms openly during each military engagement and while visible to the adversary while engaged in a military deployment prior to an attack. According to the **Geneva Protocol I New Zealand Declaration** such situations can exist only in occupied territory or in armed conflicts where peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. New Zealand has also declared its own understanding of the terms ‘deployment’ and ‘visible to the adversary’.

99 See **Geneva Protocol I** art 37(1)(d). For protection of UN personnel and property see Chapter 14. Under **Rome Statute** art 8(2)(b)(vii) it is a war crime to make improper use of the flag of the UN where death or serious personal injury results.

100 See **San Remo Manual** rules 110(b) and (f). For protection of ships and vessels on humanitarian missions see Chapter 14. Under **Rome Statute** art 8(2)(b)(vii) it is a war crime to use the distinctive emblems of the Geneva Conventions where death or serious personal injury results.

101 **San Remo Manual** rule 110(a): “Warships and auxiliary vessels [...] are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of hospital ships, small coastal reserve craft or medical transports.” See also **Geneva Convention II** art 30.

102 See **San Remo Manual** rule 110(b).

- c. passenger vessels carrying civilian passengers;<sup>103</sup>
- d. vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;<sup>104</sup>
- e. exempt, civilian, neutral or protected UN status; or
- f. surrendered or distressed, eg by sending a distress signal or by the crew taking to life rafts.<sup>105</sup>

**8.9.10** NZDF air elements are not to conduct operations pretending to be aircraft with protected, civilian or neutral status.

**8.9.11** Treacherous attacks undermine respect for vital rules of LOAC such as those protecting the conduct of negotiations under truce and those demanding that surrendering enemy be granted quarter. Abusing the enemy's trust may produce a local short-term advantage but makes it unlikely that the opposing force will comply with those obligations in future. This endangers compliance with LOAC, embitters adversaries and makes the restoration of peace more difficult.

#### FALSE TRUCE IS PROHIBITED

**8.9.12** Members of the NZDF are not to enter into any agreement with the opposing force to cease fire, enter into a truce or armistice or otherwise suspend combat with the intention of launching an attack on the enemy while they are relying on that agreement.<sup>106</sup>

#### MISUSE OF ENEMY OR NEUTRAL EMBLEMS AND UNIFORMS IS PROHIBITED

**8.9.13** Members of the NZDF are not to make use of the flags or military emblems, insignia or uniforms of:

- a. the opposing force; or
- b. any neutral State or State that is not a party to the conflict;

while engaging in attacks or in order to shield, favour, protect or impede military operations.<sup>107</sup>

**8.9.14** This rule does not prohibit members of the NZDF from using disguises in order to avoid detection while escaping from enemy captivity.

103 See **San Remo Manual** rule 110(c).

104 See **San Remo Manual** rule 110(e).

105 See **San Remo Manual** rule 111(b).

106 See **ICRC Customary IHL** rule 64. For relations with the opposing forces see Chapter 15.

107 Under **Hague Regulations** art 23(f) it is especially forbidden to "make improper use of the national flag or of the military insignia and uniform of the enemy". **Hague Draft Air Rules** rule 19: "The use of false exterior marks is forbidden." **Geneva Protocol I** art 39(1): "It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict." **Geneva Protocol I** art 39(2): "It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations." See also **ICRC Customary IHL** rules 62 and 63. Under **Rome Statute** art 8(2)(b)(vii) it is a war crime to make improper use of the flag, military insignia or uniform of the enemy or of the UN where death or serious personal injury results.



**WARSHIPS MUST FLY TRUE COLOURS AT THE TIME OF ATTACK**

- 8.9.15** A warship may fly the flag of the opposing force or a neutral state<sup>108</sup> to disguise its nationality provided that it displays its true colours before attack.<sup>109</sup> The practical advantage of false flags is now greatly diminished as identification of warships based on the flag alone is now unlikely. Electronic support measures enable shore- and sea-based assets to identify targets at great distance.
- 8.9.16** New Zealand naval ships are to conduct all operations under the New Zealand White Ensign unless specifically authorised to do otherwise by CDF. If so authorised, the commander is not to launch any attack while flying a false flag and is to show the White Ensign no later than the time the attack commences.<sup>110</sup>

**THE MISUSE OF LAW OF ARMED CONFLICT EMBLEMS IS PROHIBITED**

- 8.9.17** **Distinctive emblems** (also known as ‘protective emblems’) means badges, signs and flags imparting protection under LOAC. It includes designations and acronyms,<sup>111</sup> and the use of commonly accepted distinct signals and identification signals.<sup>112</sup>
- 8.9.18** Members of the NZDF are not to make improper use of any of the following distinctive emblems:<sup>113</sup>
- a. The Red Cross, Red Crescent or Red Crystal.<sup>114</sup>
  - b. The protective emblems of cultural property.<sup>115</sup>
  - c. The distinctive emblem of the UN.<sup>116</sup>

- 108 Use of the flag of a neutral State is an affront to its sovereignty and exposes neutral ships to the risk of attack. Neutral States whose flags are misused in this way may choose to apply strong diplomatic or practical measures in response.
- 109 See **Geneva Protocol I** art 39(2).
- 110 **Geneva Protocol I** art 39(3) states that nothing in art 39 or art 37(1)(d) “shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea”. See also **Geneva Protocol I** art 39(2) and **San Remo Manual** rules 110 and 111(a). In the **Peacock Case** the Court observed that to sail and chase under false colours may be allowable as a stratagem for war, but firing under false colours is what the law does not allow.
- 111 For example, the words ‘Red Cross’ or the letters ‘UN’.
- 112 See **Geneva Protocol I** Chapter III to Annex I.
- 113 Note that there are legal and conceptual differences between the ‘protective use’ of such emblem and the ‘organisational use’ of them. For the purposes of this order, all treacherous uses of the emblems is prohibited regardless of their technical status.
- 114 See **Hague Regulations** art 23(f). **Geneva Convention I** Chapter VII and **Geneva Convention II** Chapter VI provide for the conditions of use of the Red Cross and Red Crescent symbols. Under **Geneva Protocol III**: the ‘Red Crystal’ is protected. Under **Geneva Protocol I** art 38(1) improper use of such emblems is prohibited. See also **San Remo Manual** rule 110(f) and **ICRC Customary IHL** rule 59. Under **Geneva Protocol I** art 85(3)(f) improper use of such emblems is a grave breach of **Geneva Protocol I** and under **Rome Statute** art 8(2)(b)(vii) improper use is a war crime where death or serious personal injury result. No similar crime applies in respect of NIAC. Under **Geneva Conventions Act 1958** s 8 it is an offence to misuse such emblems, whether inside or outside New Zealand.
- 115 **Hague Cultural Property Convention** art 16 defines the ‘distinctive emblem of the Convention’ and art 17(3) states that: “During an armed conflict, the use of the distinctive emblem in any other cases [than those provided for in the Convention] shall be forbidden.” See also **San Remo Manual** rule 110(g) and **Hague Draft Air Rules** rule 26(6).
- 116 See **United Nations Flag Code and Regulations 1947** art 7. **Geneva Protocol I** art 38(2): “It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.” Under **Rome Statute** art 8(2)(b)(vii) improper use of the UN insignia or uniform is a war crime where death or serious personal injury results. See also **San Remo Manual**

- d. Emblems and symbols of well-recognised peacekeeping forces, eg the Multinational Force and Observers.<sup>117</sup>
- e. Other symbols of the Geneva Conventions and Protocols, ie the symbols for PWs, the ICs, hospital and safety zones, civil defence organisations and dangerous forces.<sup>118</sup>
- f. Other internationally recognised protective emblems, signs or signals protected by treaty.<sup>119</sup>

**8.9.19** The emblems and names of organisations such as *Médecins Sans Frontières*, Oxfam, Amnesty International and Save the Children are not specifically protected by any treaty. There are also other symbols that are well-known but not officially recognised, such as the Red Star of David.<sup>120</sup> However, even though these emblems and names are not specifically protected, because they indicate civilian status, misuse of them is treacherous. Therefore, members of the NZDF are not to misuse any symbol denoting civilian, medical, or humanitarian status.

## ESPIONAGE

**8.9.20** **Espionage** is the practice of spying, ie clandestinely or on false pretences obtaining or attempting to obtain information in the zone of operations of a party to the conflict with intent to communicate that information for the benefit of the opposing force.<sup>121</sup> The term includes cyber espionage.<sup>122</sup>

**8.9.21** The terms ‘spy’ and ‘espionage’ do not apply to:

- a. members of the armed forces engaged in gathering information in enemy territory provided they wear the uniform of the armed forces to which they belong,<sup>123</sup> or
- b. messengers and dispatch riders who carry out their tasks openly.<sup>124</sup>

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rules 110(d) and 111(a), **ICRC Customary IHL** rule 60 and **Flags, Emblems, and Names Protection Act 1981** ss 16 and 24.

117 The Multinational Force and Observers was established by the Camp David Accords and acts as a peacekeeping force in the Sinai Desert.

118 See **Geneva Convention III** art 23 (PWs), **Geneva Convention IV** art 83 (ICs), **Geneva Convention IV** Annex I art 6 (hospital and safety zone markings) and **Geneva Protocol I** art 66(4) (civil defence). **Geneva Protocol I** art 38(1): “It is prohibited to make improper use of [...] emblems, signs or signals provided for by [the Geneva Convention or Protocol I].” See also **Geneva Protocol I** art 66(8) for prohibition on misuse of the civil defence symbol. Under **Rome Statute** art 8(2)(b)(vii) improper use of such emblems is a war crime where death or serious personal injury results.

119 **Geneva Protocol I** art 38(1): “It is prohibited to make improper use of [...] other internationally recognized protective emblems, signs or signals.” Under **Geneva Protocol I** art 85(3)(f) the perfidious use of other protective signs recognised by the Geneva Conventions and Protocol I is a grave breach. See also **ICRC Customary IHL** rule 61.

120 Used by Israel as an equivalent of the Red Cross but not protected by the Geneva Conventions.

121 See **Hague Regulations** art 29, **Hague Draft Air Rules** rule 27, and **Geneva Protocol I** art 46. For status of spies under LOAC see Chapter 6. See **Geneva Convention IV** art 5 for treatment of suspected spies in detention.

122 See **Tallinn Manual** rule 66(2).

123 **Geneva Protocol I** art 46(2): “A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.” **Hague Regulations** art 29: “[S]oldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purposes of obtaining information, are not considered spies.”

124 Under **Hague Regulations** art 29 “[s]oldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or the enemy’s army” are not considered spies.



- 8.9.22** Espionage is not prohibited by LOAC<sup>125</sup> but is prohibited under the domestic law of most States, including New Zealand.<sup>126</sup> Spies captured by an NZDF force element outside of New Zealand may be tried before the Court Martial of New Zealand (Court Martial).<sup>127</sup> Spies are not entitled to PW status.<sup>128</sup> Nevertheless, they are to be treated humanely and are not to be executed.<sup>129</sup> Furthermore, if there is doubt as to the status of persons suspected of being spies, they are to be treated as PWs until their status is determined by a competent tribunal.<sup>130</sup> The use by spies of the uniforms, emblems and insignia of the opposing force or a neutral force does not technically amount to treachery or perfidy.<sup>131</sup>
- 8.9.23** A person engaged in espionage who returns to his or her own forces cannot subsequently be denied PW status or tried for that act of espionage if subsequently captured.<sup>132</sup>
- 8.9.24** Members of the NZDF who capture suspected spies:
- a. are to grant them quarter<sup>133</sup> and treat them humanely;<sup>134</sup>
  - b. are not to punish them;<sup>135</sup> and
  - c. are to ensure such persons receive a fair trial.<sup>136</sup>
- 8.9.25** If members of the NZDF are required to conduct operations that may be regarded by the opposing force as espionage, the commander responsible for the mission is to ensure that they are fully informed of their rights and obligations under LOAC and the risks inherent in the operation.

125 **Hague Regulations** art 24 provides that “the employment of measures necessary for obtaining information about the enemy and the country are considered permissible”.

126 See **Crimes Act 1961** s 78 and **AFDA** ss 13 and 26.

127 See **AFDA** s 13.

128 **Geneva Protocol I** art 46: “[...] any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.”

129 **Geneva Protocol I** art 75 provides fundamental protections for persons not entitled to higher protection under the Geneva Conventions or Protocol I.

130 **Hague Regulations** art 30: “A spy taken in the act shall not be punished without previous trial.” In *Almelo Trial* the Military Tribunal held that, even if the British pilot captured in civilian clothes was considered to be a spy, it was nevertheless necessary to give him the benefit of a fair trial. The execution of the pilot in the absence of such a trial was a war crime.

131 **Geneva Protocol I** art 39(3) provides that nothing in arts 39 or 37(1)(d) shall affect the existing generally recognised rules of international law applicable to espionage.

132 **Hague Regulations** art 31: “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.” **Hague Draft Air Rules** a rule 29 provides that punishment of acts of espionage is subject to **Hague Regulations** arts 30 and 31.

133 Denial of quarter is prohibited (see Section 8).

134 **Geneva Protocol I** art 75 provides fundamental protections for persons not entitled to higher protection under the Geneva Conventions or Protocol I.

135 For fair and proper trial see Chapter 17.

136 See **Hague Regulations** art 30.

## SECTION 10 – SPECIFIC TYPES OF OPERATION

## SIEGE WARFARE

**8.10.1** **Siege** means the encirclement of a town, city or other populated area with the intent to cut off members of the opposing force from supplies and reinforcement.

**8.10.2** Siege warfare is a lawful method of war.<sup>137</sup> NZDF commanders who plan or conduct a siege are to take all feasible precautions in the choice of methods of attack to avoid, and in any event to minimise, incidental loss of life or injury to civilians and incidental damage to civilian objects.<sup>138</sup> In particular, commanders are to:

- a. do everything in their power to warn the authorities of the besieged place before commencing an attack except where the operational requirements prevent the giving of such a warning;<sup>139</sup>
- b. take all necessary steps to spare, as far as possible, cultural property, places of worship and educational and charitable institutions, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected,<sup>140</sup> and all other specifically protected persons and objects,<sup>141</sup> provided they are not being used for military purposes;
- c. allow free passage of consignments of medical and hospital stores, of objects necessary for religious worship intended only for civilians,<sup>142</sup> of essential foodstuff,<sup>143</sup> and of clothing and medicine intended for children under 15, expectant mothers and maternity cases;<sup>144</sup>
- d. endeavour to conclude local agreements with the authorities of the besieged town or place for the removal of the wounded, sick, infirm, aged persons, children, expectant mothers and maternity cases, and for the passage into and out of besieged areas of ministers of all religions, of medical personnel and of medical equipment.

137 See generally the rules in **ICRC Customary IHL** Part II.

138 See **Geneva Protocol I** art 57(2)(a)(ii), **San Remo Manual** rules 46(b) and (c) and **ICRC Customary IHL** rules 15 and 17. For precautions in attack generally see Section 7.

139 See **Hague Regulations** art 26.

140 See **Hague Regulations** art 27, **Hague Draft Air Rules** rule 25, **Geneva Convention IV** art 18, and **Hague Convention IX** art 5. For cultural property, places of worship and educational and charitable institutions see Chapter 14.

141 For specifically protected persons and objects see Chapter 14.

142 **Geneva Convention IV** art 23: Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. See also **Galić Trial**.

143 Under **Geneva Protocol I** art 54 starvation of civilians as a method of warfare is prohibited. Likewise, under **Geneva Protocol II** art 14 starvation of the population is prohibited in NIAC. See **Rome Statute** art 8(2)(b)(xxv) for the definition of a war crime in this area.

144 **Geneva Convention IV** art 23 requires that each High Contracting Party shall “permit the free passage of all consignments of foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases”.

**8.10.3** The commander of a New Zealand force can:<sup>145</sup>

- a. delay or deny passage of an aid consignment<sup>146</sup> if there are serious reasons for fearing that:
  - (1) it may be diverted from its destination;
  - (2) control of the consignment may not be effective; or
  - (3) the opposing force will gain a definite military or economic advantage by substituting the consignment for goods, materials, services or facilities which they would otherwise provide or produce, provided that the result will not be that civilians are denied the necessities of life; and
- b. require that the distribution of the consignments be made under the supervision of the Protecting Power,<sup>147</sup> the ICRC or a UN or other humanitarian agency.

**8.10.4** If delivery is denied or delayed, the commander is to advise CDF, through COMJFNZ, of that fact and the reasons for it without delay. On no account is such delay or denial to be used to justify starvation tactics against the civilian population.<sup>148</sup>**NEW ZEALAND FORCES UNDER SIEGE****8.10.5** Subject to orders, the commander of a New Zealand force that occupies a town, city or populated area facing the approach of an opposing force is to consider the option of declaring the place to be a 'non-defended locality.' This secures legal protection for the place and its population from the danger of assault,<sup>149</sup> but at the cost of removing all forces and weapons from the place.**8.10.6** The decision to defend a town or city, however, is not prohibited by LOAC. In either case, authority is to be sought without delay from CDF, through COMJFNZ. The advice of an NZDF LEGAD is to be obtained wherever practicable.**8.10.7** The commander of a New Zealand force defending a town or place under siege is, to the greatest extent possible:

- a. to avoid placing military objectives close to civilian and protected objects;<sup>150</sup>

145 **Geneva Convention IV** art 23 provides that the Power which permits the free passage of such supplies shall have the right to prescribe the technical arrangements under which such passage is allowed.

146 'Aid' here includes medical and hospital stores, objects necessary for worship for civilians, essential foodstuff, and clothing and medicine for children under 15, expectant mothers and maternity cases (see **Geneva Convention IV** art 23).

147 For 'Protecting Power' see Chapter 16.

148 For starvation tactics see Section 8.

149 For non-defended localities see Chapter 14.

150 **Geneva Protocol I** art 58(b): "The Parties to the conflict shall, to the maximum extent feasible [...] avoid locating military objectives within or near densely populated areas." See also **ICRC Customary IHL** Rule 23.

- b. to avoid exposing the civilian population to the danger of attack;<sup>151</sup> and
- c. to arrange for the authorities of the town or place to indicate the presence of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, by distinctive and visible signs that are notified to the attacking force.<sup>152</sup>

## SNIPING

**8.10.8 Sniping** means direct targeting of individuals at a distance using small arms by a concealed shooter. Although it may utilise specialist weapons such as highly accurate rifles with optical scopes, the use of such weapons is not essential.<sup>153</sup>

**8.10.9** The use of snipers is permitted under LOAC. When authorised to conduct sniping, members of the NZDF are not to:

- a. target civilians<sup>154</sup> or other protected persons,<sup>155</sup> or persons who are *hors de combat*;
- b. employ unlawful methods of warfare or prohibited weapons such as expanding or exploding bullets;<sup>156</sup>
- c. inflict terror on the civilian population.<sup>157</sup>

**8.10.10** Forces that have suffered sustained casualties from sniper fire may become frustrated by their inability to strike back effectively. It is important that NZDF commanders understand the psychological pressures caused by enemy snipers and ensure that members of the NZDF accept the surrender of snipers of the opposing force and treat captured snipers humanely.<sup>158</sup>

## SPECIAL OPERATIONS

**8.10.11 Special operations** are focused and discrete operations of an unorthodox and frequently high-risk nature, undertaken to achieve significant political or military objectives that are outside the capability of conventional forces.

**8.10.12** Special operations are not prohibited by LOAC. The same rules of LOAC apply to special operations as in other methods of attack. In no respect are such operations beyond the law. Because they involve small sub-units operating discretely for extended periods without the usual logistic and administrative support, the prospect of compromise is constant and potentially catastrophic. This places extraordinary pressure on such forces but does not relieve them of the duty to obey LOAC. In particular, the difficulties of dealing with prisoners on

151 See **Geneva Convention IV** art 28, **Geneva Protocol I** art 51(7), **Rome Statute** art 8(2)(b)(xxiii) and **ICRC Customary IHL** rule 97. For prohibition on human shields see Section 8.

152 See **Hague Regulations** art 27.

153 In the **Galić Trial** at [183–184] the Trial Chamber discussed the accepted definition of ‘sniping’ and rejected the Defence assertion that sniping requires the use of specialised rifles with telescopic scopes, as opposed to ordinary assault rifles.

154 See **Galić Trial**.

155 See Chapter 14.

156 For prohibited weapons see Chapter 7.

157 In the **Galić Trial**, Galić was found responsible for the conduct of a terror campaign using sniping during the siege of Sarajevo.

158 See Chapter 12.

such operations is not a license to deny quarter or to kill PWs or detainees when they become an unacceptable burden. If they cannot be brought along, they must be disarmed and released.<sup>159</sup> Similarly, the potential for compromise of the operation by civilians does not justify killing those civilians.

**8.10.13** Members of the NZDF involved in special operations are not to:

- a. attack civilians, civilian objects or other protected persons or objects;
- b. conduct terror attacks or terrorism;
- c. employ unlawful methods of warfare or prohibited weapons;
- d. conduct operations on the basis that there will be no prisoners (denial of quarter); or
- e. kill or harm persons who are captured or are otherwise *hors de combat*.

**8.10.14** New Zealand forces countering special operations forces must take prudent steps for their own protection, especially at the point of capture of such forces. Special operation forces are high-value sources of intelligence, and are often specially trained in resistance to interrogation. Nevertheless, the same rules apply in respect of them as to other prisoners. Enemy special operation forces are to be:

- a. granted quarter if they indicate an intention to surrender;<sup>160</sup>
- b. treated humanely if captured or rendered *hors de combat* through wounds, sickness or shipwreck;
- c. treated as PW until their status (if in doubt) is determined by a competent tribunal;<sup>161</sup> and
- d. may only be punished as a result of a fair and proper trial.<sup>162</sup>

**8.10.15** Special operation forces operating behind enemy lines while disguised as civilians or while wearing the uniform or insignia of the opposing force or a neutral force, if captured:

- a. may be tried for treachery/perfidy;<sup>163</sup> or
- b. may be tried for espionage.<sup>164</sup>

159 See **Geneva Protocol I** art 41(3).

160 In the **Major War Criminal Trial** (at 463), Hitler's 'Commando Order' requiring that quarter be denied to commandos on principle was held to be illegal and subsequent murders of captured commandos was a war crime.

161 **Dostler Trial**: Although they had worn no distinctive emblems, were engaged on a mission to be undertaken by stealth, had avoided engaging the enemy, US special forces in uniform deployed on a sabotage operation were engaged in a genuine military mission and therefore entitled to be treated as PW on capture. Their execution without trial was a war crime.

162 For necessary elements of a fair and proper trial see Chapter 17.

163 **Falkenhorst Trial**: Sabotage or other acts of hostility by members of the armed forces in civilian clothing amounted to war treason for which the individuals could be tried. The same acts carried out in uniform did not amount to war treason. War treason did not justify execution without trial.

164 **Geneva Protocol I** art 39(3): "Nothing in [art 39 or in art 37(1)(d)] shall affect the existing

- 8.10.16** The fact that special operation forces have adopted elements of local clothing due to the environment, or are wearing items such as wetsuits or jumpsuits, does not of itself deprive them of combatant status provided that they have sufficient elements of uniform to enable them to be distinguished from civilians.

#### CYBER OPERATIONS MUST CONFORM TO LAW OF ARMED CONFLICT

- 8.10.17** **Cyber attack** means a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.<sup>165</sup>
- 8.10.18** Subject to LOAC and their orders, members of the NZDF may conduct cyber operations. Members of the NZDF authorised to conduct cyber attacks are to do so in accordance with LOAC.<sup>166</sup> They are not to carry out cyber attacks that:
- a. are directed at individual civilians or the civilian population;<sup>167</sup>
  - b. are directed against civilian objects, including computers, computer networks and cyber infrastructure, unless they become a military objective;<sup>168</sup>
  - c. are directed at protected persons or objects, including medical facilities and computers;<sup>169</sup>
  - d. do not distinguish between military objectives and civilians and civilian objects;<sup>170</sup>
  - e. are intended to spread terror amongst the civilian population;<sup>171</sup>
  - f. create or release destructive effects that cannot be limited as required by LOAC;<sup>172</sup>
  - g. are likely to cause incidental casualties to civilians or incidental damage to civilian objects that is excessive in relation to the concrete and direct military advantage;<sup>173</sup>
  - h. are treacherous<sup>174</sup> or breach the rules relating to the use of distinctive

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generally recognized rules of international law applicable to espionage." **Quirin Appeal:** Enemy combatants who without uniform come secretly through the lines for the purpose of waging war by destruction of life or property are not entitled to the status of PW. By hiding means of identification such enemies become unlawful belligerents subject to trial and punishment. **Mohammed Ali Appeal:** Members of the armed forces who commit acts of sabotage in territory under the control of the opposing forces when dressed in civilian clothes both at the time of the acts of sabotage and when arrested were not entitled to be treated on capture as PW, and were therefore criminally responsible for their actions.

165 See **Tallinn Manual** rule 30. The word 'cause' includes reasonably foreseeable consequential damage, destruction, injury or death.

166 See **Tallinn Manual** rule 20.

167 See **Tallinn Manual** rule 32.

168 See **Tallinn Manual** rule 37.

169 See **Tallinn Manual**, Chapter 5.

170 See **Tallinn Manual** rule 31.

171 See **Tallinn Manual** rule 36.

172 See **Tallinn Manual** rule 80.

173 See **Tallinn Manual** rule 55.

174 See **Tallinn Manual** rule 60.



LOAC emblems<sup>175</sup> or those of the UN,<sup>176</sup> neutral States or States not party to the conflict,<sup>177</sup> or the uniform and insignia of the opposing force.<sup>178</sup>

- 8.10.19** In the conduct of cyber operations, members of the NZDF are to take all feasible precautions to avoid, and in any event minimise, incidental loss of life or injury to civilians and incidental damage to civilian objects.
- 8.10.20** Cyber attack on the computer systems of an enemy State is lawful provided it is directed against military objectives such as the command and control systems of the opposing force.
- 8.10.21** A cyber attack directed against civilians or at civilian objects is unlawful. An attack which would be unlawful if conducted with a physically destructive conventional weapon (so-called ‘kinetic effects’) does not become lawful because it is achieved through the use of computer technology.
- 8.10.22** Cyber attack can be directed against dual-use systems supporting the opposing force provided the normal rules relating to proportionality and discrimination are complied with. Causing the computer controlling the supply of electrical power to a military headquarters to fail through the use of a computer attack would be lawful. However, if such an attack were to deprive electricity to civilian hospitals the same duties of discrimination and avoidance of disproportionate incidental loss of civilian life would arise as in respect of a conventional attack. An effect that cannot be limited, such as a virus, is liable to cause disproportionate damage to civilian systems and to act in an indiscriminate way. In the case of doubt as to whether an object or system is military or civilian in nature, it is to be presumed to be civilian.
- 8.10.23** Although there is currently no specific treaty obligation relating to the conduct of warfare by electronic means, the principles of LOAC apply to all military operations regardless of the medium employed. The methods of warfare are not unlimited, even though developing technology produces the possibility of armed conflict in previously unused environments.<sup>179</sup>
- 8.10.24** Cyber attacks that qualify as ruses of war are permitted, but treacherous use of cyber attack is prohibited.<sup>180</sup> For example, electronic transmissions intended to induce the opposing force to believe that non-existent forces are present on the battlefield or that forces are retreating when they are not, are lawful ruses of war, whereas a transmission inducing the opposing force to believe that a warship is a hospital ship would be treachery.
- 8.10.25** A ‘cyber blockade’ that blocks enemy and neutral cyber communications to the enemy State and territory under its control is governed by the same rules applicable to a physical blockade of ships and aircraft.<sup>181</sup>

175 See **Tallinn Manual** rule 62.

176 See **Tallinn Manual** rule 63.

177 See **Tallinn Manual** rule 65.

178 See **Tallinn Manual** rule 64.

179 In its **Nuclear Weapons Opinion** (at [86]) the ICJ stated that LOAC applies to all forms of weapons and warfare, whether of the past, the present or the future.

180 See **Tallinn Manual** rules 60 and 61.

181 See **Tallinn Manual**, Chapter 5, Section 9. For blockades see Chapter 10.

## INFORMATION OPERATIONS MUST COMPLY WITH LAW OF ARMED CONFLICT

**8.10.26 Information operations** means actions taken to affect the opposing force's decision-making processes. **Offensive information operations** are operations intended to destroy, degrade, disrupt, deny, deceive, exploit and influence the functions of the opposing force in order to prevent that force from exercising effective command and control, or leveraging it to gain force advantage.

**8.10.27** Subject to LOAC and orders, members of the NZDF may conduct information operations against the opposing force. All information operations are to be conducted in accordance with LOAC.<sup>182</sup> In particular, members of the NZDF are not to use offensive information operations that:

- a. are intended to harm individual civilians or the civilian population or other protected persons;
- b. are intended to spread terror amongst the civilian population, eg through mass email distribution;
- c. are treacherous;
- d. aim at securing enlistment of the civilian population of occupied territory into the armed forces;<sup>183</sup>
- e. expose PWs, retained personnel, internees or detainees to insult and public curiosity;<sup>184</sup> or
- f. advocate genocide,<sup>185</sup> crimes against humanity,<sup>186</sup> the commission of war crimes,<sup>187</sup> or aggression.<sup>188</sup>

## MERCENARY ACTIVITIES

**8.10.28** A **mercenary** is a person who is not a citizen or resident of a party to a conflict, or a member of its armed forces, and who is specially recruited to:

- a. fight in an armed conflict;

182 See **Nuclear Weapons Opinion** at [86]. For information operations involving cyber operations see **Tallinn Manual** rule 20.

183 **Geneva Convention IV** art 51: "No pressure or propaganda which aims at securing voluntary enlistment [of protected persons to serve in the armed or auxiliary forces of the occupying power] is permitted."

184 In the **Tokyo War Crime Trial** the policy of exposing PWs to public insult and curiosity with the intention of engendering contempt for Europeans was held to be a war crime.

185 Under **Genocide Convention** art III, direct and public incitement to commit genocide is prohibited. See also **Rome Statute** art 25(3)(e). The ICTR Trial Chamber in the **Kambanda Trial** held that Kambanda was guilty of directly and publicly inciting genocide by making public statements in the name of the government and by addressing public meetings and the media, at various places in Rwanda, directly and publicly inciting the population to commit acts of violence against Tutsi.

186 In the **Major War Criminals Trial**, Streicher's incitement of the German people to commit murder and extermination of Jews was held to be a crime against humanity.

187 In the **Major War Criminals Trial**, incitement of the German people to lynch Allied airmen was held to be a war crime. By contrast, the Defendant, Hans Fritzsche, was acquitted on the basis that his propaganda was not intended to incite atrocities, but rather to arouse popular sentiment in support of the German war effort. See also **ICRC Customary IHL** rule 144.

188 **ICCPR** art 20: "Any propaganda for war shall be prohibited by law." New Zealand reserved the right not to introduce legislation with regard to art 20 having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons, and having regard to the right of freedom of speech. 'War' in this sense must mean aggressive war. For the crime of aggression see Chapter 17.



- b. overthrow a government; or
- c. undermine the constitutional order of a state or its territorial integrity.

**8.10.29** A mercenary is motivated by the desire for private gain and is often promised substantially more pay than combatants of the armed forces.<sup>189</sup>

**8.10.30** Members of the NZDF are not to:

- a. recruit, use, finance or train mercenaries or prospective mercenaries;<sup>190</sup> or
- b. engage in mercenary activities.<sup>191</sup>

#### PILLAGE IS PROHIBITED

**8.10.31** **Pillage, plunder,**<sup>192</sup> **looting,**<sup>193</sup> **sacking**<sup>194</sup> and **spoliation** are all types of theft conducted for private gain exploiting the circumstances of armed conflict. The term ‘pillage’ is used in this manual to cover all these terms.

**8.10.32** Members of the NZDF are not to commit pillage. In particular, members of the NZDF are not to pillage:

- a. towns and other places of habitation;<sup>195</sup>
- b. occupied territory;<sup>196</sup>
- c. the civilian population;<sup>197</sup>
- d. cultural property;<sup>198</sup>

189 See **Mercenaries Convention** art 1. For discussion of mercenaries see Chapter 6.

190 **Mercenaries Convention** art 2 states that any person who recruits, uses, finances or trains mercenaries commits an offence. Art 5(1): “States shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.” See also **Mercenary Activities (Prohibition) Act 2004** Part 2.

191 See **Mercenary Activities (Prohibition) Act 2004** s 12.

192 ‘Plunder’ encompasses all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as ‘pillage’ (see *Blaškić Trial* at [184]).

193 In the *Celibici Trial* (at [590]), the ICTY Trial Chamber “observed that the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory”. See also the *Jelisić Trial* (at [48]) where plunder was defined as “the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto”.

194 ‘Sack’ describes widespread looting and destruction of towns taken by assault.

195 **Hague Regulations** art 28: “Pillage of a town or place even when taken by assault is prohibited. Art 47: “Pillage of occupied territory is prohibited.” See also **Rome Statute** arts 8(2)(b)(xvi) and 8(2)(e)(v).

196 **Hague Regulations** art 47: “Pillage is formally prohibited.” Under **Geneva Convention IV** art 33 pillage of protected civilians in occupied territories is prohibited.

197 Under **Geneva Convention IV** art 33 pillage of protected civilians in occupied territories is prohibited. Under **Geneva Protocol II** art 4(2)(g) pillage is prohibited at any time and in any place whatsoever in a NIAC.

198 Under **Hague Cultural Property Convention** art 4(3) it is prohibited to pillage cultural property. In the *Major War Criminal Trial*, Nazi plundering of museums, libraries, art galleries and private houses was held to be a war crime.

- e. PWs, retained personnel, detainees and internees;<sup>199</sup> and/or
- f. the wounded, sick and shipwrecked.<sup>200</sup>

#### 8.10.33 Members of the NZDF are not to:<sup>201</sup>

- a. steal from the bodies of the dead or search the bodies of the dead with intent to steal from them;
- b. steal from the wounded, sick or shipwrecked;
- c. steal from PWs or any other persons deprived of liberty, or search such persons with the intent to steal from them;
- d. steal any property that has been left exposed or unprotected as a result of armed conflict;<sup>202</sup>
- e. appropriate for personal gain any property captured from or abandoned by the opposing force;<sup>203</sup> or
- f. seize the property of the adverse party, unless such seizure is imperatively demanded by the necessities of the conflict.<sup>204</sup>

#### 8.10.34 NZDF commanders are to take all necessary actions to prevent or punish pillaging. Pillage cannot be justified as a means for forces to provision themselves or as a reward for their success in battle. It is destructive to relationships with the local civilian population and to the discipline of the Service members who are allowed to indulge in it. The prohibition extends to both the acts of individuals and to widespread and organised depredation of property in occupied territory with connivance or encouragement of persons in command.

199 In the **Jelisić Trial** (at [49]), stealing of watches, money and other valuable property from detainees under threat of death was plunder and a war crime. See also **Geneva Convention III** art 18.

200 **Geneva Convention I** art 15 states that “Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage”. **Geneva Convention II** art 18: “After each engagement, Parties to the conflict shall, without delay, take all possible measures [...] to protect [the wounded, sick and shipwrecked] against pillage.” **Geneva Convention IV** art 16: “As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the [civilian] killed and wounded, to assist shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.” **Geneva Protocol II** art 8: “Whenever circumstances [in NIAC] permit, and particularly after an engagement, all possible measure [sic] shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage [...]”

201 **AFDA** s 31(a): “Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who steals from, or with intent to steal searches, the person of anyone killed, wounded, or captured in the course of any war or warlike operations in which New Zealand is engaged.”

202 **AFDA** s 31(b): “Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who steals any property which has been left exposed or unprotected in consequence of any such war or warlike operations [...]”

203 **AFDA** s 31(c): “Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who appropriates, otherwise than on behalf of Her Majesty the Queen in right of New Zealand, any supplies of any description whatsoever captured from or abandoned by the enemy.”

204 Under **Hague Regulations** art 23(g) it is especially forbidden “to seize the enemy’s property unless such seizure be imperatively demanded by the necessities of war”. Under **Rome Statute** arts 8(2)(b)(xiii) and 8(2)(e)(xii) it is a war crime to seize and destroy the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war (in IAC) or the conflict (in NIAC).

## THE TAKING OF BOOTY IS LAWFUL

**8.10.35** **Booty** is captured military property of the opposing force. This includes weapons, maps, computers, vehicles and other materiel. It does not include the private property of PWs, their clothing, including uniforms, messing equipment, or the equipment that they hold for self-protection, such as helmets and body armour.

**8.10.36** Subject to orders, members of the NZDF may lawfully:

- a. seize as booty the military property of the opposing force;<sup>205</sup>
- b. take as a prize any enemy ship carrying contraband, subject to that taking being adjudicated by a prize court;<sup>206</sup> and
- c. requisition property where that property is demanded by military necessity, subject to the requirement to give receipts and to compensate the owners for the loss of their property.<sup>207</sup>

**8.10.37** All enemy government or military property taken by a New Zealand force in the course of armed conflict is booty and belongs to the New Zealand Government, not to the units or individuals who capture or find it. This includes all weapons, equipment and material.

## WANTON DESTRUCTION AND UNLAWFUL APPROPRIATION IS PROHIBITED

**8.10.38** **Wanton destruction** is the destruction of property which is not justified by military necessity. **Unlawful appropriation** is the appropriation of property which is not justified by military necessity.

**8.10.39** Wanton destruction and unlawful appropriation are prohibited. In particular, members of the NZDF are not to carry out wanton destruction or unlawful appropriation of:

- a. property belonging to the wounded, sick or shipwrecked, medical or religious personnel;<sup>208</sup>
- b. property belonging to persons deprived of their liberty;<sup>209</sup>

205 Under **AFDA** s 31(c) it is an offence to unlawfully appropriate such property: "Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who appropriates, otherwise than on behalf of Her Majesty the Queen in right of New Zealand, any supplies of any description whatsoever captured from or abandoned by the enemy."

206 For seizure of prizes see Chapter 10.

207 See **Hague Regulations** art 52.

208 **Geneva Convention I** art 50 and **Geneva Convention II** art 51 provide that extensive destruction and appropriation of property belonging to people protected by the respective Convention, not justified by military necessity and carried out unlawfully and wantonly, is a grave breach of the respective Geneva Conventions. See also **Rome Statute** art 8(2)(a)(iv).

209 Even though **Geneva Convention III** does not specifically deal with the wanton destruction or unlawful appropriation of PWs' property, art 18 of the Convention protects such property and **Rome Statute** art 8(2)(a)(iv) makes it a war crime to wantonly destroy or unlawfully appropriate PWs' property by virtue of the fact that they are persons protected by **Geneva Convention III**. **Geneva Convention I** art 50 and **Geneva Convention II** art 51 also apply. Where other protected persons are detained, **Geneva Convention IV** art 53 applies: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." Art 147 provides that extensive destruction and appropriation of property belonging to people protected by the Convention, not justified by military necessity and carried out unlawfully and wantonly, is a grave

- c. housing or other buildings, or personal property belonging to private persons in occupied territory;<sup>210</sup>
- d. property belonging to the State or public authorities or social or cooperative organisations in occupied territory;<sup>211</sup> or
- e. property belonging to aliens in the territory of a party to the conflict.<sup>212</sup>

**8.10.40** The prohibition on wanton destruction or unlawful appropriation operates over and above the specific protection which particular buildings or objects enjoy by virtue of being, for example cultural property or property entitled to special protection under the Geneva Convention, such as hospitals. The expressions ‘wanton’ and ‘unlawful’ merely distinguish between justified (by military necessity) and unjustified destruction and appropriation. Such justification only applies, however, when the extent of destruction or appropriation does not exceed what the military situation requires.

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210 breach of the Geneva Convention IV. See also **Rome Statute** art 8(2)(a)(iv).  
**Geneva Convention IV** art 53: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” Art 147 provides that extensive destruction and appropriation of property belonging to people protected by the Convention, not justified by military necessity and carried out unlawfully and wantonly, is a grave breach of the Geneva Convention IV. See also **Rome Statute** art 8(2)(a)(iv).

211 See **Geneva Convention IV** art 53. Art 147 provides that extensive destruction and appropriation of property belonging to people protected by the Convention, not justified by military necessity and carried out unlawfully and wantonly, is a grave breach of the Geneva Convention IV. See also **Rome Statute** art 8(2)(a)(iv).

212 **Geneva Convention IV** art 53 also applies to aliens in the territory of a party to the conflict by virtue of the fact that they are persons protected by **Geneva Convention IV**.

## SECTION 11 – PROTECTION OF THE ENVIRONMENT

## ATTACKS ON THE NATURAL ENVIRONMENT ARE PROHIBITED

- 8.11.1** **Natural environment** includes all forests and vegetation, waters, lakes and seas, the soil and sub-soil, and the air.
- 8.11.2** **Widespread** generally means encompassing an area on the scale of several hundred square kilometres. **Long-lasting** means lasting for a period of months, or approximately a season. **Severe** means involving serious or significant disruption or harm to human life, natural and economic resources or other assets.<sup>213</sup>
- 8.11.3** The terms **widespread** and **long-lasting** or **severe** must be applied in a common sense way. The prohibition clearly does not apply to methods of warfare causing only a transitory or slight effect or one that extends to only a limited area.
- 8.11.4** Members of the NZDF are not to:
- a. use methods or means of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the environment;<sup>214</sup>
  - b. attack any part of the natural environment that is not a military objective<sup>215</sup> or demanded by military necessity;<sup>216</sup>
  - c. carry out any attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated;<sup>217</sup>
  - d. make an attack upon the natural environment by way of reprisal;<sup>218</sup> or
  - e. use any environmental modification technique having widespread, long-lasting or severe effects.<sup>219</sup>

213 See definitions in the Understandings section of the **Environmental Modification Convention**. Those definitions are intended exclusively for that Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connection with any other international agreement. These definitions should therefore be regarded as indicative only.

214 **Geneva Protocol I** art 55(1): "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes 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." **San Remo Manual** rule 44: "Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law". Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited. No equivalent provision in respect of NIAC, however, members of the NZDF are to apply this order in all armed conflicts." In its **Nuclear Weapons Opinion** (at [31]), the ICJ stated that there is a "general obligation to protect the natural environment against widespread, long-term and severe environmental damage [and includes] the prohibition of methods and means of warfare which are intended or may be expected, to cause such damage; and a prohibition of attacks against the natural environment by way of reprisals". See also **Conventional Weapons Protocol III** art (2)(4), **ICRC Customary IHL** rule 43A and **Rome Statute** art 8(2)(b)(iv). For weapons likely to cause widespread, long-term and serious damage to the natural environment see Chapter 7.

215 See **ICRC Customary IHL** rule 43A.

216 See **ICRC Customary IHL** rule 43B.

217 See **ICRC Customary IHL** rule 43C.

218 See **Geneva Protocol I** art 55(2) and **Nuclear Weapons Opinion** at [31].

219 See generally the **Environmental Modification Convention**. A New Zealand force is unlikely to

**8.11.5** NZDF commanders are, wherever feasible, to avoid conducting combat operations in areas containing:

- a. rare or fragile ecosystems; or
- b. the habitat of depleted, threatened or endangered species or other forms of marine life or wildlife.<sup>220</sup>

#### COMBAT OPERATIONS IN ANTARCTICA ARE PROHIBITED

**8.11.6** **Antarctica** is all that area south of 60 degrees latitude.<sup>221</sup>

**8.11.7** Members of the NZDF are not to:

- a. station weapons of any kind on Antarctica;
- b. carry out any operation in Antarctica inconsistent with the reservation of Antarctica for non-peaceful purposes;<sup>222</sup> or
- c. establish military bases and fortifications, test weapons, or conduct military manoeuvres on Antarctica.<sup>223</sup>

#### OPERATIONS IN OUTER SPACE ARE RESTRICTED

**8.11.8** **Outer space** means the space beyond the upper atmosphere. It is generally estimated that this zone commences at about 110 kilometres above sea level which is the lower level of space in which artificial satellites have the ability to orbit.<sup>224</sup>

**8.11.9** **Other body in outer space** means any other celestial body such as a planet, asteroid or comet within the Earth's solar system.

**8.11.10** Members of the NZDF are not to assist any person or authority<sup>225</sup> to:

- a. place nuclear weapons or weapons of mass destruction (WMD) in orbit around the Earth;<sup>226</sup>

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have the capabilities to achieve such effects, however, the principles of the Convention are to be applied in respect of environmental threats of a smaller scale or magnitude.

220 See **San Remo Manual** rule 11. Although there is no treaty-based obligation to avoid such damage in NIAC, members of the NZDF are to adhere to the rules to protect the natural environment regardless of the type of conflict.

221 **Antarctic Treaty** art 6: "The provisions of the present Treaty shall apply to the area south of 60 degrees South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

222 **Antarctic Treaty** art 1: "(1) [...] There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons. (2) The present Treaty shall not prevent the use of military personnel or equipment of facilities for scientific research or for any other peaceful purpose."

223 See **Antarctic Treaty** art 1(1).

224 There is no treaty law definition of 'outer space'.

225 The NZDF does not have the capability to conduct operations in outer space. Members of the NZDF are, however, prohibited from assisting coalition partners to achieve such effects.

226 See **Outer Space Treaty** art 4 and **Moon Treaty** art 3(3). **NZNFZDAC Act 1987** s 5(2) prohibits the acquisition of nuclear explosive devices beyond the New Zealand Nuclear Free Zone by a servant of the Crown. Whether outer space is 'beyond the New Zealand Nuclear Free Zone' is undecided.

- b. install or explode nuclear weapons or install WMD on the moon, or in orbit around the moon, or anywhere else in outer space;<sup>227</sup>
- c. use the moon or other bodies in outer space for non-peaceful purposes;<sup>228</sup> or
- d. establish military bases, installations and fortifications, test weapons, or conduct military manoeuvres on the moon or other bodies in outer space.<sup>229</sup>

**8.11.11** It is not prohibited to use:

- a. space-based satellites to provide intelligence in support of armed forces operations on Earth; or
- b. space-based communications, navigational or meteorological systems in support of armed forces operations on Earth, except to the extent that such use is prohibited under any treaty specific to the system in question.

227 See **Limited Test Ban Treaty** art 1(1)(a), **Outer Space Treaty** art 4 and **Moon Treaty** art 3(3).

228 See **Outer Space Treaty** arts 3 and 4 and **Moon Treaty** arts 3(1) and (2).

229 See **Outer Space Treaty** art 4 and **Moon Treaty** art 3(4).



# OCCUPATION OF FOREIGN TERRITORY

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## SECTION 1 – INTRODUCTION

- 9.1.1** Military occupation of foreign territory presents some of the greatest Law of Armed Conflict (LOAC) challenges to any force. Civilian populations are seldom content to accept foreign occupation for long, no matter how well and benevolently it is handled. Oppressive treatment or poor governance by an occupier greatly compounds the difficulties that a force will be likely to encounter.
- 9.1.2** LOAC carefully regulates this potentially difficult and dangerous situation by imposing rights and obligations on both occupiers and inhabitants of occupied territory. The latter must generally comply with the governance imposed by the occupying force. The occupiers must in turn ensure that military governance is conducted with caution, self-control and humanity.
- 9.1.3** Since the Charter of the United Nations (UN Charter) came into force, the right of peoples to self-determination has been increasingly regarded as a fundamental principle of international law.<sup>1</sup> New Zealand has not been in control of foreign territory, outside of a United Nations (UN) framework, since 1945.<sup>2</sup> While some occupations have run for many decades, they can only be viewed as a temporary measure. Sovereignty must be returned to a legitimate government as soon as possible. Although the right of States to acquire territory through conquest has ceased to exist, occupations have not disappeared as a legal concept.
- 9.1.4** Future New Zealand Defence Force (NZDF) involvement in occupation is only likely as part of a coalition force. The NZDF may be responsible for only a small part of the occupied territory, or may share overall responsibility with other contingents. It is unlikely to assume responsibility for legislation, taxation or central government administration. LOAC obligations applicable to the NZDF remain in place regardless of the obligations of other parts of the coalition force.<sup>3</sup>
- 9.1.5** **NZDF Code of Conduct** rules relating to this chapter are:

*Do not harm anyone who is under your control. Treat them humanely; protect them from rape, abuse, torture or degrading treatment.*

*Respect civilians and civilian property.*

1 Under **Geneva Protocol I** art 1(4) IAC “includes armed conflicts in which peoples are fighting against colonial domination and alien occupation [...] in the exercise of their right of self-determination”. See also **UNGAR 1514 (XV)** 1960.

2 New Zealand provided occupation forces in both world wars. For the legal arrangements governing UN operations see, for example, **UNSCR 1272** (1999), which established a transitional authority in East Timor (UNTAET) exercising powers of government from 1999 until Timorese independence in 2003.

3 For application of LOAC to coalition operations see Chapter 6.

## SECTION 2 – LEGAL EFFECT OF OCCUPATION

### DEFINITIONS

- 9.2.1 Occupation** (also known as ‘belligerent occupation’) means that a force exercises effective authority over invaded foreign territory. It can only exist in international armed conflict (IAC). The existence of armed resistance groups does not render the occupation ineffective. The term ‘occupation’ does not refer to:
- a. the presence of armed forces in foreign territory at the invitation of the host-state or with its permission – the relationship between a visiting force and the host-state is governed by a status of forces agreement (SOFA) or by customary law on the status of forces, not LOAC;
  - b. the exercise of legal powers by a force on its own territory, which are limited to those available under domestic law;<sup>4</sup> or
  - c. peace support operations – the rights and obligations of peacekeeping forces are governed by the mandate of the force, any relevant UN Security Council resolution (UNSCR) or treaty establishing the force, any SOFA, and the domestic and military law of the troop-contributing nation.<sup>5</sup>

### LEGAL REQUIREMENTS OF OCCUPATION

- 9.2.2** The existence of an occupation means that LOAC governs the actions of the both the occupying force and the civilian population of the territory under military control even if there is no armed resistance or other hostilities taking place.<sup>6</sup> Occupation is largely a question of fact, and an occupying force cannot avoid its LOAC obligations by resorting to artificial interpretations of the true nature of the situation.
- 9.2.3** If a New Zealand force conducts occupation operations (a **New Zealand occupying force**), the Commander Joint Forces New Zealand (COMJFNZ) is to ensure that members of the NZDF receive appropriate training, at the earliest opportunity, on the nature of occupation and the legal obligations that flow from it.
- 9.2.4** Parties to the conflict can enter into special agreements relating to the rights and obligations of the occupying force and the civilian population, provided that such agreements in no way diminish the protections guaranteed by LOAC.<sup>7</sup> If New Zealand enters into such an agreement, members of the NZDF will be advised of that fact in orders.
- 9.2.5** Members of the population cannot be deprived of their rights under LOAC on the basis of change of governance brought about by the occupying force, or any agreement that it enters into with the authorities of the occupied territory.<sup>8</sup>

4 See **DA** ss 5 and 9. For martial law see “Defence: Warfare” at p 33. For recaptured territory see **Battat v R**.

5 Although an Australian force serving with the Unified Task Force (UNITAF) applied the law of occupation in Somalia in 1992–1993, States have since refrained from applying that law in such circumstances. For LOAC in peace support operations see Chapter 5.

6 **Geneva Conventions Common Article 2**: “The Convention[s] shall also apply to all cases of partial or total occupation of the territory of a High Contracting Power, even if the said occupation meets with no armed resistance.”

7 See **Geneva Convention IV** art 7.

8 **Geneva Convention IV** art 47: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the Convention by any change introduced,

Members of the population cannot give up their rights, either voluntarily or under coercion.<sup>9</sup>

## DURATION OF OCCUPATION

- 9.2.6** Occupation commences when a force establishes control over foreign territory. It may be initiated by proclamation but no particular formalities are needed to bring it into being. LOAC obligations are binding for the duration of the occupation.
- 9.2.7** Occupation ends when control of occupied territory ends, ie when:
- a. the occupying force withdraws from the territory;
  - b. the occupying force is driven out by the forces, allies or the civilian population of the State to which the territory belongs; or
  - c. administration is established over the territory by the UN.<sup>10</sup>
- 9.2.8** General cessation of hostilities does not automatically terminate an occupation, which persists even if armed resistance to it has ceased.<sup>11</sup> Purported annexation of the territory by the occupying power or the establishment of various authorities within the territory does not bring occupation to a close or relieve the occupying force of its LOAC obligations.<sup>12</sup>

## GEOGRAPHIC APPLICATION OF OCCUPATION

- 9.2.9** Occupation is limited to the territory over which the force exercises effective control.<sup>13</sup> The key determinants are that:

- a. the previous government is unable to publicly exercise its authority within the territory, and

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as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.” In the *Wall on Palestinian Territory Opinion* the ICJ stated that subsequent events in the territories occupied by Israel have done nothing to alter the fact that all of these territories remain occupied territories and Israel has continued to have the status of occupying power.

- 9 **Geneva Convention IV** art 8: “Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to [in art 7], if such there be.”
- 10 See for example, **UNSCR 1272** (1999) which brought Indonesian occupation of East Timor to an end.
- 11 **Geneva Convention IV** art 6: “In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143.” The so-called ‘one year rule’ does not apply to parties to Geneva Protocol I, who are bound by the Geneva Conventions and by Protocol I until the termination of the occupation (see **Geneva Protocol I** art 3(b)).
- 12 **Geneva Convention IV** art 47: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”
- 13 **Hague Regulations** art 42: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

- b. the occupying power is able to exercise both actual and legal authority over the territory.

**9.2.10** Occupation requires displacement by force of the civil authorities and military forces of an opposing State. A force may occupy some parts of a territory, but not others. Mere transitory presence such as patrolling through or flying over the territory of another State does not amount to occupation. It is not necessary, however, that every town or village be invested with members of the force, or that resistance must have ceased. The extent of control is likely to be a complex factual question, but LOAC obligations cannot be avoided simply because resistance makes them difficult to comply with.<sup>14</sup>

### OCCUPATION MUST ONLY BE A TEMPORARY MEASURE

**9.2.11** The historic power of a State to acquire territory through conquest no longer exists under international law.<sup>15</sup> State sovereignty does not pass to the occupying force and it may not, therefore, change the constitution or basic laws of the territory.

**9.2.12** The commander of a New Zealand occupying force is to ensure that the actions of members of the NZDF are consistent with the temporary nature of occupation. Members of the NZDF are not to:

- a. do anything likely to suggest that New Zealand purports to annex the occupied territory;
- b. affect the existing legal, constitutional and governmental structures of the occupied territory except to the extent necessary and allowed under LOAC;<sup>16</sup> or
- c. make use of the buildings, land, forest, agricultural property or other resources of the occupied territory in any way inconsistent with returning the property undamaged and undiminished to the lawful government of the territory at the completion of the occupation.<sup>17</sup>

14 See *Wall on Palestinian Territory Opinion* at [86–92]. *Al Skeini* at [149–150] the European Court of Human Rights held that the UK’s human rights obligations extend overseas to situations in which British officials exercise ‘control and authority’ over foreign nationals. The UK had a duty to conduct an effective investigation into the deaths of all the civilians killed by British soldiers, whether or not they were within the confines of a UK military base.

15 **Kellogg–Briand Pact:** The use of war is renounced as an instrument of national policy. **UN Charter** art 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In the *Major War Criminals Trial* at [17–35] the Military Tribunal held that annexation of Austria, Czechoslovakia, Poland etc was a crime against peace. See also *Tokyo War Crimes Trial* p485. For aggression and the crime of aggression see Chapter 17.

16 See Section 3.

17 **Hague Regulations** art 55: “The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct [the right to use property while in possession of it, but without damaging it or diminishing its value].” *Wall on Palestinian Territory Opinion* at [153]: “Israel is [...] under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the [security] wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.” See also **ICRC Customary IHL** rule 51(b).

## SECTION 3 – THE OBLIGATIONS OF AN OCCUPYING FORCE

### PUBLIC ORDER, SAFETY AND LAW MUST BE MAINTAINED

**9.3.1** If the NZDF is likely to become an occupying force, COMJFNZ is to establish plans for the maintenance of public order, safety and law and is to ensure that sufficient resources are dedicated to enable them to be carried out. Since the occupying force has effectively supplanted the former government, it assumes primary responsibility for stability in the occupied territory. Regardless of whether it is expected that the force will be welcomed or resented by the population, operational planning is to anticipate that elements of the population will seek to exploit the change of government in order to carry out illegal activities such as looting, sexual violence, racketeering, revenge killings, rioting and kidnapping.<sup>18</sup>

**9.3.2** The commander of a New Zealand occupying force is to ensure that, to the greatest extent practicable, the force maintains public order and safety.<sup>19</sup> He or she is to take all feasible steps to protect the lives and property of the population, protect cultural property and important public and private property, hospitals and schools, as well as safeguarding sites containing dangerous materials, such as nuclear material, chemical plants and arsenals.

### THE USE OF FORCE TO MAINTAIN LAW AND ORDER

**9.3.3** Use of force against members of the population posing a threat to peace and security, other than those taking a direct part in hostilities,<sup>20</sup> will be tightly constrained and is to be based on the principle of minimum force. COMJFNZ is to ensure that appropriate rules of engagement (ROE) are issued and that members of the NZDF are given adequate training in the lawful use of force to maintain law and order. The advice of an NZDF Legal Adviser (LEGAD) is to be obtained wherever practicable.

**9.3.4** Members of an occupying force may need to transition rapidly from a war-fighting role to a policing role. The fact that the ousted government may have exercised repressive measures of law enforcement, which cannot be applied by members of the NZDF, compounds the difficulties, but does not lessen the legal responsibilities of the force.

### THE OCCUPYING FORCE MUST PROVIDE FOR THE CARE OF CHILDREN

**9.3.5** If the NZDF is likely to become an occupying force, COMJFNZ is to establish plans for the care of children in the occupied territory and is to ensure that sufficient resources are dedicated to enable them to be carried out. Normal structures for the protection and care of children are likely to have deteriorated or ceased to operate due to conflict. NZDF commanders must, therefore, anticipate the presence of numbers of children in need of care, many of whom will be orphaned or separated from their families or caregivers. Measures for the protection and care of such children must be implemented as soon as possible.<sup>21</sup>

18 The fact that a force views itself as a liberator does not diminish this responsibility or the difficulties inherent in its application. Failure of forces invading Iraq in 2003 to adequately resource units to stabilise the country after the fall of the Ba'athist regime is recognised as having increased difficulties and casualties for the coalition force in the aftermath of the initial campaign.

19 **Hague Regulations** art 43: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

20 For the meaning of 'direct participation in hostility' see Chapter 6.

21 For the general protection of children see Chapter 14.

**9.3.6** The commander of a New Zealand occupying force is to cooperate with national and local authorities in order to:<sup>22</sup>

- a. facilitate the proper working of all institutions for the care and education of children;
- b. facilitate the identification of children and register their parentage;
- c. make suitable arrangements for the maintenance, care and education of children who are orphaned or separated from their parents and who cannot otherwise be cared for; and
- d. allow preferential measures for the provision of food, medical care and protection of children under fifteen years, expectant mothers and mothers of children under seven years.

**9.3.7** Members of the NZDF are not to:

- a. take any step that has the effect of changing the personal status of children; or
- b. enlist children into the NZDF or allow them to be enlisted into any military or paramilitary organisation over which the NZDF exercises control.

#### **THE OCCUPYING FORCE MUST PROVIDE FOR THE HEALTH AND WELFARE OF THE CIVILIAN POPULATION**

**9.3.8** If the NZDF is likely to become an occupying force, COMJFNZ is to establish plans for the provision of health and welfare of the civilian population supported in the occupied territory and is to ensure that sufficient resources are dedicated to enable them to be carried out.

**9.3.9** The commander of a New Zealand occupying force is to ensure, as far as practicable, that measures are taken, in cooperation with national and local authorities, to:<sup>23</sup>

- a. maintain medical and hospital establishments and services, public health and hygiene, wherever possible respecting the cultural values of the population;
- b. prevent the spread of infectious diseases; and
- c. enable medical personnel of all categories to carry out their duties.

#### **THE OCCUPYING FORCE MUST PROVIDE FOR THE SUPPLY OF FOOD AND OTHER ESSENTIALS**

**9.3.10** If the NZDF is likely to become an occupying force, COMJFNZ is to establish plans for the emergency provision of food and other essentials the civilian population in the occupied territory requires, and is to ensure that sufficient resources are dedicated to enable such plans to be carried out. Since the occupying force has

<sup>22</sup> See **Geneva Convention IV** art 50.

<sup>23</sup> See **Geneva Convention IV** art 56.



assumed governmental and administrative authority for the territory, it must also assume the obligation to carry out those functions regarded as fundamental duties for responsible governments, for example, famine relief. This may extend past the simple provision of supplies to ensuring that food is properly distributed and is not hoarded or sold at exorbitant prices.

- 9.3.11** The commander of a New Zealand occupying force is to ensure that, to the greatest extent practicable, the population are supplied with:
- a. food and medical supplies;<sup>24</sup> and
  - b. clothing, bedding, means of shelter, other supplies essential to their survival, and objects necessary for religious worship.<sup>25</sup>
- 9.3.12** If available resources are inadequate to meet the needs of the population, it will be necessary for foodstuffs, medical stores and other articles to be brought into the territory. As this measure will involve coordination and financial commitment at a level higher than that available to the force commander, timely reports are to be sent to the Chief of Defence Force (CDF), through COMJFNZ, about the potential for such a requirement arising.
- 9.3.13** The commander is to allow representatives of the Protecting Power<sup>26</sup> or the International Committee of the Red Cross (ICRC) 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 requirements.<sup>27</sup>

### RELIEF SUPPLIES MUST BE FACILITATED AND PROTECTED

- 9.3.14** The commander of a New Zealand occupying force is to:
- a. agree to, facilitate by all means at the commander's disposal, and supervise distribution of organised relief consignments and schemes undertaken by States, the ICRC or other impartial humanitarian organisations, for the provision of consignments of foodstuffs, medical supplies and clothing for any part of the population that is inadequately supplied;<sup>28</sup>
  - b. facilitate rapid distribution of relief consignments in cooperation with and under the supervision of a Protecting Power, delegated neutral State, the ICRC or another impartial humanitarian organisation;<sup>29</sup>

24 **Geneva Convention IV** art 55 requires that, to "the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate". **Geneva Protocol I** art 14: "The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied."

25 **Geneva Protocol I** art 69(1): "[... the] Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship."

26 For Protecting Power see Chapter 16.

27 See **Geneva Convention IV** art 55.

28 See **Geneva Convention IV** arts 59 and 61.

29 See **Geneva Convention IV** art 61 and **ICRC Customary IHL** rule 55.



- c. permit free passage of organised relief consignments and guarantee their protection;<sup>30</sup> and
- d. allow protected persons to receive individual relief consignments sent to them, unless imperative security reasons require otherwise.<sup>31</sup>

**9.3.15** The commander may approve the inclusion of relief personnel to assist in the provision, transportation and distribution of organised relief consignments, subject to any necessary security conditions. Members of the NZDF are to:

- a. respect and protect approved relief personnel; and
- b. assist, to the fullest extent practicable, approved relief personnel carrying out their relief mission.

**9.3.16** Members of the NZDF are not to restrict or limit the activities of approved relief personnel except in cases of imperative military necessity.<sup>32</sup> The commander may, as a last resort, terminate or suspend the mission of any relief personnel who do not respect the security conditions imposed by the force.<sup>33</sup> The advice of an NZDF LEGAD is to be obtained before termination or suspension wherever practicable. CDF is to be advised, through COMJFNZ, of any such termination or suspension and the reason for it without delay.

**9.3.17** The commander of a New Zealand occupying force may:

- a. order the search of relief consignments, and
- b. regulate their passage to prescribed times and routes.

**9.3.18** The Protecting Power or ICRC may be asked to certify that consignments are to be used for the relief of the civilian population and are not the benefit of the occupying force.<sup>34</sup>

**9.3.19** The commander of the New Zealand occupying force is to ensure that relief consignments are not diverted from their intended purpose other than in exceptional circumstances and only in the interests of the population and with the consent of the Protecting Power or ICRC.<sup>35</sup> The advice of an NZDF LEGAD is to be obtained before the diversion wherever practicable. CDF is to be advised, through COMJFNZ, of any such diversion and the reason for it without delay.

30 See **Geneva Convention IV** art 59 and **ICRC Customary IHL** rule 32. See also **Geneva Convention IV** art 61: “[Relief] consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments. All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.”

31 See **Geneva Convention IV** art 62.

32 For military necessity see Chapter 4.

33 **Geneva Protocol I** art 71(4): “Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular, they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.”

34 **Geneva Convention IV** art 59(4): “A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.”

35 See **Geneva Convention IV** art 60.

- 9.3.20** The commander of a New Zealand occupying force is to allow the following organisations to pursue their activities except when, as a temporary and exceptional measure, urgent reasons of security demand otherwise:
- a. Recognised national Red Cross/Red Crescent societies.<sup>36</sup>
  - b. Other relief societies and civilian organisations established for ensuring living conditions of the population by the maintenance of the essential public utility services, the distribution of relief and the organisation of rescues.<sup>37</sup>
- 9.3.21** Organisations are not to be required to make changes to their personnel or structures that would prejudice relief activities.<sup>38</sup>

### POPULATIONS MUST BE PROTECTED FROM EXPLOSIVE REMNANTS OF WAR AND CLUSTER MUNITION REMNANTS

- 9.3.22** The commander of a New Zealand occupying force is to ensure that within the area the force controls, as soon as feasible after the cessation of active hostilities, the force:
- a. reduces the risk posed by explosive remnants of war (ERW) and cluster munition remnants by:
    - (1) surveying and assessing the threat posed by ERW and cluster munition remnants;
    - (2) assessing and prioritising needs and the practicability of marking and clearing, removing or destroying ERW and cluster munition remnants; and
    - (3) marking and clearing, removing and destroying ERW and cluster munition remnants, giving highest priority to those assessed as posing a serious humanitarian risk;
  - b. takes all feasible measures to protect the civilian population, individual civilians and civilian objects from the risks and effect of ERW and cluster munition remnants, including warnings, risk education, marking, fencing and monitoring of territory affected by ERW;<sup>39</sup>
  - c. protects humanitarian missions and organisations from the effects of ERW and cluster munition remnants in the territory where the humanitarian mission or organisation will operate or is operating;<sup>40</sup> and
  - d. provides humanitarian missions and organisations with the location of all ERW and cluster munition remnants it is aware of in the territory where the humanitarian mission or organisation will operate or is operating.<sup>41</sup>

36 See Chapter 16.

37 See **Geneva Convention IV** art 63. This includes organisations such as Oxfam, Save the Children, *Médecins Sans Frontières*. For protection of Civil Defence personnel and units see Chapter 14.

38 See **Geneva Convention IV** art 63.

39 See **Conventional Weapons Protocol V** art 5(1). For ERW and cluster munition remnants see Chapter 7.

40 See **Conventional Weapons Protocol V** art 6(1)(a) and Chapter 7.

41 See **Conventional Weapons Protocol V** art 6(1)(b) and Chapter 7.

**RIGHTS OF INDIGENOUS PEOPLES MUST BE RESPECTED**

**9.3.23** Members of a New Zealand occupying force are to ensure that particular care is taken to ensure the rights of indigenous peoples within the occupied territory are respected and protected. In the event that deployment of an occupying force becomes necessary, COMJFNZ, in consultation with DLS, is to draw up necessary orders and plans to ensure such respect and protection.<sup>42</sup>

## SECTION 4 – POWERS OF AN OCCUPYING FORCE

### GENERAL POWERS OF AN OCCUPYING FORCE

- 9.4.1** An occupying force may issue orders to the civilian population to enable it to govern the territory effectively, ensure its own security and meet its LOAC obligations.<sup>43</sup> However, failure by members of the population to comply with such orders does not, of itself, constitute a breach of LOAC on their part. Persons breaching such orders can only be punished to the extent permitted by the existing law of the territory, or by any laws enacted by the occupying force.
- 9.4.2** The orders or regulations brought into force by the occupying force must comply with international human rights law (IHRL). Armed conflict or other emergencies do not justify derogation from the most important of these obligations.<sup>44</sup>

### THE OCCUPYING FORCE MAY REQUIRE COMPULSORY ADULT LABOUR

- 9.4.3** The commander of a New Zealand occupying force may require members of the local population to provide labour to meet the needs of the force or for the general welfare of the civilian population.<sup>45</sup> The use of forced labour is to be a last-resort or emergency measure. Forcing members of the population to work is likely to cause resentment or disobedience, which may, in the long-term, prove dangerous to the force. In ordinary circumstances, the force is to employ individuals at market rates of pay to perform the tasks necessary for its operations and necessary public welfare. Unusual circumstances where compulsory work is appropriate include, but are not limited to:
- a. compelling truck drivers or rail staff to move people and material quickly to re-establish utilities in a war-ravaged part of the territory;
  - b. requiring persons to turn out and help bury the dead for health reasons;
  - c. requiring food producers to work to avoid hunger or starvation amongst the population;
  - d. requiring builders to construct shelters; and
  - e. requiring medical staff to tend to the needs of the sick and injured.

43 **Geneva Convention IV** art 27 states that “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.”

44 **ICCPR** art 4(1): “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” Art 4(2) states: “No derogation from articles 6 [inherent right to life], 7 [prohibition of torture or cruel, inhuman, or degrading treatment], 8 (paragraphs 1 and 2) [prohibition of slavery or servitude], 11 [no imprisonment for inability to fulfil a contractual obligation], 15 [no retrospective offences/penalties], 16 [right to recognition as a person before the law] and 18 [right to freedom of thought, conscience and religion] may be made under this provision.”

45 **Geneva Convention IV** art 51: “The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.” *Simić Trial* (at [88]): “Compulsory labour may be lawful only if required for the needs of the army of occupation for maintaining public services, and for the feeding, sheltering, clothing, transportation or health, for the benefit of the population of the occupied country.”

**9.4.4** Such measures may be necessary when workers have been intimidated not to work with the occupying force by resistance groups or when criminal elements or racketeers are using the circumstances of armed conflict to extort exorbitant prices out of the population.

**9.4.5** The commander is to ensure that persons performing compulsory labour are:<sup>46</sup>

- a. over eighteen years of age – in cases of doubt, a reliable birth certificate is to be obtained; if this is not possible, the person is not to be required to work;
- b. paid a fair wage – as a minimum, local laws setting wages and working hours, health and safety and training are to be complied with; where those laws produce a rate of pay that is clearly inadequate or allow unsafe or unhealthy conditions of work, the commander is to obtain advice from an NZDF LEGAD on the appropriate work conditions, based on New Zealand standards, to be applied;
- c. not required to work for more than eight hours a day and that all workers have at least one day in seven free from all work – the duration and effect on the individual of work must be minimised as much as possible; work for long periods of time which denies persons the opportunity to continue with their usual pursuits or leisure activities and which is inadequately remunerated is likely to be regarded as ‘slavery-like’ and condemned as such;<sup>47</sup>
- d. not required to undertake work that is not proportionate to their intellectual and/or physical capabilities;
- e. wherever possible, working in their usual place of employment;
- f. not required to join any military or paramilitary organisation;
- g. not required to perform work of a military or semi-military nature, eg the building of defences or laying or lifting of mines;<sup>48</sup>
- h. not required to protect the security of any installation in which compulsory labour is being performed;
- i. not required to leave the territory in which they reside;
- j. not be required to perform uncompensated, abusive, degrading or humiliating work.

46 See **Geneva Convention IV** art 51.

47 Slavery and the slave trade in all their forms are prohibited (see **ICRC Customary IHL** rule 94).

48 **Geneva Convention IV** art 51: “(2) Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations [...] (4) In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.”

**9.4.6** The term ‘compulsory’ implies that persons can be punished for not complying with the order to work. However, such punishment can only be imposed in accordance with applicable legislation. Arbitrary or collective punishments are unlawful and are not to be imposed.<sup>49</sup> The force must not attempt to create unemployment or otherwise impose conditions which would encourage workers to seek employment working for the occupying force.<sup>50</sup> The advice of an NZDF LEGAD is to be obtained, wherever practicable, on appropriate arrangements for compulsory labour, including contractual matters. CDF is to be advised, through COMJFNZ, without delay, of any use of compulsory labour and the reason for it.

**9.4.7** Workers, whether voluntary or otherwise, are to be allowed to communicate with the Protecting Power/ICRC to intercede on their behalf.<sup>51</sup>

## COLLECTION OF TAXES AND LEVIES

**9.4.8** An occupying force may collect taxes, duties and tolls, but only for legitimate public purposes.<sup>52</sup> Taxation must not be used to punish the civilian population<sup>53</sup> or for private gain. Although the occupied territory can be required to bear the costs of an occupation, these impositions must only relate to the occupation itself and cannot be greater than the economy of the territory can be expected to bear.<sup>54</sup> It is unlikely that a New Zealand force would exercise this power as doing so would almost inevitably engender resentment against the force, which may prove to be dangerous and counter-productive.

**9.4.9** The commander of a New Zealand occupying force is not to impose any tax, levy or other charge on the inhabitants of occupied territory without the specific written authority of CDF.<sup>55</sup> If such authority is granted, the commander is to ensure that a receipt is given for any money taken.<sup>56</sup>

49 **Hague Regulations** art 50: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”

50 **Geneva Convention IV** art 52: “All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.”

51 **Geneva Convention IV** art 52(1): “No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power’s intervention.”

52 **Hague Regulations** art 48: “If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is 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 legitimate Government was so bound.”

53 **Hague Regulations** art 50: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”

54 **Hague Regulations** art 49: “If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.” **Hague Regulations** art 52: “Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country [...]”

55 **Hague Regulations** art 51: “No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.”

56 **Hague Regulations** art 51: “For every contribution a receipt shall be given to the contributors.”

- 9.4.10** Tax collection should only arise when the commander considers it necessary to continue local taxation regimes in order to keep local amenities and public services running. For example, tollbooths on bridges and roads should continue to operate and income tax should continue to be collected on the same basis as before the occupation.<sup>57</sup> In such a case, the tax structures and rules that existed before the occupation should be used, unless those structures were unduly harsh or oppressive, or amounted to persecution of a particular group.

#### MAINTENANCE OF LOCAL GOVERNMENT

- 9.4.11** The commander of a New Zealand occupying force may utilise local officials to maintain local governance but is not to force those officials to continue in their role against their conscience.<sup>58</sup>
- 9.4.12** The commander may, however, remove any local government official where he or she considers it necessary to do so in the interest of the security of the force or the welfare of the civilian population.<sup>59</sup> Officials who commit offences against the security of the force may also be tried for their actions.<sup>60</sup> COMJFNZ and CDF are to be advised, without delay, of any such removal from office and the reason for it. The advice of an NZDF LEGAD is to be obtained wherever practicable.
- 9.4.13** The structures of the existing society are to be kept intact to the greatest extent possible. Maintaining local mayors and city officials is the most efficient and effective way of ensuring the maintenance of public facilities and law and order. Wherever possible, the local police are to be allowed to continue in their duties so as to avoid a breakdown in law and order as the transition to occupation occurs. Members of the police cannot be required to engage in armed combat operations against the armed forces or organised resistance movement of their own country.
- 9.4.14** In some cases, use of local officials and police will not be possible. The displaced government may have instructed them not to assist the occupying force or they may have fled or abandoned their posts. Officials are not to be employed if there is reason to believe that they have:
- a. been involved or complicit in human rights violations, crimes against humanity or genocide; or
  - b. they are using their position to undermine the security of the force.
- 9.4.15** Use of indigenous government structures established by the force does not relieve it of its obligations under LOAC.

57 **Hague Regulations** art 51: “The collection of said contributions shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.” See also art 48.

58 **Geneva Convention IV** art 54: “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.”

59 The provisions of **Geneva Convention IV** art 54 do not affect the right of the Occupying Power to remove public officials from their posts.

60 See **Geneva Convention IV** art 5.



**CONTROL OF INFORMATION**

- 9.4.16** The commander of a New Zealand occupying force may censor or restrict the publication of newspapers, films, television, internet, social and other media, and restrict the holding of public meetings only to the extent necessary to:
- a. ensure the security of the force, eg suppressing information likely to be of direct use to an opposing force or inciting attacks against the force;
  - b. maintain public order and security; and
  - c. stop the transmission or publication of messages inciting racial or religious hatred, other forms of discrimination, crimes against humanity or genocide.
- 9.4.17** Freedom of expression is an important human right<sup>61</sup> but it is subject to the lawful restrictions necessary for the protection of national security, public order, public health and morality.<sup>62</sup> In addition, the right to free speech does not extend to advocating violence<sup>63</sup> or national, racial or religious hatred.<sup>64</sup>
- 9.4.18** Nevertheless, information control should not be used simply to stifle criticism of the occupation. Measures are to remain in force only for so long as strictly necessary and are to be lifted, in whole or in part, as soon as it is safe to do so.
- 9.4.19** Wherever practicable, the advice of an NZDF LEGAD is to be obtained before the imposition of any restriction on freedom of speech or control of information. CDF is to be advised, through COMJFNZ and without delay, of any such restriction and the reason for it.

**CONTROL OF CIVILIANS**

- 9.4.20** The commander of a New Zealand occupying force may impose necessary controls on the civilian population for security purposes, including:
- a. curfews;
  - b. restrictions on movement and assembly;
  - c. carriage of identity cards;
  - d. controls on commercial activity, rationing and price control; and
  - e. restrictions on change of address.<sup>65</sup>

61 See **ICCPR** art 19.

62 See **ICCPR** art 19(3)(b). See also art 4, which provides that the art 19 right may be derogated from in times of public emergency which threaten the life and existence of the nation and which have been officially proclaimed.

63 **ICCPR** art 20(1): “Any propaganda for war shall be prohibited by law.”

64 **ICCPR** art 20(2): “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

65 **Geneva Convention IV** art 27(4) states that “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”.



- 9.4.21** Such controls are to be applied in a fair and carefully regulated manner and are not to be imposed on the basis of unlawful discrimination,<sup>66</sup> or to punish or intimidate the population.<sup>67</sup> Members of the NZDF are not to impose any control that unreasonably deprives the population of the ability to practise their religion and culture.
- 9.4.22** Wherever practicable, before imposing any controls, the advice of an NZDF LEGAD is to be obtained. CDF is to be advised, through COMJFNZ and without delay, of any such control and the reason for it.

#### DETENTION OF CIVILIANS

- 9.4.23** The commander of a New Zealand occupying force may, for imperative security reasons, detain civilians in their assigned residences or, when no other practical option exists, in internment camps (ICs).<sup>68</sup>
- 9.4.24** Members of the NZDF are to treat persons who are interned for security reasons, or otherwise deprived of their liberty for any reason, humanely at all times.<sup>69</sup>
- 9.4.25** Internment is to be regarded as a measure of last-resort, used only when its justification is imperative. Prescribed procedures for internment must include a right to appeal the decision.<sup>70</sup> Where the effect of internment of assigned residences is to deprive the individuals of the ability to make a livelihood, the occupying force must ensure that they receive adequate financial support or relief.

#### CONFISCATION OF PROPERTY

- 9.4.26** The commander of a New Zealand occupying force may, where necessary, confiscate movable public property (ie property that belongs to the opposing State) that can be used for military operations.<sup>71</sup> This includes:

- a. money and other financial assets;
- b. weapons and munitions;
- c. means of transport including vehicles, ships and aircraft; and
- d. communications equipment.

66 For prohibited discrimination see Chapter 4.

67 See Chapter 12 and Chapter 13.

68 **Geneva Convention IV** art 78: "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. (2) Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of this Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power. (3) Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of this Convention." For internment see Chapter 12.

69 For standards of humane treatment of persons deprived of their liberty see Chapter 12. For treatment of civilians see Chapter 13. For treatment of other specifically protected persons see Chapter 14.

70 See **Geneva Convention IV** art 78.

71 **Hague Regulations** art 53: "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations." See also **ICRC Customary IHL** rule 51(a).

- 9.4.27** The commander of a New Zealand force may also order the confiscation of privately owned arms and ammunition, transport and communications equipment that can be used for military purposes.<sup>72</sup> Where such property is seized, the commander is to ensure that a receipt is given to the owner to enable proper restoration and/or compensation to be paid. Confiscated property is to be held securely and protected so that it can be returned intact.
- 9.4.28** Wherever practicable, the advice of an NZDF LEGAD is to be obtained before property is confiscated. CDF is to be advised, through COMJFNZ and without delay, of any such confiscation and the reason for it.
- 9.4.29** All captured military land, buildings and structures, including ports, airfields, fortifications, camps, barracks, supply depots and arsenals, are automatically at the disposal of the force throughout the conflict. All military property captured by a New Zealand force is booty and belongs to the Government of New Zealand.

#### REQUISITION OF PROPERTY

- 9.4.30** COMJFNZ is to plan for an occupying force on the basis that it will be self-sufficient, either relying on its own logistic support and that of coalition partners, or by purchasing goods, facilities and services from the local economy. The power of requisition must be approached with caution since it is likely to cause resentment, particularly if applied unwisely or excessively. Requisition from local and city authorities or members of the population may nevertheless be necessary in some circumstances as an extraordinary measure.<sup>73</sup>
- 9.4.31** The commander of a New Zealand occupying force is to ensure that no requisition is made that has the result of diminishing the food supply, necessities of life or medical care of members of the civilian population. In particular, the commander is to ensure that:
- a.** civilian hospitals and medical units, their equipment and materiel and the services of their personnel, are not requisitioned except where necessary for the adequate and immediate medical treatment of wounded and sick members of the force or of persons deprived of their liberty by the force, and as long as:
    - (1)** the requisition is a temporary measure that lasts only while the necessity exists;
    - (2)** the resources are surplus to those necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment; and

72 **Hague Regulations** art 53: "All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

73 **Hague Regulations** art 52: "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country [...] Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

- (3) immediate and satisfactory arrangements are made for the care and treatment of patients and for the needs of the civilian population for hospital accommodation, and for the medical needs of the civilian population and any wounded and sick under treatment;<sup>74</sup>

b. foodstuffs, articles of property and medical supplies are not requisitioned unless:

- (1) the goods are necessary for the use of the force;
- (2) fair value is paid; and
- (3) the goods are surplus to the requirements of the civilian population.<sup>75</sup>

**9.4.32** Requisitioned goods become the property of the Government of New Zealand, not of members of the NZDF or of the unit that acquires them. Particular care is to be taken to ensure that requisitions are only authorised at the highest level in the area of operations, and that the practice is not allowed to degenerate into looting or simple theft.

**9.4.33** The requisition power includes billeting members of the force with local householders. This traditional method of housing and feeding an occupying force typically causes resentment and is not to be used by a New Zealand occupying force.

**9.4.34** Requisition is a compulsory measure. However, failing to comply with a requisition order is only an offence if legislation makes it so. Unlike confiscation, requisition of goods or services clearly requires the owner of the property or the provider of the services be paid for his or her property or time. If practicable, the advice of an NZDF LEGAD is to be obtained before the requisition takes place. CDF is to be advised, through COMJFNZ and without delay, of any requisition and the reason for it.

74 **Geneva Convention IV** art 57 states that the “material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population”. **Geneva Protocol I** art 14: “(1) The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied; (2) The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their *matériel* or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment; (3) [...] the Occupying Power may requisition the said resources, subject to the following particular conditions: (a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war; (b) that the requisition continues only while such necessity exists; and (c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.”

75 **Geneva Convention IV** art 55 states that the “Occupying Power may not requisition foodstuffs, 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 taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods”.

**WANTON DESTRUCTION IS PROHIBITED**

- 9.4.35** Members of the NZDF are not to destroy buildings or other property, whether belonging to private persons, the State, public authorities, or other organisations, except where such destruction is rendered absolutely necessary by military operations.<sup>76</sup>

<sup>76</sup> Under **Hague Regulations** art 23(g) it is especially forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. **Geneva Convention IV** art 53: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” See also **Rome Statute** art 8(2)(a)(iv), **ICRC Customary IHL** rule 50 and Chapter 8.

## SECTION 5 – ADMINISTRATION OF JUSTICE

## CRIMINAL LAW IS TO REMAIN IN FORCE WHERE POSSIBLE

- 9.5.1** The criminal law of the territory will, to the greatest extent possible, remain in force during an occupation.<sup>77</sup> The tribunals of the territory will also continue to function in respect of all offences under that law.<sup>78</sup> Members of the NZDF will not be subject to their jurisdiction but will instead be dealt with for any offences under the Armed Forces Discipline Act 1971 (AFDA).
- 9.5.2** Repealing or suspending part of the law of the occupied territory or abrogating the power of the courts is a significant step which is to be approached with caution. The commander is not to affect the operation of local tribunals or courts except where he or she considers necessary to do so in the interest of the security of the force, the maintenance of law and order or the due administration of justice.<sup>79</sup> However, a New Zealand occupying force cannot allow laws to remain in place that deprive the civilian population of fundamental human rights. Nor can it maintain tribunals that apply torture or that are corrupt. A force may need to repeal or suspend laws that:
- a.** are a threat to the security of the force, eg those relating to conscription, rights to public assembly or possession and carriage of weapons;<sup>80</sup>
  - b.** conflict with LOAC or other treaty obligations, in particular the International Covenant on Civil and Political Rights (ICCPR) or UNSCRs; or
  - c.** permit the carrying out of the death penalty, corporal punishment or torture, slavery or inhuman and degrading treatment.
- 9.5.3** Wherever practicable, the advice of an NZDF LEGAD is to be obtained before the measure is applied. CDF is to be advised, through COMJFNZ and without delay, of any such repeal or suspension and the reasons for it.

77 **Hague Regulations** art 43: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

78 **Geneva Convention IV** art 64 provides that, subject to “the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws”.

79 **Geneva Convention IV** art 54: “The Occupying Power may not alter the status of public officials or judges in the occupied territories [...] This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.”

80 **Geneva Convention IV** art 64 requires that the “penal laws of the occupied territory shall 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 present Convention”.

## THE OCCUPYING FORCE MAY ENACT CRIMINAL LAWS

- 9.5.4** An occupying force may enact criminal laws, where necessary, to comply with LOAC obligations, to maintain public order and ensure its own security.<sup>81</sup> The laws must be published in the local language and made known to the local population before prosecution in a court or tribunal may occur.<sup>82</sup>
- 9.5.5** Constructing criminal laws that comply with international standards of justice is likely to be a complex task requiring expert advice. The commander of a New Zealand force is not to attempt to bring into force any penal law applicable to the civilian population without the specific authority of CDF.

## MEMBERS OF THE POPULATION MAY ONLY BE PUNISHED IN ACCORDANCE WITH LAW

- 9.5.6** Members of the NZDF are not to punish any person in occupied territory in respect of any alleged offence except where that punishment has been imposed by a properly constituted court.<sup>83</sup> Members of the NZDF are not to assume that they have any powers of punishment in respect of the population of occupied territory unless they are advised of such powers by CDF in orders.
- 9.5.7** A commander does not, under New Zealand law, have the power to create courts or commissions to try individuals without the authority of Parliament.<sup>84</sup>
- 9.5.8** The jurisdiction of the Court Martial of New Zealand (Court Martial) under AFDA and the Court Martial Act 2007 (CMA) does not extend to members of the civilian population in occupied territory.<sup>85</sup> Should Parliament extend the jurisdiction of the Court Martial to administer penal laws promulgated by a New Zealand occupation force, the Court Martial will apply that law in accordance with internationally recognised principles of judicial procedure.<sup>86</sup>
- 9.5.9** An occupying power can establish regular and non-political military courts to deal with offences, including international crimes, in occupied territory. Such occupation courts must meet necessary standards of independence and

81 **Geneva Convention IV** art 64: “[...] The occupying power may [...] subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the 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 establishments and lines of communication used by them.”

82 **Geneva Convention IV** art 65: “The penal provisions enacted by the Occupying Power shall 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 shall not be retroactive.” They must take into consideration the fact the accused is not a national of the Occupying Power.

83 **Geneva Convention IV** art 66: “In case of a breach of the penal provisions promulgated by it [...] the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.” Art 67: “The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence [...]”. Art 71: “No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial [...]”. See also **ICRC Customary IHL** rule 100, **Nuremberg Principle V** and Chapter 17. Under **Geneva Protocol I** art 85(4)(e) depriving a protected person of the right to a fair and regular trial is a grave breach. See also **Rome Statute** art 8(2)(a)(vi).

84 Prerogative powers to apply martial law in times of war or rebellion are substantially abridged by legislation giving effect to LOAC and international human rights obligations in New Zealand law.

85 See **AFDA** ss 6 and 78. The jurisdiction of New Zealand civil courts does not extend to occupied territory.

86 See **Geneva Convention IV** art 71, **Geneva Protocol I** art 75(4) and (7), and **ICCPR** art 14(1). In its **Wall on Palestinian Territory Opinion** the ICJ held that the Israeli occupying force must apply the ICCPR. For internationally recognised standards of justice see Chapter 17.

impartiality required by international and domestic law.<sup>87</sup> No New Zealand legislation currently provides for such courts.

- 9.5.10** If the Court Martial is empowered to deal with offences in an occupied territory, the commander of the occupying force is to ensure that if any protected person is to be tried for an offence bearing a maximum punishment of an imprisonment of two years or more, the Protecting Power and/or ICRC is provided with full details of the proceedings before they commence.<sup>88</sup> Representatives of the Protecting Power/ICRC are to be allowed to attend the trial unless prevented for exceptional reasons of security.<sup>89</sup> The commander is to ensure that the details of any conviction involving a punishment of imprisonment for two years or more are communicated to the Protecting Power/ICRC without delay.<sup>90</sup>
- 9.5.11** Members of the NZDF are not to assist in any way with the imposition of the death penalty or corporal punishment by any court in occupied territory.<sup>91</sup>

87 See **Geneva Convention IV** art 71, **Geneva Protocol I** art 75(4) and (7), and **ICCPR** art 14(1). The latter applies unless New Zealand makes a derogation under art 4(1). Other than by Israel in the occupied territories, such courts have not been applied since the end of World War II. They were not created, for example, by the US-led coalition that occupied Iraq from 2003 to 2004.

88 **Geneva Convention IV** art 71: “[...] The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons. (3) The notification to the Protecting Power [...] shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of Article 71 are fully complied with, the trial shall not proceed. The notification shall include the following particulars: (a) description of the accused; (b) place of residence or detention; (c) specification of the charge or charges (with mention of the penal provisions under which it is brought); (d) designation of the court which will hear the case; (e) place and date of the first hearing.” Provisions relating to the death penalty are inapplicable to the NZDF (see **Abolition of the Death Penalty Act 1989**).

89 **Geneva Convention IV** art 74: “Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held ‘in camera’ in the interests of the security of the Occupying Power, which shall then notify the Protecting Power [...]”. For the role of ICRC generally see Chapter 16.

90 **Geneva Convention IV** art 74: “[...] A record of judgments [...] shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgment has been received by the Protecting Power.”

91 **ICCPR Protocol II** art 1: “(1) No one within the jurisdiction of a State Party to the present Protocol shall be executed; (2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.” New Zealand abolished the death penalty when it enacted the **Abolition of the Death Penalty Act 1989**.



## SECTION 6 – THE PROTECTION OF THE POPULATION AND PROPERTY

### GENERAL PROTECTION

**9.6.1** **Protected person in occupied territory** means any person who, at a given moment and in any manner whatsoever, find themselves in the hands of an occupying power of which they are not nationals.<sup>92</sup> The term does not apply to nationals of a State not bound by Geneva Convention IV.<sup>93</sup> Nor does it apply to nationals of a neutral State or nationals of a co-belligerent State, while the State of which they are nationals has normal diplomatic representation in the State in whose control they are.<sup>94</sup> The term also does not apply to persons otherwise protected by LOAC, ie persons wounded, sick or shipwrecked,<sup>95</sup> or prisoners of war (PWs).<sup>96</sup>

### PERSONS WHO ARE NOT NATIONALS MUST BE ALLOWED TO LEAVE

**9.6.2** The commander of a New Zealand occupying force is to allow persons who are not nationals of the occupied territory to leave unless their departure is contrary to the security interests of the occupying force. The force commander is not to deny departure to any such person seeking to leave the territory without the authority of CDF.<sup>97</sup>

### PROTECTED PERSONS IN OCCUPIED TERRITORY MUST BE RESPECTED AND PROTECTED

**9.6.3** Members of the NZDF are to respect and protect the population in occupied territory. They are at all times to respect the family honour, customs and religious freedom of the population,<sup>98</sup> and treat them humanely. Members of the NZDF

92 See **Geneva Convention IV** art 4.

93 See **Geneva Convention IV** art 4. Note, however, that art 4 provides that the general protection provisions of Part II of Geneva Convention IV do apply to such persons, as long as they fit the definition in art 13. In addition, such persons are protected by Geneva Protocol I art 75.

94 See **Geneva Convention IV** art 4. Note, however, that art 4 provides that the general protection provisions of Part II of Geneva Convention IV do apply to such persons, as long as they fit the definition in art 13. In addition, such persons are protected by Geneva Protocol I art 75.

95 Such persons are protected by Geneva Conventions I and II and are not considered protected persons within the meaning of Geneva Convention IV (see **Geneva Convention IV** art 4). For protection of the wounded, sick and shipwrecked see Chapter 11.

96 Such persons are protected by Geneva Convention III and are not considered protected persons within the meaning of Geneva Convention IV (see **Geneva Convention IV** art 4). For protection of PWs see Chapter 12.

97 **Geneva Convention IV** art 48: "Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the Occupying Power shall establish in accordance with the said Article." **Geneva Convention IV** art 35: "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use. If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave." For neutral persons see Chapter 16.

98 **Geneva Convention IV** art 58: "The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities. The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their



are to protect the inhabitants of occupied territory against all acts of violence, threats of violence and insults.<sup>99</sup>

- 9.6.4** Members of the NZDF are to protect women against sexual violence, in particular against rape, enforced prostitution or any form of indecent assault.<sup>100</sup>
- 9.6.5** All inhabitants of occupied territory are to be treated with the same consideration by members of the NZDF, without any adverse distinction based on race, religion or political opinion. This does not prevent more favourable treatment being applied, where necessary, to take account of a person's state of health, age or sex.<sup>101</sup>
- 9.6.6** Members of the NZDF are not to:
- a. use coercion to obtain information from members of the civilian population;<sup>102</sup>
  - b. require oaths of allegiance or military service in the NZDF or any armed force controlled by the NZDF, or require work of a military nature or purpose;<sup>103</sup>
  - c. impose collective punishment for the actions of individuals or groups;<sup>104</sup>
  - d. take reprisals against the civilian population or civilian property;<sup>105</sup> or
  - e. take hostages to guarantee the good behaviour of the population.<sup>106</sup>

distribution in occupied territory.” See also **ICRC Customary IHL** rule 104.

99 **Geneva Convention IV** art 27: “Protected persons 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 [...]”

100 **Geneva Convention IV** art 27 requires that women “shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”. See also **UNSCR 1325** (2000) women, peace and security. For protection of women see Chapter 14.

101 **Geneva Convention IV** art 27 states that without “prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion”.

102 **Hague Regulations** art 44: “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.”

103 **Hague Regulations** art 45: “It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.” **Geneva Convention IV** art 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 [...] Protected persons may not be compelled to undertake work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour [...] In no case should the requisition of labour lead to a mobilization of works in an organization of a military or semi-military character.” See **Rome Statute** arts 8(2)(a)(v) and 8(2)(b)(xv).

104 **Hague Regulations** art 50: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.” **Geneva Convention IV** art 33(1): “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited [...]”

105 Under **Geneva Convention IV** art 33 reprisals against protected persons and their property are prohibited. See also Chapter 17.

106 **Geneva Convention IV** art 34: “The taking of hostages is prohibited.” See also **ICRC Customary IHL** rule 96 and Chapter 8.

## CIVILIAN PROPERTY AND OTHER SPECIFICALLY PROTECTED PROPERTY MUST BE RESPECTED

**9.6.7** Members of a New Zealand occupying force are to respect and protect private moveable property.<sup>107</sup> This is any property that does not belong to the opposing State and includes property of local and city authorities. It also includes the property of institutions dedicated to religion, charity and education, and the arts and sciences, and monuments, even if such property does belong to the State.<sup>108</sup> In particular, members of the NZDF are not to:

- a. pillage or steal the property of the civilian population of the occupied territory or of displaced persons within that territory;<sup>109</sup>
- b. destroy property when not justified by military necessity;<sup>110</sup> or
- c. appropriate property except where this is required by military necessity.<sup>111</sup>

## DEPORTATION AND UNLAWFUL DISPLACEMENT OF THE CIVILIAN POPULATION IS PROHIBITED

**9.6.8** Members of the NZDF are not to:

- a. assist in the transfer of members of the population of any part of an occupying force into occupied territory;<sup>112</sup>
- b. assist in individual or mass forcible transfers;

107 **ICRC Customary IHL** rule 51(c): "In occupied territory [...] private property must be respected and may not be confiscated." See also **Hague Regulations** art 53.

108 **Hague Regulations** art 56: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

109 **Hague Regulations** art 47: "Pillage is formally forbidden." See also **Geneva Convention IV** art 33 and **ICRC Customary IHL** rules 52 and 133.

110 **Hague Regulations** art 56: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." **Geneva Convention IV** art 53: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." **Geneva Convention IV** art 147 renders such destruction of property a grave breach of the Convention. See also **Rome Statute** arts 8(2)(a)(iv) and 8(2)(b)(xiii). See **ICRC Customary IHL** rule 50. For military necessity see Chapter 4.

111 See **ICRC Customary IHL** rules 50 and 51(c). **Geneva Convention IV** art 147 renders appropriation of property of protected persons, not justified by military necessity and carried out unlawfully and wantonly, a grave breach of the Convention. See also **Rome Statute** art 8(2)(a)(iv) and 8(2)(b)(xiii).

112 **Geneva Convention IV** art 49: "Individual or mass forcible transfers [...] are prohibited, regardless of their motive [...] The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." See also **ICRC Customary IHL** rule 130, **Geneva Convention IV** art 147 for grave breach and **Rome Statute** arts 8(2)(b)(viii) and 8(2)(e)(viii).

- c. deport members of the population of an occupied territory;<sup>113</sup> or
- d. displace the population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.<sup>114</sup>

**9.6.9** If a New Zealand force needs to move all or part of the civilian population out of an area for their own safety or because of military necessity, the commander of the force is take all practicable measures to ensure that:<sup>115</sup>

- a. proper accommodation for those people is provided;
- b. removals are effected in satisfactory conditions of hygiene, health, safety and nutrition; and
- c. members of the same family are not separated.

**9.6.10** The NZDF commander responsible is to ensure that:

- a. the Protecting Power/ICRC is informed of the transfer or evacuation as soon as possible and, at the latest, as soon the movement has taken place;<sup>116</sup> and
- b. the displacement lasts no longer than is strictly required by the military situation and that displaced persons are allowed to voluntarily return in safety to their homes or places of residence as soon as the reasons for their displacement end.<sup>117</sup>

## CULTURAL PROPERTY MUST BE PROTECTED

**9.6.11** The commander of a New Zealand occupying force is to take all feasible steps within the resources of the force to:

- a. prevent the theft and illicit export of cultural property from occupied territory, and
- b. return any stolen or illicitly exported property within the power of the force to the competent authorities of the occupied territory.<sup>118</sup>

113 **Geneva Convention IV** art 49(1): “[...] deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” See also **ICRC Customary IHL** rule 129, **Geneva Convention IV** art 147 for grave breach and **Rome Statute** art 8(2)(a)(vii).

114 **Geneva Convention IV** art 49: “[...] The Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may 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. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.” See also **Rome Statute** art 8(2)(e)(viii).

115 See **Geneva Convention IV** art 49 and **ICRC Customary IHL** rule 131. For military necessity see Chapter 4.

116 **Geneva Convention IV** art 49(4).

117 **ICRC Customary IHL** rule 132: “Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.” See also **Geneva Convention IV** art 49.

118 See **Hague Cultural Property Protocol II** art 21, **ICRC Customary IHL** rule 41 and Chapter 14.

## SECTION 7 – CONDUCT OF HOSTILITIES IN OCCUPIED TERRITORIES

### RESISTANCE TO OCCUPATION BEFORE EFFECTIVE OCCUPATION

- 9.7.1** Until occupation by foreign forces becomes effective, members of the armed forces of the territory being invaded as well as members of organised militia and spontaneous civilian resistance (*levee en masse*) are entitled to fight to resist the invading force. Members of militia and any spontaneous civilian resistance must, however, distinguish themselves from the civilian population by carrying their arms openly and they must comply with LOAC.<sup>119</sup>

### RESISTANCE TO OCCUPATION AFTER EFFECTIVE OCCUPATION

- 9.7.2** Once occupation becomes effective, members of the opposing force who have not surrendered are entitled to continue fighting.
- 9.7.3** Members of organised resistance movements are also entitled to continue fighting provided that they continue to carry their arms openly:<sup>120</sup>
- a. during each military engagement; and
  - b. during such time as they are visible to the opposing force while engaged in a military deployment preceding the launching of an attack.
- 9.7.4** Spontaneous civilian resistance is no longer possible once occupation has been established. Members of the population who attack the occupying force, other than as part of an organised resistance movement, forfeit their immunity from attack for such time as they take a direct part in the hostilities,<sup>121</sup> and bear criminal responsibility for killing or injuring members of the force or for causing damage or destruction to property. If captured, such persons are not entitled to PW status,<sup>122</sup> but are entitled to fundamental guarantees of humane treatment.<sup>123</sup> They can only be punished as a result of a fair and regular trial.<sup>124</sup> Their right to communicate with other persons may, however, be restricted where necessary.<sup>125</sup>

119 **Geneva Convention III** art 4A(6): “Inhabitants of a non-occupied territory who, on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, [are entitled to prisoner of war status] provided they carry arms openly and respect the laws and customs of war.” See also Chapter 6.

120 See **Geneva Protocol I** art 44(3), about which the Government of New Zealand made the following declaration: “Situations in which an armed combatant cannot distinguish himself by wearing a uniform can only exist in occupied territory or where peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. The Government of New Zealand will interpret the word “deployment” [...] as meaning any movement towards a place from which an attack is to be launched. It will interpret the words “visible to the adversary” as including visible with the aid of any form of surveillance, electronic or otherwise, available to help keep a member of the armed forces of the adversary under observation” (see **Geneva Protocol I New Zealand Declaration**). See also Chapter 6.

121 See **Geneva Protocol I** art 51(3): For ‘direct part in the hostilities’ see Chapter 6.

122 **Geneva Convention IV** art 5(1): “Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.”

123 See **Geneva Protocol I** art 75(1).

124 See **Geneva Protocol I** art 75(4) and Chapter 17.

125 **Geneva Convention IV** art 5: “(2) [...] Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the occupying power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present

**9.7.5** Protected persons who commit an offence solely intended to harm the force, but does not:

- a.** involve an attempt to kill or injure members of the occupying force or its administration, or seriously damage its property or the installations used by it; or
- b.** pose a 'grave collective danger' (eg a terrorist attack);

can be interned by the force for a period proportionate to the offence committed,<sup>126</sup> but only as a result of a fair and regular trial.<sup>127</sup>

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Convention. (3) In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial as prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power [...]."

126 See **Geneva Convention IV** art 68.

127 See Chapter 17.

## Chapter 10

# FURTHER RULES IN THE MARITIME AND AIR ENVIRONMENT

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## SECTION 1 – INTRODUCTION

- 10.1.1** Despite the fact that Law of Armed Conflict (LOAC) applying to land, sea and air operations has developed in quite distinct ways, in only a few areas is there significant difference between the legal obligations applying to these three environments. The fundamental rules requiring humane treatment of persons who are *hors de combat* through wounds, sickness, shipwreck or capture, and the rules relating to respect for civilians and civilian property, apply in all environments. So too do restrictions or prohibitions on certain weapons and methods of warfare.
- 10.1.2** There are, however, physical characteristics of the maritime and air environments that require particular rules. This chapter deals with those special obligations. It also deals with actions that are short of attack which can be taken in respect of shipping and aircraft (including that of neutral States) during armed conflict. These powers include interception, visit and search, and diversion and capture.
- 10.1.3** It is important that all members of the New Zealand Defence Force (NZDF) are aware of these rules. The conduct of modern joint force operations means that legal rights and obligations will have effects that cross between environmental divisions.



## SECTION 2 – THE APPLICATION OF LAW OF ARMED CONFLICT IN THE MARITIME AND AIR ENVIRONMENTS

### GENERAL

- 10.2.1 Auxiliary vessel** means a vessel, other than a warship, owned by or under the exclusive control of the armed forces of a State and used at that time on government non-commercial service.<sup>1</sup>
- 10.2.2 Merchant vessel** means a vessel, other than a warship, an auxiliary vessel, or a State vessel (eg a customs or police vessel) that is engaged in commercial or private service.
- 10.2.3 Military aircraft** means any aircraft operated by the armed forces of a State:<sup>2</sup>
- a. bearing the military markings of that State;
  - b. commanded by a member of the armed forces;
  - c. crewed, controlled or pre-programmed by personnel subject to regular armed forces discipline; and
  - d. the term includes military remotely piloted aerial systems (RPASs).
- 10.2.4 State aircraft** means any aircraft owned or used by a State serving exclusively non-commercial government functions.<sup>3</sup>
- 10.2.5 Warship** means a ship belonging to the armed forces of a State:<sup>4</sup>
- a. bearing the external marks distinguishing its character and nationality,
  - b. under the command of a commissioned officer,<sup>5</sup> and
  - c. crewed by personnel under regular armed forces discipline.

### LAW OF ARMED CONFLICT MUST BE COMPLIED WITH IN MARITIME AND AIR ENVIRONMENTS

- 10.2.6** All orders of this manual apply with necessary modifications to armed conflict in the maritime or air environments. Adherence to the principles of distinction and proportionality remains mandatory.<sup>6</sup> In particular, members of the NZDF are to comply with the rules of LOAC that:

- a. prohibit or restrict the use of certain weapons;<sup>7</sup>

1 See **San Remo Manual** rule 13(h) and **UNCLOS** art 32.

2 See **San Remo Manual** rule 13(j) and **HPCR Air and Missile Manual** rule (1)(x). See also **DA** s 2 for definition of 'aircraft'. All NZDF aircraft are military aircraft.

3 See **HPCR Air and Missile Manual** rule (1)(cc) and definition implied in **San Remo Manual** rules 13(j) and (l).

4 See **UNCLOS** art 29 and **San Remo Manual** rule 13(g). All NZDF naval ships are warships.

5 The officer is formally required to be named on the list of officers of that State (see **UNCLOS** art 29 and **San Remo Manual** rule 13(g)).

6 **San Remo Manual** rule 38: "In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited." See also **HPCR Air and Missile Manual** rule 5(a).

7 See **HPCR Air and Missile Manual** rules 5–9. For weapons see Chapter 7.

- b. prohibit or restrict the use of certain methods of combat,<sup>8</sup> in particular, missiles and projectiles, including those with over-the-horizon capabilities,<sup>9</sup> torpedoes,<sup>10</sup> sea mines,<sup>11</sup> and cluster munitions;<sup>12</sup>
- c. prohibit methods of warfare of a nature that cause widespread, long-term and severe damage to the natural environment;<sup>13</sup>
- d. require humane treatment of civilians and persons who are *hors de combat* through surrender, sickness, wounds, shipwreck;<sup>14</sup> and
- e. protect the transportation of the wounded and sick and medical equipment.<sup>15</sup>

8 See **HPCR Air and Missile Manual** rules 10–21. For methods of combat see Chapter 8.

9 See **HPCR Air and Missile Manual** rules 34–39 for precautions in attacks and **San Remo Manual** rule 78. For distinction in attack see Chapter 4.

10 See **San Remo Manual** rule 79 and Chapter 7.

11 See **San Remo Manual** rules 80–83 and 86 and Chapter 7.

12 For prohibition of cluster munitions see Chapter 7.

13 See **ICRC Customary IHL** rule 44 and **HPCR Air and Missile Manual** rule 88.

14 See **San Remo Manual** rules 161 and 165. For wounded, sick and shipwrecked see Chapter 11. For PWs and other persons deprived of their liberty see Chapter 12. For civilians see Chapter 13.

15 See **HPCR Air and Missile Manual** rules 71–87 and **San Remo Manual** rules 162 and 164. For protection of medical and religious personnel, medical units and establishments, and medical transports see Chapter 11.

## SECTION 3 – LEGAL REGIME OF THE SEA AND AIRSPACE

### INTRODUCTION

**10.3.1** The United Nations Convention on the Law of the Sea (UNCLOS) sets out navigational rights and restrictions in the various divisions of the sea and, as a consequence, airspace. Although directed to the peaceful uses of the sea, this regime is of great importance to the conduct of operations and impacts on movement on, above and under the world's oceans. NZDF commanders responsible for the planning and execution of combat operations in the maritime and air environments are to respect the legal rights and restrictions imposed by UNCLOS and the instruments made under it<sup>16</sup> as it applies to the rights of neutral States.<sup>17</sup>

### DEFINITIONS

**10.3.2** **Archipelagic waters** means the waters enclosed within the archipelagic baselines of a State constituted wholly of islands.<sup>18</sup>

**10.3.3** **Baseline** means the point from which a State's maritime claims are measured – normally the low-water line along the coast as marked on its official large-scale charts.<sup>19</sup> Other lines can be used to deal with irregularities such as fringing reefs<sup>20</sup> and permanent harbour works.<sup>21</sup> If the coastline is deeply indented or has a fringe of islands, a 'straight baseline' following the general direction of the coast<sup>22</sup> may be drawn if the sea area enclosed is closely linked to the land domain.

**10.3.4** **Contiguous zone** means an area up to 24 nautical miles seaward from a coastal State's baseline where it may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration and sanitary laws occurring within its territory or territorial sea, but not for purposes relating to armed conflict.<sup>23</sup>

**10.3.5** **Continental shelf** means the seabed and subsoil of submarine areas that extend beyond a State's territorial sea to the outer edge of the continental margin or 200 nautical miles from the baseline where the continental margin does not extend that far.<sup>24</sup> The legal status of the water column above the shelf is not affected.<sup>25</sup>

16 For example, **COLREGS** sets the 'rules of the road' for safe navigation of ships at sea and is binding on warships. COLREGS do not prohibit aggressive manoeuvre in combat conditions or to ramming an enemy ship, but they continue to apply in respect of navigation in the vicinity of neutral ships.

17 For schematic depiction of the divisions of the sea and airspace, see Annex A.

18 **UNCLOS** art 47(1): "An archipelagic State may draw archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of water to the area of the land, including atolls, is between 1 to 1 and 9 to 1." **UNCLOS** art 121: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." Each island has a territorial sea calculated from its own baseline. Islands that cannot sustain human habitation or economic life are called 'rocks'. See also **TS, CZ, and EEZ Act 1977** s 2(1).

19 See **UNCLOS** art 5. For New Zealand baselines see **TS, CZ, and EEZ Act 1977** ss 5 and 6; 'Low-water line' is defined at s 2(1) and "means the line representing the intersection with the shore of the plane of the Lowest Astronomical Tide", ie the lowest tide level which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions.

20 See **UNCLOS** art 6.

21 See **UNCLOS** art 11.

22 See **UNCLOS** art 7. For New Zealand's straight baselines see **TS, CZ, and EEZ Act 1977** s 6(a).

23 See **UNCLOS** art 33. For New Zealand's contiguous zone of see **TS, CZ, and EEZ Act 1977** Part 1.

24 See **UNCLOS** art 76(5). For New Zealand's continental shelf see **Continental Shelf Act 1964** s 2(1).

25 See **UNCLOS** art 76.

- 10.3.6 Exclusive economic zone (EEZ)** means a zone up to 200 nautical miles from a State's baseline where it may exercise jurisdiction over resources and some aspects of marine environmental protection. The State has certain sovereign rights but no jurisdiction over uses of the sea that are not resource-related.<sup>26</sup> For the purposes of LOAC there is essentially no difference between the high seas and an EEZ.
- 10.3.7 High seas** means all parts of the ocean seaward of the EEZ, or for a State without an EEZ, the edge of the territorial sea.<sup>27</sup>
- 10.3.8 Internal waters** means waters landward of a State's baseline, for example lakes, rivers, some bays,<sup>28</sup> harbours, canals and lagoons. Internal waters have the same legal character as land territory under LOAC.
- 10.3.9 International airspace** is not defined in any LOAC treaty. In this manual it means airspace that is not the territorial airspace of any State; that is airspace over the high seas and territory not subject to the sovereignty of any State, including any contiguous zones and EEZ.<sup>29</sup>
- 10.3.10 National airspace** means airspace over the land, internal waters, archipelagic waters, and territorial seas of a State.<sup>30</sup>
- 10.3.11 Neutral airspace** consists of the airspace over neutral waters and the land territory of neutral States.<sup>31</sup>
- 10.3.12 Neutral waters** means the internal waters, territorial sea and archipelagic waters of neutral States.<sup>32</sup>
- 10.3.13 Territorial sea** means an area up to 12 nautical miles seaward from a State's baseline and subject to its sovereignty.<sup>33</sup>

## WHERE COMBAT OPERATIONS ARE PERMISSIBLE

- 10.3.14** For LOAC purposes, the world's oceans and airspace are divided into those areas in which armed combat may be conducted as of right, and those in which it cannot.

26 See **UNCLOS** Part V. For New Zealand's EEZ see **TS, CZ, and EEZ Act 1977** Part 2.

27 See **UNCLOS** Part VII.

28 A bay is a well-marked indentation in the coastline of such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. 'Historic' bays are those which do not meet those requirements, but where a State can demonstrate open, effective, long-term, and continuous exercise of authority, and the acquiescence by foreign States in the exercise of that authority (see **Fisheries Case**).

29 See **HPCR Air and Missile Manual** rule (1)(a).

30 See **HPCR Air and Missile Manual** rule (1)(a) and **Chicago Convention** art 1: "The contracting States recognize that every state has complete and exclusive sovereignty over the airspace above its territory." Art 2: "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State." Although the Convention applies only to civil aircraft this definition reflects customary international law for all aircraft.

31 See **San Remo Manual** rule 14. For neutrality see Chapter 16.

32 See **San Remo Manual** rule 14 and **UNCLOS** art 3. For neutrality see Chapter 16.

33 See **UNCLOS** art 3. For New Zealand's territorial sea, see **TS, CZ, and EEZ Act 1977** Part 1.

- 10.3.15** Subject to LOAC and its orders,<sup>34</sup> a New Zealand force may conduct combat operations, attack opposing forces and other military objectives, conduct weapons tests, gather intelligence, conduct manoeuvre and flight operations in:
- a. national waters and airspace of an enemy State;
  - b. national waters and airspace of New Zealand or, subject to treaty arrangements, a coalition partner; or
  - c. international waters and airspace, ie the high seas, the contiguous zones of all States, the EEZs of all States, the water above any continental shelf beyond the territorial sea, and all the airspace above them.

#### COMBAT IN NEUTRAL WATERS AND AIRSPACE IS PROHIBITED

- 10.3.16** A New Zealand force is not to conduct combat operations in the national waters or national airspace of a neutral State, ie the internal waters, territorial seas and archipelagic waters, and the land territory of the neutral State and the airspace above them.<sup>35</sup>

#### PRECAUTIONS IN COMBAT OPERATIONS

- 10.3.17** Commanders of New Zealand forces operating in international waters or airspace are to conduct operations with due regard to:
- a. the freedom of navigation of ships and aircraft other than those of the enemy;
  - b. the right of neutral States to explore and exploit the natural resources of the high seas, the seabed, the ocean floor and its subsoil;<sup>36</sup>
  - c. the safety of artificial islands, installations, structures and safety zones established by neutral States in the EEZ and on the continental shelf;<sup>37</sup>
  - d. the safety of cables and pipelines laid on the seabed which do not exclusively serve the enemy State;<sup>38</sup> and
  - e. the right of neutral warships and auxiliaries not to be interfered with.<sup>39</sup>

#### EXERCISE OF INNOCENT PASSAGE, STRAITS TRANSIT AND ARCHIPELAGIC SEA-LANE PASSAGE

- 10.3.18** **Innocent passage** means passage through territorial waters that conforms with international law and which is not prejudicial to the peace, good order or security of a coastal State.<sup>40</sup> Submarines must navigate on the surface and show their flag.<sup>41</sup>

34 Members of a New Zealand force may be subject to ROE or other orders which constrain them from attacking objectives that are permissible objects for attack under LOAC. For ROE see Chapter 2.

35 See **San Remo Manual** rule 15, **HPCR Air and Missile Manual** rules 166 and 167. For neutrality see Chapter 16.

36 See **San Remo Manual** rules 34 and 36. For neutrality see Chapter 16.

37 See **San Remo Manual** rule 34.

38 See **San Remo Manual** rule 37.

39 See **UNCLOS** art 95.

40 See **UNCLOS** art 19.

41 See **UNCLOS** art 20.

**10.3.19** New Zealand naval ships retain the right of innocent passage,<sup>42</sup> transit passage through international straits ('straits transit') and archipelagic sea-lanes passage in times of armed conflict as they do in peacetime.<sup>43</sup> Enemy warships enjoy the same rights. The neutrality of the coastal State is not affected by the exercise of these rights.<sup>44</sup>

**10.3.20** The commander of a New Zealand naval ship exercising innocent passage through the territorial sea of any State other than the enemy, whether or not New Zealand is a party to a conflict, is to ensure that the ship does not:

- a. threaten or use force against the sovereignty, territorial integrity or political independence of a coastal State, or in any other manner violate the principles of international law embodied in the Charter of the United Nations (UN Charter);
- b. conduct any exercise or practice with weapons of any kind;
- c. collect information prejudicial to the defence or security of the coastal State;
- d. undertake any act of propaganda aimed at affecting the defence or security of the coastal State;
- e. launch, land or take on board any aircraft;
- f. launch, land or take on board any military device;
- g. load or unload any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- h. conduct any act of wilful and serious pollution contrary to UNCLOS;
- i. conduct any fishing activities;
- j. carry out research or survey activities;
- k. do any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; or
- l. conduct any other activity not having a direct bearing on passage.<sup>45</sup>

**10.3.21 Suspension of innocent passage.** The coastal State may take necessary steps to prevent passage in its territorial sea that is not innocent. It may also temporarily suspend innocent passage in specified areas to protect its security, including weapons exercises. Suspension must not discriminate between ships of different States and only takes effect after having been duly published.<sup>46</sup> The commander of a New Zealand naval ship is not to conduct passage through the territorial sea of a neutral State if notified that the coastal State has suspended that right.

<sup>42</sup> See **UNCLOS** art 17.

<sup>43</sup> **San Remo Manual** rule 28: "Belligerent and neutral surface ships, submarines and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under, and over all straits and archipelagic waters to which these rights generally apply." See also **San Remo Manual** rule 27 and 29 and **UNCLOS** art 17.

<sup>44</sup> See **San Remo Manual** rule 25 and **Hague Convention XIII** art 10 (not ratified by New Zealand).

<sup>45</sup> See **UNCLOS** art 19.

<sup>46</sup> See **UNCLOS** art 25(3) and **San Remo Manual** rule 19.

**10.3.22** The commander of any New Zealand force that is:

- a. in transit through or above an international strait bordered on each side by a neutral State whose waters overlap;
- b. in passage through or above neutral archipelagic waters; or
- c. exercising passage through or above routes normally used for international navigation where an archipelagic State has not designated any sea-lanes;<sup>47</sup>

is to ensure that the transit proceeds without delay.

**10.3.23** The New Zealand force is not to:

- a. do anything likely to constitute a threat or use of force against the territorial integrity or political independence of the neutral State(s) in question;
- b. initiate offensive operations against opposing forces; or
- c. use those waters as a sanctuary or base of operations.<sup>48</sup>

**10.3.24** However, New Zealand naval ships conducting straits transit or archipelagic sea-lanes passage may take all necessary defensive measures to ensure their security, including launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.<sup>49</sup>

**10.3.25** The commander of the New Zealand force is to ensure that timely notice of intended passage is given to any party to a conflict to minimise the risk of coming under mistaken attack.<sup>50</sup> If a New Zealand force is attacked by any State other than the enemy while conducting innocent passage, straits transit or archipelagic sea-lanes passage, the commander is to take all necessary measures to defend the force, but is to break off from combat at the earliest opportunity consistent with the safety of the force and is to move to international waters wherever possible unless otherwise ordered by the Chief of Defence Force (CDF).

## NEUTRAL AIRSPACE

**10.3.26** NZDF military aircraft are not to enter or transit through neutral airspace, with the following exceptions:

- a. The airspace above neutral international straits and archipelagic sea-lanes remains open at all times to military aircraft engaged in

47 **UNCLOS** art 53(12): “If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation.”

48 See **San Remo Manual** rule 30.

49 See **San Remo Manual** rule 30.

50 **San Remo Manual** rule 26: “Neutral warships, auxiliary vessels, and military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters. The neutral State should, as a precautionary measure, give timely notice of its exercise of the rights of passage to the belligerent State.”



transit or archipelagic sea-lanes passage. Such passage is to be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Commanders of NZDF military aircraft are to refrain from acts of hostility while in transit but may engage in activities that are consistent with their security and with the security of accompanying surface and subsurface forces.

- b.** Medical aircraft may, with prior notice, fly over neutral territory, land there in case of necessity, and use neutral airfield facilities as ports of call, subject to such restrictions and regulations as the neutral State may see fit to apply equally to all parties to a conflict.
- c.** NZDF aircraft in distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral State wishes to impose. The neutral State must use all the means at its disposal to prevent or terminate that violation. If captured, the aircraft and their crews must be interned for the duration of the armed conflict.<sup>51</sup>

#### FRAGILE ECOSYSTEMS MUST BE PROTECTED

**10.3.27** Unless demanded by military necessity, New Zealand forces are not to conduct operations in marine areas containing:

- a.** rare or fragile ecosystems; or
- b.** the habitat of depleted, threatened or endangered species or other forms of marine life.<sup>52</sup>

**10.3.28** New Zealand forces are to strictly comply with the terms of any agreement with the opposing State excluding such marine areas from the marine area of operations.

**10.3.29** Where operations in such marine areas are required by military necessity, CDF is to be advised of the nature of the operation, and the reason for it, through the Commander Joint Forces New Zealand (COMJFNZ), without delay. The advice of an NZDF Legal Adviser (LEGAD) is to be obtained before such an operation unless this is not practicable.

#### THE ECONOMIC RIGHTS OF NEUTRAL STATES MUST BE RESPECTED

**10.3.30** Some States assert that combat operations in the EEZ or contiguous zone are a breach of their sovereign rights as neutrals. Although New Zealand does not accept this view as a question of law, all operations conducted by New Zealand forces are to pay regard to the rights and duties of neutral States to the fullest extent consistent with the mission.

<sup>51</sup> See **HPCR Air and Missile Manual** rule 170 and Chapter 16.

<sup>52</sup> See **San Remo Manual** rule 11, **HPCR Air and Missile Manual** rules 88–89 and **ICRC Customary IHL** rule 44. For ‘military necessity’ see Chapter 4. For protection of the environment see Chapter 14.



**10.3.31** NZDF commanders conducting operations in the EEZ or on the continental shelf of a neutral State are to have due regard for the legitimate rights and duties of those neutral States.<sup>53</sup> In particular, NZDF commanders are to avoid damaging the economic or environmental interests of the neutral State or damaging the law enforcement interests protected by the contiguous zones of the neutral States.

#### MINE-LAYING

**10.3.32** Laying mines in the EEZ of a neutral State, thereby interfering with the activities of fishing fleets, is likely to be viewed as an unfriendly action. If it is absolutely necessary for a New Zealand force to lay mines in a neutral State's EEZ or on its continental shelf, the commander is to:

- a. advise CDF, through COMJFNZ, without delay so that the neutral State can be notified;
- b. ensure that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access to them;
- c. avoid so far as practicable interference with lawful exploration or exploitation of the EEZ or continental shelf; and
- d. have regard to the protection and preservation of the marine environment.<sup>54</sup>

53 **San Remo Manual** rule 12: "In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States."

54 **San Remo Manual** rule 35: "If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, inter alia, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment."

## SECTION 4 – PROTECTED VESSELS AND AIRCRAFT

### PROTECTED VESSELS MUST NOT BE ATTACKED

**10.4.1** Members of the NZDF are not to attack any of the following classes of vessel:<sup>55</sup>

- a. Hospital ships and other medical transports.
- b. Small craft used for coastal rescue operations.
- c. Vessels granted safe conduct by agreement between the belligerent parties including:
  - (1) vessels designated for and engaged in the transport of prisoners of war (PWs); and
  - (2) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations.
- d. Vessels engaged in transporting cultural property.
- e. Vessels engaged solely in carrying civilian passengers.
- f. Vessels charged with religious, non-military, scientific or philanthropic missions.<sup>56</sup>
- g. Small coastal fishing vessels and small boats engaged in local coastal trade (but they are subject to the regulations of a naval commander operating in the area and to inspection).
- h. Vessels designated or adapted exclusively for responding to pollution incidents in the marine environment.
- i. Vessels which have surrendered.
- j. Life rafts and lifeboats.

**10.4.2** **Loss of protection.** Protected vessels are exempt from attack only if they:<sup>57</sup>

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

<sup>55</sup> See **San Remo Manual** rule 47 for the list of exempt vessels.

<sup>56</sup> Note that vessels collecting scientific data of likely military applications are not protected (see **San Remo Manual** rule 47(f)).

<sup>57</sup> See **San Remo Manual** rule 48.

**10.4.3** A New Zealand force may attack ships that have breached these requirements only if:<sup>58</sup>

- a. diversion or capture is not feasible;
- b. no other method is available for exercising military control;
- c. the circumstances of non-compliance are sufficiently grave that the vessel or aircraft has become, or may be reasonably assumed to be, a military objective; or
- d. the incidental civilian casualties or incidental damage to civilian property will not be disproportionate to the military advantage anticipated from attacking the vessel or aircraft.

**10.4.4** Only as a last resort are members of the NZDF to attack a hospital ship that has lost its protection, and only after a warning and a reasonable time limit has been imposed for the breach to be rectified has gone unheeded.<sup>59</sup> Such an attack can only be conducted if authorised by CDF. The advice of an NZDF LEGAD is to be obtained unless this is not practicable.

#### PROTECTED AIRCRAFT MUST NOT BE ATTACKED

**10.4.5** Members of the NZDF are not to attack:

- a. medical aircraft,<sup>60</sup> or
- b. aircraft granted safe conduct by agreement with the opposing force.<sup>61</sup>

**10.4.6** Medical aircraft are exempt from attack only if they:<sup>62</sup>

- a. have been recognised as such;<sup>63</sup>
- b. are acting in compliance with an agreement with the opposing force;
- c. fly in areas under the control of a New Zealand force or coalition partner; or
- d. fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

58 See **San Remo Manual** rule 52.

59 **San Remo Manual** rule 51 provides that hospital ships may be attacked in the same way (see rule 52) as other vessels which have lost their protection. However, the manual imposes a higher threshold for attack of hospital ships by NZDF forces.

60 See **San Remo Manual** rule 53(a) and Chapter 11.

61 See **San Remo Manual** rule 53(b) and Chapter 15.

62 See **San Remo Manual** rule 54.

63 **HPCR Air and Missile Manual** rule 76(a): “A medical aircraft must be clearly marked with a distinctive emblem as provided by the law of armed conflict, i.e. the Red Cross, the Red Crescent, or the Red Crystal, together with its national colours, on its lower, upper and lateral surfaces.” Rule 76(c): “A temporary medical aircraft which cannot [...] be marked with the distinctive emblem ought to use the most effective means of identification available.” Rule 76(d): “Means of identification [ie markings] are intended only to facilitate identification and do not, of themselves, confer protected status.”

- 10.4.7 Safe conduct.** Aircraft granted safe conduct are exempt from attack only if they:<sup>64</sup>
- a. are innocently employed in their agreed role;
  - b. do not intentionally hamper the movements of combatants; and
  - c. comply with the details of any relevant agreement, including availability for inspection.
- 10.4.8 Loss of protection.** Subject to LOAC and their orders, members of the NZDF may attack protected aircraft that have breached the conditions of their exemption from attack, but only if:<sup>65</sup>
- a. diversion for landing, visit and search, and possible capture, is not feasible;
  - b. no other method is available for exercising military control;
  - c. the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and
  - d. the incidental casualties to civilians or damage to civilian property will not be disproportionate to the military advantage gained or anticipated.
- 10.4.9** CDF is to be advised of any proposed attack, through COMJFNZ, without delay. The advice of an NZDF LEGAD is to be obtained before attacking a protected aircraft unless this is not practicable.
- 10.4.10** In case of doubt, members of the NZDF are to conduct operations on the presumption that an aircraft exempt from attack is not a military objective unless it is clear that it is being used by the opposing force to make an effective contribution to their military effort.<sup>66</sup>

## ENEMY MERCHANT VESSELS

- 10.4.11** Unrestricted attack on merchant vessels<sup>67</sup> is prohibited.<sup>68</sup> Members of the NZDF

64 See **San Remo Manual** rule 55.

65 See **San Remo Manual** rule 57.

66 See **San Remo Manual** rule 58 and Chapter 8.

67 An enemy merchant vessel is a merchant vessel which is registered in the enemy State. The fact that it is flagged to the State of the opposing force does not, however, immediately make it a target in the way that a warship is.

68 Unrestricted attack on merchant vessels means a policy of attack on enemy merchant vessels or neutral vessels without distinction between military objectives and civilian objects, without warning, not following the rules of LOAC relating to capture and the law relating to prize, and without providing for the rescue of the shipwrecked. **Geneva Protocol I** art 49(3) provides that the basic rules protecting the civilian population apply to any land, air or sea warfare which may affect the civilian population or individual civilians on land. In the **Major War Criminals Trial** the Military Tribunal held that sinking neutral ships within a declared zone without warning was unlawful, as was failing to rescue survivors. However, Dönitz was not punished for unrestricted U-boat warfare on the basis that it had been widely practiced by both sides. In the **Tokyo War Crimes Trial** the Military Tribunal held that the policy of destroying lifeboats and murdering survivors of submarine attacks on merchant vessels was a war crime. See also **San Remo Manual** art 45, **London Procès-Verbal** rule 1 with regard to submarines and the **Nyon Agreement** art 2.

are not to attack any enemy merchant vessel unless it is a military objective,<sup>69</sup> ie the vessel:

- a. by its nature, location, purpose or use makes an effective contribution to military action of the opposing force; and
- b. offers a definite military advantage through the total or partial destruction, capture or neutralisation of the vessel, in the circumstances ruling at the time.<sup>70</sup>

**10.4.12** Subject to LOAC and their orders, New Zealand forces may attack enemy merchant vessels that are:<sup>71</sup>

- a. taking a direct part in hostilities<sup>72</sup> on behalf of the opposing force, eg laying mines, minesweeping, cutting undersea cables or pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
- b. acting as an auxiliary to an opposing force, eg carrying troops or replenishing warships;
- c. incorporated into or assisting the enemy's intelligence gathering system, eg engaging in reconnaissance, early warning, surveillance, or command, control and communications;
- d. sailing under convoy of enemy warships or military aircraft;
- e. refusing to comply with an order to stop;
- f. actively resisting visit, search or capture;
- g. being armed to an extent that they could inflict damage to a warship;<sup>73</sup> or
- h. otherwise making an effective contribution to military action, eg carrying military materiel.

**10.4.13** In case of doubt, members of the NZDF are to conduct operations on the presumption that a merchant vessel is not a military objective unless it is clear that it is being used by the opposing force to make an effective contribution to their combat effort.<sup>74</sup>

69 For military objective see Chapter 8.

70 **Geneva Protocol I** art 52(2) states that in "so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". See also **San Remo Manual** rule 40 and **ICRC Customary IHL** rule 8.

71 See **San Remo Manual** rule 60. **San Remo Manual** rule 61 states that: "Any attacks on these vessels is subject to the basic rules set out in paragraphs 38–46."

72 For 'direct part in hostilities' see Chapter 6.

73 This excludes light individual weapons for the defence of personnel (eg for use against pirates) and deflection systems such as chaff.

74 See **San Remo Manual** rule 58. For 'effective contribution' see Chapter 8.

- 10.4.14** CDF is to be advised of any such attack, through COMJFNZ, without delay. The advice of an NZDF LEGAD is to be obtained before attacking a merchant vessel unless this is not practicable.

#### ENEMY CIVIL AIRCRAFT

- 10.4.15** **Civil aircraft** means an aircraft other than a military, auxiliary or State aircraft, such as a customs or police aircraft, that is engaged in commercial or private service.<sup>75</sup>
- 10.4.16** New Zealand forces are not to attack enemy civil aircraft.<sup>76</sup> Particular care is to be taken not to attack civilian airliners in flight.<sup>77</sup>
- 10.4.17** **Loss of protection.** A civil aircraft loses its protection if it becomes a military objective.<sup>78</sup> Subject to LOAC and their orders, New Zealand forces may attack enemy civil aircraft (including civilian airliners) that are:<sup>79</sup>
- a. taking a direct part in hostilities on behalf of the opposing force, eg laying mines, minesweeping, laying or monitoring sensors, engaging in information operations,<sup>80</sup> intercepting or attacking other civil aircraft, or providing targeting information;
  - b. acting as an auxiliary aircraft to the opposing force, eg transporting troops or military cargo, or refuelling military aircraft;
  - c. incorporated into or assisting the enemy's intelligence-gathering system, eg engaging in reconnaissance, early warning, surveillance, or command, control and communications;
  - d. flying under the protection of accompanying enemy warships or military aircraft;
  - e. refusing an order to identify itself, divert from its track, or proceed for visit and search to a safe and accessible belligerent airfield;
  - f. operating fire-control equipment that could reasonably be construed to be part of an aircraft weapon system;
  - g. on being intercepted, clearly manoeuvring to attack the intercepting military aircraft;

<sup>75</sup> See **San Remo Manual** rule 13(l) and **Chicago Convention** art 3.

<sup>76</sup> See **HPCR Air and Missile Manual** rules 58–62. For military objective see Chapter 8.

<sup>77</sup> **San Remo Manual** rule 53(c): “Civil airliners are exempt from attack.” **San Remo Manual** rule 13(m): ‘civilian airliner’ “means a civil aircraft which is clearly marked and engaged in carrying civilian passengers in scheduled or non-scheduled services along Air Traffic Service routes.”

<sup>78</sup> **Geneva Protocol I** art 52(2) states that in “so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. See also **San Remo Manual** rules 40 and 62 and **ICRC Customary IHL** rule 8.

<sup>79</sup> See **San Remo Manual** rule 63. **HPCR Air and Missile Manual** rule 63 contains a similar list of activities which may result in loss of protection for a civil aircraft.

<sup>80</sup> For information operations see Chapter 8.

- h.** being armed with air-to-air or air-to-surface weapons; or
- i.** otherwise making an effective contribution to military action.

**10.4.18** If possible, CDF is to be advised of any proposed attack, through COMJFNZ, without delay. The advice of an NZDF LEGAD is to be obtained before attacking a civil aircraft unless this is not practicable.

## SECTION 5 – BLOCKADES

## DEFINITION

- 10.5.1** A **blockade** is an operation that restricts supplies to and from the enemy by blocking the approach of all vessels and aircraft to the enemy State and the departure of all vessels and aircraft from the enemy State.<sup>81</sup> In non-international armed conflict (NIAC) the term ‘enemy State’ is to be applied in respect of any area under the control of the opposing force.<sup>82</sup> A blockade is an act of war. It must be distinguished from naval interception under United Nations (UN) resolutions.<sup>83</sup>

## BLOCKADES MAY BE ENFORCED WHEN AUTHORISED

- 10.5.2** To be effective, a blockade must be enforced by naval and/or air forces in sufficient numbers and in positions to make running the blockade dangerous, even though some ships may get through.<sup>84</sup> The NZDF is unlikely to be enforcing a blockade other than as part of a coalition operation. There is no specified distance from shore that a blockade must be maintained.<sup>85</sup> Although modern developments in warship technology, radar and satellite surveillance render the distance from shore less relevant, blockades at too great a distance from enemy territory are difficult to justify because they are liable to affect the coast and ports of neutral States.

- 10.5.3** A New Zealand force is not to enforce a blockade without prior approval of CDF. Before approval is issued, CDF is to ensure that the blockade is declared and notified to all parties to the conflict and neutral States.<sup>86</sup> Such declaration must specify the commencement, duration, location and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.<sup>87</sup> Cessation, temporary lifting, re-establishment, extension or alteration of a blockade must also be declared and notified.<sup>88</sup> The commander of a New Zealand force authorised to conduct a blockade is to ensure that it:

- a. is effective,<sup>89</sup>

81 See **San Remo Manual** rules 93–104. For aerial blockade see **HPCR Air and Missile Manual** Section V. See also the discussion of naval blockades and their operation in the **Flotilla Report** at [157–163].

82 **Flotilla Report** Appendix 1 notes at [24] that the San Remo Manual rules on blockades are intended to apply to IAC as well as NIAC, as evidenced, for example, by use of the term ‘belligerents’ in rules 93–104 of the San Remo Manual, rather than ‘belligerent States’.

83 For example, the Multinational Interception Force 1995–1996 in the Persian Gulf. See **UN Charter** art 42 and Chapter 5.

84 See **Geipel v Smith** and **Flotilla Report**.

85 In WWI and WWII British naval forces applied a ‘long distance’ blockade of Germany often more than 1,000 miles from German ports.

86 See **San Remo Manual** rule 93. While traditionally notification was submitted through diplomatic channels, a ‘Notice to Mariners’ (NOTMAR) as an effective and timely means of conveying the information necessary will, in most cases, be sufficient (see **Flotilla Report** Appendix 1 at [46]).

87 See **San Remo Manual** rule 94. While ‘location’ means the geographical specifics of the blockaded area, ‘extent’ probably means the way the blockade’s enforcement measures will be enforced. It is not necessary to set an end-date, as the blockade may well last for the duration of the hostilities – possibly years (see **Flotilla Report** Appendix 1 at [27–29]).

88 See **San Remo Manual** rule 101.

89 **San Remo Manual** rule 95: “A blockade must be effective. The question whether a blockade is effective is a question of fact.” See also **Flotilla Report** Appendix 1 at [30].



- b. does not bar access to the ports and coasts of neutral States,<sup>90</sup> and
- c. is applied impartially to the vessels of all States.<sup>91</sup>

**10.5.4** An NZDF commander is not to enforce a blockade that:

- a. has the purpose of starving the civilian population or denying it other objects essential to its survival,<sup>92</sup> or
- b. will cause loss of civilian life or damage to civilian property which is excessive in relation to the direct and concrete advantage anticipated from the blockade.<sup>93</sup>

### SHIPS BREACHING THE BLOCKADE MAY BE CAPTURED

**10.5.5** New Zealand naval ships may capture any merchant vessel believed on reasonable grounds to be breaching the blockade.<sup>94</sup> That capture may occur at any time on the vessels' voyage to or from a blockaded area, if there are reasonable grounds for suspecting an intention to breach the blockade.<sup>95</sup>

### SHIPS BREACHING THE BLOCKADE MAY BE ATTACKED IN SOME CIRCUMSTANCES

**10.5.6** A vessel that refuses to stop or clearly resists visit, search or capture after a prior warning becomes a military objective<sup>96</sup> and may be attacked.<sup>97</sup> 'Clear resistance' means the ship acts in a manner that has, or may have, an impeding effect on the intercepting forces. A mere change of course in order to escape is not sufficient. An act of clear resistance against interception or capture is to be considered an effective contribution to enemy military action. Hence such vessels and aircraft lose their civilian status and become legitimate military objectives, whose destruction or damage offers a definite military advantage because the effectiveness of the blockade is preserved. Any such attack on a vessel or aircraft must be carried out in accordance with the basic rules of naval warfare, for example, as regards to distinction and proportionality.<sup>98</sup>

90 See **San Remo Manual** rule 99 and **Flotilla Report** Appendix 1 at [32].

91 See **San Remo Manual** rule 100 and **Flotilla Report** Appendix 1 at [31].

92 See **San Remo Manual** rule 102(a). **San Remo Manual** rule 103: "If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to: (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross." **San Remo Manual** rule 104: "The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted." See also **Geneva Protocol I** art 54, **Geneva Protocol II** art 14, **Rome Statute** art 8(2)(b)(xxv) and **Flotilla Report** Appendix 1 at [33] and [35].

93 See **San Remo Manual** rule 102(b) and **Flotilla Report** Appendix 1 at [36].

94 **San Remo Manual** rule 98: Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured.

95 See **Flotilla Report** Appendix 1 at [43].

96 See **San Remo Manual** rule 40.

97 **San Remo Manual** rule 67(a): "Merchant vessels flying the flag of neutral States may not be attacked unless: (a) they are believed on reasonable grounds to be [...] breaching a blockade and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture."

98 See **San Remo Manual** rules 38-46 and **Flotilla Report** Appendix 1 at [47].

**10.5.7** The fact that a vessel is liable to attack does not necessarily justify an attack likely to cause it to be sunk, destroyed or severely damaged. The principles of proportionality still apply. In most cases, it will be sufficient to disable the vessel or (where possible) board it – by force if necessary.

**10.5.8** No attack is to be made upon a civilian ship by a New Zealand force without the express authority of CDF. If authority is given, the commander of the New Zealand force is to ensure that:

- a.** at least one prior warning is given to the vessel,
- b.** civilians who are not directly participating in hostilities are not deliberately targeted,
- c.** the attack is conducted in a way to cause the least possible incidental civilian loss of life or injury and the least possible incidental damage to civilian property, and
- d.** the attack is only conducted if the direct and concrete military advantage outweighs possible incidental civilian loss of life or injury and incidental damage to civilian property.

## SECTION 6 – INTERCEPTION, VISIT AND SEARCH, DIVERSION AND CAPTURE

### DETERMINATION OF THE CHARACTER OF VESSELS AND AIRCRAFT

**10.6.1** Members of the NZDF are to assume that:

- a. a merchant vessel flying the flag of an enemy State or a civil aircraft bearing the marks of an enemy State is an enemy ship or aircraft;<sup>99</sup> and
- b. a merchant vessel flying the flag of a neutral State or a civil aircraft bearing the marks of a neutral State is a neutral vessel or aircraft until the contrary is conclusively established.<sup>100</sup>

**10.6.2** If the commander of a New Zealand force suspects that a merchant vessel flying a neutral flag actually has enemy character then, subject to orders, the commander may visit and search that vessel or may divert it for search.<sup>101</sup> The same rights of interception and diversion apply in respect of neutral aircraft.<sup>102</sup> If, after visit and search, the commander still reasonably suspects that the vessel or civil aircraft in fact has enemy character, it may be captured as prize subject to adjudication.<sup>103</sup> Enemy character can be determined by registration, ownership, charter or other criteria.<sup>104</sup>

### GENERAL POWER OF VISIT AND SEARCH

**10.6.3** On the high seas, a warship may visit and search a ship (other than a warship) where there are reasonable grounds for suspecting that it:

- a. is engaged in piracy or the slave trade;
- b. is engaged in unauthorised broadcasting and the flag State of the warship has jurisdiction;
- c. is without nationality; or
- d. although flying a foreign flag or refusing to show its flag, is in reality of the same nationality as the warship.<sup>105</sup>

### VISIT AND SEARCH OF MERCHANT VESSELS

**10.6.4** Subject to their orders, New Zealand naval ships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.<sup>106</sup>

99 **San Remo Manual** rule 112: “The fact that a merchant vessel is flying the flag of an enemy State or a civil aircraft bears the marks of an enemy State is conclusive evidence of its enemy character.”

100 **San Remo Manual** rule 113: “The fact that a merchant vessel is flying the flag of a neutral State or a civil aircraft bears the marks of a neutral State is prima facie evidence of neutral character.”

101 See **San Remo Manual** rule 114.

102 See **San Remo Manual** rule 115. As interception is usually conducted using fighter aircraft, such interception may need to be conducted by a coalition partner.

103 See **San Remo Manual** rule 116.

104 See **San Remo Manual** rule 117.

105 **UNCLOS** art 110(1). This power is now largely redundant.

106 See **San Remo Manual** rule 118. During Operation ENDURING FREEDOM coalition warships, including HMNZS TE KAHA and HMNZS TE MANA, conducted visit and search operations in the Persian Gulf and the Straits of Hormuz. These operations were based on LOAC at sea coupled with UNSCRs for the suppression of terrorism. All states are required to comply with UNSCRs.

**10.6.5** New Zealand forces are not to visit or search neutral merchant vessels:

- a. that are bound for a neutral port;
- b. that are under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such a convoy;
- c. if the flag State of the neutral warship warrants that the neutral vessel is not carrying contraband or otherwise engaged in activities not consistent with its neutral status; or
- d. if the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.<sup>107</sup>

**10.6.6** **Diversion.** If visit and search at sea is impossible or unsafe, the New Zealand force is to divert a merchant vessel to an appropriate area or port in order to do so.<sup>108</sup> Ships are now larger than in past wars and generally carry cargo in containers. A ship may carry containers from a number of different sources and destined for many different ports. Opening of containers at sea produces practical difficulties and safety risks making diversion to a safe port the most appropriate method of operations.

**10.6.7** **Measures of supervision.** Parties to the conflict may establish measures for the inspection of cargo of neutral merchant vessels and certification that a vessel is not carrying contraband, thereby avoiding the need to visit and search.<sup>109</sup> If neutral States agree to these measures, they must rigorously enforce certification procedures to ensure that their merchant vessels are not carrying contraband.<sup>110</sup> The fact that a neutral merchant vessel has submitted to the inspection of its cargo and grant of certificates of non-contraband cargo by one party to the conflict is not an act of unneutral service with regard to an opposing party.<sup>111</sup>

**INTERCEPTION, VISIT AND SEARCH OF CIVIL AIRCRAFT**

**10.6.8** Parties to the conflict, affected neutrals and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are continuously aware of the designated routes and flight plans of civil aircraft in the area of operations. This includes communication channels, identification modes and codes, destination, passengers and cargo.<sup>112</sup>

107 See **San Remo Manual** rule 120.

108 See **San Remo Manual** rule 121.

109 See **San Remo Manual** rule 122.

110 See **San Remo Manual** rule 124.

111 See **San Remo Manual** rule 123.

112 See **San Remo Manual** rule 129: "Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and should carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, eg safety or distress, in which case appropriate notification should be made immediately."

In the immediate vicinity of naval or air operations, civil aircraft must comply with instructions from the combatants regarding their heading and altitude.<sup>113</sup>

**10.6.9** Subject to their orders, New Zealand military aircraft may intercept civil aircraft outside neutral airspace where there are reasonable grounds for suspecting that they are subject to capture. If, after interception, those reasonable grounds still exist, the civil aircraft may be ordered to proceed for visit and search to an airfield that is safe for the type of aircraft involved and reasonably accessible. If no airfield is safe and reasonably accessible, a civil aircraft may be diverted from its declared destination.<sup>114</sup>

**10.6.10** A New Zealand force is to intercept, visit and search civil aircraft only with the authority of CDF. The advice of an NZDF LEGAD is to be obtained unless this is not practicable.

**10.6.11** A New Zealand force is not to exercise the right of interception, visit and search of a neutral civil aircraft:

- a. that is bound for a neutral airfield;
- b. that is under the operational control of an accompanying neutral military aircraft or warship of the same nationality, or of a neutral military aircraft or warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such control;
- c. if the flag State of the neutral military aircraft or warship warrants that the neutral vessel is not carrying contraband or otherwise engaged in activities not consistent with its neutral status; or
- d. if the commander of the neutral military aircraft or warship provides, if requested by the commander of an intercepting belligerent military aircraft, all information as to the character of the civil aircraft and its cargo as could otherwise be obtained by visit and search.<sup>115</sup>

**10.6.12 Diversion.** As an alternative to visit and search, civil aircraft may be diverted from their declared destination,<sup>116</sup> although a neutral aircraft may be diverted only with its consent.<sup>117</sup>

113 See **San Remo Manual** rule 131.

114 See **San Remo Manual** rule 128. Because of the extreme risk to the safety of the aircraft and its crew posed by interception within a combat zone, parties to the conflict should promulgate and adhere to safe procedures for intercepting civil aircraft as issued by the competent international organisation such as the International Civil Aviation Organisation. See also **HPCR Air and Missile Manual** rule 137.

115 See **San Remo Manual** rule 127.

116 See **San Remo Manual** rule 126(a)

117 See **San Remo Manual** rule 126(b).

**10.6.13 Measures of supervision.** Parties to the conflict may establish reasonable measures for the inspection of the cargo of neutral civil aircraft and certification that an aircraft is not carrying contraband to avoid the need to visit and search.<sup>118</sup> Neutral States that agree to such measures are encouraged to enforce reasonable control and certification procedures to ensure that their civil aircraft are not carrying contraband.<sup>119</sup> The fact that a neutral civil aircraft has submitted to such measures is not an act of unneutral service with regard to an opposing party.<sup>120</sup>

## CAPTURE OF ENEMY MERCHANT VESSELS AND GOODS

**10.6.14** Subject to LOAC and their orders, New Zealand forces may capture enemy vessels,<sup>121</sup> including merchant vessels and the goods on board them, in any place outside neutral waters. Prior visit and search is not required.<sup>122</sup>

**10.6.15 Taking prizes.** Captured merchant vessel and cargo may, under customary international law, be taken by the capturing State as a ‘prize’.<sup>123</sup> Claims are assessed by prize courts that arbitrate whether the ship and its cargo are lawfully subject to capture.<sup>124</sup> The High Court of New Zealand is a permanent prize court in respect of enemy shipping captured by New Zealand forces.<sup>125</sup> Due to the nature of modern armed conflict, in particular the need to limit conflict as much as possible and return to peaceful conditions quickly, the exercise of prize jurisdiction for the purposes of permanently acquiring the ships and property of another State is almost unknown. It is generally not now appropriate for a State to profit financially from the waging of armed conflict. New Zealand warships may seize enemy merchant vessels and submit them for prize arbitration only with the express authority of CDF. If practicable, the advice of an NZDF LEGAD is to be obtained before a vessel is seized as a prize.<sup>126</sup> A ship that is captured may, however, be held until the end of hostilities, which may require that it is tied up in a foreign port.

**10.6.16 Diversion of merchant ships.** If military circumstances preclude capture of a ship at sea, it may be diverted to an appropriate area or port in order to complete capture. As an alternative, an enemy merchant vessel may be diverted from its declared destination.<sup>127</sup>

118 See **San Remo Manual** rule 132 and **HPCR Air and Missile Manual** rule 138.

119 See **San Remo Manual** rule 134.

120 See **San Remo Manual** rule 133 and **HPCR Air and Missile Manual** rule 139.

121 Some enemy vessels, eg hospital ships, are exempt from capture (see **San Remo Manual** rule 136).

122 See **San Remo Manual** rule 135.

123 See **San Remo Manual** rule 138.

124 Arbitration is essential to distinguish the taking of prizes from wanton appropriation or piracy. Related to the seizure of ships as a prize is the common law right of ‘angary’ or compulsory confiscation of neutral shipping in the ports of a party to the conflict, subject to the payment of compensation. This has not been practiced since WWI and runs the risk of causing animosity in neutral States. See **Commercial and Estates v Ball** and **Commercial and Estates v Board of Trade**.

125 See **Admiralty Act 1973** s 8(1).

126 Due to the nature of modern armed conflict, in particular the need to limit conflict as much as possible and return to peaceful conditions quickly, the exercise of the prize jurisdiction for the purposes of permanently acquiring ships and other property has become rare. It is generally not now appropriate for a State to profit financially from the waging of armed conflict, although it will still wish to be compensated for its losses.

127 See **San Remo Manual** rule 138.

**DESTRUCTION OF ENEMY MERCHANT VESSELS**

- 10.6.17** As an exceptional measure, the commander of a New Zealand force may order that a captured enemy merchant vessel be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as a prize. Such a vessel may only be destroyed if:
- a. the force has provided for the safety of passengers and crew; the ship's boats are not a place of safety unless their safety is assured in the sea and weather conditions, by the proximity of land or the presence of another vessel that is in a position to take them on board;<sup>128</sup>
  - b. documents and papers relating to the prize are safeguarded;<sup>129</sup>
  - c. if feasible, personal effects of the passengers and crew are saved;<sup>130</sup> and
  - d. the vessel is not carrying civilian passengers; if it is, then the vessel is to be directed to an appropriate port or area to complete capture.<sup>131</sup>

**10.6.18** The commander of a New Zealand force is to notify CDF, through COMJFNZ and without delay, of the intention to destroy a captured enemy merchant vessel and the reason for that destruction. The ship is not to be destroyed without the approval of CDF. If practicable, the advice of an NZDF LEGAD is to be obtained before the ship is destroyed.

**CAPTURE OF NEUTRAL MERCHANT VESSELS AND GOODS**

- 10.6.19** Subject to LOAC and orders, a New Zealand force may capture neutral merchant vessels outside neutral waters only if those vessels:<sup>132</sup>
- a. are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
  - b. engage in belligerent acts on part of the enemy;
  - c. act as auxiliaries to the enemy's armed forces;
  - d. are incorporated into or assist the enemy's intelligence system;
  - e. sail under convoy of enemy warships or military aircraft;
  - f. otherwise make an effective contribution to the enemy's military action, eg by carrying military materials;
  - g. are deliberately transporting individual passengers who are members of the opposing force of the enemy;
  - h. are operating directly under enemy control, orders, charter, employment or direction;

128 See **San Remo Manual** rule 139(a).

129 See **San Remo Manual** rule 139(b).

130 See **San Remo Manual** rule 139(c).

131 See **San Remo Manual** rule 140.

132 See **San Remo Manual** rules 67 and 146.



- i. present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- j. are violating regulations established by a party to the conflict within the immediate area of naval operations; or
- k. are breaching or attempting to breach a blockade.

**10.6.20** Capture of a neutral merchant vessel is exercised by taking such vessel as prize for adjudication.<sup>133</sup> Goods on board neutral merchant vessels are subject to capture only if they are contraband.<sup>134</sup>

### DESTRUCTION OF NEUTRAL MERCHANT VESSELS AND GOODS

**10.6.21** As an exceptional measure, the commander of a New Zealand force may order that a captured neutral merchant vessel be destroyed. Every effort must be made to avoid destruction and it is not to be ordered without the explicit approval of CDF. The advice of an NZDF LEGAD is to be obtained before destruction of a neutral vessel. Destruction is not to be ordered unless:<sup>135</sup>

- a. the vessel cannot be sent into a port of New Zealand or coalition partner, diverted, or properly released;
- b. contraband forms more than half the cargo;<sup>136</sup>
- c. the New Zealand force provides for the safety of passengers and crew; the ship's boats are not a place of safety unless their safety is assured in the prevailing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board;
- d. documents and papers relating to the captured vessel are safeguarded; and
- e. if feasible, personal effects of the passengers and crew are saved.

**10.6.22** The destruction at sea of captured neutral vessels carrying civilian passengers is prohibited. For the safety of the passengers, such vessels are to be diverted to an appropriate port in order to complete capture.<sup>137</sup>

### PROTECTED VESSELS MUST NOT BE CAPTURED

**10.6.23** Members of the NZDF are not to capture:<sup>138</sup>

- a. hospital ships, medical transports<sup>139</sup> or small craft used for coastal rescue operations;

133 See **San Remo Manual** rule 146.

134 See **San Remo Manual** rule 147.

135 See **San Remo Manual** rule 151.

136 **San Remo Manual** rule 151 states that a "vessel may not be destroyed for carrying contraband unless the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo. Destruction shall be subject to adjudication".

137 See **San Remo Manual** rule 152. Capture is completed in accordance with rule 146.

138 See **San Remo Manual** rule 136.

139 So long as the medical transports are needed for the wounded, sick and shipwrecked on board (see **San Remo Manual** rule 136(b)).



- b. vessels granted safe conduct by agreement with the opposing force, including:
  - (1) vessels carrying PWs and other persons deprived of their liberty; and
  - (2) vessels engaged in humanitarian missions, including carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- c. vessels transporting cultural property under special protection;
- d. vessels conducting religious, non-military, scientific or philanthropic missions;<sup>140</sup>
- e. small coastal fishing vessels and small boats engaged in local coastal trade;<sup>141</sup> and
- f. vessels responding to pollution incidents in the marine environment, when actually engaged in such activities.

**10.6.24 Loss of protection.** Protected vessels lose their exemption from capture if they:

- a. cease to be innocently employed in their normal role;
- b. take a direct part in hostilities;<sup>142</sup>
- c. fail to immediately submit to identification and inspection when required; or
- d. intentionally hamper the movement of combatants and fail to stop or move out of the way when required.<sup>143</sup>

**CAPTURE OF ENEMY CIVIL AIRCRAFT AND GOODS**

**10.6.25** Subject to LOAC and orders, a New Zealand force may capture enemy civil aircraft and goods on board such aircraft outside neutral airspace. Prior exercise of visit and search is not required.<sup>144</sup> Capture is exercised by intercepting the enemy civil aircraft and ordering it to proceed to an airfield that is safe for that type of aircraft and reasonably accessible. On landing, the enemy civil aircraft is then taken as a prize for adjudication.<sup>145</sup> As an alternative to capture, an enemy civil aircraft may be diverted from its declared destination.<sup>146</sup>

140 But vessels collecting scientific data of likely military applications are not protected (see **San Remo Manual** rule 136(e)).

141 But such vessels are subject to the regulations of the belligerent naval commander operating in the area and to inspection (see **San Remo Manual** rule 136(f)).

142 For direct part in hostilities see Chapter 6.

143 See **San Remo Manual** rule 137.

144 See **San Remo Manual** rule 141. Note that rule 142 lists protected aircraft which are exempt from capture. See also **HPCR Air and Missile Manual** rule 134.

145 There are no permanent provisions in respect of the seizure of aircraft. It is to be expected, however, that a similar arbitral arrangement as for captured enemy vessels would be established to ensure that the seizure of aircraft and cargo was conducted properly.

146 See **San Remo Manual** rule 144.

- 10.6.26** Members of the NZDF involved in the capture are to ensure the safety of passengers and crew and their personal effects. The documents and papers relating to the prize must be safeguarded.<sup>147</sup>

#### DESTRUCTION OF ENEMY CIVIL AIRCRAFT

- 10.6.27** As an exceptional measure, the commander of a New Zealand force may order the destruction of an enemy civil aircraft and goods on board when military circumstances preclude taking the aircraft for prize adjudication, provided all persons on board have first been placed in safety and documents relating to the prize have been preserved.<sup>148</sup>

#### CAPTURE OF NEUTRAL CIVIL AIRCRAFT AND GOODS

- 10.6.28** Subject to LOAC and their orders, New Zealand forces may capture neutral civil aircraft outside neutral airspace, only if those aircraft:<sup>149</sup>
- a. are believed, on reasonable grounds, to be carrying contraband and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to an airfield that is safe for the type of aircraft involved and reasonably accessible;
  - b. directly participate in hostilities on behalf of the opposing force;
  - c. act as auxiliaries to the opposing force;
  - d. are incorporated into or assist the enemy's intelligence system;
  - e. otherwise make an effective contribution to the enemy's military action, eg by carrying military materials and, after prior warning or interception, intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
  - f. are on a flight especially undertaken to transport individual passengers who are members of the opposing force;
  - g. are operating directly under enemy control, orders, charter, employment or direction;
  - h. present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
  - i. are violating regulations established by a party to the conflict within the immediate area of naval operations; or
  - j. are engaged in a breach of blockade.

<sup>147</sup> See **San Remo Manual** rule 145.

<sup>148</sup> See **HPCR Air and Missile Manual** rule 135.

<sup>149</sup> See **San Remo Manual** rules 70 and 153. See also **HPCR Air and Missile Manual** rule 140.

**10.6.29** Goods on board neutral civil aircraft are subject to capture only if they are contraband.<sup>150</sup> The rules regarding contraband on neutral civil vessels apply also to goods on board neutral civil aircraft.<sup>151</sup>

**10.6.30** Capture is exercised by intercepting the neutral civil aircraft, ordering it to proceed to an airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing and after visit and search, taking it as prize for adjudication.<sup>152</sup> If there is no airfield that is safe and reasonably accessible, a neutral civil aircraft may be diverted from its declared destination.<sup>153</sup> As an alternative to capture, the aircraft may, with its consent, be diverted from its declared destination.<sup>154</sup>

**10.6.31** If capture is exercised, members of the NZDF responsible for the capture are to ensure the safety of passengers and crew and their personal effects. The documents and papers relating to the prize are to be safeguarded.<sup>155</sup>

#### PROTECTED AIRCRAFT MUST NOT BE CAPTURED

**10.6.32** Members of the NZDF are not to capture:

- a. medical aircraft, or
- b. aircraft granted safe conduct by agreement with the opposing force.<sup>156</sup>

**10.6.33** **Loss of protection.** Aircraft lose exemption from capture if they:

- a. cease to be innocently employed in their normal role,
- b. take a direct part in hostilities,
- c. fail to immediately submit to identification and inspection when required,
- d. intentionally hamper the movement of combatants and fail to stop or move out of the way when required, or
- e. breach any prior agreement.<sup>157</sup>

#### CONTRABAND

**10.6.34** **Contraband** means goods that are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict.<sup>158</sup> Contraband may be seized.

150 See **San Remo Manual** rule 154 and **HPCR Air and Missile Manual** rule 141(a).

151 See **San Remo Manual** rules 148–150 and 155.

152 See **HPCR Air and Missile Manual** rule 137(b).

153 See **San Remo Manual** rule 156 and **HPCR Air and Missile Manual** rule 137(c).

154 See **San Remo Manual** rule 157.

155 See **San Remo Manual** rule 158 and **HPCR Air and Missile Manual** rule 143.

156 See **San Remo Manual** rule 142.

157 See **San Remo Manual** rule 143.

158 See **San Remo Manual** rule 148 and **HPCR Air and Missile Manual** rule 1(n).

- 10.6.35** To exercise the right of capture of goods on neutral vessels, New Zealand must first publish a contraband list, which must be reasonably specific.<sup>159</sup> COMJFNZ is to ensure that copies of the list are supplied to all New Zealand forces involved in blockade operations.
- 10.6.36** Goods not on the contraband list are ‘free goods’ and not subject to capture. As a minimum, free goods must include:
- a.** religious objects;
  - b.** articles exclusively for the treatment of the wounded and sick, and for the prevention of disease;
  - c.** clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;
  - d.** items destined for PWs and other persons deprived of liberty including individual parcels and collective relief shipments of food, clothing, educational, cultural, and recreational articles;
  - e.** goods exempted from capture by international treaty or by special arrangement between parties to the conflict; and
  - f.** other goods not susceptible for use in armed conflict.<sup>160</sup>

159 See **San Remo Manual** rule 149. In coalition operations it is likely that the lead nation will draw up such lists. To be effective before a New Zealand prize court, contraband lists must be given effect to in New Zealand law by publication, legislation or regulation.

160 See **San Remo Manual** rule 150.

## SECTION 7 – FURTHER RULES RELATING TO AIR OPERATIONS

### REMOTELY PILOTED AERIAL SYSTEMS ARE SUBJECT TO LAW OF ARMED CONFLICT

**10.7.1** **Remotely piloted aerial system** means any aircraft that flies, manoeuvres and carries out its mission without a human crew on board the aircraft.<sup>161</sup> A RPAS may also be called a remotely piloted vehicle (RPV) or an unmanned aircraft system (UAS).

**10.7.2** RPASs are regulated by LOAC in exactly the same way as non-remotely piloted aircraft or any other weapon system. In particular:

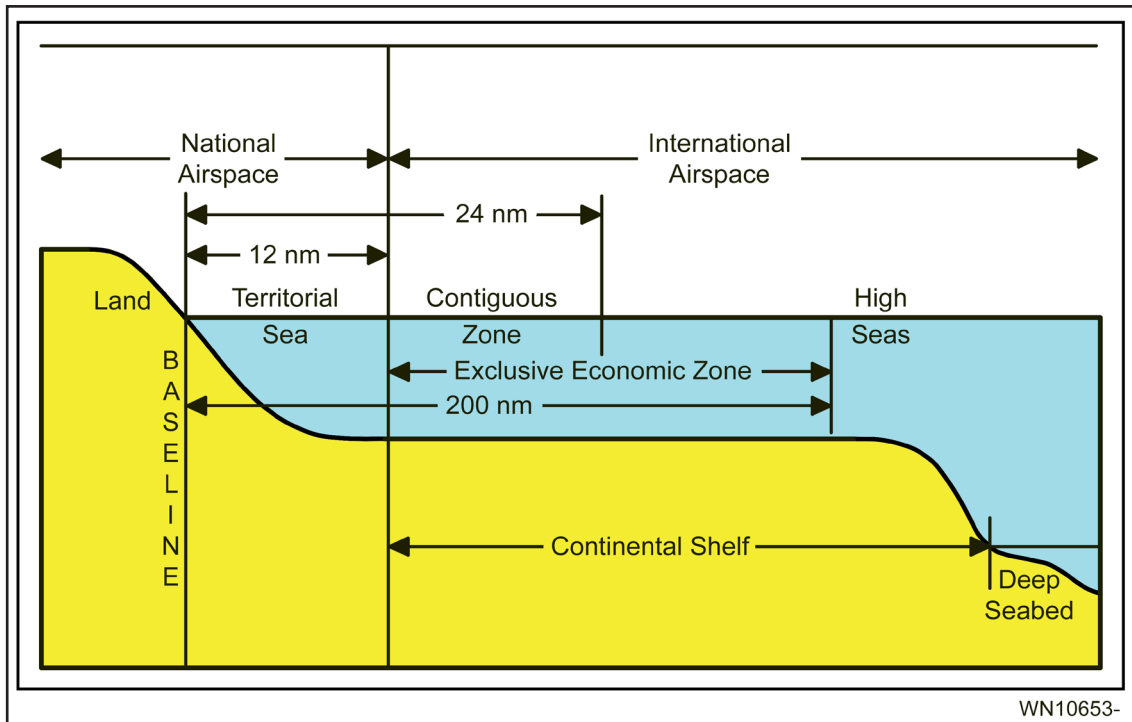
- a. where their operation constitutes an attack, RPASs must be operated by a combatant; and
- b. there must be a responsible individual in the decision-making cycle by which an attack by RPAS is launched or a target is selected.

**10.7.3** Members of the NZDF are to employ RPAS in accordance with the rules of LOAC as set out in this manual, with all necessary modifications. In particular, members of the NZDF are not to use RPASs in order to carry out attacks that:

- a. are directed at civilians or civilian objects,
- b. do not discriminate between military objectives and civilians and civilian objects,
- c. create or release destructive effects that cannot be limited as required by LOAC,
- d. are likely to cause incidental casualties to civilians or incidental damage to civilian objects which is excessive in relation to the concrete and direct military advantage, or
- e. breach the rules of LOAC relating to the inviolability of neutral airspace.

<sup>161</sup> 'RPAS' is not defined in the **San Remo Manual**. The **HPCR Air and Missile Manual** divides the definition of RPAS into two parts: rule 1(dd) "'Unmanned Aerial Vehicle (UAV)' means an unmanned aircraft of any size which does not carry a weapon and which cannot control a weapon"; and rule 1(ee): "'Unmanned Combat Aerial Vehicle' (UCAV) means an unmanned aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target." For the purposes of this manual, the term 'RPAS' encompasses both armed and unarmed RPASs.

## ANNEX A – UNCLOS MARITIME AND AIRSPACE ZONES

**Figure 1** UNCLOS maritime and airspace zones

## Chapter 11

# WOUNDED, SICK AND SHIPWRECKED; DEAD AND MISSING; MEDICAL AND RELIGIOUS PERSONNEL, MEDICAL UNITS, TRANSPORTS AND ESTABLISHMENTS

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## SECTION 1 – INTRODUCTION

- 11.1.1** Concern for the suffering of the wounded, sick and shipwrecked, whether friend or enemy, is one of the most fundamental humanitarian duties required under the Law of Armed Conflict (LOAC). The obligation is a positive one which means that forces involved in armed conflict are not only required to refrain from attacking or ill-treating the wounded, sick or shipwrecked, but also to provide whatever assistance is possible in the circumstances to those persons who are out of combat (*hors de combat*).
- 11.1.2** Although for historical reasons, the wounded and sick on land and the wounded, sick and shipwrecked at sea were dealt with in separate conventions (Geneva Convention I and Geneva Convention II respectively), the same fundamental obligations apply in all environments. This chapter applies regardless of how injury, sickness or shipwreck arose. It also sets out rights and obligations in respect of sick, wounded and shipwrecked civilians and civilian medical facilities.
- 11.1.3** This chapter covers the rules protecting medical and religious personnel, medical units, transports (including hospital ships and medical aircraft) and establishments that tend for the wounded, sick and shipwrecked. It also deals with the obligation to search for and recover the missing and dead, and to respect the bodies of all persons who have died in the course of armed conflict.
- 11.1.4** **New Zealand Defence Force (NZDF) Code of Conduct** rules relating to this chapter are:

*Collect and care for the wounded, sick and shipwrecked whether friend or enemy.*

*Respect the bodies of all persons who have died in the course of armed conflict.*

*Respect religious, medical and civil defence personnel, transports, buildings and equipment.*

## SECTION 2 – PROTECTION AND CARE OF THE WOUNDED, SICK AND SHIPWRECKED

### DEFINITIONS

- 11.2.1 Wounded and sick** mean persons, whether civilian or military,<sup>1</sup> who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also include maternity cases, expectant mothers, newborn babies and other persons who may be in need of immediate medical assistance.<sup>2</sup>
- 11.2.2 Shipwrecked** means persons, whether civilian or military, who are in peril at sea or other waters as a result of damage or loss of the vessel or aircraft in which they were travelling (regardless of how the ship or aircraft came to be wrecked),<sup>3</sup> or through being abandoned or lost overboard and who refrain from any act of hostility.<sup>4</sup>
- 11.2.3** The above terms apply in all types of conflict.<sup>5</sup> The relevant status continues to apply until another status applies, for example an enemy combatant adrift at sea is ‘shipwrecked’ until rescued and evacuated to land, at which point that person becomes a prisoner of war (PW).<sup>6</sup>

### THE WOUNDED, SICK AND SHIPWRECKED MUST BE RESPECTED AND PROTECTED

- 11.2.4** Members of the NZDF are to respect and protect the wounded, sick or shipwrecked in all circumstances.<sup>7</sup> Members of the NZDF who have wounded, sick and shipwrecked combatants of the opposing force under their control are to provide those persons with at least the same level of protection and treatment applicable to PWs.<sup>8</sup> Wounded, sick or shipwrecked persons who are not entitled to combatant status, whether in international armed conflict (IAC) or non-international armed conflict (NIAC) are, at the very least, to be given the fundamental protections applicable to civilians.<sup>9</sup>

1 See **Geneva Convention I** art 13 and **Geneva Convention II** art 13. Both Conventions apply to the sick and wounded in a variety of categories, including members of the armed forces, militias and volunteer corps of a Party to the conflict, members of organised resistance groups of Parties to the conflict, and members of crews of civil vessels and aircraft of Parties to the conflict.

2 See **Geneva Protocol I** art 8(a).

3 **Geneva Convention II** art 12(1): “[...] the term “shipwreck” means shipwreck from any cause and includes forced landing at sea by or from aircraft.”

4 See **Geneva Protocol I** art 8(b).

5 In NIAC each party must apply certain minimum provisions to those placed *hors de combat* by sickness, wounds, etc (see **Geneva Convention Common Article 3**). See also **Geneva Protocol II** art 7(1): “All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.”

6 For PWs see Chapter 12.

7 **Geneva Convention I** art 12: “Members of the armed forces [...] who are wounded or sick, shall be respected and protected in all circumstances.” **Geneva Convention II** art 12(1): “Members of the armed forces [...] who are at sea and who are wounded, sick or shipwrecked shall be respected and protected in all circumstances [...]” **Geneva Protocol I** art 10(1): “All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.” **Geneva Protocol II** art 7 applies in NIAC: “All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.” See also **ICRC Customary IHL** rule 87.

8 **Geneva Convention I** art 14: “[...] The wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.” **Geneva Convention II** art 16: “[...] the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.” See also **Geneva Protocol I** art 44(8).

9 For IAC see **Geneva Protocol I** art 75. For NIAC see **Geneva Convention Common Article 3** and **Geneva Protocol II** art 7.

- 11.2.5** New Zealand may make special agreements with opposing parties relating to the treatment of the sick, wounded and shipwrecked, in which case members of the NZDF will be informed in orders.<sup>10</sup> Protected persons may not renounce any of their Geneva Convention rights, by special agreement or otherwise.<sup>11</sup>

#### ATTACK ON WOUNDED, SICK AND SHIPWRECKED PERSONS IS PROHIBITED

- 11.2.6** Members of the NZDF are not to attack any person who has ceased to take an active part in hostilities (*hors de combat*) as a result of being wounded, sick or shipwrecked.<sup>12</sup>
- 11.2.7** **Loss of protection.** Persons who are wounded, sick or shipwrecked lose their protection from attack for such time as they take a direct part in hostilities.<sup>13</sup>

#### WOUNDED, SICK AND SHIPWRECKED PERSONS MUST BE TREATED HUMANELY

- 11.2.8** Members of the NZDF are to treat wounded, sick and shipwrecked persons humanely at all times.<sup>14</sup> Their honour, dignity and person are to be respected. Members of the NZDF are to ensure that wounded, sick and shipwrecked persons:

- a. are not murdered, wilfully killed or allowed to die through neglect;<sup>15</sup>
- b. are not subjected to degrading or humiliating treatment;<sup>16</sup>

10 However, no special agreement shall adversely affect the situation of the wounded, sick and shipwrecked or restrict the rights conferred on them by Geneva Convention I or II (see **Geneva Convention I** art 6, **Geneva Convention II** art 6 and **Geneva Convention III** art 7). For agreements with the opposing force see Chapter 15.

11 See **Geneva Convention I** art 7 and **Geneva Convention II** art 7.

12 Any attempts upon the lives of the wounded, sick or shipwrecked, or violence to their persons, shall be strictly prohibited (see **Geneva Convention I** art 12 and **Geneva Convention II** art 12). **Geneva Convention Common Article 3**: "Persons taking no active part in the hostilities, including members of the 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 [...]." **Geneva Protocol I** art 41(1): "A person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack." See also **ICRC Customary IHL** rule 47. Under **Geneva Protocol I** art 85(3)(e) it is a grave breach to make a person the object of attack in the knowledge that they are 'hors de combat'. See also **Rome Statute** arts 8(2)(b)(vi) and 8(2)(c)(i). **Llandovery Castle Trial** Attacking a hospital ship and machine-gunning the survivors was a war crime. In the **Peleus Trial** the Military Tribunal held that killing the survivors of a sunken allied merchant vessel was a war crime. For attack on persons *hors de combat* see Chapter 8.

13 For 'direct part in hostilities' see Chapter 6.

14 **Geneva Convention I** art 12: "Members of the armed forces [...] who are wounded or sick, shall be respected and protected in all circumstances." **Geneva Convention II** art 12: "Members of the armed forces [...] who are at sea and who are wounded, sick or shipwrecked shall be respected and protected in all circumstances [...]." See also **Geneva Protocol I** art 10(2), **Geneva Protocol II** art 7(2) and **ICRC Customary IHL** rule 87.

15 Attempts on the lives of wounded, sick or shipwrecked persons, wilfully leaving them without medical assistance or care, or creating conditions which expose them to infection and contagion are prohibited (see **Geneva Convention I** art 12 and **Geneva Convention II** art 12). In NIAC murder of all kinds of persons placed *hors de combat* through sickness, wounds or any other cause is prohibited (see **Geneva Convention Common Article 3**). See also **Geneva Protocol II** art 4(2)(a) and **ICRC Customary IHL** rule 89. Under **Rome Statute** art 8(2)(a)(i) wilful killing in a IAC is a war crime and under art 8(2)(c)(i) murder of all kinds in NIAC is a war crime.

16 **Geneva Convention I** art 14: "The wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them." See **Geneva Convention III** art 14: "Prisoners of war are entitled in all circumstances to respect for their persons and their honour." Outrages upon personal dignity, in particular humiliating and degrading treatment of any person in the power of a party to the conflict is prohibited (see **Geneva Protocol I** art 75(2)(b)). See **Rome Statute** Art 8(2)(b)(xxi), and 8(2)(c)(ii).

- c. are not subjected to rape, sexual slavery, forced pregnancy, enforced prostitution, enforced sterilisation, or any other form of sexual violence;<sup>17</sup>
- d. are protected from violence, intimidation, insults, abuse or public curiosity;<sup>18</sup>
- e. are not subjected to torture;<sup>19</sup>
- f. are not subjected to physical mutilation;<sup>20</sup>
- g. are not the subject of reprisals;<sup>21</sup>
- h. are not subjected to corporal punishment;<sup>22</sup>
- i. are not subjected to collective punishments;<sup>23</sup>
- j. are not threatened with any of the above acts;<sup>24</sup>
- k. are not used to render certain points, areas or military forces immune from attack;<sup>25</sup> and
- l. do not have their bodies booby-trapped or used for the placement of manually emplaced munitions.<sup>26</sup>

17 See **Geneva Protocol I** art 76(1) and **Geneva Protocol II** art 4(2)(e) and (f). Forced pregnancy is a crime against humanity (see **Rome Statute** art 7(2)(f)). Rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and any other form of sexual violence which is also a grave breach of the Geneva Conventions is also a war crime (see **Rome Statute** art 8(2)(b)(xxii) and 8(2)(e)(vi)).

18 See **Geneva Convention I** art 14, **Geneva Convention II** art 14 and **Geneva Convention III** Art 13. In the **Essen Lynching Trial** the Military Tribunal held that inciting and allowing a crowd to attack and kill wounded captured British pilots was a war crime.

19 See **Torture Convention** art 2, **Geneva Convention Common Article 3**(1)(a), **Geneva Convention I** art 12, **Geneva Convention II** art 12, **Geneva Protocol I** art 75(2)(a)(ii) and **Geneva Protocol II** art 4(2)(a). Under s 3(1) of the **Crimes of Torture Act 1989** a person who, whether inside or outside New Zealand, commits, aids, abets, incites, counsels or procures an act of torture is liable to imprisonment not exceeding 14 years. At s 3(3), s 3(1) also applies to a person who is a public official or who is acting in an official capacity. Torture of wounded, sick or shipwrecked persons is a grave breach of the **Geneva Conventions** (see **Geneva Convention I** art 50, **Geneva Convention II** art 51, **Geneva Convention III** art 130 and **Geneva Convention IV** art 147). See also **Rome Statute** arts 8(2)(a)(ii) and 8(2)(c)(i), **Furundžija Trial** and **Celibići Trial**.

20 Under **Geneva Protocol I** art 11(2)(a) it is prohibited to carry out physical mutilations on persons who are in the power of an adverse party, even with their consent.

21 **Geneva Convention I** art 46: "Reprisals against the wounded, sick, personnel, buildings or equipment protected by Convention I are prohibited." **Geneva Convention II** art 47: "Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited." See also **Geneva Protocol I** art 20 and Chapter 17.

22 See **Geneva Convention IV** art 32. **Geneva Protocol I** art 75(2)(a)(iii), **Geneva Protocol II** art 4(2)(a).

23 See **Geneva Protocol I** art 75(2)(d) and **Geneva Protocol II** art 4(2)(b). In the **Tokyo War Crimes Trial** collective punishment of the wounded and sick was held to be a war crime.

24 See **Geneva Protocol I** art 75(2)(e) and **Geneva Protocol II** art 75(2)(h).

25 **Geneva Convention III** art 23: "No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations [...]." (Note that at **Geneva Convention I** art 14 and **Geneva Convention II** art 16, the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be PWs, and the provisions of international law concerning PWs shall apply to them.) See also **ICRC Customary IHL** rule 97 prohibiting the use of human shields. See **Rome Statute** art 8(2)(b)(xxiii).

26 **Conventional Weapons Protocol II** art 7(1)(b): "[...] it is prohibited in all circumstances to use booby-traps or other devices which are in any way attached to or associated with sick, wounded or dead persons."

**STEALING FROM WOUNDED, SICK OR SHIPWRECKED PERSONS IS PROHIBITED**

- 11.2.9** Members of the NZDF are not to steal from, pillage or loot the wounded, sick or shipwrecked.<sup>27</sup>
- 11.2.10** NZDF commanders are to take all practicable measures to protect the wounded, sick and shipwrecked against pillage of their personal property.<sup>28</sup>

**WOUNDED, SICK AND SHIPWRECKED PERSONS MUST BE COLLECTED AND CARED FOR**

- 11.2.11** Members of the NZDF are to ensure that wounded, sick and shipwrecked persons, whether friend or enemy, are collected and cared for.<sup>29</sup>
- 11.2.12** The fact that the opposing force has left behind medical personnel and equipment to treat the wounded, sick or shipwrecked, as it is required to do under LOAC, does not exempt the NZDF from providing additional necessary assistance.<sup>30</sup>
- 11.2.13** An NZDF commander may, when necessary, call for assistance from local inhabitants or, if at sea, merchant or any other vessels, to voluntarily collect and care for the wounded, sick and shipwrecked under the direction of the New Zealand force.<sup>31</sup>
- 11.2.14** Subject to orders, the commander of a New Zealand naval ship may take as PWs the wounded, sick and shipwrecked of an opposing force being carried on hospital ships or other vessels.<sup>32</sup> However, such persons must be fit enough to

27 **Geneva Convention I** art 15 and **Geneva Convention II** art 18 require parties to the conflict to, without delay, take all possible measures to protect the wounded, sick and shipwrecked against pillage. **Geneva Convention IV** art 16: “As far as military considerations allow, each party to the conflict shall facilitate the steps taken to [...] protect [the wounded, shipwrecked and other persons exposed to grave danger] against pillage [...]” **AFDA** s 31: “Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who steals from, or with intent to steal searches, the person of anyone killed, wounded, or captured in the course of any war or warlike operations in which New Zealand is engaged [...]” See also **ICRC Customary IHL** rule 111.

28 **ICRC Customary IHL** rule 111: “Each party to the conflict must take all possible measures to protect the wounded, against [...] pillage of their personal property.”

29 **Geneva Convention I** art 15: “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick [...] to ensure their adequate care [...]” See **Geneva Convention II** art 18 for wounded, sick and shipwrecked at sea. **Geneva Convention Common Article 3(2)** requires that in NIAC the “wounded and sick shall be collected and cared for”. **Geneva Protocol I** art 10 requires that the “wounded, sick and shipwrecked, to whichever Party they belong [...] shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition”. See **Geneva Protocol II** art 8 for search and collection of the wounded, sick and shipwrecked to ensure their adequate care in NIAC. See also **ICRC Customary IHL** rule 109.

30 **Geneva Convention I** art 12(5).

31 **Geneva Convention I** art 18: “The military authorities may appeal to the charity of the [local] inhabitants voluntarily to collect and care for, under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities.” **Geneva Convention II** art 21: “The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead. Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance. They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.” For capture see Chapter 10. For neutrality see Chapter 16.

32 **Geneva Convention II** art 14.

be handed over and the NZDF warship must have sufficient facilities for their proper care and treatment. In view of the limited capacity of NZDF warships to treat such persons, this power is only to be exercised in extreme circumstances. This power may not be exercised where the opposing party's wounded, sick or shipwrecked are being carried on a neutral warship or in a neutral military aircraft.<sup>33</sup>

- 11.2.15** Members of the NZDF are to ensure that the wounded, sick and shipwrecked, whether friend or enemy, military or civilian, receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction is to be made among them founded on any grounds other than medical ones.<sup>34</sup>
- 11.2.16** Members of the NZDF are not to do any of the following things in respect of the wounded, sick or shipwrecked:
- a. wilfully leave them without medical care;<sup>35</sup>
  - b. deny them available medical supplies;<sup>36</sup>
  - c. create conditions that expose them to contagion or infection;<sup>37</sup> or
  - d. ill-treat or prosecute any person for having cared for them.<sup>38</sup>
- 11.2.17** Subject to orders from the Chief of Defence Force (CDF), the commander of a New Zealand force may make agreements with the commanders of opposing forces for the exchange, removal and transport of the wounded, sick and shipwrecked from the area of operations, and for the passage of medical and religious personnel proceeding to such an area.<sup>39</sup>
- 11.2.18** The obligation to search for, collect and care for the wounded, sick or shipwrecked is a fundamental humanitarian duty. It must, however, be tempered by reason. Members of the NZDF are not to endanger their own lives or the success of the mission in order to recover the wounded of the opposing force before it is safe to do so. As soon as the military circumstances permit, however, all wounded, sick and shipwrecked must be gathered and cared for, whether friend or enemy, military or civilian.
- 11.2.19** The duty to provide medical assistance to the wounded, sick and shipwrecked is limited to the capacity of the force. For example, a medical unit assisting NZDF forces that are under attack may insist that civilian sick and injured be taken to civilian hospitals if that unit does not have medical facilities available to

33 **Geneva Convention II** art 15: The neutral party is required to ensure that those persons can take no part in operations of war.

34 See **Geneva Convention I** art 12, **Geneva Convention II** art 12, **Geneva Convention Common Article 3** and **ICRC Customary IHL** rule 110.

35 See **Geneva Convention I** art 12 and **Geneva Convention II** art 12.

36 In the **Tokyo War Crimes Trial** it was held that withholding medical supplies, including those provided by the ICRC, from the sick was a war crime.

37 See **Geneva Convention I** art 12 and **Geneva Convention II** art 12.

38 Inhabitants of an area who collect and care for the wounded and sick may never be molested or convicted for having nursed the wounded or sick (see **Geneva Convention I** art 18(3)). Neutral merchant vessels that take wounded, sick or shipwrecked on board may, in no case, be captured on account of any such transport (see **Geneva Convention II** art 21).

39 See **Geneva Convention I** art 15 and **Geneva Convention II** art 18(2).



treat them. Having accepted a patient, however, no such discrimination can be entered into and the medical condition of the patient is then the sole criteria for establishing the treatment to be given.

- 11.2.20** All persons who are wounded, sick or shipwrecked are entitled to medical care, including spies, mercenaries, saboteurs and civilians taking a direct part in the hostilities.<sup>40</sup>

#### **‘MERCY KILLING’ IS PROHIBITED**

- 11.2.21** Members of the NZDF are not to kill any wounded, sick or shipwrecked person, whether a member of the NZDF or allied force, or a member of the opposing force or a civilian, even to end that person’s suffering.

- 11.2.22** When dealing with grievously injured persons, whether a member of the NZDF or allied force, or a member of the opposing force or a civilian, members of the NZDF are to render such assistance as is possible to alleviate the suffering of the person. Not even humane motives provide legal justification for the killing of persons who are *hors de combat*.<sup>41</sup>

#### **TREATMENT OF WOUNDED, SICK AND SHIPWRECKED PERSONS IS ONLY TO BE BASED ON MEDICAL CRITERIA**

- 11.2.23** NZDF commanders, medical personnel and other members of the NZDF are to ensure that the order in which the wounded, sick and shipwrecked are treated, and the nature of the treatment provided, is based purely on the medical needs of the person to be treated.<sup>42</sup>

- 11.2.24** Members of the NZDF are not to adversely discriminate amongst the wounded, sick or shipwrecked or mistreat them on any of the following grounds:

- a. They belong to the opposing force or any other group.
- b. How they have come to be incapacitated.<sup>43</sup>
- c. Race, colour, sex, language, religion, political or other opinions, wealth, birth, status, sexual orientation etc.<sup>44</sup>
- d. The person’s actions before coming under NZDF control.

#### **ONLY LEGITIMATE MEDICAL TREATMENT MAY BE APPLIED**

- 11.2.25** Members of the NZDF are to ensure that the physical and mental health of persons who are under NZDF control or who are deprived of their liberty is not endangered by any unjustified act or omission.<sup>45</sup> It is prohibited to subject such persons to any medical procedure that is not indicated by the state of health of the person and is not consistent with the generally accepted medical

40 For spies, mercenaries, saboteurs and civilians taking a direct part in the hostilities see Chapter 6.

41 In the *Hadamar Trial* an attempt to justify the execution by lethal injection of PWs on the grounds that they had tuberculosis was rejected, as was the argument that such killings were lawful under German law.

42 See **Geneva Protocol II** art 7(2).

43 See for example, **Cluster Munitions Convention** art 5(2)(e).

44 See **Geneva Convention I** art 12 and **Geneva Convention II** art 12. For non-discrimination see Chapter 4.

45 See **Geneva Protocol I** art 11(1) and **Geneva Protocol II** art 5(2)(e).

standards.<sup>46</sup> In particular, it is prohibited to carry out the following on such persons, even with their consent:

- a. Physical mutilations.
- b. Scientific, biological or medical experiments.
- c. Removal of tissues or organs for transplant.<sup>47</sup>

**11.2.26** Persons under the control of the NZDF are not to be subjected to any medical procedure without their consent.<sup>48</sup> If such a person does not consent to any medical procedure, NZDF medical personnel are to obtain a statement setting out the refusal signed or acknowledged by the individual or recorded by electronic audio or visual means. Persons with infectious diseases can, however, be isolated with or without their consent until they have undergone necessary preventive treatment.<sup>49</sup>

**11.2.27** NZDF medical officers may authorise taking blood for transfusion or skin for grafting if done solely for therapeutic purposes and given voluntarily without coercion or inducement and in accordance with generally accepted medical standards.<sup>50</sup> The medical officer is to keep a medical record for every donation of blood for transfusion or skin for grafting by persons who have voluntarily donated blood or skin.<sup>51</sup> A record is to be kept of all medical procedures undertaken. Records are to be available at all times for inspection by the Protecting Power/International Committee of the Red Cross (ICRC).<sup>52</sup>

**11.2.28** The validity of the consent of persons deprived of their liberty will often be open to doubt. They must not, therefore, be subjected to certain medical procedures even with their consent. Persons so sick that they need organ transplants should, wherever possible, be repatriated or sent to a neutral State for treatment. Only in extreme cases would a transplant from one person deprived of liberty to another be justified. In such circumstances, the Protecting Power/ICRC must be consulted. Transplant of organs from persons deprived of liberty to members of the NZDF are not to be performed in any circumstances.

46 See **Geneva Protocol II** art 5(2)(e).

47 See **Geneva Protocol I** art 11(2), **ICRC Customary IHL** rule 92, **Geneva Convention I** art 12, **Geneva Convention II** art 12, **Geneva Convention I** art 50, **Rome Statute** arts 8(2)(b)(x) and 8(2)(e)(xi) and **Medical Trial**.

48 There are no general provisions for compulsory treatment of medical conditions under New Zealand law. The only exception is in respect of mental illness under the **Mental Health (Compulsory Assessment and Treatment) Act 1992**.

49 See **Health Act 1956** Part 3 regarding infectious and notifiable diseases, and **AFDA** s 72 where treatment is compulsory for persons under the jurisdiction of the AFDA, where failure to submit would constitute a menace to the health of other members of the NZDF.

50 **Geneva Protocol I** art 11(3): "Exceptions to Article 11(2)(c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient."

51 **Geneva Protocol I** art 11(6): "Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting made under its responsibility."

52 **Geneva Protocol I** art 11(6): "In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty. These records must be available at all times for inspection by the Protecting Power."



**OBLIGATIONS WHEN LEAVING BEHIND WOUNDED AND SICK PERSONS**

**11.2.29** If a New Zealand force is compelled to leave behind the wounded and sick, for example, during rapid withdrawal from an area, the commander is to leave behind medical personnel and equipment to care for them unless military considerations do not permit.<sup>53</sup> In deciding whether to leave medical personnel behind, the commander is to consider:

- a. the need to preserve medical resources for the rest of the force;
- b. measures and resources available to treat the wounded and sick; and
- c. information about the attitude and capability of the opposing force regarding treatment of the sick and wounded and respect for LOAC.

**REPATRIATION OF SERIOUSLY WOUNDED OR SICK PRISONERS**

**11.2.30** Seriously wounded or sick PWs must be repatriated once they are well enough to make the journey. Arrangements may also be made for them to be cared for in neutral countries.<sup>54</sup>

**THE DENIAL OF RELIGIOUS RIGHTS IS PROHIBITED**

**11.2.31** Members of the NZDF are not to:<sup>55</sup>

- a. repress the religious rights of wounded, sick or shipwrecked persons;
- b. discriminate against wounded, sick or shipwrecked persons on the basis of religion;
- c. deny religious rites to persons who are dying;<sup>56</sup>
- d. prevent ministers of religion from giving spiritual assistance to wounded, sick or shipwrecked persons.

53 **Geneva Convention I** art 12: “[...] The Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care.”

54 See **Geneva Convention III** art 109.

55 **Geneva Convention IV** art 27: “Protected persons are entitled, in all circumstances, to respect for [...] their religious convictions and practices [...] All protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based on [...] religion.” See also **ICCPR** art 18. Note that the right to religious freedom is non-derogable (**ICCPR** art 4). In NIAC persons who do not take a direct part in the hostilities or have ceased to take part in the hostilities are entitled to respect for their convictions and religious practices (see **Geneva Protocol II** art 4(1) and art 4(3)(a)). See also **ICRC Customary IHL** rule 104.

56 In the **Zuehlke Trial** denial of spiritual assistance to a person under sentence of death was held to be both a war crime and a crime against humanity.

## SECTION 3 – HUMAN REMAINS

### REMAINS OF THE DEAD MUST BE SEARCHED FOR AND RECOVERED

**11.3.1** The commander of a New Zealand force is to ensure that the human remains<sup>57</sup> of persons who have died as a result of the conflict are searched for and recovered as soon as possible after each engagement, and not later than the end of active hostilities.<sup>58</sup> This includes the remains of:

- a. combatants, whether friend or enemy, and persons who have taken a direct part in hostilities;
- b. persons who have died for reasons related to occupation or while deprived of liberty; and
- c. persons who are not nationals of the country in which they have died.<sup>59</sup>

**11.3.2** The commander may seek CDF's authority to establish arrangements with the opposing force for teams to search for, identify and recover the dead from the area of operations, accompanied where necessary by members of the opposing force.<sup>60</sup> The force is also to facilitate and, if need be, search for the remains of civilians killed in the conflict if military considerations allow.<sup>61</sup> If this is not feasible, the commander is to facilitate to the greatest degree possible such a search by other organisations.

**11.3.3** Recovering human remains, whether friend or enemy, is an important humanitarian duty that is also essential to avoid the spread of disease to combatants and civilians alike. It enables the relatives to know the fate of those who have died.<sup>62</sup> The obligation must be tempered by reason. For example, recovery of bodies from areas containing mines or explosive remnants of war (ERW) is only to be conducted when the safety of the members of NZDF conducting the operation is assured.

### REMAINS OF THE DEAD MUST BE RESPECTED

**11.3.4** Mistreatment of the dead has no military utility. It serves only to embitter the enemy and the civilian population and to make a return to peace more difficult. It also causes needless distress to the families of the deceased. Just as the dead

57 The expression 'human remains' is used instead of 'bodies' because the identifiable remains of the dead may be much less than a complete human body.

58 **Geneva Convention I** art 15(1): "At all times, and particularly after each engagement, Parties to the conflict shall, without delay, take all possible measures to [...] search for the dead and prevent their being despoiled." **Geneva Convention II** art 18: "After each engagement, Parties to the conflict shall, without delay, take all possible measures to [...] search for the dead [at sea] and prevent their being despoiled." **Geneva Protocol II** art 8: "Wherever circumstances permit [in NIAC], and particularly after an engagement, all possible measure shall be taken, and without delay [...] to search for the dead, prevent their being despoiled, and decently dispose of them." See also **ICRC Customary IHL** rules 112 and 113.

59 **Geneva Protocol I** art 34(1): "The remains [...] of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in [**Geneva Convention IV** art 130], where their remains or gravesites would not receive a more favourable consideration under the Geneva Conventions and [**Geneva Protocol I**]."

60 See **Geneva Protocol I** art 33(4). For communications with the opposing force see Chapter 15.

61 See **Geneva Protocol I** art 33(2)(b).

62 **Geneva Protocol I** art 32: "In the implementation of this Section ['Missing and Dead Persons'], the activities of the High Contracting Parties, or the Parties to the conflict and of the humanitarian organizations mentioned in the Conventions and in this Protocol, shall be prompted mainly by the right of families to know the fate of their relatives."

are regarded as tapu or sacred to most New Zealanders, many other cultures attach particular importance to the treatment of human remains. In Muslim cultures the dead must be buried within 72 hours and must never be cremated. Leaving bodies exposed to the elements, or mistreatment of them, is likely to be seen as an insult to religion with potentially serious consequences. The Commander Joint Forces New Zealand (COMJFNZ) is to ensure that respect for the dead forms part of pre-deployment training (PDT) and is covered in standing orders. NZDF commanders are to take all practicable measures to protect the bodies of the dead.<sup>63</sup> Members of the NZDF are not to:

- a. mutilate, or otherwise mistreat the dead;<sup>64</sup>
- b. steal, take trophies, despoil or pillage from the dead;<sup>65</sup>
- c. use booby traps or manually emplaced explosive devices in any way connected with the dead;<sup>66</sup> or
- d. publicly display human remains or mark them with cards, emblems or words to intimidate or terrorise the opposing force or civilian population.

## DISPOSAL OF HUMAN REMAINS

**11.3.5** NZDF commanders and members of the NZDF dealing with human remains are to ensure that:

- a. personal effects are collected and stored so that they can be returned to the next of kin;<sup>67</sup>
- b. lists of opposing force dead, along with their identity tags, wills or other documents and valuables, are provided to the Protecting Power, ICRC or appropriate information agency;<sup>68</sup>

63 See **ICRC Customary IHL** rule 113.

64 **Geneva Convention IV** art 16 requires that, as “far as military considerations allow, each Party to the conflict shall [...] protect the [civilian] dead against pillage and ill-treatment”. **Geneva Protocol I** art 34(1) requires that the “remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those persons not nationals of the country in which they have died as a result of hostilities shall be respected”. **Crimes Act 1961** s 150(1)(a): “Every one is liable to imprisonment for a term not exceeding two years who indecently or improperly interferes with or offers any indignity to any human body or human remains, whether buried or not.” In the **Max Schmid Trial** mutilation of the body of an unknown US soldier was held to be a war crime, and in the **Tokyo War Crimes Trial** cannibalism and routine mutilation of the bodies of the dead, including women and children, was held to be a war crime. See also **ICRC Customary IHL** rule 113.

65 Under **Geneva Convention IV** art 16, as “far as military considerations allow, each Party to the conflict shall [...] protect the [civilian] dead against pillage and ill-treatment”. **Geneva Convention I** art 15: “At all times, and particularly after each engagement, Parties to the conflict shall, without delay, take all possible measures [...] to search for the dead and prevent their being despoiled.” See **Geneva Convention II** art 18 for this duty in conflict at sea. **AFDA** s 31: “Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who steals from, or with intent to steal searches, the person of anyone killed, wounded, or captured in the course of any war or warlike operations in which New Zealand is engaged [...]” See also **Geneva Protocol II** art 8 and **ICRC Customary IHL** rule 113.

66 Under **Conventional Weapons Protocol II** art 7(1)(b) it is prohibited to use booby-traps and other devices that are in any way attached to or associated with dead persons.

67 See **ICRC Customary IHL** rule 114.

68 **Geneva Convention I** art 16 and **Geneva Convention II** art 19 provide that parties to the conflict shall prepare and forward through the Protecting Power and the Central PW agency, death certificates or duly authenticated lists of the dead, one half of the identity disc or the disc itself, last wills and other documents, money and all items of intrinsic or sentimental value found with the dead. See also **ICRC Customary IHL** rule 114.

- c. remains are, wherever practicable, returned to the party to which they belong or the person's next of kin;<sup>69</sup>
- d. if return is not practicable, remains are to be:
  - (1) carefully examined to confirm death and establish identity;<sup>70</sup>
  - (2) stored safely (refrigerated<sup>71</sup> where possible) awaiting burial;
  - (3) left with one identity tag on the body;<sup>72</sup>
  - (4) buried, whether on land or at sea, individually where possible, but in any case with respect and religious rites;<sup>73</sup>
  - (5) cremated only for imperative hygiene or religious reasons;<sup>74</sup> and
  - (6) left undisturbed, except if exhumed to facilitate return to their home country, when necessitated by medical reasons or to carry out investigations into international crimes;<sup>75</sup> and
- e. graves are marked with culturally appropriate markers<sup>76</sup> and all available information regarding their location is recorded and exchanged.<sup>77</sup>

69 See ICRC's *Operational best practices regarding the management of human remains and information on the dead by non-specialists*.

70 **Geneva Convention I** art 17 and **Geneva Convention II** art 20(1) provide that burial on land or at sea shall be preceded by a careful examination, if possible by a medical examination, of the bodies with a view to confirming death, establishing identity and to enabling a report to be made. **Geneva Convention IV** art 129 requires that deaths "of internees must be certified in every case by a doctor, and a death certificate shall be made out showing the causes of death and the conditions under which it occurred". See also **Geneva Convention III** art 120(3) for PWs.

71 This may be practicable in cases where dead are recovered in small numbers. It may not be possible in respect of large engagements.

72 See **Geneva Convention I** art 17 and **Geneva Convention II** art 20.

73 See **Geneva Convention I** art 17, **Geneva Convention II** art 20, **Geneva Convention III** art 120, **Geneva Convention IV** art 130 (for deceased internees), **Geneva Protocol II** art 8 and **ICRC Customary IHL** rule 115.

74 **Geneva Convention I** art 17 states that bodies "shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead". See also **Geneva Convention II** art 20, **Geneva Convention III** art 120 and **Geneva Convention IV** art 130.

75 **Geneva Protocol I** art 34(4) provides that a High Contracting Party in whose territory gravesites are situated shall be permitted to exhume the remains only in order to "facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin" or "where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains and give notice to the home country of its intention to exhume the remains together with details of the intended place of reinternment".

76 It is not appropriate to use religious markers unless this is known to be acceptable to the families of the deceased. For example, crosses are not to be used to mark the graves of Muslim dead.

77 See **Geneva Convention I** art 17, **Geneva Protocol I** art 34(2) and **ICRC Customary IHL** rule 116. See **Geneva Protocol I** art 34(3) for the duty in the absence of agreements to maintain graves and return of remains.

## SECTION 4 – MISSING PERSONS

### MISSING PERSONS MUST BE SEARCHED FOR

**11.4.1** Parties to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict, and must provide family members with any information it has on their fate. The commander of a New Zealand force must, as soon as practicable, arrange for:

- a. searches for persons reported missing by the opposing force;<sup>78</sup> and
- b. searches for and recording of details about missing persons believed to have been detained, imprisoned or otherwise held in captivity for more than two weeks, or who have died in captivity.<sup>79</sup>

**11.4.2** Searching for persons who, for whatever reason, become missing in the area of operations is a fundamental humanitarian duty.<sup>80</sup> Fulfilling it must, however, be tempered by reason. Searches while combat action continues may entail an unreasonable drain on resources and expose members of the NZDF to an unacceptably high risk of casualties. However, once the situation has stabilised and the safety of NZDF searchers is assured, searching for missing persons must be given a high priority.

78 **Geneva Protocol I** art 33(1): “As soon as the circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate searches.”

79 **Geneva Protocol I** art 33(2): “In order to facilitate the gathering of information relating to missing persons each Party to the conflict shall [...]: a) record the information specified in Geneva Convention IV Article 138 in respect of persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention; b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.”

80 **Geneva Protocol I** art 32 states that the activities of Parties to the conflict and of international humanitarian organisations “shall be prompted mainly by the right of families to know the fate of their relatives”.

## SECTION 5 – MEDICAL AND RELIGIOUS PERSONNEL

## GENERAL

**11.5.1** **Medical personnel** are personnel exclusively engaged:

- a. in the search for, collection, transport, diagnosis or treatment (including first aid) of the wounded, sick and shipwrecked;
- b. in the treatment or prevention of disease;
- c. in the administration of medical units and establishments or operation or administration of medical transports; or
- d. as personnel of hospital ships or medical aircraft, or members of the crew of hospital ships or medical aircraft.<sup>81</sup>

**11.5.2** The term is not confined to qualified medical specialists. Personnel whose duties require them to ensure the adequate treatment of the wounded and sick are covered while they form an integral part of the medical service, for example, hospital cooks, administrators and mechanics.

**11.5.3** **Religious personnel** are military or civilian persons exclusively engaged in tending to the spiritual needs of those involved in armed conflict and who are attached to:

- a. the armed forces of a party to the conflict;
- b. medical units or medical transports of a party to the conflict;
- c. medical units or medical transports of neutral States, recognised and authorised aid societies of neutral States, or impartial international aid organisations; or
- d. civil defence organisations.<sup>82</sup>

## MEDICAL AND RELIGIOUS PERSONNEL MUST NOT TAKE PART IN HOSTILITIES

**11.5.4** Medical and religious personnel are non-combatants.<sup>83</sup> Medical or religious personnel of the NZDF are not to take a direct part in the hostilities.<sup>84</sup> They may carry small arms that have been issued to them and they may use them in their own defence or in that of the wounded or sick in their charge.<sup>85</sup>

81 See **Geneva Protocol I** art 8(c). Assignment of medical personnel may be either permanent or temporary (see **Geneva Protocol I** art 8(c)). 'Permanent medical personnel' means persons assigned exclusively to medical purposes for an indeterminate period; 'temporary medical personnel' means persons devoted exclusively to medical purposes for limited periods during the whole of such periods (see **Geneva Protocol I** art 8(k)).

82 See **Geneva Protocol I** art 8(d). Attachment can be permanent or temporary.

83 **Geneva Protocol I** art 43(2): "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Convention) are combatants, that is to say, they have the right to participate directly in hostilities." See also **ICRC Customary IHL** rule 3.

84 For 'direct part in hostilities' see Chapter 6.

85 See **Geneva Convention I** art 22(1).



- 11.5.5** Permanent medical or religious personnel of the NZDF are not to be used in combatant tasks (eg sentry duty), required to perform tasks incompatible with their humanitarian function, or allowed to volunteer for such tasks.<sup>86</sup> If it is found that the number of medical or religious staff exceeds requirements, they may seek to be temporarily or permanently assigned to other duties. In that case, they become combatants and are to be relieved of their special identity card for the period of alternative duties.
- 11.5.6** Temporary medical and religious personnel have the protections of LOAC only while engaged in activities directly related to a medical role. Combatants employed as lifesavers or stretcher-bearers may return to combat roles once those duties have finished. They must, of course, remove any Red Cross/Red Crescent emblem that they have been issued. To do otherwise may constitute treachery or a criminal misuse of the emblem.

### ETHICAL DUTIES OF MEDICAL AND RELIGIOUS PERSONNEL MUST BE RESPECTED

- 11.5.7** The relationship between NZDF medical personnel and their patients, and religious personnel and persons receiving their ministry, is to conform to internationally recognised norms of ethical responsibility. This applies whether the persons in care are friend or enemy. Members of the NZDF are to respect patient confidentiality and the confidence of religious ministry to the greatest degree possible within any environment of armed conflict.
- 11.5.8** Only when the communications received involve issues such as the existence of communicable disease can medical and religious personnel be required to provide such information.<sup>87</sup> NZDF commanders are not to require religious or medical personnel to abuse their special position to obtain intelligence from members of the opposing force under their care or ministry.

### MEDICAL AND RELIGIOUS PERSONNEL MUST BE RESPECTED AND PROTECTED

- 11.5.9** Members of the NZDF are to ensure that medical and religious personnel, including civilian and those of the opposing force, are respected and protected.<sup>88</sup> In particular, members of the NZDF are to ensure that medical and religious personnel:
- a.** are not attacked,<sup>89</sup> harassed or impeded in their duties;
  - b.** are granted all available help;<sup>90</sup>

86 As non-combatants, medical and religious personnel do not have combatant immunity. They may face individual criminal responsibility for any death or injury to persons or damage to property which they cause. Furthermore, allowing medical or religious personnel to undertake combat tasks invites disrespect for the Red Cross/Red Crescent emblem and may encourage opposing forces to attack medical and religious personnel and medical units and transports. Although such personnel may seek to share in the dangers and hardships of the forces with which they serve, doing so breaches LOAC. Merely removing the Red Cross/Red Crescent armband does not alter their special status.

87 For New Zealand law relating to infectious and notifiable diseases see the **Health Act 1956** Part 3.

88 See **Geneva Convention I** art 24 and **Geneva Convention II** art 36 for protection of medical and religious personnel attached to the armed forces. See **Geneva Protocol I** arts 15(1) and 15(5) for protection of civilian medical and religious personnel. See **Geneva Protocol II** art 9(1) for protection in NIAC. See also **ICRC Customary IHL** rules 25 and 27.

89 See **Geneva Protocol I** art 12(1) and **ICRC Customary IHL** rule 30. Among other things, causing death or serious injury to medical and religious personnel as protected persons is a grave breach of the Geneva Conventions (see **Geneva Convention I** art 50 and **Geneva Convention II** art 51).

90 **Geneva Protocol I** art 15(2): "If needed, all available help shall be afforded to civilian medical

- c. are not compelled to carry out tasks incompatible with their humanitarian function;<sup>91</sup>
- d. are not compelled to give priority to any person except on medical grounds;<sup>92</sup>
- e. are not punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting from that treatment;<sup>93</sup>
- f. are not required to breach their code of ethics or their obligations under LOAC;<sup>94</sup> and
- g. are not to be required to provide information they have obtained concerning the sick and wounded under their care, except as required by international law.<sup>95</sup>

## CONSIDERATIONS IN RELIGIOUS CONFLICT

**11.5.10** Where religion is an element of conflict, persons conducting religious ministry sometimes engage in activities inconsistent with a non-combatant role, for example inflaming feelings of hatred against the opposing force. However, only if such activities reach the threshold of direct participation in hostilities do the special protections under this chapter cease.<sup>96</sup> Such persons are entitled to humane treatment on capture.

## RETENTION OF MEDICAL AND RELIGIOUS PERSONNEL AFTER CAPTURE

**11.5.11** Medical and religious personnel who fall into the hands of the opposing force may only be retained for so long as the state of health and spiritual needs and the number of PWs require. Retained religious and medical personnel are not PWs but nevertheless benefit from all of the provisions of LOAC relevant to the treatment of PWs.<sup>97</sup>

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personnel in an area where civilian medical services are disrupted by reason of combat activity; (3): The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions [...].” Under **Geneva Protocol II** art 9(1) medical and religious personnel in NIAC shall be granted all available help for the performance of their duties.

91 See **Geneva Protocol I** art 15(3), **Geneva Protocol II** art 9(1) for NIAC and **ICRC Customary IHL** rule 26.

92 **Geneva Protocol I** art 9(2): “In the performance of their duties, medical personnel may not be required to give priority to any person except on medical grounds.” See also **Geneva Convention I** art 12, **Geneva Convention II** art 12 and **Geneva Protocol I** art 15(3).

93 **Geneva Protocol I** art 16(1): “Under no circumstances shall any person be punished for carrying out medical activities comparable with medical ethics, regardless of the person benefitting therefrom.” See also **Geneva Protocol II** art 10.

94 **Geneva Protocol I** art 16(2): “Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or other rules designed for the benefit of the wounded or sick or to the provisions of the Conventions or this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.” See also **Geneva Protocol II** art 10.

95 **Geneva Protocol I** art 16(3): “No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.” See also **Geneva Protocol II** art 10(3).

96 See Chapter 6.

97 **Geneva Convention II** art 37: “The religious, medical and hospital personnel assigned to the



**11.5.12** The commander of any NZDF place of detention who considers that retention of retained medical and religious personnel is no longer required is to draw this to the attention of COMJFNZ so that those personnel can be returned to the party to the conflict to whom they belong as soon as possible.<sup>98</sup>

**11.5.13** Medical and religious personnel lose their protected status as non-combatants for such time as they take a direct part in hostilities.<sup>99</sup> Members of the NZDF are not to attack medical and religious personnel who, despite losing their special protection, continue to fulfil a medical or religious function unless:

- a. due warning has been given, naming a reasonable time limit where appropriate; and
- b. the warning is unheeded, after the expiration of the time limit (if applicable);<sup>100</sup> or
- c. it is not practicable to issue a warning requiring cessation of the activities that constitute the breach; and
- d. attack upon those persons is demanded by military necessity.<sup>101</sup>

**11.5.14** The advice of an NZDF Legal Adviser (LEGAD) is to be obtained before any action is taken, unless this is not practicable.

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medical or spiritual care of the persons designated [...] shall, if they fall into the hands of the enemy, be respected and protected; they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick. They shall afterwards be sent back as soon as the Commander-in-Chief, under whose authority they are, considers it practicable [...] If, however, it proves necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing. Retained personnel shall be subject, on landing, to the provisions of [Convention I].” See also **Geneva Convention I** art 28.

98 **Geneva Convention I** art 30(1): “Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall 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 [...].” See also **Geneva Convention II** art 37.

99 They do not lose this status if they act in defence of self or of the sick and wounded in their care (see **Geneva Convention I** art 22(1)).

100 See **Geneva Convention I** art 21.

101 For military necessity see Chapter 4.

## SECTION 6 – MEDICAL UNITS AND ESTABLISHMENTS

## DEFINITIONS

**11.6.1 Medical units and establishments** are units and establishments organised for medical purposes such as the collection, transportation, diagnosis and treatment of the wounded, sick or shipwrecked, or for the prevention of disease. They may be military or civilian, temporary or permanent,<sup>102</sup> fixed or mobile, and include:

- a. hospitals and other similar units,
- b. blood transfusion centres,
- c. preventative medicine centres and institutes,
- d. medical depots, and
- e. medical and pharmaceutical stores of medical units.<sup>103</sup>

## MEDICAL UNITS AND ESTABLISHMENTS MUST NOT BE ATTACKED OR MISUSED

**11.6.2** Members of the NZDF are not to:

- a. attack medical units and establishments;<sup>104</sup>
- b. make medical units and establishments the subject of reprisals;<sup>105</sup>
- c. use the material of captured medical units and establishments for any purpose other than the care of the wounded and sick;<sup>106</sup>
- d. use medical units in an attempt to shield military objectives from attack;<sup>107</sup>
- e. use the buildings of medical facilities for military purposes, except in cases of urgent military necessity where prior arrangements have been made for the care of the wounded and sick nursed in them, and provided that the distinctive emblem and all other protective symbols are removed;<sup>108</sup>

102 **Geneva Protocol I** art 8(k): ‘permanent medical units’ means “those assigned exclusively to medical purposes for an indeterminate period”. ‘Temporary medical units’ means “those devoted exclusively to medical purposes for limited periods during the whole of such periods.” Unless otherwise specified, the term ‘medical units’ covers both permanent and temporary categories.

103 See **Geneva Protocol I** art 8(e).

104 **Geneva Convention I** art 19 states that fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked. See also **Geneva Convention IV** art 18, **Geneva Protocol I** art 12(1), **Geneva Protocol II** art 11(1), **Hague Regulations** art 27 and **ICRC Customary IHL** rule 28. See **Rome Statute** arts 8(2)(b)(xxiv), 8(2)(e)(ii) and 8(2)(e)(iv) for war crimes associated with intentionally attacking hospitals and other medical establishments.

105 **Geneva Protocol I** art 20 prohibits reprisals against protected persons and objects, such as medical units and establishments, hospitals and places where the sick and wounded are collected.

106 **Geneva Convention I** art 33: “The material of mobile medical units of the armed forces which fall into the hands of the enemy shall be reserved for the care of wounded and sick. The buildings, material and stores of fixed medical establishments of the armed forces shall remain subjects to the laws of war, but may not be diverted from that purpose as long as they are required for the care of wounded and sick [...].”

107 **Geneva Protocol I** art 12(4): “Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.”

108 **Geneva Convention I** art 33(2): “The buildings, material and stores of fixed medical

- f. booby-trap medical facilities, medical equipment, medical supplies or medical transportation;<sup>109</sup> or
- g. destroy the material and stores of medical units and establishments.<sup>110</sup>

### MEDICAL UNITS AND ESTABLISHMENTS MUST BE SITED TO AVOID ATTACK

- 11.6.3** NZDF commanders are to ensure that, wherever possible, medical units and establishments are sited so that attacks against military objectives do not imperil their safety.

### LOSS OF SPECIAL PROTECTION

- 11.6.4** Medical units and establishments lose their special protection for such time as they are used to take a direct part in hostilities.<sup>111</sup>
- 11.6.5** The following conditions do not deprive a medical unit or establishment of its protection:
- a. The carriage of arms by the personnel of the unit or establishment for their own defence or for the defence of the wounded or sick in their charge.
  - b. That the unit or establishment is protected by a picket, or sentries or by an escort.
  - c. That small arms and ammunition taken from the sick are held by the unit or establishment until they can be handed to the appropriate service.
  - d. That veterinary personnel or material are within the unit or establishment.
  - e. That humanitarian activities of the unit or establishment extend to the care of civilian wounded or sick.<sup>112</sup>

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establishments of the armed forces shall remain subjects to the laws of war, but may not be diverted from that purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them.” **Geneva Protocol I** art 38(1): “It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions and or by this Protocol.” Note that the red lion and sun symbol has now been abandoned by Iran and reference to it should be avoided. See also **Geneva Protocol II** art 12 and **Hague Regulations** art 23(f). The perfidious use of the distinctive emblem of the red cross, red crescent or other protective signs recognised by the Conventions or Protocol I is a grave breach of the Geneva Conventions (see **Geneva Protocol I** art 85(3)(f)). Under **Rome Statute** art 8(2)(b)(vii) it is a war crime to make “improper use of the distinctive emblems of the Geneva Conventions”. **Rome Elements** defines ‘improper’ to mean “combatant purposes in violation of LOAC”. Although no similar provision applies in respect of NIAC under art 8(2)(e), members of the NZDF are to apply this rule in all circumstances.

109 **Conventional Weapons Protocol II** art 7(1)(d) states that it is prohibited to booby-trap medical facilities, medical equipment, medical supplies or medical transportation.

110 See **Geneva Convention I** art 33.

111 **Geneva Convention I** art 21 provides that the “protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy”.

112 See **Geneva Convention I** art 22.

**ENTRY AND SEARCH OF CIVILIAN MEDICAL ESTABLISHMENTS**

**11.6.6** Members of the NZDF are not to enter or search civilian medical establishments unless there is a clear military necessity or humanitarian requirement to do so. Subject to LOAC and their orders, members of the NZDF may enter civilian medical facilities:

- a.** to obtain medical treatment for themselves, other members of the force or civilians under their control, to visit members of the force under treatment or to remove those persons when it is safe to do so;
- b.** where there are reasonable grounds to believe that persons in the facility pose an imminent threat to the safety or security of the facility, its staff or patients; or
- c.** where there are reasonable grounds to believe the facility is being used for purposes inconsistent with its protected status, eg storage of weapons or munitions, or harbouring members of the opposing force who are not wounded or sick.

**11.6.7** If a member of the NZDF considers that it may be necessary to enter or search a medical facility:

- a.** consideration is to be given to whether the aim could be achieved in a way that does not involve entering the facility or disrupting its functions, eg by waiting for members of the opposing force to come out or by issuing warnings;
- b.** entry and search must be conducted in a way that provides the greatest possible respect for the protected status of the facility, staff and patients;
- c.** the personal dignity and privacy of patients is to be respected, particularly of members of the opposite sex and children;
- d.** the timing, nature, duration and scope of the search must, wherever possible, take into account the routine and duties of the facility and must be scheduled so as not to disrupt surgical operations or other medical procedures; and
- e.** where sufficient resources exist, searches are to be conducted using the least intrusive method consistent with security, eg search dogs are only to be used in cases of imminent military necessity and are to be tightly controlled.

**11.6.8** Prior approval from COMJFNZ is to be obtained before any search of a medical facility unless this is not practicable. The advice of an NZDF LEGAD is to be obtained before any action is taken unless this is not practicable.

## SECTION 7 – HOSPITAL SHIPS, MEDICAL TRANSPORTS AND MEDICAL AIRCRAFT

## HOSPITAL SHIPS MUST NOT BE ATTACKED OR MISUSED

## 11.7.1 Hospital ships are:

- a. ships built or equipped specially and exclusively for assisting, treating and transporting the wounded, sick or shipwrecked;<sup>113</sup>
- b. ships used as hospital ships by national Red Cross/Red Crescent societies, officially recognised relief societies, or private persons;<sup>114</sup>
- c. ships made available to a party to the conflict for humanitarian purposes by:
  - (1) a neutral or other State which is not party to the conflict;
  - (2) a recognised or authorised aid society of such a State; or
  - (3) an impartial international humanitarian organisation.<sup>115</sup>

11.7.2 Reference to a ‘hospital ship’ includes reference to the ship’s company or crew and medical personnel.

11.7.3 Sick-bay means the sick-bay on a warship.<sup>116</sup>

11.7.4 Members of the NZDF are to respect and protect hospital ships. In particular, members of the NZDF are not to:

- a. attack hospital ships,<sup>117</sup>
- b. capture hospital ships,<sup>118</sup> or
- c. make hospital ships the subject of reprisals.<sup>119</sup>

113 See **Geneva Convention II** art 22.

114 See **Geneva Convention II** arts 24 and 25.

115 See **Geneva Protocol I** art 9(2).

116 See **Geneva Convention II** art 28.

117 Under **Geneva Convention I** art 20 hospital ships entitled to the protection of Geneva Convention II shall not be attacked from the land. **Geneva Convention II** art 22: “Military hospital ships [...] may in no circumstances be attacked or captured, but shall at all times be respected and protected, on the condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed [...]”. See also **Geneva Convention II** arts 23–25 for prohibition of attack on medical establishments ashore and on hospital ships used by relief organisations. Under **Geneva Protocol I** art 22 the protections relating to hospital ships under Geneva Convention II also apply to vessels carrying civilian wounded, sick and shipwrecked. **San Remo Manual** rules 47(a) and (b) provide that hospital ships and other medical transports are exempt from attack.

118 **Geneva Convention II** art 22 states that military hospital ships may in no circumstances be captured. The same applies to hospital ships utilised by relief organisations (see **Geneva Convention II** arts 23 and 24). **Geneva Protocol I** art 22(2) provides that the protection provided by **Geneva Convention II** arts 22, 24 and 25 shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict: “(a) by a neutral or other State which is not a Party to that conflict; or (b) by an impartial international humanitarian organisation”. See also **San Remo Manual** rule 136(a). For capture of ships see Chapter 10.

119 See **Geneva Convention II** art 47 and **Geneva Protocol I** art 20. For reprisals see Chapter 17.

**11.7.5 Loss of special protection.** Hospital ships lose their special protection for such time as they carry out acts harmful to the opposing force.<sup>120</sup> In particular, hospital ships lose their protected status if they:

- a. are not innocently employed in their normal role,
- b. do not submit to identification and inspection when required, and
- c. intentionally hamper the movement of combatants and do not obey orders to stop or move out of the way when required.<sup>121</sup>

**11.7.6** The following conditions do not deprive a hospital ship or sick-bays on board ships of their protection:

- a. That the crews of ships or sick-bays are armed for the maintenance of order or for their own defence or that of the sick and wounded.
- b. The presence on board of apparatus exclusively intended to facilitate navigation or communication.
- c. The discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.
- d. That the humanitarian activities of hospital ships and sick-bays of vessels or crews extend to the care of wounded, sick or shipwrecked civilians.
- e. The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.<sup>122</sup>

**11.7.7** Where a hospital ship has lost its exemption from attack by breaching the rules governing its protected status, it must be given due warning with a reasonable time limit to rectify the breach. If the warning goes unheeded, the hospital ship may be captured or its compliance enforced by another means.<sup>123</sup>

**11.7.8** Members of the NZDF are permitted to attack a hospital ship that has lost its protected status and has failed to heed a warning only if:

- a. diversion or capture is not feasible;
- b. no other method is available for exercising military control;
- c. the circumstances of non-compliance are sufficiently grave that the vessel or aircraft has become, or may be reasonably assumed to be, a military objective; and
- d. the collateral casualties or damage to civilian property will not be disproportionate to the military advantage gained or expected.<sup>124</sup>

120 See **Geneva Convention II** art 34, which also provides that hospital ships lose their protection if they possess or use a secret code for their wireless or other means of communication.

121 See **San Remo Manual** rule 48.

122 See **Geneva Convention II** art 35.

123 See **San Remo Manual** rules 49 and 50.

124 See **San Remo Manual** rule 51.

- 11.7.9** Attack on a hospital ship is to be a last resort.<sup>125</sup> Such an attack can only be conducted if authorised by CDF. The advice of an NZDF LEGAD is to be obtained before any action is taken unless this is not practicable.

#### **SMALL RESCUE CRAFT AND INSTALLATIONS MUST BE RESPECTED AND PROTECTED**

- 11.7.10 Coastal rescue craft** are small vessels that are employed by the State or officially recognised lifeboat institutions for coastal rescue operations.<sup>126</sup>
- 11.7.11 Coastal rescue installations** are the fixed coastal installations used exclusively by coastal rescue craft for their humanitarian missions.<sup>127</sup>
- 11.7.12** Members of the NZDF are not to:
- a. attack small rescue craft and installations,<sup>128</sup>
  - b. capture small rescue craft and installations,<sup>129</sup> or
  - c. make small rescue craft and installations the subject of reprisals.<sup>130</sup>
- 11.7.13** Small rescue craft and installations lose their protection for such time as they perform any act harmful to the opposing force. In particular, they lose their protected status if they:
- a. are not innocently employed in their normal role,
  - b. do not submit to identification and inspection when required, and
  - c. intentionally hamper the movement of combatants and do not obey orders to stop or move out of the way when required.<sup>131</sup>
- 11.7.14** Members of the NZDF are permitted to attack small rescue craft and installations only if:
- a. diversion or capture is not feasible;
  - b. no other method is available for exercising military control;

125 See **San Remo Manual** rule 50.

126 See **Geneva Convention II** art 27.

127 See **Geneva Convention II** art 27.

128 **Geneva Convention II** art 27(1): "Small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit. The same shall apply so far as possible to fixed coastal installations used exclusively by these craft for their humanitarian missions." **San Remo Manual** rule 47(b) provides that small craft used for coastal rescue operations are exempt from attack.

129 **San Remo Manual** rule 136(a) provides that small craft used for coastal rescue operations are exempt from capture. See also **Geneva Protocol I** art 22, which also provides that coastal rescue craft shall be protected even if notification has not taken place.

130 Under **Geneva Convention II** art 47 reprisals against vessels protected by Geneva Convention II are prohibited. Reprisals against small rescue craft are also prohibited at **Geneva Protocol I** art 20. For reprisals see Chapter 17.

131 See **San Remo Manual** rule 48.



- c. the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; and
- d. collateral casualties or damage will not be disproportionate to the military advantage gained or expected.<sup>132</sup>

#### LIFEBOATS AND LIFE RAFTS MUST BE RESPECTED AND PROTECTED

**11.7.15** A **lifeboat** or **life raft** is a small craft used for the survival of shipwrecked persons or persons who have survived the crash of aircraft at sea.

**11.7.16** Members of the NZDF are not to attack lifeboats and life rafts.<sup>133</sup>

**11.7.17** **Loss of protection.** A lifeboat or life raft loses its protection for such time as the occupants take a direct part in hostilities, for example by calling an attack on the rescuing force. Attack upon them is not justified by the fact that the occupants are fit and well and may be able to carry on the fight if rescued by their own side.

#### MEDICAL AIRCRAFT MUST BE RESPECTED AND PROTECTED

**11.7.18** **Medical aircraft** are aircraft of a party to the conflict used exclusively for the transport of the wounded and sick.<sup>134</sup>

**11.7.19** Members of the NZDF are not to:

- a. attack medical aircraft that are:<sup>135</sup>
  - (1) in or flying over territory controlled by New Zealand or coalition forces or flying over areas of sea not controlled by the opposing force;<sup>136</sup>
  - (2) in or flying over combat areas controlled by New Zealand or where control is disputed, preferably pursuant to a prior agreement with the opposing force;<sup>137</sup>
  - (3) flying over territory or sea controlled by the opposing force pursuant to prior agreement with the opposing force;<sup>138</sup> or

132 See **San Remo Manual** rule 52.

133 **San Remo Manual** rule 47(j) provides that life rafts and lifeboats are exempt from attack. See also *Llandovery Castle Trial*, *Peleus Trial*, *Von Ruchteschell Trial*, and *Moehle Trial*.

134 **Geneva Protocol I** art 8(j): ““medical aircraft” means any medical transport by air.”

135 **Geneva Protocol I** art 24: “Medical aircraft shall be protected and respected.” See also **San Remo Manual** rule 53(a).

136 **Geneva Protocol I** art 25: “In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.”

137 **Geneva Protocol I** art 26: “In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.”

138 **Geneva Protocol I** art 27(1): “The medical aircraft of a Party to the conflict shall continue to be protected while flying over land and sea areas physically controlled by an adverse Party, provided

(4) recognised to be medical aircraft;<sup>139</sup> or

b. make medical aircraft the subject of reprisals.<sup>140</sup>

**11.7.20 Loss of protection.** Medical aircraft lose their protection for so long as they undertake acts harmful to the opposing force. In particular, they are not exempt from attack if they:

- a. have not been recognised as medical aircraft,
- b. are not acting in compliance with an agreement whereby medical flights are notified,
- c. are not flying in an area under the control of their own or friendly forces, or
- d. do not fly outside the area of armed conflict.<sup>141</sup>

**11.7.21** Subject to LOAC and their orders, members of the NZDF may attack aircraft that have breached these requirements only if:

- a. diversion for landing, visit and search, and possible capture, is not feasible;
- b. no other method is available for exercising military control;
- c. the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and
- d. the collateral casualties or collateral damage will not be disproportionate to the military advantage gained or anticipated.<sup>142</sup>

## MEDICAL TRANSPORTS MUST BE RESPECTED AND PROTECTED

**11.7.22 Medical transports** are any form of transport by land, water or air, whether civilian or military, permanent or temporary, assigned exclusively to the transportation of the wounded, sick, shipwrecked, medical personnel and religious personnel, medical equipment and supplies.<sup>143</sup>

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that prior agreement to such flights has been obtained from the competent authority of that adverse Party.”

139 **Geneva Protocol I** art 26 provides that, in the absence of agreements between opposing forces, medical aircraft operate at their own risk but shall nevertheless be respected after they have been recognised.

140 Under **Geneva Protocol I** art 20 reprisals against medical aircraft are prohibited.

141 See **San Remo Manual** rule 54.

142 See **San Remo Manual** rule 57.

143 See **Geneva Protocol I** arts 8(f) and 8(g).

**11.7.23** Medical transports must be respected and protected.<sup>144</sup> In particular, members of the NZDF are not to:

- a. attack medical transports;<sup>145</sup>
- b. make medical transports the subject of reprisals;<sup>146</sup>
- c. use the material of captured medical transports for any purpose other than the care of the wounded and sick;<sup>147</sup>
- d. booby-trap or place manually emplaced munitions on or near medical transports;<sup>148</sup> or
- e. unreasonably stop or delay the movement of medical transports while they are carrying out their humanitarian function.

**11.7.24** Where members of the NZDF are controlling the flow of traffic on any road, reasonable efforts are to be made to ensure that medical transports can move as quickly as possible in order to carry out their humanitarian function. Such assistance is subject to reasonable measures to ensure the security of the force and the civilian population. If the opposing force is known to treacherously misuse protected status of medical transports, great care must be taken to ensure that they are not used as a vehicle from which to launch an attack. Where it is necessary to stop and/or search vehicles, priority is to be given to medical transports wherever practicable to ensure that they are held up for the least possible time.

**11.7.25 Loss of protection.** Medical transports lose their protection for such time as they are used to perform any act harmful to the opposing force and do not heed a warning to rectify the breach of their protected status. Vehicles which are identified as medical transports must not be used for any other military purpose, such as transporting troops.

**11.7.26** Armoured fighting vehicles used as ambulances are not to be used in combat configuration if the protective emblem is to be relied upon. Retaining armaments of .50 calibre and above maintains the capacity of the vehicle to be used in an offensive role inconsistent with its humanitarian function and invites disrespect for the emblem by opposing forces. Armoured fighting vehicles that retain their armament may be used to transport the wounded, but are not to display the Red Cross/Red Crescent protective emblem. This means, however, that they remain liable to being targeted by the opposing force.

144 **ICRC Customary IHL** rule 29: “Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances.” Under **Geneva Convention I** art 35 “transports of wounded or sick or of medical equipment shall be respected and protected in the same way as mobile medical units”. See also **Geneva Protocol I** art 21.

145 **Geneva Protocol I** art 12 states that medical units shall not be the object of attack and art 21 provides that medical vehicles enjoy the same protections as mobile medical units. **Geneva Protocol II** art 11(1): “[In NIAC] medical units shall be respected and protected at all times and shall not be the subject of attack.” See also **Rome Statute** arts 8(2)(b)(xxiv) and 8(2)(e)(ii).

146 See **Geneva Protocol I** art 20.

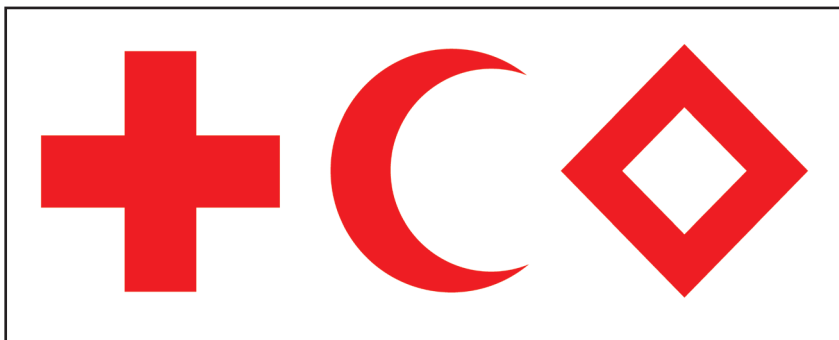
147 See **Geneva Convention I** art 33.

148 See **Conventional Weapons Protocol II** art 7(1)(d).

## SECTION 8 – PROTECTIVE EMBLEMS

## THE EMBLEMS

- 11.8.1** The emblem for medical and religious personnel is the Red Cross, Red Crescent, or Red Crystal (see Figure 1).<sup>149</sup>



**Figure 1** Red Cross, Red Crescent and Red Crystal

- 11.8.2** The distinctive emblems of the Red Cross, Red Crescent or Red Crystal must be displayed on flags and on all equipment used by the medical services, when those services seek to rely on their protected status under LOAC.<sup>150</sup> Field hospitals and dressing stations in the front lines may be precluded from displaying the emblem because of their proximity to fighting and the need to maintain camouflage. This incurs the risk that they will be attacked if the opposing force does not know their true nature.
- 11.8.3** Failure to display the emblem does not deprive medical personnel, religious personnel, medical transports, hospital ships or medical aircraft or establishments of protection if they are known to be such by the attacking force. Failure to use the emblem does not, of itself, render an object liable to attack, unless it is a military objective.
- 11.8.4** Members of the NZDF are to assume that personnel, vehicles, ships, buildings, units or establishments bearing the Red Cross, Red Crescent or Red Crystal are protected unless there is good reason to believe that the emblem is being used treacherously.
- 11.8.5** The Red Cross, Red Crescent or Red Crystal emblems are 'indicative' rather than 'protective' when used by the Red Cross/Red Crescent organisation or national societies and serves only to identify personnel, vehicles, equipment and materials belonging to the society. However, such persons and property will be protected when used in support of medical personnel, medical unit etc. They will, in any event, be civilians, and civilians and civilian property are protected, unless they become a military objective.
- 11.8.6** Members of the NZDF are to treat all uses of the Red Cross, Red Crescent or Red Crystal as protective unless ordered otherwise by COMJFNZ. The advice of an NZDF LEGAD is to be obtained unless this is not practicable.

<sup>149</sup> See **Geneva Convention I** art 38 and **Geneva Protocol III** art 2. Note that use of the Red Lion and Sun emblems listed in **Geneva Convention I** art 38(2) has been discontinued.

<sup>150</sup> See **Geneva Convention I** art 39.

- 11.8.7** Other well-known emblems that have not reached the threshold of international protection include the Red Star of David, used by Israel. Emblems of certain important non-governmental organisations (NGOs) involved in treating injured and sick persons, such as *Médecins Sans Frontières*, are likely to be encountered in areas of operation. Such emblems, although not protected by treaty, are to be respected by members of the NZDF where they are properly used to indicate the presence of a medical unit, facility or transport.
- 11.8.8** NZDF medical and religious personnel are to wear the Red Cross emblem as a badge or brassard on the left arm while on duty and are at all times to carry their issued distinctive identity card.<sup>151</sup> Subject to orders, medical personnel may only dispense with display of the emblem where it would unreasonably endanger them or their patients, for example, by breaking camouflage or by drawing fire from an opposing force which does not respect the emblem.
- 11.8.9** NZDF medical units and establishments are to display the Red Cross emblem and the New Zealand flag. Only where display of these emblems would be likely to cause the unit to come under attack, for example, when it forms part of a camouflaged position, may the emblem and flag be dispensed with.

## Chapter 12

# PERSONS DEPRIVED OF THEIR LIBERTY, PRISONERS OF WAR, RETAINED PERSONNEL, INTERNEES AND DETAINEES

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## SECTION 1 – INTRODUCTION

### GENERAL

- 12.1.1** This chapter sets out the protections applicable to prisoners of war (PWs), retained personnel, internees and detainees.
- 12.1.2** The rules of humane treatment set out in this chapter apply in respect of all persons deprived of their liberty for any reason connected with armed conflict (whether international or non-international) or peace support operations. They are also to be applied to any person under the control of a New Zealand force, even briefly. These standards of treatment are also those to which members of the New Zealand Defence Force (NZDF) are entitled if they are in the power of another force or group.
- 12.1.3** In addition to strong legal norms protecting persons held by a New Zealand force, there are many practical reasons for doing so. Allegations of ill-treatment are highly damaging to the force's reputation and to public support for its operations. A force that ill-treats its captives discourages the enemy from surrender, thereby incurring to itself needless cost in casualties and resources. Ill-treatment also makes it more likely that the opposing force will mistreat its own captives. Although reprisals of this kind are prohibited, disrespect for the rules often encourages disrespect by the enemy. A force that kills or abuses its prisoners denies itself a valuable source of intelligence. Experience shows that careful interrogation is consistently more effective than brutality.
- 12.1.4** **NZDF Code of Conduct** rules relating to this chapter are:
- Do not harm persons who surrender, are detained or are under your control.  
Treat them humanely.*
- Protect them from rape, abuse, torture or degrading treatment.*
- Respect their property.*

## SECTION 2 – GENERAL APPLICATION

### DEFINITIONS

- 12.2.1** **Apprehension** arises from a lawful power of arrest or detention by members of the NZDF.
- 12.2.2** **Capture** covers persons in the power of the NZDF through combat action, usually as a result of their surrender.
- 12.2.3** **Detainees** are persons not entitled to PW, retained personnel or internee status, who have been captured or apprehended for any reason connected with international armed conflict (IAC), non-international armed conflict (NIAC) or a peace support operation. Such persons include:
- a. enemy combatants who have not adequately distinguished themselves from the civilian population;<sup>1</sup>
  - b. members of an armed group in an IAC who do not meet the criteria for combatant status;<sup>2</sup>
  - c. mercenaries;<sup>3</sup>
  - d. members of dissident armed forces or organised armed groups in a NIAC;<sup>4</sup>
  - e. civilians who have taken a direct part in hostilities;<sup>5</sup>
  - f. persons suspected of being spies;<sup>6</sup>
  - g. persons posing a threat to the safety of the force, or to law and order, who are being held until they can be dealt with by the appropriate civil authority, including terrorists and other criminals;<sup>7</sup>
  - h. defectors from the opposing force or civil authority;<sup>8</sup> or
  - i. persons who for any reason do not qualify as protected persons under the Geneva Conventions.<sup>9</sup>

1 Any combatant who fails to meet the requirements of carrying arms openly during operations, or while preparing or launching an attack, is not a PW but is nevertheless entitled to all protection equivalent to that of a PW (see **Geneva Protocol I** arts 44(4) and 45(3)). See also **ICRC Customary IHL** rule 106 and Chapter 6.

2 For example, because the group in question does not have an internal discipline system which enforces LOAC. See **Geneva Convention III** art 4(2), **Geneva Protocol I** arts 43(1), 44(4) and 45(3) and Chapter 6.

3 **Geneva Protocol I** art 47(1) and **ICRC Customary IHL** rule 108. For status of mercenaries see Chapter 6.

4 **Geneva Protocol II** art 1 and 5. For status of dissident armed forces see Chapter 6.

5 For direct participation in hostilities see Chapter 6.

6 For a civilian suspected as a spy see **Geneva Convention IV** art 5, and for a member of the armed forces of a party to the conflict suspected as a spy see **Geneva Protocol I** art 46. See also **ICRC Customary IHL** rule 107. For spies see Chapter 6. For espionage see Chapter 8.

7 The power to detain such persons may be derived from the domestic law of the host-state, or from a UNSCR.

8 Defectors are not entitled to PW status. However, PWs who defect after capture retain their PW status.

9 **Geneva Convention IV** art 4(2): “Nationals of a neutral State who finds themselves in the territory

- 12.2.4 Detaining power** means a State that has deprived a protected person of liberty and exercises power over that person. It includes any authority, unit, organised force or group acting on behalf of that State, regardless of whether it has lawful authority to do so or not.
- 12.2.5 Hostage** means a person unlawfully taken into custody from the civilian population or other protected persons (eg PWs or medical patients) under threat of death, other harm or continued detention for the purposes of:
- a. guaranteeing the good conduct of the civilian population or other protected persons; or
  - b. forcing the opposing power, or other government or authority, to take a course of action.<sup>10</sup>
- 12.2.6 Internees**<sup>11</sup> are persons interned<sup>12</sup> in an IAC for imperative security reasons,<sup>13</sup> including:
- a. foreign civilians in New Zealand territory;<sup>14</sup>
  - b. civilians (including refugees or stateless persons)<sup>15</sup> in territory occupied by a New Zealand force;
  - c. children of internees.<sup>16</sup>
- 12.2.7 NZDF place of detention** means any place in which persons deprived of their liberty are held by members of the NZDF. It includes all PW camps, detention camps, internment camps (ICs), work camps, holding areas and detention areas, whether permanent or temporary and whether formally designated as such or not.
- 12.2.8 Persons deprived of their liberty** means PWs, retained personnel,<sup>17</sup> detainees and internees, and any person who is captured or apprehended by a force and whose legal status is in doubt. It includes persons who are held unlawfully, for example hostages. Although there is no set period of time which determines deprivation of liberty, any exercise of control over the freedom of a person for a period more than three hours is to be regarded as deprivation of liberty.<sup>18</sup>

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of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are [the detaining power]." In addition, nationals of a State not bound by Geneva Convention IV are not protected by it.

10 For prohibition on taking hostages see Chapter 8.

11 See **Geneva Conventions Act 1958** s 2 for 'protected internee'.

12 Internment may also be to an assigned residence (see **Geneva Convention IV** art 78).

13 See **Geneva Convention IV** art 42.

14 See **Geneva Convention IV** art 42, which also provides that any person, acting through the representatives of the Protecting Power, who voluntarily demands internment, shall be interned by the Power in whose hands he or she may be if his or her situation renders this step necessary.

15 **Geneva Protocol I** art 73: "Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction."

16 See **Geneva Convention IV** art 82.

17 Although retained personnel are not prisoners, they are not free to come and go as they please and must therefore also be regarded as having been deprived of their liberty.

18 Note that the obligations of humane treatment cannot be avoided by detaining persons for less than three hours.

**12.2.9 Persons under the control of the NZDF** means persons whose movements or location are dictated by members of the NZDF, for example, people held up at checkpoints, whose access to or exit from certain places is restricted temporarily, or who are being moved from one place to another without the necessity for them to be detained. It is not a legal category; it simply covers people who may not be entitled to any higher protection, but who are nevertheless entitled to humane treatment.<sup>19</sup> ‘Control’ is to be given a wide but realistic meaning. It does not apply to people over whom the NZDF has no physical or lawful powers, for example, individuals who have entered the civilian criminal justice system of the host-state.

**12.2.10 Prisoners of war**<sup>20</sup> means persons captured in the course of an IAC who are:

- a. combatants of the opposing force, even if New Zealand does not recognise the government or authority to which the force professes allegiance,<sup>21</sup> including:
  - (1) all members of the enemy armed forces, except for medical and religious personnel;<sup>22</sup> and
  - (2) members of organised armed groups and units under responsible command<sup>23</sup> that:
    - (a) are subject to an internal discipline system that enforces compliance with the Law of Armed Conflict (LOAC); and
    - (b) wear a distinctive emblem or carry their arms openly;<sup>24</sup>
- b. members of the population of unoccupied territory who spontaneously take up arms to resist invading forces and who carry their arms openly and respect LOAC;<sup>25</sup>
- c. members of forces who, because they are fighting against a colonising force, an occupying force or a racist regime, cannot wear a distinctive emblem or carry their arms openly, as long as they do carry arms openly:
  - (1) during each military engagement; and
  - (2) while visible during deployment preceding the launching of an attack;<sup>26</sup>

19 See **Geneva Protocol I** art 75(1).

20 See **Geneva Conventions Act 1958** s 2 for ‘protected prisoner of war’.

21 See **Geneva Protocol I** arts 43(1) and 44(1). For combatant status see Chapter 6.

22 It is implicit that members of the armed forces must conduct operations in uniform in order to qualify for PW status, although individual members may not be in uniform when captured. For protection of medical and religious personnel, see ‘retained personnel’ below.

23 Under **Geneva Protocol I** art 43 ‘responsible command’ means that the persons are under a command that is responsible to a Party to the conflict for their conduct.

24 See **Geneva Convention III** art 4A(2) and **Geneva Protocol I** arts 43(1) and 44(3). This includes volunteer corps and militias as well as organised resistance movements in occupied territory. For combatant status see Chapter 6.

25 See **Geneva Convention III** art 4A(6). For *levee en masse* see Chapter 6.

26 See **Geneva Protocol I** art 44(3). **Geneva Protocol I New Zealand Declaration**: ‘Visible to the adversary’ includes visible with the aid of any form of surveillance, electronic or otherwise. ‘Deployment’ means any movement towards a place from which an attack is to be launched.

- d. authorised civilians accompanying the armed forces, eg crew members of military aircraft, war correspondents, supply contractors, members of labour units, and welfare personnel;<sup>27</sup>
- e. crews of merchant ships and civil aircraft who do not qualify for more favourable treatment under LOAC;<sup>28</sup>
- f. members or former members of the armed forces of occupied territory interned because of their allegiance;<sup>29</sup>
- g. members of the armed forces of a party to the conflict interned by the NZDF where New Zealand is neutral;<sup>30</sup> and
- h. members of the opposing force permanently assigned and exclusively devoted to civil defence work.<sup>31</sup>

#### 12.2.11 The term PW also applies to:

- a. persons who have been granted PW status by New Zealand even though they are not legally entitled to that status;<sup>32</sup> and
- b. captured persons who may qualify as PW but whose status is in doubt and has not yet been determined by the status review tribunal.<sup>33</sup>

- 27 These people must be issued an identity card by the armed forces they accompany (see **Geneva Convention III** art 4A(4)).
- 28 Under **Geneva Convention III** art 4A(5) this includes masters, pilots and apprentices of the merchant marine and crews of civil aircraft.
- 29 **Geneva Convention III** art 4B(1) provides that the following are to be treated as prisoners of war: "Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power 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". For occupation see Chapter 9.
- 30 For geographic reasons reception of such persons in New Zealand territory is unlikely. They may, however, be picked up by a New Zealand warship if shipwrecked. **Geneva Convention III** art 4B(2) provides that "persons who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, are to be treated as prisoners of war". **Hague Convention V** art 11: "A neutral Power 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 can be left at liberty on giving their parole not to leave the neutral territory without permission." **Hague Convention V** art 13: "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 the neutral Power."
- 31 **Geneva Protocol I** art 67(2) provides that "military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war". For protection of civil defence personnel and property see Chapter 14.
- 32 Such recognition may be by agreement or unilateral decision. For agreements with the opposing force see Chapter 15.
- 33 **Geneva Convention III** art 5(2): "[...] Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories [entitling them to PW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." See also **Geneva Protocol I** art 45(1). For determination of status see Section 9.



**12.2.12** The Commander Joint Forces New Zealand (COMJFNZ) is to advise members of the NZDF of the identity, uniforms or distinguishing emblems and status of persons recognised as entitled to PW status in orders.

**12.2.13** **Retained personnel** are captured medical and religious personnel belonging to the opposing armed forces in an IAC, who have been retained to assist with the medical and religious needs of PWs. They are not considered to be PWs.<sup>34</sup>

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34 **Geneva Convention III** art 33 provides that “members of the medical personnel and chaplains while retained by the Detaining Power with a view of assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention”. For rights and obligations of medical and religious personnel see Chapter 11.

## SECTION 3 – FUNDAMENTAL PROTECTIONS OF ALL PERSONS DEPRIVED OF LIBERTY OR CONTROLLED BY THE NEW ZEALAND DEFENCE FORCE

### PERSONS MUST BE TREATED HUMANELY AT ALL TIMES

- 12.3.1** Members of the NZDF are to treat all persons deprived of their liberty or under NZDF control humanely regardless of their legal status or any other consideration.<sup>35</sup> They are to respect the honour, dignity, person, convictions and religious beliefs of all such persons<sup>36</sup> and are to ensure that they are not subjected to, or threatened<sup>37</sup> with:
- a. murder, wilful killing or being allowed to die through neglect;<sup>38</sup>
  - b. outrages upon their dignity, degrading or humiliating treatment;<sup>39</sup>
  - c. indecency, sexual violence, rape, forced pregnancy, enforced prostitution or enforced sterilisation, regardless of gender, age or any other consideration;<sup>40</sup>
  - d. violence, intimidation, insults, abuse or public curiosity;<sup>41</sup>
  - e. torture or other cruel or inhumane treatment;<sup>42</sup>
  - f. physical mutilation, branding or tattooing;<sup>43</sup>
  - g. serious injury to body or health;<sup>44</sup>
  - h. scientific or medical experiments or medical procedures not consistent with generally accepted medical standards;<sup>45</sup>

35 See **Geneva Convention III** art 13(1), **Geneva Convention IV** arts 27(1), 37 and 100, **Geneva Convention Common Article 3**(1), **Geneva Protocol I** art 75(1), **Geneva Protocol II** art 4(1) and **ICRC Customary IHL** rule 87.

36 See **Geneva Convention III** art 14(1), **Geneva Convention IV** art 27, **Geneva Protocol I** art 75(1), **Geneva Protocol II** art 4(1) and **ICRC Customary IHL** rule 127.

37 See **Geneva Protocol I** art 75(2)(e) and **Geneva Protocol II** art 4(2)(h).

38 See **Geneva Convention III** art 130, **Geneva Convention IV** arts 32 and 147, **Geneva Convention Common Article 3**(1)(a), **Geneva Protocol I** art 75(2)(a)(i) and 85(3)(e), **Geneva Protocol II** art 4(2)(a), **ICRC Customary IHL** rule 89 and **Rome Statute** arts 7(1)(a), 8(2)(a)(i) and 8(2)(c)(i). In the *Tokyo War Crimes Trial* (at 645–646) subjecting PWs to forced ‘death marches’ without sufficient food and water and without rest was a war crime.

39 See **Geneva Convention III** art 14(1), **Geneva Convention IV** arts 27 and 90, **Geneva Convention Common Article 3**, **Geneva Protocol I** art 75(2)(b), **Geneva Protocol II** art 4(2)(e), **ICCPR** art 10(1), **ICRC Customary IHL** rule 90 and **Rome Statute** arts 8(2)(b)(xxi) and 8(2)(c)(ii).

40 See **Geneva Protocol I** art 76(1), **Geneva Protocol II** art 4(2)(e), **ICRC Customary IHL** rule 93 and **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi). For protection of women and children see Chapter 14.

41 See **Geneva Convention III** art 13, **Geneva Convention IV** art 27, *Tokyo War Crimes Trial* at 705–706 and *Essen Lynching Trial*.

42 See **Geneva Convention III** art 17, **Geneva Convention IV** arts 32 and 147, **Geneva Convention Common Article 3**, **Geneva Protocol I** art 75(2)(a)(ii), **Geneva Protocol II** art 4(2)(a), **Torture Convention** art 2, **ICRC Customary IHL** rule 90, **Crimes of Torture Act 1989** s 3, **Rome Statute** arts 8(2)(a)(ii) and 8(2)(c)(i), **ICCPR** art 7 (this right is non-derogable, see art 4), *Furundžija Trial* and *Celibici Trial*.

43 See **Geneva Convention III** art 13, **Geneva Convention IV** arts 32 (mutilation) and 100 (tattooing and branding), **Geneva Convention Common Article 3**(1)(a), **Geneva Protocol I** arts 11(2)(a) (which prohibits physical mutilation of persons deprived of their liberty even with their consent) and 75(2)(a)(iv), **Geneva Protocol II** art 4(2)(a) and **Rome Statute** arts 8(2)(b)(x) and 8(2)(e)(xi).

44 See **Geneva Convention III** art 130, **Geneva Convention IV** arts 32 and 147 and **Rome Statute** art 8(2)(a)(iii).

45 See **Geneva Convention III** arts 13 and 130, **Geneva Convention IV** arts 32 and 147, **Geneva Protocol I** arts 11(2), which also prohibits removal of tissue or organs for transplantation, even with consent, except where these acts are justified by generally accepted medical standards, and

- i. reprisals;<sup>46</sup>
- j. corporal punishment;<sup>47</sup>
- k. persecution<sup>48</sup> or adverse discrimination based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth, sexual orientation or any similar criteria;<sup>49</sup>
- l. collective punishments;<sup>50</sup>
- m. being used to render certain points, areas or military forces immune from attack (eg human shields);<sup>51</sup> and
- n. being held as hostages.<sup>52</sup>

**12.3.2** Members of the NZDF are to take all necessary steps to ensure that persons deprived of liberty or who are under their control are not denied the necessities of life. Wilfully allowing persons to die of disease, hunger, thirst or exhaustion is murder. Persons deprived of liberty or under NZDF control are to be protected from attack by other members of the force, coalition partners and the civilian population.

11(5) (the right to refuse any surgical operation), **Geneva Protocol II** art 5(2)(e), **ICRC Customary IHL** rule 92 and **Rome Statute** arts 8(2)(b)(x) and 8(2)(e)(xi). In the *Medical Trial* conducting medical experiments on PWs was a war crime, and on other persons was a crime against humanity. See also Chapter 11.

46 See **Geneva Convention III** art 13, **Geneva Convention IV** art 33, **ICRC Customary IHL** rule 146, *Kupreškić Trial* and Chapter 17.

47 See **Geneva Convention IV** art 32, **Geneva Protocol I** art 75(2)(a)(iii). **Geneva Protocol II** art 4(2)(a) and **ICRC Customary IHL** rule 91. In the *Major War Criminals Trial* ordering corporal punishment against recalcitrant PWs was a war crime. In the *Tokyo War Crimes Trial* use of corporal punishment against PWs for the slightest offence, or no offence, was a war crime.

48 **Rome Statute** art 7(2)(g): “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” In the *Kupreškić Trial* (at [621]), the ICTY Trial Chamber defined persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in customary or treaty law”. For persecution as a crime against humanity see **Rome Statute** art 7(1)(h). See also *Tadić Trial* at [20] and Chapter 17.

49 **Geneva Convention III** art 16 requires that “all prisoners of war shall be treated alike by the Detaining Power, without adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria”. See also **Geneva Convention Common Article 3(1)**, **Geneva Convention IV** art 27, **Geneva Protocol I** art 75(1) under which discrimination on the basis of national or social origin, wealth, birth or other status is also unlawful, **Geneva Protocol II** art 2(1), **ICRC Customary IHL** rule 88 and Chapter 4.

50 **Geneva Convention IV** art 33(1): “No protected person may be punished for an offence he or she has not personally committed. Collective penalties [...] are prohibited [...].” See also **Geneva Convention III** art 87, **Geneva Protocol I** art 75(2)(d), **Geneva Protocol II** art 4(2)(b) and **ICRC Customary IHL** rule 103.

51 **Geneva Convention III** art 23(1): “No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations [...].” **Geneva Convention IV** art 28: “The presence of a protected person may not be used to render certain points or areas immune from military operations.” See also **ICRC Customary IHL** rule 97 and **Rome Statute** art 8(2)(b)(xxiii). While no equivalent provision applies to NIAC, such treatment amounts to inhumane treatment. For human shields see Chapter 8.

52 See **Geneva Convention IV** arts 34 and 147, **Geneva Convention Common Article 3(1)(b)**, **Geneva Protocol I** art 75(2)(c), **Geneva Protocol II** Art 4(2)(c), **ICRC Customary IHL** rule 96, **Rome Statute** arts 8(2)(a)(viii) and 8(2)(c)(iii), **Hostages Convention** arts 1 and 2 and **Crimes (IPP, UN & AP, & Hostages) Act 1980** s 8. In the *Hostages Trial* it was held that arbitrary killings of hostages was a war crime.

**PERSONS ARE TO BE PROTECTED FROM PUBLIC CURIOSITY**

- 12.3.3** All persons deprived of their liberty are to be protected from public curiosity. Although capture of members of an opposing force is always newsworthy, persons deprived of liberty are not to be paraded or exhibited to the public or media. Members of the NZDF in charge of media relations are to ensure that images are not produced that show the faces of particular individuals or which are calculated or likely to ridicule or dishonour them individually or collectively.

**USE OF FORCE MUST BE PROPORTIONATE AND A LAST RESORT**

- 12.3.4** PWs are *hors de combat*, detained personnel keep their protection as non-combatants, and all other classes of persons deprived of their liberty are protected as civilians. Regardless of status, they are all immune from attack. Members of the NZDF are not to attack persons deprived of liberty or under NZDF control except if they take a direct part in hostilities. Any other use of force against such persons, especially deadly force, is justified only if it is reasonably proportionate to their actions. Force is not to be used to punish them,<sup>53</sup> intimidate or terrorise them, or as a reprisal.<sup>54</sup> Members of the NZDF are only to use force as a last resort, where that force is necessary:

- a. for self-defence of the guards or defence of other persons;<sup>55</sup>
- b. to quell a riot;<sup>56</sup> or
- c. to prevent escape of persons deprived of liberty, or to recapture persons who have escaped.<sup>57</sup>

- 12.3.5** Use of force is to be:

- a. no more than it is reasonable to use in the circumstances; and
- b. preceded, wherever possible, by warnings in a language those persons will understand.<sup>58</sup>

**COMPELLING MILITARY SERVICE IS PROHIBITED**

- 12.3.6** Members of the NZDF are not to compel persons deprived of their liberty to:

- a. serve in the NZDF or any force under the control of the NZDF, or in any group that directly supports NZDF operations;<sup>59</sup> or
- b. do any work of a fundamentally military nature.<sup>60</sup>

53 For punishment of PWs, see Section 11.

54 For reprisals, see Chapter 17.

55 For self-defence see **Crimes Act 1961** s 48.

56 For riots see **Crimes Act 1961** ss 43, 45–47.

57 For prevention of escape or rescue see **Crimes Act 1961** s 40. For prevention of certain offences see **Crimes Act 1961** s 41.

58 **Geneva Convention III** art 42: “The use of weapons against prisoners of war, especially those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.”

59 **Geneva Convention III** art 130 provides that compelling a PW to serve in the forces of a hostile power is a grave breach. **Geneva Convention IV** provides that an “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”. To do so is a grave breach (see art 147). See also **Rome Statute** art 8(2)(a)(v). In the *Major War Criminal Trial* (at 246) using Russian PWs to operate anti-aircraft guns was a war crime. The compelling of military service by detainees in NIAC is prohibited for the NZDF for practical and humanitarian reasons, although this is not addressed in treaty law.

60 For work of PWs see Section 12.

**SLEEP DEPRIVATION IS PROHIBITED**

- 12.3.7** Sleep deprivation is not to be used as a method of punishment, intimidation or as an interrogation technique. Persons deprived of their liberty are to be given at least eight hours' rest per 24-hour period, during which there is to be an opportunity to sleep for a single undisturbed period of no less than four hours.
- 12.3.8** Operational circumstances may result in the sleep of persons deprived of liberty being disrupted or delayed. They may need to be woken up for safety or security reasons, for example fire drills or searches for weapons or contraband. Disturbance of sleep may also be necessary during transfers. These factors do not justify deliberately and repeatedly waking persons, or keeping them awake, with a view to causing them disorientation or mental distress.

**SEXUAL EXPLOITATION IS PROHIBITED**

- 12.3.9** NZDF commanders are to take all necessary steps to prevent sexual exploitation arising from the imbalance of power that exists between members of the NZDF and persons deprived of liberty or under their control.
- 12.3.10** Members of the NZDF are not to engage in any form of sexual activity or close personal relationship with any person deprived of liberty or under NZDF control, regardless of that person's age or gender, and regardless of whether the person consents or appears to consent.<sup>61</sup> Members of the NZDF are not to attempt to induce such a relationship by offering improved conditions, food or money or any other form of reward.
- 12.3.11** Any person subject to the Armed Forces Discipline Act 1971 (AFDA) who engages or attempts to engage in any form of sexual relationship or close personal relationship with any person deprived of their liberty or under NZDF control is to be immediately suspended from duty and is to face investigation under AFDA.

**UNUSUAL CONDITIONS OF COMBAT DO NOT EXCUSE BREACHES OF LAW OF ARMED CONFLICT**

- 12.3.12** Members of the NZDF are not to kill or harm persons they have captured or apprehended even if custody of those persons inhibits operations or endangers the capturing force. If, due to unusual conditions of combat, it is not possible for members of the NZDF to evacuate or transfer such persons, they are to be disarmed, released and all feasible precautions are to be taken to ensure their safety.<sup>62</sup>
- 12.3.13** Unforeseen circumstances beyond the control of the force (eg unexpectedly high numbers of surrenders or enemy interdiction of supplies) may make it impossible to fully comply with all requirements of LOAC. In such cases, members of the NZDF are to provide the highest level of care and treatment possible to persons deprived of liberty or under NZDF control within the resources available to them.<sup>63</sup>

61 See **Crimes Act 1961** s 128A. In particular, consent cannot be recognised as genuine where a person is deprived of liberty and is reliant on the other party for security and the necessities of life. See **Rome Statute** Rules of Procedure and Evidence, rule 70.

62 See **Geneva Protocol I** art 41(3).

63 **Aleksovski Trial** at [213–221]: The ICTY Trial Chamber noted that generally poor conditions of detention can, to a certain extent, be excused by the circumstances under which the detention centre is being run.

- 12.3.14** Neglect of persons cannot be excused on the basis that the force is under-resourced or ill-prepared for detention operations if these failures arise from poor planning. Deliberately inhumane treatment can never be excused.<sup>64</sup> If the commander of an NZDF place of detention considers that available resources are insufficient to ensure the proper treatment of persons deprived of liberty, that officer is to report the matter to the Chief of Defence Force (CDF), through COMJFNZ. COMJFNZ is to ensure that all deficiencies are rectified without delay.

### THE PROPERTY OF PERSONS DEPRIVED OF LIBERTY MUST BE RESPECTED AND PROTECTED

- 12.3.15** Members of the NZDF are not to steal or loot the property of any person deprived of liberty or under NZDF control.<sup>65</sup>
- 12.3.16** Members of the NZDF are not to take money or property from such persons except on orders of an officer. Any money and property taken is to be held in safe-keeping with details of the amount and ownership being registered and a receipt given.<sup>66</sup>
- 12.3.17** All military property taken from captured members of an opposing force is booty and belongs to the New Zealand Government, not to individual units or members of the NZDF.<sup>67</sup> Property of persons not part of an opposing force is not booty; it remains at all times the property of the true owner.
- 12.3.18** Members of NZDF are not to:
- a. barter or trade with persons deprived of their liberty or under their control for items of personal property; or
  - b. accept gifts of money or valuable items from persons deprived of their liberty or under their control, their family or associates.
- 12.3.19** On release, all property and money taken from persons deprived of liberty is to be returned, except where such property has been properly confiscated in accordance with New Zealand law, for example seized evidence relating to a crime.<sup>68</sup>

64 In the **Tokyo War Crimes Trial** the argument that PWs were starved because of the difficulty of providing food in the face of enemy attacks was refuted; offers of food were rejected, supplies provided by the ICRC left undistributed, and these conditions were generally not endured by the captors, only by the prisoners.

65 **Geneva Convention IV** art 33(2): "Pillage [of protected persons] is prohibited." See **AFDA** s 31(a): "Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who steals from, or with intent steal searches, the person of anyone killed, wounded, or captured in the course of any war or warlike operations in which New Zealand is engaged [...]." In the **Jelisić Trial** (at [46–49] and [138]) stealing valuable property from detainees under threat of death was plunder and a war crime. See also **Geneva Convention III** art 18 and **ICRC Customary IHL** rule 122. For looting see Chapter 8.

66 See **Geneva Convention III** art 18 and **Geneva Convention IV** art 97. Persons deprived of liberty are to be allowed to keep some money on them to enable them to make purchases, or shall be issued purchase coupons to an equal amount (see **Geneva Convention III** art 58 and **Geneva Convention IV** art 97).

67 See **ICRC Customary IHL** rule 49.

68 **Geneva Convention III** art 119 provides that on repatriation, "any articles of value impounded from prisoners of war under Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122". **Geneva Convention IV** art 97



## SECTION 4 – DUTIES AT THE OUTBREAK OF HOSTILITIES

## ACTIONS FOR THE BENEFIT OF PERSONS DEPRIVED OF LIBERTY

**12.4.1** At the commencement of hostilities, CDF will ensure that the following actions are taken for the benefit of persons deprived of their liberty:

- a. Determination of any protecting power or substitute.<sup>69</sup>
- b. Prescribing procedures to enable:
  - (1) recording and transmission of information relating to the identity, health, location, escape or death of persons deprived of liberty<sup>70</sup> to a national Information Bureau or the Central Prisoners of War Information Agency,<sup>71</sup> to the International Committee of the Red Cross (ICRC), to the State concerned or to next of kin; and
  - (2) collection and forwarding of personal valuables, money and documents of persons who have been repatriated or released or who have escaped or died, to the Information Bureau, to the State concerned or to next of kin.<sup>72</sup>

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provides that on “release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts [...] with the exception of any article or amounts withheld by the Detaining Power by virtue of its legislation in force. If property is withheld, the owner shall receive a detailed receipt”. See **AFDA** s 99 for disposal of property taken in search. For confiscated cultural property see Chapter 14.

69 See **Geneva Protocol I** art 2(c) and Chapter 16.

70 **Geneva Convention III** art 122 provides that the information collected on PWs “shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent”. In addition, the “Information Bureau shall receive from the various departments concerned information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths” of PWs. “Likewise, information regarding the state of health of prisoners of war who are seriously ill or seriously wounded, shall be supplied regularly, every week if possible”. **Geneva Convention IV** art 136(2): “[...] Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.”

71 See **Geneva Convention III** arts 122–125 and **Geneva Convention IV** arts 136–141 for establishment of official information bureaux. As such bureaux will operate independently of the NZDF, detailed procedures are not addressed in this manual and will have to be established when needed.

72 **Geneva Convention III** art 122: “[...] The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died, and shall forward the said valuables to the Powers concerned. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full particulars of the identity of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Other personal effects of such prisoners of war shall be transmitted under arrangements between the Parties to the conflict concerned.”



- c. Issuing identity cards to persons whose special status requires such cards.<sup>73</sup>
- d. Setting up a Mixed Medical Commission to examine sick and wounded PWs, and to make appropriate decisions regarding them.<sup>74</sup>
- e. Providing for the registration of graves of persons deprived of liberty who have died.<sup>75</sup>
- f. Establishing a means for persons deprived of their liberty to communicate with their families.
- g. Notifying the opposing force of:
  - (1) NZDF titles and ranks<sup>76</sup> and rules relating to parole;<sup>77</sup>
  - (2) locations and marking of NZDF places of detention and transports;<sup>78</sup>
  - (3) arrangements enabling persons to exercise their right of correspondence and to receive relief supplies and of any changes in those arrangements;<sup>79</sup> and
  - (4) New Zealand law relating to the wills of members of the NZDF held as PWs by the opposing force.<sup>80</sup>

## COMMANDERS MUST PLAN FOR THE CAPTURE, APPREHENSION AND DETENTION OF PERSONS

**12.4.2** Capture or apprehension of persons can occur in all operations. Persons may come into the power of a New Zealand force through a number of circumstances, including:

- a. capitulation of the opposing force in whole or in part;
- b. capture individually or in small groups, eg as a result of having been captured by patrols;
- c. transfer of prisoners to the force by a coalition partner;
- d. collection of the wounded, sick, or shipwrecked;<sup>81</sup>

73 See **Geneva Convention III** art 17. The NZDF identity card meets these requirements. See also **Geneva Convention I** art 40, **Geneva Convention II** art 42 and **Geneva Protocol I** art 18(3) for identification of medical and religious personnel and **Geneva Protocol I** art 79(3) for identity cards for journalists.

74 See **Geneva Convention III** art 112 and Annex II. For wounded and sick see Chapter 11.

75 **Geneva Convention III** art 120 requires that, in order that “graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power”. See also **Geneva Convention IV** art 130.

76 See **Geneva Convention III** art 43.

77 See **Geneva Convention III** art 21.

78 See **Geneva Convention III** art 23 and **Geneva Convention IV** art 83.

79 See **Geneva Convention III** art 69.

80 **Geneva Convention III** art 120 provides that “wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin”. See also **Wills Act 2007** ss 34 and 38.

81 See **Geneva Protocol I** art 44(8).

- e. assumption of responsibility for persons already deprived of liberty in occupied territory, eg common criminals in prisons;
- f. persons handed over by the local population for alleged crimes or as a security risk; and
- g. persons arrested for civil unrest, rioting or looting.

#### **12.4.3** COMJFNZ is to ensure that:

- a. all planning is based on the assumption that a New Zealand force will capture or apprehend persons of different legal status, physical and mental condition, age and of both sexes;
- b. all plans provide for captured or apprehended persons to be:
  - (1) detained in suitable conditions and under the care of appropriate numbers and types of NZDF personnel;
  - (2) transferred to a coalition partner or the civil authorities of the host-state subject to guarantees of proper treatment; or
  - (3) released if continued detention or transfer is not legally justified;
- c. NZDF places of detention are adequately resourced for all likely contingencies;
- d. members of the NZDF are properly trained in their duties and LOAC obligations in respect of persons deprived of their liberty;
- e. adequate medical facilities are provided for the care of wounded and sick persons;
- f. sufficient numbers of female members of the NZDF are available to search and guard women deprived of their liberty; and
- g. New Zealand forces are supplied with the appropriate forms and resources to record and report the capture or apprehension of persons, their transfer to another force or authority or other incidents and activities required to be recorded or reported by LOAC.

### **STANDING ORDERS**

#### **12.4.4** The commander of a New Zealand force is to ensure that standing orders for the force contain orders on the following topics:

- a. Requirements for humane treatment of persons deprived of liberty or under the control of the force.
- b. Prohibition of sexual exploitation.
- c. Protection of the property of persons deprived of liberty or under NZDF control.
- d. Procedures for receiving and investigating complaints about treatment.

- e. Procedures for facilitating visits and interviews by the Protecting Power, ICRC and authorised human rights organisations.
- f. Strictly limiting persons who are authorised to have access to persons deprived of liberty.

### COMMAND OF PLACES OF DETENTION

**12.4.5** COMJFNZ is to appoint a suitable and qualified officer of the Armed Forces to be the commander for each NZDF place of detention.<sup>82</sup> No officer is to be appointed unless he or she:

- a. has qualified on an NZDF LOAC Level 3 course;<sup>83</sup> and
- b. is appointed a commanding officer (CO) for discipline and has qualified as a disciplinary officer (DISCO) in respect of every person subject to the AFDA who is:
  - (1) posted to, serving with, attached to, working at or visiting the NZDF place of detention;<sup>84</sup> and
  - (2) held at the place of detention.<sup>85</sup>

**12.4.6** COMJFNZ is to ensure that at least one copy of the following documents, in English and in the language(s) persons held there will understand, is available and displayed at each NZDF place of detention:

- a. The Geneva Conventions and any special agreement supplementing those conventions.
- b. Geneva Protocols I, II and III.

**12.4.7** COMJFNZ is to ensure that members of the NZDF:

- a. posted to, serving with or attached to NZDF places of detention;
- b. fulfilling a Service police function; or
- c. otherwise likely to be involved in the handling or custody of persons deprived of their liberty;

82 **Geneva Convention III** art 39(1) states that every “prisoner of war camp shall be placed under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power”. This does not exclude Territorial Force officers who are transferred to the Regular Force for the period of an operation. For the definition of members of the Regular Force see **DA** s 13.

83 See Chapter 18.

84 This includes members of the Civil Staff and other civilians subject to the AFDA (see **AFDA** s 16).

85 This includes PWs (see **AFDA** s 12).

are given sufficient training in their duties and have access to this manual and all provisions of LOAC relating to the treatment, rights and obligations of persons deprived of their liberty. All affected members of the NZDF are to familiarise themselves with those provisions.<sup>86</sup>

## SPECIAL AGREEMENTS

**12.4.8** New Zealand may make special agreements with other parties to the conflict<sup>87</sup> relating to:

- a. procedures for the relief of retained personnel;<sup>88</sup>
- b. pay of PWS;<sup>89</sup>
- c. conditions for sending individual parcels and collective relief;<sup>90</sup>
- d. accommodation in neutral countries of sick and wounded PWs and direct repatriation or internment in a neutral country of PWs who have undergone a long period of captivity;<sup>91</sup>
- e. release and, where appropriate, repatriation of persons deprived of liberty after the cessation of active hostilities;<sup>92</sup>
- f. the conduct of inquiries into any alleged breach of LOAC;<sup>93</sup>
- g. extending the application of Geneva Convention III and IV;<sup>94</sup> and
- h. granting of PW status to members of an opposing force even if not legally entitled to that status.

**12.4.9** No agreement or arrangement can have the effect of denying to persons deprived of their liberty the rights to which they are entitled under LOAC.<sup>95</sup> Members of the NZDF must be told of the existence of any such agreement or arrangement in orders.

86 **Geneva Convention III** art 127 requires that any “military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of [Geneva Convention III] and be specially instructed as to its provisions”. **Geneva Convention IV** art 144 requires that any “civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of [Geneva Convention IV] and be specially instructed as to its provisions”.

87 Agreements may also be made with the UN. For agreements see Chapter 15.

88 See **Geneva Convention III** art 33 and **Geneva Convention IV** art 109 and Annex II.

89 See **Geneva Convention III** arts 60, 65 and 67.

90 See **Geneva Convention III** arts 72, 73 and 75 and **Geneva Convention IV** art 109 and Annex II.

91 See **Geneva Convention III** arts 109 and 110.

92 See **Geneva Convention IV** art 132.

93 **Geneva Convention III** art 132 and **Geneva Convention IV** art 149. See Section 10 for inquiries into mistreatment.

94 **Geneva Convention Common Article 3** requires that, in NIAC, the “Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the [Geneva] Convention”. For agreements with the opposing force see Chapter 15.

95 See **Geneva Convention III** art 6 and **Geneva Convention IV** art 7.

## SECTION 5 – DUTIES COMMENCING AT THE POINT OF CAPTURE

### CAPTURED PERSONS MUST BE RESPECTED AND PROTECTED

**12.5.1** Members of the NZDF are to apply LOAC protections to persons deprived of their liberty from the moment of capture or apprehension.<sup>96</sup> Members of the NZDF are to:

- a. accept the surrender of any person seeking to do so at the first moment that it is safe to do so;<sup>97</sup>
- b. protect the person from attack by members of the force, coalition partners or members of the civilian population;<sup>98</sup> and
- c. care for any person who is wounded or sick as promptly as possible.<sup>99</sup>

**12.5.2** Persons who indicate an intention to surrender but then carry out any hostile act lose their immunity and may be attacked. Hostile acts include attacks on the capturing force or attempts to send radio messages, destroy codes or damage military equipment.

**12.5.3** A person who has engaged in a false surrender may not be denied quarter if a subsequent, genuine, surrender is made. In such circumstances, the capturing force must be doubly wary of treachery and the person surrendering is not to be allowed to take advantage of uncertainty about whether his or her actions are genuine.

**12.5.4** A New Zealand force is not required to allow opposing forces to dictate the time and place of their surrender. They can be required to wait for a lull in combat activity or for the arrival of more friendly forces before their surrender is accepted.

### SEARCHING AND INITIAL PROCESSING

**12.5.5** Members of the NZDF are to carefully search captured or apprehended persons. The dignity of the person being searched is to be protected to the greatest degree possible in the circumstances. Persons being searched may be placed in 'search positions' such as lying face down on the ground or with their hands spread against a wall. The person is not to be left in that position any longer than is necessary to complete the search. Subject to orders, members of the NZDF are to take, tag and record the following items:<sup>100</sup>

- a. Arms and ammunition, knives, razors and any other means of causing harm to themselves, members of the NZDF or other prisoners.

96 See **Geneva Convention III** art 5. Protections apply to PWs from the time that they fall into the power of the enemy.

97 It is prohibited to order that there shall be no survivors (see **Hague Regulations** art 23(d), **Geneva Protocol I** art 40, **Geneva Protocol II** art 4(1), **ICRC Customary IHL** rule 46 and **Rome Statute** arts 8(2)(b)(xii) and 8(2)(e)(x)). For prohibition of denial of quarter see Chapter 8.

98 See **Hague Regulations** art 23(c), **Geneva Convention Common Article 3**(1)(a), **Geneva Protocol I** arts 41(1) and 85(3)(e), **Geneva Protocol II** art 4(2)(a), **ICRC Customary IHL** rule 47 and **Rome Statute** art 8(2)(b)(vi). For prohibition on attack on persons *hors de combat* see Chapter 8.

99 See **Geneva Convention I** art 12 for wounded and sick on land, **Geneva Convention II** art 12 for the wounded, sick and shipwrecked at sea and **Geneva Convention IV** art 16 for civilians.

100 See **Geneva Convention III** art 18, which also states that the "Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply. Such objects [...] shall be kept in the custody of the Detaining Power and returned in their initial shape to prisoners of war at the end of captivity".

- b. Military equipment other than uniforms, insignia, and protective equipment.
- c. Documents, maps, orders, diaries and logs, compasses, notebooks, or any other information of military value.
- d. Computers, cellphones and other electronic devices capable of sending a message or storing data.
- e. Objects reasonably believed to have been looted or stolen.

**12.5.6** Members of the NZDF are to ensure that persons deprived of their liberty are left in possession of the following objects:<sup>101</sup>

- a. Personal possessions, eg eyeglasses, personal letters, family photographs.
- b. Military/civilian clothing and protective equipment, such as helmets, body armour and gas masks.
- c. Decorations, insignia, badges of rank.
- d. Eating equipment, ration packs and water bottles.
- e. Identity cards and discs or similar personal papers.
- f. Items of religious significance, such as books of prayer.

**12.5.7** Metal eating utensils may be removed if security so requires. Plastic utensils must be substituted at the earliest opportunity.

#### **SPECIAL RESPECT MUST BE PAID TO GENDER AND AGE**

**12.5.8** Women and girls are only to be searched by women.<sup>102</sup> Men and boys are only to be searched by men. Where the circumstances of the capture or apprehension make this impossible, members of the NZDF must not be exposed to needless danger by allowing members of the opposite sex to retain hidden weapons or explosives. In such cases, searching a person of the opposite sex or a child is to be done in the presence of another person. Members of the NZDF searching any person, particularly a member of the opposite sex or a child, are not to do or say anything likely to be regarded as indecent.

**12.5.9** Intimate body searches<sup>103</sup> of any person, regardless of gender or age, are to be carried out in an established NZDF place of detention only, on the orders of an officer, and under strict conditions guaranteeing the safety and privacy of the person being searched.

**12.5.10** The potential to capture or apprehend women or children for reasons connected with conflict is now commonplace. Planning for operations must include the need to search female and child prisoners without humiliating them or running the risk of sexual assault. There can be no excuse for failing to provide female guards to search and control women deprived of liberty once they are taken to

<sup>101</sup> See **Geneva Convention III** art 18 and **Geneva Convention IV** art 97.

<sup>102</sup> For protection of women see Chapter 14.

<sup>103</sup> That is, searching body orifices or cavities.

an established NZDF place of detention. Wherever possible, electronic scanners are to be used to reduce the need for physical contact with the person being searched.

## PERSONS MUST BE TOLD OF THE REASON FOR CAPTURE OR APPREHENSION

**12.5.11** Captured or apprehended persons are to be told, as soon as possible and in a language they understand, the reasons why they are being deprived of liberty.<sup>104</sup> The information on the card set out in Annex A is to be read to them and they are to be given a copy of the card.

**12.5.12** Where persons have been apprehended and removed without warning from their home or place of work, a card as set out in Annex B is to be left at that place and with the civilian authorities where practicable, advising of the apprehension and its reason.

## PRECAUTIONS TO BE TAKEN AT TIME OF CAPTURE OR APPREHENSION

**12.5.13** The moments leading up to and immediately after capture are highly dangerous to captor and prisoner alike. Members of the NZDF are to take all reasonable steps to ensure that they are not unnecessarily exposed to risk while taking prisoners. A greater degree of searching and physical control is justified when the members of the opposing force are known to engage in treacherous attacks or tactics such as detonating concealed explosive vests or grenades.

## CAPTURE OR APPREHENSION MUST BE REPORTED

**12.5.14** Recording and reporting that a person has been captured or apprehended, and why, is essential for the following purposes:

- a. Ensuring that no person is held by the force whose existence, physical condition and identity is not recorded.
- b. Preventing the disappearance of protected persons.<sup>105</sup>
- c. Providing information or intelligence of military value.
- d. Providing information required by national and international bodies concerned with the welfare of protected persons.<sup>106</sup>
- e. Assisting investigation of international and domestic crimes.
- f. Providing information for determining status under LOAC, in particular whether he or she is entitled to PW status.<sup>107</sup>

<sup>104</sup> See **Geneva Protocol I** art 75(3).

<sup>105</sup> **Geneva Protocol I** art 33(2): "In order to facilitate the gathering of information [relating to missing persons], each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol: (a) record the information specified in Article 138 of the Fourth Convention in respect of persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention." Inability to account for persons known to have been taken into custody may give rise to accusations of murder or other crimes which may be hard to dispel. For enforced disappearances see **Rome Statute** arts 7(1)(i) and 7(2)(i) and **ICRC Customary IHL** rule 98.

<sup>106</sup> See **Geneva Convention III** arts 122 and 123.

<sup>107</sup> See Section 9.



**12.5.15** The commander of a New Zealand force that has captured or apprehended any person is to ensure that the following information is recorded on a card or electronic file, is preserved and is transmitted without delay to COMJFNZ.<sup>108</sup>

- a. The person's identity (if known).
- b. Reason for capture or apprehension.
- c. Time, place and circumstances of capture or apprehension.
- d. Any wounds or illness of the person.
- e. The current location of the person.

**12.5.16** The person's identity, location and physical condition is to be passed to an appropriate Information Bureau (if any) and the Protecting Power or ICRC.<sup>109</sup>

**12.5.17** Details of the time, place and circumstances of the capture may be withheld, where necessary, for the maintenance of security. The information and the reason why it must not be released is to be advised to CDF, through COMJFNZ, without delay.

**12.5.18** No physical or mental torture, nor any other form of coercion, may be inflicted upon any person deprived of their liberty or under the control of the NZDF, to secure from them information of any kind, including details of identity. Persons who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.<sup>110</sup>

**12.5.19** If the circumstances make it impracticable to do so at the point of capture or apprehension, identity information is to be gathered as soon as possible afterwards. This may arise because:

- a. combat is continuing and constitutes a danger to captor and prisoner alike;
- b. the person is sick or injured, in which case the priority is to be given to treatment and evacuation; he or she is to be given a unique identification number and handed over to the medical service without delay;<sup>111</sup>
- c. the person only speaks a language that members of the capturing force cannot speak; or
- d. the person seeks to conceal his or her true identity.

**12.5.20** Members of the NZDF are not at any time to leave persons without identity documents or discs. If they do not have identity documents or discs, an identity tag, such as in Annex C, is to be provided at the earliest opportunity.<sup>112</sup>

108 See **ICRC Customary IHL** rule 123.

109 See **Geneva Convention III** arts 122 and 123.

110 See **Geneva Convention III** art 17.

111 **Geneva Convention III** art 17 states that PWs who, "owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service". See also Chapter 11.

112 See **Geneva Convention III** art 18, which also states that the "Detaining Power shall supply [identity] documents to prisoners of war who possess none". See also **Geneva Convention III** art 17, and Annex C.

- 12.5.21** In coalition force operations, the capture or apprehension of a person may not be solely attributable to members of the armed forces of a particular State. For practical purposes, the force in whose control the person is in at the time of evacuation from the area of operations should be regarded as the capturing force.
- 12.5.22** A New Zealand force may need to hand captured or apprehended persons over, with or without questioning them, to specialised units of Service police or intelligence personnel responsible for processing them. Satisfactory identification may not be possible before this is done. The capturing force is to do its best to record details of captured or apprehended persons including, wherever possible, photographs and biometric material (eg fingerprints). The combined nature of an operation does not relieve members of the NZDF of the duty to comply with the fundamental duties of humane treatment under LOAC for however long the person is in their control.<sup>113</sup>

### DOUBT AS TO LEGAL STATUS

- 12.5.23** When the legal status of a captured or apprehended person is in doubt, if they fall into one of the categories listed in article 4 of Geneva Convention III, then they are to be granted PW status until such time as their status has been determined by a competent tribunal.<sup>114</sup> In such cases of doubt, the commander of the capturing force is to make a report recording:
- a. the circumstances of capture;
  - b. whether the person directly participated in hostilities<sup>115</sup> and, if so, how;
  - c. whether the person was carrying weapons openly for such time as he or she was:
    - (1) involved in combat action; or
    - (2) visible to the capturing force while engaged in deployment preceding the launching of an attack;
  - d. whether the person was:
    - (1) in uniform; or
    - (2) wore a distinctive emblem visible at a distance; and
  - e. what status, if any, the person claims to hold.

<sup>113</sup> For humane treatment, see Section 3 and Section 5.

<sup>114</sup> See **Geneva Convention III** art 5.

<sup>115</sup> For direct part in hostilities see Chapter 6.

## SECTION 6 – QUESTIONING AND INTERROGATION

- 12.6.1** **Questioning** means obtaining information from captured or apprehended persons, the value of which would deteriorate if questioning was delayed. **Interrogation** is the systematic longer term questioning of selected individuals by trained and qualified interrogators.
- 12.6.2** Subject to LOAC and orders, qualified members of the NZDF may conduct questioning of persons at, or soon after, the point of capture or apprehension in order to:
- a. ascertain a person's identity and status;<sup>116</sup>
  - b. obtain information of intelligence and security value; or
  - c. obtain evidence relating to domestic or international crimes.
- 12.6.3** Questioning or interrogation, in a language that the person understands, may be initiated or continued once the person has been evacuated to a place of detention. Questioning or interrogation is not to be conducted by any person whose function is to guard or protect persons deprived of their liberty.

### IMPROPER METHODS OF INTERROGATION ARE PROHIBITED

- 12.6.4** Questioning and interrogation must comply with the fundamental rules of humane treatment set out in Section 3. If there is any doubt about the propriety of a method or circumstance of questioning or interrogation, the advice of an NZDF Legal Adviser (LEGAD) is to be obtained before the process begins. Members of the NZDF are not to use any of the following techniques in any circumstances, regardless the importance of the information sought:
- a. Torture or inhumane treatment.<sup>117</sup>
  - b. Degrading treatment, such as leaving persons naked, dressing them in clothes of the opposite gender, or forcing them to engage in acts or contact with items they regard as dirty or repulsive.<sup>118</sup>
  - c. Stress positions,<sup>119</sup> white noise, sleep deprivation, blindfolding,

<sup>116</sup> For status determination see Section 9.

<sup>117</sup> See Section 3.

<sup>118</sup> In the **Furundžija Trial** leaving a female prisoner naked for lengthy periods formed part of the crime of torture. The **Taguba Report** concluded that US MP personnel had intentionally abused detainees at Abu Ghraib Prison in Iraq by forcing prisoners to wear women's underclothing, touch used sanitary products, publicly masturbate, etc.

<sup>119</sup> That is, postures and physical positions intended to cause pain or physical exhaustion. See **Klinge Trial** at 1.

sensory deprivation, deprivation of food or water,<sup>120</sup> exposure to extremes of heat or cold,<sup>121</sup> waterboarding.<sup>122</sup>

- d. Threats of any form of violence or mistreatment,<sup>123</sup> eg attack by guard dogs, or threats to other persons.<sup>124</sup>
- e. Physical or moral coercion.<sup>125</sup>
- f. Offers of more favourable conditions, eg better food, accommodation or pay as a reward for providing information.
- g. Refusal to treat wounds or provide medical attention.<sup>126</sup>
- h. Administering chemicals, drugs or other substances.<sup>127</sup>

### QUESTIONING OF WOUNDED AND SICK, AND MEDICAL STAFF IS LIMITED

**12.6.5** Medical personnel are entitled to protect the medical confidentiality of information obtained in connection with the treatment of patients. No action is to be taken against them or their patients for refusal to disclose such information.<sup>128</sup> Members of the NZDF are not to question medical personnel beyond ascertaining their identity. They are not to interrogate medical personnel about patients under their care.

- 120 **Ireland v UK** at [96] and [168]: Lengthy use of stress positions, white noise, sleep deprivation, blindfolding and deprivation of food or water in combination over a period of hours amounts to ‘inhuman treatment’. It would now be regarded as torture – see **Selmouni v France**. See **Committee Against Torture v Israel** at [23–30]. The use of stress positions, hooding, powerfully loud music and shaking of detainees is prohibited. Detainees must not be treated inhumanely or with a lack of respect for their human dignity. **Celibići Trial** at [530]: The prohibition on inhuman treatment is violated if adequate food, water, clothing, medical care and shelter are not provided in light of the protected persons’ varying habits and health.
- 121 **Killing Trial**: Keeping persons under interrogation in excessively heated cells was found to be a war crime. See also **Klinge Trial**.
- 122 See **Asano Trial**. Waterboarding is the practice of pouring water into the breathing passages of a constrained person, or pouring water onto a cloth over that person’s nose and mouth in order to simulate drowning.
- 123 See **Geneva Protocol I** art 75(2)(e) for the prohibition against threats.
- 124 In the **Taguba Report** the use of military working dogs without muzzles to intimidate and frighten detainees was described as intentional abuse.
- 125 **Geneva Convention IV** art 31: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”
- 126 **Geneva Convention I** art 12 and **Geneva Convention II** art 12 provide that the wounded, sick and shipwrecked shall not be wilfully left without medical assistance and care. **Geneva Convention III** art 13 provides that 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 be regarded as a serious breach of the present Convention”. At the **Killing Trial** (at 70) denying medical treatment to PWS under interrogation was a war crime. In the **Taguba Report** allowing an MP to stitch the wound of a detainee injured by MP personnel was described as ill-treatment.
- 127 Under **Geneva Protocol I** art 11(1) medical procedures not indicated by the state of health of the person concerned are prohibited. Under **Geneva Protocol II** art 5(2)(e) it is prohibited to subject persons to any medical treatment that is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances. See also Chapter 11.
- 128 See **Geneva Protocol I** art 16(3) and **Geneva Protocol II** art 10(4).

- 12.6.6** Members of the NZDF are not to question or interrogate wounded or sick persons beyond ascertaining their identity, unless they have first received the written advice of a medical officer that interrogation will not endanger the health of the wounded or sick person, and have approval of COMJFNZ.<sup>129</sup> Interrogation or questioning must be conducted at a time and in a place that does not disrupt the provision of medical care to that person or other wounded or sick persons.

#### QUESTIONING OF CHILDREN RESTRICTED

- 12.6.7** Subject to LOAC and their orders, members of the NZDF may need to obtain information from children in certain circumstances, for example, where a child soldier has been captured or where the child's identity must be obtained. Questioning is only to be done by trained personnel and is to be done in a way that takes account of the child's age. At the outbreak of hostilities, COMJFNZ is to identify suitable members of the NZDF to question children. Those members are to be provided with specialised training in dealing with children.

#### INFORMATION REQUIRED OF PRISONERS OF WAR

- 12.6.8** The only information that a PW is required to give is his or her:
- a. full name;
  - b. rank;
  - c. regimental, personal or serial number, or equivalent information; and
  - d. date of birth.<sup>130</sup>
- 12.6.9** PWs who refuse to give this information can be denied privileges due to rank or status but cannot otherwise be punished. On no account is coercion to be used to obtain it.<sup>131</sup>

#### INFORMATION FROM OTHER PERSONS DEPRIVED OF LIBERTY

- 12.6.10** Detainees and internees are not obliged by LOAC to provide any information. They may, however, be legally required to provide proof of identity or reasons for their presence in a particular place in accordance with domestic law or the laws of the occupying power. Failure to do so may entail penal consequences.<sup>132</sup> This does not provide an authority for torture or physical compulsion.

129 **Geneva Convention III** art 13 provides that 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". For protection of the sick, wounded and shipwrecked see Chapter 11.

130 See **Geneva Convention III** art 17.

131 See **Geneva Convention III** art 17.

132 For powers of occupying force see Chapter 9.

## SECTION 7 – EVACUATION FROM THE COMBAT ZONE

### EVACUATION MUST BE CONDUCTED QUICKLY, SAFELY AND HUMANELY

- 12.7.1** Members of the NZDF are to ensure that any captured or apprehended person under their control:
- a. is evacuated as quickly as possible to a place of detention<sup>133</sup> that is far enough away from the combat zone for that person to be out of danger; and
  - b. is not unnecessarily exposed to danger while awaiting evacuation.<sup>134</sup>
- 12.7.2** Wounded or sick persons are to be evacuated through medical channels unless they would run greater risks by being moved than by remaining where they are.<sup>135</sup> They are to be provided with medical care during this period and protected from the effects of combat to the best of the ability of the New Zealand force.
- 12.7.3** Members of the NZDF responsible for the evacuation of captured or apprehended persons are to ensure that, as far as practicable:
- a. a list of persons evacuated is made and retained;<sup>136</sup>
  - b. movement is effected humanely, safely and in conditions no worse than those used for transporting members of the NZDF;<sup>137</sup>
  - c. the method of movement is not beyond the physical capabilities of the persons evacuated;<sup>138</sup>
  - d. sufficient food, drinkable water, clothing and medical attention is provided;<sup>139</sup>
  - e. any stay in a transit camp is as brief as possible;<sup>140</sup> and
  - f. vehicles are marked 'PW' or with another agreed emblem so that they are not mistakenly attacked by the opposing force.

### EVACUATION AT SEA

- 12.7.4** The commander of a New Zealand naval ship that captures persons at sea may:
- a. hold persons on board until they can be offloaded safely;
  - b. convey them to a port of a coalition or friendly State;

133 If this is not an NZDF place of detention, the evacuation must also be regarded as a transfer. See Section 9.

134 See **Geneva Convention III** art 19, **Geneva Convention IV** art 83 and **Geneva Protocol II** art 5(2)(c).  
135 **Geneva Convention IV** art 127 provides that "sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands". See also **Geneva Convention III** art 19.

136 If it is not possible to complete such a list, numbers and other details providing the best identification in the circumstances are to be recorded and retained.

137 See **Geneva Convention III** art 20 and **Geneva Convention IV** art 127.

138 See **Geneva Convention IV** art 127.

139 See **Geneva Convention III** art 20 and **Geneva Convention IV** art 127.

140 See **Geneva Convention III** art 20.

- c. convey them to a neutral port; or
- d. where there is an agreement to do so, take them to a port in enemy territory, provided they will not serve again for the duration of the armed conflict.<sup>141</sup>

**12.7.5** Wounded or sick persons captured at sea are to be evacuated to a point of land away from combat action as soon as possible. COMJFNZ is to compile a list of places to which such persons can be taken and is to promulgate and update it as necessary.

**12.7.6** Evacuation vessels are to be marked 'PW' or with another agreed emblem so that they are not mistakenly attacked by the opposing force.

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See **Geneva Convention II** art 16. For LOAC in the maritime environment see Chapter 10.



## SECTION 8 – BLINDFOLDING, EARMUFFING AND RESTRAINT

### BLINDFOLDING, EARMUFFING AND RESTRAINT ARE TO BE USED ONLY WHEN NECESSARY

**12.8.1** COMJFNZ is to ensure that members of the NZDF are trained in the proper use of blindfolds, handcuffs/plasti-cuffs, restraints and earmuffs. Only persons who have been trained in these techniques are to apply them. If there is any doubt as to whether it is appropriate to apply any of these measures, the advice of an NZDF LEGAD is to be obtained before the measure is applied. Subject to their orders and LOAC, members of the NZDF may, where necessary, do the following:

- a. Blindfold captured or apprehended persons while they are in areas of military or security importance. If blindfolding is necessary, blackened goggles are to be used. If these are not available, a soft cloth may be tied firmly over the eyes but not so tightly that it causes pain or is likely cause injury or damage their eyesight. Only in extreme circumstances of security risk are blindfolds and earmuffs to be used at the same time.
- b. Use earmuffs to temporarily stop persons hearing what is going on around them. No other device or method is to be used. Only in extreme circumstances of security risk are blindfolds and earmuffs to be used at the same time.
- c. Temporarily segregate persons prior to interrogation so that they do not communicate with each other.
- d. Handcuff, plasti-cuff or otherwise physically restrain persons for their own protection, the protection of other prisoners or of those interrogating them.

**12.8.2** Members of the NZDF are not to use any of these measures in a way that is cruel, inhuman or degrading. Persons subjected to them are, wherever possible, to be told in a language they understand why the measures are being applied. They are not to be blindfolded, earmuffed, physically restrained or segregated:

- a. for any period longer than necessary;
- b. in a manner likely to cause them pain, cut off circulation, or cause injury;<sup>142</sup> or
- c. as a punishment or reprisal.

**12.8.3** Persons are not to be placed in hoods or have sandbags or other objects placed over their heads that inhibit breathing,<sup>143</sup> or held for extended periods in the dark or in conditions which deprive them temporarily or permanently of the use

142 In *Committee Against Torture v Israel* (at [26]) the Supreme Court of Israel noted that handcuffing persons under interrogation for the protection of the investigator is permitted. However, handcuffing a suspect in an uncomfortable or painful position is not required for the investigator's safety and is prohibited, as is the use of inappropriately small cuffs. There are other ways of preventing the suspect from fleeing which do not involve causing pain and suffering.

143 Persons are to be allowed to retain hats, veils, shawls or scarves over their heads for protection from the elements, for cultural reasons or to protect their privacy. In no circumstances are these items of clothing to be used to inhibit breathing.

of natural senses, such as sight and hearing, or awareness of place and the passing of time.<sup>144</sup>

- 12.8.4** Because blindfolded, earmuffed or restrained persons are particularly susceptible to harm through accident or climatic conditions, any NZDF commander who has ordered or allowed the use of such measures is to constantly monitor the person's welfare and safety. Their need for food and water, shelter, shade, clothing and sanitary facilities is to be monitored and attended to. Particular care is to be taken of persons who are injured, sick, disabled, pregnant or very young or old. If it is necessary to restrain persons while they are being transported, the member of the NZDF responsible is to ensure that restrained persons are not able to be injured through aircraft, vessel or vehicle movement, and that the persons are able to be released from their restraints rapidly in order to evacuate the transport in the case of emergency.
- 12.8.5** Use and duration of use of any of these measures is to be recorded on the card at Annex B and retained. Any member of the NZDF who receives control of a person who has been blindfolded, earmuffed or restrained is to establish how long the person has been subjected to these measures and is to immediately review the need for the measures to continue.

#### REMOVAL OF CLOTHING AND OTHER ITEMS

- 12.8.6** Persons deprived of liberty may be required to remove items, such as belts, as a security measure. They may be temporarily deprived of clothing for sanitary reasons provided that this is done in a way that preserves their dignity and does not provide grounds for allegations of indecency. This is particularly important if the person, for cultural or religious reasons, regards nudity before strangers as especially offensive or degrading. Suitable replacement clothing is to be provided to them as soon as they have been deprived of their own.<sup>145</sup>

<sup>144</sup> **Geneva Convention III** art 25 requires that PW quarters shall have adequate lighting. Art 87(3) states that imprisonment in premises without daylight and, in general, any form of torture or cruelty are forbidden. **Geneva Convention IV** art 118(2) states that imprisonment of internees without daylight is prohibited. See also **UNGAR 43/173** (1988) Principle 6.

<sup>145</sup> The **Taguba Report** into abuses committed at Abu Ghraib Prison, Iraq, described depriving detainees of their clothes for several days at a time and photographing and videoing detainees while they were naked as intentional abuse.

## SECTION 9 – STATUS DETERMINATION AND REASON FOR DETENTION

### PRISONERS OF WAR

**12.9.1** A uniformed member of the enemy armed forces in an IAC is automatically entitled to PW status (or retained personnel status) and can establish this simply by providing his or her name, rank, serial number and date of birth.

**12.9.2** A combatant is not to be denied PW status because he or she is alleged to have breached LOAC.<sup>146</sup> A person may be tried for such offences, but this does not affect the applicable legal status. The only exception is where combatants deliberately fail to distinguish themselves from the civilian population by not carrying arms openly during a military engagement or while deploying on a military engagement and visible to the adversary.<sup>147</sup> Such a person forfeits his or her right to PW status, but is to be given protection equivalent in all respects to those accorded to PWs.<sup>148</sup> If a combatant is captured in circumstances other than during an attack or when preparing for an attack, the previous activities of that combatant are not grounds for depriving him or her of combatant or PW status.<sup>149</sup>

### PERSONS WHOSE STATUS IS IN DOUBT

**12.9.3** The legal status of captured or apprehended persons other than uniformed members of enemy armed forces may not be clear. This is particularly so when:

- a. opposing forces include armed groups who may not qualify as combatants or otherwise have a right to enjoy PW status;
- b. there are civilians accompanying the opposing force whose exact role is not clear;
- c. civilians are taking a direct part in hostilities;
- d. it is uncertain that a situation of violence has reached the point of being an armed conflict;<sup>150</sup>
- e. the conflict, although apparently waged by groups within a State, is in fact controlled and directed by another State;<sup>151</sup>
- f. the conflict involves both international and non-international elements;
- g. the opposing force is difficult to distinguish from the civilian population; or
- h. persons have been captured or apprehended outside of combat during peace support operations.

146 **Geneva Protocol I** art 44(2): “While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.”

147 See **Geneva Protocol I** art 44(3).

148 See **Geneva Protocol I** art 44(4). See also *Quirin Appeal* and *Mohammed Ali Appeal*.

149 See **Geneva Protocol I** art 44(5).

150 See Chapter 5.

151 This issue was adjudicated in the *Tadić Jurisdiction Appeal*.

**DETERMINATION OF STATUS AND REASON FOR DETENTION**

**12.9.4** Where it is not immediately apparent that a captured or apprehended person is a PW, two determinations must be made:

- a. The status of the person under LOAC.
- b. The reason for the person to be deprived of liberty.

**12.9.5** If the person has taken a direct part in hostilities in an IAC and may have a claim to PW status, he or she is to be treated as a PW until any other status is established.<sup>152</sup>

**PRISONER OF WAR STATUS IN CASES OF DOUBT IS TO BE DETERMINED ON THE FACTS**

**12.9.6** Persons are not to be disqualified from PW status on the basis of a blanket determination. The question is, in every case, to be determined in accordance with the circumstances. There must, however, be a genuine doubt as to the status of the person before these obligations come into play. For example, in a NIAC a member of an armed group cannot qualify as a PW.<sup>153</sup> The advice of an NZDF LEGAD is to be obtained if there is any question as to whether status determination is necessary. Doubt as to status is presumed to exist where:<sup>154</sup>

- a. the party on which the captured person relies claims PW status on his or her behalf,
- b. the person appears to be a PW, or
- c. the person claims PW status.

**12.9.7** COMJFNZ is to assemble a court of inquiry (COI)<sup>155</sup> to make findings and a recommendation as to the status of the captured person.<sup>156</sup> An appropriately qualified NZDF LEGAD is to be appointed as counsel assisting the court.<sup>157</sup>

**12.9.8** The COI is to meet the following terms of reference:

- a. What were the circumstances surrounding the capture or apprehension of the person?
- b. Was the capture or apprehension made pursuant to an arrest warrant or other similar legal authority?
- c. What is the person's identity (if known)?
- d. Did the person claim to be a member of an armed force or group? If so, which armed force or group?

152 **Geneva Convention III** art 5: "[...] Should any doubt arise as to whether persons, having committed belligerent acts and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

153 The exact status of a conflict is often in doubt. See Chapter 5.

154 **Geneva Protocol I** art 45(1).

155 **AFDA** s 200A(3) states that a "court of inquiry may be assembled to perform the functions and duties, and exercise the powers, of a competent tribunal under Article 5 of Schedule 3 of the Geneva Conventions Act 1958". See also **DM 69** (2 ed) Volume 3.

156 COMJFNZ may delegate this power to a commander in the operational area in appropriate cases.

157 See **AFDA** s 200B(3) and **DM 69** (2 ed) Volume 3.

- e. Was the person carrying a weapon at the time of capture? If so, was the weapon carried openly while visible to the capturing force?<sup>158</sup>
- f. Did the person take a direct part in hostilities,<sup>159</sup> including attacks against New Zealand or coalition forces or other related targets?
- g. Did the person take part in planning attacks against New Zealand or coalition forces or other related targets?
- h. Was the person preparing to conduct attacks against New Zealand or coalition forces or other related targets?
- i. Was the person wearing a uniform when detained?
- j. Was the person wearing a distinctive emblem that was visible at a distance?<sup>160</sup>
- k. Did the captured person claim PW status when captured or apprehended or at any subsequent time?
- l. Did the person commit an apparently criminal act? If so, what was the act and when was it committed?
- m. What other information indicates that the person may be entitled to PW status?
- n. What other information indicates that the captured person may not be entitled to PW status?

**12.9.9** The person whose status is in doubt is to be afforded the rights set out in AFDA s 200N<sup>161</sup> and is to receive such assistance as is possible in the circumstances to enable presentation of evidence relevant to the question of his or her status.

**12.9.10** The representatives of any protecting power and the ICRC are to be allowed to attend the proceedings, unless exceptionally it is necessary to exclude them in the interest of security. In that case, the advice of the Director of Defence Legal Services (D DLS) is to be obtained before the COI assembles. The Protecting Power and/or the ICRC must be advised of the decision and the reasons for it.<sup>162</sup>

158 See **Geneva Protocol I** art 44(3). **Geneva Protocol I New Zealand Declaration**: ‘Visible to the adversary’ includes visible with the aid of any form of surveillance, electronic or otherwise, and ‘deployment’ means any movement towards a place from which an attack is to be launched.

159 For direct part in hostilities see Chapter 6.

160 **Geneva Protocol I New Zealand Declaration**: The words ‘visible to the adversary’ include visible with the aid of any form of surveillance, electronic or otherwise.

161 See also **DM 69** (2 ed) Volume 3.

162 **Geneva Protocol I** art 45(2) provides that, whenever possible, the adjudication of the status of a captured person shall occur before the trial for an offence with which that person is charged; “The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held ‘in camera’ in the interest of State security”. In such a case, the Detaining Power shall advise the Protecting Power accordingly. Under **AFDA** s 200F(1)(e) the president of the COI may authorise the representatives of the Protecting Power and the ICRC to be present. See also **DM 69** (2 ed) Volumes 1 and 3. For rights and obligations of Protecting Powers see Chapter 16.

- 12.9.11** The COI is to make its findings based on the balance of probabilities. It is to consider the LOAC rules applicable to combatant and PW status.<sup>163</sup> The completed record of proceedings is to be given an appropriate security classification and forwarded in accordance with AFDA s 200R.
- 12.9.12** Based on the report, the commander will record and promulgate a determination as to whether or not the person is entitled to PW status. The record of proceedings and evidence are then to be forwarded to COMJFNZ for review. CDF is to be advised of the outcome of all status determinations before any further action is taken.
- 12.9.13** The legal status of the person is relevant to questions such as:
- a. whether he or she is criminally liable for acts of violence against the capturing force or other persons, or damage to property; and
  - b. when the person must be released or repatriated.<sup>164</sup>
- 12.9.14** If determined not to be entitled to PW status, a person who faces trial for actions taken during hostilities (eg killing or injuring persons or causing damage) may still claim PW status at the trial.<sup>165</sup>
- 12.9.15** Persons who claim PW status need to establish that they belong to a force that is under responsible command and therefore provide details of the identity or existence of the group to which they claim to belong. Verification of such claims may require investigation beyond the capabilities of the NZDF. It may be necessary to seek the assistance of a coalition partner with the necessary interpreters and intelligence resources to be able to determine the true situation. However, the decision as to status is for the NZDF to make, not the coalition partner.
- 12.9.16** Regardless of the legal status of the individual concerned, no person who is in the power of a New Zealand force is without legal protection. All persons must be treated humanely.

#### DETERMINATION OF GROUNDS FOR DEPRIVATION OF LIBERTY

- 12.9.17** No person is to be deprived of their liberty unless there is good legal reason to do so,<sup>166</sup> and must not be held for any period longer than that reason requires.<sup>167</sup> In the case of PWS, they are held to prevent them from rejoining the enemy force and this provides sufficient legal authority for their deprivation of liberty. In respect of other persons, however, a more specific legal basis is necessary. To ensure that this requirement is met, CDF will appoint an independent Detention Authority, which will be advised by a suitably qualified NZDF LEGAD. The Detention Authority will comprise a person or persons with appropriate experience in fact-finding and with a knowledge of military matters, and who may be civilian. The Detention Authority is to conduct the review independently and is not to be subject to the command or influence of the commander of the New Zealand force responsible for having captured or apprehended the person in question or responsible for their detention.

<sup>163</sup> In particular, **Geneva Convention III** art 4 and **Geneva Protocol I** art 43.

<sup>164</sup> See Section 14.

<sup>165</sup> **Geneva Protocol I** art 45(2). See also *Mohamed Ali Appeal*.

<sup>166</sup> **ICRC Customary IHL** rule 99: "Arbitrary deprivation of liberty is prohibited."

<sup>167</sup> **ICRC Customary IHL** rule 128.

**12.9.18** The Detention Authority will consider the information relating to a person deprived of liberty no later than 48 hours after he or she is captured or apprehended, to determine whether that individual should be:

- a. released,
- b. transferred to the civilian authorities for criminal investigation, or
- c. interned for imperative reasons of security.

#### **AUTHORITY FOR CONTINUED DEPRIVATION OF LIBERTY**

**12.9.19** CDF may, taking into account the nature of the operation and the circumstances, impose a maximum period beyond which a person may not be deprived of his or her liberty without review.

**12.9.20** If a person has been held for a period that is approaching, either:

- a. the maximum set by CDF; or
- b. (if no maximum has been set) three months;

and the Detention Authority considers it necessary to continue detention, an application for continued deprivation of liberty is to be made to COMJFNZ. The application is to set out full reasons why it is considered necessary to hold the person for a longer period.

**12.9.21** COMJFNZ will review the case and make a decision as to whether to approve continued deprivation of liberty. CDF is to be advised of the decision. If it is decided that it is no longer necessary to hold the person for imperative reasons of security, the person is to be released.

**12.9.22** If there is sufficient evidence to support a criminal charge against a person deprived of liberty, he or she should be transferred to the civil authorities for criminal prosecution.

#### **NEUTRALS**

**12.9.23** If it is discovered that a person deprived of liberty is a national of a neutral State,<sup>168</sup> the commander of the New Zealand force holding the person is to advise CDF, through COMJFNZ, without delay. The person will be repatriated as soon as possible unless the person is:

- a. a member of the opposing force or is taking a direct part in hostilities against the NZDF or coalition partners;
- b. a military adviser to the opposing force;
- c. a mercenary;<sup>169</sup>
- d. alleged to be involved in criminal activity; or
- e. alleged to be a spy.<sup>170</sup>

168 This includes defence attachés of neutral States. For neutral persons see Chapter 16.

169 For status of mercenaries see Chapter 6. For prohibition of mercenary activities see Chapter 8.

170 For espionage see Chapter 8.



**12.9.24** In these circumstances, the individual is to be treated humanely and is to be detained until direction is received from COMJFNZ as to whether the person is to be treated as a PW, a detainee or is to be handed over to the appropriate civil authorities.

#### UNITED NATIONS AND ASSOCIATED PERSONNEL

**12.9.25** If persons claim or appear to be United Nations (UN) personnel or associated personnel,<sup>171</sup> Headquarters Joint Forces New Zealand (HQ JFNZ) is to be advised without delay. Such persons:

- a. are not to be interrogated or questioned beyond ascertaining their identity; and
- b. once identified are to be promptly returned to the UN or other appropriate authorities.<sup>172</sup>

**12.9.26** If doubt exists as to whether the persons are in fact UN or associated personnel, they are to be held until the appropriate UN body or representative can confirm their identity. Pending release, such personnel are to be treated to at least the same standard afforded to PWs.<sup>173</sup>

<sup>171</sup> For UN or associated personnel see Chapter 14.

<sup>172</sup> See **Safety of Peacekeepers Convention** art 8.

<sup>173</sup> **Safety of Peacekeepers Convention** art 8: “[...] Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.”

## SECTION 10 – HOLDING PERSONS DEPRIVED OF THEIR LIBERTY

## NEW ZEALAND DEFENCE FORCE PLACES OF DETENTION

**12.10.1** The commander of a New Zealand force that captures or apprehends any person may, subject to orders:

- a. confine an able-bodied person in an NZDF place of detention until their release or transfer is ordered by CDF;<sup>174</sup>
- b. transfer a sick or wounded person to an appropriate medical facility;
- c. transfer the person to the forces of another State; or
- d. transfer the person to appropriate civil authorities.

## PROTECTED PERSONS CANNOT GIVE UP OR BE DEPRIVED OF RIGHTS

**12.10.2** Persons deprived of their liberty cannot, even of their own free will, surrender any of their rights to protection under LOAC.<sup>175</sup> Members of the NZDF are to apply LOAC even if the persons in their custody do not demand those rights.

**12.10.3** Persons do not lose their rights or protection because they are alleged to have committed war crimes or other international crimes.<sup>176</sup> They may, however, be tried before a fair and regular trial.<sup>177</sup>

**12.10.4** If the commander of a place of detention has very good reason to believe that a person held there is engaged in activities hostile to the security of the NZDF, that person's rights may be restricted, especially in respect of communications.<sup>178</sup> The duty to report that the person is deprived of liberty and details of his or her location and health still applies. The person is to be treated humanely and is not to be deprived of the right to a fair and regular trial.<sup>179</sup> The full rights under

174 **Geneva Convention III** art 21: "The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter [...]."

175 **Geneva Convention III** art 7 states that PWs may in no circumstances renounce in part or in entirety the rights secured to them by Geneva Convention III or by any special agreements entered into for their protection. Likewise **Geneva Convention IV** art 8 states that protected persons may in no circumstances renounce in part or in entirety the rights secured to them by Geneva Convention IV or by any special agreements entered into for their protection.

176 Under **Geneva Protocol I** art 44(2) violation of the rules of LOAC shall not deprive a combatant of his or her right to be a PW, except in respect of the provisions of art 44(3) and (4).

177 See **ICRC Customary IHL** rule 100. Wilfully depriving a PW or protected person of fair trial rights is a grave breach of **Geneva Convention III** (see art 130), **Geneva Convention IV** (see art 147) and **Geneva Protocol I** (see art 85(4)(e)). For judicial guarantees see Chapter 17.

178 **Geneva Convention IV** art 5: "Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention [...]."

179 **Geneva Convention IV** art 5 states that in each case, "such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention". See also **ICRC Customary IHL** rule 100. Wilfully depriving a PW or protected person of fair trial rights is a grave breach of **Geneva Convention III** (see art 130), **Geneva Convention IV** (see art 147) and **Geneva Protocol I** (see art 85(4)(e)). For judicial guarantees see Chapter 17.

LOAC must be restored at the earliest date consistent with the security of the New Zealand force.<sup>180</sup> CDF is to be informed of any such restrictions, through COMJFNZ, without delay. The advice of an NZDF LEGAD is to be obtained before the measures are imposed.

## LEGAL RESPONSIBILITY FOR PERSONS DEPRIVED OF LIBERTY

**12.10.5** Any person deprived of liberty by the NZDF immediately becomes the responsibility of New Zealand, irrespective of the individual responsibility of members of the NZDF.<sup>181</sup>

**12.10.6** Members of the NZDF involved in:

- a. the capture or apprehension, evacuation, transfer or holding of any person deprived of liberty; or
- b. the operation of any NZDF place of detention;

are legally responsible for any mistreatment which they commit and any system of abuse in which they play a part.<sup>182</sup>

**12.10.7** Every NZDF commander is personally responsible for the conduct of every person under his or her command who:

- a. holds or controls any person deprived of their liberty,
- b. has any person under his or her control, or
- c. commands or controls or serves in any NZDF place of detention.

**12.10.8** Commanders are to prevent offences likely to occur and punish offences that have occurred.<sup>183</sup>

## PLACES OF DETENTION MUST BE INSPECTED

**12.10.9** COMJFNZ is to ensure that every aspect of a place of detention is run in a proper and humane manner. The commander of a New Zealand force is to conduct thorough and unannounced physical inspections of NZDF places of detention under their command and the persons detained in them at least once every 30 days. The first inspection should occur at the earliest opportunity after the establishment of the place of detention. They are to promptly take all necessary measures to rectify any breaches of LOAC that are identified. Additional random inspections are to be carried out on behalf of the commander on a frequent basis. Advice of an NZDF LEGAD is to be sought on the legal standards to be applied, however, the proper conduct of detention never ceases to be a command responsibility.

180 **Geneva Convention IV** art 5 states that such persons “shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be”.

181 **Geneva Convention III** art 12(1) states that PWs “are in the hands of the enemy Power, but not the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them”. **Geneva Convention IV** art 29: “The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.”

182 For individual criminal responsibility and criminal complicity see Chapter 17.

183 For command responsibility see Chapter 17.

**12.10.10** The commander of an NZDF place of detention is to conduct frequent and routine inspection of the facilities in person. These are to be conducted at least once every seven days.

**12.10.11** All inspection reports from the commander of the New Zealand force and the commander of the NZDF place of detention are to be sent to CDF, through COMJFNZ, without delay. Any deficiency in resources or evidence of mistreatment is to be addressed in the report.

#### **ALLEGATIONS OF MISTREATMENT MUST BE RECORDED, INVESTIGATED AND REPORTED**

**12.10.12** COMJFNZ is to ensure that all persons deprived of their liberty and their representatives have the opportunity to raise complaints about mistreatment. This includes:

- a. the widest possible access by delegates of the ICRC and appropriate human rights organisations;<sup>184</sup> and
- b. ‘no-notice’ interviews by NZDF commanders of persons deprived of liberty.

**12.10.13** Every allegation of mistreatment made to a member of the NZDF is to be recorded in writing on the form at Annex D and forwarded to CDF, through COMJFNZ, without delay. Every well-founded allegation against any person subject to the AFDA is to be investigated in accordance with the AFDA.<sup>185</sup>

**12.10.14** COMJFNZ is to assemble a COI to gather evidence and report on the circumstances relating to every credible allegation of mistreatment.<sup>186</sup> The report is to be provided to CDF who will, as soon as practicable, provide information to the Protecting Power and/or ICRC setting out the nature of the incident and the disciplinary or criminal proceedings (if any) that resulted.

#### **DEATH OR INJURY OF PERSONS DEPRIVED OF LIBERTY MUST BE INVESTIGATED AND REPORTED**

**12.10.15** If any person suffers death or serious injury while deprived of liberty by the NZDF or under the control of the NZDF, the commander of the New Zealand force is to ensure that the circumstances are fully investigated and reported to CDF through the chain of command.<sup>187</sup> Any injury is to be considered serious unless it is trifling or superficial.<sup>188</sup>

184 Access is also to be provided to UN representatives, including the Office of the High Commissioner on Human Rights and the Subcommittee on the Prevention of Torture.

185 See **AFDA** s 102 and **DM 69** (2 ed) Volume 1.

186 **AFDA** s 200A and **DM 69** (2 ed) Volume 2.

187 **Geneva Convention III** art 121: “Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power [...]” **Geneva Convention IV** art 131(1): “Every death or serious injury of an internee caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power [...]”

188 Serious injury includes permanent loss of bodily function or temporary severe loss of bodily function, hearing loss, poisoning, vision impairment, bone fracture, laceration, crushing, amputation of body part, burns requiring specialist treatment, injury causing loss of consciousness, any injury that causes the person to be hospitalised for 48 hours or more. It includes every injury that appears to have been caused by mistreatment.

**12.10.16** Where, as a result of that investigation, there is a well-founded allegation that the death or injury is due to wrongdoing on the part of any person (including another person deprived of liberty) the matter is to be:

- a. recorded in the form of a charge and investigated in accordance with the AFDA; or
- b. referred to the appropriate civil authority.<sup>189</sup>

**12.10.17** Regardless of the outcome of disciplinary or criminal proceedings, COMJFNZ is to assemble a COI to gather evidence and report on the circumstances of the death or injury.<sup>190</sup> The report is to be sent to CDF who will, as soon as practicable, provide a full report to the Protecting Power and/or ICRC, setting out the nature and cause of the injury or death and the disciplinary or criminal proceedings (if any) that resulted.<sup>191</sup>

### PERSONS MAY MAKE REQUESTS AND COMPLAINTS

**12.10.18** Persons deprived of their liberty are to be allowed to make requests and complaints at any time about the fact of being deprived of their liberty and/or the conditions under which they are held.<sup>192</sup> These requests and complaints may be made to:

- a. the commander of the NZDF place of detention, or
- b. the commander of the New Zealand force, or
- c. the Protecting Power or ICRC or appropriate human rights organisation.<sup>193</sup>

**12.10.19** If the member of the NZDF who receives the complaint or request cannot resolve the matter, or decides not to do so, the person is to be advised of the right to take the matter higher. If the person chooses to do so, the request or complaint is to be transmitted without delay and without alteration to the next superior officer. The advice of an NZDF LEGAD is to be sought in any case where the request or complaint claims that LOAC is not being complied with.

189 **AFDA** s 102 and **DM 69** (2 ed) Volume 1. Deaths or injuries caused by detainees, internees or retained personnel must be referred to the appropriate civil authority since the NZDF has no jurisdiction to try such people. See also **Geneva Convention III** art 121 and **Geneva Convention IV** art 131.

190 See **AFDA** s 200A and **DM 69** (2 ed) Volume 2.

191 See **Geneva Convention III** art 121 and **Geneva Convention IV** art 131.

192 Under **Geneva Convention III** art 78 these requests and complaints shall not be limited nor considered to be part of the correspondence quota referred to in art 71 and, even if they are recognised to be unfounded, they may not give rise to any punishment. See also **Geneva Convention IV** art 101.

193 **Geneva Convention III** art 78: "Prisoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected. They shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity. These requests and complaints [...] must be transmitted immediately [...] Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers." See also **Geneva Convention IV** art 101 for rights of internees to make complaints and petitions.

**12.10.20** It is to be expected that requests and complaints, including unfounded ones, will be made by discontented or bored persons deprived of liberty. It is essential that such communications are properly investigated and are dealt with expeditiously and fairly. Failure to provide a responsive mechanism for requests and complaints, as well as breaching LOAC, may ferment resentment, disobedience and even rebellion. No person is to be punished for making a request or complaint even if it proves unfounded.<sup>194</sup>

#### **CHALLENGE TO GROUNDS OF DETENTION**

**12.10.21** Where any person claims, on credible grounds, that he or she should not have been deprived of liberty or that continued detention is unwarranted, the commander of the NZDF place of detention is to formally review the grounds for that person's detention. The advice of an NZDF LEGAD is to be sought. The decision and the reasons for it are to be recorded in writing and are to be provided to the person in question, the Protecting Power and/or ICRC and COMJFNZ. If the person is not satisfied with that response the matter is to be referred to the Detention Authority.<sup>195</sup>

**12.10.22** All such submissions are to be treated seriously. To continue to detain a person without good reason is a serious breach of international and New Zealand law.

#### **ROUTINE REVIEW OF GROUNDS FOR DETENTION**

**12.10.23** Whether or not a person requests it, the grounds for continuing to deprive a person of liberty are to be reviewed by the commander of the New Zealand place of detention once every 28 days.

**12.10.24** In any case where there are grounds to believe that the status of the person should be reviewed, the matter is to be referred to the Detention Authority or, as appropriate, to a medical commission.

#### **RESPONSIBILITY FOR WELFARE AND SAFETY**

**12.10.25** The commander of an NZDF place of detention has primary responsibility for the welfare and safety of all persons deprived of liberty within that place. The commander is to ensure that all members of the NZDF and other persons allowed into the camp for any reason fully comply with LOAC relating to the rights and obligations of persons deprived of their liberty.

**12.10.26** No member of the NZDF, regardless of rank, is to give any order to the commander of an NZDF place of detention adversely affecting the welfare and safety of persons deprived of their liberty within that place.

**12.10.27** In the event that a conflict arises between the commander of an NZDF place of detention and any other officer as to the appropriate standard of care to be applied, the matter is to be referred to COMJFNZ for resolution without delay.

<sup>194</sup> See **Geneva Convention III** art 78 and **Geneva Convention IV** art 101.  
<sup>195</sup> For determination of status see Section 9.



**ADEQUATE SHELTER, ACCOMMODATION AND PROTECTION MUST BE PROVIDED**

**12.10.28** Confinement in NZDF places of detention is not intended as punishment, but is merely to prevent persons from taking further part in the hostilities or to hold them for security reasons. COMJFNZ is to ensure that NZDF places of detention are:

- a. outside the combat zone and not exposed to the effects of combat action,<sup>196</sup> and have adequate shelters against air attacks and the other hazards of war;<sup>197</sup>
- b. as healthy, safe and comfortable as circumstances allow;<sup>198</sup>
- c. able to ensure warmth, comfort and hygiene;<sup>199</sup>
- d. sited on land;<sup>200</sup> and
- e. not used to render areas immune from attack.<sup>201</sup>

**12.10.29** All persons deprived of liberty are to be:

- a. accommodated and cared for free of charge;<sup>202</sup> and

196 **Geneva Convention III** art 23 provides that no PW “may at any time be sent to, or detained in areas where they may be exposed to the fire of the combat zone”. See also **Geneva Convention IV** art 83 with respect to internees and **Geneva Protocol II** art 5(2)(c) in NIAC. See also **ICRC Customary IHL** rule 121.

197 **Geneva Convention III** art 23 requires that PWs “shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population [...] and they] may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them”. For similar provisions for internees see **Geneva Convention IV** art 88. In the *Tokyo War Crimes Trial* exposing PWs and internees to unnecessary danger from air raids was held to be a war crime.

198 See **Geneva Convention III** art 22, **Geneva Convention IV** art 85, **Geneva Protocol II** art 5(1)(b) and **ICRC Customary IHL** rule 118.

199 **Geneva Convention IV** art 85 requires that the “Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of war. In no case shall permanent places of internment be situated in unhealthy areas or districts the climate of which is injurious to internees [...] The premises shall be fully protected against dampness, adequately heated and lighted [...] The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, the age, sex and state of health of the internees. Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry [...] Showers or baths shall also be available”. See also **Geneva Convention III** art 22 for PWs and **ICRC Customary IHL** rule 118.

200 See **Geneva Convention III** art 22. Unhealthy and cruel confinement, such as ‘prison hulks’, is prohibited. Temporary holding on board a ship is permissible where it is more humane and safer than on land. Persons must be shifted to suitable premises on land, or released or repatriated as soon as possible. The right to be accommodated in quarters which afford every possible safeguard as regards to hygiene and health, and provide efficient protection against the rigours of climate and the effects of war will generally only be met by the provision of well-run and constructed camps and buildings on land.

201 Under **Geneva Convention III** art 23 the presence of a PW may not be used to “render certain points or areas immune from military operations”. **Geneva Convention IV** art 28: “The presence of a protected person may not be used to render certain points or areas immune from military operations.” For prohibition of human shields see Chapter 8.

202 See **Geneva Convention III** art 15 and **Geneva Convention IV** art 81.



- b. held in groups according to their nationality, language or customs but should not be separated from others belonging to the forces with which they were serving at the time of capture, except with their own consent.<sup>203</sup>

### DISTINCTIVE EMBLEMS MUST BE DISPLAYED

**12.10.30** Whenever military considerations permit, the commander of any NZDF place of detention is to ensure that the nature of the camp is indicated by the letters 'PW' or 'IC' placed so as to be clearly visible from the air (refer to Figure 1).<sup>204</sup> There is no internationally recognised emblem in respect of other places of detention. Parties to the conflict may, however, agree to a suitable marking between them.



**Figure 1** Distinctive emblems for places of detention: Prisoner of War Camp and Internment Camp respectively.

### PLACES OF DETENTION ARE TO BE ADEQUATELY FENCED

**12.10.31** The commander of an NZDF place of detention is to ensure that it is properly fenced to prevent escapes and to protect persons deprived of liberty from the populace.<sup>205</sup> Fences and barricades that are inherently dangerous (eg high voltage electric fences, mines and booby traps) are not to be used.

### ADEQUATE MEDICAL ATTENTION AND CARE MUST BE PROVIDED

**12.10.32** COMJFNZ is to ensure that every NZDF place of detention has an adequate medical centre, including isolation wards for those with contagious diseases or mental illness, with suitably qualified medical personnel in sufficient numbers to care for the persons held there.<sup>206</sup> It may be necessary to cooperate with coalition partners in order to guarantee the appropriate level of medical care. Although a person may be transferred to the medical facilities of another State, NZDF remains responsible for the proper treatment of that person. Medical facilities are to be monitored to ensure that they meet these requirements.

**12.10.33** The commander of every NZDF place of detention is to ensure that all persons deprived of liberty are given adequate medical attention. In particular, they are to be given:

- a. regular medical inspections, at least monthly, to ensure their general health, and, where appropriate, fitness for work;<sup>207</sup>

203 **Geneva Convention IV** art 82: "The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. Internees who are nationals of the same country shall not be separated merely because they have different languages [...]." See also **Geneva Convention III** art 22.

204 See **Geneva Convention III** art 23 and **Geneva Convention IV** art 83. In French-speaking countries the letters 'PG' for '*prisonnier de guerre*' may be used.

205 See **Geneva Convention III** art 21.

206 See **Geneva Convention III** art 15, **Geneva Convention IV** art 91, **Geneva Protocol I** art 11(1), **Geneva Protocol II** art 5(2)(e) for NIAC and **ICRC Customary IHL** rule 118.

207 See **Geneva Convention III** art 31 and **Geneva Convention IV** art 92 which include details of

- b. free medical attention, where necessary, at the earliest possible moment;<sup>208</sup> and
- c. admission to civilian or military medical units if seriously injured or sick.<sup>209</sup>

**12.10.34** Persons deprived of liberty are to be given the facilities to report to as being sick. The medical practitioner who deals with the person is to:

- a. make appropriate recommendations to the commander relating to treatment and other conditions relating to the person; and
- b. write a certificate setting out the nature of the complaint and the treatment given. If attributable to work, the certificate must also set out the circumstances of the accident or illness. The certificate is to be copied to the Protecting Power and/or ICRC.

#### RETAINED MEDICAL PERSONNEL

**12.10.35** Retained medical personnel are not PWs, but they have all the protections of PW status in addition to rights and privileges as retained personnel.<sup>210</sup> The commander of an NZDF place of detention is to ensure that:

- a. medical personnel are only retained while they are necessary for the treatment of persons deprived of liberty – if more are captured than are necessary to care for PWs, those in excess of the requirement must be repatriated; in cases of lengthy captivity they may be relieved by other medical personnel in order to return home;<sup>211</sup>
- b. all necessary assistance is provided to allow retained medical personnel to carry out their medical duties;<sup>212</sup>
- c. the senior retained medical officer has the right to deal directly with the commander on any matter relating to medical care;<sup>213</sup>
- d. assistance, including transport, is made available for periodical visits to work detachments or hospitals outside the camp;<sup>214</sup> and
- e. retained medical personnel are not compelled to do any work other than perform their medical duties.<sup>215</sup>

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medical inspections. See also **Geneva Protocol II** art 5(2)(d) for NIAC.

208 See **Geneva Convention III** art 15 and **Geneva Convention IV** art 81. Free medical attention may include dental work, dentures, immunisation, provision of spectacles and pharmaceutical preparations/medicines.

209 **Geneva Convention IV** art 91 requires that “maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population”. See also **Geneva Convention III** art 30. In the **Tokyo War Crimes Trial** withholding medical supplies, including those provided by the Red Cross, from PWs and internees was held to be a war crime.

210 **Geneva Convention III** art 33: “Members of the medical personnel [...] while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of [Geneva Convention III], and shall also be granted all facilities necessary to provide for the medical care of [...] prisoners of war [...]”

211 See **Geneva Convention III** art 33. Relief will be by agreement between the Parties to the conflict.

212 See **Geneva Convention III** art 33.

213 See **Geneva Convention III** art 33(2)(b).

214 See **Geneva Convention III** art 33(a).

215 See **Geneva Convention III** art 33(c).

- 12.10.36** Civilian medical personnel, including those who were tending to the medical needs of armed groups, are to be allowed to continue to perform their medical duties. They may only be detained when this is necessary for security purposes.<sup>216</sup>
- 12.10.37** Medical practitioners serving in the opposing force, other than as part of the medical services, are PWs if captured. The commander of the NZDF place of detention may, however, require them to exercise their medical function in the interest of PWs and other persons deprived of their liberty. In that case, they are entitled to the same rights as retained personnel and are exempt from any other work.<sup>217</sup>
- 12.10.38** These provisions do not relieve the NZDF of the obligation to care for the medical needs of persons deprived of their liberty.<sup>218</sup> If retained medical personnel lack the training, qualifications, skill or experience to look after persons deprived of liberty, they are to be relieved of their duties and NZDF medical resources are to be applied instead.

#### RELIGIOUS RIGHTS MUST BE RESPECTED

- 12.10.39** The commander of an NZDF place of detention is to ensure that persons deprived of their liberty are allowed complete freedom of religious worship, including attendance at religious services. While persons deprived of liberty must comply with the routine of the place of detention, the commander is to ensure that the routine does not unnecessarily interfere with the observance of religious rights. Adequate premises are to be provided for religious services to be held.<sup>219</sup>
- 12.10.40** Persons deprived of their liberty are not to be persecuted or discriminated against on the grounds of religion.<sup>220</sup> Members of the NZDF are to act with respect for the religious beliefs of all persons and are to refrain from insensitive or offensive behaviour. Care is to be taken not to destroy or damage religious items of importance to those persons.

216 See **Geneva Protocol I** art 16 for general protection of the duties of civilian medical personnel. For medical personnel see Chapter 11.

217 See **Geneva Convention III** art 32.

218 **Geneva Convention III** art 33 provides that nothing in the article relieves “the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view”.

219 **Geneva Convention IV** art 93: “Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities. Ministers of religion who are interned shall be allowed to minister freely to members of their community [...]”. See also **Geneva Convention III** art 34, **Geneva Convention IV** arts 27 and 86, **Geneva Protocol II** art 4 for NIAC, **ICCPR** arts 4 and 18 for the non-derogable right to freedom of religion, **ICRC Customary IHL** rule 104 and Chapter 11.

220 In its *Kvočka Appeal* judgment (at [320]), the Appeals Chamber of the ICTY affirmed that “the crime of persecution consists of an act or omission which: 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law [...] and; 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics [...]”.

**RETAINED RELIGIOUS PERSONNEL**

**12.10.41** Retained religious personnel are not PWs, but they have all the protections of PW status in addition to rights and privileges as retained personnel.<sup>221</sup> This does not relieve the NZDF of the obligation to care for the religious needs of persons deprived of their liberty.<sup>222</sup> The commander of an NZDF place of detention is to ensure that:

- a. religious personnel are only retained while necessary to tend to the spiritual needs of persons deprived of liberty – if more are retained than are needed, those surplus to requirement are to be repatriated; where captivity is lengthy, religious personnel may be relieved by others in order to return home;<sup>223</sup>
- b. all necessary assistance is provided to allow religious personnel to tend to the spiritual needs of persons deprived of liberty;<sup>224</sup>
- c. the senior retained religious officer should be allowed to deal directly with the commander on any matter relating to the spiritual needs persons deprived of their liberty;<sup>225</sup>
- d. assistance, including transport, is to be made available for periodic visits to work detachments or hospitals outside the NZDF place of detention;<sup>226</sup>
- e. retained religious personnel are not be compelled to do any work other than perform their religious duties;<sup>227</sup> and
- f. retained religious personnel may, subject to appropriate censorship, write to international religious organisations and the religious authorities of the country of detention concerning their religious duties.<sup>228</sup>

**12.10.42** Where persons deprived of liberty are not PWs, these rules are to be applied to the greatest extent possible. Ministers of religion are to be allowed to conduct their religious duties amongst detainees and internees.

**12.10.43** PWs who are ministers of religion, but not members of the religious services of their own forces, are to be allowed to minister to PWs of their community. They are entitled to the same rights as retained personnel and are exempt from any other work.<sup>229</sup>

221 **Geneva Convention III** art 33: “[...] chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of [Geneva Convention III], and shall also be granted all facilities necessary to provide [...] religious ministrations to prisoners of war [...].”

222 **Geneva Convention III** art 33 provides that nothing in the article relieves “the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view”.

223 See **Geneva Convention III** art 33. Relief will be by agreement between the Parties to the conflict.

224 See **Geneva Convention III** arts 33 and 35.

225 See **Geneva Convention III** art 33(2)(b).

226 See **Geneva Convention III** art 33(a).

227 See **Geneva Convention III** art 33(c).

228 See **Geneva Convention III** art 35. The article also provides that letters and cards which they may send for this purpose shall be in addition to any allocated quota.

229 **Geneva Convention III** art 36: “Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to

**12.10.44** If there is no retained religious officer or minister of the appropriate faith within the place of detention, persons deprived of liberty may request that a minister or qualified layperson be appointed to fulfil this role.<sup>230</sup> The commander is to seek expert advice from COMJFNZ on how to facilitate such a request.

#### SECURITY CONSIDERATIONS OF RELIGIOUS PERSONNEL

**12.10.45** Retained religious personnel enjoy rights and privileges for the purpose of ministering to the religious needs of persons deprived of liberty, whatever those needs may be. These special rights and privileges only apply, however, provided they do not cause harm to the NZDF or its coalition partners. Religious personnel who incite violence or disobedience, who preach religious or racial hatred, or who compromise the security or discipline of the place of detention may, after a warning, lose their right to conduct such services. In appropriate cases, religious personnel who are prepared to accept the obligations inherent in their duties may be substituted.

**12.10.46** Persons deprived of their liberty are not to be deprived of spiritual care on the basis of breaches of discipline. The commander is to exercise great care before concluding that the activities of bona fide religious personnel should be interfered with.

#### ADEQUATE AND APPROPRIATE FOOD MUST BE PROVIDED

**12.10.47** COMJFNZ is to ensure that suitable plans are made to provide food, water and other necessities to persons deprived of liberty, and to ensure that these supplies can be stored, prepared and issued in hygiene conditions. Expert advice is to be obtained if necessary. Commanders of NZDF places of detention are to ensure that:

- a. persons deprived of liberty are given sufficient food and good quality drinking water to keep them in good health;<sup>231</sup> and
- b. account is taken of the usual dietary requirements of the persons concerned, particularly in relation to cultural and religious beliefs.<sup>232</sup>

**12.10.48** Members of the NZDF are not to deny food or water to persons deprived of their liberty as a punishment or for any other purpose.<sup>233</sup>

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minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work.”

230 **Geneva Convention III** art 37: “When prisoners of war have not the assistance of a retained chaplain or a prisoner of war minister of their faith, a minister of the prisoners’ or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office. This appointment, subject to the approval of the Detaining Power, shall take place with the agreement of the community of prisoners concerned and, wherever necessary, with the approval of the local religious authorities of the same faith. The person thus appointed shall comply with all regulations established by the Detaining Power in the interests of discipline and military security.”

231 **Geneva Convention III** art 26 and **Geneva Convention IV** art 89 require that the “basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies” and that “sufficient drinking water shall be supplied”. See **Geneva Protocol II** art 5(1)(b) for NIAC. In the **Tokyo War Crimes Trial** exposing PWs and internees to malnutrition, starvation and exhaustion was held to be a war crime.

232 See **Geneva Convention III** art 26 and **Geneva Convention IV** art 89. In the **Tokyo War Crimes Trial** failure to take into consideration the national customs and racial habits of PWs and detainees, resulting in malnutrition, was held to be a war crime.

233 Under **Geneva Convention III** art 26(6) collective disciplinary measures affecting food are prohibited.

**ADEQUATE CLOTHING MUST BE PROVIDED**

**12.10.49** COMJFNZ is to ensure that suitable plans are made to provide persons deprived of liberty with necessary clothing, including underwear and footwear, suitable to the climatic conditions.<sup>234</sup> If required, adequate working clothes, including safety clothing, must also be supplied.<sup>235</sup>

**RECREATION AND WELFARE MUST BE PROVIDED FOR**

**12.10.50** Commanders of NZDF places of detention are to ensure that persons deprived of liberty are provided with:

- a. adequate facilities for intellectual, educational, and recreational pursuits, sports and games;<sup>236</sup> and
- b. canteens or shops where they can buy food, toiletries and other everyday items at market price or lower.<sup>237</sup>

234 **Geneva Convention III** art 27: "Clothing, underwear and footwear shall be supplied in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained. Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war [...]." **Geneva Convention IV** art 90: "When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and are unable to procure any, it shall be provided free of charge by the Detaining Power [...]." In the *Tokyo War Crimes Trial* requiring PWs and internees to remain in the clothes in which they were detained, with the result that they were eventually clothed in rags, was held to be a war crime.

235 **Geneva Convention III** art 27 requires that "prisoners of war who work shall receive appropriate clothing, wherever the nature of the work demands". **Geneva Convention IV** art 90 states that internees who work "shall receive suitable working outfits, including protective clothing, wherever the nature of their work so requires".

236 **Geneva Convention III** art 38: "While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners and shall take the measure necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment. Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being outdoors. Sufficient open spaces shall be provided for this purpose in all camps." See **Geneva Convention IV** art 94 for similar provisions for internees. Art 94 also requires that special playgrounds are reserved for children and young people.

237 **Geneva Convention III** art 28: "Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local prices. The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose [...]." The article also contains provisions for closure of such funds. **Geneva Convention IV** art 87: "(1) Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort. (2) Profits made by the canteen shall be credited to a welfare fund to be set up for each place of internment and administered for the benefit of the internees attached to such place of internment [...]." Art 87 provides for the closing of the fund and the distribution of its contents. Art 98: "All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowances may take the form of credits or purchase coupons. (2) Furthermore, internees may receive allowances from the Power to which they owe allegiance, the Protecting Powers, the organizations which may assist them, or their families, as well as the income from their property in accordance with the law of the Detaining Power [...]."



## TOBACCO PRODUCTS

**12.10.51** Provisions requiring that persons deprived of their liberty be permitted to smoke tobacco pre-date awareness of the health hazards of smoking. While persons deprived of their liberty should, therefore, be allowed to smoke, common-sense precautions, such as those preventing smoking in sleeping accommodation and public areas, are to be applied.<sup>238</sup> Cigarettes may be purchased from a canteen but will not be supplied by a New Zealand force.

## CAPTURE CARDS

**12.10.52** As soon as possible after a person has been captured or apprehended, and no later than one week after arriving at an NZDF place of detention, the NZDF commander responsible is to ensure that every person deprived of liberty is provided with a capture card as set out in Annex E. When completed, one copy of the card is to be sent without delay to his or her family and another to the ICRC. This right also arises in case of sickness, removal to hospital or transfer to another camp.<sup>239</sup>

## WOMEN ENTITLED TO SPECIAL PROTECTION

**12.10.53** Members of the NZDF are to treat women deprived of liberty with respect, with due care to their sex and no less favourably than men.<sup>240</sup> Regard is to be had for biological factors such as menstruation, pregnancy and childbirth. The commander of an NZDF place of detention is to ensure that women are:

- a. quartered separately from men;<sup>241</sup>
- b. immediately supervised by women;<sup>242</sup>

238 The provisions of the **Smoke-free Environments Act 1990** are to be applied for the protection of both persons deprived of liberty and members of the NZDF.

239 **Geneva Convention III** art 70: “Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or another camp, every prisoner of war shall be enabled to write directly to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.”

240 **Geneva Convention III** art 14 requires that female PWs “be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men”. Art 29 requires that in any camps in which women PWs are accommodated, separate conveniences for the purposes of hygiene are to be provided for them. See also **ICRC Customary IHL** rule 134. For women as protected persons see Chapter 14.

241 **Geneva Convention III** art 25 requires that “in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them” (see art 97 for separate accommodation of female PWs undergoing punishment). Art 29 requires that in any camps in which female PWs are accommodated, separate conveniences for the purposes of hygiene are to be provided for them. **Geneva Convention IV** art 76 requires that women “shall be confined in separate quarters and shall be under the direct supervision of women” (see also art 124 for separate accommodation for female detainees undergoing punishment). Art 85(4) states that “whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory”. **Geneva Protocol I** art 75(5): “Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men’s quarters. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.” **Geneva Protocol II** art 5(2)(a) states that “except where men and women of a family are accommodated together, women shall be held in quarters separated from those of men”. See also **ICRC Customary IHL** rule 119.

242 See **Geneva Convention III** art 97(4): Women PWs undergoing disciplinary punishment shall be under the immediate supervision of women. **Geneva Convention IV** art 76 requires that women



- c. only searched by women;<sup>243</sup> and
- d. protected from rape and all other forms of sexual violence.<sup>244</sup>

**12.10.54** Pregnant women and mothers with dependant infants must have their cases considered with the utmost priority.<sup>245</sup> It is prohibited to execute pregnant women or mothers with dependant infants.<sup>246</sup>

#### CHILDREN DEPRIVED OF THEIR LIBERTY ARE ENTITLED TO SPECIAL PROTECTION

**12.10.55** A child is any person who has not reached the age of 18 years.<sup>247</sup>

**12.10.56** Children deprived of their liberty continue to benefit from special protection, whether or not they are entitled to be treated as PW.<sup>248</sup>

**12.10.57** Children are to be held in quarters separate from adults, except that families are to be accommodated as family units wherever possible.<sup>249</sup> At the commencement of any hostilities in which it is likely that the NZDF will have to detain children, COMJFNZ is to identify service members who will be suitable

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“shall be confined in separate quarters and shall be under the direct supervision of women” (see also art 124 for separate accommodation for female detainees undergoing punishment). **Geneva Protocol I** art 75(5) states that women under any form of detention shall be supervised only by women. **Geneva Protocol II** art 5(2)(a) states that in NIAC women interned or detained for any reason related to the armed conflict shall be under the immediate supervision of women. See also **ICRC Customary IHL** rule 119.

243 **Geneva Convention IV** art 97 states that a “woman internee shall not be searched except by a woman”.

244 **Geneva Protocol I** art 76(1) requires that women “shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”. **Geneva Protocol II** art 4(2)(e) states that “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution and any other form of indecent assault” are prohibited, whether or not liberty has been restricted. See also **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).

245 The model agreement, contained at Annex I of **Geneva Convention II**, concerning direct repatriation and accommodation in neutral countries of wounded and sick PWs, recommends that all “women prisoners of war who are pregnant or mothers with infants and small children” shall be eligible for accommodation in a neutral country (see 1(B)(7)). **Geneva Convention IV** art 132 requires that “Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children”.

246 See **Geneva Protocol I** art 76(3), **Geneva Protocol II** art 6(4) and **Abolition of the Death Penalty Act 1989** under which New Zealand has abolished the death penalty.

247 Under **UNCROC** art 1 a ‘child’ means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. Under the **Age of Majority Act 1970** s 4, the age of majority in New Zealand is 20 years of age. Regardless of the age of majority in other States, members of the NZDF are to treat any person under the age of 18 years as a child.

248 **Geneva Convention IV** art 132(2): “The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for release, the repatriation, the return to places of residence or the accommodation in a neutral country of [...] children, pregnant women and mothers with infants and young children [...]”. Art 76(5) requires that “proper regard shall be paid to the special treatment due to minors”. **Geneva Protocol I** art 77(3) states that if “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 [art 77], whether or not they are prisoners of war”. **Geneva Protocol II** art 4(3)(d) states that in NIAC “the special protection provided by [art 4] to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities [...] and are captured”. See also **ICRC Customary IHL** rule 135. For protection of children see Chapter 14.

249 **Geneva Protocol I** art 77(4): “If arrested, detained or interned for reasons 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 [art 75(5)].” See **ICRC Customary IHL** Rule 120.

for guarding and caring for such children. Those members of the NZDF are to receive specific training in their duties. Wherever practicable, advice is to be obtained from persons with expertise in dealing with children deprived of liberty.

**12.10.58** If it is necessary to hold children temporarily with adults in any place of detention, the NZDF commander responsible is to put in place procedures to ensure that those children are protected from any form of indecency or violence.

**12.10.59** It is undesirable to keep young children in the same quarters as adolescents since they are likely to be victim to bullying or indecency. If it becomes necessary for the NZDF to hold children of different ages for more than a brief period, COMJFNZ is to put in place orders to ensure that children are divided into appropriate groups on the basis of age and sex, and are housed and detained in conditions that take full account of their special needs as children. In particular, to the greatest extent practicable, facilities are to be provided for education, recreation and social activities. Contact between the child and his or her family must be facilitated as much as is possible. The assistance of appropriate governmental and non-governmental organisations (NGOs) is to be sought.

**12.10.60** Children have the same right to challenge the basis for their detention as adults. Any child whose case is being dealt with by the Detention Authority or the Status Review Authority is to be provided with appropriate assistance by an officer who is independent of the decision-making process. The Detention Authority and the Status Review Authority are to be guided in their decisions by the principle that the primary consideration is the best interests of the child.<sup>250</sup> Wherever possible, children should be released from detention into an appropriate alternative form of care at the earliest opportunity.

#### **VULNERABLE PERSONS ARE ENTITLED TO SPECIAL PROTECTION**

**12.10.61** A vulnerable person is someone deprived of liberty who, by reason of mental or other disability, age or illness, is:

- a. unable to take care of himself or herself,
- b. unable to protect himself or herself against harm or exploitation, or
- c. is dependent on others for assistance in the performance of basic physical functions.

**12.10.62** Vulnerable persons are to be given special treatment according to need. Those who require medical treatment (eg mentally disabled persons) are to be handed over to medical staff. If the safety of such people cannot be guaranteed in any other way, they are to be segregated from other persons deprived of liberty.

## COMMUNICATIONS AND VISITS BY PROTECTING POWER/INTERNATIONAL COMMITTEE OF THE RED CROSS/HUMAN RIGHTS ORGANISATIONS MUST BE FACILITATED

**12.10.63** Members of the NZDF are to permit and facilitate delegates or representatives of Protecting Powers, the ICRC and authorised human rights organisations to:

- a. visit at will all NZDF places of detention except where temporarily not possible for imperative reasons of security; and
- b. interview all persons deprived of their liberty and representatives without witnesses, either personally or through interpreters.<sup>251</sup>

**12.10.64** Nationals of the prisoner's State may be included in such visiting parties.<sup>252</sup>

## COMMUNICATIONS WITH OUTSIDE PERSONS OR AGENCIES AND RECEIPT OF RELIEF PACKAGES MUST BE ALLOWED

**12.10.65** Persons deprived of their liberty are to be allowed to:

- a. correspond with their families and, where possible, receive visits from family members;<sup>253</sup> and
- b. receive individual or collective relief packages.<sup>254</sup>

**12.10.66** COMJFNZ is to put in place procedures for censorship of incoming and outgoing mail and other communications. This includes arranging for translators where required. Censorship is not to be used as a pretext to delay or deny relief packages. Where it is necessary to open a package addressed to a PW or

251 **Geneva Convention III** art 126: "[...] Representatives or delegates of the Protecting Power shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour [...] They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter. Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure." See **Geneva Convention IV** art 143 for protected civilians. See **ICRC Customary IHL** rule 124 which states that under IAC the ICRC must be granted regular access to persons deprived of their liberty, whereas in NIAC the ICRC may only offer its services.

252 **Geneva Convention III** art 126 states that the "Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in these visits. The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives".

253 **Geneva Convention III** art 71: "Prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly, exclusive of the capture cards [...] Further limitations may be imposed only if the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry out the necessary censorship [...] Such letters and cards must be conveyed by the most rapid means at the disposal of the Detaining Power; they must not be delayed or retained for disciplinary reasons [...]." See also **Geneva Convention IV** art 107 for similar rights for internees and **ICRC Customary IHL** rules 125 and 126.

254 **Geneva Convention III** art 72 states that "prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character". See **Geneva Convention IV** art 108 for civilian internees. Art 76: "Protected persons accused of a offences shall be detained in the occupied country [...] shall have the right to receive at least one relief parcel monthly." Under **Geneva Protocol II** art 5(1)(c) in NIAC persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained, "shall be allowed to receive individual or collective relief".

internee, this should be done in that person's presence or in the presence of the appropriate representative.<sup>255</sup>

**12.10.67** The commander of an NZDF place of detention is to allow, where feasible, for messages to be sent by email, facsimile or other electronic media.<sup>256</sup> The commander is to put in place measures to ensure that access to electronic media is controlled by the NZDF and that messages can be censored. The commander is to obtain expert advice on mechanisms to ensure that cyber security is maintained.

### PERSONS DEPRIVED OF LIBERTY MUST NOT BE DENIED LEGAL RIGHTS

**12.10.68** Persons deprived of their liberty retain their civil capacity and the right to be recognised as a person before the law.<sup>257</sup> They retain the right to:

- a. challenge their detention or enforce other legal rights before a court;<sup>258</sup> and
- b. make wills and, where possible, carry out other legal transactions.

**12.10.69** Members of the NZDF are not to do anything that has the effect of denying persons deprived of liberty the right to be a person before the law.

### REPRESENTATIVES MUST BE ALLOWED

**12.10.70** The commander of an NZDF place of detention is to facilitate the appointment of representatives to speak for persons deprived of their liberty in their dealings with the NZDF, ICRC or authorised human rights organisations.

255 **Geneva Convention III** art 76: "The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. Mail shall be censored only by the dispatching State and the receiving State, and once only by each. The examination of consignments intended for prisoners of war shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or of a fellow-prisoner duly delegated by him. The delivery to prisoners of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship. Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible." See **Geneva Convention IV** art 112 for censoring of mail of internees.

256 **Geneva Convention III** art 71 and **Geneva Convention IV** art 107 provide for PWs and internees to send messages by telegram where they have been a long time without news, where they find it impossible to send or receive news from their relatives by post, or where they are at a considerable distance from their homes. They shall likewise benefit by this provision in cases which are recognised to be urgent. Because telegrams are now rare, this function may need to be replicated through email or fax.

257 **Geneva Convention III** art 14(3) provides that PWs "shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as captivity requires". **Geneva Convention IV** art 80: "Internees retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status." **Rome Statute** art 8(2)(b)(xiv): "Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party" is a serious violation of LOAC. See **ICCPR** arts 4 and 16 for the non-derogable right to be recognised as a person before the law. In the *Quirin Appeal* (at 317) it was held that the fact that the petitioners were enemy aliens, unlawful belligerents, and subject to a Presidential Proclamation denying them access to US courts did not foreclose consideration by the courts of their claim to protection under the US Constitution.

258 See *Hirabayashi v US*, *Korematsu v US*, *Mohamed Ali Appeal*, *Re Yamashita*, *Rasul v Bush*, *Hamdan v Rumsfeld*. See also *Liversidge v Anderson*, dissenting judgment of Lord Atkin, now preferred as the correct position.

- 12.10.71** The senior PW officer is the PW representative.<sup>259</sup> If there are no officers, the representative is elected by the PWs, subject to veto by the commander of the place of detention. In that case, the Protecting Power/ICRC is to be advised of the reason, and the PWs may elect another person instead.<sup>260</sup> The PW representative must have the same nationality, customs and language as the PWs he or she represents. Camps containing PWs of different nationalities and/or languages will need to have more than one representative.<sup>261</sup>
- 12.10.72** An internee representative committee may be elected by secret ballot every six months.<sup>262</sup> The same provisions are to be applied to the election of a person to represent the interests of detainees unless there are strong security reasons not to do so.

### THE ROLE OF REPRESENTATIVES

**12.10.73** Representatives of persons deprived of their liberty are to be:

- a. allowed to act so as to further the physical and intellectual well-being of persons in detention;<sup>263</sup>
- b. allowed to organise persons deprived of their liberty for mutual assistance;<sup>264</sup>
- c. afforded facilities and privileges necessary for them to perform their tasks, including communication with the commander, the Protecting Power, the ICRC and authorised human rights organisations;<sup>265</sup>

- 259 **Geneva Convention III** art 79 states that in “camps of officers and persons of equivalent status or in mixed camps, the senior officer among the prisoners of war shall be recognized as the camp prisoners’ representative [...] Officer prisoners of war of the same nationality shall be stationed in labour camps for prisoners of war, for the purpose of carrying out the camp administration duties for which prisoners of war are responsible. These officers may be elected as prisoners’ representatives [...].”
- 260 **Geneva Convention III** art 79: “[...] In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners’ representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them [...] Every representative elected must be approved by the Detaining Power before he has the right to commence his duties. Where the Detaining Power refuses to approve a prisoner of war elected by his fellow prisoners of war, it must inform the Protecting Power of the reason for such refusal [...].”
- 261 **Geneva Convention III** art 79: “[...] In all cases the prisoners’ representative must have the same nationality, language and customs as the prisoners of war whom he represents. Thus, prisoners of war distributed in different sections of a camp, according to their nationality, language or customs, shall have for each section their own prisoners’ representative [...].”
- 262 **Geneva Convention IV** art 102: “In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers the International Committee of the Red Cross and any other organization which may assist them [...].”
- 263 **Geneva Convention III** art 80 and **Geneva Convention IV** art 103 require that “Internee Committees shall further the physical, spiritual and intellectual well-being of the internees”.
- 264 See **Geneva Convention III** art 80 and **Geneva Convention IV** art 103.
- 265 **Geneva Convention III** art 81: “[...] All material facilities shall be granted them [prisoners’ representatives], particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc) [...] All facilities shall likewise be accorded to the prisoners’ representatives communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, the Mixed Medical Commissions and with the bodies which give assistance to prisoners of war. Prisoners’ representatives of labour detachments shall enjoy the same facilities for communication with the prisoners’ representatives of the principal camp. Such communications shall not be restricted, nor considered as forming part of the quota mentioned



- d. permitted to visit places where persons they represent are detained;<sup>266</sup> and
- e. made available to every person deprived of liberty for consultation.<sup>267</sup>

**12.10.74** Representatives are not to be held accountable for offences in which they have played no part committed by persons deprived of liberty.<sup>268</sup>

## WORK OF PEOPLE DEPRIVED OF LIBERTY

**12.10.75** LOAC allows for PWs and persons in occupied territory to be required to work, but not by coercive or physical measures.<sup>269</sup> On the other hand, there is no legal power to compel detainees to work and, if internees do agree to work, they may cease work subject to reasonable notice.<sup>270</sup> In practical terms, even powers to compel PWs to work are likely to be of little value to the commander of an NZDF place of detention. Although a PW could face disciplinary action under the AFDA for refusal to work, such measures may not be effective in view of the limited range of punishment that can be applied. No disciplinary measures are available in respect of retained personnel, internees or detainees. Persons under the age of 18 are not to be required to work.

**12.10.76** The commander of an NZDF place of detention may therefore make work available to persons deprived of their liberty when such work exists and can be properly supervised. No person is to be compelled to work without the authority of CDF. In the event that a compulsory work regime is established for persons deprived of liberty, COMJFNZ is to issue orders for the conduct and conditions of work. Advice is to be obtained from an NZDF LEGAD on the appropriate conditions of work to be applied.

**12.10.77** Persons who volunteer for work are to be fairly remunerated at no less than the minimum wage for the territory in question. If that rate produces an unduly low rate of pay, the commander may take into account the New Zealand minimum wage.<sup>271</sup> The commander of an NZDF place of detention remains responsible for

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in article 71 [ie general correspondence] [...].” See **Geneva Convention IV** art 104 for internees’ representatives.

266 See **Geneva Convention III** art 81. See **Geneva Convention IV** art 104 for internees’ representatives.

267 See **Geneva Convention III** art 81.

268 **Geneva Convention III** art 80: “[...] Prisoners’ representatives shall not be held responsible, simply by reason of their duties, for any offences committed by prisoners of war.”

269 **Hague Regulations** art 6 states that the State “may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war”. **Geneva Convention III** art 49: “[...] If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.” See also **Geneva Convention IV** art 51.

270 **Geneva Convention IV** art 95: “The Detaining Power shall not employ internees as workers, unless they so desire [...] After a working period of six weeks, internees shall be free to give up work at any moment subject to eight days’ notice. These provisions constitute no obstacle to the right of the Detaining Power to employ interned doctors, dentists and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks [...] No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited [...]”

271 Pay rates based on Swiss Francs are now obsolete (see **Geneva Convention III** art 60).

compliance with LOAC in any work detachment,<sup>272</sup> and is to ensure no one is to be required to do work that:

- a. does not provide an equitable rate of pay and compensation for injury or illness incurred while employed;<sup>273</sup>
- b. is excessive or unhealthy or unsafe;<sup>274</sup>
- c. is humiliating;<sup>275</sup>
- d. is of a military or semi-military nature or purpose, or requires them to take a direct part in hostilities;<sup>276</sup>
- e. is unsuited to the physical ability, gender or age of the person;<sup>277</sup>
- f. involves any element of sexual exploitation;
- g. requires training or expertise not held by the person;

- 272 **Geneva Convention III** art 56: “The organization and administration of labour detachments shall be similar to those of prisoner of war camps. Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of their government, for the observance of the provisions of Geneva Convention III in labour detachments. The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.”  
**Geneva Convention IV** art 96: “[...] The commandant shall keep an up-to-date list of labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organizations who may visit the places of internment.”
- 273 **Geneva Convention IV** art 51: “[...] Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capabilities. The legislation in force in the occupied territory 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, shall be applicable to the protected persons assigned to the work [...].”  
 Art 95: “[...] The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases [...] in accordance with the national laws and regulations, and with existing practice; they shall in no case be inferior to those obtaining work of the same nature in the same district. Wages for work done shall be determined on an equitable basis [...].” Under **Geneva Protocol II** art 4(2)(f) slavery remains prohibited in all its forms at any time and in any place whatsoever. See also **Geneva Convention III** art 60. See **Rome Statute** art 7(1)(c) for slavery as a crime against humanity, **Crimes Act 1961** s 98, **ICCPR** arts 4 and 8, **Slavery Convention** art 1(1), **Supplementary Slavery Convention** for prohibited practices similar to slavery and **ICRC Customary IHL** rule 94.
- 274 **Geneva Convention III** art 52 states that unless he is a volunteer, “no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature”.
- 275 **Geneva Convention III** art 52 states that no “prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power’s own forces”. **Geneva Convention IV** art 95 states that “employment on work which is of a degrading or humiliating character in any case [is] prohibited”.
- 276 **Hague Regulations** art 6 states that tasks undertaken by PWs “shall not be excessive and shall have no connection with the operations of the war”. **Geneva Convention III** art 50 states the type of work which PWs may be compelled to do, may not be “military in character or purpose”. **Geneva Convention IV** art 51 states that “protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations”. In addition, in no case “shall requisition of labour lead to a mobilization of works in an organization of a military or semi-military character”.
- 277 See **Geneva Convention IV** art 95.



- h. requires safety or specialist equipment if that is not available; or
- i. interferes with the duties of retained personnel in respect of the medical or spiritual needs of persons deprived of liberty, or the duties of PWS' or internees' representatives.<sup>278</sup>

**12.10.78** No person is to be allowed to do work that is unsafe or dangerous, for example, removing mines or explosive remnants of war (ERW), even as a volunteer, without the specific permission of CDF.<sup>279</sup> Permission may be granted in circumstances where persons deprived of liberty have specialist skills in the performance of a difficult or dangerous task and their readiness to volunteer is shown to be genuine.

**12.10.79** The types of work that are permitted include:

- a. administration, maintenance and installation of the camp;
- b. agriculture;
- c. industry involving the production of raw materials and manufacturing, except heavy industry, metallurgical or chemical works as these are likely to be military objectives or used for a military purpose;
- d. public works or construction of a non-military nature;
- e. transport and handling of non-military stores;
- f. commercial business, arts and crafts;
- g. domestic service; and
- h. public utility services having no military purpose or character.<sup>280</sup>

**12.10.80** Working hours are not to exceed eight hours a day. Each person must be allowed at least one hour's break in the middle of the day, one day free of work each week and a period of eight days without work each year.

#### PERSONS MAY BE PUNISHED ONLY AFTER A FAIR AND REGULAR TRIAL

**12.10.81** The NZDF currently has no legislative power to try retained personnel, internees or detainees other than alleged spies.<sup>281</sup>

<sup>278</sup> See **Geneva Convention III** arts 33(c) and 81 and **Geneva Convention IV** art 104.

<sup>279</sup> **Geneva Convention III** art 52 states that unless the PW is a volunteer, "no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature [...] The removal of mines or similar devices shall be considered as dangerous labour." **Geneva Convention IV** art 95 requires that no internee "be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited". Furthermore, "working conditions [...] shall not be inferior to those applicable to work of the same nature in the same district". **Geneva Protocol II** art 5(1)(e) requires that, in NIAC, protected persons, "if made to work, [shall] have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population".

<sup>280</sup> See **Geneva Convention III** art 50.

<sup>281</sup> See **AFDA** s 26 and **DM 69** (2 ed) Volume 1. For the NZDF's legislative power of PWS see Section 12.

**12.10.82** If such powers are established, persons deprived of liberty are entitled to minimum standards of justice regardless of all other considerations.<sup>282</sup> Any trial under New Zealand jurisdiction must be fair and held before a regular court conducted in accordance with New Zealand standards of justice.<sup>283</sup>

#### THE DEATH PENALTY IS ABOLISHED

**12.10.83** New Zealand has abolished the death penalty. Members of the NZDF are not to impose or carry out the death penalty on any person deprived of liberty, regardless of the crime alleged against the person or the circumstances surrounding sentencing.<sup>284</sup>

**12.10.84** Members of the NZDF are not to take any part in the execution of the death penalty on any person or assist another force to carry out such a sentence. Where members of the NZDF are involved in operations that expose persons deprived of their liberty to the death penalty at the hands of another power, New Zealand may express its opposition to that penalty. This is usually done at a government level by urging the other government not to apply the penalty.

282 See *Hamdan v Rumsfeld*. Persons captured in the course of armed conflict are, at the very least, entitled to the protection of **Geneva Convention Common Article 3** which entails the right to trial before a regular court. For judicial guarantees see Chapter 17.

283 **Geneva Convention III** art 84(2): “In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized and, in particular the procedure of which does not afford the accused the rights and means of defence provided for in article 105.” Under art 130 it is a grave breach of the Convention to wilfully deny a PW the rights of a fair and regular trial. **Geneva Convention IV** art 5 states that persons suspected of sabotage or espionage in occupied territory “shall not be deprived of the rights of a fair and regular trial prescribed by the present Convention”. Art 71 states that “no sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial”. Under Art 147 it is a grave breach of the Convention to wilfully deny a protected person the rights of a fair and regular trial. Under **Geneva Convention Common Article 3** it is prohibited in NIAC to pass sentence on detained persons “without previous judgment pronounced by a regular constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. **Geneva Protocol I** art 75(4) states that in NIAC “[n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”. See art 75(4)(a) to (j) for characteristics of minimum standards of a fair and regular trial in IAC. Under art 85(4)(e) it is a grave breach of the Geneva Conventions to wilfully deny a protected person the rights of a fair and regular trial. See also **Geneva Protocol II** art 6 for minimum standards of a fair and regular trial in NIAC. In the *Susuki Motosuke Trial* a Japanese officer was found guilty of the “war crime of murder” for executing Indonesian civilians without trial. See also **Rome Statute** art 8(2)(a)(vi), **Nuremberg Principle V**, **ICRC Customary IHL** rule 100 and Chapter 17.

284 See **Abolition of the Death Penalty Act 1989**.

## SECTION 11 – TRANSFER OF PERSONS DEPRIVED OF THEIR LIBERTY TO OTHER FORCES OR AUTHORITIES

### TRANSFER TO FORCES OR AUTHORITIES OF ANOTHER STATE

- 12.11.1** The size and composition of New Zealand forces makes it unlikely that NZDF places of detention will be established for long-term holding of captured or apprehended persons. In most circumstances the force will:
- a. transfer a person to the control of a coalition partner which has the resources and personnel to process and hold him or her,
  - b. transfer the person to the control of the appropriate civil or military authority of the territory in which the force is operating, or
  - c. release the person.
- 12.11.2** Transfer may be either temporary or permanent. It may occur at or shortly after the point of capture, or at some later date after a period of detention in an NZDF place of detention.
- NO TRANSFER WITHOUT CHIEF OF DEFENCE FORCE AUTHORITY**
- 12.11.3** Members of the NZDF are not to transfer any person to the forces or authorities of any other State without the authority of CDF.
- 12.11.4** Internees and detainees are not to be transferred out of occupied territory to New Zealand or the territory of any other State.<sup>285</sup>
- 12.11.5** Where persons deprived of liberty are transferred to another State, primary responsibility for complying with LOAC falls upon the receiving State.<sup>286</sup> However, before making the transfer, New Zealand must satisfy itself that the receiving State is a party to Geneva Convention III or IV, as applicable, and that it is willing and able to comply with the obligations of LOAC.<sup>287</sup> In addition, if the Protecting Power advises New Zealand that the receiving State is not abiding by LOAC with respect to persons so transferred, then New Zealand must take effective measures to correct the situation or request return of the transferred persons.<sup>288</sup>
- 12.11.6** Members of the NZDF are not to transfer persons to the forces or authorities of any State that is not bound to give them appropriate protection under LOAC. In particular:
- a. PWs and retained personnel are not to be transferred to a State that is not a party to Geneva Convention III,<sup>289</sup> and
  - b. internees and detainees are not to be transferred to a State that is not a party to Geneva Convention IV.<sup>290</sup>

285 **Geneva Convention IV** art 49: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territories to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive [...]." Under art 147 unlawful deportation or transfer of a protected person is a grave breach. This rule does not apply to a person who is a national of a State maintaining normal diplomatic relations with New Zealand (see **Geneva Convention IV** art 4). See also **Rome Statute** art 8(2)(a)(vii).

286 See **Geneva Convention III** art 12 and **Geneva Convention IV** art 45.

287 See **Geneva Convention III** art 12.

288 See **Geneva Convention III** art 12 and **Geneva Convention IV** art 45.

289 See **Geneva Convention III** art 12. At present all States are parties to Geneva Convention III.

290 See **Geneva Convention IV** art 45. At present all States are parties to Geneva Convention IV.

- 12.11.7** Persons deprived of liberty are not to be transferred to any force or authority if there is a real risk they will be killed, tortured or otherwise mistreated. The NZDF must be satisfied that transferred persons will be treated humanely and in accordance with LOAC.<sup>291</sup> This may include requiring high-level assurances, agreements or arrangements.
- 12.11.8** Members of the NZDF who become aware of breaches of LOAC by a receiving force or authority are to report the matter to their superiors without delay. The commander of the New Zealand force is to report the matter to CDF, through COMJFNZ and D DLS, immediately. If CDF is not satisfied with the standard of treatment given to transferred persons, the matter will be raised with the force in question or its government at political, diplomatic and senior command level. In some cases, it will be possible for the NZDF to provide necessary help to rectify the failure, for example, by supplying food, medical assistance or logistic assistance. If necessary, the New Zealand force will resume custody of persons deprived of liberty until any defects relating to their treatment are rectified, or require that the persons who have already been handed over be returned to NZDF custody.<sup>292</sup>
- 12.11.9** If it becomes apparent that the authorities of the State to which a person owes allegiance are breaching LOAC, this matter will be dealt with at the highest levels of command and may render future cooperation with those authorities impossible.
- 12.11.10** If NZDF personnel are required to transfer persons to the forces or the authorities of a State that retains the death penalty, the force commander is to advise CDF. Appropriate communications will be made by the Government to the receiving State.<sup>293</sup>
- 12.11.11** A formal handover procedure for transferring persons from NZDF custody to that of the receiving State is to be conducted at the time custody changes. Members of the NZDF responsible for the transfer are to ensure that:
- a. persons are officially advised of their departure and of their new postal address;<sup>294</sup>
  - b. when they arrive at their new place of detention or internment, persons are permitted to write to their relatives to advise of their new location (see templates at Annex E);<sup>295</sup>

291 See **Geneva Convention III** art 12 and **Geneva Convention IV** art 45.

292 See **Geneva Convention III** art 12 and **Geneva Convention IV** art 45.

293 Under **ICCPR Optional Protocol II** Parties must work towards the abolition of the death penalty. See **Abolition of the Death Penalty Act 1989**.

294 See **Geneva Convention III** art 48 and **Geneva Convention IV** art 128.

295 See **Geneva Convention III** art 70 provides that in case of “transfer to [...] another camp every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the one annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner”. **Geneva Convention IV** art 106 requires that in cases of “transfer to another place of internment [...] every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the one annexed to the present Convention, informing his relatives of his detention, address and state of health. The cards shall be forwarded as rapidly as possible and may not be delayed in any way”.

- c. a transfer document conforming to Annex F is filled out for each transferee and retained;
- d. all available details regarding the medical condition of transferees are provided to the receiving State;
- e. all documents, information and other material relating to the capture of the persons, including that of an intelligence or evidentiary value, or which may relate to status determination, prosecution, retention or release of the transferees, are provided to the receiving State; and
- f. all personal effects are transferred with the transferee.<sup>296</sup>

### THE CONDITIONS OF TRANSFER MUST BE HUMANE

**12.11.12** The members of the NZDF who are responsible for the transfer of persons deprived of liberty are to ensure that it is effected humanely and in conditions no less favourable than if members of the NZDF were being transported.<sup>297</sup> Adequate precautions are to be taken to ensure the safety of persons while being transferred, whether by land, sea or air.<sup>298</sup> The responsible NZDF commander is to ensure they are:

- a. transported in a method adequate for the weather conditions;<sup>299</sup>
- b. provided with sufficient food and drinking water to keep them in good health;<sup>300</sup>
- c. provided with necessary clothing, shelter and medical attention;<sup>301</sup> and
- d. informed of their departure and the place to which they are being transferred (this information may need to be generic for security reasons).<sup>302</sup>

<sup>296</sup> **Geneva Convention III** art 48 provides that notification of transfer “shall be given in time for them [PWS] to pack their luggage and inform their next of kin. They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head. Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners’ representative, any measures needed to ensure the transport of the prisoners’ community property and of the luggage they are unable to take with them in consequence of [security restrictions]. The costs of transfers shall be borne by the Detaining Power”. **Geneva Convention IV** art 128 provides that internees “shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited if the conditions of transfer so require, but in no case to less than twenty-five kilograms per internee [...] The commandant of the place of internment shall take, in agreement with the Internee Committee, any measures needed to ensure the transport of the internees’ community property and of the luggage internees are unable to take with them in consequence of restriction imposed”.

<sup>297</sup> See **Geneva Convention III** art 46.

<sup>298</sup> See **Geneva Convention III** art 46 and **Geneva Convention IV** art 49. See also **Geneva Convention III** art 47 which provides that “if the combat zone draws closer to a camp, the prisoners of war shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or if they are exposed to greater risks by remaining on the spot than by being transferred”.

<sup>299</sup> See **Geneva Convention III** art 46.

<sup>300</sup> See **Geneva Convention III** art 46 and **Geneva Convention IV** art 49.

<sup>301</sup> See **Geneva Convention III** art 46 and **Geneva Convention IV** art 49.

<sup>302</sup> **Geneva Convention III** art 48: “In the event of transfer, prisoners of war shall be officially advised

**12.11.13** A complete list of transferees is to be taken before transfer and sent to HQ JFNZ. In cases where a list of names is not possible, numbers and descriptions of individuals, including available biometric material and photographs, are to be recorded and retained.<sup>303</sup>

**12.11.14** Wounded, sick and infirm persons, and maternity cases are not to be transferred if doing so would endanger their health, unless it is necessary for their own safety or if they are being transferred in order to receive medical care.<sup>304</sup> A medical examination of transferees is to be conducted prior to transfer.

### TRANSFER AGREEMENTS OR ARRANGEMENTS

**12.11.15** A transfer agreement or arrangement with the receiving State will be established wherever practicable, setting out:

- a. New Zealand's obligations and expectations under the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR Optional Protocol II), aiming at the abolition of the death penalty;
- b. that the transferred persons will be treated in accordance with the international obligations of both participants;
- c. that the NZDF will notify the ICRC and appropriate human rights organisations when a person is transferred to the forces or authorities of that State;
- d. that representatives from the ICRC will have full access to such persons and to the facilities where they are held;
- e. that representatives of the NZDF will have full access to the transferees; and
- f. that the receiving State authorities will advise the NZDF of any legal proceedings, transfers or significant changes concerning transferees.

**12.11.16** A New Zealand force must make its own enquiries about the welfare of transferees, which may include reference to the reports of credible human rights organisations. While the ICRC investigates breaches of LOAC, it does not make its findings known other than to the government concerned.<sup>305</sup>

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of their departure and of their new postal address. Such notifications shall be given in time for them to pack their luggage and inform their next of kin. They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head. Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners' representative, any measures needed to ensure the transport of the prisoners' community property and of the luggage they are unable to take with them in consequence of [security restrictions]. The costs of transfers shall be borne by the Detaining Power."

303 See **Geneva Convention III** art 46.

304 See **Geneva Convention III** art 47.

305 In the *Simić Decision* (at [73]), the ICTY Trial Chamber held that "the right to non-disclosure of information relating to the ICRC's activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate" and that the "ICRC has a right to insist on such non-disclosure by parties to the Geneva Conventions and Protocols".



## SECTION 12 – RULES SPECIFIC TO PRISONERS OF WAR

### PRISONERS OF WAR ARE SUBJECT TO MILITARY DISCIPLINE

- 12.12.1 Summary proceedings** means proceedings under AFDA Part 5. These are ‘disciplinary sanctions’ and ‘disciplinary punishments’, as referred to in Geneva Convention III, Part III, Section VI, Chapter III.
- 12.12.2 Court Martial proceedings** means proceedings before the Court Martial of New Zealand (Court Martial). These are judicial proceedings as referred to in Geneva Convention III, Part III, Section VI, Chapter III.
- 12.12.3** PWs remain subject to their own military law and must comply with the orders of their superior officers and regulations of the prisoners’ representative. However, PWs are not to be permitted to impose or carry out punishments on other PWs while they are under the control of the NZDF.
- 12.12.4** PWs are subject to summary proceedings or Court Martial proceedings for breaches of the AFDA committed after capture, and for international crimes, including breaches of LOAC, whether before or after capture.<sup>306</sup> If the matter is remanded for trial before the Court Martial, the Protecting Power, the ICRC, the PW and the prisoners’ representative are to be informed of the intention to do so.<sup>307</sup>
- 12.12.5** PWs are subject to the AFDA<sup>308</sup> except for:
- a. cowardly behaviour (AFDA s 28);
  - b. offences in relation to capture by the enemy (AFDA s 30);
  - c. failure to suppress or report mutiny (AFDA s 33);
  - d. threat of force against person on guard duty or watch (AFDA s 34(5)(c));
  - e. refusal to assist a provost officer (AFDA s 37(1)(b)); and
  - f. desertion (AFDA s 47).

306 See Chapter 17.

307 **Geneva Convention III** art 104: “In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power [...] The said notification shall contain the following information: 1) surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession of trade, if any; 2) place of internment or confinement; 3) specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable; 4) designation of the court which will try the case, likewise the date and place fixed for the opening of the trial. The same communication shall be made by the Detaining Power to the prisoners’ representative. If no evidence is submitted, at the opening of the trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners’ representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.” See also **Geneva Conventions Act 1958** s 4.

308 See **AFDA** s 12.



**12.12.6** Summary proceedings against PWs are to be conducted in accordance with the AFDA and associated Rules of Procedure (RP). The procedure to be applied, with necessary modifications, is:

- a. if the accused holds a rank in an armed force, the same as if the accused held the corresponding rank in a New Zealand Armed Force; or
- b. in other cases, the same as if the accused were a rating of able rank in the Navy, a private in the Army or a leading aircraftman in the Air Force.<sup>309</sup>

**12.12.7** The commander of the NZDF place of detention is to ensure that no informal punishment system is used either by the guards or the PWs themselves. Only a properly appointed DISCO may conduct summary proceedings.<sup>310</sup> These powers are not to be delegated to PWs or exercised by PWs.<sup>311</sup>

**12.12.8** There are no offences under the AFDA that apply to PWs but do not apply to members of the NZDF.<sup>312</sup> In exercising their respective discretions as to whether a charge should be remanded for trial before the Court Martial, DISCOs, superior commanders<sup>313</sup> and the Director of Military Prosecutions are to exercise the greatest leniency that the circumstances allow. Summary proceedings should be used wherever possible.<sup>314</sup> DISCOs should refer charges to the civil authority only in circumstances in which they would have done so with a member of the NZDF.<sup>315</sup>

**12.12.9** A PW is not to be brought up for trial before the Court Martial unless he or she is represented by counsel and at least 14 days have elapsed since instructions for the representation of the accused at the trial were first given to his or her counsel. If this is not done, the Court will adjourn the trial to enable this rule to be complied with.<sup>316</sup>

**12.12.10** If the PW does not accept the appointed counsel, the Protecting Power (if any) may appoint counsel instead.<sup>317</sup> The Court Martial may itself direct that counsel be assigned to watch over the interests of the accused at further proceedings in the absence of counsel either accepted by the accused or instructed by the Protecting Power.<sup>318</sup>

309 See **AFDA** s 117ZJ(1).

310 See **AFDA** s 2 and Part 5, and **Geneva Convention III** art 96.

311 See **Geneva Convention III** art 96.

312 If such offences are created, they can only be dealt with by summary proceedings, not Court Martial proceedings (see **Geneva Convention III** art 82).

313 The superior commander must provide a statement of opinion as to whether prosecution of the charge is in the interests of the service (see **AFDA** ss 117ZG(3)(b) and (4)(b)).

314 **Geneva Convention III** art 83: "In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial [ie via trial by Court Martial] or disciplinary [ie via a summary trial], the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures."

315 **Geneva Convention III** art 84 states that a "prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war". See also **AFDA** s 102(1)(b).

316 See **Geneva Conventions Act 1958** s 5(1). Counsel will be appointed by the Registrar of the Court Martial. Appointed counsel are remunerated under the Legal Services Act 2011.

317 See **Geneva Conventions Act 1958** s 5(2).

318 See **Geneva Conventions Act 1958** s 5(3).

## PENALTIES

**12.12.11** In applying any penalty to PWs, the DISCO is to take into account that PWs are detained due to circumstances beyond their will and do not owe any duty of allegiance to New Zealand.<sup>319</sup> No PW is to be sentenced to:

- a. a punishment more severe than would be imposed on a member of the NZDF for the same offence,<sup>320</sup> or
- b. reduction in rank.<sup>321</sup>

**12.12.12** PWs who have served any sentence are not to be treated differently from other PWs.<sup>322</sup> If punished for escaping, however, they may be subject to special surveillance. Women are not to be punished or treated more severely than a member of the NZDF (male or female) dealt with for the same offence.<sup>323</sup> PWs retain, even if convicted, the special protection of LOAC.<sup>324</sup>

**12.12.13** PWs accused of disciplinary offences are not to be kept in close confinement awaiting trial, except in circumstances in which a member of the NZDF would be held under close arrest. Close confinement must be kept to a minimum and must not exceed 14 days.<sup>325</sup>

**12.12.14** PWs accused of offences are entitled to all procedural protections available to members of the NZDF.<sup>326</sup> This includes full disclosure, the opportunity to present a defence, the right to call witnesses and have a qualified interpreter.<sup>327</sup> The finding must be announced to the PW and to the prisoners' representative. A record of disciplinary punishments is to be maintained by the commander and must be open to inspection by the representatives of the Protecting Power.

319 **Geneva Convention III** art 87 provides that when "fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed". No minimum punishments are prescribed in the AFDA.

320 **Geneva Convention III** art 87 states that PWs "may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts". See also **Geneva Convention III** arts 86 and 130. See **Geneva Protocol I** art 75(2)(iii) and **ICRC Customary IHL** rule 91 for prohibition of corporal punishment. See **AFDA** s 80 for discretion of Court Martial as to punishment.

321 See **Geneva Convention III** art 87 states that "[n]o prisoner of war may be deprived of his rank by the Detaining Power". **AFDA** s 117R(3)(b) requires a DISCO to obtain a specified certificate in order to impose the punishment of reduction in rank. However, this certificate will not be provided in respect of a PW.

322 See **Geneva Convention III** art 88.

323 See **Geneva Convention III** art 88. There is no differentiation of punishments on the basis of gender under the AFDA.

324 See **Geneva Convention III** art 85.

325 **Geneva Convention III** art 95: "A prisoner of war accused of an offence against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence, or if it is essential in the interests of camp order and discipline. Any period spent by a prisoner of war in confinement awaiting the disposal of an offence against discipline shall be reduced to an absolute minimum and shall not exceed fourteen days. The provisions of Articles 97 [conditions relating to premises of PWs undergoing punishment] and 98 [rights of PWs undergoing confinement as a punishment] shall apply to prisoners of war who are in confinement awaiting the disposal of offences against discipline." See also **DM 69** (2 ed) Volume 1, Chapter 3 for close arrest.

326 See **DM 69** (2 ed) Volume 1.

327 See **DM 69** (2 ed) Volume 1, Chapter 7 and **RP** 9–13 and 62.

**12.12.15** Sentences of detention are to conform to Defence Force Orders (DFOs) governing detention of members of the NZDF.<sup>328</sup> Detention of PWs is not to be carried out in civil prisons, and must be carried out in places that are clean and sanitary. Officers are not to be confined with non-commissioned officers (NCOs) and other ranks. Women are not to be confined with men.<sup>329</sup> Detention must not affect privileges attached to rank. Exercise in the open air is to be allowed for at least two hours daily, and medical inspection and, as necessary, treatment or transfer to the camp infirmary or hospital is to be allowed. PWs are to be allowed to read, write and receive mail.<sup>330</sup>

#### PUNISHMENT OF PRISONERS OF WAR WHO ESCAPE

**12.12.16** A PW who is captured attempting to escape may be punished summarily only, even for a repeat offence.<sup>331</sup> Any member of the NZDF who captures an escaped PW is to hand that prisoner over to the appropriate military authorities without delay.<sup>332</sup> The Protecting Power and/or ICRC are to be informed.<sup>333</sup>

**12.12.17** PWs who attempt to escape may be the subject of special surveillance, provided that it is conducted in the NZDF place of detention, is not harmful to the health of the PW and does not involve a breach of LOAC.<sup>334</sup>

**12.12.18** Attempted escape, even if repeated, is not to be treated as an aggravating circumstance if the PW is tried for offences committed during his or her escape attempt. Non-violent offences committed to facilitate escape (eg damaging public property, theft without intent of self-enrichment, forging documents, wearing civilian clothing) must only be dealt with summarily.<sup>335</sup>

**12.12.19** PWs who aid or abet an escape or attempted escape are to be dealt with summarily.<sup>336</sup> Collective punishments are not to be imposed because other PWs have escaped.<sup>337</sup>

**12.12.20** PWs who make good their escape are not liable to any punishment if subsequently recaptured.<sup>338</sup>

#### PAY

**12.12.21** PWs are entitled to a monthly advance of pay to enable them to buy items from

328 See **DM 69** (2 ed) Volume 1, Chapter 9.

329 See **Geneva Convention III** art 97.

330 See **Geneva Convention III** art 98. Parcels and remittances of money, however, may be withheld from them until the completion of the punishment (see art 98).

331 See **Geneva Convention III** art 92. *Major War Criminals Trial* at [345–6]: The ‘Bullet Decree’ by which escaped PWs were to be shot without trial upon recapture was a war crime. See also [86]. In the *Tokyo War Crimes Trial*, forcing PWs to swear an oath not to escape, often under torture, was held to be a war crime. **Geneva Convention III** art 91: Making good an escape means rejoining the escapee’s own force, or an allied force leaving territory controlled by the NZDF or coalition partners, or joining a ship of the escapee’s flag State or an ally.

332 See **Geneva Convention III** art 92.

333 See **Geneva Convention III** art 94.

334 See **Geneva Convention III** art 92.

335 See **Geneva Convention III** art 93.

336 See **Geneva Convention III** art 93.

337 See **Geneva Convention III** art 87. In the *Tokyo War Crimes Trial* imposition of brutal collective punishments on PW who had not participated in an escape was held to be a war crime.

338 **Geneva Convention III** art 91, which also describes the criteria by which an escape is deemed to have succeeded, namely rejoining one’s own or an allied force, leaving territory controlled by the Detaining Power or one of its allies, or joining a ship of one’s flag State or an ally, even if the said ship is in waters controlled by the Detaining Power, as long as the ship is not under the control of the detaining Power.

the camp canteen.<sup>339</sup> CDF will seek an appropriation from Parliament to pay PWs at a rate that is reasonable and is not less than that set out in Geneva Convention III.<sup>340</sup> Such advances are considered to be made on behalf of the Power on which the PWs depend. At the close of hostilities, advances of pay will be a matter for negotiation between the Detaining Power and the Power on which the PWs concerned depend.<sup>341</sup>

**12.12.22** NZDF must accept, for distribution to PWs, any supplementary pay received from their home State. Such sums must be the same for each PW in the same category and must be payable to all PWs of that category.<sup>342</sup>

**12.12.23** If they work, PWs are entitled to a fair working rate of pay.<sup>343</sup> Any claim a PW makes for compensation for injury or disability arising out of work they perform for the Detaining Power is to be referred, through the Protecting Power, to the Power on which that PW depends.<sup>344</sup>

**12.12.24** The NZDF must allow remittances of money to be paid to PWs individually or collectively and, subject to restrictions, the NZDF is also required to facilitate payments made abroad by PWs, with priority to be given to payments PWs wish to make to their dependents.<sup>345</sup>

**12.12.25** COMJFNZ will prescribe the maximum amount of cash PWs may have in their possession. In most cases, it will be more appropriate for PWs to be issued camp vouchers instead. The commander is also to set rules for cash purchases of goods and services or commodities outside of the camp.<sup>346</sup>

**12.12.26** The commander of the NZDF place of detention is to establish accounts to hold sums in excess of that permitted, cash taken from PWs at the time of capture, advances of pay, working pay, or sums sent to the PWs by his or her government

339 See **Geneva Convention III** art 60.

340 The sums set out in **Geneva Convention III** art 60 are expressed in Swiss Francs and are obsolete due to changes in the value of money since 1949.

341 See **Geneva Convention III** art 67.

342 See **Geneva Convention III** art 61. Supplementary pay does not relieve the Detaining Power of its obligations with respect to PW pay under Geneva Convention III.

343 **Geneva Convention III** art 62: "Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct [...] The Detaining Power shall inform prisoners of war, as well as the Power on which they depend, through the intermediary of the Protecting Power, of the rate of daily working pay that it has fixed. Working pay shall likewise be paid by the detaining authorities to prisoners of war permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps, and to prisoners who are required to carry out spiritual or medical duties on behalf of their comrades. The working pay of the prisoners' representative, of his advisors, if any, and of his assistants shall be paid out of the fund maintained by canteen profits. The scale of this working pay shall be fixed by the prisoners' representative and approved by the camp commander. If there is no such fund, the detaining authorities shall pay the prisoners a fair working rate of pay."

344 See **Geneva Convention III** art 68, which also provides that any "claim for compensation in respect of personal effects, monies or valuables impounded by the Detaining Power and not forthcoming on [the PW's] repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or its servants, shall likewise be referred to the Power on which he depends. Nevertheless, any such personal effects required for use by the prisoners of war whilst in captivity shall be replaced at the expense of the Detaining Power. The Detaining Power will, in all cases, provide the prisoner of war with a statement, signed by a responsible officer, showing all available reasons why such effects, monies or valuables have not been restored to him".

345 See **Geneva Convention III** art 63.

346 See **Geneva Convention III** art 58. These rules are subject to any arrangement with the Protecting Power.

or family.<sup>347</sup> These sums may not be converted into any other currency without the prisoner's consent.

### COMFORT PACKS

**12.12.27** If the establishment of individual accounts and payment of advances of pay is not practicable in the circumstances, COMJFNZ is to arrange for PWs to receive packs comprising small consumable items, such as toothpaste and toiletries, as a substitute. This arrangement is to continue until pay arrangements can be established. Cigarettes and confectionery should only be supplied in exchange for coupons, not as an automatic issue. Withdrawal of such items is one of the few methods that the commander can use to control bad behaviour. In view of the health effects of smoking, NZDF must not encourage PWs to smoke.

### PAROLE

**12.12.28** **Parole** is an undertaking given by a PW not to escape or, if released from captivity, not to return to combative duties. A person who gives his or her parole must adhere to it, as must the Power on whom they depend.<sup>348</sup> It is now unusual to grant parole as most armed forces generally prohibit their personnel from accepting parole if captured.

**12.12.29** Members of the NZDF are not to grant parole to PWs without prior approval from CDF. Members of the NZDF are not to force PWs to give parole.<sup>349</sup>

### PRISONERS OF WAR MUST DISPLAY RESPECT FOR RANK

**12.12.30** PWs must pay proper respect to the rank of superior officers in the NZDF. The commander of an NZDF PW camp is to enforce the following rules through camp standing orders:

- a. PW officers must salute an NZDF officer higher in rank, and must salute the camp commandant whether higher in rank or not.
- b. PWs other ranks must salute all NZDF officers.<sup>350</sup>

**12.12.31** PWs are permitted to wear their own badges of rank and nationality and their decorations.<sup>351</sup>

347 See **Geneva Convention III** arts 64–66.

348 See **Geneva Convention III** art 21 for further details relating to parole.

349 See **Geneva Convention III** art 21.

350 See **Geneva Convention III** art 39.

351 See **Geneva Convention III** art 40.

## SECTION 13 – RULES SPECIFIC TO INTERNEES

### INTERMENT OF CIVILIANS

**12.13.1** An NZDF commander may only order civilians in territory under the control or jurisdiction of a New Zealand force to be interned if:

- a. safety and security of the force, coalition partners, or the civilian population makes it absolutely necessary; or
- b. the civilians have voluntarily demanded to be interned.<sup>352</sup>

**12.13.2** Such persons are to be interned only:

- a. for so long as they pose a threat to safety and security or until the question of whether they pose such a threat is resolved; or
- b. until they can be handed over to the appropriate civil authority.

### NO POWER OF PUNISHMENT OVER INTERNEES

**12.13.3** Members of the NZDF have no lawful authority to discipline internees. The jurisdiction of the Court Martial of New Zealand does not extend to internees in New Zealand or abroad.<sup>353</sup> If Parliament requires NZDF to exercise such powers, it will pass legislation consistent with humanitarian principles<sup>354</sup> and require that the law be applied in accordance with generally recognised principles of judicial procedure.<sup>355</sup> The rules relating to sentencing will take into account the fact that the defendant is not a national of New Zealand.<sup>356</sup>

**12.13.4** Members of the NZDF are not to apply informal punishments to internees or expose internees to:

- a. any physical exertion dangerous to their health;
- b. physical or moral victimisation;
- c. identification by tattooing or markings on the body;
- d. prolonged standing, rollcalls, punishment or military drill; or
- e. reduction of food rations.<sup>357</sup>

352 See **Geneva Convention IV** art 42. For occupation see Chapter 9.

353 See **CMA** s 36 and **AFDA** s 78. For persons subject to the AFDA, see **AFDA** Part I.

354 **Geneva Convention IV** art 100: The disciplinary regime in places of internment must be consistent with humanitarian principles. See also **Geneva Conventions Act 1958** ss 4 and 5.

355 **Geneva Convention IV** art 71. **Geneva Protocol I** art 75. See also **ICCPR** art 14. See **Construction of Wall on Palestinian Territory Opinion**. For internationally recognised standards of justice see Chapter 17.

356 **Geneva Convention IV** art 118: Courts or authorities shall in passing sentence take as far as possible into account the fact that the defendant is not a national of the Detaining Power. They shall be free to reduce the penalty prescribed for the offence with which the internee is charged and shall not be obliged, to this end, to apply the minimum sentence prescribed. See arts 119–120 for further procedural protections of internees.

357 **Geneva Convention IV** art 100: The disciplinary regime of internment camps shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimisation.



- 12.13.5** Internees held in New Zealand remain subject to New Zealand law and will be dealt with by the civil authorities for any offence they commit.
- 12.13.6** Internees held in occupied territory remain subject to the ordinary law of that territory, except to the extent that that law has been properly repealed or amended by the occupying force.<sup>358</sup> Internee Committees must be informed of all judicial proceedings brought against the internees and of the results of those proceedings.<sup>359</sup>

### ESCAPE OF INTERNEES

- 12.13.7** An internee who is recaptured attempting to escape or after escape may be punished summarily only, even for a repeat offence.<sup>360</sup> Recaptured internees are to be handed over to the competent authorities as soon as possible.<sup>361</sup>
- 12.13.8** Internees punished as a result of escape or attempt to escape may be the subject of special surveillance, provided that it is conducted in the NZDF place of internment, is not harmful to the health of the internee and does not involve a breach of LOAC.<sup>362</sup>
- 12.13.9** Escape or attempt to escape, even if it is a repeated offence, is not to be treated as an aggravating circumstance if the internee is prosecuted for offences committed during his or her escape attempt.<sup>363</sup> The NZDF is to ensure that the competent authorities exercise leniency in deciding whether punishment awarded for an offence shall be disciplinary or judicial in nature, especially in relation to acts committed in connection with an escape, whether successful or not.<sup>364</sup>
- 12.13.10** Internees who aid or abet an escape or attempted escape are to be dealt with summarily only.<sup>365</sup> Collective punishments are not to be imposed because other internees have escaped.<sup>366</sup>

358 **Geneva Convention IV** art 117. See Chapter 9.

359 **Geneva Convention IV** art 118.

360 See **Geneva Convention IV** art 120. Escaping or attempting to escape are considered offences against discipline (see **Geneva Convention IV** art 122). See **Geneva Convention IV** art 119 for types of disciplinary punishments applicable to internees.

361 See **Geneva Convention IV** art 122.

362 See **Geneva Convention IV** art 120.

363 See **Geneva Convention IV** art 121.

364 See **Geneva Convention IV** art 121.

365 See **Geneva Convention IV** art 120.

366 See **Geneva Convention IV** art 33.



## SECTION 14 – END OF CAPTIVITY

### PROTECTION MUST CONTINUE UNTIL THE END OF CAPTIVITY

**12.14.1** The protection of LOAC continues in respect of persons deprived of their liberty until their final release, repatriation or re-establishment takes place, even when this occurs after the cessation of operations or occupation.<sup>367</sup>

### RELEASE AND REPATRIATION OF THE WOUNDED AND SICK

**12.14.2** Because the detention of persons who have not committed offences is only justified by the need to prevent them from taking part in hostilities or otherwise harming the detaining force, persons who are unable or unlikely to be able to do so should be released and repatriated as soon as possible.<sup>368</sup> Details of such repatriations should be the subject of agreements between the parties to the conflict.

**12.14.3** Mixed medical commissions comprising of medical experts from New Zealand and neutral powers will make all decisions regarding sick and wounded PWs. Detailed provisions on the roles and functions of these commissions are set out in Geneva Convention III, Annex II.

**12.14.4** COMJFNZ is to facilitate direct repatriation of PWs and, where appropriate, other persons deprived of their liberty, who are:

- a. incurably wounded or sick and whose mental or physical fitness seems to have been gravely diminished;
- b. wounded and sick and are unlikely to recover within a year and whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished; and
- c. wounded and sick and have recovered but whose mental or physical health has been gravely and permanently diminished;

provided they are well enough to travel and consent to being repatriated.<sup>369</sup>

<sup>367</sup> **Geneva Convention III** art 5: The Convention applies to PW until their final release and repatriation. **Geneva Convention IV** art 6: The Convention applies to protected persons, including internees and detainees, until their release, repatriation or re-establishment. **Geneva Protocol I** art 3(b): The Protocol applies to protected persons, including internees and detainees, until their release, repatriation or re-establishment. Art 75(6): persons who are arrested, detained or interned for reasons related to the armed conflict enjoy the protections of art 75 until their final release, repatriation or re-establishment even after the end of the armed conflict. **Geneva Protocol II**: All persons deprived of their liberty in non-international armed conflict, or whose liberty has been restricted for reasons related to such conflict, including those whose liberty is restricted after the conflict for the same reasons, enjoy the protection of arts 5 and 6 until the end of such deprivation or restriction of liberty.

<sup>368</sup> See **Geneva Convention III** Annex I.

<sup>369</sup> **Geneva Convention III** art 109 requires that “Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel”, but no sick or injured PW “who is eligible for repatriation may be repatriated against his will during hostilities.” See also art 110.

- 12.14.5** PWs who are wounded or sick but expected to recover within a year, or whose mental or physical health is seriously threatened by continued captivity, may be accommodated in a neutral State if their condition might be more speedily and effectively treated, or if the threat to their health may be removed by being sent there.<sup>370</sup> If their condition deteriorates or remains significantly impaired, they may be repatriated from the neutral State to their State of origin.<sup>371</sup>
- 12.14.6** PWs who are repatriated under medical conditions must not be allowed to take any further part in the hostilities, even if they subsequently recover their health.

#### PRISONER EXCHANGES AND UNILATERAL RELEASE

- 12.14.7** CDF may, subject to agreement from the Minister of Defence, authorise the exchange of PWs, internees or detainees held in NZDF custody for NZDF personnel or New Zealand nationals held by the opposing force. Exchanges are usually conducted on a number for number and/or rank for rank basis.
- 12.14.8** CDF may also authorise unilateral release/repatriation of persons deprived of liberty where the conflict is expected to be of short duration, is geographically limited, or the burden of caring for those persons is disproportionate to the utility of holding them.
- 12.14.9** The conditions of exchange, release and repatriation will be set out in a precise written agreement between NZDF and the opposing force.<sup>372</sup> The agreement will specify whether exchanged persons may subsequently rejoin the armed forces and take a part in the hostilities.

#### PERSONS MUST BE RELEASED WHEN THE REASON FOR CAPTIVITY CEASES

- 12.14.10** COMJFNZ is to establish plans for the release of persons deprived of their liberty when the reason for their captivity ends. The plan is to give effect to the following principles:
- a. Persons deprived of liberty are to be released with the minimum delay as soon as the circumstances justifying their captivity have ceased.<sup>373</sup>
  - b. Persons who are not suspected or convicted of any criminal offence are to be released without delay after the cessation of active hostilities.<sup>374</sup>
  - c. PWs must be released and repatriated. Simply turning PWs free does not meet this requirement.
  - d. Retained personnel are to be repatriated at any time they are no longer required to look after the medical or spiritual needs of PWs.

<sup>370</sup> See **Geneva Convention III** arts 109 and 110 and Annex I, and **Geneva Convention IV** art 132.

<sup>371</sup> See **Geneva Convention III** art 110 and Annex I.

<sup>372</sup> For agreements see Chapter 15.

<sup>373</sup> See **Geneva Convention IV** art 132, **Geneva Protocol I** art 75(3) and **ICRC Customary IHL** rule 128.

<sup>374</sup> **Geneva Convention III** art 118: The costs of repatriation are to be shared equitably between the Detaining Power and the Power upon whom the PWs depend. Repatriation of PWs is to be effected in conditions similar to those laid down for their transfer (see also arts 46–48 and 119). **Geneva Convention IV** art 133. New Zealand must bear the costs of returning internees to the place where they resided prior to internment. See also **ICRC Customary IHL** rule 128. **Geneva Protocol I** art 85(4)(b) unjustifiable delay in the repatriation of PWs and civilians is a grave breach.

- e. Persons against whom criminal proceedings are pending or who are in prison after conviction are not be released and repatriated until charges are heard and any custodial sentence imposed has been served,<sup>375</sup> unless they are granted an amnesty.<sup>376</sup>

**12.14.11** COMJFNZ is to facilitate assistance in the search for dispersed persons deprived of liberty at the end of hostilities or occupation.<sup>377</sup>

#### **NO PERSON IS TO BE RELEASED WITHOUT THE AUTHORITY OF THE CHIEF OF DEFENCE FORCE**

**12.14.12** Members of the NZDF are not to release any person deprived of liberty from the control of the NZDF without explicit written approval of CDF. Members of the NZDF are not to assist any person deprived of liberty to escape.<sup>378</sup>

#### **PERSONS SEEKING ASYLUM OR REFUGE**

**12.14.13** No member of the NZDF has the power to offer or grant refugee status or a right to asylum. Any such claim or requests from a person deprived of liberty by a New Zealand force are to be reported to HQ JFNZ. They will be assessed by the appropriate authorities in New Zealand.

#### **DETECTION AND PROSECUTION OF INTERNATIONAL CRIMES**

**12.14.14** The commander of an NZDF place of detention is to facilitate, assist and, where appropriate, initiate investigations to bring to justice persons deprived of liberty suspected of committing international crimes.<sup>379</sup> Such persons remain entitled to the protections of LOAC during the investigation.<sup>380</sup>

**12.14.15** Commanders are to plan for the potential need to gather and preserve items and information to be used as evidence in prosecuting international crimes.

375 See **Geneva Convention III** art 119, which also states that “Parties to the conflict shall communicate to each other the names of any prisoners of war who are detained until the end of the proceedings or until punishment has been completed”. See also **Geneva Convention IV** art 133 and **ICRC Customary IHL** rule 128.

376 **Geneva Protocol II** art 6(5): “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” See also **ICRC Customary IHL** rule 159 which notes that the exception to the rule is person who are suspected of, accused of or sentenced for war crimes.

377 See **Geneva Convention III** art 119 for PWs and **Geneva Convention IV** art 133 for internees.

378 Under the **Crimes Act 1961** s 118, to knowingly assist any PW or internee to escape from detention or parole in New Zealand is punishable by imprisonment for a term not exceeding seven years. Under **ADFA** s 46, any person subject to the AFDA who wilfully and without authority, releases or wilfully permits the escape of any person who is committed to their charge or whom it is their duty to guard commits an offence punishable by imprisonment for a term not exceeding five years. Committing the same offence with a lesser mental element is punishable by up to two years in prison.

379 **Geneva Protocol I** art 88(1): “The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches, including extradition.” See **International War Crimes Tribunals Act 1995** for New Zealand assistance to any ad hoc tribunal that may be established by the UNSC. See **IC & ICC Act 2000** for the arrest and surrender of persons to the ICC. See also **Rome Statute** arts 59 and 86–89. For duty to suppress and repress international crimes see Chapter 17.

380 **Geneva Protocol I** art 75(7)(b).

**LOSS OF SPECIAL PROTECTION**

- 12.14.16** Persons deprived of their liberty keep their protected status at all times while they remain in the control of the NZDF. They do not lose their protected status by virtue of having committed international crimes,<sup>381</sup> breaches of discipline or attempts to escape.
- 12.14.17** Persons deprived of liberty lose immunity from attack if they take a direct part in hostilities, for example by escaping and rejoining opposing forces. If such persons are recaptured, protection under LOAC resumes.

381

**Geneva Protocol I** art 44(2): “While all combatants are obliged to comply with LOAC, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4 [failure to distinguish himself or herself from the civilian population].”

## SECTION 15 – RIGHTS AND OBLIGATIONS OF MEMBERS OF THE NEW ZEALAND DEFENCE FORCE WHEN DEPRIVED OF LIBERTY

### MEMBERS OF THE NEW ZEALAND DEFENCE FORCE MUST AVOID CAPTURE

**12.15.1** Members of the NZDF are to avoid being captured by an opposing force and are to continue to fight the enemy for as long as possible. If separated from their unit, they are to evade the enemy and rejoin friendly forces. A commander is never to surrender his or her command while the means to resist or evade capture exist. Surrender is only acceptable if it is no longer possible to inflict casualties on the enemy or where further resistance will be futile.<sup>382</sup>

### MEMBERS OF THE NEW ZEALAND DEFENCE FORCE REMAIN SUBJECT TO THE ARMED FORCES DISCIPLINE ACT 1971 AND TO NEW ZEALAND DEFENCE FORCE ETHOS AND VALUES

**12.15.2** Members of the NZDF who become PWs or otherwise deprived of liberty remain subject to the AFDA.<sup>383</sup> In particular they are:

- a. to obey the orders of their superior officers,
- b. not to aid the enemy,<sup>384</sup> and
- c. not to do anything to lower the morale of the NZDF or any allied force.<sup>385</sup>

**12.15.3** Members of the NZDF are not to do any act to the detriment of fellow prisoners for favourable treatment. They are, at all times, to conduct themselves in accordance with the NZDF ethos and values. Members of the NZDF cannot be forced to join the opposing force or actively aid its war effort. To do so voluntarily renders the individual liable to be tried for treason or other serious offences.<sup>386</sup>

### MEMBERS OF THE NEW ZEALAND DEFENCE FORCE CANNOT BE DEPRIVED OF RIGHTS UNDER LAW OF ARMED CONFLICT

**12.15.4** The New Zealand Government will not, under any circumstances, agree to the deprivation of the LOAC rights guaranteed to captured members of the NZDF. If members of the NZDF are told by their captors that New Zealand has agreed to such deprivation of rights this is to be regarded as a trick.

**12.15.5** Members of the NZDF cannot be asked or forced to give up any rights and privileges under LOAC.

382 See **AFDA** s 30 for offences relating to capture by the enemy. Surrendering certain equipment to the enemy is a crime under s 23 (aiding the enemy).

383 **AFDA** s 20(2): Time spent as a PW does not count towards the limitation period within which charges must be dealt with under the AFDA.

384 **AFDA** s 23. Aiding the enemy does not include actions required by LOAC such as providing details of name, rank, serial number and date of birth, or performance of non-military work (see **Geneva Convention III** arts 17 and 49).

385 See **AFDA** s 23(2)(i)(i).

386 See **Crimes Act 1961** s 73 and **AFDA** s 23.

**DUTY TO ESCAPE AND REJOIN THE NEW ZEALAND DEFENCE FORCE**

- 12.15.6** It is the duty of every captured member of the NZDF to attempt to escape and rejoin the NZDF to continue the fight against the opposing force.<sup>387</sup> Promising not to escape enables the enemy to divert members of its guard force to combat duties and may amount to aiding the enemy. Members of the NZDF are not to give an undertaking not to escape or return to hostilities (parole) and cannot be forced to do so.<sup>388</sup>

**RIGHTS AND OBLIGATIONS IF CAPTURED**

- 12.15.7** Every member of the NZDF captured in an IAC is entitled to be treated as a PW, or, in the case of medical and religious personnel, as retained personnel.
- 12.15.8** If captured in other circumstances, for example NIAC or peace support operations, captured members of the NZDF remain entitled to humane treatment.
- 12.15.9** Experience shows that if members of the NZDF are aware of their rights and duties, they get better treatment. Increased awareness also helps end illegal practices. In all cases, members of the NZDF have the right to demand humane treatment under LOAC.

**PROVISION OF INFORMATION/RESISTANCE TO INTERROGATION**

- 12.15.10** A captured member of the NZDF must:
- a. show his or her identity card to the captor on demand; and
  - b. provide his or her name, rank, date of birth and service number.<sup>389</sup>
- 12.15.11** Non-compliance may restrict privileges afforded on the basis of rank and status.<sup>390</sup> As blood group and religion are included on identity discs, this information can also be supplied if requested.
- 12.15.12** A captured member of the NZDF is not obliged to give any other information. Every member of the NZDF is, to the best of his or her ability, to resist attempts by the opposing force to obtain further information for as long as possible.
- 12.15.13** Members of the NZDF are not to make oral or written statements disloyal to New Zealand and its allies or harmful to their cause.

**BASIC PROTECTIONS**

- 12.15.14** Captured members of the NZDF must be allowed to retain their identification cards. Any other military documents may be taken by the captor.<sup>391</sup> Documents or equipment that may be of use to the enemy must be destroyed before capture if possible.

387 In the *Dreier Walde Trial* the British Military Court noted that “it is the duty of an officer or a man if he is captured to try and escape”.

388 See *AFDA* s 39(a).

389 See *Geneva Convention III* art 17.

390 See *Geneva Convention III* art 17.

391 See *Geneva Convention III* art 18.

**12.15.15** A captured member of the NZDF has the right:

- a. to be respected, protected and enjoy all of the fundamental guarantees of humane treatment set out in Section 3;
- b. to have access at all times to a copy of the Geneva Conventions and, where applicable, Geneva Protocol I, II and III;
- c. to send out a 'Capture Card' no later than seven days after having reached a PW camp;
- d. if detained as other than a PW, to demand that the NZDF be informed of his or her capture;
- e. to retain his or her rank and be afforded proper treatment and respect based on that rank;
- f. to food, water, clothing, adequate accommodation and necessary medical treatment;
- g. to retain his or her personal effects (unless receipt given in return), protective equipment (including helmet and body armour), and messing equipment;
- h. to bring complaints to the officers of the Detaining Power, the camp commander and the ICRC;
- i. not to be exposed unnecessarily to the danger of combat; and
- j. not to be punished for any offence except as the result of a fair trial.

**12.15.16** A captured member of the NZDF may be required to carry out work provided it is healthy and safe, is not directly aiding the enemy and is appropriate to the rank of the service member in question (officers are not required to work and NCOs are only required to perform supervisory functions).

## HOSTAGES

**12.15.17** In certain operations, for example peace support operations, there is a possibility of members of NZDF being taken as hostages by warring parties or armed groups. Unlike internment of PWs, the taking of hostages is unlawful.<sup>392</sup> For this reason, the position of hostages can be precarious. The group that has detained them has already demonstrated disrespect for LOAC and cannot, therefore, be relied upon to recognise the other important provisions relating to proper treatment. Nevertheless hostages still have the right to be respected and protected, and to be afforded humane treatment.

**12.15.18** Although many of the provisions relating to PWs are not likely to be respected by hostage-takers, members of the NZDF taken hostage are not to do any act to the detriment of fellow hostages for favourable treatment. They are at all times to conduct themselves in accordance with the NZDF ethos and values.

**12.15.19** Note that NZDF may issue special orders on conduct after capture as a hostage.



**ANNEX A – REASON FOR CAPTURE OR APPREHENSION****REASON FOR CAPTURE OR APPREHENSION**

TO BE PRINTED IN ENGLISH AND THE LANGUAGE WHICH THE PERSON DEPRIVED OF LIBERTY WILL UNDERSTAND. THIS IS TO BE READ ALOUD AND A COPY PROVIDED TO THE PERSON.

You are now under the control of the New Zealand Defence Force.

You will be well-treated.

The reason you are being held is:  
[delete inapplicable]

CAPTURE IN COMBAT

TAKING PART IN HOSTILITIES

SECURITY RISK TO THE FORCE

SUSPECTED OF OFFENCE, NAMELY (state offence)

OTHER REASON (state reason)

You must comply with all directions given to you by members of the NZDF.

- Do not conceal weapons
- Do not try to escape
- Do not harm members of the NZDF or other persons also being held

You will not be harmed, provided you comply with these rules.

If you are injured or sick, or if you need food, water or clothing – tell a member of the NZDF.

We will tell your family that you have been detained and where you are being held. We will also inform the Red Cross/Red Crescent.

## ANNEX B – RECORD OF CAPTURE OR APPREHENSION BY THE NEW ZEALAND DEFENCE FORCE

### RECORD OF CAPTURE OR APPREHENSION BY THE NEW ZEALAND DEFENCE FORCE

To be completed by the most senior member of the NZDF at the point of capture or apprehension as soon as it is safe to do so.

**Do not harm persons who surrender, are detained or are under your control. Treat them humanely; protect them from rape, abuse, torture and degrading treatment. Respect their property.**

#### Part 1: Details of person captured or apprehended

1. SURNAME .....  
     Father's name ..... Mother's name .....
2. FIRST NAME(S) .....
3. RANK (if any) .....
4. IDENTITY NUMBER ..... DATE OF BIRTH .....
5. SEX [Male] [Female] (delete one)
6. ADDRESS .....  
     .....  
     .....
7. RELIGION ..... LANGUAGE .....
8. WOUNDS OR ILLNESS .....
9. ARMED FORCE/GROUP .....
10. OTHER INFORMATION .....  
     .....  
     .....

#### Part 2: Details of capture or apprehension

1. DTG .....
2. PLACE .....
3. REASON .....
4. UNIT .....

5. CURRENT LOCATION OF PERSON .....  
.....  
.....

**Part 3: Seized property**

- 1. ....
- 2. ....
- 3. ....
- 4. ....
- 5. ....
- 6. ....
- 7. ....
- 8. ....
- 9. ....
- 10. ....

**Part 4: Restraint, etc.**

Is person:

Cuffed/restrained ☐      Blindfolded ☐      Earmuffed ☐

**Persons must not be cuffed, restrained, blindfolded or earmuffed for longer than is strictly necessary for security reasons. If a person under your control is subject to these measures, YOU are responsible for that person’s safety and welfare at all times.**

Date/time applied:

Signature ..... Date/time.....

## ANNEX C – PRISONER OF WAR IDENTITY CARD

<p>Official seal imprint</p>		<p>Religion</p>		<p>Finger-prints (optional)</p>		<p>Any other mark of identification .....</p>	
<p>Blood type</p>		<p>Religion</p>		<p>(Left forefinger)</p>		<p>(Right forefinger)</p>	
<p>Hair</p>		<p>Eyes</p>		<p>Weight</p>		<p>Height</p>	
<p>Photograph of the bearer</p>							
<p>(Name of the country and military authority issuing this card)</p>							
<p>IDENTITY CARD</p>							
<p>FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES</p>							
<p>Name .....</p>							
<p>First names.....</p>							
<p>Date and place of birth.....</p>							
<p>Accompanies the Armed Forces as .....</p>							
<p>Date of issue</p>				<p>Signature of bearer</p>			
<p>.....</p>				<p>.....</p>			

ANNEX D – INCIDENT/ALLEGATION REPORT

INCIDENT/ALLEGATION REPORT

To be completed by the most senior member of the NZDF present at any time a person deprived of liberty or under NZDF control makes an allegation of ill-treatment, is killed, or suffers any serious injury. If it appears that a person subject to the AFDA may have committed an offence, such persons are not to be questioned in connection with this form but are to be questioned under caution by a member of the Service police.

1. Details of reporting person

Service No. .... Rank .....

Name ..... Unit .....

Signature: ..... Date: .....

2. Details of incident/allegation

Date/time: ..... Location: .....

Brief description of incident/allegation:

Action taken on incident/allegation:

Injuries/fatalities:

Medical attention provided:

3. Alleged victims

Name, details, nationality, description and location of alleged victim(s):

**4. Alleged involvement**

Name, details and descriptions of all persons alleged to be involved in the incident including members of the NZDF, other forces and host-nation authorities:

**5. Witnesses**

Provide details of all likely witnesses and where they may be located:

**6. Evidence taken**

Provide outline of all evidence that has been taken and where it is located:

## ANNEX E – CAPTURE CARD

## CAPTURE CARD

## PRISONER OF WAR MAIL

## IMPORTANT

This card must be completed by each prisoner immediately after being taken prisoner and each time his/her address is changed (by reason of transfer to a hospital or to another camp).

This card is distinct from the special card which each prisoner is allowed to send to his/her relatives.

TO:

CENTRAL PRISONER OF WAR  
AGENCY

## CAPTURE CARD FOR PRISONER OF WAR

*WRITE LEGIBLY IN BLOCK LETTERS. DO NOT ADD ANY REMARKS.*

NAME (last, first, middle)		RANK	
SERVICE NUMBER	NATION OF SERVICE	PLACE OF BIRTH	
DATE OF BIRTH	FIRST NAME OF FATHER	MAIDEN NAME OF MOTHER	
NAME, ADDRESS AND RELATIONSHIP OF KIN		DATE OF CAPTURE AND TRANSFER	
<b>PHYSICAL CONDITION</b> (check applicable box)			
<input type="checkbox"/> Good health	<input type="checkbox"/> Recovered	<input type="checkbox"/> Sick	<input type="checkbox"/> Seriously wounded
<input type="checkbox"/> Not wounded	<input type="checkbox"/> Convalescent	<input type="checkbox"/> Slightly wounded	
FORMER ADDRESS		INTERNMENT SERIAL NO.	
DATE	SIGNATURE OF PRISONER		
PRESENT ADDRESS (name of camp, hospital or location)			



**ANNEX F – RECORD OF TRANSFER OF A PERSON CAPTURED OR  
APPREHENDED BY THE NEW ZEALAND DEFENCE FORCE**

**RECORD OF TRANSFER OF A PERSON CAPTURED OR  
APPREHENDED BY THE NEW ZEALAND DEFENCE FORCE**

Transferee's personal assigned number		
Date of transfer	Location of transfer	
Transferee's last name	First name	Middle name
Rank (if any)	Service number (if any)	Date of birth
Other identifying information (eg father's name, name of village/town, identifying marks)		Male/female Adult/child (delete inapplicable)
<div style="display: flex; justify-content: space-between; align-items: flex-start;"> <div style="width: 30%;"> <p>Permanent transfer      <input style="width: 40px; height: 25px;" type="checkbox"/></p> <p>Temporary transfer      <input style="width: 40px; height: 25px;" type="checkbox"/></p> </div> <div style="width: 65%;"> <p>As of: ..... (date)</p> <p>From: ..... To: ..... (date)</p> </div> </div>		
<div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <p>Medical and dental records: Attached YES/NO</p> <p>Personal items inventory: Attached YES/NO</p> <p>Documents relating to capture: Attached YES/NO</p> <p>Other items transferred (list):</p> </div> <div style="width: 35%;"> <p>Initials:</p> <p>Initials:</p> <p>Initials:</p> </div> </div>		
<p>Does the transferee wish to complain about his or her treatment while under the control of members of the NZDF?</p> <p>Yes/No (if yes, briefly record details)</p>		

Transferring New Zealand force:	Receiving force or authority:
Location transferred from:	Location transferred to:
Authorised member of the NZDF transferring:	Authorised member of receiving State:
(Number, rank, name, appointment)	(Number, rank, name, appointment)
Signature:	Signature:

# CIVILIANS AND CIVILIAN OBJECTS

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## SECTION 1 – INTRODUCTION

- 13.1.1** Armed conflict is now frequently conducted in areas inhabited by civilians. Operations may occur in urban environments or places in which large numbers of civilians, including refugees and displaced persons, may congregate. Even in the maritime environment, some contact with civilians and civilian objects is not unlikely. Civilians are a protected class of person. It is no longer permissible to classify them as ‘enemy’ simply by virtue of their citizenship of an enemy State.
- 13.1.2** It is vital that New Zealand forces earn the respect and support of members of the local civilian population. Otherwise, they will very likely deny help to the force and may aid the enemy making victory harder to achieve. Allegations of ill-treatment are highly damaging to the reputation of a force and to the public support for the cause for which it fights, both at home and abroad. Members of the New Zealand Defence Force (NZDF) must also conduct operations so as to reduce the suffering of civilians as much as possible.
- 13.1.3** The rules in this chapter consolidate those in other chapters that protect civilians and their property. They cover:
- a.** protection of civilians and civilian property from the effects of armed conflict; and
  - b.** protection of civilians who come into contact with a New Zealand force, ie civilians who are deprived of their liberty, are controlled by members of the NZDF or whose lives are otherwise affected by NZDF operations.
- 13.1.4** The rules of humane treatment set out in this chapter apply in respect of all civilians affected by NZDF operations, regardless of the State to which they belong, regardless of the territory in which they may be and regardless of whether the contact between them and members of the NZDF occurs in international armed conflict (IAC), non-international armed conflict (NIAC), or peace support operations.
- 13.1.5** **NZDF Code of Conduct** rule relating to this chapter is:

*Respect civilians and civilian property.*

## SECTION 2 – PROTECTION FROM THE EFFECTS OF ARMED CONFLICT

**13.2.1** Members of the NZDF are to take constant care to spare the civilian population, individual civilians and civilian objects from the destruction and suffering caused by armed conflict.<sup>1</sup> They are not to:

- a. attack<sup>2</sup> the civilian population;<sup>3</sup>
- b. attack individual civilians,<sup>4</sup> unless they are directly participating in hostilities;<sup>5</sup>
- c. wilfully kill or murder civilians;<sup>6</sup>
- d. use terror attacks against the civilian population;<sup>7</sup>
- e. attack civilian objects, unless they become military objectives;<sup>8</sup> or
- f. launch any attack which may be expected to cause disproportionate incidental loss of civilian life, injury to civilians, or damage to civilian objects.<sup>9</sup>

1 See **Geneva Protocol I** art 57(1).

2 **Geneva Protocol I** art 49(1): “‘Attacks’ means acts of violence against the adversary, whether in offence or in defence.” Attack can also encompass any widespread and systematic mistreatment of the civil population (see **Rome Statute** art 7(2)(a)). See also **San Remo Manual** rule 13(b), **Galić Trial** at [141], **Kunarac Appeal** at [86], **Limaj Trial** at [182–185] and Chapter 8. See Chapter 17 for crimes against humanity.

3 **Geneva Protocol I** art 50: “(2) The civilian population comprises all persons who are civilians; (3): The presence within the civilian population of individuals who do not come within the definition of civilian does not deprive the population of its civilian character.” In the **Limaj Trial** (at [186]), the ICTY Trial Chamber held that the definition of “civilian” is expansive and includes individuals who at one time performed acts of resistance as well as persons who [are] hors de combat”. See also **ICRC Customary IHL** rule 5.

4 **Geneva Protocol I** art 50(1) provides that in “case of doubt whether a person is a civilian, that person shall be considered to be a civilian”. Art 73: “Persons who, before the beginning of the hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons in all circumstances and without any adverse distinction.” For ‘refugee’ see **Refugee Convention** art 1(A), **Immigration Act 2009** ss 126 and 129, and **Stateless Persons Convention** (not in force for New Zealand) art 1(1).

5 See **ICRC Customary IHL** rule 6. **Geneva Convention Common Article 3**(1)(a) provides that in NIAC it is prohibited to commit violence to life and person, in particular murder of all kinds to any person taking no active part in the hostilities. **Geneva Protocol I** art 51(2) requires that the “civilian population as such, as well as individual civilians, shall not be the object of attack”. See art 85(3)(a) for grave breach. In NIAC it is prohibited to commit acts of violence to the life, health and physical or mental well-being of persons who do not take a direct part in the hostilities (see **Geneva Protocol II** art 4(2)(a)). See also art 13(2) and **Rome Statute** arts 8(2)(b)(i) and 8(2)(e)(i).

6 In NIAC it is prohibited to commit violence to life and person, in particular murder of all kinds to any person taking no active part in the hostilities (see **Geneva Convention Common Article 3**(1)(a)). **Geneva Convention IV** art 27: “Protected persons are entitled, in all circumstances, [...] to be] protected especially against all acts of violence [...]”. See art 147 for grave breach and **Rome Statute** arts 8(2)(a)(i) and 8(2)(c)(i).

7 Under **Geneva Convention IV** art 33(1) “all measures of intimidation or of terrorism are prohibited”. **Geneva Protocol I** art 51(2) states that “acts, or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. Under **Geneva Protocol II** art 4(2)(d) in NIAC it is prohibited to carry out acts of terrorism against persons who do not take a direct part in hostilities. In the **Major War Criminals Trial** systematic brutality intended to terrorise the civilian population practised in occupied territories was held to be a war crime. See also **Geneva Protocol II** art 13(2) and **Terrorism Financing Convention** art 2(b).

8 **Geneva Protocol I** art 52: “Civilian objects shall not be the object of attack or of reprisal. Civilian objects are objects which are not military objectives as defined in paragraph 2.” See also **ICRC Customary IHL** rules 7–10 and **Rome Statute** art 8(2)(b)(ii). For military objectives see Chapter 8.

9 See **Geneva Protocol I** art 57(2)(a): “Those who plan or decide upon and attack shall: (i) do

- 13.2.2** Members of the NZDF are to take all feasible precautions<sup>10</sup> to avoid or minimise injury and death to civilians and destruction of civilian objects. They are to:
- a. treat objects ordinarily dedicated to civilian purposes as civilian objects unless there is persuasive information to the contrary;<sup>11</sup>
  - b. use all available information necessary to make targeting decisions<sup>12</sup> and verify that the objectives to be attacked:
    - (1) are military objectives;<sup>13</sup> and
    - (2) are not subject to protection under Law of Armed Conflict (LOAC);<sup>14</sup>
  - c. choose means and methods of attack to avoid or minimise incidental loss of civilian life, injury to civilians and damage to civilian objects;<sup>15</sup>
  - d. give effective advance warning, if circumstances permit, of attacks which may affect the civilian population,<sup>16</sup> of the use of remotely delivered mines<sup>17</sup> and booby traps,<sup>18</sup> and of the existence of explosive remnants of war (ERW);<sup>19</sup>

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everything feasible to verify that the objectives to be attacked are [...] military objectives [...]; (ii) take all 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 relating to the concrete and direct military advantage anticipated.” **Geneva Protocol I New Zealand Declaration:** “The military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and the term “military advantage” involves a variety of considerations, including the security of attacking forces. “Concrete and direct military advantage anticipated” means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.” See also **San Remo Manual** rule 46(d) and **ICRC Customary IHL** rule 14. For proportionality in attack see Chapter 8.

10 **Conventional Weapons Protocol III** art 1(5) provides that ‘feasible precautions’ means actions which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.

11 **Geneva Protocol I** art 52(3): “In case of doubt whether an object that is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

12 In the **Hostages Trial** the Military Tribunal held that a commander cannot plead his own dereliction of duty to inform himself of the conduct of his subordinates as a defence.

13 See **San Remo Manual** rule 46(a), **ICRC Customary IHL** rule 16 and Chapter 8.

14 **Geneva Protocol I** art 57(2)(a)(i): “With respect to attacks [...] those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilian nor civilian objects and are not subject to special protection but are military objects within the meaning of Article 52(2) and that it is not prohibited by the provisions of this Protocol to attack them.” See also Chapter 8.

15 See **Geneva Protocol I** art 57(2)(a)(ii), **San Remo Manual** rules 46(b) and (c) and **ICRC Customary IHL** rule 17. For means of combat see Chapter 7. For methods of combat see Chapter 8.

16 See **Geneva Protocol I** art 57(2)(c) and **ICRC Customary IHL** rule 20.

17 **Conventional Weapons Protocol II** art 6(4): “Effective advance warning shall be given of any delivery or dropping of remotely-delivered mines that may affect the civilian population, unless circumstances do not permit.” See also Chapter 7.

18 See **Conventional Weapons Protocol II** art 7(3)(b) and Chapter 7.

19 See **Conventional Weapons Protocol V** art 5(1) and Chapter 7.

- e. cancel or suspend the attack if it becomes apparent that:
  - (1) the target is not a military objective;
  - (2) the objective is subject to special protection; or
  - (3) the attack is expected to cause disproportionate incidental loss of civilian life, injury to civilians, damage to civilian objects;<sup>20</sup>
- f. choose, where possible, military objectives which are expected to result in the least incidental damage;<sup>21</sup> and
- g. avoid locating military objectives in or near densely populated areas, endeavour to remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives, and take other necessary precautions to protect them against the dangers resulting from military operations.<sup>22</sup>

20 See **San Remo Manual** rule 46(d) and **ICRC Customary IHL** rule 19.

21 **Geneva Protocol I** art 57(3): “When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack may be expected to ensure the least damage to civilian lives and civilian objects.” See also **ICRC Customary IHL** rule 21.

22 See **Geneva Protocol I** arts 58(b) and (c) and **ICRC Customary IHL** rule 22.



## SECTION 3 – PROTECTION OF CIVILIANS AFFECTED BY OPERATIONS

## CIVILIANS MUST BE TREATED HUMANELY

**13.3.1** Members of the NZDF are, at all times, to respect, protect and treat humanely, without any adverse distinction, all civilians with whom they come into contact.<sup>23</sup> They are to ensure that civilians are not subjected to, or threatened<sup>24</sup> with:

- a. being murdered or wilfully killed;<sup>25</sup>
- b. being allowed to die through neglect;<sup>26</sup>
- c. torture of all kinds, whether physical or mental;<sup>27</sup>
- d. corporal punishment;<sup>28</sup>
- e. mutilation;<sup>29</sup>
- f. humiliating or degrading treatment;<sup>30</sup>
- g. great suffering or injury to body or health;<sup>31</sup>
- h. violence, intimidation, insults, abuse or public curiosity;<sup>32</sup>

23 See **Geneva Convention IV** art 27, **Geneva Protocol I** art 75(1), **Geneva Protocol II** art 4 and **ICRC Customary IHL** rule 127.

24 See **Geneva Protocol I** art 75(2)(e) and **Geneva Protocol II** art 4(2)(h).

25 See **Geneva Convention Common Article 3**, **Geneva Convention IV** art 32, **Geneva Protocol I** art 75(2)(a)(i), **Geneva Protocol II** art 4(2)(a) and **ICRC Customary IHL** rule 89. See **Rome Statute** arts 8(2)(a)(i) and 8(2)(c)(i), **Geneva Convention IV** art 147 (grave breach) and **Geneva Protocol I** art 85(3)(e) (grave breach). In the *Tokyo War Crimes Trial* subjecting civilians to death marches without sufficient food and water or rest was held to be a war crime.

26 Allowing persons in the power of the force to die of disease, hunger, thirst or exhaustion is a war crime and a crime against humanity (for prohibition against starvation tactics in respect of civilians see Chapter 8).

27 Torture is defined at **Rome Statute** art 7(2)(e) and at **Crimes of Torture Act 1989** s 2(1). Torture of persons taking no active part in the hostilities is prohibited (see **Geneva Convention Common Article 3**, **Geneva Protocol I** art 75(2)(a)(ii), **Geneva Protocol II** art 4(2)(a), **Geneva Convention IV** art 147 (grave breach), **Rome Statute** arts 7(1)(f), 8(2)(a)(ii) and 8(2)(c)(i) and **ICRC Customary IHL** rule 90). **Torture Convention** art 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.” See also **ICCPR** arts 4 and 7 for non-derogable prohibition of torture. **Crimes of Torture Act 1989** s 3(1) states that any person who commits or aids, abets incites, counsels or procures any person to commit an act of torture is liable to imprisonment for a term not exceeding 14 years. Attempt and conspiracy to torture carry a maximum penalty of 10 years’ imprisonment (s 3(2)). See also *Furundžija Trial* and *Celibići Trial*.

28 **Geneva Convention IV** art 32 prohibits corporal punishment of protected civilians. See also **ICRC Customary IHL** rule 91.

29 Mutilation of persons taking no active part in the hostilities is prohibited. It is also prohibited to carry out physical mutilations on persons interned, detained or otherwise deprived of liberty, even with their consent (see **Geneva Convention Common Article 3**, **Geneva Protocol I** arts 11(2)(a) and 72(2)(a)(iv) and **Geneva Protocol II** art 4(2)(a)).

30 Protected persons are entitled, in all circumstances, to respect for their persons, and their honour (see **Geneva Convention IV** art 27). The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes must not be ignominious nor expose them to ridicule (**Geneva Convention IV** art 90). Under **Geneva Convention Common Article 3**(1)(c), in NIAC “outrages upon dignity, in particular humiliating and degrading treatment of persons” taking no active part in the hostilities is prohibited. See also **Geneva Protocol I** art 75(2)(b), **Geneva Protocol II** art 4(2)(e), **ICRC Customary IHL** rule 90, **ICCPR** arts 7 and 10 and **Rome Statute** arts 8(2)(b)(xxi) and 8(2)(c)(ii).

31 Under **Geneva Convention IV** art 147 wilfully causing great suffering or injury to body or health of a protected person is a grave breach. See also **Rome Statute** art 8(2)(a)(iii).

32 See **Geneva Convention IV** art 27.

- i. scientific or medical experiments or treatments that are not medically justified, or removal of tissue or organs for transplant;<sup>33</sup>
- j. reprisals;<sup>34</sup>
- k. punishment without regular court processes;<sup>35</sup> or
- l. collective punishment.<sup>36</sup>

## ADVERSE DISCRIMINATION IS PROHIBITED

**13.3.2** Members of the NZDF are not to discriminate against any civilian on the basis of race, colour, sex, sexual orientation, language, religion, political belief or other opinion, national or social origin, wealth, birth or any other similar criteria.<sup>37</sup> However, positive measures for enhanced protection of civilians on the basis of health, age and sex are permitted.<sup>38</sup>

**13.3.3** Members of the NZDF are not to support the practice of apartheid<sup>39</sup> or other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.<sup>40</sup>

33 **Geneva Protocol I** art 11(2): “It is, in particular, prohibited to carry out on [persons interned, detained or otherwise deprived of liberty], even with their consent: [...] (b) medical or scientific experiments; c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1 [ie are indicated by the person’s state of health and are consistent with generally accepted medical standards].” See also **ICRC Customary IHL** rule 92. Under **Geneva Protocol I** art 11(4), any willful act or omission which violates the prohibition on medical experiments and removal of tissue etc is a grave breach. See also **Geneva Convention IV** art 147 and **Rome Statute** arts 8(2)(b)(x) and 8(2)(e)(xi). In the *Medical Trial* conducting medical experiments on civilians was held to be a crime against humanity. For prohibited medical treatment see Chapter 11.

34 **Geneva Convention IV** art 33(3): “Reprisals against protected persons and their property are prohibited.” **Geneva Protocol I** art 51(6): “Attacks against the civilian population or civilians by way of reprisals are prohibited.” *Kupreškić Trial* at [527–536]: The rule prohibiting reprisals against civilians in the hands of an adversary protects detainees and internees and is applicable in both IAC and NIAC. See **ICRC Customary IHL** rule 145.

35 In NIAC it is prohibited to pass sentences and carry out executions on persons taking no active part in the hostilities “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” (see **Geneva Convention Common Article 3**(1)(d)). **Geneva Protocol I** art 75(4): “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure [...].” See also **Geneva Convention IV** arts 71–75 and 126 and **Geneva Protocol II** art 6(2).

36 See **Geneva Convention IV** art 33, **Geneva Protocol I** arts 75(2)(d) and 75(4)(b), **Geneva Protocol II** arts 4(2)(b) and 6(2)(b) and **ICRC Customary IHL** rules 102 and 103.

37 **Geneva Protocol I** art 75(1): “[...] persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol [...] shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any similar criteria [...].” See also **Geneva Protocol II** art 2(1), **Geneva Convention IV** art 27 and **Geneva Convention Common Article 3**. For non-discrimination see Chapter 4.

38 See **Geneva Convention IV** art 27 and Chapter 14.

39 Apartheid is a crime against humanity (see **Rome Statute** art 7(1)(j)). However, apartheid requires the existence of a framework of government rather than actions by individual service members.

40 See **Geneva Protocol I** art 85 and **Rome Statute** art 7(2)(g) for a definition of ‘persecution’. The list of prohibited grounds of discrimination in **Rome Statute** art 7(1)(h) is not finite. Emerging protections under international law, eg in respect of persons with disabilities, may in the future provide a basis for prohibiting persecution. If further grounds arise, members of the NZDF will be advised of that fact in orders.

- 13.3.4** Members of the NZDF are not to use insulting or racially insensitive words or expressions to describe the civilian population. The Commander Joint Forces New Zealand (COMJFNZ) is to ensure that pre-deployment training (PDT) includes instruction on the customs, religion or race of the civilian population.

#### UNLAWFUL DEPORTATION, TRANSFER AND DISPLACEMENT IS PROHIBITED

- 13.3.5** A New Zealand force may need to evacuate parts of the civilian population from an area for their own security or for imperative military reasons. Evacuations must be of a temporary nature only and should not require civilians to leave their own territory. Civilians are to be moved the least amount, consistent with their continued safety and the requirements of military necessity. They are to be returned to their homes as quickly as is safely possible once that necessity ends. Where displacement of civilians is necessary, members of the NZDF are to ensure that proper accommodation is provided, removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and members of the same family are not separated.<sup>41</sup>
- 13.3.6** To the greatest extent possible, a New Zealand force must avoid contributing to the humanitarian crisis that frequently accompanies the creation of large numbers of refugees and internally displaced persons. NZDF commanders are to ensure that the force does not take part in any operation which has the effect of:
- a. unlawfully deporting or transferring all or part of the population within or outside of the territory in which they live;<sup>42</sup>
  - b. displacing the civilian population unless demanded by the security of the civilians themselves or by imperative military reasons;<sup>43</sup>
  - c. ‘ethnically cleansing’ an area of civilians on the basis of race, religion, ethnicity or any other prohibited ground of discrimination;<sup>44</sup> or
  - d. transferring parts of the New Zealand civilian population or that of a coalition partner into occupied territory.<sup>45</sup>

#### PROTECTION OF REFUGEES AND DISPLACED PERSONS

- 13.3.7** Members of the NZDF are to take particular care to protect and respect the rights of refugees, stateless persons and internally displaced persons.<sup>46</sup> Many people within these categories are, by definition, already the subject of persecution; they are particularly vulnerable to mistreatment. If a New Zealand force has refugees, stateless persons and internally displaced persons under

41 See **Geneva Convention IV** art 49.

42 **Geneva Convention IV** art 49. See art 147 for grave breach and **Rome Statute** art 8(2)(a)(vii) for war crime. See also *Gotovina Appeal*.

43 **Geneva Convention VI** art 49, **Geneva Protocol II** art 17(1) for NIAC and **Rome Statute** art 8(2)(e)(viii).

44 So-called ‘ethnic cleansing’ couples the prohibited practice of persecution with that of unlawful displacement of the civilian population.

45 See **Rome Statute** art 8(2)(b)(viii).

46 See **Geneva Protocol I** art 73: “Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons [...] in all circumstances and without any adverse distinction.” For ‘refugee’ see **Refugee Convention** art 1(A), **Immigration Act 2009** s 129. For ‘stateless person’ see **Stateless Persons Convention** (not in force for New Zealand) art 1(1).

its control (eg through guarding a refugee camp), the commander is to take all necessary steps to protect those persons from attack by other forces or groups, and to protect them from ill-treatment.<sup>47</sup> In particular, they are to be protected from sexual violence and exploitation.

### THE USE OF HUMAN SHIELDS IS PROHIBITED

- 13.3.8** Members of the NZDF are not to use civilians to render places or military forces immune from attack or other military operations, or to shield military objectives from attacks, or to shield, favour or impede military operations.<sup>48</sup>

### THE ENFORCED DISAPPEARANCE OF CIVILIANS IS PROHIBITED

- 13.3.9** **Enforced disappearance** means detention or abduction of persons with the authorisation of the State or a political organisation, followed by refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>49</sup>
- 13.3.10** Members of the NZDF are not to take part in any operation that has the effect of bringing about the enforced disappearance of any person.<sup>50</sup>

47 The **Kahan Report** found that Israeli forces had allowed a militia group to enter the Sabra and Shatilla refugee camps in Lebanon knowing that a massacre of refugees was likely to result. The officers had indirect responsibility for the events that occurred.

48 **Geneva Convention IV** art 28: The presence of a protected person may not be used to render certain points or areas immune from military operations. **Geneva Protocol I** art 51(7): The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, to shield military objectives from attacks or to shield, favour or impede military operations. See **Rome Statute** art 8(2)(b)(xxiii). **Blaškić Appeal** at [670]. Allowing the use of civilians as a human shield in front of a headquarters was a war crime. See also **ICRC Customary IHL** rule 97. See Chapter 8.

49 See **Rome Statute** art 7(2)(i) for definition for 'enforced disappearance of persons'. See also **ICRC Customary IHL** rule 98 and **Enforced Disappearance Convention** (not in force for New Zealand). At the **Major War Criminals Trial** the 'Night and Fog Decree' by which civilians in occupied territory disappeared without trace was held to be a crime against humanity.

50 **Rome Statute** arts 7(1)(i) and (2)(i) enforced disappearance of persons is a crime against humanity. See also **ICRC Customary IHL** rule 98.

## SEXUAL VIOLENCE AND SEXUAL EXPLOITATION IS PROHIBITED

- 13.3.11** All sexual violence is prohibited regardless of the age, gender or sexual orientation of the victim. Members of the NZDF are to ensure that civilians are not subjected to rape,<sup>51</sup> sexual slavery,<sup>52</sup> enforced prostitution,<sup>53</sup> forced pregnancy,<sup>54</sup> enforced sterilisation<sup>55</sup> or any other form of sexual violence.<sup>56</sup>
- 13.3.12** NZDF commanders are to take all necessary steps to prevent sexual exploitation that may arise from the major imbalance of power that exists between members of a New Zealand force and the members of a vulnerable civilian population. Commanders are to bear in mind that consent to sexual relations by a member of the civilian population who is hungry, intimidated or reliant on the force for protection is not true consent. In circumstances of conflict, persons engaged in prostitution may not be doing so of their own free will. COMJFNZ is to promulgate orders relating to relationships between members of the NZDF and the civilian population in order to prevent exploitation.<sup>57</sup>

## THE DENIAL OF RELIGIOUS RIGHTS IS PROHIBITED

- 13.3.13** Failure to respect the religious rights and beliefs of the civilian population engenders bitterness which may in turn give rise to further atrocities and hinder the return to peace. Members of the NZDF are to respect the religious customs and beliefs of all persons with whom they have contact. Members of the NZDF are not to:

- a. deny or repress the religious rights of any person,<sup>58</sup>

- 51 **Geneva Protocol I** art 76(1): “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution or any other form of indecent assault.” Art 77(1): “Children shall be the object of special respect and shall be protected against any form of indecent assault [...]” **Geneva Protocol II** art 4(2)(e) provides that rape is prohibited in NIAC. See **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi) for war crimes. ‘Rape’ includes any physical invasion of a sexual nature committed on a person whether male or female under circumstances which are coercive. **Akayesu Trial** (at [597]): “Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official.” In the **Furundžija Trial** (at [185]), “coercion or force or threat of force against the victim or third party was held to be one of the objective elements of rape”. In the **Kunarac Trial** (at [459]), the Trial Chamber noted that it is evident from the Furundžija case that the terms coercion, force, or threat of force were not to be interpreted narrowly and that coercion in particular would encompass most conduct which negates the consent of the victim.
- 52 See **Geneva Protocol II** art 4(2)(f), **ICRC Customary IHL** rule 94 and **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 53 See **Geneva Protocol I** art 76(1), **Geneva Protocol II** art 4(2)(e), **Awochi Trial** and **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 54 See **Rome Statute** art 7(2)(f): “‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” See also arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 55 See **Geneva Protocol I** art 11(1), **Geneva Protocol II** art 5(2)(e) and **Rome Statute** arts 8(2)(b)(xxii) and art 8(2)(e)(vi).
- 56 **Geneva Protocol I** art 76(1): “Women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.” **Geneva Protocol I** art 77(1): “Children shall be the object of special respect and shall be protected against any form of indecent assault.” In NIAC, any form of indecent assault is prohibited (see **Geneva Protocol II** art 4(2)(e)). **UNSCR 1325** (2000) calls upon parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls and to protect them from gender-based violence (see arts 9 and 10). See also **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 57 See **UN Secretary General’s Bulletin 13** (2003) on Special Measures for Protection from Sexual Exploitation and Sexual Abuse for peace support operations.
- 58 **Hague Regulations** art 46 requires that religious convictions and practice of persons in occupied territory must be respected. **Geneva Convention IV** art 27: “Protected persons are entitled,



- b. discriminate against any person on the basis of religion,<sup>59</sup>
- c. deny religious rites to persons who are dying,<sup>60</sup>
- d. prevent ministers of religion from giving spiritual assistance to the members of their religious communities,<sup>61</sup>
- e. make religious personnel the subject of attack,<sup>62</sup> or
- f. attack buildings dedicated to religion or places of worship.<sup>63</sup>

## SLAVERY AND SLAVE LABOUR ARE PROHIBITED

**13.3.14 Slavery** means the exercise of all or any of the powers attaching to ownership over a person.<sup>64</sup> It is prohibited to subject any person to slavery of any kind.<sup>65</sup> Members of the NZDF are not to:

- a. engage in any activity connected with slavery;

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in all circumstances [...] to respect for their religious convictions and practices [...].” **Geneva Convention IV** art 76 states that detained persons in occupied territory shall have the right to receive any spiritual assistance which they may require (see also arts 86 and 93). **Geneva Protocol II** art 4(1): “[In NIAC] All persons who do not take a direct part or who have ceased to take part in hostilities [...] are entitled to [...] respect for their convictions and religious practices.” See **Geneva Protocol II** art 4(3)(a) for religious and moral education of children. **Geneva Protocol II** art 5(1)(d): “[Persons whose liberty has been restricted] shall be allowed to practice their religion and, if requested and appropriate, to receive spiritual assistance for persons such as chaplains, performing religious functions.” See also **ICRC Customary IHL** rule 104 and **ICCPR** art 18 for the right to freedom of religion.

59 **Geneva Convention Common Article 3** requires that persons taking no active part in the hostilities shall be treated without adverse distinction founded on religion or faith.  
 60 In the **Zuehlke Trial** denial of spiritual assistance to a person under sentence of death was held to be both a war crime and a crime against humanity.

61 **Geneva Convention IV** art 58: “The Occupying Power shall permit ministers to give spiritual assistance to the members of their religious communities. The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.”

62 **Geneva Protocol I** art 15(5): “Civilian religious personnel shall be respected and protected [...]” See **Geneva Protocol II** art 9(1) for NIAC.

63 **Hague Regulations** art 27: “In sieges and bombardments all necessary steps must be taken to spare, as far as possible [...] buildings dedicated to religion, provided they are not being used at the time for a military purpose [...]” See also **Hague Convention IX** art 5 and **Hague Draft Air Rules** rule 25 for naval and aerial bombardment respectively and **Geneva Protocol I** art 53(a). If in doubt, such buildings are to be presumed not to be making an effective contribution to military action (see **Geneva Protocol I** art 52(3)). **Geneva Protocol II** art 16 prohibits acts of hostility against places of worship in NIAC. See **Geneva Protocol I** art 85 for grave breach and **Rome Statute** arts 8(2)(b)(ix) and 8(2)(e)(iv) for war crime. See also Chapter 14.

64 **Rome Statute** art 7(2)(c): “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” The **Major War Criminals Trial** judgment held that the slave labour programme of the Third Reich was a war crime and a crime against humanity. In the **Pohl Trial** (at 970), the Military Tribunal held that “slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of freedom by forceful restraint”. In the **Tokyo War Crimes Trial** the practice of forced recruitment of native slave labour was held to be a war crime. Factors used to determine whether a person has been enslaved are the control of someone’s movements, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour (see **Simić Trial** at [85–87]). See also **Krnjelac Trial** at [350–356], **Slavery Convention** and **Supplementary Slavery Convention**.

65 **Geneva Convention IV** art 51, **Geneva Protocol II** art 4(2)(f), **ICRC Customary IHL** rules 94 (slavery) and 95 (forced labour), **ICCPR** arts 4 and 8 (the right not to be held in servitude is non-derogable) and **Crimes Act 1961** s 98. At **Rome Statute** art 7(1)(c) enslavement is a crime against humanity.

- b. require labour from any person in circumstances amounting to or resembling slavery; or
- c. allow, encourage or impose any form of uncompensated or abusive forced labour on any person.

**13.3.15** The practice of slavery must be distinguished from the legitimate use of prisoners of war (PWs)<sup>66</sup> and civilians in occupied territory<sup>67</sup> to perform work, provided that the work is not unduly arduous or dangerous to the person performing it. Members of the NZDF are not to establish any system of compulsory labour without specific authority from the Chief of Defence Force (CDF).

### COLLECTIVE PUNISHMENT IS PROHIBITED

**13.3.16** **Collective punishment** is an act of violence carried out against civilians or a civilian population to punish them for actions of individuals, for example, failure to help the force, or doing acts likely to help the enemy. Collective punishment is distinguishable from reprisal, which is a measure intended to force the opposing force to cease committing breaches of LOAC. Reprisals against civilians are, in any circumstances, prohibited.

**13.3.17** Regardless of the motive, collective punishments are absolutely prohibited and cannot be justified on the basis of unlawful acts by members of the civilian population or by the fact that the persons selected for punishment have relatives or friends who have committed offences against the force or are 'terrorists' or 'insurgents'.<sup>68</sup> Acts such as 'punitive house demolitions' are unlawful. Members of the NZDF are not to order or carry out or threaten any act of collective punishment against any civilian, a civilian population, or civilian object.

<sup>66</sup> For persons deprived of liberty see Chapter 12.

<sup>67</sup> For occupation see Chapter 9.

<sup>68</sup> See **Geneva Convention IV** art 33, **Geneva Protocol I** arts 75(2)(d) and 75(4)(b), **Geneva Protocol II** arts 4(2)(b) and 6(2)(b) and **ICRC Customary IHL** rules 102 and 103.



## SECTION 4 – ENEMY NATIONALS IN NEW ZEALAND

- 13.4.1** **Enemy national** means any person in New Zealand in time of armed conflict who is a national of an opposing party to the conflict.
- 13.4.2** It is not certain that in any future armed conflict control of enemy nationals in New Zealand will be a responsibility of the NZDF.<sup>69</sup> This section is only relevant if such responsibilities are placed upon the NZDF.
- 13.4.3** Enemy nationals in New Zealand are protected persons.<sup>70</sup> As protected persons, enemy nationals enjoy all the rights of protected persons under LOAC.<sup>71</sup> For example, they must receive medical attention and hospital treatment to the same extent as New Zealand nationals and be allowed to practise their religion.
- 13.4.4** Any enemy national who wishes to leave New Zealand territory at the outset of an armed conflict or during an armed conflict must be allowed to leave, unless his or her departure is contrary to New Zealand's national interests.<sup>72</sup> If the NZDF is made responsible for such departures, members of the NZDF are to ensure that they are carried out in satisfactory conditions as regards safety, hygiene, sanitation and food.<sup>73</sup>
- 13.4.5** Enemy nationals who remain in New Zealand may, if absolutely necessary, be interned for security reasons.<sup>74</sup> Persons interned are entitled to appeal the decision and to have their case reviewed at least twice per year.<sup>75</sup>

69 Control of enemy nationals during WWII in New Zealand was administered entirely by civilians up to the time that a person was interned. Custody was then a matter for the Army.

70 **Geneva Convention IV** art 4 states that "nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".

71 See Chapter 14.

72 **Geneva Convention IV** art 35(1): "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use. If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. Upon request, representative of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave."

73 **Geneva Convention IV** art 36: "Departures [...] shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned. The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands."

74 See **Geneva Convention IV** art 42. Internment may be in an assigned residence and may be voluntary.

75 See **Geneva Convention IV** art 43. In addition, unless they object, details of persons interned and of reviews of their cases are to be given to the Protecting Power.

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## SECTION 1 – INTRODUCTION

- 14.1.1** Law of Armed Conflict (LOAC) provides special protection to certain persons over and above that which they enjoy by virtue of being civilians. Similarly, LOAC protects certain objects over and above the rules protecting civilian objects. The protections set out in this chapter have arisen because the persons or objects in question have frequently been particularly susceptible to unlawful attack or mistreatment, or because the consequences of attack upon them are unusually dire.
- 14.1.2** Specific protection is also accorded to some members of the armed forces, such as United Nations (UN) peacekeeping personnel or personnel assigned to civil defence tasks. This is because of the vital nature of those roles in ending conflict or in reducing civilian suffering.
- 14.1.3** Increased destructiveness of means and methods of warfare means cultural property and places of worship in combat zones are in particular danger of damage or destruction. The preservation of cultural and spiritual heritage is of great importance for all peoples of the world. Members of the New Zealand Defence Force (NZDF) must understand that unjustified attacks on such property not only damages the reputation of New Zealand, but also endangers the mission and the lives of comrades. Defence of culture and religion are matters for which many people will fight to the death.

- 14.1.4** **NZDF Code of Conduct** rules relating to this chapter are:

*Fight only opposing forces or persons taking a direct part in hostilities.*

*Attack only military objectives and destroy no more than the mission requires.*

*Respect cultural property and places of worship.*

*Respect the use of protective emblems, symbols and markings.*

## SECTION 2 – UNITED NATIONS AND ASSOCIATED PERSONNEL AND UNITED NATIONS PROPERTY

### DEFINITIONS

#### 14.2.1 UN and associated personnel means:

- a. persons engaged or deployed by the UN Secretary-General who are members of the military, police or civilian component of a UN operation; and
- b. officials or experts on a mission of the UN or its specialised agencies or the International Atomic Energy Agency (IAEA), who are present in an official capacity in the area where a UN operation is being conducted.<sup>1</sup>

#### 14.2.2 Associated personnel means:

- a. persons assigned by a government or intergovernmental organisation with the agreement of the UN;
- b. persons engaged by the UN Secretary-General or by a specialised agency or by the IAEA; and
- c. persons deployed by a humanitarian non-governmental organisation (NGO), or by an agency under an agreement with the UN Secretary-General, or with a specialised agency or with the IAEA to carry out activities in support of the fulfilment of the mandate of a UN operation.<sup>2</sup>

#### 14.2.3 UN operation means an operation established by the competent organ of the UN in accordance with the Charter of the United Nations (UN Charter) and conducted under UN authority and control:

- a. where the operation is for the purpose of maintaining or restoring international peace and security;<sup>3</sup>
- b. where the Security Council or the General Assembly has declared that there exists an exceptional risk to the safety of the personnel participating in the operation;<sup>4</sup> or
- c. for the purposes of delivering humanitarian, political or development assistance in peacebuilding, or emergency humanitarian assistance.<sup>5</sup>

#### 14.2.4 UN property means the premises, accommodation, installations, material, vehicles, vessels and aircraft of a UN operation.

1 See **Safety of Peacekeepers Convention** art 1(a) and **Crimes (IPP, UN and AP and Hostages) Act 1980** s 2.

2 See **Safety of Peacekeepers Convention** art 1(b).

3 See **Safety of Peacekeepers Convention** art 1(c)(i).

4 See **Safety of Peacekeepers Protocol** art 1(c)(ii).

5 See **Safety of Peacekeepers Protocol** art 2(1).

## DISTINCTIVE EMBLEMS OF THE UNITED NATIONS

**14.2.5** Military and police personnel, vehicles, vessels and aircraft on UN operations must bear distinctive identification.<sup>6</sup> Other personnel, vehicles, vessels and aircraft involved in a UN operation must be appropriately identified unless the Secretary-General decides otherwise.<sup>7</sup> UN and associated personnel must carry appropriate identification.<sup>8</sup> Failure to display the emblems does not deprive UN personnel and property of their protection if they are known to be such by the attacking force.<sup>9</sup>

**14.2.6** The distinctive emblems (see Figure 1) of the UN are:

- a. the UN badge/flag;<sup>10</sup>
- b. light blue berets, helmets and brassards; and
- c. white paintwork on vehicles, aircraft and vessels, and materiel with the letters 'UN' ('UN livery').



**Figure 1** Emblems of the United Nations: the UN badge and livery

**14.2.7** Members of the NZDF are to respect the emblems of the UN and are not to misuse those emblems.<sup>11</sup>

6 See **Safety of Peacekeepers Convention** art 3(1).

7 See **Safety of Peacekeepers Convention** art 3(1).

8 See **Safety of Peacekeepers Convention** art 3(2).

9 See for example, **Crimes (IPP, UN and AP and Hostages) Act 1980** ss 3(1)(b) and 4(1)(b).

10 The UN emblem was adopted by **UNGAR 92(I)** in 1946 and the flag by **UNGAR 167(II)** in 1947. See also **UN Flag Code and Regulations 1947** art 1.

11 **Geneva Protocol I** art 38(2): "It is prohibited to make use of the distinctive emblem of the United Nations, except as authorised by that Organization." Under **Rome Statute** art 8(2)(b)(vii) improper use of the UN flag or emblem is a war crime. For treacherous misuse of LOAC emblems see Chapter 8.

## UNITED NATIONS AND ASSOCIATED PERSONNEL MUST NOT BE ATTACKED OR HINDERED AND UNITED NATIONS PROPERTY MUST NOT BE ATTACKED

**14.2.8** Except with respect to operations authorised by the UN Security Council (UNSC) as enforcement actions under Chapter VII of the UN Charter,<sup>12</sup> UN and associated personnel are entitled to all rights and protections applicable to civilians. Members of the NZDF are not to:

- a. attack UN or associated personnel or UN property;<sup>13</sup>
- b. unlawfully detain UN personnel or associated personnel;<sup>14</sup>
- c. do any act that prevents UN or associated personnel from carrying out their mandate;<sup>15</sup> or
- d. booby-trap or place manually emplaced munitions on UN property displaying the distinctive emblems of the UN.<sup>16</sup>

## PROTECTION OF UNITED NATIONS OPERATIONS FROM MINES/EXPLOSIVE REMNANTS OF WAR

**14.2.9** The head of a UN operation in an area controlled by a New Zealand force may ask that the area be made safe from mines, booby traps, explosive remnants of war (ERW) and cluster munition remnants.<sup>17</sup> The NZDF commander receiving such a request is to advise the Chief of Defence Force (CDF), through the Commander Joint Forces New Zealand (COMJFNZ), without delay. The obligation to render an area safe is constrained by resources available to the force and the operational situation at the time. Meeting these obligations will be more feasible once hostilities have subsided or ceased. Where a request is beyond the capabilities of the force, COMJFNZ is to advise CDF of courses of action available to meet these obligations, including calling upon coalition partners for assistance.

**14.2.10** Within available resources, the NZDF commander is to ensure that, as far as practicable, the force:

- a. takes necessary measures to protect the UN operation from the effect of minefields, mines, booby traps, manually emplaced munitions, ERW and cluster munition remnants, while carrying out its duties (this also applies in respect of UN fact-finding missions<sup>18</sup>);

12 **Safety of Peacekeepers Convention** art 2(2): "This convention shall not apply to a UN operations authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces to which the law of international armed conflict applies." For combatant status see Chapter 6.

13 **Safety of UN Personnel Convention** art 7(1): UN and associated personnel shall not be made the object of attack. **Crimes (IPP, UN and AP and Hostages) Act** ss 3-6: A person who commits or threatens to commit certain crimes of violence against persons protected by the Convention whether inside or outside of New Zealand, is liable on conviction to the same penalty to which he or she would have been liable had he or she been charged with a crime against the relevant provision of the Crimes Act 1961. See **Rome Statute Art 8(2)(b)(iii)**: **Sesay Trial** : Attacks on UN peacekeepers are a war crime. See **ICRC Customary IHL Rule 33** and **San Remo Manual** rules 39 and 41.

14 See **Safety of Peacekeepers Convention** arts 8 and 9(1)(a).

15 See **Safety of Peacekeepers Convention** art 7(1).

16 See **Conventional Weapons Protocol II** art 7(1)(a) and Chapter 7.

17 See Chapter 7 for discussion of these weapons.

18 See **Conventional Weapons Protocol II** art 12(3)(b).



- b. removes or renders harmless mines, booby traps, manually emplaced munitions, ERW and cluster munition remnants as necessary to protect UN and associated personnel in that area; and
- c. makes available to the head of the UN operation all known information concerning the location of minefields, mines, booby traps, manually emplaced munitions, ERW and cluster munition remnants in that area.<sup>19</sup>

### LOSS OF SPECIAL PROTECTION

**14.2.11** Immunity from attack is lost if personnel take a direct part in hostilities against a New Zealand force or coalition partners. UN property loses immunity from attack if it becomes a military objective.<sup>20</sup>

**14.2.12** Combat action between a New Zealand force and a force claiming UN protection could arise:

- a. from treacherous use by that force of UN emblems;<sup>21</sup>
- b. through mistaken identity; or
- c. because UN or associated personnel are not complying with the obligation of impartiality and are acting contrary to their mandate.

**14.2.13** A New Zealand force that is attacked by a force claiming UN protection has the right and obligation to defend itself until combat can be broken-off.<sup>22</sup> Where there is reason to believe the opposing force is treacherously feigning UN protections, an attack on that force is only to be ordered with the specific authority of CDF, except in the case of imminent self-defence.

**14.2.14** If personnel who are captured or apprehended by members of the NZDF are identified as UN or associated personnel, the following conditions apply:

- a. They are not to be interrogated.
- b. They are to be promptly returned to the UN or appropriate authorities.
- c. Pending their release, they are to be accorded the same rights as prisoners of war (PWs).<sup>23</sup>

**14.2.15** Members of a force taking part in UN operations must comply with the applicable principles and rules of LOAC.<sup>24</sup>

19 See **Conventional Weapons Protocol II** art 12(2)(b).

20 See **ICRC Customary IHL** rule 33. For direct participation in hostilities see Chapter 6.

21 See **UN Flag Code and Regulations 1947** art 7, **Geneva Protocol I** art 38(2), **ICRC Customary IHL** rule 60, **San Remo Manual** rules 110(d) and 111(a) and **Rome Statute** art 8(2)(b)(vii). For treachery/perfidy see Chapter 8.

22 **Safety of Peacekeepers Convention** art 21: "Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence."

23 See **Safety of Peacekeepers Convention** art 8. These duties apply except as otherwise provided in an applicable SOFA. It is unlikely that there will be a SOFA between New Zealand and the UN.

24 See **UN Secretary-General's Bulletin 13 (1999)** for observance by United Nations forces of IHL. For application of LOAC to UN peace support operations see Chapter 5.

## SECTION 3 – HUMANITARIAN RELIEF PERSONNEL AND PROPERTY

### DEFINITIONS

**14.3.1 Humanitarian relief personnel** are personnel who, with the approval of the Party in whose territory they operate, form part of the assistance provided to relief action (eg transportation and distribution of relief consignments).<sup>25</sup>

### HUMANITARIAN RELIEF PERSONNEL MUST BE PROTECTED AND RESPECTED

**14.3.2** Members of the NZDF are to respect and protect humanitarian relief personnel and the property, buildings, vehicles and other objects used for humanitarian relief operations.<sup>26</sup> They are:

- a. not to attack them or property used for humanitarian relief operations;
- b. to the fullest extent practicable, assist them to carry out their relief mission; and
- c. to permit free passage of all consignments of essential foodstuffs, clothing and medicines, particularly those intended for children, expectant mothers and maternity cases.<sup>27</sup>

### LOSS OF SPECIAL PROTECTION

**14.3.3** The commander of a New Zealand force may restrict the activities or movements of relief personnel only in cases of imperative military necessity or if there is reason to believe that the relief will be diverted for military or improper use. Restrictions are to be imposed for the minimum period demanded by the circumstances. The commander is to inform CDF, through COMJFNZ, of the imposition of any such restriction and the reason for it without delay.<sup>28</sup>

**14.3.4** If humanitarian relief personnel exceed the terms of their mission or fail to take account of the security requirements of the New Zealand force, their mission may be terminated.<sup>29</sup> They are not to be attacked, however, unless they take a direct part in the hostilities.<sup>30</sup> If their mission is terminated, they retain all the rights and obligations of other civilians.

**14.3.5** If an NZDF commander has reason to believe that persons claiming protection as humanitarian relief personnel are abusing the obligations of neutrality and impartiality, the matter is to be reported to CDF, through COMJFNZ, without delay. No action is to be taken without the authority of CDF unless necessary in immediate self-defence. The advice of an NZDF Legal Adviser (LEGAD) is to be obtained before any action is taken, unless this is not practicable.

25 See **Geneva Protocol I** art 71(1).

26 **Geneva Protocol I** art 71(2): “[Humanitarian relief personnel] shall be respected and protected.” See also **ICRC Customary IHL** rules 31 and 32.

27 For duty to facilitate and protect relief supplies in occupied territory see Chapter 9.

28 See **Geneva Protocol I** art 71(3) and Chapter 9.

29 **Geneva Protocol I** art 71(4): “Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.”

30 For direct part in hostilities see Chapter 6.

## SECTION 4 – CIVIL DEFENCE PERSONNEL AND PROPERTY

## DEFINITIONS

**14.4.1 Civil defence** means some or all of the following humanitarian tasks intended to protect the civilian population against the dangers of hostilities and disasters, and help it recover from the immediate effects, and also to provide the conditions necessary for its survival:

- a. Warning.
- b. Evacuation.
- c. Management of shelters.
- d. Management of blackout measures.
- e. Rescue.
- f. Medical services including first aid and religious assistance.
- g. Firefighting.
- h. Detection and marking of danger areas.
- i. Decontamination and similar protective measures.
- j. Provision of emergency accommodation and supplies.
- k. Emergency assistance in the restoration and maintenance of order in distressed areas.
- l. Emergency repair of indispensable public utilities.
- m. Emergency disposal of the dead.
- n. Preservation of objects essential for survival.
- o. Complementary activities such as planning and organisation.<sup>31</sup>

**14.4.2 Civil defence organisations** means establishments and units organised or authorised by the competent authorities of a party to a conflict to perform any of the civil defence tasks listed above, and assigned and devoted exclusively to those tasks.<sup>32</sup> The term includes civilian civil defence organisations from States that are neutral or not a party to the conflict performing civil defence tasks in the territory of a party to the conflict, with its consent and under its control.<sup>33</sup>

**14.4.3 Civil defence personnel** means persons assigned by a party to the conflict to exclusively perform civil defence tasks. It includes personnel assigned exclusively to the administration of civil defence organisations.<sup>34</sup>

<sup>31</sup> See **Geneva Protocol I** art 61(a).

<sup>32</sup> See **Geneva Protocol I** art 61(b).

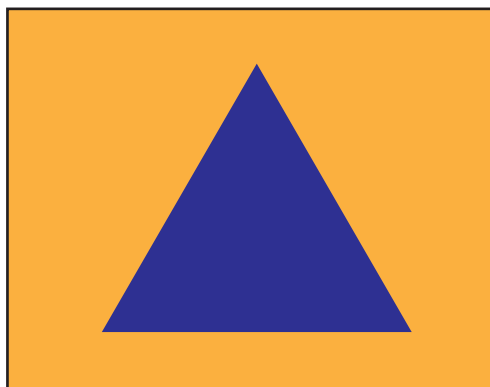
<sup>33</sup> See **Geneva Protocol I** art 64(1). Note that this provision also states that “in no circumstances shall this activity be deemed to be an interference in the conflict”.

<sup>34</sup> See **Geneva Protocol I** art 61(c).

**14.4.4 Civil defence property** means buildings, equipment, supplies or transports or materiel used by a civil defence organisation in performing its tasks.<sup>35</sup>

#### DISTINCTIVE SIGN

**14.4.5** Personnel, buildings, equipment and transports of military units assigned to civil defence organisations must be clearly marked with the distinctive sign of civil defence.<sup>36</sup> Failure to display the sign does not deprive civil defence organisations of protection if they are known to be such by the attacking force.<sup>37</sup>



**Figure 2** Civil Defence Emblem

**14.4.6** Members of the NZDF are not to misuse the sign for civil defence.<sup>38</sup>

#### CIVIL DEFENCE PERSONNEL AND PROPERTY MUST BE RESPECTED AND PROTECTED

**14.4.7** Members of the NZDF are to respect and protect civil defence organisations and personnel, and members of the civilian population called upon to perform civil defence tasks.<sup>39</sup> They are to assist, to the fullest extent practicable, civil defence personnel in carrying out their duties within the area of operations.

**14.4.8** Members of the NZDF are not to:

- a. attack civil defence personnel, civil defence property or shelters for the protection of the civilian population;<sup>40</sup>

<sup>35</sup> See **Geneva Protocol I** art 61(d).

<sup>36</sup> See **Geneva Protocol I** art 66 for regulations concerning identification of civil defence organisations, buildings, vehicles, materiel and personnel. See **Geneva Protocol I** art 67(1)(c) and 67(3) for identification of personnel and property of military units assigned exclusively to civil defence tasks. The identification of religious and medical personnel associated with civil defence is also governed by **Geneva Protocol I** art 18. Note that **Geneva Protocol I** art 66(7) provides that in time of peace the sign may, with the consent of the competent national authorities, be used for civil defence identification purposes. However, in peacetime, New Zealand uses an emblem that is similar but distinguishable from the distinctive emblem of the Geneva Conventions (see **Civil Defence Emergency Management Regulations 2003** (SR 2003/89) Schedule 1). See also **Geneva Protocol I** Annex I and art 16(1).

<sup>37</sup> Nevertheless, Parties must take the measures necessary to supervise the display of the sign and to prevent and repress any misuse (see **Geneva Protocol I** arts 66(1), (2) and (8)).

<sup>38</sup> See **Geneva Protocol I** arts 66(1), (2) and (8). For treacherous misuse of LOAC symbols and emblems see Chapter 8.

<sup>39</sup> See **Geneva Protocol I** art 62(1). Art 62(1) also applies to civilians who, although not members of civilian civil defence organisations, respond to an appeal from the competent authorities and perform civil defence tasks under their control (see art 62(2)).

<sup>40</sup> **Geneva Protocol I** art 62(1) requires that civilian civil defence organisations and their personnel are respected and protected. Furthermore, buildings and materiel used for civil defence purposes and shelters provided for the civilian population are civilian objects under art 52 and therefore may not be the subject of attack or reprisal (see **Geneva Protocol I** art 62(3)). See also

- b. compel civil defence organisations to perform activities that would interfere with the proper performance of their tasks;<sup>41</sup>
- c. change the structure or personnel of civil defence organisations in any way that may jeopardise the efficient performance of their mission;<sup>42</sup>
- d. require civil defence organisations to give NZDF interests priority;<sup>43</sup> or
- e. compel, coerce or induce civil defence organisations to perform their tasks in a manner prejudicial to the interests of the civilian population.<sup>44</sup>

**14.4.9** An NZDF commander may, where necessary for security, order that enemy civil defence personnel under NZDF control be disarmed.<sup>45</sup>

#### REQUISITION OF CIVIL DEFENCE MATERIEL MAY ONLY OCCUR UNDER CERTAIN CONDITIONS

**14.4.10** Members of the NZDF are not to:

- a. divert from their proper use or requisition civil defence property if that would be harmful to the civilian population,<sup>46</sup> or
- b. divert or requisition shelters provided for the use of the civilian population or needed by that population.<sup>47</sup>

**14.4.11** An NZDF commander may order requisition or diversion of civil defence materiel or buildings only if, and so long as, the property is required to meet other needs of the civilian population.<sup>48</sup> CDF is to be informed, through COMJFNZ and without delay, of any requisition or diversion and the reasons for it. The advice of an NZDF LEGAD is to be obtained before any action is taken, unless this is not practicable.

#### MILITARY PERSONNEL ASSIGNED TO CIVIL DEFENCE ARE PROTECTED

**14.4.12** Armed forces personnel permanently assigned to civil defence organisations and exclusively devoted to civil defence tasks<sup>49</sup> are entitled to the same protection as civilian personnel, provided that they:

- a. do not perform any other military duties during the conflict;<sup>50</sup>
- b. are clearly distinguishable by prominently displaying the civil defence symbol, and carry an identity card certifying their status;<sup>51</sup>

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**Rome Statute** arts 8(2)(b)(xxiv) and 8(2)(e)(ii).

41 See **Geneva Protocol I** art 63(1).

42 See **Geneva Protocol I** art 63(1).

43 See **Geneva Protocol I** art 63(1).

44 See **Geneva Protocol I** art 63(2).

45 See **Geneva Protocol I** art 63(3).

46 See **Geneva Protocol I** art 63(4). See also the exception to this at art 63(5).

47 See **Geneva Protocol I** art 63(6).

48 Provided that the general rule of art 63(4) continues to be observed, the Occupying Power may requisition or divert civil defence buildings or materiel if they are necessary for other needs of the civilian population and the requisitioning or diversion continues only while such necessity exists (see **Geneva Protocol I** art 63(5)).

49 See **Geneva Protocol I** art 67(1)(a).

50 See **Geneva Protocol I** art 67(1)(b).

51 See **Geneva Protocol I** art 67(1)(c).

- c. are equipped only with light individual weapons for maintaining order or for self-defence;<sup>52</sup>
- d. do not participate directly in hostilities<sup>53</sup> or commit, outside their civil defence tasks, acts harmful to the New Zealand force;<sup>54</sup> or
- e. perform their civil defence tasks only within their own national territory.<sup>55</sup>

**14.4.13** Military personnel serving in civil defence organisations are PWs if captured. They may, if necessary, be employed on civil defence tasks in the interest of the civilian population in occupied territory. If the work is dangerous, only volunteers may be used.<sup>56</sup>

**14.4.14** The commander of a New Zealand force may requisition or divert the property of enemy units permanently assigned to civil defence organisations and used exclusively on civil defence tasks in case of imperative military necessity only.<sup>57</sup> CDF is to be informed, through COMJFNZ and without delay, of the requisition or diversion and the reasons for it. The advice of an NZDF LEGAD is to be obtained before any action is taken, unless this is not practicable.

#### LOSS OF SPECIAL PROTECTION

**14.4.15** Civil defence organisations and their personnel lose their special protections if they are used outside of their proper tasks to perform acts harmful to a New Zealand force or its coalition partners. However, protection ceases only after a warning has been given, setting, if appropriate, a reasonable time limit has gone unheeded.<sup>58</sup>

**14.4.16** A civil defence organisation does not lose protection merely because it:

- a. operates under military control/direction,<sup>59</sup>
- b. involves military cooperation or personnel,<sup>60</sup>
- c. incidentally benefits military victims of war, eg those *hors de combat*;<sup>61</sup>
- d. is organised along military lines or requires compulsory service,<sup>62</sup> or
- e. bears light weapons for maintaining order and self-defence.<sup>63</sup>

52 See **Geneva Protocol I** art 67(1)(d).

53 For direct participation in hostilities see Chapter 6.

54 See **Geneva Protocol I** art 67(1)(e).

55 See **Geneva Protocol I** art 67(1)(f).

56 See **Geneva Protocol I** art 67(2).

57 **Geneva Protocol I** art 67(4): “The *matériel* and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.”

58 See **Geneva Protocol I** art 65(1).

59 See **Geneva Protocol I** art 65(2)(a).

60 See **Geneva Protocol I** art 65(2)(b).

61 See **Geneva Protocol I** art 65(2)(c).

62 See **Geneva Protocol I** art 65(4).

63 See **Geneva Protocol I** art 65(3).

- 14.4.17** If attacked by persons claiming protection as a civil defence organisation, members of the NZDF have the right and duty to defend themselves. In other circumstances, members of the NZDF are only to attack civil defence personnel performing acts harmful to a New Zealand force after a warning has been issued and not complied with within a reasonable period. The attack is to be ordered only with specific authority of CDF. The advice of an NZDF LEGAD is to be obtained before any action is taken, unless this is not practicable.



## SECTION 5 – WOMEN

## WOMEN MUST BE RESPECTED AND PROTECTED

**14.5.1** Female combatants and women who take a direct part in hostilities share the same rights and obligations as their male counterparts. They are equally competent to attack, and to be attacked.<sup>64</sup> If rendered *hors de combat* through capture, wounds, sickness or shipwreck, however, the special physical needs of women and their vulnerability to sexual violence, sexual exploitation and ill-treatment is to be recognised by members of the NZDF. Girls are also entitled to special protection on account of their age.<sup>65</sup>

**14.5.2** Members of the NZDF are to:

- a. protect women from rape,<sup>66</sup> sexual slavery,<sup>67</sup> enforced prostitution,<sup>68</sup> forced pregnancy,<sup>69</sup> enforced sterilisation,<sup>70</sup> sexual exploitation or any form of sexual violence;<sup>71</sup> and
- b. ensure that women who are under the control of the NZDF or deprived of their liberty for any reason are treated with respect and due care to their sex and no less favourably than men.<sup>72</sup> In particular, women are to be:
  - (1) quartered separately from men and immediately supervised by women;<sup>73</sup> and

64 Out-dated attitudes regarding women taking a direct part in combat have no significance in LOAC. See **Human Rights (Women in Armed Forces) Amendment Act 2007**.

65 For children see Section 6.

66 **Geneva Protocol I** art 76(1): “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution or any other form of indecent assault.” **Geneva Protocol II** art 4(2)(e) provides that rape is prohibited in NIAC. See **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi) for war crime. ‘Rape’ includes any physical invasion of a sexual nature committed on a person whether male or female under circumstances which are coercive.

67 See **Geneva Protocol II** art 4(2)(f), **ICRC Customary IHL** rule 94 and **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).

68 See **Geneva Protocol I** art 76(1), **Geneva Protocol II** art 4(2)(e), **Awochi Trial** and **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).

69 See **Rome Statute** art 7(2)(f): “‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” See also arts 8(2)(b)(xxii) and 8(2)(e)(vi).

70 See **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).

71 **Geneva Protocol I** art 76(1): “Women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.” **Geneva Protocol I** art 77(1): “Children shall be the object of special respect and shall be protected against any form of indecent assault.” In NIAC, any form of indecent assault is prohibited (see **Geneva Protocol II** art 4(2)(e)). **UNSCR 1325** (2000) calls upon parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls and to protect them from gender-based violence (see arts 9 and 10). See also **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).  
72 See **Geneva Convention I** art 12, **Geneva Convention II** art 12, **Geneva Convention III** art 14 and **Geneva Convention IV** art 27.

73 **Geneva Convention III** art 25 requires that in “any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them”. **Geneva Convention III** art 29(2) requires that in “any camps in which women prisoners of war are accommodated, separate conveniences [for personal hygiene] shall be provided for them”. **Geneva Convention IV** art 85 states that whenever “it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences shall be obligatory”. **Geneva Protocol I** art 75(5): “Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men’s quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where

- (2) searched only by women, unless in the circumstances this is absolutely not possible.<sup>74</sup>

**14.5.3** Pregnant women and mothers with dependant infants are to be treated with particular care. If deprived of liberty, they are only to be held in a place where adequate treatment and care can be given and to a standard at least as good as for the general population.<sup>75</sup>

#### THE PARTICIPATION OF WOMEN IN DEPLOYMENTS

**14.5.4** COMJFNZ is to ensure that contingents for both armed conflict and peace support operations contain sufficient numbers of women to ensure that NZDF's LOAC obligations can be met. The important role of women in conflict resolution and peace processes is to be kept in mind when drawing-up contingent lists.<sup>76</sup>

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families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units." See **Geneva Protocol II** art 5(2)(a) for the similar provision in NIAC. **Geneva Convention III** art 97(4): "[...] Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women." See also **Geneva Convention IV** art 76 and **Geneva Convention IV** art 124(3). For PWs, retained personnel, internees and detainees see Chapter 12.

74 **Geneva Convention IV** art 97(4): "[...] A woman internee shall not be searched except by a woman [...]." For searches of women and for planning requirements for protection of women deprived of their liberty see Chapter 12.

75 **Geneva Convention IV** art 91 requires that if maternity cases are interned "they must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population". **Geneva Protocol I** art 76(2): "Pregnant women and mothers having dependent children who are arrested, detained or interned for reasons to do with the armed conflict shall have their case considered with the utmost priority."

76 See **UNSCR 1325** (2000).

## SECTION 6 – CHILDREN

## CHILDREN MUST BE RESPECTED AND PROTECTED

- 14.6.1** A **child** is, unless otherwise specified, any person who has not reached the age of 18 years.<sup>77</sup> Regardless of the age of majority in other States, members of the NZDF are to treat any person under the age of 18 years as a child.
- 14.6.2** Children affected by armed conflict are entitled to special respect and protection.<sup>78</sup> This section consolidates the rules that protect children from the effects of war that are set out in other chapters, for example, those that are applicable to a child by virtue of being deprived of liberty, a civilian, or being wounded, sick or shipwrecked.<sup>79</sup> The fact of being a child is not to be used as a ground for adverse discrimination.<sup>80</sup>
- 14.6.3** Children who are combatants, or who take a direct part in hostilities, are liable to be attacked in the same way as their adult counterparts. However, if rendered *hors de combat* through capture, wounds, sickness or shipwreck, or simply within the control of the NZDF, their special physical and emotional needs as children and their vulnerability to sexual violence and ill-treatment are to be recognised and actively guarded against by members of the NZDF.
- 14.6.4** Members of the NZDF are to ensure that children under their control are:
- a. protected from rape,<sup>81</sup> sexual slavery,<sup>82</sup> enforced prostitution,<sup>83</sup> forced pregnancy,<sup>84</sup> enforced sterilisation,<sup>85</sup> sexual violence or sexual exploitation;<sup>86</sup>
  - b. provided with the care they require, in particular receiving an education and being reunited with their families;<sup>87</sup>

- 77 **UNCROC** art 1: “[...] a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” The age of majority varies from country to country. Under the **Age of Majority Act 1970** s 4 the age of majority in New Zealand is 20 years of age.
- 78 See **ICRC Customary IHL** rule 135.
- 79 For example, **Geneva Convention IV** art 38(5) provides that children under 15 years who are aliens in the territory of a Party to the conflict shall benefit from any preferential treatment to the same extent as nationals of the State concerned. **UNCROC** art 38(1): “States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.”
- 80 For principle of non-discrimination see Chapter 4.
- 81 **Geneva Protocol I** art 77(1): “Children shall be the object of special respect and shall be protected against any form of indecent assault [...]” **Geneva Protocol II** art 4(2)(e) provides that rape is prohibited in NIAC. See **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi) for war crime. ‘Rape’ includes any physical invasion of a sexual nature committed on a person whether male or female under circumstances which are coercive.
- 82 See **Geneva Protocol II** art 4(2)(f), **ICRC Customary IHL** rule 94 and **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 83 See **Geneva Protocol II** art 4(2)(e), **Awochi Trial** and **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 84 See **Rome Statute** art 7(2)(f): “‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” See also arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 85 See **Rome Statute** arts 8(2)(b)(xxii) and 8(2)(e)(vi).
- 86 **Geneva Protocol I** art 77(1) provides that children shall be the object of special respect and shall be protected against any form of indecent assault. **UNCROC** art 34: “States Parties undertake to protect children from all forms of sexual exploitation and sexual abuse.”
- 87 **Geneva Protocol I** art 77(1) requires Parties to the conflict to provide children with the care and aid they require, whether because of their age or for any other reason. See **Geneva Protocol II** art 4(3) for NIAC.

- c. not recruited into the NZDF or into any armed group supporting the NZDF;<sup>88</sup>
- d. held in quarters separately from adults except where families are accommodated as a unit;<sup>89</sup>
- e. provided additional food in proportion to their needs, as well as education, physical exercise, sports and outdoor games and special playgrounds;<sup>90</sup>
- f. not subjected to torture or any other cruel, inhumane or degrading treatment<sup>91</sup> or executed;<sup>92</sup>
- g. not compelled to work;<sup>93</sup> and
- h. allowed, wherever possible, to maintain contact with their families through regular correspondence and visits.<sup>94</sup>

**14.6.5** Members of the NZDF are not to use booby traps that are in any way attached to or associated with children's toys or other portable objects, or products specially designed for the feeding, health, hygiene, clothing or education of children.<sup>95</sup>

88 See **UNCROC** arts 38(2) and (3), **Geneva Protocol I** art 77(2), **Geneva Protocol II** art 4(3)(c), **Hinga Norman Decision**, **Lubanga Trial**, **ICRC Customary IHL** rule 136 and **Rome Statute** arts 8(2)(b)(xxvi) and 8(2)(e)(vii).

89 **Geneva Convention IV** art 82(2): "Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated by reasons of employment or health [or discipline]. Internees may request that their children who are left at liberty without parental care shall be interned with them." **Geneva Protocol I** art 77(4): "If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separately from adults, except where families are accommodated as a unit, as provided in Article 75, paragraph 5." **UNCROC** art 37(c) provides that every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so. For detention see Chapter 12.

90 **Geneva Convention IV** art 76(5) requires that, in respect of detained persons accused or convicted of offences, the Occupying Power shall pay proper regard to the special treatment due to minors. Art 89(5) provides that interned children under 15 years of age shall be given additional food, in proportion to their physiological needs. Art 94 requires the detaining Power to ensure that children and young people receive education and that they are given opportunities for physical exercise, sports and outdoor games. Special playgrounds shall be reserved for children and young people.

91 **UNCROC** art 37(a) provides that no child shall be subjected to torture or any other cruel, inhumane or degrading treatment. The general prohibitions against torture and cruel or inhumane treatment also apply to children (see **Geneva Convention Common Article 3**, **Geneva Protocol I** art 75(2)(a)(ii), **Geneva Protocol II** art 4(2) and **ICRC Customary IHL** rule 90).

92 See **Geneva Convention IV** art 68, **Geneva Protocol I** art 77(5) and **Geneva Protocol II** art 6(4). The death penalty has been abolished in New Zealand (see **Abolition of the Death Penalty Act 1989**).

93 Under **Geneva Convention IV** art 51 the Occupying Power may not compel protected persons to work unless they are over 18 years of age.

94 See **UNCROC** art 37(c).

95 See **Conventional Weapons Protocol II** art 7(1)(e).

- 14.6.6** Whenever a New Zealand force controls<sup>96</sup> or occupies<sup>97</sup> territory in which there are children likely to be affected by the conflict, the commander is, as far as possible, to:
- a. cooperate with national and local authorities to ensure the proper working of all institutions devoted to the care and education of children;<sup>98</sup>
  - b. establish safety zones and localities to protect children from the effects of war;<sup>99</sup>
  - c. conclude local agreements for removal of children from besieged and encircled areas;<sup>100</sup>
  - d. remove children from places where hostilities are taking place and move them to a safer area;<sup>101</sup>
  - e. allow free passage of medical and hospital stores, foodstuffs, clothing and medicines intended for children;<sup>102</sup>
  - f. ensure that children who are orphaned or separated from their families are not left to their own resources, and is to facilitate the exercise of their religion and their education;<sup>103</sup>
  - g. conclude agreements for the release, repatriation and return of children to places of residence or accommodation in a neutral country;<sup>104</sup>
  - h. facilitate, with the consent of the Protecting Power or International Committee of the Red Cross (ICRC), the reception in neutral countries of children who are orphaned or separated from their families;<sup>105</sup>

96 Where a New Zealand force controls foreign territory with the permission of the lawful government, the primary responsibility for care and protection of children remains with that government. The responsibilities set out in this part must, in such circumstances, be applied to the extent that arrangements with the lawful government allow.

97 For occupation see Chapter 9.

98 See **Geneva Convention IV** art 50.

99 See **Geneva Convention IV** art 14.

100 See **Geneva Convention IV** art 17.

101 The precautions to protect civilians from the effects of attacks at **Geneva Protocol I** art 58 also apply to children. See also **Geneva Protocol II** art 4(3)(e).

102 **Geneva Convention IV** art 23(1) requires that each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores, essential foodstuffs, clothing and tonics intended for children under the age of 15.

103 **Geneva Convention IV** art 24(1): "The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition [...]." See also **Geneva Protocol II** art 4(3)(a) in NIAC.

104 **Geneva Convention IV** art 132: "The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children [...]."

105 See **Geneva Convention IV** art 24.

- i. facilitate identification of children and register their parentage;<sup>106</sup>
- j. arrange for all children under 12 years affected by the conflict, particularly those separated from their families, to be identified by the wearing of identity discs or by some other means;<sup>107</sup>
- k. ensure that, in the provision of relief to the civilian population, priority is given to children;<sup>108</sup> and
- l. allow the continuation of any preferential measures for the provision of food, medical care and protection of children, expectant mothers and mothers of small children.<sup>109</sup>

**14.6.7** Members of the NZDF are not to evacuate children to a foreign country unless:

- a. there are compelling reasons of health, medical treatment or, in occupied territory, the safety of the children;
- b. the parents or lawful guardians have consented in writing;
- c. it is authorised by CDF; and
- d. it is supervised by the Protecting Power or ICRC.

**14.6.8** Members of the NZDF are not to take part in evacuation or transfer of children in circumstances giving rise to reasonable suspicion that the transfer is intended to destroy the national, ethnic, racial or religious group to which the children belong.<sup>110</sup>

## THE USE OF CHILD SOLDIERS IS PROHIBITED

**14.6.9** A **child soldier** is any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity including, but not limited to, children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.<sup>111</sup>

106 See **Geneva Convention IV** art 50 and the further provisions it contains to allow this to occur. Particulars of their parents or other near relatives should always be recorded if available.

107 See **Geneva Convention IV** art 24.

108 **Geneva Protocol I** art 70(1) provides that in the distribution of relief consignments, priority shall be given to persons such as children.

109 **Geneva Convention IV** art 50(5): “[...] The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.”

110 Forcibly transferring children of a national, ethnic, racial or religious group, or another group, with intent to destroy as such the group to which the children belong, constitutes the crime of genocide (see **Genocide Convention** art 2(e)).

111 See **Paris Principles** at 7.



**14.6.10** Members of the NZDF are not to:

- a. use children to take a direct part in hostilities;<sup>112</sup> or
- b. recruit children into armed forces or armed groups.<sup>113</sup>

**14.6.11** COMJFNZ is to ensure that no person under the age of 18 years is deployed as part of a New Zealand force during armed conflict.<sup>114</sup> If any member of the NZDF becomes aware that a member of a New Zealand force is under the age of 18 years, he or she is to report the matter to COMJFNZ without delay.

**14.6.12** Although children who are forced or induced to take up arms are victims of war, NZDF commanders are not to ignore the special danger that child soldiers pose to members of the NZDF and the civilian population. Children are, in particular, prone to being manipulated into committing war crimes and their behaviour can be unpredictable and irrational. Nevertheless, if there is a choice of available objectives, NZDF commanders are to avoid attacking child soldiers if possible.

112 **Geneva Protocol I** art 77(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 [...]”. For NIAC see **Geneva Protocol II** art 4(3)(c). **UNCROC** art 38(2): “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. **UNCROC Protocol I** art 1: “States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities.” See also *Hinga Norman Decision*, *Lubanga Trial*, **ICRC Customary IHL** rule 137 and **Rome Statute** arts 8(2)(b)(xxvi) and 8(2)(e)(vii).

113 **UNCROC** art 38(3): “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years 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, States Parties shall endeavour to give priority to those who are oldest.” **UNCROC Protocol I** art 2: “States Parties shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces.” **UNCROC Protocol I** art 4(1): “Armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of eighteen years.” Art 4(2) requires States to take measures to ensure that children are not recruited into armed groups, including criminalisation. Under art 39(a) of **ILO Convention 182** forced or compulsory recruitment of children for use in armed conflict is listed as one of the “worst forms of child labour”. See also **Geneva Protocol I** art 77(2), **Geneva Protocol II** art 4(3)(c), **ICRC Customary IHL** rule 136 and **Rome Statute** arts 8(2)(b)(xxvi) and 8(2)(e)(vii).

114 **DA** s 37: “No person serving in the Armed Forces who is under 18 years is liable for active service.” **DFO 3**, Part 9 stipulates that members of the Armed Forces under the age of 18 are not to be deployed on any form of operational service outside of New Zealand (whether amounting to armed conflict or not). New Zealand’s declaration on **UNCROC Protocol I** art 2 is that the minimum age at which New Zealand will permit voluntary recruitment is 17 years of age. As required, New Zealand has ensured that safeguards are in place to ensure that such recruitment is genuinely voluntary, is carried out with the informed consent of the person’s parents or legal guardians and that the recruit is fully informed of the duties involved in such military service. A birth certificate as reliable proof of age must be provided prior to acceptance into national military service (see **New Zealand’s Initial Report on Optional Protocol on the Involvement of Children in Armed Conflict**, CRC/C/OPAC/NZL/1, 30 July 2003). The requirement to raise the age of recruitment does not apply to schools operated by or under the control of the armed forces.



## SECTION 7 – JOURNALISTS

- 14.7.1** Journalists play a dangerous and vital role in reporting on war. Nevertheless, protections granted to journalists under LOAC do not substantially alter the status, rights or obligations journalists otherwise enjoy as civilians.<sup>115</sup>
- 14.7.2** Members of the NZDF are to respect and protect journalists who are engaged in dangerous professional missions in the area of operations and are not to attack them or their property, or unnecessarily hinder them.<sup>116</sup> Journalists accredited to the armed forces of a party to armed conflict are entitled to PW status if captured.
- 14.7.3** **Loss of protection.** Journalists lose their immunity from attack if they take a direct part in hostilities.<sup>117</sup> Individuals who abuse their protection as journalists in order to provide direct assistance to a party, conduct espionage or sabotage lose their special protection under LOAC while they are doing so. They are also liable to prosecution for any action in breach of international or domestic law that they may commit. Writing or presenting media material critical of a force or supportive of the aims or actions of the enemy is not an action adversely affecting the journalist's protected status. Simply gathering information about the general conduct of hostilities does not constitute espionage. Because freedom of the press is an important value to States such as New Zealand, no action is to be taken against a journalist who is believed to have forfeited their protection under LOAC without the authority of CDF. The advice of an NZDF LEGAD is to be obtained before any action is taken. Any person deprived of liberty in such circumstances is to be treated humanely and remains entitled to all LOAC protections applicable to their civilian status.

115 See **Geneva Protocol I** art 79(1). **Geneva Protocol I** art 79(3) provides that journalists may obtain an identity card issued by the government of the State of which they are a national or in whose territory they reside or in which the news medium employing them is located. Details on the form such identity cards should take is at Annex A to **Geneva Protocol I**. For civilians see Chapter 13.

116 See **ICRC Customary IHL** rule 34.

117 For direct part in hostilities see Chapter 6.

## SECTION 8 – CULTURAL PROPERTY, EDUCATIONAL AND CHARITABLE INSTITUTIONS AND PLACES OF WORSHIP

### DEFINITIONS

**14.8.1 Cultural property** means movable and immovable property which constitutes the cultural or spiritual heritage of peoples or is of great importance to the cultural heritage of every people. The term includes cultural property under ‘enhanced protection’.<sup>118</sup> Protected cultural property includes:<sup>119</sup>

- a. monuments of architecture, art or history;
- b. archaeological sites;
- c. groups of buildings of historical or artistic interest;
- d. works of art and buildings dedicated to art;
- e. manuscripts, books, collections of books and archives;
- f. objects of artistic, historical or archaeological interest;
- g. scientific collections and buildings dedicated to science;
- h. buildings preserving or exhibiting movable cultural property, eg museums, large libraries, archives, and refuges sheltering movable cultural property in the event of armed conflict;<sup>120</sup> and
- i. centres containing large amounts of moveable and immovable cultural property of very great importance.

**14.8.2 Places of worship** means buildings dedicated to religion, sacred edifices and all other places of worship or spiritual significance, regardless of religion, for example cathedrals, churches, mosques, temples and shrines. The term is not limited to large or imposing buildings. Places of great religious significance may be simple in appearance and may include natural features as well as artificial structures. Where places of worship are of great cultural significance, the rules relating to cultural property apply.

118 **Hague Cultural Property Protocol II** art 10: “Cultural property may be placed under enhanced protection provided that it meets the following three conditions: (a) it is cultural heritage of the greatest importance for humanity; (b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection; (c) it is not used for military purposes or the shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.” Art 12: “The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack [and by refraining] from any use of the property or its immediate surroundings in support of military action.” Art 14(1): “Where cultural property no longer meets any one of the criteria [for enhanced protection], the Committee [for the Protection of Cultural Property in Armed Conflict] may suspend its enhanced protection status or cancel that status by removing that cultural property from the List.” See also **Cultural Property (Protection in Armed Conflict) Act 2012** s 4(4).

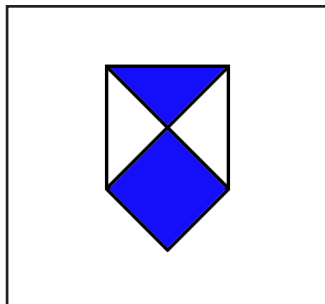
119 See definition at **Hague Cultural Property Convention** art 1 and **Cultural Property (Protection in Armed Conflict) Act 2012** s 4.

120 Refuges intended to shelter movable objects of cultural property during armed conflict may be granted ‘special protection’ by entry on the International Register and are immune from attack while so registered. Immunity may be withdrawn for periods of unavoidable military necessity (see **Hague Cultural Property Convention** arts 8 to 11). See also **Hague Cultural Property Convention** art 1(b) and **Cultural Property (Protection in Armed Conflict) Act 2012** s 4(3)(d).

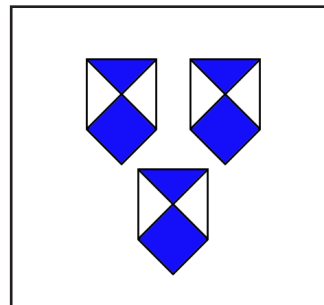
- 14.8.3** **Schools** means facilities dedicated principally to education, regardless of the name of the facility in the local context, including early childhood education facilities, primary schools, colleges and universities (except those for the training or education of members of the armed forces), and the land and grounds attached to such institutions.<sup>121</sup>

## PROTECTIVE EMBLEMS

- 14.8.4** Property protected under the Hague Cultural Property Convention is to be marked with the distinctive emblem<sup>122</sup> of the Convention or, if specially protected,<sup>123</sup> three of these symbols:



**Figure 3** Hague Cultural Property Convention emblem for cultural property



**Figure 4** Hague Cultural Property Convention emblem for cultural property under special protection

- 14.8.5** Failure to display the symbol(s) does not deprive cultural property of its protection if it is known to be such by the attacking force.<sup>124</sup>
- 14.8.6** Members of the NZDF are not to misuse the emblems relating to the protection of cultural property.<sup>125</sup>

## MEMBERS OF THE NEW ZEALAND DEFENCE FORCE MUST BE NOTIFIED OF KNOWN CULTURAL PROPERTY

- 14.8.7** Although some buildings and objects are of obvious cultural significance, it cannot be taken for granted that every member of the NZDF will know the significance of every object encountered during operations. On the commencement of hostilities, COMJFNZ is to compile a list of all known cultural property in the area of operations and is to ensure that it is:
- a. promulgated to members of the force in orders, and
  - b. taken into account in planning operations.
- 14.8.8** COMJFNZ is to seek expert advice on the content of the list from the Director of Defence Legal Services (D DLS) and experts in the field, including the United Nations Educational, Scientific, and Cultural Organisation (UNESCO), and is to incorporate property recognised as having special or enhanced protection. The list is to be expressly non-exhaustive and is to state that other items may be added as their status becomes known. The fact that an item of cultural importance is not on the list does not mean that it is open to attack.

<sup>121</sup> See **Guidelines for Protecting Schools** at 4.

<sup>122</sup> See **Hague Cultural Property Convention** art 16.

<sup>123</sup> See **Hague Cultural Property Convention** arts 10 and 17.

<sup>124</sup> See **Hague Cultural Property Convention** art 4(5).

<sup>125</sup> See **Hague Cultural Property Convention** art 17(3) and **Rome Statute** art 8(2)(b)(vii). For treacherous misuse of LOAC emblems and symbols see Chapter 8.

**CULTURAL PROPERTY MUST BE PROTECTED AND RESPECTED**

**14.8.9** Unjustified destruction of cultural property deprives future generations of the right to enjoy their cultural heritage, damages the reputation of the NZDF and will embitter the enemy and the civilian population, thereby prolonging conflict. Cultural property that is not a military objective, whatever its apparent value, is never to be the target of deliberate attack.<sup>126</sup>

**14.8.10** Members of the NZDF are to respect and protect cultural property and are not to:

- a. attack, damage or destroy cultural property;<sup>127</sup>
- b. use cultural property and its immediate surroundings in support of military action or in a manner likely to expose it to damage or destruction;<sup>128</sup>
- c. make cultural property the object of reprisals;<sup>129</sup>
- d. requisition, steal, vandalise, mark or ‘tag’ cultural property;<sup>130</sup>
- e. booby-trap cultural property;<sup>131</sup> or
- f. attack, seize, take in prize or capture cultural property that is being transported.<sup>132</sup>

**PLACES OF WORSHIP AND BUILDINGS DEDICATED TO CHARITABLE PURPOSES MUST BE RESPECTED AND PROTECTED**

**14.8.11** A place of worship that is not a military objective, whatever its apparent value, is never to be the target of deliberate attack.<sup>133</sup> Even if an object is not recognised as being of great spiritual or cultural value, NZDF commanders are to bear in mind that unjustified damage or destruction of such places, or misuse of them, is likely to embitter the civilian population and damage the reputation of the NZDF. Caution is to be applied in planning and execution of attacks to avoid, and in any case minimise, damage to places of worship.<sup>134</sup> Members of the NZDF

126 See **Geneva Protocol I** art 53(a), **Geneva Protocol II** art 16, **Hague Regulations** art 27, **Hague Convention IX** art 5, **Hague Air Rules** art 25, **ICRC Customary IHL** rule 38 and **Rome Statute** arts 8(2)(b)(ix) and 8(2)(e)(iv).

127 See **Geneva Protocol I** art 53(a), **Geneva Protocol II** art 16, **Hague Regulations** art 27, **Hague Convention IX** art 5, **Hague Draft Air Rules** rule 25, **ICRC Customary IHL** rule 38 and **Rome Statute** arts 8(2)(b)(ix) and 8(2)(e)(iv). In the **Strugar Trial** the ICTY held that the attack on the historic town of Dubrovnik was a war crime.

128 See **Hague Cultural Property Convention** art 4(1), **Geneva Protocol I** art 53(b) and **Geneva Protocol II** art 16.

129 See **Hague Cultural Property Convention** art 4(4) and **Geneva Protocol I** art 53(c).

130 See **Hague Cultural Property Convention** art 4(3), **Cultural Property (Protection in Armed Conflict) Act 2012** s 7(2)(e), **Summary Offences Act 1981** s 11 and **Stolen Cultural Property Convention**. ‘Tagging’ includes graffiti, writing, drawing, painting, spraying, or etching on an object, or otherwise marking it.

131 See **Conventional Weapons Protocol II** art 7(1)(i).

132 See **Hague Cultural Property Convention** art 4(3).

133 **Geneva Protocol I** art 53(a) prohibits directing any acts of hostility against places of worship. **Geneva Protocol I** art 52(3): “In case of doubt whether an object which is usually dedicated to civilian purposes, such as a place of worship [...] is being used to make an effective contribution to military action, it shall be presumed not to be so used.” See also **Hague Cultural Property Convention** art 4(1), **ICRC Customary IHL** rule 38B and **Rome Statute** art 8(2)(e)(iv).

134 **Hague Regulations** art 27: “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to [...] religion [...] provided they are not being used at the same time for military purposes.” See also **Hague Convention IX** art 5, **Hague Draft Air Rules** rule 25 and **ICRC Customary IHL** rule 38A.

are to apply the same rules to buildings, whether or not they are of a religious nature, that are dedicated to charitable purposes.<sup>135</sup>

**14.8.12** Members of the NZDF are to respect and protect places of worship and buildings dedicated to charitable purposes. Members of the NZDF are not to:

- a. attack, damage or destroy places of worship or buildings dedicated to charitable purposes;<sup>136</sup>
- b. use places of worship or their immediate surroundings in support of the military effort or in a manner likely to expose it to damage or destruction;<sup>137</sup>
- c. make places of worship or buildings used for charitable purposes the object of reprisals;<sup>138</sup>
- d. requisition, steal, vandalise, mark or ‘tag’ places of worship;<sup>139</sup>
- e. booby-trap places of worship;<sup>140</sup> or
- f. do anything in, or to, a place of worship which will be of offence to those people who regard it as sacred.

#### SCHOOLS MUST BE PROTECTED AND RESPECTED

**14.8.13** Schools are to be afforded particular protection from the effects of war as their destruction or endangerment is an attack on the learning and development of future generations who bear no responsibility for the armed conflict from which the damage arises.<sup>141</sup> NZDF commanders are to take all practicable steps to protect the right of children to have an education.<sup>142</sup> Use and occupation of schools and other educational institutions obviously inhibits the exercise of this right and is to be avoided wherever possible. Where, for military reasons, it is necessary for the force to use such an institution, for example for accommodating personnel, storage of materiel or as part of a defensive position, all feasible steps must be taken, in consultation with local authorities, to ensure that the disruption to the education of children is reduced as much as practicable. This may include identifying and facilitating the use of other suitable facilities for such purposes.

135 **Hague Regulations** art 27: “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to [...] charitable purposes [...] provided they are not being used at the same time for military purposes.” See also **Hague Convention IX** art 5, **Hague Draft Air Rules** rule 25 and **ICRC Customary IHL** rule 38A.

136 See **Geneva Protocol I** art 53(a), **Geneva Protocol II** art 16, **Hague Regulations** art 27, **Hague Convention IX** art 5, **Hague Draft Air Rules** rule 25, **ICRC Customary IHL** rule 38B and **Rome Statute** arts 8(2)(b)(ix) and 8(2)(e)(iv).

137 See **Hague Cultural Property Convention** art 4(1), **Geneva Protocol I** art 53(b) and **Geneva Protocol II** art 16.

138 See **Hague Cultural Property Convention** art 4(4) and **Geneva Protocol I** arts 52(1) and 53(c).

139 See **Hague Cultural Property Convention** art 4(3), **Cultural Property (Protection in Armed Conflict) Act 2012** s 7(2)(e), **Summary Offences Act 1981** s 11 and **Stolen Cultural Property Convention**. ‘Tagging’ includes graffiti, writing, drawing, painting, spraying, or etching on an object, or otherwise marking it.

140 See **Conventional Weapons Protocol II** art 7(1)(i).

141 See **Guidelines for Protecting Schools**.

142 See **ICESCR** art 13.

**14.8.14** Members of the NZDF are not to:

- a. attack, damage or destroy schools;<sup>143</sup>
- b. make schools the objects of reprisals;<sup>144</sup> or
- c. booby-trap or use other emplaced munitions in or around schools.<sup>145</sup>

**14.8.15** Members of the NZDF are not to use school buildings or facilities for military purposes unless it is absolutely necessary. In such cases, all feasible steps are to be taken to ensure that:

- a. civilians and, in particular, children are protected from the effects of attack upon the institutions by opposing forces, including, where necessary, the removal of such persons from the vicinity;<sup>146</sup>
- b. such use is for the minimum time possible;
- c. use of the facility does not breach the prohibition on treachery, ie the protection applicable to the school is not be used to induce the opposing force into thinking that this protection is being relied upon with the intention of betraying that confidence;<sup>147</sup> and
- d. adverse effects on children, in particular in respect to their right to education, are reduced to the maximum extent possible.<sup>148</sup>

**LOSS OF PROTECTION****14.8.16** If the opposing force uses cultural property, places of worship, buildings dedicated to charitable purposes or schools or their immediate environs for a military purpose, they become a military objective and their protection may be lost.<sup>149</sup> Such property may only be attacked, however, if imperatively demanded by military necessity.<sup>150</sup> The opportunity to inflict casualties on the enemy, by itself, does not provide an imperative. Commanders are to carefully consider the overall effects of an attack, the value of the target, and whether they have an alternative to doing so. Members of the NZDF are not to attack forces using cultural property, places of worship, buildings dedicated to charitable purposes or schools unless:

- a. the opposing force is warned that it must cease its military use of the property and fails to do so within a reasonable time;

143 See **Geneva Protocol I** art 52. Under **Geneva Protocol I** art 52(3) a school is a building which should be presumed not to be a military objective. See also **Rome Statute** arts 8(2)(b)(ix) and 8(2)(e)(iv).

144 See **Geneva Protocol I** art 52(1).

145 See **Conventional Weapons Protocol II** art 7(1)(e).

146 See **Geneva Protocol I** art 58.

147 See Chapter 8.

148 **Geneva Convention IV** art 50: "The Occupying Power shall, with the co-operation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children [...]."

149 See **Geneva Protocol I** art 52(2). For loss of enhanced protection see **Hague Cultural Property Protocol II** art 13(1)(b) and see **Hague Cultural Property Convention** art 11(1) for loss of special protection.

150 See **Hague Cultural Property Convention** arts 4(2) and 11(2).

- b. attack is the only feasible means of terminating that misuse; and
- c. all feasible precautions are taken in the choice of means and methods of attack to avoid, or in any event minimise, damage to the property.<sup>151</sup>

**14.8.17** Except in the case of immediate self-defence, a deliberate attack on cultural property, places of worship, buildings dedicated to charitable purposes or schools that have lost their protection is only to be ordered on the authority of CDF. The advice of an NZDF LEGAD is to be obtained before the attack unless this is not practicable. In cases of immediate self-defence, the attack must be approved by the highest ranked NZDF commander in the area of operations.

**14.8.18** Loss of protection does not mean that the whole of the object is open to attack or destruction if only a small part of it is being used by the enemy. It is the opposing force, and that part of the property which has become a military objective, which is open to attack – not the protected property per se.

**14.8.19** In some circumstances, military use of cultural property will be unavoidable. For example, many bridges still in use today are centuries old. A force may have no choice other than to use and, if necessary, defend them. Because use of cultural property invites its destruction by the enemy, such use is to be kept to the absolute minimum and all feasible measures are to be taken to avoid damage to the property.

151

See **Geneva Protocol I** arts 57(2)(a)(ii) and (iii). If the damage to the property would be excessive in relation to the direct military advantage anticipated from the attack considered as a whole, the attack is to be cancelled. For precautions to be taken in attack see Chapter 8.



## SECTION 9 – INSTALLATIONS CONTAINING DANGEROUS FORCES

### DAMS, DYKES AND NUCLEAR POWER STATIONS MUST NOT BE ATTACKED

- 14.9.1** Works or installations containing dangerous forces, such as dams, dykes or nuclear power stations, are not to be attacked if this would release dangerous forces that would cause consequent severe losses among the civilian population.<sup>152</sup>
- 14.9.2** This special protection does not apply to all works and installations containing dangerous forces, such as chemical weapons sites, ammunition warehouses and fuel storage areas. Although such works and installations are not protected under this rule, attacks on them are nevertheless governed by principles of proportionality and applicable precautions in attack.<sup>153</sup>
- 14.9.3** Members of the NZDF are not to:
- a. attack dams, dykes or nuclear power stations, even if they are military objectives, if the attack may result in the release of dangerous forces and consequent severe losses amongst the civilian population;<sup>154</sup>
  - b. attack other military objectives located at or in the vicinity of such works or installations if the attack may result in the release of dangerous forces and consequent severe losses amongst the civilian population; or
  - c. make such works or installations, or objectives in the vicinity thereof, the subject of reprisals.<sup>155</sup>

### LOSS OF SPECIAL PROTECTION

- 14.9.4** Protection against attack ceases if:
- a. for a dam or dyke, only if it is used for other than its normal function and in regular, significant and direct support of military operations;<sup>156</sup>
  - b. for a nuclear power station, only if it provides electricity in regular, significant and direct support of military operations;<sup>157</sup> and
  - c. for other military objective in the vicinity of such works and installations, only if they are used in regular, significant and direct support of military operations.<sup>158</sup>

152 See **Geneva Protocol I** art 56(1).

153 See **Geneva Protocol I** art 57. For proportionality see Chapter 4.

154 See **Geneva Protocol I** art 56(1) and **Geneva Protocol II** art 15 for NIAC. See **Rome Statute** art 8(2)(b)(iv) and **Geneva Protocol I** art 85(3)(c) for grave breach.

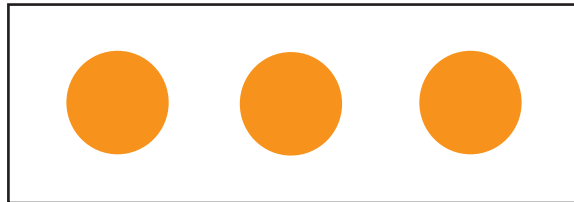
155 See **Geneva Protocol I** art 56(4). There is no equivalent provision relating to NIAC, however, the principles of proportionality would govern such attacks.

156 See **Geneva Protocol I** art 56(2)(a). This means that a dam or dyke cannot be attacked merely because it is holding back the sea or other waters, the release of which may harm or hinder opposing forces.

157 See **Geneva Protocol I** art 56(2)(b).

158 See **Geneva Protocol I** art 56(2)(c).

- 14.9.5** Even if works or installations containing dangerous forces lose their protection from attack, they may actually be attacked only if such attack is the only feasible way to terminate the regular, significant and direct support to the military operations of an opposing force.<sup>159</sup>
- 14.9.6** If it becomes necessary to attack such a target, all practical precautions are to be taken to avoid the release of the dangerous forces. In such cases, all precautionary measures that are practicable to avoid the release of the dangerous forces or to protect civilian persons or objects are to be used.<sup>160</sup> Such an attack is only to be conducted when authorised by CDF. Advice of an NZDF LEGAD is to be obtained before any such attack is executed.
- 14.9.7** **Protective symbol.** The symbol for dams, dykes and nuclear power stations containing dangerous forces is three bright orange disks on the same axis:<sup>161</sup>



**Figure 5** Symbol for installations containing dangerous forces

- 14.9.8** Failure to display the symbol in no way relieves any Party to the conflict of its obligations with respect to works or installations containing dangerous forces.<sup>162</sup>

159 See **Geneva Protocol I** art 56(2).  
 160 See **Geneva Protocol I** arts 56(3) and 57.  
 161 See **Geneva Protocol I** Annex I art 16.  
 162 See **Geneva Protocol I** art 56(7).

## SECTION 10 – PLACES ESTABLISHED FOR HUMANITARIAN PURPOSES

## NON-DEFENDED LOCALITIES MUST BE RESPECTED AND PROTECTED

**14.10.1** A **non-defended locality** (also known as an ‘undefended locality’ or ‘open city’) is an inhabited place in the area of operations declared or agreed to be open for occupation by the opposing force.<sup>163</sup> To qualify as a non-defended locality:<sup>164</sup>

- a. all combatants, mobile weapons and military equipment must have been evacuated;<sup>165</sup>
- b. no hostile use may be made of fixed military installations or establishments;
- c. no acts of hostility may be committed by the authorities or the population; and
- d. no activities in support of military operations may be undertaken.<sup>166</sup>

**14.10.2** Declaring non-defended localities is intended to save the occupants from unnecessary suffering when it is not intended that the place should be defended. The area is to be marked, to the greatest extent possible, with clearly visible signs declaring it to be non-defended. If such a declaration or agreement is made, COMJFNZ is to ensure that any affected New Zealand force is advised of that fact in orders.

**14.10.3** Members of the NZDF are not to attack non-defended localities.<sup>167</sup>

**14.10.4** An NZDF commander who intends to declare a non-defended locality is to obtain authority to do so from CDF, through COMJFNZ. The advice of an NZDF LEGAD is to be obtained before the declaration is issued. Once the declaration is made, members of the NZDF are to strictly comply with the terms of the declaration.

**14.10.5 Loss of special protection.** A non-defended locality loses its special protection for so long as it is used for any military activity harmful to the opposing force. However, breach of the conditions of the declaration does not, by itself, deprive the locality of other LOAC protections or convert civilian objects into military

163 **Geneva Protocol I** art 59(2): “The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party [...]” Art 59(4): “The declaration [...] shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt [...]” Art 59(5): “The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in [art 59(2) ...].”

164 See **Geneva Protocol I** arts 59(2)(a)–(d).

165 It is not required that medical or religious personnel, personnel exclusively engaged in civil defence tasks, or police personnel be removed (see **Geneva Protocol I** art 59(3)).

166 Isolated acts of violence by individual members of the civilian population would not be enough to deprive the locality of its protection or turn it into a military objective. The occupying force can, nevertheless, respond to such attacks in self-defence.

167 **Hague Regulations** art 25: “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.” **Hague Convention IX** art 1: “The bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings is forbidden [...]” Art 3 provides that a bombardment may be commenced after due notice has been given if the local authorities decline to comply with requisitions for provisions. However, this no longer reflects LOAC. See also **Geneva Protocol I** art 59(1), **Hague Draft Air Rules** rule 24(3) and **Rome Statute** art 8(2)(b)(v).

objectives.<sup>168</sup> An attack on a non-defended locality that has lost its protection is only to be conducted when authorised by CDF. Advice of an NZDF LEGAD is to be obtained before any such attack is executed.

## DEMILITARISED ZONES MUST BE RESPECTED AND PROTECTED

**14.10.6** A **demilitarised zone** is an area in which the parties to the conflict have agreed not to conduct military operations.<sup>169</sup> It is normally an area which fulfils the following criteria:<sup>170</sup>

- a. All combatants, mobile weapons and military equipment must have been evacuated.<sup>171</sup>
- b. No hostile use is made of fixed military installations or establishments.
- c. No acts of hostility are committed by the authorities or the population.<sup>172</sup>
- d. All activity linked to the military effort has ceased.<sup>173</sup>

**14.10.7** Agreement to establish a demilitarised zone is intended to save the occupants from unnecessary suffering when it is not intended that the place should be fought over. The area is to be marked, to the greatest extent possible, with clearly visible signs declaring it to be a demilitarised zone.

**14.10.8** The power to agree to the establishment of a demilitarised zone is reserved to CDF. If such an agreement is made, COMJFNZ is to ensure that any affected New Zealand force is advised of that fact in orders. Members of the NZDF are to strictly comply with the terms of such an agreement.

**14.10.9** Members of the NZDF are not to:

- a. make military use of any demilitarised zone,<sup>174</sup> or
- b. attack a demilitarised zone.<sup>175</sup>

**14.10.10 Loss of special protection.** A demilitarised zone loses its special protection for so long as it is used for any military purpose harmful to the opposing force. However, breach of the conditions of the declaration does not, by itself, deprive the locality of other LOAC protections or convert civilian objects into military

168 **Geneva Protocol I** art 59(4): “[...] Even if the conditions laid down in [art 59(2)] are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.”

169 See **Geneva Protocol I** art 60(1) and Chapter 15. **Geneva Protocol I** art 60(5) requires that a demilitarised zone be clearly marked by the Party in control of the zone.

170 See **Geneva Protocol I** art 60(3).

171 It is not required that medical or religious personnel, personnel exclusively engaged in civil defence tasks, or police personnel be removed (see **Geneva Protocol I** art 60(4)).

172 Isolated acts of violence by individual members of the civilian population would not be enough to deprive the locality of its protection or turn it into a military objective. Nevertheless, the occupying force can respond to such attacks in self-defence.

173 The parties are to agree on the interpretation of this condition (see **Geneva Protocol I** art 60(3)).

174 **Geneva Protocol I** art 60(1): “It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.”

175 An attack on a demilitarised zone is a grave breach under **Geneva Protocol I** art 85. See also **Geneva Protocol I** art 60(1).

objectives.<sup>176</sup> An attack on a demilitarised zone which has lost its protection is only to be conducted when authorised by CDF. Advice of an NZDF LEGAD is to be obtained before any such attack is executed.

## HOSPITAL AND SAFETY ZONES MUST BE RESPECTED AND PROTECTED

**14.10.11** A **hospital** or **safety zone** is an area established in a party's territory or occupied territory to protect wounded, sick and elderly persons, children, expectant mothers and mothers with infants from the effects of war.<sup>177</sup>

**14.10.12** **Protective symbol.** The symbol for hospital and safety zones is oblique red bands on a white background. Hospitals and places treating the wounded and sick may also be marked with the Red Cross, Red Crescent or Red Crystal.<sup>178</sup>



Figure 6 Emblem for hospitals and safety zones

**14.10.13** Failure to display the symbol does not deprive the hospital or safety zone of protection if it is known to be such by the attacking force. Provided that persons within the zone do not take a direct part in the conflict and that the zone does not become a military objective, such zones will always be civilian objects and may not be attacked regardless of whatever other protections are agreed.

**14.10.14** Under no circumstances are members of the NZDF to attack a hospital or safety zone.<sup>179</sup>

**14.10.15** **Loss of special protection.** A hospital or safety zone loses its special protection for so long as it is used for any military purpose harmful to the opposing force. Where practicable, a warning is to be given and the force using the zone given an opportunity to desist their activity before an attack is launched. An attack on a hospital or safety zone that has lost its protection is only to be conducted if

176 **Geneva Protocol I** art 60(7): "If one of the Parties to the conflict commits a material breach of the provisions of [arts 60(3) or (6)], the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict."

177 **Geneva Convention IV** art 14(1): "In times of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven. Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created [...]." See also Annex I to **Geneva Convention IV**. For conditions hospital and safety zones must fulfil see **Geneva Convention IV** Annex I art 4.

178 **Geneva Convention IV** Annex I art 6: "Hospital and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts. Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun) emblem on a white ground. They may be similarly marked at night by means of appropriate illumination."

179 See **Geneva Convention IV** Annex I art 11.

authorised by CDF. Advice of an NZDF LEGAD is to be obtained before any such attack is executed.

### NEUTRALISED ZONES

**14.10.16** A **neutralised zone** is a zone established in a combat zone intended to shelter from the effects of war, without distinction:

- a. wounded and sick combatants or non-combatants; and
- b. civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.<sup>180</sup>

**14.10.17** The protection afforded to a neutralised zone will be set out in the agreement by which it is established. Provided that persons within the zone do not take a direct part in hostilities and provided that the zone does not become a military objective, such zones are civilian objects and may not be attacked, regardless of whatever other protections are agreed.

**14.10.18** Members of the NZDF are not to attack neutralised zones.

**14.10.19 Loss of special protection.** A neutralised zone loses its special protection for so long as it is used for any military purpose harmful to the opposing force. An attack on a neutralised zone which has lost its protection is only to be conducted when authorised by CDF. Advice of an NZDF LEGAD is to be obtained before any such attack is executed.

180 **Geneva Convention IV** art 15: “(1) Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction: a) wounded and sick combatants or non-combatants; b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character. (2) When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.”

## SECTION 11 – PROTECTION OF THE ENVIRONMENT

## ATTACKS ON THE NATURAL ENVIRONMENT ARE PROHIBITED

**14.11.1 Natural environment** includes all forests and vegetation, waters, lakes and seas, the soil and subsoil, and the air.

**14.11.2** Members of the NZDF are not to:

- a. use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe<sup>181</sup> damage to the environment;<sup>182</sup>
- b. attack any part of the natural environment that is not a military objective<sup>183</sup> or demanded by military necessity;<sup>184</sup>
- c. carry out any attack against a military objective which may be expected to cause incidental damage to the environment that would be excessive in relation to the concrete and direct military advantage anticipated;<sup>185</sup>
- d. attack the natural environment by way of reprisal;<sup>186</sup> or
- e. use any environmental modification technique having widespread, long-lasting or severe effects.<sup>187</sup>

**14.11.3** NZDF commanders are, wherever feasible, to avoid conducting combat

181 These terms are defined in the Annex to the **Environmental Modification Convention** as follows: 'widespread' means encompassing an area on the scale of several hundred square kilometres; 'long-lasting' means lasting for a period of months, or approximately a season; 'severe' means involving serious or significant disruption or harm to human life, natural and economic resources or other assets. The Annex adds: "This interpretation is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement."

182 **Geneva Protocol I** art 55(1): Care must be taken to protect the natural environment against widespread, long-term and severe damage. Methods or means of warfare that cause such damage and thereby prejudice the health or survival of the population are prohibited. **Conventional Weapons Protocol III** art (2)(4). **Rome Statute** art 8.2(b)(iv). There is no equivalent provision in respect of NIAC, however, members of the NZDF are to apply this order in all armed conflicts. **Nuclear Weapons Opinion** at [31]: There is a general obligation to protect the natural environment and prevent widespread, long-term and severe environmental damage, a prohibition of methods and means of warfare which are intended or may be expected, to cause such damage and a prohibition of attacks against the natural environment by way of reprisals. **San Remo Manual** rule 44: Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited. See also **ICRC Customary IHL** rule 43A. For weapons likely to cause widespread, long term and serious damage to the natural environment see Chapter 7. For environmental warfare see Chapter 8.

183 See **ICRC Customary IHL** rule 43A.

184 See **ICRC Customary IHL** rule 43B.

185 See **ICRC Customary IHL** rule 43C.

186 See **Geneva Protocol I** art 55(2) and **Nuclear Weapons Opinion**.

187 **Environmental Modification Convention** art 1(1). See art 2 for a definition of 'environmental modification techniques'. A New Zealand force is unlikely to have the capabilities to achieve such effects. The principles are to be applied in respect of environmental threats of a smaller scale or magnitude.



operations in areas containing:

- a. rare or fragile ecosystems; or
- b. the habitat of depleted, threatened or endangered species or other forms of marine life or wildlife.<sup>188</sup>

#### COMBAT OPERATIONS IN ANTARCTICA ARE PROHIBITED

**14.11.4** **Antarctica** is all that area south of 60 degrees south latitude.<sup>189</sup>

**14.11.5** Members of the NZDF are not to carry out any act in Antarctica inconsistent with its reservation for peaceful purposes.<sup>190</sup> In particular, in Antarctica members of the NZDF are not to:

- a. establish military bases and fortifications,
- b. test any type of weapons, or
- c. conduct military manoeuvres.<sup>191</sup>

#### OPERATIONS IN OUTER SPACE ARE RESTRICTED

**14.11.6** **Outer space** means that space beyond the upper atmosphere, generally estimated to commence at about 110 kilometres above sea level, which is the lower level of space in which artificial satellites have the ability to orbit.<sup>192</sup>

**14.11.7** Members of the NZDF are not to do any of the following or assist any person or authority to:

- a. place nuclear weapons, or weapons of mass destruction in orbit around the earth, on the moon, or in orbit around the moon, or anywhere else in outer space;<sup>193</sup>
- b. use the moon or other bodies in outer space for non-peaceful purposes;<sup>194</sup> or
- c. establish military bases, installations and fortifications, test weapons, or conduct military manoeuvres on the moon or other bodies in outer space.<sup>195</sup>

188 See **San Remo Manual** rule 11. Although there is no treaty-based obligation to avoid such damage in NIAC, members of the NZDF are to protect the natural environment regardless of the type of conflict.

189 **Antarctic Treaty** art 6: "The provisions of the present treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area." For high seas see Chapter 10.

190 See **Antarctic Treaty** art 1.

191 See **Antarctic Treaty** art 1(1).

192 There is no treaty definition of 'outer space'. This, however, is a commonly agreed definition (see **Starke's International Law** at 165).

193 See **Limited Test Ban Treaty** art 1(1)(a), **Outer Space Treaty** art 4, **Moon Treaty** arts 3(3) and (4) and **NZNFZDAC Act 1987** ss 5(1)(a) and 14. For nuclear weapons and WDM see Chapter 7.

194 See **Outer Space Treaty** art 4 and **Moon Treaty** arts 3(1) and (2).

195 See **Outer Space Treaty** art 4 and **Moon Treaty** art 3(4).

- 14.11.8** It is not prohibited to use space-based satellites or space-based communications, navigational or meteorological systems in support of operations, except to the extent prohibited by the treaty specific to the system in question.

# RELATIONS BETWEEN OPPOSING PARTIES TO THE CONFLICT

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## SECTION 1 – INTRODUCTION

- 15.1.1** This chapter deals with the rules governing the relations between opposing forces in a conflict. Even in modern armed conflict it is necessary for opposing forces to communicate with each other for reasons including humanitarian purposes, to make agreements at a local or general level and, at the end of hostilities, to make arrangements for the fighting between them to cease.
- 15.1.2** Negotiations in the modern operational environment no longer rely on meetings in person as was once the case, since radio and electronic communication with the enemy is easily achievable. However, experience has shown that commanders may be unwilling to engage in discussions without some element of face-to-face negotiation. In this respect, little has changed since the rules were codified in 1907. Such negotiations may be carried out using representatives who are referred to as ‘parlementaires’.
- 15.1.3** In addition to the communications that occur directly between the parties to the conflict, it is to be expected that other intermediaries will be present in the course of modern armed conflict. This may include special representatives of the United Nations (UN) Secretary-General, high officials of other States (known as ‘good offices’) or representatives of regional organisations that have an interest in bringing the conflict to an end or lessening its effects. They are entitled to protection under the Law of Armed Conflict (LOAC) and by virtue of special agreements drawn up with parties to the conflict.
- 15.1.4** It is essential that communications are conducted in accordance with LOAC and in good faith so as not to jeopardise the carrying out of necessary humanitarian functions and to avoid needlessly prolonging hostilities.
- 15.1.5** **New Zealand Defence Force (NZDF) Code of Conduct** rule relating to this chapter:

*Do not fight treacherously by falsely using the protections of the Law of Armed Conflict to harm the opposing force.*

## SECTION 2 – COMMUNICATIONS BETWEEN OPPOSING PARTIES

### COMMUNICATIONS BY GOVERNMENTS

**15.2.1** Armed conflict between two or more States usually means that normal communications and diplomatic relations between them have ceased. In non-international armed conflict (NIAC) a government will often refuse, on political grounds, to communicate with the leaders of armed groups in rebellion against them. It is important, however, that wherever possible some means of communications be kept open for humanitarian purposes and to facilitate a return to peace. Such communications may be carried on directly by means of telephone or electronic media or through intermediaries such as:

- a. the UN,
- b. the International Committee of the Red Cross (ICRC),<sup>1</sup>
- c. a Protecting Power,<sup>2</sup> or
- d. a neutral State.<sup>3</sup>

### COMMUNICATIONS BY FORCES MUST BE APPROPRIATELY AUTHORISED

**15.2.2** It may be necessary for NZDF commanders to communicate with commanders of the opposing forces in order to:

- a. allow humanitarian relief supplies for the civilian population to pass between the opposing forces and for the passage of ministers of religion, medical personnel and medical equipment on their way to such areas;<sup>4</sup>
- b. evacuate civilians and persons who are *hors de combat* from wounds or sickness, aged persons, children and maternity cases from the area of operations;<sup>5</sup>
- c. search for, identify and bury the dead, or search for missing persons;<sup>6</sup>
- d. identify demilitarised zones,<sup>7</sup> neutralised zones,<sup>8</sup> safety or hospital zones,<sup>9</sup> or non-defended localities;<sup>10</sup>
- e. identify the location of cultural property or places of worship, hospitals, places of detention and places where the sick and wounded are collected;<sup>11</sup> and

1 For ICRC see Chapter 16.

2 For Protecting Power see Chapter 16.

3 For neutral States see Chapter 16.

4 See **Geneva Convention IV** art 17 and **ICRC Customary IHL** rule 55.

5 See **Geneva Convention IV** art 17. For evacuation of civilians see **Geneva Protocol I** art 58(a). For evacuation of wounded and sick see **Geneva Convention I** art 15 (note that under art 8(a) wounded and sick includes maternity cases and the infirm). For evacuation of children see **Geneva Protocol I** art 78. For evacuation of internees see **Geneva Protocol II** art 5(2).

6 See **Geneva Convention I** art 15, **Geneva Protocol I** art 33(4) and Chapter 11.

7 See **Geneva Protocol I** art 60 and Chapter 14.

8 See **Geneva Convention IV** art 15 and Chapter 14.

9 See **Geneva Convention IV** art 14 and Chapter 14.

10 See **Geneva Protocol I** art 59 and Chapter 14.

11 See **Hague Regulations** art 27 and Chapter 14.

- f. warn the enemy to stop misusing protected objects, eg hospitals, installations containing dangerous forces or cultural property, for military purpose in breach of LOAC.<sup>12</sup>

**15.2.3** The commander of a New Zealand force may conduct communications for these purposes, or any other purpose, only with the approval of the Chief of Defence Force (CDF). The advice of an NZDF Legal Adviser (LEGAD) is to be obtained before opening communications unless this is not practicable.

**15.2.4** Members of the NZDF are not to communicate with members of the opposing force on their own initiative. To do so without authority may constitute a serious offence against the Armed Forces Discipline Act 1971 (AFDA).<sup>13</sup>

### COMMUNICATIONS MUST BE CONDUCTED IN GOOD FAITH

**15.2.5** Members of the NZDF are to conduct all communications with the opposing force that are regulated by LOAC in good faith.<sup>14</sup> In particular, they are not to enter into any agreement with the intention of launching a surprise attack on the opposing force while it is relying on that agreement.<sup>15</sup>

### INITIATING COMMUNICATIONS

**15.2.6** A force that wishes to communicate with the opposing force must make its intention clear and unambiguous. Methods of initiating such communications include:

- a. displaying the white flag of truce,<sup>16</sup>
- b. using radio or electronic messages or messages dropped from aircraft, and
- c. using an intermediary such as the delegates of the ICRC or representatives of the UN.<sup>17</sup>

### NEW ZEALAND DEFENCE FORCE PARLEMENTAIRES MUST ACT IN GOOD FAITH

**15.2.7** A **parlementaire** is a person authorised by a party to a conflict to enter into communications with an opposing force.<sup>18</sup>

**15.2.8** Members of the NZDF acting as parlementaires are to:

- a. advance under a flag of truce or otherwise make their status as a parlementaire clear to the opposing force;<sup>19</sup>

12 See **Geneva Protocol I** art 13(1), **Hague Cultural Property Convention** art 11(1) and **Hague Cultural Property Protocol II** arts 6(d) and 13(2)(c)(ii).

13 Under **AFDA** s 24 communicating with the enemy either with intent to assist the enemy or merely without authorisation is an offence punishable by life imprisonment.

14 See **ICRC Customary IHL** rule 66.

15 See **Hague Regulations** art 34, **ICRC Customary IHL** rule 64 and **Rome Statute** arts 8(2)(b)(xi) and 8(2)(e)(ix). For treachery see Chapter 8.

16 See **Hague Regulations** art 32.

17 See Chapter 16.

18 See **Hague Regulations** art 32.

19 See **Hague Regulations** art 32.

- b. comply with all instructions given by the opposing force, in particular the route to be taken, the size of the party and directions as to the rate of advance; and
- c. refrain from any action harmful to the opposing force or otherwise inconsistent with his or her status.<sup>20</sup>

**15.2.9** Members of the NZDF are not to conduct any act of treachery by feigning the protected status of a parlementaire or by abusing the status of a flag of truce in order to conduct an act harmful to the opposing forces while relying on that status.<sup>21</sup>

### NEW ZEALAND FORCES RECEIVING PARLEMENTAIRES

**15.2.10** Members of the NZDF receiving parlementaires are to ensure that caution is exercised throughout the process. It is for the force initiating communications to make their intentions clear. It is they who must break cover and advance towards the New Zealand force, not vice versa.

**15.2.11** A New Zealand force to which the communication is directed is not under an obligation to receive such an approach and may turn back a parlementaire if:

- a. circumstances do not permit such communications (eg the force is under attack at the time); or
- b. there are good grounds for expecting treachery.<sup>22</sup>

**15.2.12** The rule that a parlementaire may be turned back does not mean that the force can deny the opposing force the chance to surrender (ie deny quarter) or refuse it the opportunity to carry out other humanitarian functions provided for under LOAC. It is not permissible to declare that the force will not receive parlementaires in any circumstances. A refusal to accept the approach of a parlementaire is only justifiable while the circumstances that make the refusal necessary continue to exist.

**15.2.13** A New Zealand force to which the communication is directed:

- a. is not required to cease general combat operations while the parlementaire approaches, because although the parlementaire and his or her party are immune from attack, the rest of the opposing force is not;
- b. may continue to build-up defences, bring up supplies, conduct reconnaissance, carry out troop movements and conduct all military preparations and operations, as may the opposing force;
- c. is to take all necessary and lawful steps to prevent the parlementaire from taking advantage of his or her mission to obtain information or attack the force;<sup>23</sup>

20 See **Hague Regulations** art 34.

21 See **Hague Regulations** arts 23(f) and 34, **Geneva Protocol I** art 37(1)(a), **ICRC Customary IHL** rules 58 and 64 and **Rome Statute** arts 8(2)(b)(vii), 8(2)(b)(xi) and 8(2)(e)(ix). For treachery see Chapter 8.

22 See **Hague Regulations** art 33. For treachery see Chapter 8.

23 See **Hague Regulations** art 33 and **ICRC Customary IHL** rule 68.



- d. is not required to agree to a demand to speak directly to the commander of the New Zealand force and is not to do so if there is a possibility of a treacherous attack; and
- e. is to decline unnecessary repetitions of visits when the communications are demonstrably not in good faith but are clearly an attempt to buy time for tactical reasons.

### CONDITIONS MAY BE IMPOSED FOR APPROACH OF PARLEMENTAIRES

**15.2.14** The commander of the New Zealand force can require that the parlementaire advance on foot or by vehicle, approach slowly and make his or her intentions clear. Conditions can include the use of temporary security measures such as blindfolds. The commander may specify that a parlementaire must be able to communicate in English or may delay acceptance of a parlementaire until an interpreter can be obtained.

**15.2.15** NZDF commanders are to take all reasonable steps to be sure that the parlementaire has authority to make representations on behalf of the force that he or she claims to represent. The commander can demand that written authority or credentials from the opposing commander be presented. A mistake in this regard can have serious consequences, particularly if the commander of the opposing force considers that he or she is not bound by undertakings made by the parlementaire in excess of that parlementaire's actual authority. If it appears likely that negotiations will be prolonged, the parties may establish a neutralised zone in order to carry out negotiations.<sup>24</sup>

### PARLEMENTAIRES MUST NOT BE ATTACKED

**15.2.16** Members of the NZDF are not to:

- a. attack a person advancing under a flag of truce or who has otherwise made clear his or her status as a parlementaire;<sup>25</sup> or
- b. attack any person accompanying a parlementaire, such as a flag carrier, interpreter or a radio operator.<sup>26</sup>

### LOSS OF PROTECTION

**15.2.17** If it is determined on good grounds that a supposed parlementaire is intending to take advantage of their mission in a way that is contrary to LOAC and detrimental to the New Zealand force, for example to conduct a treacherous attack or to obtain information, then members of the NZDF may attack that person as soon as the false purpose is known.<sup>27</sup> NZDF commanders are not to allow the force to incur needless casualties where treacherous intent on the part of the opposing force is clear. It is not necessary to allow that person to reach New Zealand positions. Wherever possible, members of the NZDF are, however, to turn back false parlementaires rather than attacking them. This may avoid accusations of breaching LOAC that may be hard to disprove.

<sup>24</sup> See Chapter 14.

<sup>25</sup> Under **ICRC Customary IHL** rule 67 parlementaires are inviolable. See also **Hague Regulations** art 32.

<sup>26</sup> Under **Hague Regulations** art 32 the right of inviolability also applies to trumpeters, buglers and drummers, the flag-bearer and interpreters. Reference to trumpeters, buglers and drummers is now obsolete, but the principle remains that members of the party accompanying the parlementaire are also inviolable.

<sup>27</sup> See **ICRC Customary IHL** rule 69.

- 15.2.18** A parlementaire whose false purpose is discovered after having been received by a New Zealand force is to be captured and detained. A false parlementaire must be treated humanely and remains entitled to all LOAC protections applicable to his or her status.<sup>28</sup> He or she may be tried for treacherous conduct, but is entitled to a fair and regular trial and must not be summarily executed or ill-treated.

## SECTION 3 – ARMISTICES, TRUCES AND CEASEFIRES

## ARMISTICES MUST BE RESPECTED

- 15.3.1** An **armistice** is a suspension of military operations by agreement between parties to a conflict.<sup>29</sup> A **local armistice** affects only those parts of the opposing parties within a fixed area and can be agreed by military commanders.<sup>30</sup> A **general armistice** suspends the military operations of the parties to the conflict everywhere.<sup>31</sup> It is authorised by the highest levels of political control only and often precedes a general negotiation for peace.<sup>32</sup>
- 15.3.2** NZDF commanders are to agree to an armistice only when authorised to do so by CDF.
- 15.3.3** An armistice may be for a set time or for an indefinite period. If indefinite, parties to the conflict may resume operations at any time provided that the opposing force is informed that the armistice is at an end.<sup>33</sup> Although there are no prescribed formalities for an armistice, its terms should be reduced to writing in order to avoid misunderstandings. It takes effect from the time it is declared, but individuals are not bound by its terms until they are made aware of it.<sup>34</sup>
- 15.3.4** Members of the NZDF subject to an armistice are to comply with its terms. NZDF commanders are to ensure that the force remains vigilant as armistices can fail. This may result in a rapid return to combat.
- 15.3.5** Serious breach of its terms by the opposing force gives the NZDF the right to renounce the armistice and, where necessary, recommence hostilities immediately.<sup>35</sup> A breach that has arisen from the isolated actions of individuals, rather than a planned course of action by the force itself, does not give grounds for renunciation. However, the aggrieved party can demand that the individuals be punished and that compensation be paid.<sup>36</sup>
- 15.3.6** An armistice does not bring a state of armed conflict to an end or bring about a state of peace. LOAC continues to apply to the parties. In particular, parties to an armistice who remain in occupation of territory are subject to LOAC applicable to occupation.<sup>37</sup>

29 **Hague Regulations** art 36: "An armistice suspends military operations by mutual agreement between the belligerent parties [...]."

30 A local armistice suspends military operations "only between certain fractions of the belligerent armies and within a fixed radius" (see **Hague Regulations** art 37). A local armistice may be agreed for short-term purposes such as burying the dead. ANZAC forces entered into such an armistice with Turkish forces at Gallipoli in 1915.

31 A general armistice "suspends the military operations of the belligerent States everywhere" (see **Hague Regulations** art 37).

32 New Zealand was a party to the general armistice that concluded war on the Western Front in 1918 and which eventually resulted in a treaty of peace in 1919. By contrast, New Zealand was also a party to the general armistice concluded in Korea in 1953. However, there has been no peace treaty between North Korea and the UN, meaning that a legal state of war subsists, although hostilities have almost completely subsided.

33 **Hague Regulations** art 36: "If [the armistice's] duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice."

34 See **Hague Regulations** art 38.

35 **Hague Regulations** art 40: "Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately."

36 **Hague Regulations** art 41: "A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained."

37 For occupation see Chapter 9.

**TRUCES MUST BE COMPLIED WITH**

**15.3.7** A **truce** is a cessation in hostilities, usually with the express intent that communications be commenced.

**15.3.8** Members of the NZDF subject to a truce are to comply with its terms.

**CEASEFIRES MUST BE COMPLIED WITH**

**15.3.9** A **ceasefire** is a preliminary step towards a truce or armistice. It requires only that opposing forces stop launching attacks at each other. If an armistice is agreed, a permanent ceasefire may be instituted in order to bring about a cessation of hostilities. A ceasefire may be used for humanitarian purposes, such as to enable the search for and recovery of the dead and wounded,<sup>38</sup> or the exchange of prisoners or detainees.<sup>39</sup>

**15.3.10** Members of the NZDF are to comply with the terms of any ceasefire that applies to them. Breach of the terms of a ceasefire is prohibited.

**PASSPORTS AND SAFE CONDUCTS MUST BE RESPECTED**

**15.3.11** A **passport** is a document issued by a commander permitting unmolested movement by persons within the territory occupied by the force.<sup>40</sup> A **safe conduct** is a type of passport permitting persons to pass safely through an area occupied by a force in order to get to a particular place that could otherwise not be reached, particularly passage through areas in which active combat is taking place.<sup>41</sup>

**15.3.12** Passports and safe conducts apply to the individuals to whom they are issued and also to specified goods or other property.

**15.3.13** A member of the NZDF to whom a passport or safe conduct has been issued:

- a. is to comply with its conditions, and
- b. is not to engage in any act to the detriment of the issuing force or do any act incompatible with the purpose for which the document was issued.

**15.3.14** Members of the NZDF are not to attack any person whom they know to have been issued with a passport or safe conduct by the NZDF or a coalition partner.

**15.3.15** **Loss of protection.** Persons enjoying the protection of a passport or safe conduct lose their special protection under LOAC if, and for so long as, they abuse its terms or take a direct part in hostilities.

38 **Geneva Convention I** art 15 and **Geneva Convention II** art 18 provide that local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area. **Geneva Convention IV** art 17 also allows for local arrangements to allow the passage of medical and religious personnel and equipment.

39 See **Geneva Convention III** art 109.

40 The term is not to be confused with the document of the same name by which international travellers prove their identity and nationality in peacetime.

41 'Safe conduct' is part of customary international law and relies on agreement between the parties to have effect. See for example, **San Remo Manual** rules 47(c), 53(b), 110(e), 136(c) and 142(b).

**SPECIAL AGREEMENTS MUST BE RESPECTED**

**15.3.16** Agreements between opposing forces may necessitate a number of humanitarian and other purposes under LOAC, including:

- a. appointment of substitute Protecting Powers;<sup>42</sup>
- b. repatriation of wounded and sick prisoners of war (PWs);<sup>43</sup>
- c. arranging for the transfer or exchange of PWs and other persons deprived of liberty;<sup>44</sup>
- d. location and marking of hospital zones,<sup>45</sup> demilitarised zones,<sup>46</sup> etc;
- e. permitting activities between them that would normally not occur during armed conflict, eg postal correspondence or trade in certain commodities (known as a 'cartel'); and
- f. regulating the treatment of members of the armed forces ordered to remain behind to protect enemy or neutral persons or property when the main body of the force departs (known as a 'safeguard').<sup>47</sup>

**15.3.17** Members of the NZDF are to comply with the terms of any special agreement which imposes obligations or applies protections in respect of them.

42 **Geneva Protocol I** art 2(c): ““Protecting Power” means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Geneva Conventions and this Protocol.”

43 **Geneva Convention III** art 109 requires Parties to the conflict to send back to their own country, regardless of number or rank, seriously wounded and seriously sick PWs, after having cared for them until they are fit to travel.

44 See **Geneva Convention III** art 109.

45 See **Geneva Convention I** art 23(2) and Annex I arts 6 and 7.

46 See **Geneva Protocol I** art 60(2).

47 This custom is now rare. Agreements can specify that safeguards be allowed to return to their home territory or rejoin their own forces unhindered once their function is completed.

## SECTION 4 – SURRENDER

## SURRENDER MUST BE IN GOOD FAITH

- 15.4.1** **Surrender** means that a party to the conflict or its armed forces (in whole or in part) have indicated that they will cease combat operations and submit to the will of the enemy. **Conditional surrender** means that a party surrenders on certain terms or in exchange for undertakings from the victor. For example, forces may be allowed to retreat from the area of operations in good order either with or without their arms or warships may be allowed to return to their ports unhindered. **Unconditional surrender** requires the surrendering State or force to submit completely and accept the requirements imposed by the victor. The term **capitulation** is also sometimes used to specify the surrender of a defended position.
- 15.4.2** LOAC requires that enemy forces who no longer have the will or ability to fight are allowed to surrender and that they are respected and protected once they have. It is prohibited to deny a force, or any member of it, the right to surrender or to conduct warfare on the basis that surrenders will not be accepted (no quarter).<sup>48</sup> It is in the interests of a force to encourage and accept the surrender of an opposing force. Inhumane treatment inevitably makes other surrenders less likely and is therefore counter-productive.
- 15.4.3** The terms of a conditional surrender must be agreed between opposing forces. Conditional surrender is no longer predicated on an agreement that the surrendering force will be humanely treated, since that is demanded by LOAC in all cases. The terms of surrender must be strictly complied with by both sides.<sup>49</sup> Members of the NZDF receiving the surrender of opposing forces are to strictly comply with the terms of any such agreement.
- 15.4.4** Surrender must respect military honour. This includes a duty not to humiliate those who have surrendered or expose them to public curiosity.<sup>50</sup> Neither conditional nor unconditional surrender permits the victor to act inhumanely to those who are surrendering.
- 15.4.5** Upon surrendering, members of the capitulating force become entitled to the rights and privileges of PWs, retained personnel or detainees, depending upon their status.<sup>51</sup>

## DUTY OF MEMBERS OF THE NEW ZEALAND DEFENCE FORCE

- 15.4.6** A member of the NZDF is not to surrender while there is a realistic prospect of continuing the fight against the opposing force, or a realistic prospect of evading capture and rejoining friendly forces. A commander is never to surrender a New Zealand force while the capacity to fight on exists.

48 It is a war crime to kill or wound a combatant who has surrendered (see **Rome Statute** art 8(2)(b)(vi)) or to deny quarter (see **Rome Statute** art 8(2)(b)(xii) and 8(2)(e)(x)). For prohibition on denial of quarter see Chapter 8.

49 In the **Scuttled U-Boats Case** Oberleutnant Grumpelt was found guilty of breaching the terms of an Instrument of Surrender by scuttling U-boats that had been surrendered by German High Command. His defence that he had not received notification of the Instrument of Surrender was rejected.

50 See **Geneva Convention III** art 13 and **Geneva Convention IV** art 27.

51 For PWs, retained personnel, internees and detainees see Chapter 12.

- 15.4.7** If defeat is inevitable, every effort is to be made to destroy weapons, equipment and classified material before surrender to prevent them from falling into enemy hands. Failure to do so is an offence against the AFDA.<sup>52</sup> Recognising that the military situation is hopeless and further resistance is futile is not the same as acting out of concern for one's own safety. The former creates a legitimate ground for surrender, whereas the latter is cowardice and is an offence punishable under the AFDA.<sup>53</sup>

52 **AFDA** s 23 deals with offences of assisting the enemy. For example, under s 23(1)(a) it is an offence punishable by life imprisonment to, with intent to assist the enemy, abandon or surrender any place or any ship, aircraft, or armoured fighting vehicle, that it is one's duty to defend or to destroy, or under s 23(1)(b) to cause the capture or destruction by the enemy of such a thing. Under s 23(2)(a) it is an offence punishable by life imprisonment to, knowingly and without lawful excuse, abandon or surrender any place or any ship, aircraft, or armoured fighting vehicle, that it is one's duty to defend or to destroy, or under s 23(2)(b), to cause the capture or destruction by the enemy of such a thing.

53 **AFDA** s 28: "Every person subject to [the AFDA] commits an offence, and is liable to imprisonment for life, who, when before the enemy, in such a manner as to show cowardice, (a) leaves his post or any other place of duty where it is his duty to be; or (b) abandons his weapons or other equipment in his charge; or (c) by any act or omission, fails to carry out the duty required of him."



# NEUTRAL STATES, PERSONS AND ORGANISATIONS

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## SECTION 1 – INTRODUCTION

- 16.1.1** This chapter deals with the rights and obligations of States that are not parties to a conflict but are, nevertheless, potentially affected by it. It also examines the rights and obligations of nationals of such States, and of neutral organisations.
- 16.1.2** It is important for members of the New Zealand Defence Force (NZDF) to understand the law governing neutrality. Failure to respect another State's neutrality may cause it to support the opposing force, with potentially disastrous results. Failure to comply with obligations to a neutral State, on the other hand, could result in New Zealand being drawn into a conflict against the wishes of the Government and people.
- 16.1.3** This chapter also examines the role of neutral, impartial and independent organisations, whose activities are generally directed towards alleviating the suffering caused by war. Respect for these organisations is essential if they are to perform their duties. Violation of their rights is also likely to cause a significant loss of public support for the operation.

## SECTION 2 – GENERAL PRINCIPLES

## NATURE OF NEUTRALITY

- 16.2.1** A **neutral State** is a State that is not a party to a conflict and takes no part in materially or militarily supporting the operations of any party to it. **Constitutional neutrality** is not necessary for a State to be a neutral in respect of any given conflict.<sup>1</sup> **Neutral territory** is the land territory of a neutral State. Its internal waters, territorial sea, and archipelagic waters (if any) are **neutral waters**.<sup>2</sup> **Neutral airspace** is the airspace over neutral waters and neutral territory.
- 16.2.2** Although the law governing neutrality is fundamental and applies to all international armed conflicts (IAC),<sup>3</sup> it has been significantly affected by the Charter of the United Nations (UN Charter). States do not have the right to remain neutral where the United Nations Security Council (UNSC) requires enforcement action under Chapter VII.<sup>4</sup> The rules of neutrality therefore only strictly apply to armed conflict in respect of which the UNSC has not authorised or prohibited the use of force by the parties to the conflict.<sup>5</sup>
- 16.2.3** The law of neutrality does not apply to non-international armed conflicts (NIAC). The principle of non-intervention essentially precludes States from interfering on behalf of armed groups in rebellion against the government, although such interventions are by no means rare.<sup>6</sup> Nevertheless, the principles relating to neutrality of persons and organisations must be applied, subject to necessary modifications.
- 16.2.4** States sometimes choose not to actively participate in a conflict, but nevertheless materially support one of the parties.<sup>7</sup> It is a question of fact as to whether such support reaches the point where other parties to the conflict consider that State to no longer be neutral.

1 Constitutional neutrality is claimed by Austria, Costa Rica, Finland, Ireland, Liechtenstein, Malta, Sweden, Switzerland, Turkmenistan and the Vatican.

2 For 'internal waters', 'territorial sea' and 'archipelagic waters' see Chapter 10.

3 See *Nuclear Weapons Opinion* at [89].

4 **UN Charter** art 2(5): "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

5 See for example, the US-led invasion of Iraq in 2003. Neutrality may also arise where a State exercises the right of collective or individual self-defence under UN Charter art 51 in response to an attack in respect of which the UNSC has not yet taken action.

6 Assistance to insurgents is, *prima facie*, a use of force against the territorial integrity of the State or its political independence. *Nicaragua v USA* (at [246]): "Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition." However, art 7 of the Annex to **UNGAR 3314** (1974) "Definition of Aggression" excludes support for peoples struggling for self-determination from the definition of aggression. New Zealand has never used armed force in support of insurgents against another government.

7 The term 'non-belligerent State' is sometimes used to describe situations, such as US support to Britain's war effort in WWII before it became a party to the conflict in 1942. The Netherlands similarly provided support to the US invasion of the Iraq in 2003 without being a party to the conflict.

### SECTION 3 – OBLIGATIONS IN RESPECT OF NEUTRAL STATES WHERE NEW ZEALAND IS A PARTY TO THE CONFLICT

**16.3.1** NZDF commanders are to ensure that New Zealand forces respect the sovereign rights and territorial integrity of neutral States.<sup>8</sup> Members of the NZDF are not to:

- a. recruit combatants on neutral territory to serve in the NZDF;<sup>9</sup>
- b. move personnel, munitions or supplies into or across neutral territory;<sup>10</sup>
- c. fly New Zealand military aircraft into neutral airspace;<sup>11</sup>
- d. set up or use communications facilities on neutral territory in order to communicate with New Zealand or coalition forces;<sup>12</sup>
- e. attack any neutral force, warship, military aircraft or other object unless it takes a direct part in hostilities against a New Zealand force or coalition partner;<sup>13</sup>
- f. attack or capture neutral merchant vessels and neutral civil aircraft unless they are believed on reasonable grounds to be carrying contraband or breaching a blockade and those ships or aircraft refuse to comply with an order to stop or land, or engage in belligerent acts on behalf of the enemy;<sup>14</sup>
- g. attack any opposing force, ship, aircraft or other object on neutral territory, in neutral waters or in neutral airspace;<sup>15</sup>

- 8 **Hague Convention V** art 1: “The territory of neutral powers is inviolable.” **Hague Convention XIII** art 1: “Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.” **San Remo Manual** rule 12: “In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.”
- 9 **Hague Convention V** art 4: “Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.” See also **Mercenaries Convention** arts 2 and 5(1), **Mercenary Activities (Prohibition) Act 2004** s 7 and Chapter 8.
- 10 See **Hague Convention V** art 2.
- 11 See **San Remo Manual** rule 18, **Hague Draft Air Rules** rule 4 and Chapter 10.
- 12 See **Hague Convention V** art 3. It is also forbidden for any belligerent to use any communications installation, established by them before the war on the territory of a neutral Power, for purely military purposes, and which has not been opened for the service of public messages (see art 3(b)). See also **Hague Convention XIII** art 5.
- 13 See **San Remo Manual** rule 15, rule 16(a) states that “hostile action” includes attack on or capture of persons or objects located in, on or over neutral waters and territory. This rule applies regardless of whether the person or object attacked would otherwise be a lawful military objective.
- 14 **San Remo Manual** rule 67: “Merchant vessels flying the flag of neutral States may not be attacked unless they: (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search, or capture; (b) engage in belligerent acts on behalf of the enemy; (c) act as auxiliaries to the enemy’s armed forces; (d) are incorporated into or assist the enemy’s intelligence system; (e) sail under convoy of enemy warships or military aircraft; or (f) otherwise make an effective contribution to the enemy’s military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.” For similar provisions relating to neutral civil aircraft see **San Remo Manual** rule 70. See **San Remo Manual** rules 60 and 63 for actions which may render enemy merchant vessels military objectives.
- 15 See **San Remo Manual** rule 15. Rule 16(a) states that “hostile action” includes attack on or capture of persons or objects located in, on or over neutral waters and territory.

- h. visit, search, divert or capture ships, aircraft or other objects in neutral waters or airspace;<sup>16</sup>
- i. mine neutral waters;<sup>17</sup>
- j. mine any waters without first allowing free exit of neutral shipping or allowing for passage between neutral waters and international waters;<sup>18</sup> and
- k. use neutral territory, waters or airspace as a base from which to launch attacks.<sup>19</sup>

### ENTRY INTO NEUTRAL TERRITORY OR AIRSPACE IS PROHIBITED

**16.3.2** A New Zealand force is not to enter neutral territory or neutral airspace. Any force or member of the NZDF accidentally in neutral territory or airspace is to leave that territory or airspace as quickly as possible. The Chief of Defence Force (CDF) is to be informed of any such infringement without delay, through the Commander of Joint Forces New Zealand (COMJFNZ).

**16.3.3** A violation need not be intentional before a State can defend its neutrality. In most cases, however, it will simply warn the encroaching force to leave. If ordered to leave neutral territory or airspace, an NZDF commander or member is to comply with that demand as quickly as possible. The force is not to engage in combat against the neutral armed forces unless it is attacked, in which case it has the right and duty to defend itself. The commander is, however, to break off combat and withdraw at the earliest safe opportunity. Members of the NZDF are only to surrender to neutral forces if withdrawal is not possible and no other lawful options are available.<sup>20</sup>

### HOT PURSUIT

**16.3.4** If opposing forces enter the territory of a neutral State that is unable or unwilling to expel or intern them, then, subject to their orders and LOAC, a New Zealand force is entitled to undertake hot pursuit and attack those enemy forces. The mere presence of the opposing forces in neutral territory does not justify hot pursuit; there must be evidence of a failure to maintain neutrality.<sup>21</sup>

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**Hague Convention XIII** art 2: Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden. This rule applies regardless of whether the person or object attacked would otherwise be a lawful military objective.

16 **Hague Convention XIII** art 2: “Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.” See also **San Remo Manual** rules 15 and 16.

17 See **San Remo Manual** rule 15. Rule 16(c) states that hostile acts include the laying of mines. **Nicaragua v USA** (at [292](8)): Laying mines outside the ports and harbours of Nicaragua was a breach of LOAC.

18 See **San Remo Manual** rules 85 and 87.

19 **Hague Convention XIII** art 5: “Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries [...]” See also **San Remo Manual** rule 16(b). **San Remo Manual** rule 17 states that belligerent forces may not use neutral waters as a sanctuary.

20 Captured personnel are entitled to conditions equivalent to those provided to PWs. There are historical examples of foreign forces deliberately entering neutral territory or airspace in order to be interned so as to avoid further combat duties. Such actions, if committed by members of the NZDF, would constitute desertion under **AFDA** s 47 and the individuals concerned would face disciplinary investigation on their return to the NZDF.

21 New Zealand can seek compensation from the neutral State for this breach of neutrality.

- 16.3.5** There is no general right of hot pursuit on land for any other purpose, for example, the pursuit of criminals. It is uncertain whether the power enables pursuit of dissident armed forces or armed groups across borders in NIAC.<sup>22</sup> It is an extreme measure to be used only with caution since such an action may provoke an armed response from the neutral State in question.
- 16.3.6** The commander of a New Zealand force is not to exercise the right of hot pursuit into neutral territory without the specific authority of CDF. The advice of an NZDF Legal Adviser (LEGAD) is to be obtained before neutral territory is entered.

#### ENTRY OF NAVAL SHIPS INTO NEUTRAL WATERS IS RESTRICTED

- 16.3.7** New Zealand naval ships may continue to exercise the right of innocent passage through the territorial seas of neutral States, subject to certain restrictions on their activities. Neutral port facilities and waters may not be used for warlike operations.<sup>23</sup> There is no equivalent right of innocent passage over land or through national airspace or in internal waters.
- 16.3.8** If the passage of a New Zealand naval ship ceases to be innocent and the neutral coastal State requires it to leave, it is to do so without delay. New Zealand naval ships are not to:
- a. use neutral waters as a sanctuary from attack;<sup>24</sup>
  - b. remain in neutral ports, roadsteads<sup>25</sup> or territorial waters for more than 24 hours unless allowed by the law of the neutral State;<sup>26</sup> or
  - c. prolong their stay in a neutral port beyond the permissible time except on account of damage or adverse weather; they are to depart as soon as the cause of the delay is at an end.<sup>27</sup>
- 16.3.9** Unless specifically authorised by CDF, and in the absence of special provisions to the contrary, no more than three New Zealand naval ships are to be in a neutral port or roadstead at one time.<sup>28</sup>

22 Apartheid-era South Africa asserted the right to pursue insurgents into Namibia. Other examples include Colombian attacks on rebels in Ecuador and American attacks on Taliban militants in Pakistan. All have been controversial.

23 See **Hague Convention XIII** arts 12–14.

24 See **San Remo Manual** rule 17.

25 'Roadstead' means an enclosed area with an opening to the sea in the littoral zone normally used for the loading, unloading, and anchoring of ships. Roadsteads must be clearly marked on charts by the coastal state (see **UNCLOS** art 12).

26 **Hague Convention XIII** art 12: "In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention." Art 13: "If a Power which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations." For definition of territorial waters see Chapter 10.

27 See **Hague Convention XIII** art 14, which also provides that the regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes. See also **San Remo Manual** rule 21.

28 See **Hague Convention XIII** art 15.

- 16.3.10** If an enemy warship is in the same neutral port or roadstead, at least 24 hours must elapse between its departure and the departure of the New Zealand warship. The ship that arrived first must leave first, unless it has been granted an extension of its stay. A New Zealand naval ship is not to leave a neutral port or roadstead until 24 hours after the departure of a merchant ship flying the flag of the enemy State.<sup>29</sup>
- 16.3.11** Necessary repairs may be made to make a warship seaworthy, but not to improve its combat ability.<sup>30</sup> Resupply may only bring up supplies to the peacetime standard and the ship may only take on sufficient fuel to enable it to reach the nearest friendly port.<sup>31</sup> The ship may not replenish supplies of fuel in a port of the same State for the next three months.<sup>32</sup> It may not increase supplies of war material or armament or add members to the ship's company.<sup>33</sup>
- 16.3.12** A ship taken as prize may only be brought into a neutral port because of unseaworthiness, stress of weather, or a lack of fuel or provisions. It must leave as soon as these circumstances end. If it does not, the prize may be released and the prize crew interned.<sup>34</sup>
- 16.3.13** Failure to comply with the orders and regulations made by the neutral State, or violation of its neutrality, may result in the warship being prohibited to enter that State's ports or roadsteads.

#### ATTACK ON NEUTRAL PERSONS IS PROHIBITED

- 16.3.14** **Neutral persons** are nationals of a neutral State whether or not they are members of that State's armed forces.<sup>35</sup>
- 16.3.15** Members of the NZDF are not to attack any neutral person.<sup>36</sup>
- 16.3.16** **Loss of protection.** A neutral person loses his or her protection and may be attacked, subject to orders and LOAC, if he or she:
- a. takes a direct part in hostilities against a New Zealand force or coalition partner (including mercenary activity); or
  - b. commits acts in favour of a belligerent, particularly voluntarily enlisting in the armed force of one of the belligerents.<sup>37</sup>

<sup>29</sup> See **Hague Convention XIII** art 16.

<sup>30</sup> **Hague Convention XIII** art 17: The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

<sup>31</sup> **Hague Convention XIII** art 19: They may, on the other hand, fill their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

<sup>32</sup> **Hague Convention XIII** art 20: "Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power."

<sup>33</sup> See **Hague Convention XIII** art 18. This applies even to bringing the crew up to its full complement ("completing its crew").

<sup>34</sup> See **Hague Convention XIII** art 21. For law relating to prizes see Chapter 10.

<sup>35</sup> See **Hague Convention V** art 16.

<sup>36</sup> See **Hague Convention V** art 17.

<sup>37</sup> See **Hague Convention V** art 17.



- 16.3.17** Neutral persons who enlist in the enemy armed forces are to be treated as combatants and are entitled to PW status if captured. They must not be more severely treated than nationals of the enemy State.<sup>38</sup> Neutral persons serving as mercenaries are entitled to neither combatant status nor PW status but must be treated humanely.<sup>39</sup>
- 16.3.18** Neutral persons who take a direct part in hostilities without joining the armed forces of a Party face criminal responsibility for death, injury or destruction which they cause. As long as their State of nationality maintains normal diplomatic relations with New Zealand, neutral persons have only the same rights and obligations as they would in peacetime. They remain entitled to humane treatment.<sup>40</sup> If there is no diplomatic relationship, however, neutral persons are protected under Geneva Convention IV,<sup>41</sup> regardless of whether they were civilians or members of the armed forces of their State of nationality.

38 See **Hague Convention V** art 17. For PWs see Chapter 12.

39 See **Geneva Protocol I** arts 47(1) and 75 and **Geneva Protocol II** art 4(1). For mercenaries see Chapter 6.

40 See **Geneva Protocol I** art 75.

41 Under **Geneva Convention IV** art 4, persons protected by **Geneva Convention IV** are those who find themselves, at a given moment and in any manner whatsoever, in case of a conflict or occupation, in the hands of a Party to the conflict or an Occupying Power of which they are not nationals. However, such persons are not protected if they are nationals of a State not bound by **Geneva Convention IV** or if they are nationals of a State which has normal diplomatic representation in the State in whose hands they are.

## SECTION 4 – NEW ZEALAND AS A NEUTRAL STATE

### OBLIGATIONS AS A NEUTRAL STATE

**16.4.1** Although not bound by the rules explicitly applying to parties to a conflict, neutral States must comply with the rules of LOAC that apply in all circumstances.<sup>42</sup>

**16.4.2** Where New Zealand is neutral in respect of any conflict, the NZDF may be called upon to defend that neutrality, by force if necessary.<sup>43</sup> Such a use of force does not make New Zealand a party to the conflict.<sup>44</sup> Subject to LOAC and their orders, it is the right and duty of members of the NZDF to:

- a. terminate violations of the neutrality of New Zealand's territorial sea or internal waters by any warship of a party to the conflict – the ship may be captured and its crew interned, or as a last resort, the ship may be attacked;<sup>45</sup>
- b. require any force of a party to the conflict to leave New Zealand territory or be interned; a force that refuses to comply may, as a last resort, be attacked; and
- c. require any military aircraft of a party to the conflict that enters New Zealand airspace to land and then intern its crew for the duration of the conflict – aircraft that fail to follow instructions to land may, as a last resort, be attacked.

### RIGHTS AND OBLIGATIONS OF NEW ZEALANDERS AS NEUTRAL PERSONS

**16.4.3** If New Zealand is a neutral State in respect of any armed conflict, members of the NZDF are not to:

- a. attack any of the forces involved in the conflict except where necessary to defend New Zealand's neutrality;<sup>46</sup>
- b. directly participate<sup>47</sup> in the conduct of the armed conflict; or
- c. supply weapons, ammunition or war material of any kind to any party to the conflict.<sup>48</sup>

42 See further Chapter 5.

43 **Hague Convention V** art 5: "A neutral Power must not allow any of the acts referred to in Articles 2–4 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."

44 **Hague Convention V** art 10: "The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act." **Hague Convention XIII** art 26: "The exercise by a neutral Power of its rights can under no circumstances be considered as an unfriendly act by one or other belligerent [...]."

45 See for example, **Hague Convention XIII** art 24 and **Hague Convention V** art 10.

46 **Hague Convention V** art 10: "The fact that a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act."

47 For direct participation in hostilities see Chapter 6.

48 See **Hague Convention XIII** art 6.

- 16.4.4** Where New Zealand is not a party to the conflict but has not taken a stance of neutrality, supply of material to a party to the conflict, subject to international law,<sup>49</sup> may be authorised by the Government, in which case CDF will advise affected members of the NZDF.
- 16.4.5** If personnel of the parties to the conflict come under control of the NZDF, they must be interned at a distance from the theatre of war until the end of the armed conflict.<sup>50</sup> They are to be clothed, fed and treated humanely to at least the same standard as prisoners of war (PWs).<sup>51</sup>
- 16.4.6** Where sick, wounded or shipwrecked combatants of a party to the conflict are brought into New Zealand territory or handed over to the control of the NZDF, for example on an NZDF warship, by either party, members of the NZDF are to ensure they do not take part again in military operations.<sup>52</sup> Where such persons are received on board a New Zealand naval ship, they are not to be returned to their own forces, or handed over to the opposing force, without the express authority of CDF. They are to be respected and protected and cared for in accordance with the rules of LOAC applicable to all wounded, sick and shipwrecked persons.<sup>53</sup> When recovered, they are to be interned.

49 **Hague Convention V** art 7 and **Hague Convention XIII** art 7: A neutral power is not obliged to prevent export or transport of arms and munitions or anything of use to the army or a fleet of a Party to a conflict. However, such supply must not be in breach of any embargo imposed by the United Nations Security Council acting under Chapter VII of the UN Charter.

50 **Hague Convention V** art 11: "A neutral Power 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 can be left at liberty on giving their parole not to leave the neutral territory without permission." But note **Hague Convention V** art 13: "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."

51 **Hague Convention V** art 12: "In the absence of a special convention to the contrary, the neutral Power shall supply the interned with the food, clothing and relief required by humanity. At the conclusion of peace the expenses caused by internment shall be made good." See also Chapter 12.

52 **Hague Convention V** art 14: "A neutral power may authorize passage over its territory of the sick and wounded belonging to the belligerent armies, on the condition that the trains bringing them shall carry neither personnel nor war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose. [Such sick and wounded] must be guarded by the neutral Power so as to ensure their not taking part again in the military operations [...]."

53 **Hague Convention V** art 15: "The Geneva Convention applies to sick and wounded interned in neutral territory." For treatment and protection of the wounded, sick and shipwrecked see Chapter 11.

## SECTION 5 – PROTECTING POWERS

### ROLE, RIGHTS AND DUTIES OF PROTECTING POWERS

- 16.5.1** A **Protecting Power** is a State that has accepted responsibility for monitoring the well-being of protected persons under the Geneva Convention and Geneva Protocols, and property under the Hague Cultural Property Convention.<sup>54</sup>
- 16.5.2** A **substitute for a Protecting Power** is an impartial organisation acting in place of a Protecting Power.<sup>55</sup>

### DUTIES OF A PROTECTING POWER

- 16.5.3** Although the role of Protecting Power is intended to perform an important humanitarian function, a Protecting Power has rarely been appointed. The protective role has typically been carried out by the International Committee of the Red Cross (ICRC), but under its specific mandate rather than as a substitute for a Protecting Power. Protecting Powers may, however, play a part in future conflicts. Members of the NZDF must therefore be aware of the rights and obligations of such powers under LOAC.
- 16.5.4** It is the duty of the Protecting Power to safeguard the LOAC interests of the parties to the conflict.<sup>56</sup> They must also ensure that their representatives or delegates do not exceed their mission and that they take account of the imperative necessities of security of the State in which they carry out their duties.<sup>57</sup>

### PROTECTING POWERS MUST BE RESPECTED

- 16.5.5** Members of the NZDF are to cooperate with representatives or delegates of a Protecting Power and facilitate, to the greatest extent possible, the conduct of their duties.<sup>58</sup> In particular they are to:
- a. treat representatives or delegates with respect and assist them wherever possible in the conduct of their duties;
  - b. facilitate their advocacy role ('good offices') in the interest of:
    - (1) protected persons;<sup>59</sup>

54 **Geneva Protocol I** art 2(c): "'Protecting Power' means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol." See also **Geneva Protocol I** art 5 and **Hague Cultural Property Convention** art 21.

55 See **Geneva Protocol I** art 2(d), **Geneva Convention I** art 10, **Geneva Convention II** art 10, **Geneva Convention III** art 10, **Geneva Convention IV** art 11 and **Hague Cultural Property Convention** art 21.

56 **Geneva Convention I** art 8: "The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties." See also **Geneva Convention II** art 8, **Geneva Convention III** art 8, **Geneva Convention IV** art 9 and **Hague Cultural Property Convention** art 21.

57 See **Geneva Convention I** art 8, **Geneva Convention II** art 8, **Geneva Convention III** art 8, **Geneva Convention IV** art 9 and **Hague Cultural Property Convention** art 21.

58 **Geneva Convention III** art 8(2) and **Geneva Convention IV** art 9(2) require that the "Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers".

59 See **Geneva Convention I** art 8, **Geneva Convention II** art 8, **Geneva Convention III** art 8 and **Geneva Convention IV** art 9.

- (2) settling disagreements relating to the application or interpretation of the Geneva Conventions and Protocols;<sup>60</sup>
  - (3) protecting cultural property;<sup>61</sup>
- c. allow communications or complaints from PWs and other persons deprived of their liberty relating to the conditions of their captivity;<sup>62</sup>
- d. consider proposals relating to the creation, limitations and methods of supervision of demilitarised zones;<sup>63</sup>
- e. provide information on the location of places of detention;<sup>64</sup>
- f. facilitate the supervision of detention of PWs and other persons deprived of their liberty, in particular to allow:
  - (1) access to all places of detention, and other premises occupied by protected persons; and
  - (2) the opportunity and facilities to interview such persons;<sup>65</sup>
- g. facilitate attendance at any trial of PWs or persons deprived of liberty;<sup>66</sup>

60 **Geneva Convention I** art 11: "In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling disagreement. For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for [protected persons], possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such meeting." See also **Geneva Convention II** art 11, **Geneva Convention III** art 11, **Geneva Convention IV** art 12.

61 **Hague Cultural Property Convention** art 22(1): "The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the present Convention."

62 Under **Geneva Convention III** art 78 PWs have "the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity". In addition, "prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers".

63 See **Geneva Protocol I** art 60(2).

64 **Geneva Convention III** art 23: "[...] Detaining powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps [...]." See also **Geneva Convention IV** art 83.

65 See **Geneva Convention III** art 126 and **Geneva Convention IV** art 143. This includes places of detention, internment, imprisonment, labour and work.

66 **Geneva Protocol I** art 45(2): "If a person [who has taken part in hostilities] who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible [...], this adjudication shall occur before the trial of the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly."

- h. provide all necessary reports, including those relating to labour detachments,<sup>67</sup> arrangements for pay of PWs,<sup>68</sup> death or serious injury of a person deprived of liberty,<sup>69</sup> or transfer of PWs to another State; and
- i. facilitate verification of the state of food and medical supplies<sup>70</sup> and supervision of consignments of medical and refugees' stores in occupied territories.<sup>71</sup>

**16.5.6** If a member of the NZDF believes that any person purporting to be a representative or delegate of the Protecting Power is not entitled to that status or is not complying with the obligations of neutrality and impartiality, the matter is to be reported to CDF, through COMJFNZ, without delay. No action violating the status of such a person is to be taken, however, without the authority of CDF, unless necessary as an action of immediate self-defence. The advice of an NZDF LEGAD is to be obtained unless this is not practicable.

67 See **Geneva Convention III** art 56 and Chapter 12.

68 See **Geneva Convention III** art 62 and Chapter 12.

69 See **Geneva Convention III** arts 121 and 131.

70 See **Geneva Convention IV** art 55.

71 **Geneva Convention IV** art 23 provides that a Power which allows the passage of consignments of medical and hospital stores and religious objects "may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Power".

## SECTION 6 – NEUTRAL ORGANISATIONS

### THE INTERNATIONAL COMMITTEE OF THE RED CROSS

**16.6.1** The **International Committee of the Red Cross** is an international humanitarian movement employing the principles of impartiality, neutrality and independence.

**16.6.2** The ICRC's functions include:

- a. assuming the humanitarian duties of a Protecting Power;<sup>72</sup>
- b. facilitating the establishment of hospital zones and other protected locations;<sup>73</sup>
- c. assisting in LOAC training;<sup>74</sup>
- d. facilitating tracing of missing persons;<sup>75</sup>
- e. facilitating and recording of information relating to children evacuated to foreign countries;<sup>76</sup>
- f. providing its services to parties in a NIAC;<sup>77</sup> and
- g. preparing texts, assisting in diplomatic conferences and consulting with the State parties with respect to proposals for amendment to LOAC treaties.<sup>78</sup>

**16.6.3** The ICRC investigates alleged breaches of LOAC but does not make its findings known other than to the party concerned. Employees and former employees of the ICRC do not give evidence in the subsequent trials of persons accused of war crimes.<sup>79</sup>

### DUTIES OF NATIONAL RED CROSS AND RED CRESCENT SOCIETIES

**16.6.4** National Red Cross and Red Crescent societies may perform any of the following duties:

- a. Be employed in the same duties and on the same footing as medical personnel.<sup>80</sup>

72 See **Geneva Convention I** art 10, **Geneva Convention II** art 10, **Geneva Convention III** art 10, **Geneva Convention IV** art 11 and **Geneva Protocol I** art 5(4).

73 See **Geneva Convention I** art 23.

74 See **Geneva Protocol I** art 6(1).

75 **Geneva Protocol I** art 33(3) provides for the transmission of relevant information to the Central Tracing Agency of the ICRC to facilitate the search for missing persons.

76 **Geneva Protocol I** art 78(3) provides for the sending to the Central Tracing Agency of the ICRC information cards relating to evacuated children.

77 Under **Geneva Convention Common Article 3** an impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict.

78 For example, **Geneva Protocol I** art 97(1) provides that amendments to **Geneva Protocol I** will involve consulting with all High Contracting Parties and the ICRC.

79 In its **Simić Decision** the ICTY Trial Chamber held that the ICRC has an absolute right to non-disclosure of information relating to the work of the ICRC in the possession of its employee.

80 **Geneva Convention I** art 26 provides that the staff of national Red Cross societies who may be employed in the same duties as medical personnel engaged in the search for, or the collection, transportation or treatment of the wounded or sick, or in the prevention of disease, or in medical administrative duties (see art 24) are placed on the same footing as those personnel, provided



- b. Provide hospital ships.<sup>81</sup>
- c. Facilitating personal communications between protected persons in the territory of a party to the conflict, or in occupied territory, and their families.<sup>82</sup>

### THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND NATIONAL RED CROSS AND RED CRESCENT SOCIETIES MUST BE RESPECTED

**16.6.5** The commander of a New Zealand force is to ensure that members of the NZDF cooperate with representatives or delegates of the ICRC, national Red Cross and Red Crescent societies, and International Federation of Red Cross and Red Crescent Societies (IFRC), and that they facilitate to the greatest extent possible the conduct of their duties.<sup>83</sup> In particular, members of the NZDF are to:<sup>84</sup>

- a. treat the delegates and employees of the ICRC, national Red Cross and Red Crescent societies with respect and assist them wherever possible in the conduct of their duties; and
- b. provide all the facilities within their power to enable them to carry out:
  - (1) the humanitarian duties assigned by the Geneva Conventions and Protocols; and
  - (2) any other humanitarian activities in favour of victims of the conflict consented to by the New Zealand Government.

**16.6.6** If a member of the NZDF has reason to believe that any person purporting to be a delegate or employee of the ICRC or a national Red Cross/Crescent society is not entitled to that protection or is not complying with the obligations of neutrality and impartiality required under LOAC, the facts supporting that belief are to be reported through the chain of command to Headquarters New Zealand Defence Force (HQNZDF) without delay. No action violating the protection of such a person is to be taken, however, without the authority of CDF, unless necessary as an action of immediate self-defence. The advice of an NZDF LEGAD is to be obtained unless this is not practicable.

### OTHER HUMANITARIAN ORGANISATIONS

**16.6.7** Other organisations carry out humanitarian work in times of armed conflict, but none have the special position under international law enjoyed by the ICRC. In particular, it cannot always be assured that the principles of neutrality and impartiality will be satisfied.

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that the staff of such societies are subject to military laws and regulations.

81 **Geneva Convention II** art 24 provides that hospital ships utilised by national Red Cross societies shall have the same protection as military hospital ships.

82 See **Geneva Convention IV** art 25.

83 See **Geneva Convention I** art 8, **Geneva Convention II** art 8, **Geneva Convention III** art 8 and **Geneva Convention IV** art 9.

84 **Geneva Protocol I** art 81(4) requires that the High Contracting Parties and the Parties to the conflict shall, as far as possible, make available certain facilities to the ICRC, the national Red Cross and Red Crescent societies, the IFRC and other humanitarian organisations referred to in the Geneva Convention or Protocol I.

- 16.6.8** The decision as to the recognition of additional humanitarian organisations will be made by the Government, and members of the NZDF will be advised of this decision in orders. If the humanitarian function of such organisations is confirmed, commanders and other members of the NZDF are to afford them the same cooperation and assistance as is set out for the ICRC and national Red Cross/Crescent societies.

## Chapter 17

# PREVENTION AND PUNISHMENT OF BREACHES OF LAW OF ARMED CONFLICT AND OTHER INTERNATIONAL CRIMES

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## SECTION 1 – INTRODUCTION

- 17.1.1** All States have a duty to repress and suppress breaches of the Law of Armed Conflict (LOAC) and other international crimes. This means that a State is obliged to punish those persons who commit offences and must take measures to prevent breaches in the first place. States must not encourage breaches of LOAC by the armed forces and agents of other States with whom they are cooperating and must take steps to discourage such breaches.
- 17.1.2** States must search for and bring to justice persons alleged to have committed war crimes and other international crimes. States must also cooperate and assist in the investigation, prosecution, extradition or surrender of such persons. They must cooperate with other States and the United Nations (UN) to respond to serious violations of LOAC.
- 17.1.3** This chapter explains the law relating to the trial and punishment of persons who fail to comply with LOAC. It is essential that members of the New Zealand Defence Force (NZDF) understand that breaches of the rules set out in this manual may result in personal criminal responsibility before the Court Martial of New Zealand (Court Martial), a civilian court or an international court or tribunal. They must also be able to identify such offences committed by other persons. Members of the NZDF have been called upon to give evidence before international criminal tribunals in the past, and may well be required to do so again in the future.
- 17.1.4** **NZDF Code of Conduct** rules which relate to this chapter are:
- Uphold LOAC by preventing and reporting violations.*
- Disobedience of LOAC dishonours the NZDF and New Zealand.*
- Disobedience also renders you liable to punishment as a war criminal.*

## SECTION 2 – MEASURES FOR PREVENTION AND PUNISHMENT OF BREACHES OF LAW OF ARMED CONFLICT AND OTHER INTERNATIONAL CRIMES

### STATE RESPONSIBILITY

- 17.2.1** Failure to comply with LOAC has consequences at both State and individual level. The UN Security Council (UNSC) may impose sanctions<sup>1</sup> or establish tribunals to try individuals whose actions constitute a threat to international peace and security. It may refer a situation to the prosecutor of the International Criminal Court (ICC). An aggrieved State may take the matter to the International Court of Justice (ICJ).
- 17.2.2** New Zealand is responsible for the actions of members of the NZDF.<sup>2</sup> A breach of LOAC is attributable to New Zealand, as well as to the individuals at fault. New Zealand may be required to make reparations to victims.
- 17.2.3** New Zealand is under an obligation to:
- a. take measures to prevent breaches of LOAC;
  - b. search for persons alleged to have committed international crimes, conduct a trial, or hand them over for trial by another State or international court or tribunal;<sup>3</sup> and
  - c. assist other States and the UN in respect of criminal proceedings brought against alleged international criminals, including extradition.<sup>4</sup>

1 **UN Charter** art 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures [...]”

2 **Geneva Protocol I** art 91: “A Party to the conflict [...] shall be responsible for all acts committed by persons forming part of its armed forces.” See also **ICRC Customary IHL** rule 149.

3 **Geneva Convention I** art 49, **Geneva Convention II** art 50, **Geneva Convention III** art 129, **Geneva Convention IV** art 146 and **Geneva Protocol I** art 86(1) require repression of grave breaches.

4 See **Geneva Protocol I** art 88. **Geneva Protocol I** art 89: “In situations of serious violations of the Geneva Conventions or this Protocol, the High Contracting parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” The **International War Crimes Tribunals Act 1995** provides for New Zealand to assist in the investigation, prosecution, arrest and surrender of persons for any ad hoc tribunal established by the UNSC. **Torture Convention** arts 6–8 include the duty to try, extradite and assist in criminal proceedings against persons alleged to have committed torture. Under Part 9 (arts 86–102) of the **Rome Statute** States Parties shall cooperate fully with the ICC in its investigation and prosecution. States must arrest and surrender persons accused of crimes within the jurisdiction of the court or who have been convicted by the ICC. **Rome Statute** art 59 also requires States Parties to arrest and surrender accused persons at the request of the ICC pre-trial chamber. **IC & ICC Act 2000** Part 3 contains general provisions relating to requests for assistance from the ICC, Part 4 provides for the arrest and surrender of persons to the ICC, Part 7 provides for transit of persons and for the sentences to be served in New Zealand and Part 9 provides for investigations to be conducted in New Zealand and for the ICC to sit in New Zealand. See also **ICRC Customary IHL** rule 161.

## SECTION 3 – JURISDICTION OVER INTERNATIONAL CRIMES

### INTERNATIONAL CRIMINAL LAW

**17.3.1** International criminal law is the body of law concerned with the apprehension, trial and punishment of persons who have committed the most serious crimes of international concern.<sup>5</sup> Those crimes are:

- a. the crime of genocide,
- b. crimes against humanity,
- c. war crimes, and
- d. the crime of aggression.<sup>6</sup>

**17.3.2** The crime of torture is also regarded as an international crime. When committed in the course of armed conflict, however, torture will usually be dealt with as a war crime or as a crime against humanity.

**17.3.3** Piracy, transnational trafficking of drugs or arms, human smuggling and terrorism are also regarded as international crimes but have not come within the jurisdiction of the major international tribunals. They may, in the future, come within the focus of international criminal law, as may criminal degradation of the environment.

### UNIVERSAL JURISDICTION

**17.3.4** **Universal jurisdiction** is the principle of law underpinning the exercise of jurisdiction over serious international crimes, even if the usual grounds for jurisdiction within national law do not apply. It is an exception to the general reluctance of States to extend criminal laws beyond their territory, unless there is some connection between the crime, or its victims, and the State in question.<sup>7</sup> New Zealand criminal law is strictly territorial in respect to all but a few crimes.<sup>8</sup> As with piracy and the slave trade, however, the international community has come to regard genocide,<sup>9</sup> crimes against humanity,<sup>10</sup>

<sup>5</sup> See **Rome Statute** art 1.

<sup>6</sup> See **Rome Statute** art 5(1).

<sup>7</sup> In the **Lotus Case** (see especially at 30), the Permanent Court of International Justice held that there is no rule of international law which prevents a State from extending its laws and the jurisdiction of its courts beyond its own territory, in that case in a situation where a collision had occurred on the high seas.

<sup>8</sup> **Crimes Act 1961** s 6 states that “no act done or omitted outside New Zealand is an offence, unless by virtue of this Act or of any other enactment”, s 7A provides that, if jurisdiction over the person exists, extraterritorial jurisdiction exists for terrorist acts, sexual offences against children, removal of body parts, engagement in forced labour, smuggling migrants, trafficking in people, crimes affecting the administration of law and justice including bribery and corruption.

<sup>9</sup> **Genocide Convention** art 6 provides that genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international tribunal as may have jurisdiction. **IC & ICC Act** s 9 provides jurisdiction in respect of every person who in New Zealand or elsewhere, commits genocide or conspires or agrees to commit genocide. In the **Eichmann Appeal** Israel asserted universal jurisdiction to try offenders for genocide because the universal power vested in every state to prosecute for crimes of this type is based on customary international law. See also **Akeyesu Trial** and **Kambanda Trial**.

<sup>10</sup> **IC & ICC Act 2000** s 10 provides jurisdiction in respect of every person who in New Zealand or elsewhere commits a crime against humanity. In the **Zyklon B Trial** the British Military Court found that it had the jurisdiction to try the makers of poisonous gas used to kill Belgian, French, Czech and Polish nationals in German and occupied territory despite the fact that none of the victims were British. In the **Eichmann Appeal** Israeli courts were held to have jurisdiction to try offenders charged with crimes against humanity despite the fact that the offences were committed outside



war crimes,<sup>11</sup> torture,<sup>12</sup> and the crime of aggression<sup>13</sup> as being crimes against all humankind (*erga omnes*) and therefore to regard international criminals as enemies of humanity.

- 17.3.5** States give effect to the principle of universal jurisdiction by enacting laws with extraterritorial effect proscribing international crimes and empowering courts to try persons of all nationalities in their domestic courts, regardless of where the crime was committed.
- 17.3.6** The inherent tension between universal jurisdiction and the principle of State sovereignty has, however, resulted in certain exercises of this power being found to be an excessive breach of other international law rules, in particular, Head of State immunity.<sup>14</sup> In this respect, exercise of universal jurisdiction by domestic courts is distinguishable from the power of an international tribunal or court to try individuals within its mandated powers, regardless of any other jurisdictional nexus.

### EXERCISE OF UNIVERSAL JURISDICTION IN NEW ZEALAND

- 17.3.7** New Zealand courts can try persons alleged to have committed crimes against humanity, genocide or war crimes<sup>15</sup> whether or not:

a. the accused is a New Zealand citizen or resident,<sup>16</sup>

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of the territory of Israel by a citizen of a foreign State, and that the State of Israel did not exist at the time they were committed.

- 11 **Geneva Conventions Act 1958** s 3 provides jurisdiction in respect of any person who, in New Zealand or elsewhere, commits a grave breach of the Geneva Convention or Geneva Protocol I. **IC & ICC Act** s 11 provides jurisdiction in respect of every person who, in New Zealand or elsewhere, commits a war crime. **ICRC Customary IHL** rule 157: "States have the right to vest universal jurisdiction in their national courts over war crimes."
- 12 **Torture Convention** art 5(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 that person]." Art 7: "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 [...] if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. See also **Crimes of Torture Act 1989** s 3(1) and **Pinochet Case**.
- 13 See **IC & ICC Act 2000** ss 8–11. So far prosecution of the crime of aggression has only ever arisen in international tribunals rather than in domestic courts.
- 14 In the **Arrest Warrant Case** (at [53]) the ICJ considered immunity of serving State officials under international law. When abroad, they enjoy full immunity from arrest on criminal charges, including war crimes or crimes against humanity. The ICJ noted that such immunity is not granted for their benefit, but to ensure the effective performance of their functions on behalf of their State. At [58] the ICJ found no exception to such immunity under customary international law or under legal instruments creating some international criminal tribunals. However, the Court identified a number of circumstances under which immunity is not a bar to prosecution, namely a serving Foreign Minister may be tried by the domestic courts in his or her own country, or if the State he or she represents waives immunity, or when the person ceases to hold office, or if the person is brought before the ICTY, ICTR or ICC, these being international tribunals whose statutes specifically allow trial of persons enjoying immunity. **Rome Statute** art 27(2): "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." Nevertheless, under **Rome Statute** art 98(1) the ICC may not require a State to act inconsistently with its obligations under international law with respect to State or diplomatic immunity or persons or property of a third State, unless the third State involved agrees. See also **Charles Taylor Trial**, where the accused was indicted by the Special Court for Sierra Leone when he was President of Liberia.
- 15 Aggression is not currently criminalised in New Zealand because as yet the ICC has no jurisdiction over it. However, in the 2010 **Kampala Amendment** to the **Rome Statute** the crime of aggression has been defined and a regime has been decided as to how the ICC will exercise jurisdiction over this crime. However, ICC jurisdiction over that crime will not begin until after 1 January 2017 when States Parties meet to set a date.
- 16 See **Geneva Conventions Act 1958** s 3(3), **IC & ICC Act 2000** s 8, **Crimes (IPP, UN & AP, &**

- b. the offence was committed in New Zealand,<sup>17</sup> or
- c. the accused was in New Zealand at the time the act occurred or the decision to charge the accused was made.<sup>18</sup>

**17.3.8** No New Zealand court has yet exercised universal jurisdiction.<sup>19</sup>

### APPREHENSION OF ALLEGED INTERNATIONAL CRIMINALS

**17.3.9** Members of the NZDF may, in the course of operations, be required to apprehend persons accused of international crimes. Any subsequent prosecution of such persons will be a matter for civil authorities of New Zealand or another State or an international court or tribunal.<sup>20</sup>

**17.3.10** Universal jurisdiction only provides authority for States to try individuals who come within their jurisdiction. There is no general power for members of the NZDF to apprehend accused persons within the jurisdiction of another State in order to return them to New Zealand for trial.<sup>21</sup> Such action will only be ordered where there is a treaty or UNSC resolution (UNSCR) empowering the NZDF to do so. Members of the NZDF are to carry out such apprehensions only when authorised by the Chief of Defence Force (CDF).

**17.3.11** Care must be exercised in the apprehension of alleged international criminals to ensure that they come before the court in a proper manner. They are to be treated humanely and their rights are to be respected.<sup>22</sup> The advice of an NZDF Legal Adviser (LEGAD) is to be obtained by the commander of a New Zealand force involved in such an apprehension before it is carried out.

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- 17 **Hostages) Act** ss 3–6 and **Cultural Property (Protection in Armed Conflict) Act 2012** s 9. See **IC & ICC Act 2000**, s 8(1)(c)(ii), **Crimes (IPP, UN & AP & Hostages) Act** ss 3(1)(a), 4(1)(a), 5(1)(b), 5(1A)(b), 6(1)(b) and 6(1A)(b), **Geneva Conventions Act 1958** s 3(1) and **Cultural Property (Protection in Armed Conflict) Act 2012** s 7(1)(a).
- 18 See **IC & ICC Act 2000** s 8(1)(c)(iii).
- 19 In 2006 the Auckland District Court issued arrest warrants against Lieutenant General Moshe Ya'alon for war crimes committed in Israel, brought as a private prosecution by Wakim. However, the proceedings were stayed by the Attorney-General (see *Wakim v Ya'alon*).
- 20 PWs can be tried under the AFDA s 12, however, this is subject to the **Geneva Conventions Act 1958**.
- 21 In *R v Hartley* the Court of Appeal found that the appellant had been brought back to New Zealand unlawfully, but that he had then been lawfully arrested in New Zealand. The Court observed that, if there is evidence of improper dealings by the authorities, then the Court may exercise its discretion to discharge the accused. Note that New Zealand has concluded extradition treaties with a number of other States. However, in the *Eichmann Appeal* the illegality of Eichmann's kidnapping in Argentina was ruled not to affect the legality of his trial in Israel. This approach is not generally followed in common law States.
- 22 *Nikolić Jurisdiction Appeal* at [114]: Certain human rights violations against the accused are of such a serious nature that they require the exercise of jurisdiction be declined. Apart from such exceptional cases, the remedy of setting aside jurisdiction will usually be disproportionate. The correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international law.

**JURISDICTION UNDER THE ARMED FORCES DISCIPLINE ACT 1971**

**17.3.12** If a well-founded allegation is made that any person subject to the Armed Forces Discipline Act 1971 (AFDA)<sup>23</sup> has committed an international crime, regardless of where it is alleged to have occurred,<sup>24</sup> that allegation is to be:

- a. recorded in the form of a charge and investigated in accordance with AFDA,<sup>25</sup> or
- b. referred to the appropriate civil authority.<sup>26</sup>

**CHOICE OF CHARGE**

**17.3.13** International criminal law overlaps with both criminal law and Service law. A number of different provisions may criminalise any given act or omission. Which is the most appropriate is an exercise of judgment. Charges against persons subject to the AFDA may be laid, as appropriate, relying on any of the following:

- a. A Service offence under the AFDA only, alleging a general breach of discipline, such as looting (AFDA s 31) and negligent performance of service duty (AFDA s 73(1)(d)).
- b. A civil offence under ADFA s 74(1) relying on legislation giving domestic effect to LOAC obligations, ie an offence against:
  - (1) Geneva Conventions Act 1958 s 3;<sup>27</sup>
  - (2) International Crimes and International Criminal Court Act 2000 (IC & ICC Act 2000) s 9 (genocide),<sup>28</sup> s 10 (crimes against humanity),<sup>29</sup> or s 11 (war crimes);<sup>30</sup>
  - (3) New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987 (NZNFZDAC Act 1987) s 14;
  - (4) Crimes of Torture Act 1989 s 3;
  - (5) Chemical Weapons (Prohibition) Act 1996 ss 6 or 8;
  - (6) Anti-Personnel Mines Prohibition Act 1998 s 7;
  - (7) Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 (Crimes (IPP, UN and AP, and Hostages) Act 1980) ss 3–6 and 8;
  - (8) Mercenary Activities (Prohibition) Act 2004 ss 7–12;

23 See **AFDA** ss 6, 8–13 and 16.

24 All international crimes incorporated into New Zealand law are rendered extra-territorial by **AFDA** s 74(1).

25 See **AFDA** s 102(1)(a) and **DM 69** (2 ed) Volume 1.

26 See **AFDA** s 102(1)(b).

27 Grave breaches of the Geneva Conventions also constitute war crimes under the **IC & ICC Act 2000** s 11.

28 See also **Rome Statute** art 6.

29 See also **Rome Statute** art 7.

30 See also **Rome Statute** arts 8(2)(a),(b), 8(2)(b),(c),(e).

- (9) Cluster Munitions Prohibition Act 2009 s 10; or
- (10) Cultural Property (Protection in Armed Conflict) Act 2012 s 7.

- c. A civil offence under AFDA s 74(1) relying on criminal legislation, in particular the Crimes Act 1961.

**17.3.14** Where the act or omission breaches a provision in this manual, but is not otherwise criminalised under New Zealand law (eg use of a weapon prohibited by the Conventional Weapons Convention), a charge should be recorded as ‘Failing to comply with written orders’ (ADFA s 39(a)).

**17.3.15** Service or criminal offences may be preferred where international crimes require proof of elements placing an unnecessary burden on the prosecution. For example, an allegation of wilfully killing a person protected under Geneva Convention IV may be better dealt with by a charge of murder under s 172 of the Crimes Act 1961, if the applicability of the Convention is in doubt or if the protected status of the victim was unclear.<sup>31</sup> A disciplinary officer (DISCO) is to seek the advice of a NZDF LEGAD before investigating any charge alleging an international crime.

#### PERMISSION OF ATTORNEY-GENERAL FOR CERTAIN OFFENCES

**17.3.16** A charge alleging an offence against any of the following provisions, can only proceed with the consent of the Attorney-General:

- a. Geneva Conventions Act 1958 s 3.<sup>32</sup>
- b. IC & ICC Act 2000 ss 9–11.<sup>33</sup>
- c. Crimes of Torture Act 1989, s 3.<sup>34</sup>
- d. NZNFZDAC Act 1987 ss 5-8.<sup>35</sup>
- e. Crimes (IPP, UN and AP, and Hostages) Act 1980 ss 3–6 and 8.<sup>36</sup>
- f. Chemical Weapons (Prohibition) Act 1996 ss 6 or 8 where the contravention has occurred outside of New Zealand.<sup>37</sup>
- g. Cluster Munitions Prohibition Act 2004 s 10.<sup>38</sup>
- h. Cultural Property (Protection in Armed Conflict) Act 2012 s 7.<sup>39</sup>

31 See **Geneva Conventions Act 1958** s 3(7) for situations where the applicability of a Geneva Convention or of Geneva Protocol I is unclear.

32 See **Geneva Conventions Act 1958** s 3(5).

33 See **IC & ICC Act 2000** s 13(1).

34 See **Crimes of Torture Act 1989** s 12(1).

35 See **NZNFZDAC Act 1987** s 15(1).

36 See **Crimes (IPP, UN & AP, and Hostages) Act 1980** s 14(1).

37 See **Chemical Weapons (Prohibition) Act 1996** s 5(2).

38 See **Cluster Munitions Prohibition Act 2009** s 18(1).

39 See **Cultural Property (Protection in Armed Conflict) Act 2012** s 39(1).

**TRIAL OF PERSONS IN THE POWER OF THE NEW ZEALAND DEFENCE FORCE**

**17.3.17** Prisoners of war (PWs)<sup>40</sup> and alleged spies<sup>41</sup> held by the NZDF are subject to the AFDA and may be tried for any international crime by the Court Martial.

**17.3.18** Unless Parliament legislatively extends jurisdiction under the AFDA, retained personnel,<sup>42</sup> internees and detainees may only be tried for international crimes by a civilian court.<sup>43</sup>

**OBLIGATION TO TRY OR EXTRADITE ACCUSED**

**17.3.19** If a person is, on reasonable grounds, accused of an international crime, but it is decided not to try that person within New Zealand's jurisdiction, where appropriate he or she must be:

- a. surrendered to an international court or tribunal having jurisdiction, or
- b. extradited to a State seeking to exercise jurisdiction.<sup>44</sup>

**17.3.20** If the person is extradited to a State that retains the death penalty, New Zealand will urge that State not carry out that penalty.<sup>45</sup>

**JURISDICTION OF AD HOC, HYBRID, AND OTHER TRIBUNALS**

**17.3.21** Tribunals established by the UNSC have jurisdiction in accordance with the resolution under which they were established.<sup>46</sup> Special tribunals or 'hybrid tribunals' may also be established under national jurisdiction with UN supervision or assistance.<sup>47</sup> Tribunals may be established under other legal arrangements acceptable under international law, including so-called

40 See **AFDA** s 12.

41 See **AFDA** s 13.

42 Medical personnel and personnel of the national Red Cross or other recognised voluntary aid societies who are carrying out medical functions, and who fall into the hands of an adverse Party, may be retained by that adverse Party for as long as needed to care for sick and wounded PWs. Such retained personnel shall not be deemed PWs (see **Geneva Convention I** arts 24, 26 and 28(2)).

43 Such persons are not covered by the jurisdiction provisions of the AFDA.

44 There is a duty to extradite an individual alleged to have committed an international crime such as torture to a State seeking to exercise universal jurisdiction in respect of that offence (see **Pinochet Case** at [97]).

45 See **ICCPR Protocol II** aiming at the abolition of the death penalty.

46 For example, **UNSCR 827** (1993) established the ICTY with a mandate to try persons responsible for grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity committed on the territory of the former Yugoslavia since 1991. The ICTY Appeal Chamber in the **Tadić Jurisdiction Appeal** found that the establishment of the ICTY fell squarely within the powers of the Security Council under the UN Charter art 41, and that as a judicial body the ICTY has the power to determine its own jurisdiction. See also **Milošević Decision, UNSCR 955** (1994) for establishment of the ICTR and **International War Crimes Tribunals Act 1995**.

47 The Extraordinary Chambers in the Courts of Cambodia were established by an agreement between the UN and the Government of Cambodia with jurisdiction to prosecute the crime of genocide, crimes against humanity, grave breaches of the Geneva Conventions and crimes under Cambodian law committed during the period of Democratic Kampuchea. The Special Court for Sierra Leone, set up jointly by the Government of Sierra Leone and the UN, is mandated to try those who bear the greatest responsibility for serious violations of LOAC and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Special Panels for Serious Crimes (East Timor) were established under UNTAET Regulation 2000/15 with jurisdiction in respect of genocide, war crimes, crimes against humanity, murder, sexual offences and torture committed in the period between 1 January 1999 and 25 October 1999.

‘occupation courts.’<sup>48</sup> In each case the jurisdiction of the tribunal is carefully prescribed in terms of when and where the alleged crimes took place.

### SUBJECT MATTER JURISDICTION OF INTERNATIONAL CRIMINAL COURT

**17.3.22** The ICC has jurisdiction to try a person if he or she is accused of a crime within the jurisdiction of the court,<sup>49</sup> alleged to have been committed after the coming into force of the Rome Statute.<sup>50</sup> Those crimes are:

- a. the crime of genocide,<sup>51</sup>
- b. crimes against humanity,<sup>52</sup>
- c. war crimes,<sup>53</sup> and
- d. the crime of aggression.

**17.3.23** ICC jurisdiction, in respect of the crime of aggression, will not take effect until after January 2017, subject to the decision of a meeting of States parties and subject to requirements for sufficient ratifications.<sup>54</sup>

### PERSONAL JURISDICTION AND ADMISSIBILITY OF CASES BEFORE THE INTERNATIONAL CRIMINAL COURT

**17.3.24 Complementarity.** The ICC’s jurisdiction is one of ‘last resort’ arising where States having primary right to prosecute will not do so themselves. This is a principle known as ‘complementarity’.<sup>55</sup>

**17.3.25** The ICC may exercise jurisdiction only in respect of:

- a. natural persons, not States or corporate entities;<sup>56</sup>
- b. persons aged 18 years or over at the time of the offence;<sup>57</sup> and
- c. persons, if accused of the crime of aggression, who are in a position effectively to exercise control over or to direct the political or military action of a State.<sup>58</sup>

48 The Iraqi Special Tribunal was established by statute by the Coalition Provisional Authority. The establishing statute was reaffirmed by the Iraqi Interim Government and, for constitutional reasons, was renamed Iraqi High Tribunal (IHT). The IHT has jurisdiction over any Iraqi national or resident in respect of genocide, crimes against humanity, war crimes and stipulated Iraqi laws, committed from 17 July 1968 until 1 May 2003 in Iraq and elsewhere, and against Iraq’s ethnic and religious populations. However, because it is a civilian court it does not qualify as an ‘occupation court’ (see Chapter 9).

49 **Rome Statute** art 22(1): “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”

50 **Rome Statute** art 24: “(1) No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. (2) In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.” See also art 11.

51 See **Rome Statute** art 5(1)(a).

52 See **Rome Statute** art 5(1)(b).

53 See **Rome Statute** art 5(1)(c).

54 See **Rome Statute** art 15 *bis* (3) (**Kampala Amendment**).

55 **Rome Statute** art 1 states 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”.

56 See **Rome Statute** art 25(1).

57 See **Rome Statute** art 26. Note that this is a jurisdictional rule and does not engage the question of what is the age of criminal responsibility under international law (see **Orić Trial** at [400]).

58 See **Rome Statute** art 8 *bis* (1) (**Kampala Amendment**).



**17.3.26** Except for situations referred to the ICC by the UNSC, the ICC may exercise its jurisdiction only if one or more of the following States are Parties to the Rome Statute or have accepted the jurisdiction on the ICC:<sup>59</sup>

- a. The State on whose territory or ship or aircraft the conduct in question occurred.
- b. The State of which the person accused of a crime is a national.<sup>60</sup>

**17.3.27** It is expected that States that are willing and able to genuinely do so, will exercise jurisdiction in respect of crimes alleged to have been committed on their territory or by their nationals. If they do, the case is inadmissible before the ICC.<sup>61</sup> AFDA s 102 requires that every well-founded allegation of an offence must be recorded in the form of a charge and investigated in accordance with the AFDA. New Zealand can demonstrate that it is both willing and able to investigate and prosecute international crimes alleged to have been committed by New Zealanders or on New Zealand territory. It is not anticipated that the ICC will have cause to try a member of the NZDF.

## ELEMENTS OF CRIMES

**17.3.28** The Rome Statute provides for elements of crimes to assist the ICC in the interpretation and application of the crimes over which it has jurisdiction.<sup>62</sup> A New Zealand court may have regard to any elements of crimes. Where they assist understanding of an offence, elements of LOAC crimes are referred to in the footnotes to this chapter. Repetitive elements common amongst crimes are omitted.<sup>63</sup>

## OPTING-OUT PROVISIONS

**17.3.29** On ratifying the Rome Statute, a State may declare that it does not recognise, for seven years from the date the Statute comes into force with respect to that State, the jurisdiction of the ICC with regard to article 8 crimes allegedly committed by that State's nationals on its territory.<sup>64</sup> New Zealand did not apply this provision and has incorporated all listed war crimes as part of New Zealand law. A State party may also declare that it does not accept the jurisdiction of the ICC in respect of the crime of aggression committed by its nationals or on its territory.<sup>65</sup>

59 See **Rome Statute** arts 12(1) and (3).

60 See **Rome Statute** art 12(2).

61 See **Rome Statute** art 17.

62 **Rome Statute** art 9(1): "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8." Art 9(2) provides for amendments to the elements of the ICC crimes. **IC & ICC Act 2000** s 12(4): "For the purposes of interpreting and applying Articles 6 to 8 of the [Rome] Statute in proceedings for an offence against section 9 or section 10 or section 11; (a) the New Zealand court exercising jurisdiction in the proceedings may have regard to any elements of crimes adopted or amended in accordance with Article 9 of the [Rome] Statute."

63 For example, an element of all war crimes is that the conduct took place in the context of, and was associated with, an armed conflict. All crimes against humanity require that the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population.

64 See **Rome Statute** art 124. Such a declaration may be withdrawn at any time. See for example, the Declaration of France dated 9 June 2000.

65 See **Rome Statute** art 15 *bis* (4).



**DEFERRAL BY THE SECURITY COUNCIL**

**17.3.30** The UNSC may, by a resolution under Chapter VII of the Charter of the United Nations (UN Charter), request the court to defer an investigation or prosecution for a period of 12 months. The deferral request may be extended by another UNSCR.<sup>66</sup> This provision may be of particular importance when efforts to broker a peace settlement would be hampered by investigation or prosecution of individuals involved in the process.

**INITIATION OF INVESTIGATIONS**

**17.3.31** A ‘situation’, in which one or more crimes are alleged to have been committed, may be referred to the Prosecutor by:

- a. a State that is a party to the Rome Statute;<sup>67</sup>
- b. by resolution of the UNSC;<sup>68</sup> or
- c. by the Prosecutor of the ICC, on the basis of information received.<sup>69</sup>

**JURISDICTION RESERVED FOR THE MOST SERIOUS CASES**

**17.3.32** The ICC’s jurisdiction is over the most serious crimes of concern to the international community as a whole.<sup>70</sup> Crimes against humanity, for example, meet this threshold because they require that the act was committed as part of a widespread or systematic attack.<sup>71</sup> Jurisdiction over war crimes applies, in particular, when acts are committed as part of a plan or policy or as part of a large-scale commission of such crimes.<sup>72</sup> A case is inadmissible if it is not of sufficient gravity to justify further action by the ICC.<sup>73</sup> This does not affect the ability of a New Zealand court or military tribunal to try individuals for isolated or less serious offences.

66 See **Rome Statute** art 16.

67 See **Rome Statute** arts 13(a) and 14.

68 See **Rome Statute** art 13(b). The UNSC does so under Chapter VII of the UN Charter. It may refer situations affecting States that are not parties to the Rome Statute. The indictment of the President of the Republic of Sudan by the ICC is an example of the use of this UNSC power (see **Al Bashir Indictment**).

69 See **Rome Statute** arts 13(c) and 15.

70 See **Rome Statute** Preamble and art 5(1).

71 See **Rome Statute** art 7(1). There is no definition of ‘widespread or systematic’ but the attack must clearly be more than isolated, sporadic or minor acts of violence.

72 See **Rome Statute** art 8(1).

73 See **Rome Statute** art 17(1)(d).

## SECTION 4 – CRIMINAL RESPONSIBILITY

## INDIVIDUAL RESPONSIBILITY

**17.4.1** A person faces individual criminal responsibility<sup>74</sup> if that person:

- a. commits an international crime, whether individually or jointly with another person;<sup>75</sup>
- b. orders, solicits or induces the commission of an international crime;<sup>76</sup>
- c. aids, abets or otherwise assists in the commission or attempted commission of an international crime;<sup>77</sup>
- d. contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose;<sup>78</sup>
- e. directly and publicly incites others to commit genocide;<sup>79</sup> or
- f. attempts to commit an international crime.<sup>80</sup>

**17.4.2** To be guilty of an international crime, generally a person must commit the act with knowledge and intent.<sup>81</sup> Some offences set their own mental ingredient, for example wilful killing.<sup>82</sup> This does not limit the ability of a New Zealand court or military tribunal to find the person guilty of a criminal or service offence that is based on negligence or recklessness, for example, manslaughter or negligent performance of a service duty.<sup>83</sup>

74 The *Major War Criminals Trial* decision (at 223) noted that crimes against international law are committed by men [and women], not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. See also *ICRC Customary IHL* rule 151.

75 See *Rome Statute* art 25(3)(a), *Nuremberg Principle I*, *ICTY Statute* art 7(1), *ICTR Statute* art 6(1), *Rainbow Warrior Ruling* at 204 and *Peleus Trial*.

76 See *Rome Statute* art 25(3)(b).

77 See *Rome Statute* art 25(3)(c), *Torture Convention* art 4(1), *Crimes of Torture Act 1989* ss 3(1)(b) and 3(1)(c), *Nuremberg Principle VII*, *ICTY Statute* art 7(1) and *ICTR Statute* art 6(1). In the *Tadić Appeal* no proof was required of the existence or pre-existence of a common plan. See also *Aleksovski Appeal*.

78 See *Rome Statute* art 25(3)(d), *Essen Lynching Trial*, *Einsatzgruppen Trial*, *Tadić Appeal*, *Krnjelac Appeal* and *Krajišnik Trial*.

79 See *Rome Statute* art 25(3)(e), *Akayesu Trial*, *Nahimana Trial* and *Major War Criminals Trial*.

80 *Rome Statute* art 25(3)(f): “A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person attempts to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”

81 *Rome Statute* art 30: “(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. (2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (3) For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.” See *Rome Elements* at [2].

82 See *Rome Statute* art 8(2)(a)(i).

83 For manslaughter see *Crimes Act 1961* s 171. For negligent performance of duty see *AFDA* s 73(1)(d).

**CRIMINAL COMPLICITY**

**17.4.3** Complicity as a basis for individual responsibility under international criminal law requires:

- a. knowledge on the part of the accused that an offence is taking place; and
- b. a contribution by way of assistance, which has a substantial effect on the perpetration of the crime.<sup>84</sup>

**17.4.4** An intention to encourage the offence is an essential ingredient.<sup>85</sup> Complicity based on omission (eg a failure to conduct inspections of coalition detention facilities) requires that the person must have a legal duty to protect the victim of the crime, a right or power of control over the offender and has failed to observe or discharge the duty.

**RESPONSIBILITY OF COMMANDERS**

**17.4.5** In addition to offences that a commander personally commits or orders, a commander is criminally responsible for offences committed by forces under his or her effective command and control, as a result of failure to exercise proper control over them. Command responsibility is applicable to both military and civilian leaders.<sup>86</sup> The commander is liable if he or she:

- a. knew that the forces were committing or about to commit such crimes; or
- b. should have known, owing to the circumstances, that the forces were committing or about to commit such crimes; and
- c. failed to take all necessary and reasonable measures in his or her power to prevent or repress their commission or have the matter investigated and prosecuted.<sup>87</sup>

84 See *Furundžija Trial* at [249].

85 In the *Zyklon B Trial* (at 102), the third accused, a gas technician at the plant which made poison gas used in Nazi concentrations camps, was acquitted because there was no evidence that he could either influence or prevent the transfer of gas to Auschwitz. Under those circumstances, knowledge of how the gas was being used was insufficient to establish complicity.

86 Compare *Rome Statute* art 28(a) and (b).

87 See *Rome Statute* arts 28(a) and (b). Command responsibility is predicated on the power of the superior to control the acts of subordinates (see *Celibići Appeal*). *Geneva Protocol I* art 86(2): “The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.” See also art 87, *ICTY Statute* art 7(3), *ICTR Statute* art 6(3) and *ICRC Customary IHL* rule 153. In the *Re Yamashita* offences were so widespread that under the circumstances Yamashita had abrogated his responsibilities as a commander which amounted to acquiescence. The exact basis for the guilty finding is not clear. In the *Tokyo War Crimes Trial* it was held that a commander does not discharge his duty merely by instituting an appropriate system and thereafter neglecting to learn of its application. In the *Hostages Trial* the tribunal held that a commander cannot plead his own dereliction of duty to inform himself of the conduct of his subordinates as a defence. In the *Pohl Trial* responsibility for the mistreatment of prisoners was held to be based both on Pohl’s ability to exert influence and his status as an SS officer. In the *Roehling Trial* de facto influence was sufficient to establish criminal liability. In the *Aleksovski Trial* (at [76] and [80]) the ICTY Trial Chamber discussed that the term ‘superior’ is not limited to military commanders but may also apply to the civilian authorities: “The decisive criterion [...] is not only the accused’s formal legal status but also his

- 17.4.6** A commander in a higher headquarters is not expected to keep completely informed of every detail of military operations carried out by subordinates. He or she is entitled to assume that tasks entrusted to responsible subordinates will be carried out lawfully.<sup>88</sup> Where circumstances suggest that commission of international crimes is likely, however, a commander cannot turn a blind eye to that possibility. Lack of knowledge of the contents of reports is not a defence since a failure to acquaint him or herself of such reports is a dereliction of duty.<sup>89</sup> Some activities, for example detention, pose such risks that commanders must put in place procedures to ensure that they are adequately and fully informed of the conduct of subordinates.
- 17.4.7** If the commander's knowledge cannot be proved by direct evidence, it can be inferred from the circumstances, particularly where the crimes are so widespread, severe and notorious that the commander must, or ought to have known about them. It is not an excuse that the crimes were committed by forces not under the direct command and control of a commander where it is apparent that the breach will occur or is desired by the commander.<sup>90</sup>

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ability, as demonstrated by his duties and competence, to exercise control [...] Responsibility may be imposed by virtue of a *de facto*, as well as *de jure*, position as a commander"; "An individual's superior position per se is a significant indicum that he had knowledge of the crimes committed by his subordinates. The weight given to that indicum however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the act was, the more difficult it will be [...] to establish that the superior had knowledge of them". See also **Brđanin Trial**, **High Command Trial** and **Halilović Trial**.

88 See **High Command Trial** at 76.

89 See **Hostages Trial** at 71. In the **Celebići Appeal** the ICTY Appeals Chamber held that an accused must be shown to have reason to know by virtue of the information he possesses, which must be such as at least to put him on notice, of the risk of such offences so as to indicate the need for additional information or investigation to ascertain whether such offences were about to be committed.

90 See **High Command Trial** at 74. Regarding the massacre of Palestinians in the Sabra and Shatilla Refugee Camps in Lebanon in 1982, the Kahan Commission concluded that Israeli Defence Force officers who had allowed Christian militia members to enter refugee camps knowing that a massacre of refugees was likely had indirect responsibility of the events which occurred. A commander cannot be absolved of responsibility for the safety of protected persons by passing them on to the forces of another State.

## SECTION 5 – WAR CRIMES

## GRAVE BREACHES OF THE GENEVA CONVENTIONS

**17.5.1** Grave breaches of the Geneva Conventions are war crimes<sup>91</sup> and may be tried by a New Zealand court or military tribunal or by the ICC. The following acts are grave breaches if committed against persons or property protected<sup>92</sup> by the relevant Geneva Convention:

- a. Wilful killing.<sup>93</sup>
- b. Torture or inhuman treatment, including biological experiments.<sup>94</sup>
- c. Wilfully causing great suffering, or serious injury to body or health.<sup>95</sup>
- d. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>96</sup>
- e. Compelling a PW or other protected person to serve in the forces of a hostile power.<sup>97</sup>
- f. Wilfully depriving a PW or other protected person of the rights of fair and regular trial.<sup>98</sup>
- g. Unlawful deportation or transfer or unlawful confinement.<sup>99</sup>
- h. Taking of hostages.<sup>100</sup>

91 See **Geneva Protocol I** art 85(5) and **ICRC Customary IHL** rule 156.

92 The protected status of the person or object, and the accused's knowledge of that protected status, is an element of every such offence.

93 See **Geneva Convention I** art 50, **Geneva Convention II** art 51, **Geneva Convention III** art 130, **Geneva Convention IV** art 147 and **Rome Statute** art 8(2)(a)(i).

94 See **Geneva Convention I** art 50, **Geneva Convention II** art 51, **Geneva Convention III** art 130, **Geneva Convention IV** art 147 and **Rome Statute** art 8(2)(a)(ii). **Rome Elements** states that Element 2 of the crime of torture under **Rome Statute** art 8(2)(a)(ii) requires that the "perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind".

95 See **Geneva Convention I** art 50, **Geneva Convention II** art 51, **Geneva Convention III** art 130, **Geneva Convention IV** art 147 and **Rome Statute** art 8(2)(a)(iii).

96 See **Geneva Convention I** art 50, **Geneva Convention II** art 51, **Geneva Convention IV** art 147 and **Rome Statute** art 8(2)(a)(iv). **Rome Elements** states that Element 2 of **Rome Statute** art 8(2)(a)(iv) requires that "the destruction or appropriation was not justified by military necessity", and Element 3 that "the destruction or appropriation was extensive and carried out wantonly".

97 See **Geneva Convention III** art 130 and **Rome Statute** art 8(2)(a)(v). **Rome Elements** states that Element 1 of **Rome Statute** art 8(2)(a)(v) requires that "the perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power".

98 See **Geneva Convention III** art 130, **Geneva Convention IV** art 147 and **Rome Statute** art 8(2)(a)(vi). For standards of fair trial see **ICCPR** art 14, and Section 8.

99 See **Geneva Convention IV** art 147 and **Rome Statute** art 8(2)(a)(vii). **Rome Elements** states that Element 1 of the crime of unlawful deportation and transfer under **Rome Statute** art 8(2)(a)(vii) requires that "the perpetrator deported or transferred one or more persons to another State or to another location".

100 See **Geneva Convention IV** art 147 and **Rome Statute** art 8(2)(a)(viii). **Rome Elements** states that Element 3 of **Rome Statute** art 8(2)(a)(ii) requires that "the perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons". See *Blaškić Appeal* at [639] and Chapter 8.

**GRAVE BREACHES OF GENEVA PROTOCOL I**

**17.5.2** Grave breaches of Geneva Protocol I are war crimes and may be tried before a New Zealand court or military tribunal.<sup>101</sup> The following acts are grave breaches when carried out wilfully and causing death or serious injury to body or health:

- a. Seriously endangering the physical or mental health or integrity of persons in the power of a party other than the one on which they depend that involves, even with their consent:
  - (1) physical mutilations,
  - (2) medical or scientific experiments, or
  - (3) removal of tissue or organs for transplantation,

except where these acts are justified in any medical procedure that is indicated by the state of health of the person concerned and that is consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and are not deprived of their liberty.<sup>102</sup>
- b. Making the civilian population or individual civilians the object of attack.<sup>103</sup>
- c. Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects.<sup>104</sup>
- d. Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects.<sup>105</sup>
- e. Making non-defended localities and demilitarised zones the object of attack.<sup>106</sup>
- f. Making a person the object of attack in the knowledge that the person is *hors de combat*.<sup>107</sup>
- g. Perfidious use of the distinctive emblem of the Red Cross, Red Crescent or other protective signs recognised by the Geneva Conventions or Protocol I.<sup>108</sup>

101 Grave breaches of Geneva Protocol I are not included within the Rome Statue because a small number of negotiating States were not parties to it.

102 See **Geneva Protocol I** arts 11(2) and (4). Art 11(3): “Exceptions to the prohibition [on removal of tissue and organs for transplantation] may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.”

103 See **Geneva Protocol I** art 85(3)(a).

104 See **Geneva Protocol I** art 85(3)(b). For ‘civilian objects’ see art 52(1) and for indiscriminate attacks causing excessive loss of life etc see art 57(2)(a)(iii). See also Chapter 8.

105 See **Geneva Protocol I** art 85(3)(c). For ‘civilian objects’ see art 52(1) and for installations containing dangerous forces see Chapter 14.

106 See **Geneva Protocol I** art 85(3)(d).

107 See **Geneva Protocol I** art 85(3)(e). For persons *hors de combat* see Chapter 8.

108 See **Geneva Protocol I** art 85(3)(f).



**17.5.3** The following acts are also grave breaches when carried out wilfully and in violation of the Geneva Conventions or Protocol I:

- a. Transfer 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.<sup>109</sup>
- b. Unjustifiable delay in the repatriation of PWs or civilians.<sup>110</sup>
- c. The practice of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.<sup>111</sup>
- d. Making clearly recognised historic monuments, works of art, or places of worship that constitute the cultural or spiritual heritage of peoples the object of attack, causing them extensive destruction as a result.<sup>112</sup>
- e. Depriving protected persons of the rights of fair and regular trial.<sup>113</sup>

#### CUSTOMARY WAR CRIMES IN INTERNATIONAL ARMED CONFLICT

**17.5.4** The Rome Statute lists crimes derived from customary international law over which the ICC has jurisdiction, particularly when committed as part of a plan or policy or as part of a large-scale commission of such crimes.<sup>114</sup> These war crimes may be tried by a New Zealand court or military tribunal.<sup>115</sup> They are:

- a. intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities;<sup>116</sup>
- b. intentionally directing attacks against civilian objects, ie objects that are not military objectives;<sup>117</sup>
- c. intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter, as long as they are entitled to the protection given to civilians or civilian objects under LOAC;<sup>118</sup>

109 See **Geneva Protocol I** art 85(4)(a). Such transfer or deportation must be in violation of **Geneva Convention IV** art 49.

110 See **Geneva Protocol I** art 85(4)(b).

111 See **Geneva Protocol I** art 85(4)(c). For apartheid as a crime against humanity see **Rome Statute** arts 7(1)(h) and (j).

112 See **Geneva Protocol I** art 85(4)(d). The property must be subject to special protection arrangements, eg within the framework of a competent international organisation. There must be no evidence of violation by the adverse party of **Geneva Protocol I** art 53(b) (use in support of the military effort) and the historic monuments, works of art, and places of worship must not be located in the immediate proximity of military objectives. See Chapter 14.

113 See **Geneva Protocol I** art 85(4)(e). For fair trial standards see **ICCPR** art 14, and Section 8.

114 See **Rome Statute** arts 6, 7(1) and 8(1).

115 See **IC & ICC Act 2000** s 11.

116 See **Rome Statute** art 8(2)(b)(i) and Chapter 8.

117 See **Rome Statute** art 8(2)(b)(ii). For general protection of civilians see Chapter 13.

118 See **Rome Statute** art 8(2)(b)(iii). **Rome Elements** states that Element 4 of **Rome Statute** art 8(2)(b)(iii) requires that “such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict”. See also **Sesay Trial** and Chapter 14.



- d. intentionally launching an attack in the knowledge that such an 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 that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;<sup>119</sup>
- e. attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended and are not military objectives;<sup>120</sup>
- f. killing or wounding a combatant who, having laid down his or her arms or having no longer means of defence, has surrendered at discretion;<sup>121</sup>
- g. making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the UN, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;<sup>122</sup>
- h. 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;<sup>123</sup>
- i. 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;<sup>124</sup>
- j. subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind that 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;<sup>125</sup>
- k. killing or wounding treacherously individuals belonging to the hostile nation or army;<sup>126</sup>

119 See **Rome Statute** art 8(2)(b)(iv). **Rome Elements** states that Element 2 of **Rome Statute** art 8(2)(b)(iv) requires that the “attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated”. For ‘concrete and direct overall military advantage’ see Chapter 8.

120 See **Rome Statute** art 8(2)(b)(v) and Chapter 8 and Chapter 14.

121 See **Rome Statute** art 8(2)(b)(vi) and Chapter 8.

122 See **Rome Statute** art 8(2)(b)(vii) and Chapter 8.

123 See **Rome Statute** art 8(2)(b)(viii) and Chapter 9.

124 See **Rome Statute** art 8(2)(b)(ix) and Chapter 14.

125 See **Rome Statute** art 8(2)(b)(x). **Rome Elements** states that Element 2 of **Rome Statute** art 8(2)(b)(x) (medical or scientific experiments) requires that the “experiment caused death or seriously endangered the physical or mental health or integrity of such person or persons”, and that Element 3 requires that the “conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person’s or persons’ interest”. Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. See also Chapter 12.

126 See **Rome Statute** art 8(2)(b)(xi). **Rome Elements** includes the following elements of **Rome**

- l. declaring that no quarter will be given;<sup>127</sup>
- m. destroying or seizing the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war;<sup>128</sup>
- n. declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;<sup>129</sup>
- o. 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;<sup>130</sup>
- p. pillaging a town or place, even when taken by assault;<sup>131</sup>
- q. employing poison or poisoned weapons;<sup>132</sup>
- r. employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;<sup>133</sup>
- s. employing bullets that 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;<sup>134</sup>
- t. employing weapons, projectiles and material, and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of LOAC,

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**Statute** art 8(2)(b)(xi): 1. The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under LOAC; 2. The perpetrator intended to betray that confidence or belief; 3. The perpetrator killed or injured such person or persons; 4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons; 5. Such person or persons belonged to an adverse party. See also Chapter 8.

127 See **Rome Statute** art 8(2)(b)(xii). **Rome Elements** states that Element 3 of **Rome Statute** art 8(2)(b)(xii) requires that the "perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed". See also Chapter 8.

128 See **Rome Statute** art 8(2)(b)(xiii) and Chapter 8.

129 See **Rome Statute** art 8(2)(b)(xiv). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xiv): 1. The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions; 2. The abolition, suspension or termination was directed at the nationals of a hostile party; 3. The perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party. See also Chapter 12.

130 See **Rome Statute** art 8(2)(b)(xv). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xv): 1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person's own country or forces; 2. Such person or persons were nationals of a hostile party. See also Chapter 12.

131 See **Rome Statute** art 8(2)(b)(xvi) and Chapter 8.

132 See **Rome Statute** art 8(2)(b)(xvii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xvii): 1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment; 2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties. See also Chapter 7.

133 See **Rome Statute** art 8(2)(b)(xviii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xviii): 1. The perpetrator employed a gas or other analogous substance or device; 2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties. See also Chapter 7.

134 See **Rome Statute** art 8(2)(b)(xix). **Rome Elements** states that Element 3 of **Rome Statute** art 8(2)(b)(xix) requires that the "perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect". See also Chapter 7.

provided that such weapons, projectiles and material, and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Rome Statute;<sup>135</sup>

- u. committing outrages upon personal dignity, in particular, humiliating and degrading treatment;<sup>136</sup>
- v. committing rape,<sup>137</sup> sexual slavery,<sup>138</sup> enforced prostitution,<sup>139</sup> forced pregnancy,<sup>140</sup> enforced sterilisation,<sup>141</sup> or any other form of

135 See **Rome Statute** art 8(2)(b)(xx). Such an annex would have to be added by amendment in accordance with arts 121 and 123.

136 See **Rome Statute** art 8(2)(b)(xxi). **Rome Elements** states that Element 2 of **Rome Statute** art 8(2)(b)(xxi) requires that the “severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity”. This element takes into account relevant aspects of the cultural background of the victim, and for this crime ‘persons’ can include dead persons and the victim need not personally be aware of the existence of the humiliation or degradation or other violation. See also Chapter 12.

137 See **Rome Statute** art 8(2)(b)(xxii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxii) (rape): “1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” The concept of ‘invasion’ is intended to be broad enough to be gender-neutral. It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See also Chapter 8.

138 See **Rome Statute** art 8(2)(b)(xxii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxii) (sexual slavery): “1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.” It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. Given the complex nature of this crime, it is recognised that its commission could involve more than one perpetrator as a part of a common criminal purpose. It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Slavery Convention. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children. See also Chapter 8, Chapter 11, Chapter 12 and Chapter 14.

139 See **Rome Statute** art 8(2)(b)(xxii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxii) (enforced prostitution): “1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.” It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See also Chapter 12, Chapter 13 and Chapter 14.

140 See **Rome Statute** art 8(2)(b)(xxii). ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy (see **Rome Statute** art 7(2)(f)). See also Chapter 12, Chapter 13 and Chapter 14.

141 See **Rome Statute** art 8(2)(b)(xxii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxii) (forced sterilisation): “1. The perpetrator deprived one or more persons of biological reproductive capacity; 2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.” The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice. It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See also Chapter 12, Chapter 13 and Chapter 14.

sexual violence<sup>142</sup> also constituting a grave breach of the Geneva Conventions;

- w. utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;<sup>143</sup>
- x. 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;<sup>144</sup>
- y. 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;<sup>145</sup> and
- z. conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities.<sup>146</sup>

## WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICT

**17.5.5** War crimes in non-international armed conflict (NIAC)<sup>147</sup> include serious violations of Geneva Convention Common Article 3,<sup>148</sup> namely any of the following acts committed against persons taking no active part in the hostilities, including

- 142 See **Rome Statute** art 8(2)(b)(xxii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxii) (sexual violence): “1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; 2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions; 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.” It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See also Chapter 12, Chapter 13 and Chapter 14.
- 143 See **Rome Statute** art 8(2)(b)(xxiii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxiii) “1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under LOAC; 2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.” See also **Blaškić Appeal** at [670] and Chapter 8.
- 144 See **Rome Statute** art 8(2)(b)(xxiv). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxiv): “1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions; 2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.” See also Chapter 11.
- 145 See **Rome Statute** art 8(2)(b)(xxv). **Rome Elements** states that Element 2 of **Rome Statute** art 8(2)(b)(xxv) requires that the “perpetrator intended to starve civilians as a method of warfare”. See also Chapter 8.
- 146 See **Rome Statute** art 8(2)(b)(xxvi). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(b)(xxvi): “1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities; 2. Such person or persons were under the age of 15 years; 3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.” See also **Lubanga Trial** and Chapter 14.
- 147 It should be noted that **Rome Statute** arts 8(2)(c) and 8(2)(e) apply to NIAC and not to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. See also Chapter 5.
- 148 See **Rome Statute** art 8(2)(c).

members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- a. Violence to life and person, in particular, murder of all kinds,<sup>149</sup> mutilation,<sup>150</sup> cruel treatment<sup>151</sup> and torture.<sup>152</sup>
- b. Committing outrages upon personal dignity, in particular, humiliating and degrading treatment.<sup>153</sup>
- c. The taking of hostages.<sup>154</sup>
- d. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.<sup>155</sup>

149 See **Rome Statute** art 8(2)(c)(i). **Rome Elements** states that Element 2 of **Rome Statute** art 8(2)(c)(i) (murder) requires that the person(s) murdered “were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities”. The footnote to Element 2 states that the term “religious personnel” includes those non-confessional non-combatant military personnel carrying out a similar function. For direct part in hostilities see Chapter 6. For *hors de combat* see Chapter 8. For medical and religious personnel see Chapter 11. For civilians see generally Chapter 13.

150 See **Rome Statute** art 8(2)(c)(i). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(c)(i) (mutilation): “1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage; 2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person’s or persons’ interests; 3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.” See also Chapter 11 and Chapter 12.

151 See **Rome Statute** art 8(2)(c)(i). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(c)(i) (cruel treatment): “1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; 2. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.” See also Chapter 11 and Chapter 12.

152 See **Geneva Convention Common Article 3**(1)(a) and **Rome Statute** art 8(2)(c)(i). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(c)(i) (torture): “2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; 3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.” See also Chapter 11 and Chapter 12.

153 See **Geneva Convention Common Article 3**(1)(c) and **Rome Statute** art 8(2)(c)(ii). **Rome Elements** states that Element 2 of **Rome Statute** art 8(2)(c)(ii) requires that the “severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity”. ‘Persons’ can include dead persons. The victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

154 See **Geneva Convention Common Article 3**(1)(b) and **Rome Statute** art 8(2)(c)(iii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(c)(iii): “3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons; 4: Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.” See Chapter 12.

155 See **Geneva Convention Common Article 3**(1)(d) and **Rome Statute** art 8(2)(c)(iv). **Rome Elements** states that Element 4 of **Rome Statute** art 8(2)(c)(iv) requires that there “was no previous judgement pronounced by a court, or the court that rendered judgement was not “regularly constituted”, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.” The Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial. For international standards see **Geneva Protocol I** art 75 and **ICCPR** art 14.



## CUSTOMARY WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICT

- 17.5.6** The Rome Statute lists crimes in NIAC derived from customary international law over which the ICC has jurisdiction, particularly when committed as part of a plan or policy, or as part of a large-scale commission.<sup>156</sup> These war crimes may be tried by a New Zealand court or military tribunal.<sup>157</sup> They are:
- a. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;<sup>158</sup>
  - b. 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;<sup>159</sup>
  - c. intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter, as long as they are entitled to the protection given to civilians or civilian objects under LOAC;<sup>160</sup>
  - d. 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;<sup>161</sup>
  - e. pillaging a town or place, even when taken by assault;<sup>162</sup>
  - f. committing rape,<sup>163</sup> sexual slavery,<sup>164</sup> enforced prostitution,<sup>165</sup> forced

156 See **Rome Statute** arts 6, 7(1) and 8(2)(e), which refers to other serious violations of the laws and customs applicable in armed conflicts not of an international character, of uses of the term “within the established framework of international law”. This expression is understood by some parties to imply that these other serious violations only arise in circumstances of protracted armed conflict of a higher level than that for **Geneva Convention Common Article 3**. This distinction is not applied in this manual. See also Chapter 5.

157 See **IC & ICC Act 2000** s 11.

158 See **Rome Statute** art 8(2)(e)(i). For direct part in hostilities see Chapter 6.

159 See **Rome Statute** art 8(2)(e)(ii) and Chapter 11.

160 See **Rome Statute** art 8(2)(e)(iii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(e)(iii): “2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; 3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.” See also Chapter 14.

161 See **Rome Statute** art 8(2)(e)(iv) and Chapter 14.

162 See **Rome Statute** art 8(2)(e)(v) and Chapter 8.

163 See **Rome Statute** art 8(2)(e)(vi). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(e)(vi) (rape): “1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” The concept of “invasion” is intended to be broad enough to be gender-neutral. It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See also Chapter 12, Chapter 13 and Chapter 14.

164 See **Rome Statute** art 8(2)(e)(vi). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(e)(vi) (sexual slavery): “1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.” See also Chapter 12, Chapter 13 and Chapter 14.

165 See **Rome Statute** art 8(2)(e)(vi). **Rome Elements** includes the following elements of **Rome Statute**

pregnancy,<sup>166</sup> enforced sterilisation,<sup>167</sup> and any other form of sexual violence<sup>168</sup> also constituting a serious violation of Geneva Convention Common Article 3;

- g. conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities;<sup>169</sup>
- h. ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;<sup>170</sup>
- i. killing or wounding treacherously a combatant adversary;<sup>171</sup>
- j. declaring that no quarter will be given;<sup>172</sup>
- k. subjecting persons who are in the power of another party to the conflict to physical mutilation<sup>173</sup> or to medical or scientific experiments of any

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- art 8(2)(e)(vi) (enforced prostitution): “1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.” It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See also Chapter 12, Chapter 13 and Chapter 14.
- 166 See **Rome Statute** art 8(2)(e)(vi). ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy (see **Rome Statute** art 7(2)(f)).
- 167 See **Rome Statute** art 8(2)(e)(vi). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(e)(vi) (enforced sterilisation): “1. The perpetrator deprived one or more persons of biological reproductive capacity; 2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.” It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.
- 168 See **Rome Statute** art 8(2)(e)(vi). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(e)(vi) (sexual violence): “1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; 2. The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions; 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.” It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. See also Chapter 12, Chapter 13 and Chapter 14.
- 169 See **Rome Statute** art 8(2)(e)(vii). **Rome Elements** states that Element 3 of **Rome Statute** art 8(2)(e)(vii) requires that the “perpetrator knew or should have known that such person or persons were under the age of 15 years”. See also Chapter 14.
- 170 See **Rome Statute** art 8(2)(e)(viii). **Rome Elements** states that Element 3 of **Rome Statute** art 8(2)(e)(viii) requires that the “perpetrator was in a position to effect such displacement by giving such order”. See also Chapter 13.
- 171 See **Rome Statute** art 8(2)(e)(ix) and Chapter 8.
- 172 See **Rome Statute** art 8(2)(e)(x). **Rome Elements** states that Element 3 of **Rome Statute** art 8(2)(e)(x) requires that the “perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed”. See also Chapter 8.
- 173 See **Rome Statute** art 8(2)(e)(xi). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(e)(xi) (mutilation): “1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage; 2. The conduct caused death or seriously



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;<sup>174</sup>

- l. destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict;<sup>175</sup>
- m. employing poison or poisoned weapons;<sup>176</sup>
- n. employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;<sup>177</sup> and
- o. 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.<sup>178</sup>

## LISTED CRIMES ARE NOT EXHAUSTIVE

**17.5.7** Although the war crimes listed in the Rome Statute are extensive, they do not preclude other crimes from being added to the Statute, or being tried before domestic courts or ad hoc tribunals. Customary war crimes which are not listed include misuse of protected objects or buildings in order to harm the opposing force,<sup>179</sup> attacking medical aircraft and hospital ships,<sup>180</sup> and use of unlawful means of warfare not yet listed in the Rome Statute. Customary crimes that are currently listed as applying solely to international armed conflict (IAC) may eventually be applied to NIAC as well.

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endangered the physical or mental health of such person or persons; 3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest; 4. Such person or persons were in the power of another party to the conflict. Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty." See also Chapter 12.

174 See **Rome Statute** art 8(2)(e)(xi) and Chapter 11 and Chapter 12.

175 See **Rome Statute** art 8(2)(e)(xii). **Rome Elements** includes the following elements of **Rome Statute** art 8(2)(e)(xii): "3. Such property was protected from that destruction or seizure under the international law of armed conflict; 4. The perpetrator was aware of the factual circumstances that established the status of the property."

176 There is no specific international law pertaining to use of poison or poisoned weapons as a war crime in NIAC. In New Zealand's domestic law the **Crimes (IPP, UN and AP, and Hostages) Act 1980** s 3 makes it an offence to poison a person protected by the Geneva Conventions (see Schedule 1 of the Act), but there is no domestic legislation that makes it an offence for members of the NZDF to use poison or poison weapons against combatants in NIAC. The use of poison or poisoned weapons may also fall within the definition of 'chemical weapon' in the **Chemical Weapons Convention**. New Zealand domestic law through the **Chemical Weapons (Prohibition) Act 1996** s 6(1) makes it an offence to develop and use chemical weapons. See also **ICRC Customary IHL** rule 72 and Chapter 7.

177 See the **Geneva Gas Protocol**. In addition, asphyxiating and poisonous gases and all analogous liquids, materials and devices may fall within the definition of 'chemical weapon' in **Chemical Weapons Convention**. New Zealand domestic law through the **Chemical Weapons (Prohibition) Act 1996** s 6(1) makes it an offence to develop and use chemical weapons. See also **ICRC Customary IHL** rule 74 and Chapter 7.

178 Use of expanding bullets may fall within the prohibition on causing unnecessary suffering, which applies in both IAC and NIAC. See also **ICRC Customary IHL** rule 77 and Chapter 7.

179 See Chapter 14.

180 See Chapter 11.

## SECTION 6 – OTHER INTERNATIONAL CRIMES

## GENOCIDE

**17.6.1** **Genocide** means any of the following acts done with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

- a. Killing members of the group.<sup>181</sup>
- b. Causing serious bodily or mental harm to members of the group.<sup>182</sup>
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.<sup>183</sup>
- d. Imposing measures intended to prevent births within the group.<sup>184</sup>
- e. Forcibly transferring children of the group to another group.<sup>185</sup>

**17.6.2** It is prohibited to commit genocide or to directly and publicly incite others to commit genocide.<sup>186</sup> Genocide may be committed in connection with an armed conflict but there is no legal requirement for the existence of an armed conflict as an element of the offence.

## CRIMES AGAINST HUMANITY

**17.6.3** **Crimes against humanity** are offences conducted against a civilian population as part of a widespread and systematic attack.<sup>187</sup> An element of all crimes against humanity is that the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread and systematic attack directed against a civilian population.<sup>188</sup> They need not have been committed in connection with armed conflict.

181 See **Rome Statute** art 6(a), **Genocide Convention** art 2(a), *Akayesu Trial* and *Kambanda Trial*.

182 See **Rome Statute** art 6(b) and **Genocide Convention** art 2(b).

183 See **Rome Statute** art 6(c) and **Genocide Convention** art 2(c).

184 See **Rome Statute** art 6(d) and **Genocide Convention** art 2(d).

185 See **Rome Statute** art 6(e) and **Genocide Convention** art 2(e).

186 **Rome Statute** art 25(3)(e): “In respect of the crime of genocide [a person is criminally responsible if he or she] directly and publicly incites others to commit genocide.”

187 See **Rome Statute** art 7(1). Art 7(2)(a): “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in [art 7(1)] against any civilian population, pursuant to, or in furtherance of, a State or organizational policy to commit such attack.” For the purposes of defining crimes against humanity an ‘attack’ is not limited to the use of armed force and can encompass any widespread and systematic mistreatment of the civil population. See *Galić Trial* at [141], *Kunarac Appeal* at [86] and *Limaj Trial* at [194].

188 See **Rome Elements** on crimes at art 7.

**17.6.4** The following acts are crimes against humanity:

- a. Murder.<sup>189</sup>
- b. Extermination.<sup>190</sup>
- c. Enslavement.<sup>191</sup>
- d. Deportation or forcible transfer of population.<sup>192</sup>
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.<sup>193</sup>
- f. Torture.<sup>194</sup>

189 See **Rome Statute** art 7(1)(a). **Rome Elements** states that for **Rome Statute** art 7(1)(a) the term “killed” is interchangeable with the term “caused death” (see footnote 7).

190 See **Rome Statute** art 7(1)(b). Art 7(2)(b) states: “‘Extermination’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.” The conduct could be committed by different methods of killing, either directly or indirectly. The infliction of such conditions could include the deprivation of access to food and medicine. The term ‘as part of’ would include the initial conduct in a mass killing.

191 See **Rome Statute** art 7(1)(c). Art 7(2)(c) states: “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” **Rome Elements** states that Element 1 of **Rome Statute** art 7(1)(c) requires that the “perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.” It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the **Supplementary Slavery Convention**, and it is also understood that the conduct described in this element includes trafficking in persons, in particular women and children (see footnote 11 of **Rome Elements**).

192 See **Rome Statute** art 7(1)(d). Art 7(2)(d) states: “‘Deportation or forcible transfer of a population’ means forced displacement of the persons concerned by expulsion or other coercive acts in which they are lawfully present, without grounds permitted under international law.” **Rome Elements** states that the term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment (see footnote 12 to discussion of **Rome Statute** art 7(1)(d)). “Deported or forcibly transferred” is interchangeable with “forcibly displaced” (see footnote 13 of **Rome Elements**).

193 See **Rome Statute** art 7(1)(e).

194 See **Rome Statute** art 7(1)(f). Art 7(2)(e) states: “‘Torture’ means the intentional infliction of severe pain or suffering whether physical or mental upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” **Rome Elements** states that no specific purpose need be proved for this crime (see footnote 14 of **Rome Elements**).

- g. Rape,<sup>195</sup> sexual slavery,<sup>196</sup> enforced prostitution,<sup>197</sup> forced pregnancy,<sup>198</sup> enforced sterilisation,<sup>199</sup> or any other form of sexual violence of comparable gravity.<sup>200</sup>
- h. Persecution against any identifiable group.<sup>201</sup>

- 195 See **Rome Statute** art 7(1)(g). **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(g) (rape): “1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” The concept of “invasion” is intended to be broad enough to be gender-neutral. A person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.
- 196 See **Rome Statute** art 7(1)(g). **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(g) (sexual slavery): “1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.” Given the complex nature of this crime, it is recognised that its commission could involve more than one perpetrator as a part of a common criminal purpose (see footnote 17 of **Rome Elements**). It is also understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Slavery Convention. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children (see footnote 18 of **Rome Elements**). See also Chapter 12, Chapter 13 and Chapter 14.
- 197 See **Rome Statute** art 7(1)(g). **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(g) (enforced prostitution): “1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.” It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.
- 198 See **Rome Statute** art 7(1)(g). Art 7(2)(f): “‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out any other grave breach of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”
- 199 See **Rome Statute** art 7(1)(g). **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(g) (enforced sterilisation): “1. The perpetrator deprived one or more persons of biological reproductive capacity; 2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.” The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice (see footnote 19 of **Rome Elements**). It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity (see footnote 20 of **Rome Elements**).
- 200 See **Rome Statute** art 7(1)(g). **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(g) (sexual violence): “1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; 2. Such conduct was of a gravity comparable to the other offences in [Rome Statute art 7(1)(g)].” It is understood that ‘genuine consent’ does not include consent obtained through deception.
- 201 See **Rome Statute** art 7(1)(h): “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” Art 7(2)(g) states: “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Art 7(3) states: “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within

- i. Enforced disappearance of persons.<sup>202</sup>
- j. The crime of apartheid.<sup>203</sup>
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>204</sup>

**17.6.5** There is a considerable overlap between war crimes and crimes against humanity. Offences against the civilian population may be charged under either category. For example, deliberately shelling the civilian population of a town can be tried as a war crime of attacking a civilian population or as the crime against humanity of murder.<sup>205</sup>

## AGGRESSION

**17.6.6** Crime of aggression means the planning, preparation, initiation or execution, by a person in a position to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter.<sup>206</sup>

the context of society. The term 'gender' does not indicate any meaning different from the above." **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(h): "1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law; 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute, or any crime within the jurisdiction [of the ICC]."

202 See **Rome Statute** art 7(1)(i). Art 7(2)(i): "'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(i): "1. The perpetrator: (a) Arrested, detained or abducted one or more persons; or (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons; [...] 4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization; 5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such state or political organization." The word 'detained' would include a perpetrator who maintained an existing detention. It is understood that under certain circumstances an arrest or detention may have been lawful (see footnotes 25 and 26 of **Rome Elements**).

203 See **Rome Statute** art 7(1)(j). Art 7(2)(h): "'The crime of apartheid' means inhumane acts of a character similar to other crimes against humanity referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(j): "1. The perpetrator committed an inhumane act against one or more persons; 2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts; 3. The perpetrator was aware of the factual circumstances that established the character of the act; 4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups; 5. The perpetrator intended to maintain such regime by that conduct." It is understood that "character" refers to the nature and gravity of the act (see footnote 29 of **Rome Elements**).

204 See **Rome Statute** art 7(1)(k). **Rome Elements** includes the following elements of **Rome Statute** art 7(1)(k): "1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute; 3. The perpetrator was aware of the factual circumstances that established the character of the act." It is understood that "character" refers to the nature and gravity of the act (see footnote 29 of **Rome Elements**).

205 Stanislav Galić was found guilty of the crime against humanity of murder for shelling the civilian population of Sarajevo (see **Galić Trial**).

206 See **Rome Statute** art 8 bis (1) (**Kampala Amendment**). **Nuremberg Charter** art 6(a) defines

- 17.6.7 Act of aggression** means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. Any of the following acts, regardless of a declaration of war, qualifies as an act of aggression:
- a. Invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.
  - b. Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
  - c. Blockade of the ports or coasts of a State by the armed forces of another State.
  - d. Attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State.
  - e. Use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.
  - f. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.
  - g. Sending, by or on behalf of a State, of armed bands, groups, irregulars or mercenaries, who carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>207</sup>
- 17.6.8** It is prohibited to plan, prepare, initiate or wage acts of aggression.<sup>208</sup>

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'Crimes against peace' as "planning, preparation, initiations or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". See **Tokyo Charter** art 5(a).

207 See **Rome Statute** art 8 bis (2) (**Kampala Amendment**).

208 Signatories to the **Kellogg-Briand Pact** of 1928 pledged to renounce the use of war as an instrument of national policy. **UN Charter** art 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The crime of aggression (or 'crimes against peace') did not exist before the Nuremberg and Tokyo trials. The crime was specifically formulated to try Axis leaders and high-ranking officers for having launched war against other nations. In the **Major War Criminals Trial** the defendants were found guilty of planning, initiating and waging aggressive war against a number of States. See also **Tokyo War Crimes Trial**. Although the crime is recognised as part of customary international law, no trials for the crime of aggression have proceeded subsequent to the Nuremberg and Tokyo war crimes trials.



## SECTION 7 – DEFENCES, EXCUSES AND JUSTIFICATIONS

### INTRODUCTION

**17.7.1** A person accused of international crimes is entitled to prove that he or she should be excused of the offence in the circumstances or was justified in his or her actions. Many of these grounds are substantially similar to those in New Zealand criminal law. All defences, excuses and justifications in the Rome Statute may be argued before a New Zealand court or before a military tribunal trying an international crime.<sup>209</sup> Because customary international law is part of the common law of New Zealand, the accused may also argue any customary defence except to the extent that it is inconsistent with statutory provisions.<sup>210</sup>

### SUPERIOR ORDERS

**17.7.2** The fact that a person committed an international crime pursuant to the order of his or her government or superior does not relieve that person of criminal responsibility<sup>211</sup> unless:

- a. the person was under a legal obligation to obey the order;

209 See **IC & ICC Act 2000** s 12(1)(a)(ix) which affirms the application in New Zealand law of **Rome Statute** art 31, which specifies grounds for excluding criminal responsibility.

210 **Crimes Act 1961** s 20(1): “All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.”

211 However, the existence of a superior order may be a mitigating factor in sentencing. See **Nuremberg Charter** art 8: “The fact that the Defendant acted pursuant to order of his Government or of a superior does not relieve him of responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” **ICTY Statute** art 7(4) and **ICTR Statute** art 6(4) contain the same wording. **Nuremberg Principle IV**: “The fact that a person acted pursuant to order of his Government or of a superior does not relieve him of responsibility under international law, provided a moral choice was in fact available to him.” **Rome Statute** art 33: “(1) The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or superior in question; (b) The person did not know the order was unlawful; and (c) The order was not manifestly unlawful. (2) For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.” **IC & ICC Act 2000** s 12(1)(a)(xi) provides that art 33 of the Rome Statute, which relates to superior orders and prescription of law, applies with necessary modifications to proceedings for an offence under ss 9–11. **Cultural Property (Protection in Armed Conflict) Act 2012** s 10: “(1) In any proceedings for an offence against a provision of this Part, it is a defence for the defendant to show that the defendant: (a) was under a legal obligation to obey orders of a government or of a superior (whether military or civilian); and (b) was acting under an order of that government or superior; and (c) did not know the order was unlawful. (2) For the purposes of subsection (1) the defendant must be taken to have shown those facts if: (a) sufficient evidence is adduced to raise an issue with respect to them; and (b) the contrary is not proved by the prosecution beyond reasonable doubt. (3) The defendant may not rely on the defence in subsection (1) if the order in question was manifestly unlawful. (4) It is a question of law: (a) whether an obligation is a legal obligation; and (b) whether an order is manifestly unlawful.” **Major War Criminals Trial** (at 471): “The true test is not the existence of the order, but whether a moral choice was in fact possible”. The Military Tribunal noted in the **Einsatzgruppen Trial** (at 470) that the “obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent”. In the **Erdemović Appeal** superior orders did not, of itself, amount to a defence under the statute but is merely a factual circumstance to be considered in determining whether the defence of duress is made out on the merits (see the Trial Judgment at [15], affirmed by the Appeals Chamber at [4] of the disposition section of the appeal judgment). In **Vialle v Police** the Court of Appeal declined to decide whether there is a general defence of superior orders under New Zealand law. Members of the New Zealand forces are justified in obeying a superior command to suppress a riot unless the command is manifestly unlawful (see **Crimes Act 1961** s 47).



- b. the person did not know that the order was unlawful; or
- c. the order was not manifestly unlawful.<sup>212</sup>

**17.7.3** An order is manifestly unlawful if it would appear to a person of ordinary sense and understanding to be clearly illegal.<sup>213</sup> All orders to commit genocide and crimes against humanity are, of necessity, manifestly unlawful.<sup>214</sup>

**17.7.4** It is for the court to decide the application of the defence to the case before it. Expression of the defence does not guarantee exemption from criminal responsibility in all cases. A court is more likely to apply it in circumstances of orders received in the heat of combat, than those orders which indicate a calculated intent to commit atrocity.<sup>215</sup> Similarly, it is more likely to be accepted when the recipient is low in rank.<sup>216</sup> If not accepted as a defence, superior orders may be considered in mitigation of punishment.<sup>217</sup>

## DURESS

**17.7.5** **Duress** means that the accused did not act of his or her own free will, but was forced to carry out the crimes instigated by another.<sup>218</sup> The defence can only arise from an imminent threat of death or serious bodily harm.<sup>219</sup> A general risk of punishment or adverse consequence at some time in the future does not suffice. The defence of duress does not offer a complete defence to a member of the armed forces charged with a crime against humanity or of a war crime involving the killing of innocent human beings.<sup>220</sup> Furthermore, an accused cannot claim

<sup>212</sup> See **Rome Statute** art 33(1) and **IC & ICC Act 2000** s 12(1)(a)(xi).

<sup>213</sup> The standard is whether a person 'of ordinary sense and understanding' would have known the order to be unlawful. See **Calley Appeal** at [9]: "In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement." See also **Finta Appeal** at 92: "The identifying mark of a 'manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: 'forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of 'manifest' illegality required in order to annul the soldier's duty of obey and render him criminally responsible for his actions."

<sup>214</sup> See **Rome Statute** art 33(2). Orders to commit genocide or crimes against humanity are manifestly unjust for the purposes of art 33.

<sup>215</sup> See **Einsatzgruppen Trial** at 377.

<sup>216</sup> **Erdemović Trial** at [18]: Superior orders was more likely to count as mitigation when the accused was low ranked.

<sup>217</sup> See **ICTY Statute** art 7(4) and **ICTR Statute** art 6(4). Superior orders only count as mitigation when the order influenced the behaviour of the accused, not when he or she was prepared to carry out the criminal act anyway (see **Erdemović Sentencing Judgment** at [17]).

<sup>218</sup> In the **Einsatzgruppen Trial** (at 481) the Tribunal held that members of squads exterminating ethnic minorities could not rely on the defence of duress since it was established that soldiers not suited to such activities were relieved of their duties and reassigned to regular units.

<sup>219</sup> **Rome Statute** art 31(1)(d) provides that it is a defence that the "conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control." This defence is available in a New Zealand court for offences under ss 9–11 of the **IC & ICC Act 2000** by virtue of s 12(1)(a)(ix) of that Act.

<sup>220</sup> See **Erdemović Appeal** at [19]. In **Erdemović Appeal (Separate Opinion)** (see [84–85]) Judges McDonald and Vohrah were of the view that, in the face of a threat to themselves, the law expects

that his or her actions arose from coercion if they in fact coincided with what the person intended to do anyway.

- 17.7.6** Under New Zealand criminal law, the defence of duress is called ‘compulsion’.<sup>221</sup> Compulsion can never be a defence for murder, attempted murder, serious offences against the person, kidnapping and robbery.<sup>222</sup> The existence of compulsion may be considered in mitigation of punishment.

## OFFICIAL CAPACITY

- 17.7.7** The official capacity, position or rank of a person:
- a. affords no defence, excuse or justification for international crimes before the ICC or an international tribunal, unless it is overridden by specific treaty provisions;<sup>223</sup>
  - b. is not considered in mitigation of punishment;<sup>224</sup> and
  - c. is not a ground for refusing to surrender a person for trial for breaches of LOAC by an international or foreign tribunal or court.<sup>225</sup>
- 17.7.8** Diplomats, serving Heads of State or Heads of Government may be able to rely on their official capacity to assert immunity from prosecution before a domestic court.<sup>226</sup>

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heroism from soldiers who are trained to display greater fortitude than civilians and who must have contemplated the possibility of a violent death. However, strong dissenting judgments considered that duress may be a defence. See also **Stalag Luft III Trial**, **Feurststein Trial** and **Holzer Trial** where duress provided no defence to the killing of innocent people.

221 **Crimes Act 1961** s 24(1): “Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he or she believes that the threats will be carried out and if he or she is not a party to any association or conspiracy whereby he or she is subject to compulsion.”

222 See **Crimes Act 1961** s 24(2).

223 **Rome Statute** art 27: “(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute ground for a reduction in sentence. (2) Immunities and special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” See also **Nuremberg Charter** art 7 and **Nuremberg Principle III**. In the **Major War Criminals Trial** the International Military Tribunal held that a person who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of a State if the State moves outside its competence under international law. In the **Tokyo War Crimes Trial** Oshima’s defence of diplomatic immunity as ambassador to Germany was held to have no relation to crimes before the tribunal. In the **Pinochet Case** (at [77]) it was held that Head of State immunity cannot be relied upon in respect of acts of torture allegedly committed after the Torture Convention had been ratified by affected States. In the **Milosević Decision**, the accused’s position as former President of Yugoslavia did not mean that the ICTY did not have the competence to try him. In the **Kambanda Trial** the ICTR had jurisdiction to try the accused for genocide notwithstanding his position of Prime Minister of Rwanda at the time of the crime.

224 **Rome Statute** art 27(1) provides that official capacity shall not, in and of itself, constitute a ground for reduction of sentence. See **Nuremberg Charter** art 7.

225 **IC & ICC Act 2000** s 31(1): “The existence of any immunity or special procedural rule attaching to official capacity of any person is not a ground for: (a) refusing or postponing the execution of a request for surrender or other assistance to the ICC; or (b) holding that a person is ineligible for surrender or transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide assistance sought in a request by the ICC.” See also **Charles Taylor Immunity Decision**.

226 See **Arrest Warrant Case**.

**NO STATUTE OF LIMITATIONS FOR INTERNATIONAL CRIMES**

**17.7.9** There is no limitation period applicable to breaches of LOAC. Persons can be tried for breaches of LOAC no matter how long ago they occurred.<sup>227</sup>

**CRIMES OF OTHERS DO NOT PROVIDE EXCUSE**

**17.7.10** The defence of *tu quoque* (you also) is not available in respect of alleged breaches of LOAC or other international crimes. An accused cannot use as an excuse the fact that the opposing force has committed similar crimes, either before or after the commission of the crime by the accused.<sup>228</sup>

**17.7.11** The actions of other forces may be relevant where disregard of a rule of customary international law is so general as to indicate that it can no longer be regarded as being the practice of States.<sup>229</sup> The argument must be applied with caution. Reliance on general disregard for a law as authority for the proposition that the law no longer exists, can cause a downward spiral of brutality.

**SELF-DEFENCE, DEFENCE OF ANOTHER AND DEFENCE OF PROPERTY**

**17.7.12** A person accused of an international crime may plead self-defence where the act in question was performed:

- a. in order to defend or protect the accused or another person from imminent and unlawful attack; or
- b. in respect of war crimes only in order to protect property from imminent and unlawful attack where:
  - (1) the property was essential for the survival of the accused or another person, or
  - (2) the property was essential for the accomplishment of a military mission,

provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.<sup>230</sup>

227 **Rome Statute** art 29: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.” **Rome Statute** art 29 is incorporated into New Zealand law in **IC & ICC Act 2000** s 12(1)(vii). In addition, **Criminal Procedure Act 2011** s 25(1) provides that there is no limitation period in respect of international crimes contained in Schedule 1 of the Act. See also **ICRC Customary IHL** rule 160.

228 The bulk of LOAC obligations are unconditional and not based on reciprocity. In the **High Command Trial** the Military Tribunal held that an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused. In the **Kupreškić Trial** (at [511]) the Trial Chamber held that “the *tu quoque* defence has no place in contemporary international humanitarian law”. See also **Milošević Appeal** at [250].

229 In the **Major War Criminals Trial** Dönitz was relieved of punishment for unrestricted U-boat warfare on the basis of evidence that the British Admiralty had issued similar orders and that unrestricted submarine warfare was carried on by the US. In the **Skorzeny Trial** defence evidence by a British special operative that the use of enemy uniforms and insignia in WWII was so widespread that the prohibition on such use no longer reflected the usages of war was accepted. Neither argument could now succeed due to the development of LOAC.

230 See **Rome Statute** art 31(1)(c) and **IC & ICC Act 2000** s 12(1)(a)(ix).

**17.7.13** The fact that the accused was involved in defensive operations is not, in itself, a ground for excluding criminal responsibility.<sup>231</sup> In combat, members of the armed forces must constantly defend themselves, but this alone does not excuse breaches of the law. The defence can only succeed where the law was breached in order to avoid imminent peril from an attack which was, in itself, unlawful. Defence of property, although allowed for in the Rome Statute article 31(1)(c), is unlikely to excuse war crimes except in the rarest of circumstances. It is unlikely that self-defence could realistically be pleaded in respect of genocide or crimes against humanity. In respect of the crime of aggression, self-defence of the individual from imminent and unlawful attack must be distinguished from the inherent right to self-defence of States preserved in UN Charter article 51.

## NECESSITY

**17.7.14** Necessity as a defence applies where the accused was not entirely deprived of choice of action but was faced with a choice between two unlawful acts.<sup>232</sup> Necessity affords no general authority for the breach of LOAC. For example, the need to obtain information from persons under interrogation does not justify torture or inhuman treatment.<sup>233</sup>

**17.7.15** **Military necessity** is distinguishable from necessity as a defence. Military necessity is the fundamental principle of LOAC justifying legitimate use of armed force to achieve the mission. Military necessity does not provide a defence to breaches of LOAC, in particular, those rules which are absolute, such as the prohibition on the wilful killing of protected persons or the use of torture.<sup>234</sup>

231 See **Rome Statute** art 31(1)(c). In the **Kordić & Čerkez Trial** (at [452]) the Trial Chamber drew attention to the wording of art 31(1)(c) of the Rome Statute, namely that the fact that a person was involved in a defensive operation conducted by forces shall not “in itself” constitute a ground for excluding criminal responsibility. Therefore, any argument raising self-defence in such circumstances “must be assessed on its own facts and in the specific circumstances relating to each charge”.

232 See **Tifaga v Dept of Labour** where the New Zealand Court of Appeal found that the appellant was not deprived of choice of a lawful act and therefore had no defence.

233 In the **Committee Against Torture v Israel** case the Court commented that a defence of necessity may be open to a person who had used physical interrogation methods for the purpose of saving human lives, although even this was doubtful. In the **Einsatzgruppen Trial** (at 462–463) the defence of necessity was rejected because the factual basis for the necessity (to eradicate the threat to Europe of Bolshevism by extermination of Jews) was fanciful. Under this theory any belligerent who is hard-pressed would be allowed unilaterally to abrogate the laws and customs of war. With such facile disregarding of resolutions of the rules of war would quickly disappear. In the **Flick Trial** six German industrialists were accused of, among other things, using slave labour. They argued (at 18) the defence of necessity on the grounds that refusing to use slave labour to bring German war production to full capacity “would be construed as sabotage and would be treated with summary and severe punishments”. In the notes (at 49) on the trial it is reported that, referring to the **Pohl Trial**, the Tribunal said: “The Tribunal was willing to admit, however, that it was possible for an accused to set up a successful plea of necessity if he employed such labour only because it was supplied to him by the State authorities and if refusal to use would have resulted in sufficiently serious consequences to himself”. In the **Krupp Trial** (at 149) the Tribunal held that where the compelled behaviour coincides with what the defendant desires to do in any event, the defence of necessity is not available. Here the defendants had demonstrated not only a willingness, but an “ardent desire to employ forced labour”.

234 For example, provisions which allow derogation in case of military necessity are limited to such matters as attacking civilian objects and allowing relief supplies to be delivered. **Geneva Protocol I** art 54(5) provides that derogation from the prohibition on attacking or destroying objects which are indispensable to the survival of the civilian population “may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity”. Art 62(1) states that “civil defence organisations shall be entitled to perform their civil defence tasks except in case of imperative military necessity” (see also art 67(4)), and art 71(3) states that “only in case of imperative military necessity may the activities of the relief personnel [transporting and distributing relief consignments to the civilian population] be limited or their movements be temporarily

- 17.7.16** Necessity is also recognised as a customary law justification for the actions of a State when the action was the only way it could safeguard an essential interest against grave and imminent peril.<sup>235</sup> It can only be invoked under certain strictly defined conditions which must be cumulatively satisfied. The State concerned is not the sole judge of whether those conditions have been met.

## MISTAKE

- 17.7.17** Mistake of fact excludes criminal responsibility only if it negates the mental element required by the crime.<sup>236</sup> Given the confusion of combat and the speed of decision-making, mistake of fact is by no means rare. For example, a commander may order an artillery attack on a building believing it to be an enemy headquarters, when in fact it has ceased to be used as such and civilians have now moved into it as a refuge. The commander has not intentionally targeted the civilians, so a charge of wilful killing cannot succeed. The commander may still face disciplinary action before a domestic court or military tribunal, however, if the mistake was due to a failure to adequately verify the target thereby constituting manslaughter or negligent performance of duty.<sup>237</sup>
- 17.7.18** A mistake of law as to whether a particular type of conduct is an international crime is not a ground for excluding criminal responsibility. It may, however, be a ground for excluding responsibility if it negates the mental element required by such a crime.<sup>238</sup>

## MENTAL INCAPACITY AND INTOXICATION

- 17.7.19** It is a defence that the accused suffers from a mental disease or defect that destroys the capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.<sup>239</sup>
- 17.7.20** It is a defence that the accused was in a state of intoxication which destroyed his or her capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person had become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that as a result of the intoxication, he or she was likely to engage in criminal conduct.<sup>240</sup>

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restricted". **Rome Statute** art 8(23)(a)(iv) states that extensive destruction and appropriation of property are war crimes if carried out unlawfully and wantonly and not justified by military necessity. **High Command Trial** (at 126): "The rules of international law must be followed even if this results in the loss of a battle or even a war." See also **Peleus Trial**, **Milch Trial** and **Krupp Trial**.

235 In the **Gabčíkovo-Nagymaros Project** (at [51]) the ICJ observed that necessity as a "ground for precluding wrongfulness can only be accepted on an exceptional basis [...] Thus, according to the [International Law] Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied". In its **Nuclear Weapon Opinion** (at [41]) the ICJ stated that "the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law". Certain measures may be lawful when the life of the State itself is threatened, which would not be in other circumstances (at [97]). See also **Wall on Palestinian Territory Opinion**.

236 See **Rome Statute** art 32(1).

237 See **Crimes Act 1961** s 171, **AFDA** ss 73(1)(d) and 74(1), **DM 69** (2 ed) Volume 1.

238 **Rome Statute** art 32(2) provides that a "mistake of law may [...] be a ground for excluding criminal responsibility if it negates the mental elements required by such a crime, or as provided for in article 33 [superior orders]".

239 See **Rome Statute** art 31(1)(a). See, however, **Celibíć Appeal** in which diminished mental responsibility was not accepted as a defence, only as a mitigating factor. For the defence of insanity in New Zealand law see **Crimes Act 1961** s 23.

240 See **Rome Statute** art 31(1)(b). For intoxication in New Zealand law see **R v Kamipeli**.



## SECTION 8 – FAIR TRIAL

## RIGHT TO A FAIR TRIAL

**17.8.1** A person facing trial for an international crime, regardless of the tribunal, remains entitled to the status he or she holds under LOAC. For example, persons cannot be deprived of PW status simply because they have been accused of committing war crimes.

**17.8.2** Every person charged with an international crime must be granted a public and fair trial.<sup>241</sup> The accused has the right:

- a. to be treated equally without discrimination;<sup>242</sup>
- b. to be informed without delay, in detail, and in a language he or she can understand, the nature of the charges;<sup>243</sup>
- c. to be presumed innocent until proven guilty;<sup>244</sup>
- d. to proceedings conducted in a language which he or she can understand or else an interpreter must be provided;<sup>245</sup>
- e. to be afforded all necessary rights and means of defence, in particular, to be given adequate time to prepare a defence and consult with counsel of his or her choice;<sup>246</sup>
- f. to have the opportunity to bring witnesses in his or her defence, and to cross-examine prosecution witnesses;<sup>247</sup>
- g. to be present during the trial;<sup>248</sup>
- h. not to be compelled to testify against himself or herself, or to confess guilt;<sup>249</sup>
- i. not to be tried for an offence which was not a crime at the time it was committed;<sup>250</sup>

241 See **Rome Statute** art 67(1) and **Nuremberg Principle V**.

242 See **Rome Statute** art 67(1), **Geneva Protocol I** art 75, **ICCPR** art 14(1), **ICTY Statute** art 21(1), **ICTR Statute** art 20(1) and Chapter 4.

243 See **Rome Statute** art 55(2)(a), **Geneva Protocol I** art 75(3), **Geneva Protocol II** art 6(2)(a), **ICCPR** art 14(3)(a), **Nuremberg Charter** art 16(a) and **NZBORA** s 24(a).

244 See **Rome Statute** art 66(1), **Geneva Protocol I** art 75(4)(d), **Geneva Protocol II** art 6(2)(d), **ICTY Statute** art 21(3), **ICTR Statute** art 20(3), **ICCPR** art 14(2) and **NZBORA** s 25(c).

245 See **Rome Statute** art 55(1)(c), **ICTY Statute** art 21(4)(f), **ICTR Statute** art 20(4)(f), **ICCPR** art 14(3)(f) and **NZBORA** s 24(g).

246 See **Rome Statute** art 67(1)(b), **ICTY Statute** art 21(4)(b), **ICTR Statute** art 20(4)(b), **ICCPR** art 14(3)(b) and **NZBORA** s 24(d).

247 See **Rome Statute** art 67(1)(e), **Geneva Protocol I** art 75(4)(g), **ICTY Statute** art 21(4)(e), **ICTR Statute** art 20(4)(e), **ICCPR** art 14(3)(e), **Nuremberg Charter** art 16(e) and **NZBORA** s 25(f).

248 See **Rome Statute** art 63(1), **Geneva Protocol I** art 75(4)(e), **Geneva Protocol II** art 6(2)(e), **ICTY Statute** art 21(4)(d), **ICTR Statute** art 20(4)(d), **ICCPR** art 14(3)(d) and **NZBORA** s 25(e).

249 See **Rome Statute** art 67(1)(g), **Geneva Protocol I** art 75(4)(f), **Geneva Protocol II** art 6(2)(f), **ICTY Statute** art 21(4)(g), **ICTR Statute** art 20(4)(g), **ICCPR** art 14(3)(g) and **NZBORA** s 25(d).

250 See **Rome Statute** art 22(1), **Geneva Protocol I** art 75(4)(c), **Geneva Protocol II** art 6(2)(c), **ICCPR** art 15(1) and **NZBORA** s 26(1).

- j. to be tried without undue delay;<sup>251</sup>
- k. to be convicted only on the basis of individual responsibility;<sup>252</sup>
- l. not to be subject to collective punishments;<sup>253</sup> or
- m. to be advised of judicial and other remedies and applicable time limits.

251 See **Rome Statute** art 67(1)(c), **ICTY Statute** art 21(4)(c), **ICTR Statute** art 20(4)(c), **ICCPR** art 14(3)(c) and **NZBORA** s 25(b).

252 See **Rome Statute** art 25(2), **Geneva Protocol I** art (75)(4)(b), **Geneva Protocol II** art 6(2)(b), **ICTY Statute** art 7(1) and **ICTR Statute** art 6(1).

253 See **Geneva Protocol I** art (75)(2)(d) and **Geneva Protocol II** art 4(2)(b).



## SECTION 9 – PUNISHMENT OF INTERNATIONAL CRIMES

### GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

**17.9.1** The punishment in New Zealand law for genocide, conspiring or agreeing to commit genocide,<sup>254</sup> committing a crime against humanity<sup>255</sup> or committing a war crime<sup>256</sup> is:

- a. if the offence involves wilful killing, the same penalty as for murder (a presumption of a sentence of imprisonment for life);<sup>257</sup> or
- b. imprisonment for life or a lesser term in any other case.

**17.9.2** Imprisonment for life requires the imposition of a minimum period of imprisonment, which must be a period of not less than 10 years.<sup>258</sup>

### GRAVE BREACHES OF GENEVA CONVENTIONS OR PROTOCOL I

**17.9.3** The punishment for a grave breach of the Geneva Conventions or Protocol I under the Geneva Conventions Act 1958 is:

- a. if the offence involves wilful killing of a person protected by the relevant Geneva Convention or the First Protocol, the same penalty as for murder (presumption of a sentence of imprisonment for life);<sup>259</sup> or
- b. imprisonment for no more than 14 years in any other case.<sup>260</sup>

### PUNISHMENT FOR OFFENCES RELATING TO NUCLEAR WEAPONS

**17.9.4** The maximum punishment for acquiring, manufacturing, stationing, or testing a nuclear weapon under New Zealand law is imprisonment for a term not exceeding 10 years.<sup>261</sup>

### PUNISHMENT FOR OFFENCES RELATING TO BIOLOGICAL WEAPONS

**17.9.5** The maximum punishment for acquiring, manufacturing, stationing, or possessing a biological weapon under the New Zealand law is imprisonment for a term not exceeding 10 years.<sup>262</sup>

254 See **IC & ICC Act 2000** s 9(3).

255 See **IC & ICC Act 2000** s 10(3).

256 See **IC & ICC Act 2000** s 11(3).

257 **Crimes Act 1961** s 172(1): "Every one who commits murder is liable to imprisonment for life."  
**Sentencing Act 2002** s 102: "(1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust. (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so." See also ss 86C, 86D, 86E and 103. The Sentencing Act 2002 does not apply to proceedings under the AFDA. For sentencing under the AFDA see **DM 69** (2 ed) Volume 1, Chapter 8, Annexes A and B, and **DFO 14/2011**.

258 See **Sentencing Act 2002** s 103. The Sentencing Act 2002 does not apply to proceedings under the AFDA. For sentencing under the AFDA see **DM 69** (2 ed) Volume 1, Chapter 8, Annexes A and B, and **DFO 14/2011**.

259 See **Crimes Act 1961** s 172(1).

260 See **Geneva Conventions Act 1958** s 3(4).

261 **NZNFZDAC Act 1987** s 14(2): "Every person who commits an offence against this Act is liable on conviction to imprisonment for a term not exceeding 10 years."

262 See **NZNFZDAC Act 1987** s 14(2).

**PUNISHMENT FOR OFFENCES RELATING TO CHEMICAL WEAPONS**

- 17.9.6** The maximum punishment for acquiring, manufacturing, transferring or using chemical weapons under New Zealand law is imprisonment for life<sup>263</sup> or a fine not exceeding \$1,000,000.<sup>264</sup>

**PUNISHMENT FOR OFFENCES RELATING TO RIOT CONTROL AGENTS**

- 17.9.7** The maximum punishment for intentionally or recklessly using riot control agents as a method of warfare under New Zealand law is imprisonment for life<sup>265</sup> or a fine not exceeding \$1,000,000.<sup>266</sup>

**PUNISHMENT FOR OFFENCES RELATING TO ANTI-PERSONNEL MINES**

- 17.9.8** The maximum punishment for acquiring, manufacturing, transferring or using anti-personnel mines (APMs) under New Zealand law is imprisonment for a term not exceeding seven years or a fine of no more than \$500,000.<sup>267</sup>

**PUNISHMENT FOR LOOTING**

- 17.9.9** The maximum punishment for looting under the AFDA is imprisonment for life.<sup>268</sup>

**PUNISHMENT FOR OFFENCES OF TORTURE**

- 17.9.10** The punishment for torture under the Crimes of Torture Act 1989 is imprisonment for a period not exceeding 14 years.<sup>269</sup>

**PUNISHMENT FOR OFFENCES RELATING TO MERCENARY ACTIVITIES**

- 17.9.11** The punishment for mercenary activities is imprisonment for a period not exceeding 14 years.<sup>270</sup>

**NO DEATH PENALTY FOR INTERNATIONAL CRIMES IN NEW ZEALAND**

- 17.9.12** New Zealand has abolished the death penalty. Any person tried by a New Zealand court for an international crime cannot, therefore, be subject to this punishment.<sup>271</sup> Persons found guilty of offences by the ICC cannot be subjected to the death penalty.<sup>272</sup>

263 Imprisonment for life requires the imposition of a minimum period of imprisonment, which must be a period of not less than 10 years (see **Sentencing Act 2002** s 103).

264 See **Chemical Weapons (Prohibition) Act 1996** s 6(1).

265 Imprisonment for life means the imposition of a minimum period of imprisonment, which must be a period of not less than 10 years (see **Sentencing Act 2002** s 103).

266 See **Chemical Weapons (Prohibition) Act 1996** s 8.

267 See **Anti-Personnel Mines Prohibition Act 1998** s 7(3).

268 See **AFDA** s 31(a). Looting, particularly when carried out as part of a widespread and systematic attack, is also punishable as a war crime under the **IC & ICC Act 2000** s 11. Looting of protected persons or objects is a grave breach of the Geneva Convention or Geneva Protocol I and is punishable under the **Geneva Conventions Act 1958** s 3.

269 See **Crimes of Torture Act 1989** s 3. Torture of protected persons is also punishable under the **Geneva Conventions Act 1958** s 3 and the **IC & ICC Act 2000** ss 10 and 11.

270 See **Mercenary Activities (Prohibition) Act 2004** ss 7–11. Mercenary activities are all punishable by imprisonment for 14 years.

271 **Abolition of the Death Penalty Act 1989**. Approximately 25 percent of States retain the death penalty. If a member of the NZDF were to face trial for a breach of LOAC in another jurisdiction it is possible that the local courts could apply the death penalty in the event of a conviction. See however, **Geneva Convention III** arts 87 and 100.

272 See **Rome Statute** art 77(1).

**PUNISHMENT BEFORE INTERNATIONAL CRIMINAL TRIBUNALS**

**17.9.13** Ad hoc tribunals may impose punishments in accordance with their statutes<sup>273</sup> for aggression, genocide,<sup>274</sup> crimes against humanity,<sup>275</sup> and war crimes.<sup>276</sup> Tribunals may also require any proceeds of crime to be returned to the victims.<sup>277</sup>

**PUNISHMENT BEFORE THE INTERNATIONAL CRIMINAL COURT**

**17.9.14** If found guilty of an international crime under the Rome Statute, a person is liable to be sentenced to:<sup>278</sup>

- a. imprisonment for a maximum of 30 years;
- b. imprisonment for life when the offence is of an extremely serious nature;
- c. a fine; and/or
- d. forfeiture of property derived from the commission of the crime.

<sup>273</sup> See for example, **ICTY Statute** art 24(1) and **ICTR Statute** art 23(1).

<sup>274</sup> In the **Kambanda Trial** the ICTR Trial Chamber had to balance mitigating factors, including a guilty plea, against aggravating factors, especially the fact that Kambanda occupied a high ministerial post at the time he committed the crimes. In the event, the Trial Chamber sentenced him to life imprisonment for genocide and the Appeals Chamber affirmed the sentence.

<sup>275</sup> In the **Major War Criminals Trial** the International Military Tribunal applied the most severe punishments in respect of crimes against humanity. Of the 16 defendants found guilty of crimes against humanity, 12 were sentenced to hang, one to life imprisonment, two to imprisonment for 20 years, and one for 15 years. In the **Erdemović Appeal** (at [10]) the ICTY Appeal Chamber approved the comment of the Trial Chamber in its sentencing decision, namely that “there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present”. See also **Akeyasu Trial**.

<sup>276</sup> **Furundžija Appeal** at [240]: The ICTY Appeal Chamber observed that no principle requires war crimes to be treated less harshly than crimes against humanity. Determination of the gravity of the offence requires consideration of the particular circumstances of the case. An individual convicted of war crimes can be sentenced to imprisonment for a term up to and including the remainder of his life.

<sup>277</sup> See **ICTY Statute** art 24(3) and **ICTR Statute** art 23(3).

<sup>278</sup> See **Rome Statute** art 77.

## SECTION 10 – REPRISALS

**17.10.1** A **reprisal** is an action taken by a party to conflict, which would otherwise be unlawful, for the purpose of forcing an opposing party to comply with LOAC. To be justified, a reprisal must be preceded by a breach of LOAC by the other party.<sup>279</sup>

**17.10.2** Reprisals are not a means of punishment or arbitrary vengeance but are rather a means of coercion which can be applied only when other methods of encouraging or requiring an opposing force to comply with LOAC have failed.<sup>280</sup> The power is essentially limited to attacks on persons and objects that were already lawful targets.<sup>281</sup> It may, however, involve using means or methods of warfare from which the force had, until that time, refrained.<sup>282</sup>

**17.10.3** In order to be lawful, a reprisal must be:<sup>283</sup>

- a. in direct response to a serious and continuing disregard for LOAC and directed at the party responsible for that breach;<sup>284</sup>
- b. proportionate to the breach to which it responds;<sup>285</sup>
- c. publicised;<sup>286</sup>
- d. conducted only after a formal warning has gone unheeded;
- e. authorised at the highest level of government;
- f. conducted against a target that is not subject to specific exclusion from reprisal under LOAC (see below);<sup>287</sup> and
- g. terminated as soon as the opposing force complies with LOAC.

279 See the definition in the **Hostages Trial** at 3 and **ICRC Customary IHL** rule 145.

280 See **Hostages Trial** at 3.

281 For example, **Geneva Protocol I** prohibits reprisals directed at wounded, sick, shipwrecked and medical personnel (art 20), the civilian population (art 51(6)), civilian objects (art 52(1)), cultural objects and places of worship (art 53(c)), objects indispensable to survival of the civilian population (art 54(4)), the natural environment (art 55(2)) and works or installations containing dangerous forces (art 56(4)). **Geneva Convention III** art 13(3) prohibits reprisals against PWs and detainees.

282 Although some States (eg the UK) declared reservation to Geneva Protocol I preserving their right to engage in a range of reprisals, New Zealand has not entered any such reservation.

283 See discussion of reprisals in **Kupreškić Trial** at [535].

284 In the **Hostages Trial** (see 65) it was held that it is prohibited to take reprisals in one place for an act against the occupation forces committed at some other place. To permit such a practice means that there would be no deterrent effect upon the community where the offence was committed.

285 In the **Kappler Trial** the massacre of 335 Italians in the Ardeatine Cave was held to be a disproportionate response to the death of 33 German policemen in an ambush by partisans. See also **Hostages Trial**, **Naulilaa Case**, **Kesselring Trial** and **Kupreškić Trial**.

286 In the **Bruns Appeal** (at 19) the Norwegian Supreme Court stated that if the aim of reprisals is to change the adversary's conduct and force him to keep to the rules of lawful warfare, then the reprisals must be made public and announced as such. During the whole of the occupation there was no indication from the Germans that their acts of torture were to be regarded as reprisals.

287 For example, **Geneva Protocol I** prohibits reprisals directed at wounded, sick, shipwrecked and medical personnel (art 20), the civilian population (art 51(6)), civilian objects (art 52(1)), cultural objects and places of worship (art 53(c)), objects indispensable to the survival of the civilian population (art 54(4)), the natural environment (art 55(2)) and works or installations containing dangerous forces (art 56(4)). **Geneva Convention III** art 13(3) prohibits reprisals against PWs and detainees.

**17.10.4** Members of the NZDF are not to conduct reprisals against persons and objects protected by LOAC, namely:

- a. PWs, retained personnel, detainees and internees;<sup>288</sup>
- b. the sick, wounded or shipwrecked, medical personnel, medical units, hospital ships and medical transports and aircraft;<sup>289</sup>
- c. civilians and civilian objects;<sup>290</sup>
- d. cultural property and places of worship;<sup>291</sup>
- e. the natural environment;<sup>292</sup>
- f. works or installations containing dangerous forces;<sup>293</sup> or
- g. UN or associated personnel, or UN property.<sup>294</sup>

**17.10.5** NZDF commanders do not have authority to order reprisals of their own initiative. Members of the NZDF are not to conduct reprisals against any person or object unless expressly ordered by CDF on the authority of the Minister of Defence. If faced with breaches of LOAC by the opposing force, the commander of a New Zealand force is to bring the matter to the attention of CDF without delay.

288 Under **Geneva Convention III** art 13(3) and **Geneva Convention IV** art 33(3) reprisals against protected persons and their property are prohibited. Reprisals against civilians who find themselves in the hands of an adversary are prohibited (see *Kupreškić Trial*). This rule protects detainees and internees and is applicable in both IAC and NIAC. See **ICRC Customary IHL** rule 146.

289 See **Geneva Convention I** art 46, **Geneva Convention II** art 47, **Geneva Protocol I** art 20 and **ICRC Customary IHL** rule 146.

290 See **Geneva Convention IV** art 33, **Geneva Protocol I** art 51(6), **Conventional Weapons Protocol II** art 3(7), *Kupreškić Trial* and **ICRC Customary IHL** rule 146.

291 **Geneva Protocol I** art 53(c), **Hague Cultural Property Convention** arts 4(4) (IAC) and 19(1) (NIAC) and **ICRC Customary IHL** rule 147.

292 See **Geneva Protocol I** art 55(2).

293 See **Geneva Protocol I** art 56(4).

294 See **Safety of Peacekeepers Convention** art 7(1), **Crimes (IPP, UN and AP, and Hostages) Act 1980** ss 3–6, **Rome Statute** art 8(2)(b)(iii), **ICRC Customary IHL** rule 33 and Chapter 14.

## Chapter 18

# LAW OF ARMED CONFLICT TRAINING PROGRAMME AND LEGAL ADVICE FOR COMMANDERS

To be issued.