

Danish Ministry of Defence • Defence Command Denmark

MILITARY MANUAL

ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED
FORCES IN INTERNATIONAL OPERATIONS

COLOPHON

Military Manual on international law relevant to Danish armed forces in international operations

Danish Ministry of Defence
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The printed version of the Military Manual published in this edition was produced on the basis of the 2010-2014 Defence Agreement in which the Parties to Agreement decided that Denmark, like many other States should have a military manual. The manual was produced by a task force established in 2012 under the auspices of the joint Operations Staff at Defence Command Denmark. The task force answered to a select steering committee headed by the Chief of the Joint Operations Staff and with representatives from the staffs, the Danish Ministry of Defence, the Ministry of Justice, the Ministry of Foreign Affairs of Denmark, the Royal Danish Defence College and the Office of the Military Prosecutor General.

Prefaces

Foreword by the Danish Minister of Defence

Over recent decades, the Danish armed forces have participated actively in international land, sea, and air operations. The question of Denmark's compliance with international law, including international humanitarian law, has become part of the daily business of the Danish Defence and is a subject of growing interest from political quarters as well as from the general public at large.

Therefore, I am extremely pleased with the publication of this Manual – the first of its kind in Denmark. The Manual is a result of the Danish Defence Agreement for the period 2010-2014 in which a broad spectrum of political parties agreed that Denmark should have its own military manual with the aim of further strengthening the Danish Defence's training in, and application of, international humanitarian law and the law of armed conflict.

This Manual provides the Danish Defence with a comprehensive perspective for understanding their obligations under international law when Danish soldiers participate in international operations. For instance, this might include such issues as the identification of military objectives, the use of force, and protective measures for the civilian population, the wounded and sick, and persons deprived of liberty. Moreover, the Manual includes many important lessons learned from the Danish armed forces' participation in international opera-

tions over recent decades.

The Manual will be a living document reflecting dynamic developments, for instance, in case law from the European Court of Human Rights as well as practical experience the Danish Defence gathers from deployment in highly diverse international operations.

Over the years, Denmark has deployed several military contingents that have taken on a variety of tasks under very different and often very difficult conditions. The Manual will provide a legal framework for planning the participation of the Danish Defence in international operations and, in particular, for preparing operational orders tailored to the specific international operation.

I would like to extend my sincere thanks and appreciation to the many people – both inside and outside the Danish Defence and government departments involved – who have contributed to the extensive and thorough work on the Manual.



Peter Christensen

Foreword by the Chief of Defence, Denmark

When the “Military Manual” project was approved as part of the Danish Defence Agreement 2010-2014, it was imperative for the finished product that the Manual add value to the armed forces of Denmark. I believe to a high degree that this has been accomplished. The Manual offers a broad spectrum of specific instructions and directions that are useful for the conduct of military operations and, in the years ahead, will serve as an important tool for my planning staffs, commanders, and military legal advisers here in Denmark and in the missions.

It gives me great pleasure to note that the origin of this Manual may be traced to the findings from an in-depth study of the experience gained by the Danish Defence over the last 15-20 years, providing the framework for handling in the future a wide array of difficult questions with which the Danish Defence has been preoccupied during that period.

The Manual will provide a platform for all training of military and civilian personnel of the Danish Defence in the rules of international law during international military operations. Since the Manual is very comprehensive, it is necessary to offer follow-up training courses and supplementary implementation tools such as an update of the soldier's cards and other directives in the area. Therefore, I have allocated the necessary resources to undertake this important task.

I would like to thank the many people who have contributed to this Manual, including the many military personnel who devoted time to commenting on draft chapters to ensure proper focus on military use and relevance.



Peter Bartram

Preface by the Editor-in-Chief

by **JES RYNKEBY KNUDSEN** EDITOR-IN-CHIEF OF PROJECT TEAM

This Manual is the first Danish manual on international law applicable to Danish armed forces engaged in international military operations. It has been drawn up in cooperation with the units and agencies of the Danish Defence, and it has been written specifically for the units and agencies of the Danish Defence.

During the slightly more than three years of the existence of the project team, I have enjoyed working with four talented consultants in the team of people who have written the texts for the project steering group. They are the legal advisers Michaela Grunth, Ulrik Graff, and Pedro Maria Leopold Watts Gauguin da Fonseca as well as Major Tom Elvius Brisson. Chapter 14 on naval operations was written by the military legal advisers Mathias Buch and Iben Yde, both of whom are affiliated with the Royal Danish Navy and, together, possess considerable international experience in the operations of the Navy.

In putting together the project team, I made a consistent effort to find an appropriate balance between solid knowledge of international law and international military legal experience. Accordingly, the project team overall brings practical experience from Danish military deployments to Bosnia and Herzegovina, Albania, Iraq, Afghanistan, Libya, and anti-piracy operations off the Horn of Africa. The Manual addresses various difficult questions

of international law, which have required the consultation of national and international specialists. The contribution of these people deserves acknowledgement: Peter Vedel Kessing of the Danish Institute for Human Rights, Andreas Laursen of the Danish Public Prosecutor for Serious Economic and International Crime, and Preben Søegaard Hansen of the Danish Red Cross. The project has also been engaged in cooperation with a range of international experts in which regard I would like to offer my special thanks to Professor Françoise Hampson and Professor Charles Garraway (both of the University of Essex) and to Dr. William Boothby for their valuable input and inspiration.

Pernille Steensbech Lemée of FOKUS Kommunikation has assisted in developing the project dissemination concept and proofread the chapters as they were completed to ensure specifically that the Manual is able to disseminate knowledge of international law in an easily comprehensible manner without compromising factual accuracy. I also owe a special debt of gratitude to Birger and Jeppe Morgenstjerne of ferdio for having created the infographics of the Manual.

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Introduction

Introduction

In the Agreement regarding the Affairs of the Danish Defence for the period 2010–2014 (Defence Agreement), it was decided that Denmark should have a military manual. The political parties behind the agreement adopted the following text:

‘With the aim of further strengthening the Danish Defence’s education and training in, and application of, International Humanitarian Law (IHL) and the laws of armed conflict, a Danish military manual is to be prepared on the subject matter. Before embarking on the work, it should be decided what type of military manual Denmark should have in such case as the parties to the Defence Agreement agree that the manual should provide value added in relation to the status quo.’

User instructions

This Manual is a reference work on international law for members of the Danish Defence during international military operations. The Manual provides a description of international law in all military operations outside the borders of Denmark to which Denmark contributes military forces. It is the first time all relevant rules of international law have been presented in the form of a handbook targeted at all members of the Danish Defence, but it is primarily written for planning staffs at the tactical and operational levels.

The Manual is designed to give a quick overview of international law applicable in the context of a given international military assignment, and special emphasis has been placed on describing matters that recent experience has shown to require attention. The chapters of the Manual are structured with a certain uniformity, perspective, and motivation, making it suitable for use in education as well, although the scope of the Manual necessitates the selection of certain texts for specific training programmes. At the same time, the Manual is structured thematically, allowing the individual chapters to be used by the subject-matter experts in government departments and during deployment.

The Manual describes the general frame of reference for international law. Therefore, it is not the intention to offer exhaustive guidelines or positions on every conceivable legal issue related to the execution of military operations. This means, for instance, that mission-specific legal directives and associated legal advice will also be necessary in the future, and it should also be borne in mind that the Manual does not provide an academic analysis of relevant rules.

At the same time, the Manual sets out Denmark's approach to how international law should be implemented in practice in a Danish defence context. Parts of the Manual reflect policies, teaching theory, operational considerations and, in some cases, deliberate additions for the protection of individual groups. These additions have particularly been necessary in non-international armed conflicts for which regulation under international law is not as extensive as in the case of international armed conflicts between States. This is instrumental in securing a high degree of consistency in different types of armed conflict.

The Manual addresses the framework in international law for all military deployments across the spectrum of conflicts, ranging from different kinds of operations in time of peace to the deployment of troops in armed conflicts.

Chapter 2 describes the legal basis for deployment of military forces under domestic and international law, including when an armed conflict situation exists, of what type, and with what legal effects.

Chapter 3 offers a general description of which rules of international law apply in different scenarios. In addition, the chapter introduces the potential need for regulating the legal status of Danish forces in territories of foreign States and, finally, introduces rules on the use of force.

Chapters 4-11 describe international law in armed conflict, and Chapters 12-15 focus on special areas dealing with both peacetime and conflict scenarios. The topics overlap. Therefore, cross-references are used frequently throughout the Manual.

The primary obligations appear in numbered boxes. The numbering has been used solely for easy identification and use. The boxes contain what constitutes the primary obligations within a given area. In other words, not all obligations or rights appear as a box text. In some cases, the text ‘+NIAC’ appears in the bottom right corner of the box. This abbreviation means that the rule concerned applies in both international and non-international armed conflict.

In some cases, it has been necessary to use technical terms from international law and military operations that require additional explanation. Such terms are highlighted in italics and marked by an asterisk (*), indicating that more information about the relevant term is available in the glossary provided in Appendix 1 to the Manual. In addition to the glossary, a list of abbreviations (Appendix 2) and a list of sources of law (Appendix 3) are provided at the end of the Manual.

The regulation of Computer Network Operations (CNO*) is introduced in Section 3.10 of Chapter 3 and is subsequently integrated into relevant chapters. To help and support those who are particularly engaged in CNO*, a reference page has been prepared as Appendix 4 to the Manual.

Finally, an overview of all additions to the obligations described in the Manual is provided at the end (Appendix 5) called Addendums throughout.

Examples are used to a wide extent to illustrate the application and relevance of, at times, highly complex rules for Danish armed forces in familiar scenarios.

Scope of application

As mentioned, the Manual describes the rules of international law applicable to international military operations in which Danish armed forces participate. The scope of application means that attention is focused on Denmark's obligations under international law as opposed to the domestic law of Denmark or the States in which Danish forces operate. A few exceptions have been made where it is difficult to apply international law without including, in particular, the rules of Danish domestic law.

The scope of the Manual is limited to the participation of Danish armed forces

in international military operations. Therefore, military operations under national auspices are not described. However, the Manual also applies to members of Danish armed forces who take part in the planning, execution, or decision-making processes from Denmark in relation to international operations to which Danish forces are deployed.

Project efforts to ensure the usefulness of the Manual

The relevance and usefulness of the Manual have been key priorities throughout the process. The work on the Manual commenced with the submission of an enquiry to the Danish Defence as well as to Danish civil society to identify areas that, based on experience, deserved special focus in the Manual. The enquiry resulted in more than 30 focus areas, most of which are elaborately described in the Manual.

Throughout the entire writing process, the project team have been in dialogue with the primary target group, formally as well as more informally, in the form of meetings, visits to duty stations, focus groups for commenting on draft texts, seminars, the establishment of briefing sites on the Danish Defence Integrated Information Network (DDIN), etc.

The Manual has been prepared through a process in which national and international experts, as well as other countries and organisations, have been consulted on selected areas.

The Manual is applicable to every member of the Danish Defence

The Manual applies to every person acting under the command of the Danish Chief of Defence in an international military operation, regardless of whether the relevant person is in the territory of Denmark or not and regardless of whether the person is a civilian employee or military staff member.

The Manual describes the relevant rules applicable to Danish armed forces during an international military operation. Naturally, not all rules are of practical relevance to all employees. Which elements of the Manual are relevant to an individual employee depend on factors such as function and functional level.

With respect to function, some rules are most relevant to special departments or branches of service. The rules regulating the protection of the sick and wounded, for example, are most relevant to logisticians in general and to the Medical Service in particular. The rules on weapons are most relevant to those working to procure

weapons for the Danish Defence or those who lay down specific provisions on how to use the weapons stored at the arsenal of the Danish Defence.

With respect to the functional level, a wide array of rules imposes requirements on the planning of military operations; and, consequently, these rules are not directed at the Danish Defence's boots on the ground. Still other rules apply to a high degree specifically to the individual soldier. This is true, for instance, with respect to fundamental rules regulating conduct on the battlefield.

Approach to international law

In cases of doubt as to the interpretation of international law, the general principles of interpretation under treaty law have been applied, the decisions of relevant international courts have been taken into account, and the project team have consulted the manuals of other States and, in some cases, international experts in order to find, through these avenues, the correct understanding of international law.

For many reasons, customary international law is crucial, particularly in the area of IHL since an ever-growing share of the world's conflicts are of a non-international nature. Customary international law is also important in international armed conflicts in which not all parties to the conflict, including allied States, are party to the same conventions as Denmark. The 2005 Study on Customary IHL published by the International Committee of the Red Cross has provided the starting point for the identification of customary international law within the law of armed conflict in this Manual. Where there are known objections to the treatment of customary international law by the study, the project team have undertaken an additional assessment of the individual rule concerned. Chapter 3 of the Manual presents the sources of international law in greater detail.

As is the case, for instance, with the application of human rights law (HRL) outside the territory of Denmark, weight has also been accorded to the decisions of relevant international courts, and a leading international expert has been consulted alongside the practice followed by other States and organisations in order to aid the interpretation of the precise scope of certain provisions.

Additions

In the majority of the areas covered by the Manual, the obligations of States are counterbalanced by the rights of individuals. This is definitely true in the area of human rights, but certain elements of IHL also reflect such a balance. Here, the main consideration is not to grant rights to individuals but, rather, to create a balance between interventions that are militarily necessary in armed conflict and the protection of individual civilians and the civilian population based on humanitarian considerations. The protective rules of international law in these areas are, therefore, an expression of the minimum level of protection that States are obliged to ensure. In other words, States are free to provide better protection to vulnerable groups than the protection dictated by international law.

In certain, very carefully selected contexts, the Manual makes a **deliberate addition** to Denmark's obligations under international law. Additions in the Manual are marked with a footnote and the text "**Addendum**". Such additions may have been made for a number of reasons, including a request for additional protection, but they may also be included for educational reasons, i.e., to ensure consistency in the application of the rules across different conflicts or to facilitate the work involved in applying the rules.

Accordingly, additions (in the form of an "Addendum") cannot be seen as an indication that Denmark or the Danish Defence feels obliged under international law to act in this way.

Proposals for changing, altering, modifying, or amending the Manual

The Manual is to be amended in step with developments in international law and as changes in the needs of the Danish Defence are identified. Any proposals for changing, altering, modifying, or amending the Manual must be submitted to the Legal Section of Defence Command Denmark, which then coordinates with all agencies operating within the authority of the Danish Ministry of Defence and provides for motivated proposals to be presented to the Ministry of Defence, which – depending on the circumstances – consults with the Ministry of Justice and the Ministry of Foreign Affairs. All changes, alterations, modifications, or amendments to this Manual, including any proposals for adjusting its additions, are subject to approval by the Ministry of Defence.

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The international military operation

Battlefield and conflict status

The international military operation

Battlefield and conflict status

1. Introduction

1.1

Chapter contents

Over the years, the Danish Armed Forces have been deployed to a broad spectrum of highly diverse international missions. Up until 1999, the focus had primarily been on peace support operations, acting either directly under the military command of the United Nations, nicknamed the “Blue Berets”, or on a UN mandate under the military command of NATO. Denmark took part in the first Gulf War in 1990 by deploying the corvette Olfert Fischer. During the period from 1999 to 2015, Danish forces were continually deployed to a variety of armed conflicts, both international armed conflicts with Serbia, Libya, and Afghanistan and non-international armed conflicts with non-State actors in Iraq and Afghanistan. The same period saw the deployment of Danish military contingents to various UN missions, and Danish armed forces have helped combat piracy off the Horn of Africa and have provided assistance in a range of emergency relief situations, including operations to fight the Ebola epidemic in Sierra Leone.

This chapter addresses questions of fundamental importance for the overall legal basis for any Danish international military deployment. Firstly, on what legal basis are Danish forces deployed? Secondly, should Danish forces be deployed to an armed conflict and, if so, what type of armed conflict, or is it a military operation outside armed conflict? This question, which is dealt with in more detail in Chapter 3, determines which branch of international law is applicable during deployment.

1.2

Scope in relation to other chapters

This chapter should be read and applied in conjunction with Chapter 3, which addresses the question of how the applicable international law in a particular military operation is identified and how the applicable international law is operationalised in ROE and in other ways.

2. Basis and mandate of deployment

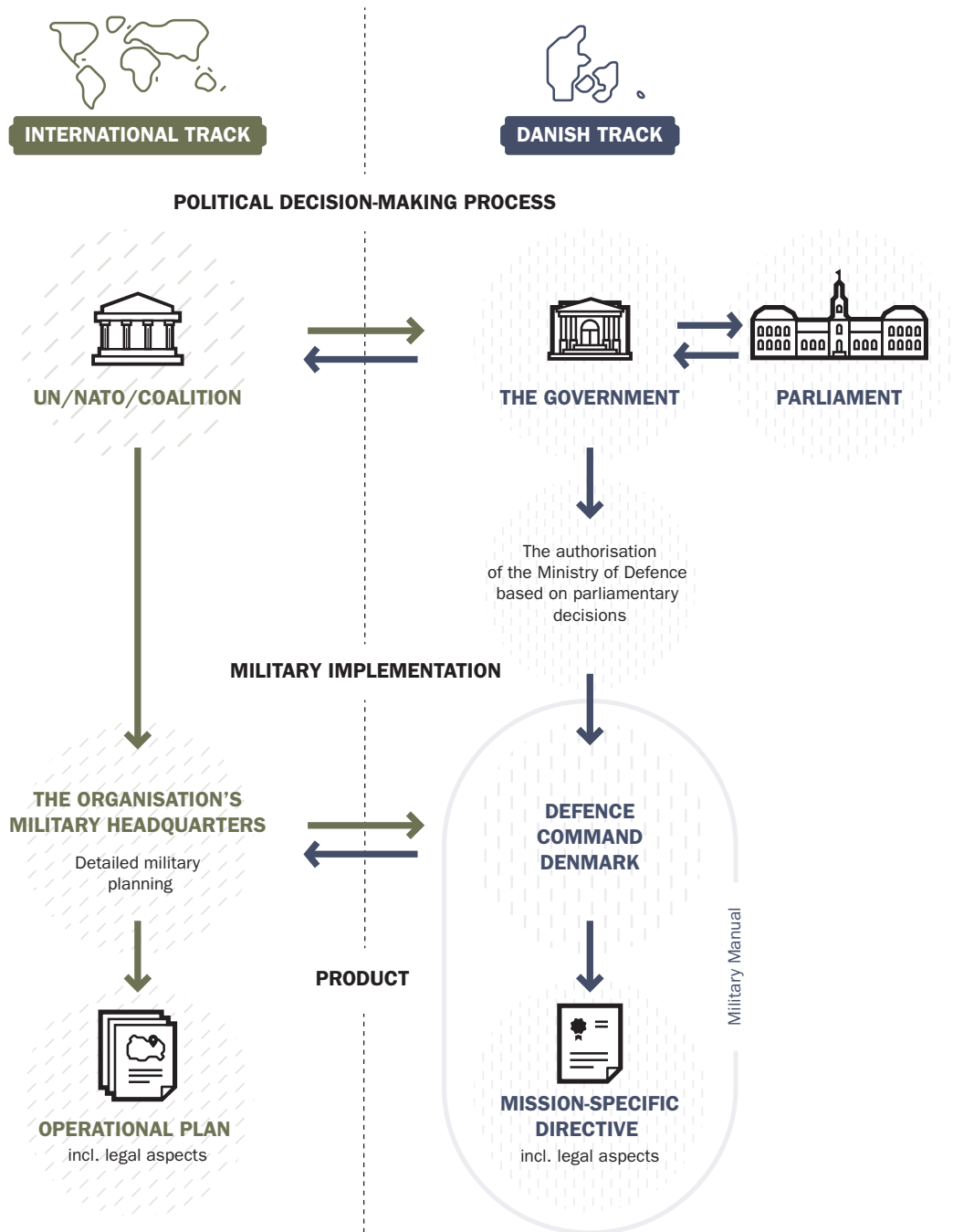
2.1

Competence to deploy Danish forces under Danish law

It follows from section 19(2) of the Constitution of the Kingdom of Denmark that the Government may not use military force against any foreign State without the consent of Parliament, except for purposes of defence against an armed attack on the Realm or Danish forces.

Hence, as a general rule, parliamentary consent needs to be obtained prior to the deployment of a Danish military contingent if the Government expects to use military force or if, after a comprehensive assessment, it cannot be ruled out that military force will be used. On the other hand, the consent of Parliament is generally not required in a situation in which military force is used to defend against an armed attack on the territory of Denmark or on Danish military units. For a more detailed description of recourse to an expanded right of self-defence, reference is made to Section 7.6 of Chapter 3.

PROCESS FOR DEPLOYMENT OF DANISH CONTINGENT



• **FIGURE 2.1** •

The figure illustrates the parallel national and international processes connected with Denmark's participation in an international military operation. The relationship between the mission-specific directive from Defence Command Denmark and the Military Manual is illustrated in the bottom right corner.

Parliament gives its consent to the deployment of Danish forces by adopting a parliamentary resolution, which then forms the overall political and legal basis – the national mandate – for the deployment, including the preparation of mission-specific directives by Defence Command Denmark.

For military commanders and their staffs, the parliamentary resolution sets out the overall framework for the Danish contingent, including the size of the force (maximum deployment of military personnel), the tasks to which Parliament has consented, the specific nature of the contingent in terms of capabilities, the geographical limitations of Danish forces' field of operations, the economic framework, time limits for the deployment, command relations, etc.

The description of the legal basis in international law provided by the parliamentary resolution will also be relevant to the deployed force. Sometimes, therefore, steps will be taken in the establishment of the basis in international law to work out a more detailed delimitation of the force's task, use of force, legal status, etc.

2.2

Basis and mandate in international law

The sovereignty and integrity of States must be respected. This notion is manifested in the principle of non-intervention, which is accepted as *customary international law**.¹ The prohibition is reflected in the Charter of the United Nations in a manner that also prohibits the UN from intervening in the internal affairs of its Member States.²

The deployment of Danish military forces to an international military operation, therefore, must be undertaken on the basis of international law. Such a basis may consist of an **invitation** or another form of consent from the territorial State, which means that the foreign military presence does not take on the character of an intervention. The basis may also be provided by a resolution of the UN Security Council or when a State acts in self-defence against an armed attack against the State itself (**individual self-defence**), or in the defence of another State at the request of this State (**collective self-defence**), or also in cases in which the basis for **humanitarian intervention** has been fulfilled.

¹ See, e.g., ICJ *Nicaragua v. USA* judgment of 26 November 1984, para. 202 and ICJ *Corfu Channel* judgment of 9 April 1949 para. 35.

² UN Charter, Art. 2(7).

2.2.1 Invitation from the receiving State

A military deployment may take place on the basis of an invitation from a State to render any kind of assistance in executing a particular operation. It may be that insurgent groups or other armed organisations threaten the security of the State. The impetus may also be an urgent need for assistance in the wake of natural disasters, as was the case, for instance, when the Danish Armed Forces offered their support, including Hercules aircraft, in connection with the tsunami disaster in 2005. It could also be other humanitarian efforts, such as the support provided by the Danish Defence to fight the Ebola outbreak in Africa in 2014 or dealing with the challenges regional armed conflicts sometimes present to neighbouring States. NATO's military contributions in Albania and Macedonia (including Denmark's) during the Kosovo conflict may be seen as an example of this.

An invitation may exist when a State approaches one or more States or an organisation with a request for assistance. Such a request may result in the formation of a coalition or, if the request is addressed to the UN, a coordinated mission. Danish armed forces will often deploy contingents to coalition-, alliance- or UN-led coordinated operations. Regardless of the composition of the operation, it has to comply with the terms of the invitation, i.e., it is tailored to the need for assistance the receiving State has requested and does not go beyond the content of the invitation.

Except for situations in which the UN Security Council has jurisdiction, the general principle arising from the respect for the sovereignty of States is that a State is required to give its consent before other States may use its territory for military purposes. This is the reason, for instance, Denmark seeks diplomatic clearance for Danish aircraft to fly through the airspace of other States or to land in their territories. The rules at sea are slightly more flexible as regards the passage of ships, including warships, through the territorial seas of other States, since a customary law principle of innocent passage gives ships of all States the right to pass through the territorial seas of other States. It is a prerequisite for such passage, however, that the instructions of the coastal State are observed during passage and that the passage is innocent.³ For more information, see Chapter 14 on naval operations.

Therefore, the deployment of Danish armed forces at the invitation of a State can occur in the context of multiple scenarios. In the event of disaster relief or peace-keeping missions, the deployment will not typically take place in an armed conflict.

³ United Nations Convention on the Law of the Sea, Art. 17-20.

If, on the other hand, it is an invitation to assist a State in its fight against insurgent groups, deployment will be made to a non-international armed conflict (NIAC) of a transnational character; and, if the invitation acquires the character of a request by a State to assist this State in exercising its right of self-defence against attacks by another State, Denmark's participation in such a mission will often be a contribution to an existing international armed conflict (IAC). More information about the types of conflict is available below.

2.2.2 Resolution of the UN Security Council

Under the Charter of the United Nations, the UN Security Council has primary responsibility for the maintenance of international peace and security.⁴ This is why the Security Council, under Chapter VII of the United Nations Charter, may authorise measures involving the use of armed force against any State whose acts are considered to constitute a threat to or breach of international peace and security.⁵ This power may be exercised with or without the consent of the Member State concerned. Decisions of the Security Council on such matters can be made by an affirmative vote of at least nine out of the fifteen members of the Security Council vote,⁶ provided that none of the five permanent members votes against it.

Another important point in connection with the functions and powers of the Security Council is that all Member States of the United Nations are obliged, depending on the wording of the resolution, to accept and carry out the decisions of the Security Council.⁷ One of the effects of this is that, whether or not they are actively taking part in a military operation, States are obliged, depending on the circumstances, to accept the implications such an operation may have for the individual Member State — for instance, that the authorised military force may need to be present in the State in the form of transit, flights over the State's territory, or storage of material. In such situations, it will often be necessary to enter into an agreement with the State affected in this manner.

A Security Council resolution may authorise Member States to take all necessary measures to restore international peace and security in an area. The authorisation may be more or less detailed, depending on the complexity of the forthcoming mission. Some resolutions are concise descriptions of the purpose of the interven-

4 UN Charter, Art. 24.

5 UN Charter, Chapter VII.

6 UN Charter, Art. 27(3).

7 UN Charter, Art. 25.

tion and the allocation of responsibility for the mission, whereas others are highly comprehensive and detailed. An authorisation to use force refers to Chapter VII of the UN Charter and typically grants a mandate for “the use of all necessary means/measures”. It is then left to the acting military alliance of States to operationalise the resolution in accordance with any other relevant provisions of international law, including limitations on the use of force.

An authorisation for use of military force from the UN Security Council does not determine in itself whether an armed conflict exists or not. This assessment depends on whether the objective criteria for armed conflict under IHL have been met, see Section 3.3.1 below for more information. That will often be the case, however. The formulations used by the Security Council in its resolutions often provide indications, for instance, in the form of wording about the armed forces’ observance of international law; but, in rare cases, they will contain wording about whether it is the Security Council’s assessment that an armed conflict exists and, if that is the case, which parties are involved.

Deployment based on a Security Council resolution, therefore, also requires a closer assessment of whether personnel are deployed to an armed conflict or not, the impact this will have on the status of Danish forces, and, consequently, the rules applicable to the relationship between the actors operating in the conflict area.

2.2.3 Individual or collective self-defence

It follows from Article 51 of the UN Charter and from international customary law that States have the right to defend themselves if an armed attack has been launched against them. Similarly, States may exercise this right of self-defence in anticipation of an imminent armed attack. This is not an inherent right under the UN Charter but is recognised in customary international law. Whether the attack is conducted by a State or a non-State actor has no effect the right of self-defence. For instance, the UN Security Council referred to the inherent right of individual or collective self-defence (for States) on the day after the terrorist attacks that took place on 11 September 2001 and condemned at the same time acts of international terrorism.⁸

An act of self-defence must be **necessary**, i.e., it must be necessary to prevent or suspend the attack or new attacks that are assessed to follow. If conditions suggest that it has been a single attack only or if it is assessed that a diplomatic effort will be

8 UN SC Resolution 1368 of 12 September 2001.

capable of settling the dispute, it should be considered whether an act of self-defence is necessary.

At the same time, the act of self-defence is required to be **proportionate**. This implies a requirement of proportionality between the act of attack and the act of self-defence, allowing expectations of subsequent attacks to be taken into account in the assessment.

With respect to any computer network attacks (*CNA**) against objectives in Denmark or against Danish armed forces, it should be emphasised that, although an attack may have consequences that can be equated with more conventional armed attacks, the initiator of the attack must be identifiable as a prerequisite for a legitimate act of self-defence. If evidence can be produced to prove that a *CNA** has been routed through another State's *digital infrastructure**, this is not in itself sufficient evidence to target that State's digital infrastructure for acts of self-defence.⁹ Additional information about the responsibility of States is provided in Chapter 15.

Measures taken by States in the exercise of their right of self-defence must be immediately reported to the Security Council. There is a limit on the timeframe for engaging in acts of self-defence in that such acts cannot continue after the Security Council has taken effective measures to deal with the situation.¹⁰

In a Danish context, the consent of Parliament is generally not required in a situation demanding the use of military force in self-defence against an armed attack on the territory of Denmark or on Danish military units, see Section 2.1 above. In such cases, the forces attacked must engage in combat without delay and without awaiting or requesting an order, even if the commanders in question have no knowledge of a declaration or state of war. This follows the Danish Royal Decree concerning Rules of Engagement.¹¹

This Royal Decree is still in force, and the wording set forth above has remained unchanged since it was issued for the first time on 6 March 1952. Moreover, the Royal Decree describes various duties, authorisations, and practical matters. It was amended on a few points on 26 April 1961. Most of the rules contained in the Royal Decree are only relevant for an attack on the territory of Denmark. However, by

⁹ CWM rule 7.

¹⁰ UN Charter, Art. 51.

¹¹ Danish Royal Decree No. 63 of 6 March 1952, as revised by Danish Royal Decree No. 130, concerning Rules of Engagement for the Armed Forces in Case of an Attack on the Country and in Time of War of 26 April 1961.

their wording, they are also applicable to attacks on a Danish military unit outside the territory of Denmark.

Danish units operating outside the territory of Denmark in most situations will be subject to use-of-force directives, which take into account the risk of attacks on Danish units. In these cases, the Royal Decree is not intended to change the use-of-force directives that have been issued for the individual mission. There may be circumstances, however, in which use-of-force directives have not been prepared or have not entered into force, in which the unit is in the process of deployment, or in which the use-of-force directive otherwise fails to take account of the situation at hand.

In these cases, the unit will be governed by the Royal Decree and will be entitled to engage in combat without delay in response to an attack. Furthermore, the unit shall be obligated never to allow weapons and other war material to fall into the hands of the adversary in a functional condition.

The Royal Decree does not require the attack to originate from another State. Depending on the circumstances, including the character and scope of the attack, terrorist attacks or attacks by other armed groups might constitute an attack within the meaning of the Royal Decree. It is for the commander in charge to assess whether an act directed against Danish forces has the character of an actual attack. The reaction to such attacks must take place within the rules of IHL concerning objectives, means, and method. If individuals are detained in connection with such an act, the rules of IHL on the handling of persons deprived of liberty are applicable in combination with relevant rules of HRL. For more information, see Section 4.4 of Chapter 3.

It may subsequently turn out that the attack was conducted by persons who do not fulfil the criteria under international law as party to an armed conflict. In such cases, any action dealing with the conflict – including the handling of detainees, if applicable – must comply with the rules on the use of force in time of peace.

Collective self-defence

Apart from a State's own defence against attacks, commonly referred to as individual self-defence, States may act in the defence of other States that come under attack. It is a prerequisite for such acts of **collective self-defence**, however, that the attacked State submits a request for support in the situation, see above. Such requests may be submitted in advance without connection to a specific situation as NATO Member

States have done in Article 5 of the Treaty of Washington, the so-called “musketeer oath”.

One particular aspect of the right of collective self-defence is triggered in situations in which Danish military forces are on a foreign mission in proximity to an **attack against the armed forces of other States**.

If such an attack is launched in international deployments in which Denmark’s military presence is based on a **parliamentary resolution** that legitimately authorises the use of necessary force in the mission, Danish forces have the right to use force in accordance with the RoE applicable to the mission, including the defence of other units taking part in the mission. Additional information about RoE is provided in Section 7.3 of Chapter 3.

On the other hand, if such an attack occurs in a situation in which Danish units are operating within the territory of a foreign State without the authorisation of parliament, Danish forces may not act in collective self-defence in aid of the foreign military unit unless the attack is assessed to pose a threat to the Danish unit. For example, the scenario might involve Danish forces on exercise, Danish forces during deployment or redeployment, or situations in which Danish forces are taking part in military operations that are not related to the attack.

Both the Constitution of the Kingdom of Denmark and the Danish Royal Decree concerning Rules of Engagement, thus, provide that, without the consent of Parliament, Danish forces may only act in the defence of Danish forces. Accordingly, this national right of self-defence does not include the right to involve Danish forces in acts of collective self-defence.¹²

2.2.4 Other bases in international law

In addition to the above-mentioned bases for military intervention under international law, there have been examples in practice of States referring to exceptional circumstances as a legal basis for military intervention in the internal affairs of sovereign States.

There have, for instance, been precedents in history in which, without a UN mandate, countries or groups of countries have, in quite extraordinary situations, jus-

¹² Danish Royal Decree concerning Rules of Engagement for the Armed Forces in case of an Attack on the Country and in Time of War of 6 March 1952 (for more information, see Section 3.4.3 below).

tified the use of force as being necessary to counter in the necessity of countering massive atrocities against civilian populations and extreme humanitarian distress. Such an operation can be described as a **humanitarian intervention**.

From Denmark's perspective, the possibility of humanitarian intervention is considered to be founded on the following three main criteria:

- 1) There is a specific state of, extreme humanitarian distress on a large scale, requiring immediate and urgent relief.
- 2) Alternatives to taking forcible action without a UN mandate are exhausted.
- 3) The resort to the use of military force takes place with respect for the principles of proportionality and necessity, and strictly limited in time and scope to the aim of humanitarian considerations.¹³

The deployment of Danish forces as part of a humanitarian intervention in another State is subject to the consent of Parliament in accordance with section 19(2) of the Constitutional Act of Denmark, see Section 2.1 above.

“Responsibility to Protect” (R2P) is a political principle of protection that gives States a responsibility to protect their own people from four specific international crimes: genocide, ethnic cleansing, crimes against humanity, and war crimes. For more information about R2P, see Chapter 4.7. The principle also makes the international community responsible for supporting States in fulfilling this obligation and for taking appropriate measures against States that clearly cannot or will not comply with their responsibility to protect their own people. R2P and humanitarian interventions are both aimed at preventing the most serious human rights violations from being committed against the population.

R2P does not in itself provide an international law basis for the use of force. Therefore, military interventions into the internal affairs of States undertaken with reference to R2P must be authorised by the UN Security Council if consent has not been given by the State in question. This happened in 2011 when the Security Council referred to R2P in Security Council Resolution 1973 on the use of force for the protection of the Libyan population. Moreover, the Security Council has referred to R2P more than 20 times in resolutions on peacekeeping operations in which the international community, with the consent of a State, has supported the State in protecting its population against the four crimes mentioned above.

13 Substantially, the Danish main criteria reflect the main criteria of the United Kingdom made public on August 29 2013.

3. Armed conflict or not

3.1

Introduction

The Government of Denmark decides whether the Danish armed forces should deploy on an international military operation, and the Government assesses whether the basis in international law required for such an operation is available. Before making the decision, the Government must consult Parliament to the extent laid down in section 19 of the Constitution of the Kingdom of Denmark.

During the decision-making process, the question about the status of the conflict under international law and the legal status of Danish forces in the deployment at issue will often be discussed. Therefore, there will be assessments of or, at least, indications as to whether the Danish armed forces will be deployed within or outside armed conflict as determined by international law.

In addition, Danish armed forces will often be deployed within the framework of an alliance or coalition, which is why the operational basis, etc., will sometimes contain statements about the mission commanders' assessment of the framework in international law for the deployment.

To establish a basis for determining which rules of international law are applicable during the military deployment, an assessment is made as to whether an armed conflict exists or not and, if so, which type of armed conflict it is and what parties are involved in the conflict. This assessment is made by the Ministry of Foreign Affairs of Denmark.

The situation in conflict areas can develop from peace to armed conflict and vice versa. Such developments may occur while Danish forces are deployed – and engaged in the operation. It is essential to be attentive to this — for example, by undertaking a dynamic categorisation of the conflict as a prerequisite for being able to conduct military operations in accordance with the aspects of international law that are relevant at the given time.

Below is a description of the provisions of international law as to when an armed conflict exists and the character of the armed conflict.

3.2

International and non-international armed conflicts (IACs and NIACs)

3.1. An armed conflict between two or more States is referred to as an **international armed conflict (IAC)**.

An armed conflict is referred to as a **non-international armed conflict/internal armed conflict** when it takes place between a State and a non-State organised armed group, such as an insurgent group. This term is also used when the conflict is between two or more non-State organised armed groups. **This Manual uses the abbreviation OAG for non-State organised armed groups,¹⁴ and MOAG for members of such groups.** For more information, see Chapter 5.

This Manual uses the term **non-international armed conflict (NIAC)** in view of the fact that such conflicts can also involve many States, and the term “internal armed conflict” may consequently be misleading.

The terms are repeated frequently throughout the Manual. Therefore, the abbreviation **IAC** is used for international armed conflict, and the abbreviation **NIAC** is used for non-international armed conflict. Both abbreviations are common in international cooperation.

The distinction between IAC and NIAC is important because of IHL’s very detailed regulation of IACs, whereas the regulation of NIACs is significantly more limited and, in certain areas, differs considerably from the rules for conflicts between States. For instance, an OAG is generally denied the privileges of combatant status, and a NIAC has a limited geographical extent.

NIACs, on the other hand, may be subject to more or less extensive regulation in treaty law, depending, for instance, on whether the OAGs are fighting for self-determination, whether they control some of the territorial State’s territory, and whether they are fighting against each other or with a State as their adversary.

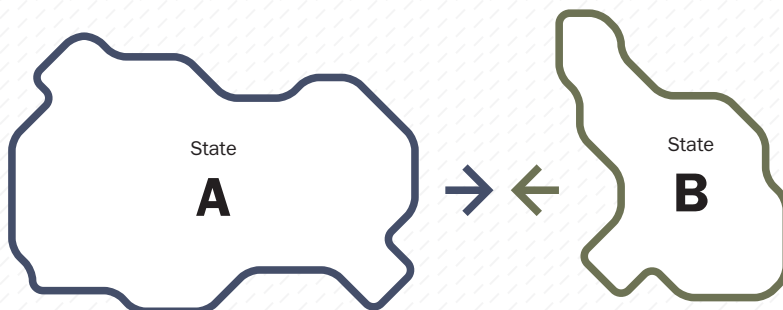
The relatively modest regulation of NIACs means that there are more areas that are regulated by customary law or in which human rights are accorded greater importance than is the case with IACs. For more information, see Section 4.4 of Chapter 3.

IHL basically distinguishes only between **two types of conflict: international and non-international armed conflicts**.

¹⁴ On 7 October 2015, the Government of Denmark introduced Bill No. L 24 to amend the Danish Criminal Code concerning participation in dissident armed forces. The Act uses various terms, including the term “non-State organised armed forces”. The term is used both in GC ComA 3 and in AP II, Art. 1(1) — in the latter case, to refer to the specific type of non-State actors that consist of *dissidents**. In this Manual, for the sake of convenience, the term comprises both non-State organised armed groups (OAG) and non-State organised armed forces.

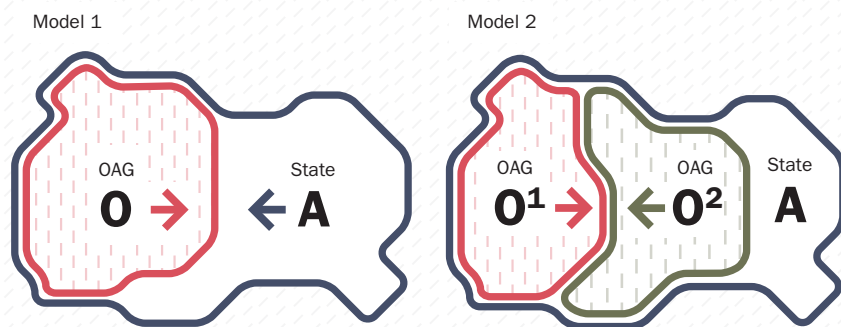
• FIGURE 2.2 •

INTERNATIONAL ARMED CONFLICT (IAC)



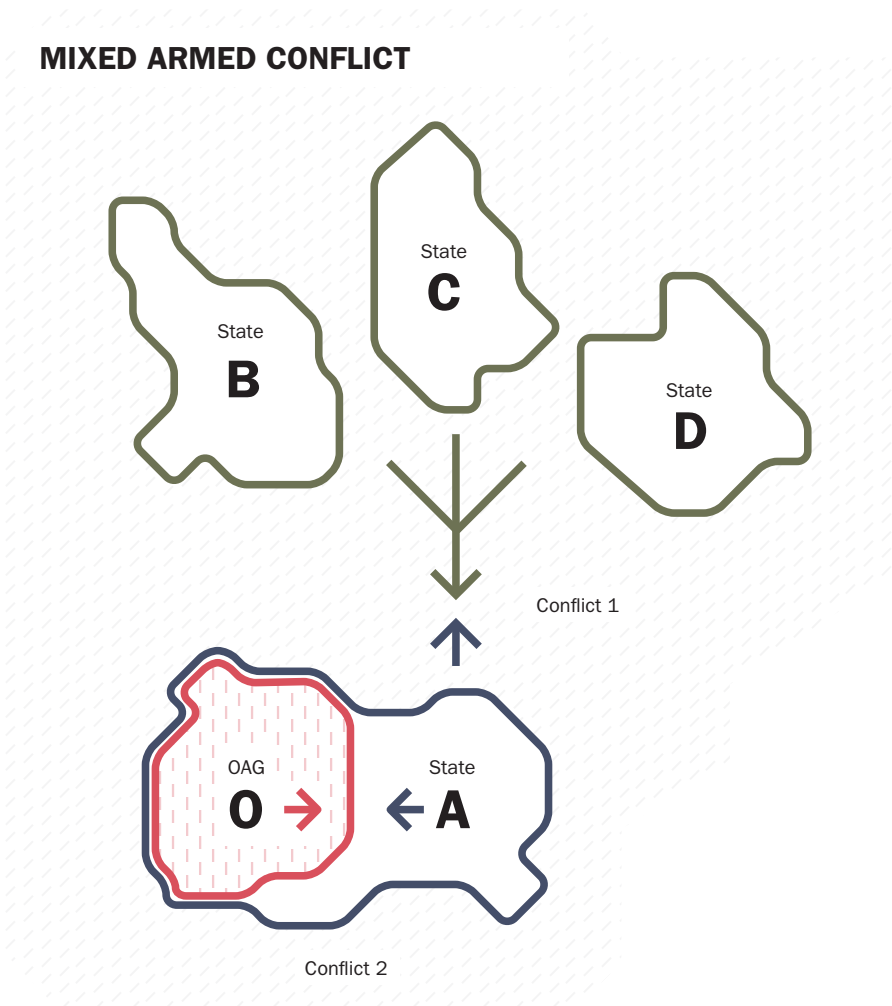
• FIGURE 2.3 •

NON-INTERNATIONAL ARMED CONFLICTS (NIAC)



Thus, international law only distinguishes between two types of conflict. The challenges in this area, therefore, are not the numerous types of conflict but, rather, the possibility that modern conflict scenarios may include many conflicts simultaneously and may take place across national borders. In other words, there may be significant challenges connected with the categorisation that is necessary under international law of contemporary armed conflicts. Below is a brief outline of some of the typical categorisation challenges engendered by contemporary armed conflicts.

• FIGURE 2.4 •



Mixed armed conflicts

An OAG often moves across borders, and multiple armed conflicts are not infrequently in progress at the same time and place – so-called **mixed armed conflicts**. A State can thus be engaged in NIAC with one or more OAGs and, at the same time, be engaged in IAC with States – even an international coalition.

Example 2.1: For instance, in Libya in March-June 2011, the Gaddafi government was simultaneously engaged in NIAC with the Libyan rebel movement and in IAC, first, with a coalition of States and, then, with Member States of the NATO Alliance.

Internationalised armed conflicts

Another conflict structure that may complicate the categorisation effort comprises conflicts in which States intervene in a NIAC in support of the non-State party with the effect that the character of the conflict transforms into an IAC. However, the transformation requires the OAG to be regarded as a “*de facto unit*” into the intervening State’s armed forces¹⁵ in the sense of “*belonging to a Party to the conflict*” according to GC III.¹⁶ In such cases, an OAG may attain the privileges of combatant status if the relevant conditions have otherwise been met.

If an OAG is not incorporated as a “*de facto unit*” into the intervening State’s armed forces, an internationalised armed conflict does not exist. Instead, it comprises – at least – two armed conflicts, which is why the conflicts may be referred to as mixed as described above.

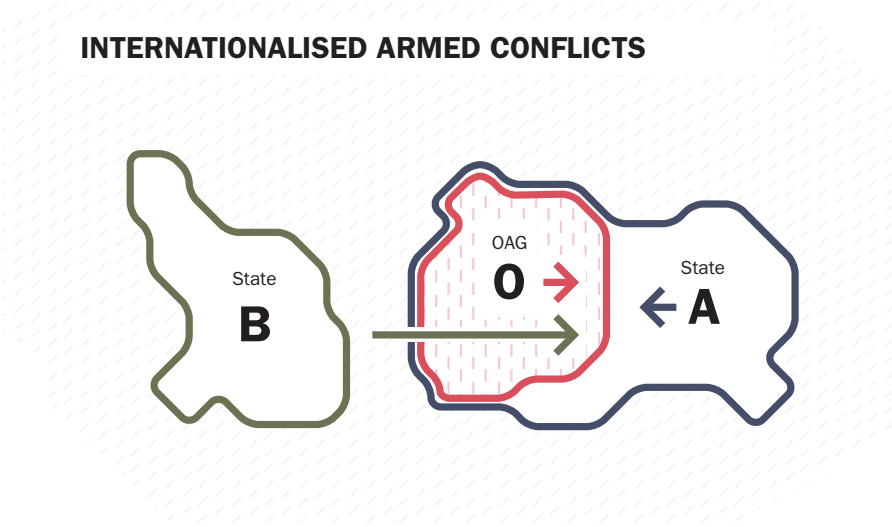
Example 2.2: The International Criminal Tribunal for the Former Yugoslavia (ICTY) found that the conflict in Bosnia and Herzegovina in 1992 was also international because Yugoslavia’s financial and logistical support to the forces of the Bosnian Serb army in Bosnia, combined with assistance in the planning and execution of military operations, involved the exercise of overall control over the forces of the Bosnian Serb Army, but it did not find that the Bosnian Serb army belonged to Yugoslavia. Thereafter, the conflict was said to have had the status of a mixed armed conflict.¹⁷

¹⁵ ICTY Tadić IT-94-1-A 1999, para. 137.

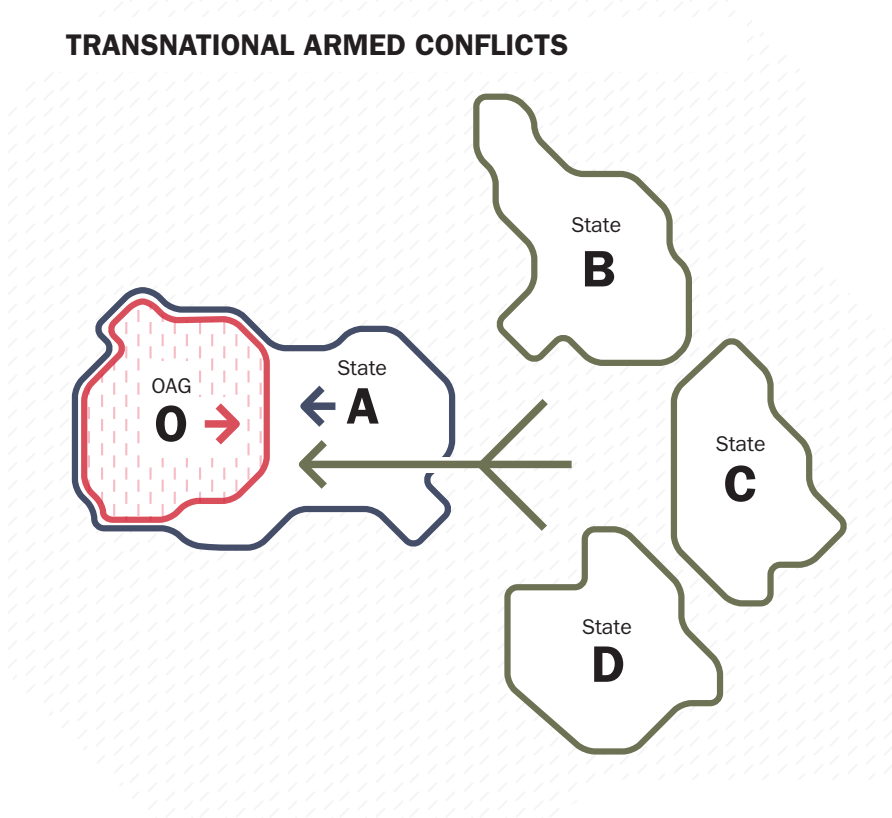
¹⁶ GC III, Art. 4. A. (2).

¹⁷ ICTY Tadić IT-94-1-A 1999, paras. 150-156.

• FIGURE 2.5 •



• FIGURE 2.6 •



Transnational armed conflicts

A different type of NIAC is the so-called “transnational armed conflict”. The transnational character of these conflicts consists of the participation of one or more States in a NIAC outside their own territories.

For instance, a transnational NIAC may arise when a State requests assistance to fight an OAG within its own territory:

Example 2.3: In cases in which a State takes the side of the OAG in the conflict, it will be an IAC, as was the case in Afghanistan under the Taliban regime after the terrorist attacks on the United States on 11 September 2001. On the other hand, once new leadership had been established in Afghanistan and the Bonn Agreement had been signed, the character of the conflict transformed into a **transnational NIAC** because the coalition then forged a common front with the State of Afghanistan against the Taliban and Al Qaeda.

A second scenario is the case in which a State accepts another State’s military presence to fight an OAG in its own territory — perhaps, even without taking an active part in the fighting. The scenario is illustrated below. This does not mean that the conflict loses its internal character since the State(s) alone is/are operating on one side of the conflict only.

A third scenario is the case in which other States, in the context of the collective self-defence of a State, use force against an OAG in the territory of a third State without the consent of the third State when the third State does not have the willingness or ability to stop attacks emanating from its territory against the State for whose benefit collective self-defence is exercised. The conflict will be internal as long as the hostilities are solely directed against that OAG.

As an example of this last scenario, the terrorist organisation Al-Qaeda, which moves across borders and plans and conducts attacks in several States, can be mentioned. This and similar situations give rise to a variety of fundamental issues in international law — for instance: What is the international legal status of an OAG? And what are the consequences under international law when members of the armed forces of these OAGs take up residence in States that have not yet been involved in the conflict? These and other questions relating to this problem will be addressed elsewhere in the Manual. Here, it is only relevant to conclude that such conflicts do not fall outside the classic classification of conflicts in IHL. They will be classified as NIACs in cases in which OAGs alone are in conflict with one or more States.

3.3

Duration of the armed conflict: Commencement, suspension, and cessation

In order to identify applicable international law in an international military operation, it is crucial to determine whether an armed conflict exists. In relation to both NIACs and IACs, IHL applies only if two fundamental prerequisites are met.

Firstly, it has to be an **armed conflict**, which requires a certain **intensity** of the conflict. Secondly, the conflict must be **between at least two parties within the meaning of international law**. These two criteria are dealt with in the following sections.

The following section deals with the duration of the armed conflict.

3.3.1 The commencement of the armed conflict

The intention of States is that IHL, with a few exceptions, should apply only in armed conflicts. The Geneva Conventions apply in cases of declared war **and in any other cases of armed conflict**. In other words, a declaration of war is no longer needed. If a formal declaration of war is made, such a declaration may in itself be sufficient to initiate an armed conflict, even if fighting has not yet broken out.¹⁸ It is the **factual circumstances** that determine whether an armed conflict is in existence. IHL is applicable even if one of the parties to the conflict does not recognise that an armed conflict exists.¹⁹ Declarations of war are also dealt with in Section 3.4.1 below.

On one hand, not any type of border dispute or provocation **between States** constitutes an armed conflict between States. On the other hand, Common Article 1 to the Geneva Conventions dictates that the Conventions apply “in all circumstances”. This means they apply regardless of whether one’s adversary actually observes the rules and regardless of why the parties have ended up in armed conflict with one another. This phrase also indicates that a high level of intensity is not required in inter-State conflicts and that the rules are already applicable at the time when the first attack is planned, i.e. before the conflict has technically broken out.

The intensity threshold is higher for **NIACs**. Here, it will often be necessary to assess when sporadic acts of violence – possibly in the form of violent demonstrations

¹⁸ The explanatory notes to Bill No. L 24 of 18 December 2015 provides supplementary text on this.

¹⁹ GC ComA 2.

or temporally separate, isolated strikes – develop into actual armed conflict. AP II expressly provides that the Protocol does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. See also Section 3.4 below on the requirement for the organisation of an OAG.

In a landmark decision, the ICTY established a test for determining the existence of an armed conflict as follows:

*“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.”*²⁰

Other judicial decisions add the following indicative factors, which may help determine whether armed hostilities are sufficiently intense to constitute a NIAC:²¹

- What is the number of confrontations, and what are the duration, geographical extent, and intensity of the individual confrontations?
- What type of weapons and other military equipment is used?
- What are the number and calibre of munitions fired?
- What is the number of persons and type of forces partaking in the fighting?
- What is the number of casualties resulting from the confrontations?
- What is the extent of material destruction?
- Are there any civilians fleeing combat zones and, if so, how many?

3.3.2 The suspension and cessation of armed conflicts

The issue of **conflict cessation**, exactly as in the case of conflict outbreak, has consequences for Danish forces, since peacetime regulation is reinstated to its full extent when the conflict has ceased. This applies both in relation to domestic law and international law.

Prisoners of war and internees must be released upon the end of the conflict unless they are being prosecuted or serving a sentence or unless the UN Security Council has decided that internment may continue after the end of the conflict, as was the case in Iraq at the end of June 2004.²² In relation to domestic law, for instance, the legal effects of the Danish Military Penal Code pertaining to armed conflicts cease to apply.

²⁰ ICTY Tadić IT-94-1-AR72 1995, para. 70.

²¹ ICTY *Haradinaj* IT-04-84-T 2008, para. 49.

²² UN SC Res. 1546 of 8 June 2004 regarding the security situation in Iraq.

IHL applies throughout the conflict. Its application ceases only upon the general close of military operations or, if applicable, on the termination of an occupation.²³ An exception to this rule applies to persons held in custody by the parties. They continue to enjoy the benefits of the relevant provisions of the Conventions until their final release and repatriation.²⁴

A conflict may generally come to an end **in one of three ways**:

- 1) one of the parties to the conflict surrenders unconditionally; or
- 2) a peace agreement enters into force between the parties; or
- 3) the conflict abates and, eventually, stops altogether – typically, because one of the parties has been defeated

A unilateral declaration that the conflict has ceased is not sufficient for the conflict actually to have ceased. Indeed, it is the factual circumstances that determine whether the conflict as such can be deemed to have ceased. Peace agreements or longer-term armistices may indicate the intention of the parties to end the armed conflict, but they will not have this effect if the use of armed force continues between the parties. On the other hand, there may actually be cases in which a conflict ceases before a proper peace agreement has been finalised. In such cases, armistices will often precede the actual cessation of the conflict.

When the territory of a foreign State is occupied, IHL will not cease to apply until the occupation has terminated.²⁵ Situations could arise in which the armed hostilities between the parties are suspended but there are still areas occupied by the adversary. IHL also applies in such cases until the occupation has terminated.²⁶

The rules of armed conflict cannot be **suspended**. A suspension of hostilities is possible, however. This may be arranged in the form of armistices concluded at a high or low level, affording protection to a larger or smaller area, and the suspension may therefore also be of a longer or shorter duration.²⁷ Armistices may be arranged for a variety of reasons. They could, for instance, be rooted in a desire to take all possible measures to evacuate civilians from certain combat zones or to collect and treat the sick and wounded, as IHL encourages the parties to do.²⁸ They could also be rooted

²³ GC IV, Art. 6, and AP I, Art. 3(b).

²⁴ GC I and II, ComA 6, GC III, Art. 5 and 118, AP I, Art. 3(b), and conc. NIAC AP II, Art. 2(2).

²⁵ AP I, Art. 3(b).

²⁶ GC ComA 2, as read with AP I, Art. 3(b).

²⁷ HLWR, Art. 36-41.

²⁸ GC I, Art. 15, and GC II, Art. 18.

in a desire to suspend combat in order to engage in negotiations for lasting peace settlements. The contents of armistice agreements must be fully respected unless the adversary commits grave violation of the agreement — for instance, by resuming hostilities.

Throughout history, armistices and peace agreements have often been concluded through the employment of negotiators, who seek to enter into communication with the adversary under the display and protection of the white flag of truce. A negotiator must be respected as long as the negotiator does not take advantage of his or her mission to obtain information about the adversary. In case of abuse, the negotiator may be detained temporarily.²⁹

In a **Danish context**, the status of negotiator is not something any military commander is entitled to assume. The status of negotiator implies the authority conferred by a State to negotiate with the adversary. In other words, the adversary must be confident that the Danish negotiator has been granted the necessary authority to conclude an agreement with binding effect on the Danish armed forces.

As mentioned, such agreements are concluded at many levels, and States should not adopt excessively restrictive rules governing contact with the adversary. There should be a possibility of local, time-limited armistices that benefit the sick and wounded as well as vulnerable civilians.

Under section 35 of the Danish Military Penal Code, it is a criminal offence in armed conflict to seek contact with the adversary without the necessary authorisation.

3.4

Status as a party to the conflict

The requirement of **two parties within the meaning of international law** is generally unproblematic in IACs.

In NIACs, it may sometimes be more difficult to determine whether non-State armed groups meet the requirements imposed by international law as a condition for an armed group to become a party to an armed conflict, and treaties contain few provisions on this. Clashes between a State's law enforcement forces or armed forces, on one hand, and groups of civilian insurgents, on the other hand, may be very vio-

²⁹ HLWR, Art. 32-34.

lent, cause casualties, and be fairly comprehensive, also in terms of time, without meeting the requirements for a NIAC because the insurgents are not sufficiently organised to constitute an OAG.

Additional Protocol II requires, *inter alia*, a certain level of organisation **as a condition for an armed group (OAG) to be treated as a party to a NIAC, including a requirement that the group must be under responsible command.**³⁰ Moreover, judicial decisions have developed various indicators of such organisation. These indicators must be assumed to be applicable, regardless of whether the conflict is covered by AP II:³¹

- Does the group have a command structure?
- Does the group have an internal regulation of discipline?
- Does the group operate from a headquarters?
- Has the group demonstrated the ability to establish logistics, including the procurement and distribution of weapons and other military equipment?
- Has the group demonstrated the ability to plan, coordinate, and conduct military operations?
- Has the group demonstrated the ability to negotiate and conclude agreements?
- Does the group control parts of the territory of the State?
- Does the group demonstrate the ability to speak with one voice?

3.4.1 How is it determined in practice whether Denmark is in armed conflict?

As a prerequisite for the ability to implement its international legal obligations, it is incumbent upon each party to a conflict to take an active position on the question of whether the State or OAG is a party to an armed conflict.

For decades, it has not been a common practice for States to declare war on each other, which used to be the custom throughout the history of warfare. It is still true, however, that a declaration of war implies the subsequent existence of an armed conflict between the party issuing and the party receiving the declaration, regardless of the factual circumstances.³²

No formal national or international mechanism is available to determine with

³⁰ AP II, Art. 1(1).

³¹ *I.a.* ICTY Tadić IT-94-1-AR72 1995, para. 70, and ICTY Haradinaj et al. IT-04-84-T 2008, para. 89.

³² GC I-IV ComA 2, AP I, Art. 1(2).

authority whether an armed conflict exists. In the absence of a declaration of war, IHL is found to be applicable on the basis of factual circumstances described above.

At the intergovernmental level, guidance on the status of conflicts may sometimes be found in UN documents or in ICRC announcements of its assessment of whether an armed conflict exists. Once in a while, States themselves may also publish announcements about armed conflicts. Upon the outbreak of an armed conflict at the latest, the ICRC will always contact all parties to the conflict.

In relation to Denmark's participation in armed conflict, no procedure has been established for the identification of Denmark as a party to the conflict. **The Constitution of the Kingdom of Denmark** contains a few provisions on the use of the Danish armed forces³³ but does not presuppose a decision as to whether the Danish armed forces will thereby be taking part in an actual armed conflict. In a few cases, although not consistently, the explanatory notes to the Government's proposals for parliamentary resolutions have made it clear that the deployment of Danish forces implies that Denmark will become a party to an armed conflict.³⁴ The assessment of whether Denmark becomes a party to an armed conflict is generally made by the Ministry of Foreign Affairs in consultation with the Ministry of Defence. The assessment of whether Denmark is a party to an armed conflict depends, among other factors, on the intensity of the Danish military effort, including the character and scope of the overall active military contribution.

3.4.2 Military Penal Code and armed conflict

The Danish Military Penal Code contains a number of provisions relating to acts that are only criminal offences during armed conflict, including treason, unauthorised contact with the adversary, misuse of protected distinctive signs, pillage and looting of the property of the dead.³⁵ The Code also contains provisions authorising more severe punishment for violations in times of armed conflict than in times of peace — for instance, illegal absence from service and gross, intentional dereliction of duty.³⁶ Additional information about national prosecution is provided in Chapter 15.

33 Constitutional Act of the Kingdom of Denmark, section 19(2).

34 See, e.g., B 165 of 6 May 2003 on the proposal for a parliamentary resolution on Denmark's contribution to a multinational security force in Iraq, para. 3, or B 123 introduced on 30 September 2014 on Denmark's contribution of additional military contingents in support of the fight against ISIL, proposal for parliamentary resolution B 8 adopted on 10 November 2015 and proposal for parliamentary resolution B 108 adopted on 19 April 2016.

35 Danish Act No. 530 of 24 June 2005, sections 28 & 35-38.

36 Danish Act No. 530 of 24 June 2005, sections 25(2) and 27(3).

The question of the existence of an armed conflict is also essential in relation to determining domestically the legal status of personnel. However, the Danish Military Penal Code has a special built-in mechanism according to which the Minister for Defence may decide “in case of imminent prospects of armed conflict” that the above-mentioned stipulations of the Military Penal Code on armed conflict must apply during a specific military operation. In addition, the Minister may authorise the commander of a contingent to make such a decision with respect to the contingent when there is an imminent prospect of armed conflict. These provisions have not yet been implemented and do not require Denmark actually to be party to an armed conflict within the meaning of international law.³⁷

In the majority of cases, Defence Command Denmark’s directive for a military contingent will describe whether Danish armed forces are being deployed to take part in an armed conflict and what legal implications the deployment will have for the Danish forces in relation to international law and domestic law, including the Danish Military Penal Code.

3.4.3 Armed conflicts in multinational military deployments

In addition to the requirement that there be parties and an armed conflict, Denmark’s status during a multinational military deployment also depends on whether the **Danish forces may be deemed to have been deployed on behalf of Denmark** or on behalf of the UN. Below are a few brief examples of typical situations, but there may be cases of doubt. It is, therefore, crucial that such an analysis be mission-specific.

Military operations under the military command of the UN

An armed conflict may commence – or recommence – during a peace support operation in which Danish forces take part. Such a situation may arise, for instance, when an international force has been deployed either to keep the former parties to the conflict apart physically or to ensure compliance with the terms of armistices, peace agreements, or the like.

Example 2.4: Such deployments are sometimes seen in high-tension areas under the **actual military command of the United Nations**, as was the case of the deployment of Danish and other forces to the UN mission UNPROFOR from February 1992 to March 1995, first, in Croatia and, later, in Bosnia and Herzegovina in order to demilitarise the parties and safeguard “UN Protected Areas”.

³⁷ Danish Act No. 530 of 24 June 2005, section 10.

The UN has a unique status under international law as an international organisation in the field of international peace and security, which distinguishes the organisation from any other international organisation. In operations in which the **UN takes actual military command** of State military contingents, there may be cases in which the UN as an organisation becomes a party to an armed conflict if armed clashes occur between the parties to the conflict in the area and UN forces.³⁸

In such operations, Danish military personnel are also required to observe international law, specifically Denmark's obligations under international law. Although, as an international organisation, the United Nations cannot accede to international conventions, the organisation is bound by the rules of customary international law. Pursuant to Article 97 of the UN Charter, the Secretary-General of the United Nations has issued a bulletin instructing UN forces to act in compliance with the rules of IHL in situations in which such forces are engaged in armed conflict as combatants.³⁹ Section 5.5 of Chapter 3 of the Manual provides a more detailed description of the obligations that apply to Danish forces operating under the command of the UN in the context of IHL.

Military operations under the command of a coalition or alliance

In other cases, an international force may be operating under the command of NATO or a coalition composed for that specific purpose. Such a deployment may be **authorised by the UN Security Council** or performed on a different basis of international law, but unlike the UN-led operations, the armed forces are not under the command of the United Nations. The forces operate under the command and control, in part, of the States themselves and, in part, of the commanders of the international force. Examples of this type of operation are IFOR and SFOR Bosnia and Herzegovina, KFOR Kosovo, and ISAF Afghanistan, all of which were UN-mandated but NATO-led operations. In such cases, the **nations contributing troops become parties to the armed conflict themselves** if such a conflict arises between the parties to the conflict in the area and the nations represented in the NATO or coalition force.

The same applies to coalition-led operations, such as the deployment Operation Odyssey Dawn against Libya, which – during its initial phase from 19 to 31 March 2011 and under a mandate from the UN Security Council – implied the involvement

38 UN Secretary General's Bulletin on Observance by United Nations Forces of IHL, 1999, Art. 1.

39 UN Secretary-General's Bulletin on Observance by United Nations Forces of IHL, 1999.

of a number of States in an IAC with the State of Libya.⁴⁰

In contemporary coalition and alliance operations that take place within the framework of armed conflicts against State and/or non-State actors, the deployment of Danish military forces to such operations may vary over the period of the armed conflict. In such situations, the question arises as to whether Denmark is only a party to the conflict when it engages in an operation with military support or whether Denmark must be assumed to be a party to the conflict from the date of the first deployment and until Denmark chooses to withdraw its military contingent definitively from the operation.

As previously outlined, the question has certain consequences under international law as well as under domestic law, and the answer will depend on an assessment of the intensity of the Danish military effort, see Section 3.4.1 above.

Example: In connection with the deployment of a Danish cargo aircraft in 2014 in support of the international coalition's fight against ISIL in Iraq, it was assessed that the deployment was of a character that did not make Denmark a party to the armed conflict against ISIL in Iraq. In connection with the later deployment in 2014 of fighter aircraft in offensive air operations against ISIL targets in Iraq, it was assessed that Denmark became a party to the armed conflict against ISIL in Iraq on the Iraqi side. When a radar contingent was deployed in early 2016 after the fighter aircraft had been returned to Denmark, it was assessed that the character and extent of Denmark's total active military participation in the international conflict in support of Iraq meant that Denmark was still a party to the armed conflict against ISIL since, in addition to the radar contingent, Denmark had deployed a staff and capacity-building contingent and intended to redeploy the fighter aircraft, which was decided in the spring of 2016.⁴¹

The consequences of the Danish opt-out from EU defence cooperation

As a result of Denmark's rejection of the Maastricht Treaty in the referendum on 2 June 1992, seven of the political parties in the Danish Parliament adopted what was known as the "national compromise", which includes, among other things, an opt-out from Danish participation in the EU Common Security and Defence Policy. The opt-out now appears in a protocol to the Lisbon Treaty and, therefore, has the same legal effect as the treaties of the European Union.

The defence opt-out means that Denmark does not participate in "the elaboration

40 UN SC Res. 1973 of 17 March 2011 concerning a no-fly zone over Libya.

41 See B 122 of 27 August 2014 (proposal for parliamentary resolution) on Denmark's contribution of military contingents in support of the operation in Iraq, B 8 of 10 November 2015 on the deployment of additional Danish military contingents in support of the fight against ISIL, and B 108 of 19 April 2016 on the deployment of additional Danish military contingents in support of the fight against ISIL in Iraq and Syria.

and the implementation of decisions and actions of the Union which have defence implications”.⁴²

Practically speaking, the effect of the defence opt-out is that Denmark cannot participate in decisions on or in the planning or execution of **military** EU operations.

Examples of EU-led operations in which Denmark has been prevented from participating include the EU military operation in the Former Yugoslav Republic of Macedonia in 2003, in the Democratic Republic of the Congo later in 2003, in Bosnia and Herzegovina in 2004, and in Chad and the Central African Republic from October 2007 as well as the EU-led counter-piracy operation off the Horn of Africa under the name of “Operation Atalanta”.

On the other hand, nothing prevents Denmark from participating in the European Union’s **civilian crisis management operations**, such as the police missions in Afghanistan and Bosnia and Herzegovina, provided that they have no defence implications.

In cases in which an EU operation **contains both civilian and military elements**, therefore, it is necessary to determine specifically whether the civilian and military elements will be so clearly separated that Denmark will be able to participate in the civilian elements of such an action.

The meaning of the defence opt-out in relation to Denmark’s ability to participate in a specific EU action will need to be established before any decision on Denmark’s participation. The Ministry of Foreign Affairs of Denmark should be involved prior to this assessment. The same applies if an opt-out assessment becomes relevant as a result of changed circumstances with respect to an ongoing operation or as a result of the participation of Danish forces in alliance or coalition operations in which an EU-led military operation is also participating.

In assessing whether Danish forces were able to participate in a specific military mission in accordance with the opt-out from EU defence cooperation, it has been emphasised, for instance, whether a Danish contingent would be acting under the command of the European Union, whether a Danish contingent would be subject to the EU rules governing military operations, and whether the contingent would be financed through EU defence budget lines. These criteria are not exhaustive, though, and it will always rely on a specific assessment.

⁴² Protocol No. 22 on the position of Denmark, Part II, Art. 5.

Special situations with mixed mandates

Situations have emerged in contemporary conflict scenarios in which Danish forces have been deployed under a peace support mandate in a mission area where a concurrent armed conflict has been going on.

Example 2.5: Such a situation occurred when a Danish ammunition clearance team, among other personnel, was deployed to the newly-established ISAF in January 2002 to assist the Afghan government in law enforcement in Kabul.⁴³ At the same time, the special operations force TG-Ferret had been deployed to contribute to the US-led Operation Enduring Freedom, which was also operating in Afghanistan.

In such cases, all Danish forces will be involved in the armed conflict with the relevant actor. This does not preclude the existence of different mandates and tasks for different units. It merely means that the relationship to the relevant other party to the conflict is the same for all Danish forces deployed.

The exception to this is a situation in which Danish forces operate under the command of the United Nations in the context of a UN-led mission and another Danish contingent has been deployed to a conflict in the same area but under a different command. In keeping with the argumentation above, the deployment of such Danish contingents to UN-led operations must be deemed as affiliated with the UN as an organisation. These Danish contingents, therefore, are not necessarily participating in the armed conflict taking place in the area — not even in the case of Danish forces deployed to the same area under a different mandate. In such deployments, the UN forces will often be easily recognisable as UN personnel, including the use of blue helmets, white vehicles, and the distinctive emblem of the UN.

3.5

Geographical scope of the conflict

In case of armed conflict, it is relevant to define the territory in which the belligerent States are allowed to engage in hostilities within the framework of applicable international law, including IHL.

43 B 45 (proposal for parliamentary resolution) of 8 January 2002.

3.5.1 International armed conflicts (IACs)

Areas in which hostilities are allowed

Traditionally, IHL presumes that the participation of State parties in an IAC has effect in relation to their own territories on land, at sea, and in the air, unless it is agreed between the parties to the conflict that individual areas or zones are to be exempt from attack during the conflict, i.e., neutralised zones.⁴⁴

‘On land’ comprises (all) the land territories of a State. In the case of Denmark, an IAC will extend to the whole kingdom.

‘At sea’ comprises the territorial seas,⁴⁵ of the belligerent States, their *continental shelves** and *exclusive economic zones** as well as the high seas.⁴⁶ Hostile actions may also extend to the continental shelves and exclusive economic zones of non-belligerent States provided that due regard is given to the activities of the coastal State in the area.⁴⁷

The high seas and the exclusive economic zones of non-belligerent States may be used for acts of war on the condition that such acts of war are conducted with due regard to the operation of ships by non-belligerent States and the rights and duties of these States at sea. Additional information about belligerent States’ use of different waters is provided in Chapter 14.

Airspace over the land territories, territorial seas, and exclusive economic zones of the belligerent States and airspace over the high seas comprise the areas in which acts of war are allowed. Outer space begins at the point the airspace of States terminates. The boundaries of outer space are not clearly delimited by international law, and the subject is controversial. The Outer Space Treaty contains restrictions on States’ use of outer space, including celestial bodies.⁴⁸

44 GC IV, Art. 15.

45 United Nations Convention on the Law of the Sea, Section 2, which was incorporated into Danish law by Executive Order No. 17 of 21 July 2005.

46 SRM, paragraphs 10-12.

47 SRM, paragraphs 34 and 35.

48 Danish Executive Order on the Outer Space Treaty of 27 January 1967.

Cyberspace also gives rise to new, interesting questions in relation to the geographical delimitation of warfare. The reason it makes sense to mention geographical delimitation at all in this context is that it is important to address these questions – also in relation to cyberwarfare – on the basis of the territoriality and sovereignty of States.

The classic neutrality rules provide that neutral infrastructure – i.e., infrastructure located in the territory of a State that is neutral to a conflict – must not be made the object of attack regardless of whether the infrastructure is privately owned or State-owned. Nor is it permissible to attack, State-owned infrastructure of neutral States, even if the infrastructure is located in outer space, in international airspace, or on the high seas. It is also assumed that infrastructure located in the territory of a neutral State may not be used by belligerent States to engage in acts of war.

The number of cases of known State practice concerning the application of these principles in relation to cyberwarfare is still limited, but the principles must generally be presumed to be of relevance in this area.⁴⁹

Actual use of territories by the parties to a conflict

It is not certain that hostilities take place in the territories of all belligerent States simultaneously. In contemporary armed conflicts, the UN Security Council authorises the use of force for international coalitions and alliances in response to breaches of international peace and security by Member States. Such deployments often take place far from the coalition States' own borders. In these cases, hostilities are often limited to the territory of the State that is the subject of the Security Council resolution. Denmark has been engaged in a number of IACs since 1999, including in Kosovo, Afghanistan, Iraq, and Libya. In none of these conflicts has Danish territory been involved in hostilities.

Although conflicts may be, and today often are, limited to parts of the conflict areas, this does not alter the fact that, as a matter of international law, Danish territory in principle is included in the area in which IHL is applicable in IACs to which Denmark is a party. This means, among other things, that it would not in itself be contrary to international law if the adversary in an IAC conducted an act of war against a military objective in Denmark.

⁴⁹ CWM, Rule No. 92.

Moreover, some of the rights and obligations associated with an IAC are independent of whether hostilities actually take place. This applies, for instance, to Denmark's rights and obligations with respect to individuals who are nationals of the country with which Denmark is in armed conflict but are present in Danish territory at the outset of the conflict.⁵⁰ This also applies to the establishment of a *national information bureau** responsible for handling information with respect to persons, including the dead, in Danish custody.⁵¹

Other rights and obligations relate specifically to the conduct of hostilities. This applies, for instance, to States' obligation to take certain precautions against the effects of the adversary's attacks, including their obligation to keep the civilian population away from military objectives. Such precautions must be taken "to the maximum extent feasible" and to the extent they are deemed necessary for the protection of civilians and the civilian population.⁵² In other words, there is no obligation to initiate such precautions unless there are prospects that the hostilities will spread to the territory of Denmark. For more information, see Chapter 6.

Permanent exclusion zones established by the parties

The presentation above briefly outlines areas on Earth in which belligerent States are entitled to engage in acts of war. International law also includes a **number of treaties** that exempt certain territories from any act of war. These include, to mention a few, Spitsbergen (Svalbard),⁵³ the Åland Islands,⁵⁴ the Suez⁵⁵ and Panama⁵⁶ Canals, and the Antarctic.⁵⁷

In addition, the parties to an armed conflict may agree on an **ad hoc** basis to declare certain zones as "neutralised" or "demilitarised" in the context of conflict-specific agreements.⁵⁸ Additional information about protected zones is provided in Chapter 6.

50 GC IV, Art. 35-46.

51 GC III, Art. 122, GC IV, Art. 136, as well as GC I, Art. 16, and GC II, Art. 19, both of which refer to GC III, Art. 122.

52 AP I, Art. 58(c).

53 The Svalbard Treaty of 9 February 1920.

54 1921 Decision of the Council of the League of Nations.

55 1888 Convention of Constantinople.

56 1977 Treaty concerning the Permanent Neutrality and Operation of the Panama Canal.

57 Art. 1, 1959 Antarctic Treaty.

58 I.a. GC IV, Art. 14 on hospital and safety zones and localities, Art. 15 on neutralized zones, AP I, Art. 59 on non-defended localities and Art. 60 on demilitarized zones.

Conflict neutrality

States not taking part in the armed conflict (non-belligerent States)

To be a party to an armed conflict presupposes that IHL is applicable to the mutual relations of the conflicting parties. On the other hand, there will be States that do not take part in the conflict. These States are called “non-belligerent States” or, to use a more classical term, “neutral States”. This Manual uses the terminology “conflict-neutral” to accentuate its difference from peacetime neutrality in which States such as Switzerland and Costa Rica have chosen, also in time of peace, to refrain from membership in alliances.

It is an absolutely fundamental principle of international law that States must refrain from the use of force, or the threat to use force, against the “territorial integrity” or “political independence” of other States “or in any other manner inconsistent with the purposes of the United Nations”, as it is phrased in the introductory provisions of the UN Charter.⁵⁹ This prohibition should be construed broadly.

Therefore, on one hand, the territorial integrity of conflict-neutral States must be respected by the parties to a conflict. Parties to a conflict who do not respect the neutrality of conflict-neutral parties commit a **violation of neutrality**.⁶⁰

On the other hand, the general rule is that States desirous of remaining neutral in relation to an on-going armed conflict must prohibit the belligerent States from any use of the neutral State’s territory that is contrary to international law. Any failure by the neutral state to do so constitutes an act in “breach of neutrality”. The adversary to the State violating neutrality in the conflict may subsequently take all necessary measures against that State to respond to the breach of neutrality, even if such measures involve intervention in the territory of the neutral State. If neutrality is not enforced at all, the neutral state will also run the risk that the parties to the conflict will deem the neutrality to have been abolished with the effect that the neutral State becomes a party to the conflict.

The fundamental regulation of neutrality dates back to 1907. With the founding of the League of Nations and, later, the United Nations, States have accepted a set of global rules in support of international peace and security. This means that, among

⁵⁹ UN Charter, Art. 2(4).

⁶⁰ HCV and HC XIII, Art. 1.

other enforcement tools, the UN Security Council can impose sanctions, including embargoes, and may authorise the use of military force with a view toward restoring international peace and security. By virtue of their membership of the United Nations, Member States commit themselves to compliance with the Security Council's binding resolutions.⁶¹ This means, for instance, that States may be required to place their territories at the disposal of the military troop transports of belligerent States. The Council may also impose an embargo against one of the parties to the conflict – typically, the aggressor – which the UN Member States are obliged to respect.

Today, it is assumed that States may maintain their status as conflict-neutral States even if they comply with UN Security Council's enforcement measures such as those mentioned above.

The consequences of neutrality are dealt with in individual chapters of the Manual.

3.5.2 Non-international armed conflicts (NIACs)

As a general rule, a NIAC is limited to the territory of a State. Generally, therefore, the conflict is only allowed to take place within the territory of that State. If a NIAC is conducted in a State, IHL is applicable to the entire territory of the State.

In conflicts known as **transnational non-international armed conflicts**, there are examples of OAGs that have initiated hostilities in the territories of several States. These scenarios are described in Section 3.2 above.

As previously mentioned, if a State accepts or invites external States to engage in acts of war against an OAG on its own territory, the conflict will not lose its character of a NIAC. Moreover, in these situations, the conflict will be limited to the territory of the State in which the hostilities are taking place.

⁶¹ UN Charter, Art. 25.

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Overview of applicable international law in mission areas

Overview of applicable international law in mission areas

1. Introduction

1.1

Chapter contents

This chapter outlines the framework in international law for deployments of the Danish armed forces in different scenarios. In addition to providing an introduction to international law in military operations, the chapter will also focus on certain issues that, over the years, have required particular attention, including the use of force, contributions to the understanding of self-defence concepts, the application of human rights, and the legal status of Danish armed forces in the territory of a foreign State. In the description of these issues, relevant parts of Danish law have also been included in the analysis.

Section 2 gives an overview of the different rules and their application in different conflict scenarios. Therefore, this section is vital for understanding which rules are applicable in operations outside armed conflict and which rules are applicable in armed conflict. Moreover, the section introduces the discussion of CNO*, which is addressed in specific contexts in the other chapters of the Manual.

Section 3 identifies the primary rules of international law that generally apply in all types of military deployment.

The issue of human rights and their application to military operations has attracted a great deal of attention in the debate on international law over the last few years. The human rights obligations of Danish armed forces are described in general terms in **Section 4**, making it possible to determine the scope of Denmark's obligations under HRL in a given military deployment regardless of whether it takes place in an armed conflict or not. Human rights, which are only addressed in general terms in this Manual, are also described within the contexts of the other chapters of the Manual to the extent that human rights are considered to be of relevance in armed conflicts.

Section 5 of the chapter provides an introduction to IHL, including treaties and customary law, and to other relevant documents in IHL. IHL is dealt with at the end of the chapter because it is a regime of international law that only becomes relevant in the event of armed conflict. On that point, IHL differs from the other rules of international law, which may be of relevance in all conflict scenarios.

Section 6 introduces mission-specific agreements. Some of the most important mission-specific agreements are those that define the legal status of Danish armed forces in the territories of other States, known as Status of Forces Agreements (SOFAs). SOFAs are not dealt with elsewhere in the Manual. Therefore, their description in this chapter is more detailed than most of the other topics in the chapter.

Section 7 looks into certain aspects of the use of force. In armed conflict, the use of force is predominantly regulated by IHL. In military deployments outside of armed conflict, the use of force is regulated by the peacetime rules of international law, including human rights, and, to a certain extent, by the domestic legal system of the States involved. This presentation also includes an introduction to rules of engagement (RoE). RoE do not fall within the scope of international law but are an absolutely central part of the way military missions control all aspects of the use of force, whether there is a state of armed conflict or not. In this connection, Section 7 also discusses the concepts of self-defence and extended self-defence to determine the specific content of these concepts in relevant military contexts.

As elsewhere in the Manual, this chapter deals with the obligations of Danish armed forces under international law. Danish law is addressed only insofar as it is deemed necessary for understanding the international law obligations in the proper context.

1.2

Scope in relation to other chapters

This chapter is confined to identifying applicable international law in different deployment scenarios.

The framework in international law for military operations outside armed conflict is described in more detail, especially in regard to the use of force and the right to life but also in relation to general international law in an overall context. Chapter 12 of the Manual addresses all aspects of the Danish responsibility for persons deprived of liberty, including in military operations outside of armed conflict. For this reason, various obligations under HRL, for instance, are described in more detail in Chapter 12, where they are addressed in the context of other relevant international law. Chapters 13 and 14 also describe international law across a spectrum of strategic scenarios, and Chapter 15 on implementation and enforcement describes rules of international law concerning criminal prosecution and certain forms of responsibility applicable in peacetime as well as in armed conflict.

2. Mapping of applicable international law in military operations

2.1

Introduction

The situation in conflict areas can develop from peace to armed conflict and vice versa. Such developments may occur while Danish forces are deployed to and engaged in an operation. Therefore, it is essential to **categorise the conflict dynamically** in order to be able to conduct military operations in accordance with the elements of international law that are relevant at a given time. Such assessments are made by authorities at a strategic level and are communicated through the chain of command; see also Section 4.4 below.

2.2

International law in military deployments outside of armed conflict

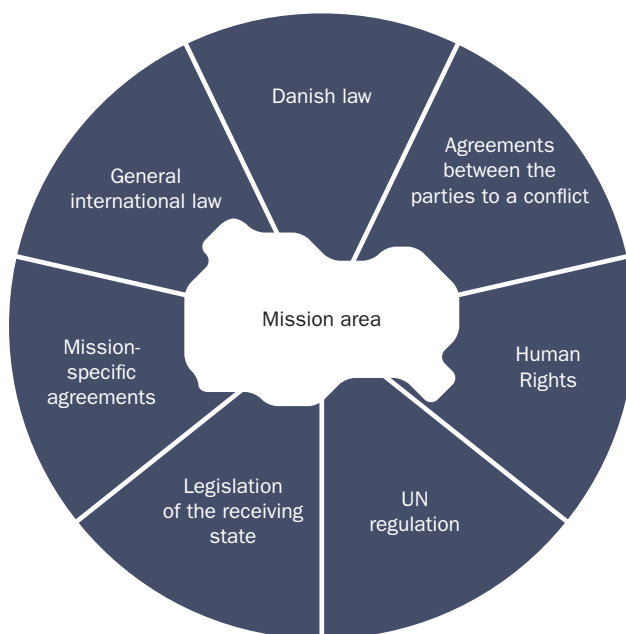
Military deployments outside of armed conflict may be very diverse. Such missions may range from classic UN peace support missions to a mission aimed at stabilising

the security situation of a State or region. Such missions, as a general rule, will not involve UN forces as a party to an armed conflict, but such scenarios cannot be ruled out; see Section 3.4.3 of Chapter 2 for more details.

In certain cases, the operations may be of a more humanitarian nature, including support for victims of natural disasters. It may also be the type of deployment the Royal Danish Navy has carried out in recent years to combat piracy in the waters off the Horn of Africa or operations to support other States in patrolling airspace.

If a Danish force is deployed to a military operation where an armed conflict does not exist — or no longer exists, the international legal basis will be provided by mission-specific resolutions of the UN Security Council, bilateral agreements, including any invitation from the receiving State, general international law, and — in particular — HRL. These rules are described in more detail in Sections 3-6 below.

LEGAL REGULATION OF MILITARY OPERATIONS OUTSIDE ARMED CONFLICT



• **FIGURE 3.1** •

The figure illustrates the typical components providing legal regulation of Danish armed forces in an international military operation outside of armed conflict.

2.3

International law during armed conflicts

During armed conflict, IHL is applicable as a special regime of international law, adopted by States with a view toward regulating hostile actions conducted by States and non-State actors.

Denmark has taken part in a number of armed conflicts since 1999 when Danish F-16 aircraft participated in NATO's military action against Serbia. Since then, Denmark has deployed contingents to IACs in Afghanistan, Iraq, and Libya and has taken part in transnational NIACs in Iraq and Afghanistan. The international legal consequences of Danish involvement in armed conflict are addressed in general terms in Section 7 below and in more detail in other chapters of this Manual.

Another topical issue is how Danish forces should conduct themselves in cases in which obligations under HRL are applicable in international military operations and where HRL differs from IHL. This issue is approached from a general perspective in Section 4.4 below.

3. General international law

3.1

Introduction

Through conventions and treaties, States have committed themselves in a wide range of areas that may be of relevance for Danish forces deployed to military operations across the spectrum of conflict scenarios. This section provides a brief introduction to the conventions that experience has shown may have relevance.

This section outlines only some of these rules and their general impact on Denmark's international military operations. The presentation is not exhaustive, and a mission-specific analysis of the international legal framework for Denmark's international military operations should always be undertaken.

3.2

The UN Charter

The Charter of the United Nations is an essential component of international law.¹ The Charter establishes a number of organs of the United Nations, including the UN Security Council and the International Court of Justice (ICJ). The UN Security Council has primary responsibility for the maintenance of international peace and security. States must, depending on the wording, comply with resolutions of the UN Security Council. The Security Council is the only international organ that is empowered to authorise the use of military force against a Member State if this State has committed an act that constitutes a breach of international peace and security.² The authorisations take the form of resolutions that, in addition to describing the task and the authorised use of force, may also contain limitations in time, space, and scope and, particularly, demarcations with respect to other authorised missions in the area.

When a Security Council resolution has been adopted, therefore, it provides a starting point for the military and international legal efforts to map out applicable international law in specific military operations.

In the event of a conflict between the obligations of States under the UN Charter and the obligations of States under other sources of international law, States' obligations under the UN Charter are to prevail.³ This implies, for instance, that the provisions of Security Council resolutions, depending on the circumstances, will take precedence over other obligations under international law.

3.3

Resolutions of the UN Security Council and General Assembly

Side by side with the general rules of international law referred to above, Denmark is bound by its obligations to a range of international organisations. The principal actor in this connection is the United Nations. Under the UN Charter, two organs of the United Nations are competent to deal with international peace and security, i.e., the Security Council and the General Assembly. Once in a while, the Secretary-General of the United Nations issues bulletins or other regulations, but they only have effect

1 Executive Order nr. 8 of 22 November 1945 concerning the Charter of the United Nations and the Statute of the International Court of Justice, signed at San Francisco on 26 June 1945.

2 UN Charter, Arts. 24, 25, 39, and 42.

3 UN Charter, Art. 103.

with respect to the UN's own personnel and the forces operating under UN military command and control.

From an international law perspective, there is a distinction between resolutions of the Security Council and resolutions of the General Assembly: Security Council resolutions, depending on their wording, are binding on UN Member States⁴ whereas General Assembly resolutions have no formally binding force in international law.⁵ It will, of course, always be important to analyse the text of a resolution closely to examine, for instance, whether actual obligations are imposed on States.

In addition to addressing specific regional conflicts, the Security Council adopts **thematic resolutions** on issues that, in the opinion of the Council, are relevant to international peace and security. Such thematic issues typically include a series of resolutions addressing the issue concerned. Some of these issues are “women and peace and security”,⁶ “small arms”,⁷ “children in armed conflict”,⁸ “protection of civilians in armed conflict”,⁹ and “protection of humanitarian workers providing assistance to refugees and other people in conflict situations”.¹⁰

These resolutions are part of international law. The relevant resolutions are discussed in more detail in the chapters of the Manual dealing with armed conflicts insofar as the resolutions involve obligations in addition to those already flowing from IHL or HRL. For more information about, for instance, the protection of children and women in armed conflict, see Chapter 6.

The resolutions are often also relevant to post-conflict deployments, however, and are issued to an extensive range of addressees, including organisations, States, the UN's own missions, etc. Therefore, it may be difficult to condense the resolutions into more specific obligations for the armed forces of States in military operations outside of armed conflict. This work is undertaken at the strategic level in a mission-specific setup and is reflected in the plans targeted at the various components of the mission. This will typically result in a division of tasks that involves the pro-

4 UN Charter, Art. 25 and ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), paras. 113-116.

5 UN Charter, Art. 11-15.

6 See, e.g., “Repertoire of the Practice of the Security Council, 17th Supplement, 2010–2011”, “Women and Peace and Security”.

7 See, e.g., “Repertoire of the Practice of the Security Council, 17th Supplement, 2010–2011”, “Small Arms”.

8 See, e.g., “Repertoire of the Practice of the Security Council, 17th Supplement, 2010–2011”, “Children in Armed Conflict”.

9 See, e.g., “Repertoire of the Practice of the Security Council, 17th Supplement, 2010–2011”, “Protection of Civilians in Armed Conflict”.

10 See, e.g., UN SC Res. 1502 of 26 August 2003, “Violence against Humanitarian Workers”.

tection of the civilian population and particularly vulnerable groups by authorising the use of force necessary to prevent atrocities against civilians, including children or women, in particular.

In addition to the authorisation of the use of force, procedures for **reporting** incidents of violations against the civilian population must be available. These procedures must specify what is understood by **violations**. Reporting is mandatory regardless of who the perpetrator is, and an adequate level of detail is needed to enable the relevant authorities to make additional inquiries/conduct an investigation. Information about the military commanders' duty to act and report, having subordinates by chain of command, is provided in Section 4.5.3 of Chapter 15.

The protection of children and youth also implies a certain respect for the **right of children to education**, etc., even in areas of conflict. It is necessary, therefore, to exercise restraint with respect to the military use of children's institutions, including day-care facilities, schools, and orphanages. This also applies in situations in which the international legal basis, including SOFAs, allows for the evacuation of such institutions for use by international military forces.¹¹

It is not uncommon for Danish armed forces to participate in post-conflict operations in countries where Denmark had previously been a party to the conflict and, at that time, conducted attacks that may have left **unexploded ordnance** or mines. In such cases, Denmark has special international law obligations, both under Protocol V to the UN Convention on Certain Conventional Weapons and under subsequent resolutions of the UN Security Council.¹² See Section 8 of Chapter 9 for a review of the scope of these obligations.

Another essential focus area for the UN is assistance to ensure that **humanitarian aid** reaches the areas of conflict. This focus has led to the adoption of a protocol to the Convention on the Safety of United Nations and Associated Personnel with a view toward extending the legal protection to include personnel of humanitarian organisations.¹³ In line with this, the UN Security Council has adopted a number of resolutions condemning violations of any kind whatsoever against persons who participate in humanitarian operations. At the same time, the Security Council reaffirms the obligation of parties to an armed conflict to comply with the applicable rules and principles of international law, including the IHL obligation regarding

¹¹ UN SC Res. 2143 of 7 March 2014. Addendum 3.1

¹² See the preamble to the resolution.

¹³ Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel of 8 December 2005.

access for humanitarian organisations to provide humanitarian relief.¹⁴ The primary aim of such regulation is to ensure that humanitarian aid reaches those in need. In many post-conflict and disaster scenarios, it will be a high-priority task to establish a framework for humanitarian aid that is as safe as possible. Within the specific context of military operations, this will often involve escort duties, protection duties, and/or the assignment of special protection status to the personnel, material, and vehicles of relief organisations. Chapter 6 provides more information on humanitarian organisations and the obligations of parties to armed conflicts.

3.4

Rules on State responsibility

The International Law Commission — a body of experts established by the United Nations — presented in 2001 its Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹⁵ The rules in themselves do not impose actual obligations on States, but they describe the conditions under which a State may incur responsibility or liability for violations of international law. It is true that the rules only describe the responsibility of States. However, since Danish military personnel represent the State of Denmark, responsibility for the breach of an obligation of international law by such personnel may invoke the responsibility of the State of Denmark going beyond any potential individual and/or command responsibility. Thus, the Draft articles are of vital importance to understand Denmark's international responsibility, especially in complex, multi-national military alliances in which Denmark is cooperating with other States, organisations, or private military companies. Additional information about the allocation of responsibilities is provided in Chapter 15.

In 2011, the Commission adopted draft articles on the responsibility of international organisations for internationally wrongful acts by which is meant breaches of international obligations to another international organisation, a State, or the international community.¹⁶ In common with the articles on State responsibility, these rules impose no actual obligations on international organisations but deal with, for example, the consequences of a breach. The debate on the draft articles by the General Assembly of the United Nations has not yet been concluded.¹⁷

¹⁴ See reference above in note 11.

¹⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN DOC A/56/10 2001.

¹⁶ Draft articles on the responsibility of international organizations, with commentaries. Report of the International Law Commission on the work of its sixty-third session, 26 April to 3 June and 4 July to 12 August 2011 (A/66/10 and Add. 1).

¹⁷ FN GA res A/RES/69/126.

3.5

Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties lays down rules for the conclusion, suspension, and termination of treaties and contains provisions on how States are supposed to interpret treaties, etc.¹⁸ These principles also apply to the understanding of IHL but do not contribute significantly to resolving the issue of the relationship between IHL and HRL in situations in which they conflict with one another (see Section 4.4).

3.6

United Nations Convention on the Law of the Sea

The Convention contains provisions on a comprehensive range of aspects, including innocent passage through the territorial seas of States, the reservation of the high seas for peaceful purposes, warships, and the right to establish national jurisdiction in the repression of piracy.¹⁹ It also contains provisions on the principles by which States define the limits of territorial waters, etc., and, as such, has continued relevance for armed conflicts. The Convention states that the high seas must be reserved for peaceful purposes.²⁰ This provision is apparently inconsistent with the rule in the San Remo Manual that opens up the possibility of conducting hostilities on the high seas but with due regard for the simultaneous exercise by non-belligerent States of rights of exploration and exploitation of the high seas.²¹

Although it is not expressly provided for in the Convention, the Law of the Sea Convention must be assumed to have been adopted with a particular view toward peacetime regulation and in recognition of the fact that special conditions apply during an armed conflict at sea. Consequently, no significant challenges are associated with reading the Convention in conjunction with the customary law that has developed in the field of naval warfare over the centuries and which today finds expression in, for instance, the San Remo Manual. Chapter 14 on naval operations addresses the issue in more detail.

18 Danish Executive Order concerning the Vienna Convention on the Law of Treaties of 23 May 1969.

19 United Nations Convention on the Law of the Sea of 10 April 1982, ratified by Denmark on 2 September 2004.

20 Law of the Sea Convention, Art. 88 and 301.

21 SRM, Rules Nos. 10(c) and 36.

3.7

Chicago Convention on International Civil Aviation

Despite its title, the Convention is applicable not only to civilian aircraft but also to State aircraft, including aircraft used for military purposes.²² The Convention sets forth rules on international aviation in time of peace as well as in war but, at the same time, imposes an obligation on States to respect the freedom of action of belligerent States and neutral States alike.²³ The Convention includes, for instance, a special rule on “pilotless aircraft” stipulating that such an aircraft may be flown over the territory of a State only provided that special authorisation is given by that State, which may be subject to specific terms.²⁴

3.8

International Telecommunication Convention

Denmark has acceded to a series of international conventions pertaining to tele-, radio, satellite, and Internet communications.²⁵ Membership in the United Nations International Telecommunication Union (ITU) is important because States, by acceding to the International Telecommunication Convention, leave it to the ITU to assign radio frequencies along the electromagnetic spectrum, to assign satellite orbits, etc.²⁶ States generally retain their freedom with regard to the use of military communication. However, this, too, is subject to various restrictions — for instance, on frequency usage, etc. These restrictions must be respected by the Danish armed forces in international military operations outside of armed conflict within the framework that applies to the Convention.²⁷

3.9

Conventions for special protection, applicable both in peacetime and in armed conflict

A number of treaties are intended to establish special protection in a particular area. A common feature of the examples mentioned here is that they are applicable both

22 Executive Order on Denmark's Ratification of the Convention on International Civil Aviation signed at Chicago on 7 December 1944.

23 Art. 89 of the Convention

24 Art. 8 of the Convention.

25 Constitution of the International Telecommunication Union, Geneva 1992, acceded to by Denmark on 18 June 1993, implemented by Danish Executive Order No. 127 of 8 December 1994.

26 Art. 12, PP 78.1(1) of the Convention.

27 Art. 48 of the Convention.

in times of peace and armed conflict. In armed conflict, however, other regulations may apply in the area. That is the case, for instance, for the protection of cultural heritage and the natural environment. In some cases, the conventions themselves contain text for dealing with any inconsistencies. In other cases, different regulations are to be interpreted as consistent to the greatest possible extent.

3.9.1 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage 1972

Denmark is party to this Convention along with 190 other States to promote respect for and protection of the world's cultural and natural heritage. The overall approach is that all States have an interest in and a formal responsibility for the identification, conservation, and protection of this heritage. The Convention should not be confused with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols, which is dealt with in more detail in Chapter 6.

For the purposes of the Convention, **cultural heritage** includes not only architecture but also individual works — for instance, paintings, sculptures, elements of an archaeological nature such as inscriptions or excavations, etc., as well as structures that are of outstanding universal value from a historical, artistic, or scientific point of view. **Natural heritage** includes physical and biological formations that are of outstanding universal value from an aesthetic or scientific point of view. Natural heritage may also be precisely delineated geological formations or natural sites that constitute the habitat of threatened species of plants or animals of outstanding universal value from the point of view of science, natural beauty, or conservation. Natural heritage may also be natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The Convention primarily requires each State to identify, protect and conserve the cultural and natural heritage in its own territory.²⁸ Since the Convention addresses *world heritage*, protecting and respecting heritage, however, is the duty of all States. **Accordingly, each State Party to the Convention undertakes not to take any deliberate measures that might directly or indirectly damage identified cultural and natural heritage.**²⁹

²⁸ Art. 3-5 of the Convention.

²⁹ Art. 6(3) of the Convention.



Official logo of UNESCO

There are challenges associated with the identification of protected world cultural or natural heritage. For instance, it can be difficult to attain an overview of protected areas, monuments, etc., in a given State. For this reason, an identification and registration organisation has been established under the auspices of UNESCO: the World Heritage Committee. On the basis of nominations submitted by States, the Committee determines whether to include sites on the World Heritage List. The updated list is available on the UNESCO website.³⁰ In keeping with the decision to include sites on the list, the World Heritage Committee has adopted an emblem to identify protected areas, etc., that can therefore be used by Danish armed forces operating in the territories of foreign States as an indicator for protection. The emblem must be used alongside the official UNESCO logo. Protected areas, buildings, etc., may then not be used for military purposes and must otherwise be protected and respected.

3.9.2 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 18 May 1977

The Convention prohibits States from using environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.³¹ Environmental modification is defined as any deliberate manipulation of natural processes to change the dynamics, composition, or structure of the Earth, including its flora, fauna, lithosphere, hydrosphere, and atmosphere, or of outer space. The Convention also applies in armed conflict. It supplements AP I, which requires States to display care in protecting the natural environment, including a prohibition of the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment and thereby prejudice the health or survival of the population.³²

³⁰ www.unesco.org

³¹ Ratified by Denmark 19 April 1978, published 15 February 1979 in Danish Law Gazette C.

³² AP I, Art. 55.

3.9.3 Conventions of the United Nations International Labour Organization on fundamental rights and the protection of workers

The conditions of employment for persons recruited locally in the mission area will often be regulated by Status of Forces Agreements (SOFAs) and will often require members of the local labour force to be employed on the same conditions as those applicable to other public-sector employees of the receiving State, i.e., the State in which the military operation takes place.³³ In the absence of a SOFA, the law of the receiving State must also be respected.

Denmark has been a member of the United Nations International Labour Organization (ILO) since its creation in 1919 and has ratified more than 70 ILO conventions that ensure **global minimum standards for labour conditions** and social security for workers.³⁴

Above all, the conventions oblige Denmark as a State to implement these standards into Danish domestic law in a satisfactory and effective manner. The conventions may have a limited territorial scope of application, but the principles may be applied to persons employed by the Danish State outside the territory of Denmark.

The core of these conventions is recognised as having a basis in human rights. These rights are universal and must be respected by all States. This includes eight conventions in all, including conventions on freedom of association, collective bargaining, the prohibition of child labour, the abolition of forced labour, the right to equal remuneration for work of equal value, and the prohibition of discrimination.

Moreover, during armed conflict, a number of special provisions regulating labour while deprived of liberty and in an occupied territory are applicable. These special provisions are described in more detail in the relevant chapters of the Manual, and Chapter 6 describes the absolute prohibition of slavery and other forms of unpaid forced labour under HRL.

Some of the ratified ILO conventions are of relevance to the Danish Defence - for example, in cases in which civilians are recruited locally to assist Danish armed forces in **military operations outside an armed conflict**. A review of the core conventions of the ILO, EU regulations, and Danish collective agreements provides the

³³ See, e.g., NATO SOFA, Art. IX(4).

³⁴ International Labour Organization Constitution art. 19, stk. 5 og 6.

following list of conditions to which the Danish armed forces **need to pay special attention** as an employer of locally-employed staff:

- 1) Locally-employed staff should be employed pursuant to a written contract of employment that forms the basis of the employment relationship by specifying, for instance, the employment period, working hours, and place of work and contains provisions on termination by notice and termination for breach. The contract should specify the wages the employee is entitled to receive and how the wages will be paid. The wage level itself, on the other hand, should be consistent with the wages paid for equivalent services in the receiving State.
- 2) Employees have the right to organise and to collective bargaining. In practice, this will often mean that the employees are entitled to appoint a workplace representative.
- 3) No unfair discrimination is allowed in the context of the selection criteria for employees.³⁵ The prohibition against discrimination may be challenging to interpret in practice, particularly in military operations taking place in unstable regions. This is because it will often be necessary to select, for example, interpreters/drivers of a particular ethnicity or of a particular gender in order to achieve the desired effect of the task to be performed. Such cases will not usually be regarded as involving unfair discrimination. An assessment should, against this background, be made in possible consultation with LEGAD or other specialists.
- 4) The minimum age for any type of employment or work that, by its nature or the circumstances in which it is carried out, is likely to jeopardise the health, safety, or morals of young persons is 18 years of age.³⁶ Recruitment into the Danish armed forces engaged in military operations may constitute this type of employment because of the security risk. Therefore, the age limit in this case is 18 years of age.
- 5) Local staff shall be entitled to/have the right to reasonable occupational safety, including information about the risks that may be associated with their work as well as access to special protection equipment. If an employee suffers a labour-related injury, workmen's compensation shall be paid to the employee.³⁷ The amount of such compensation is to be determined in accordance with appropriate local standards.

35 Convention concerning Discrimination in Respect of Employment and Occupation of 25 June 1958, ratified by Denmark on 22 June 1960.

36 Minimum Age Convention 1973 (Convention No. 138) and Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999, Art.3(d).

37 Convention Concerning Workmen's Compensation for Accidents of 10 June 1925.

- 6) Employees shall be entitled to/have the right to take a reasonable amount of vacation. This is another example in which the receiving State's regulation of the area should give an indication of the rights of employees.
- 7) Employees shall be entitled to/have the right to wages during sick leave and maternity leave in accordance with the standards applicable in the receiving State.

3.9.4 Protection of diplomats

This protection has been included here because Danish armed forces regularly come into contact with diplomats of other States, including in operations outside of armed conflict and in NIACs of a transnational character. Danish armed forces must respect the accreditation that, on presentation of proof, has been assigned to members of diplomatic staff in the State to which Danish forces are deployed.

Diplomats, duly registered with the local authorities, enjoy the privileges and immunities set forth in the Vienna Convention on Diplomatic Relations of 1961.³⁸ Protected personnel are typically equipped with diplomatic identification and a passport, and their vehicles are marked with the distinctive letters "CD", combined with the use of special features on licence plates, etc.

Diplomatic vehicles may be stopped but not searched, not even at checkpoints or the like. This raises the question of whether a diplomatic vehicle should be permitted passage into an area of operation even though checkpoint personnel have not been able to search the vehicle. The starting point for any State is to ensure that diplomats enjoy freedom of movement and travel within its territory. This starting point is modified, however, in accordance with laws and regulations concerning zones into which entry is prohibited or restricted for reasons of national security.³⁹

The archives, communications, and official correspondence of a diplomatic mission are inviolable, and diplomatic mail may not be opened or detained. All bags, folders, binders or the like containing such documents must bear visible external marks of their character. The same inviolability is applicable to *CNO**.⁴⁰

The person of a diplomat is inviolable and is not liable to any form of detention or search. The premises of the mission are inviolable, and the private residence of a diplomatic agent enjoys the same inviolability.

³⁸ Vienna Convention on Diplomatic Relations of 18 April 1961.

³⁹ Vienna Convention, Art. 26.

⁴⁰ CWM, Rule No. 84.

The same rules of protection apply to members of the administrative and technical staff of the mission.

The Vienna Convention on Consular Relations of 1963 regulates the legal status of, for instance, consular officers and the consular premises.⁴¹ The consular premises are inviolable without the consent of the head of the consular post with regard to that part of the consular premises used exclusively for the work of the consular post. Consular archives and documents are inviolable. Freedom of movement and freedom of communication must be ensured to all members of the consular staff. The official correspondence of the consular post is inviolable, and the consular bag may not be opened or detained.

3.10

Regulation of Computer Network Operations in international law

Denmark's Computer Network Operations (CNO*) capacity is still in its early stage of development at this time. Therefore, it is not an area in which the Danish forces have a significant amount of operational experience.

CNO* is divided into three basic operational modes of which the attack mode is of primary relevance in this Manual. The three operational modes are:

- Defence, referred to as Computer Network Defence (CND*);
- Exploitation, referred to as Computer Network Exploitation (CNE*); and
- Attack, referred to as Computer Network Attack (CNA*).

It is debatable whether cyberspace should be regarded as a completely new domain for hostilities or whether it is more natural to regard CNO* as a new means of combat that is used on the existing battlefield.

This may seem to be a purely academic debate, but it is relevant to the way the subject is handled in the Manual. The Manual treats CNO* as a means of combat subject to the existing rules of international law.

The fact that the Manual treats CNO* as a means of combat also means that there is no separate chapter on CNO* and that the CNO* aspects of the general rules are

⁴¹ Vienna Convention on Consular Relations of 24 April 1963.

discussed where it is particularly relevant in the Manual. This will usually be in situations in which the effects of a *CNA** can be equated with the effects known from conventional attacks.

If the effects of a *CNA** are of such a nature that it can be equated with an attack within the meaning of international law, the *CNA** is subject to the same rules as those applicable to more conventional attacks in which case it must be treated as such.

In this context, it is necessary to distinguish between two different forms of attack: a *CNA** considered to be an attack that can be equated to a conventional attack, as dealt with in Chapter 8, and a *CNA** that is an attack in the sense that it gives the State attacked the right to exercise its right to self-defence under the UN Charter, as dealt with in Chapter 2.

It is not difficult to imagine the use of a *CNA** in a conventional attack, and Chapter 8 presents various examples of how *CNA** operations were executed. On the other hand, it is more difficult to imagine an isolated *CNA** that would be considered an armed attack under Article 51 of the UN Charter. If a *CNA** is used in conjunction with conventional military operations, the overall consequences of the attacks must be assessed in relation to determining whether it is an attack under Article 51 of the UN Charter.

There are also other examples in which general international law has an impact on *CNO** — for instance, the actors on the battlefield, a subject dealt with in Chapter 5, or the rules governing acts of perfidy and ruses of war, which are discussed in Chapter 10.

Even when the Manual does not discuss separately the *CNO** aspects of an area of international law, certain aspects of the treatment may be of relevance to *CNO**. The decision not to discuss the subject separately merely reflects the view that such a discussion has not been considered necessary at the present time. Indeed, the general parts of the Manual contain multiple footnote references to the Tallinn Manual (CWM) in spite of the absence of a separate discussion of *CNO** in the main text. More information about the Tallinn Manual is provided in Section 5.4.2 below.

4. Human rights law

The Manual addresses HRL from an overall perspective both in this chapter and in individual chapters in which human rights are assessed to have relevance.

4.1

Introduction

Human rights are fundamental rights that, as a general rule, apply to all persons in the State concerned. However, certain rights are reserved for the citizens of a State, and some rights are aimed at particular groups of people in need of special protection — for instance, women, refugees, persons with disabilities, or children. Other conventions focus on a particular theme — for instance, protection against torture, etc., and racial discrimination.

States are under an obligation to ensure that all persons **subject to the jurisdiction of the State** in fact enjoy the human rights the State is obliged to observe.

Denmark has acceded to a wide range of international human rights conventions. These include:

- The European Convention on Human Rights (ECHR);
- The United Nations International Covenant on Civil and Political Rights (ICCPR);
- The United Nations International Covenant on Economic, Social and Cultural Rights (ESCR);
- The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- The United Nations Convention on the Rights of the Child (CRC);
- The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and
- The United Nations Convention on the Rights of Persons with Disabilities (CRPD).

Below is a description of when human rights are applicable to Danish armed forces when taking part in military operations outside Denmark. For that purpose, the assessment of this question is based on case law from the European Court of Human Rights (ECtHR).

4.2

Application of human rights outside Denmark

Human rights primarily apply within the territory of the State itself. In certain exceptional situations, however, a State – and, therefore, its armed forces – may also be bound by human rights obligations when acting outside its territory.

On the basis of ECtHR case law, it can be concluded that the European Convention on Human Rights, at a minimum, is applicable when a State acts outside its own territory and exercises physical, effective control over individuals (**personal jurisdiction**) or effective control over a territory (**territorial jurisdiction**) and when a State exercises **public powers** with the consent of the territorial State.

Personal jurisdiction

First of all, personal jurisdiction may arise in cases in which Denmark deprives a person of their liberty or otherwise detains a person in the territory of another State and the person is thereby under the physical and actual control of Danish forces.⁴²

Another situation in which personal jurisdiction is assumed to exist — without this being a case of actual deprivation of liberty — arises, for instance, when Danish armed forces outside Denmark have full control over a military camp and the persons present in the camp. In such cases, however, personal jurisdiction does not arise solely from the State's control over the camp, etc., as physical and actual control by the State over the persons present in the camp is decisive.⁴³ Personal jurisdiction will exist, for instance, if a person has been brought to a Danish camp where the person is under the physical and actual control of Danish forces for the purpose of interrogation.

42 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, para. 136, ECtHR, *Hassan v. UK* (Appl. No. 29750/09) of 16 September 2014, para. 76.

43 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, para. 136.

However, it is not a requirement for the existence of personal jurisdiction that the person deprived of liberty is physically present in an area controlled by Denmark. This is illustrated by a judgment in which the ECtHR found that the conditions for establishing personal jurisdiction may also be met in situations in which checkpoints are manned by a State's armed forces, since the purpose of such checkpoints is to assert authority and control over persons passing through the checkpoint.⁴⁴

Personal jurisdiction most often flows from cases involving deprivation of liberty.⁴⁵ See Chapter 12 for a more detailed discussion of this topic, including how applicable HRL is combined with IHL in cases of armed conflict.

Territorial jurisdiction

Territorial jurisdiction exists when a State exercises effective control over an area located in another State. According to case law, a very high degree of control is required; by contrast, if the conditions are met, the entire ECHR, including the protocols acceded to by Denmark, will be applicable.⁴⁶

In cases in which there is territorial jurisdiction, Denmark may be responsible not only for the actions of the Danish armed forces but also for the actions and omissions of local law enforcement agencies. In that case, it is not decisive for Denmark's responsibility whether the relevant actions are performed by Danish forces themselves or through a more indirect form of control of local authorities, including the police.⁴⁷

What is primarily decisive, however, is the strength of Denmark's military presence in the area. Other factors may also come into play — for instance, the extent to which the military, economic, and political support provided to the subordinate local administration gives the foreign armed forces influence and control in the region.⁴⁸

In armed conflicts in which the conditions for belligerent occupation are met, questions could arise about the simultaneous application of IHL and HRL. This

44 ECtHR, *Jaloud v. Netherlands* (Appl. No. 47708/08) of 20 November 2014, para. 152.

45 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, para. 137.

46 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, para. 138.

47 ECtHR, *Loizidou*, paras. 52-56, ECtHR *Cyprus v. Turkey* (Appl. No. 25781/94) of 10 May 2001, para. 77, and ECtHR, *Ilascu v. Moldova and Russia* (Appl. No. 48787/99) of 8 July 2004, para. 314.

48 EMD *Ilascu and Others v. Moldova and Russia*, (Appl. No. 48787/99) of 8 July 2004, paras. 388-394.

question is dealt with in more detail immediately below and in Chapter 11.

If territorial jurisdiction applies, responsibility will often be shared with organisations and other States taking part in the international mission. Such a mission will typically be structured into a military component, a security component, and a more civilian component aimed at reconstruction, for instance. In the overall planning of the mission, the military forces will often be given responsibility for restoring and maintaining civil law and order and public security in the area.⁴⁹

Public powers

The ECtHR has also recognised the exercise of a third form of jurisdiction, which the Court refers to as “public powers”.⁵⁰ According to case law, this jurisdiction applies when a State, based on the invitation of the territorial State or its express or implied consent, exercises all or some of the public powers of the territorial State.⁵¹ This may be in the form of executive or judicial powers. What is decisive is that the violation of rights in a specific situation may be ascribed (linked) the troop-contributing nation involved rather than the territorial State.⁵²

For instance, the ECtHR has found extraterritorial jurisdiction in a case in which States (the United Kingdom and the US) had temporarily assumed responsibility for security, including the enforcement of civil law and order in Iraq.⁵³ In other words, the Court found jurisdiction in the case although neither of the conditions for personal or territorial jurisdiction were met. In this case, the Court attributed significant weight to the facts that the United Kingdom exercised powers that were usually vested in Iraq and that the United Kingdom exercised these powers on the basis of Iraq’s invitation or its express or implied consent.⁵⁴

The case concerned the right to life, including the requirement that individuals should be protected from the arbitrary deprivation of life and that the State exercising such public powers should refrain from using deadly armed force that does not meet the requirements of the Convention.

Other human rights will also often be of relevance. When Danish armed forces take part in the exercise of public powers on the basis of an invitation from the territorial State, see above, relevant human rights will be determined by concrete assessment,

49 See, e.g., UN SC Resolution 1244 of 10 June 1999 regarding the situation in Kosovo.

50 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, paras. 135 and 149.

51 ECtHR, *Bankovic and Others v. Belgium* (Appl. No. 52207/99) of 12 December 2001, para. 71.

52 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, para. 135.

53 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, paras. 144-148.

54 ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, para. 135.

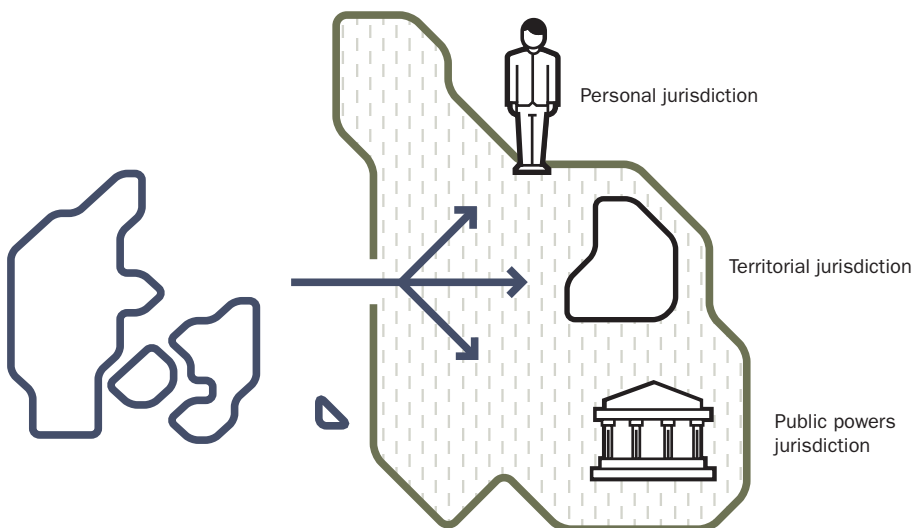
taking into account an assessment of the powers exercised as well as which human rights problems this might trigger.

Summary of Denmark's responsibility for complying **with HRL in military operations**

The Danish armed forces are **obliged** to comply with HRL in military operations in which Denmark exercises extraterritorial jurisdiction in the form of personal jurisdiction, territorial jurisdiction, or where public powers are exercised by Danish forces. To determine which human rights are of relevance in the individual case, it is necessary to perform an in-depth analysis of the individual mission and its basis, see Chapter 2.

4.3

HUMAN RIGHTS OUTSIDE DENMARK



• **FIGURE 3.2** •

This figure illustrates the three instances, see above, in which Denmark's obligations under HRL apply in mission areas (extraterritorial jurisdiction). These instances apply regardless of whether an armed conflict exists or not.

Special considerations concerning Danish forces deployed under UN military command and control

The United Nations peacekeeping forces are an integral part of the UN organisation.⁵⁵ As an international organisation, the United Nations also has obligations under HRL that must be observed by the contingents placed at its disposal.⁵⁶ The United Nations has not become party to human rights conventions but is bound by customary law and may incur responsibility as an organisation in the event that the UN peacekeeping forces violate these obligations.⁵⁷

In many situations, Danish armed forces are deployed within the framework of a peace operation under the **military command of the United Nations**, i.e., in which the forces serve under the authority of a UN-appointed military commander who refers directly to the United Nations and issues orders directly to subordinate units.

It is in such operations the **United Nations lays down the relevant operational procedures**, RoE, etc., to ensure compliance with human rights with which Danish forces must comply. The UN rules and procedures are generally consistent with Denmark's obligations. However, in certain cases, depending on the mission and the tasks to be undertaken by the Danish contingent, these obligations will be specified in national directives — for instance when the Danish obligations extend beyond those imposed by the UN.

The ECtHR has exercised restraint in pronouncing judgments ordering Member States to observe the ECHR in UN-led peace-support operations with reference to the opinion that it would constitute disproportionate interference in the activities of the United Nations as an organisation with primary responsibility for international peace and security.⁵⁸

Following the Danish Military Penal Code §1 cf. §3, if Danish military personnel violate the Danish Criminal Code or the Danish Military Penal Code during such missions, the offence may fall within Danish criminal jurisdiction depending on the circumstances. For more information, see Section 4.2 of Chapter 15.

55 Letter of 3 February 2004 from the UN Legal Counsel to the Director of Codification Division.

56 Draft Articles on the Responsibility of International Organizations, June 2011, A/CN.4/L.778, Art. 7.

57 ICJ Advisory Opinion of 11 April 1969, "Reparation for Injuries Suffered in the Service of the United Nations", para. 174.

58 Concerning ECHR, see ECtHR, *Behrami and Saramati v. France and Others* (App. No. 71412/01 and 78166/01) of 2 May 2007, paras. 140-141 and para. 149.

Section 5.5 below provides more information about the application of IHL in UN-led operations. See also Section 2.5 of Chapter 12 for information about the deprivation of liberty during such operations.

4.4

Human Rights Law in armed conflict

It is a basic principle that HRL applies at all times. Fundamental human rights are not dependent on the existence of an armed conflict or other exceptional circumstances. Armed conflicts may naturally exert particular pressure on the rights of individuals, such as the right to life, liberty, and security of person.

In some cases, during the adoption of human rights conventions, States have explicitly addressed the application of the rules in armed conflict or other special situations. Some of the rights, therefore, incorporate a certain amount of flexibility.

Some human rights conventions provide for derogation from certain rights in cases in which the internal security of the Member State concerned is seriously threatened. The ECHR and the ICCPR are examples of this.⁵⁹

Derogation implies that States Parties are allowed to **derogate** from certain rights temporarily and generally. Moreover, a great number of rights, including freedom of assembly, freedom of expression, and the right to respect for private and family life, may be limited based on a **specific individual assessment** in special situations — for example, when the security of the State is at risk.

Certain human rights are **absolute** and, therefore, are not be subject to derogation. This applies, first and foremost, to the right to life (except with respect to deaths resulting from lawful acts of war), the prohibition against torture or any other form of cruel, inhuman or degrading treatment or punishment, slavery, and punishment without law.⁶⁰

As mentioned in Chapter 2, IHL is essentially only applicable in armed conflict.

In some cases, during armed conflict, there may be discrepancies between HRL and IHL. One example is the protection under HRL of the right to life in contrast to the

⁵⁹ ECHR, Art. 15(1), and ICCPR, Art. 4(1).

⁶⁰ ECHR, Art. 15(2) and ICCPR, Art. 4(2). Under the CCPR, no derogation may be made from various additional rights, including the right to freedom of religion, see Art. 4(2).

rules of IHL entitling combatants to take a direct part in hostilities.

However, HRL also complements IHL in a large number of areas. This is particularly true of the fundamental guarantees that apply when persons are in the power of an adverse party to a conflict.⁶¹ These fundamental guarantees are discussed in the relevant chapters of the Manual along with other rights of persons held in Danish custody.

Insofar as human rights are applicable outside the borders of Denmark, the Danish armed forces are required, to the greatest possible extent, to interpret the two sets of rules in a manner that ensures maximum consistency between them. This calls for an in-depth analysis of the individual conflict and situation in the light of international law, including an analysis of the applicable rules at the different stages of the conflict.

The intensity of hostilities may change, and the degree of area control may vary. Therefore, it is not merely a question of identifying human rights of relevance to a specific armed conflict when the first troops of a military contingent are deployed to an international military operation. It must also be done on a continuous basis. This assessment is made by the Danish Ministry of Defence on the basis of an on-going assessment of the factual circumstances in the mission area, and the results are communicated through the chain of command to the deployed Danish unit.

4.5

Particularly relevant fundamental human rights

As mentioned above, ongoing analyses with respect to international law are needed to identify the rights the Danish armed forces are obligated to observe with due regard for the mission tasks and the special circumstances prevailing in the mission area and the applicability of relevant human rights to the situation.

Below is a list of examples illustrating which human rights may be of relevance to military operations. The list is not exhaustive, and other rights might therefore also be relevant, depending on the situation.

In armed conflicts, this review will be supplemented by the list of fundamental rights in armed conflict provided in Chapter 6.

61 For instance, AP I, Art. 75ff., and AP II, Arts. 4 and 5.

1. The right to life, including the prohibition of the death penalty.⁶²

The right to life is naturally of relevance in military operations in which the use of deadly armed force is authorised under certain circumstances. The right to life is a very broad phrase. It contains, for instance, aspects related to the prohibition against the death penalty, the prohibition of the use of force by authorities, and the duty to investigate suspicious deaths. All aspects are relevant when the obligation to observe the right to life follows from one of the three “forms of jurisdiction” described above.

In operations in which none of the three conditions for jurisdiction is met, Danish armed forces must respect the aspects of the right to life that are linked to their own use of force.⁶³ Particular emphasis, therefore, has been placed on these aspects, including the requirement of absolute necessity to save one’s own or other persons’ lives in cases in which deadly armed force is used against persons other than combatants and civilians who take a direct part in hostilities in armed conflicts. This aspect of the right is dealt with in more detail in Section 7.4 below in connection with the discussion of the framework for the use of force in international military operations.

2. Prohibition against torture or any other form of cruel, inhuman, or degrading treatment or punishment.⁶⁴

This absolute prohibition primarily relates to the treatment by the Danish armed forces of persons deprived of liberty and, therefore, is dealt with in more detail in Chapter 12 of the Manual. These are deemed to be cases of *personal jurisdiction**. The prohibition might also encompass obligations to prevent acts of torture, etc., in any territory controlled by Danish armed forces.

3. Right to liberty and security of person.⁶⁵

Deprivation of liberty is permissible only if it occurs in accordance with the conditions prescribed by law. This means, for instance, that the deprivation of liberty must be provided for in domestic law. The measure also has to be necessary, i.e., proportionate to its purpose. In addition, deprivation of liberty must be in accordance with one of the legitimate purposes (grounds for detention) listed in Article 5 of the European Convention on Human Rights.

Limitations

In general, the territorial State is responsible for implementing legislation that gives the peace-support forces and other relevant authorities the necessary statutory powers to conduct such deprivations of liberty. In cases in which the State in question is under partial or total occupation, this duty will rest with the occupying power. More information about the right of the occupying power to implement legislation with effect in the occupied territory is provided in Chapter 11.

Limitations on freedom of movement in the context of military operations

The right of individuals to move freely and to have the freedom to choose their place of residence will often be challenged in States that are experiencing, or have experienced, disaster or conflict. Limitations may be placed on the exercise of the freedom of movement and the freedom to choose one’s residence that are in accordance with law and necessary for the purposes listed in Article 2 of Protocol 4 to the ECHR, including the interests of national security or public safety.

⁶² See, e.g., UNDHR, Art. 3, ECHR, Art. 2, and CCPR, Art. 7.

⁶³ Addendum 3.2.

⁶⁴ See, e.g., UNDHR, Art. 5, ECHR, Art. 3, CCPR, Art. 7 and CAT.

⁶⁵ See, e.g., UNDHR, Art. 12, ECHR, Art. 8, and CCPR, Art. 17.

4. Right to respect for private and family life⁶⁶

Everyone has the right to respect for one's private and family life, one's home, and one's correspondence. The right may be relevant in all three forms of jurisdiction referred to in Section 4.2 above.

Limitations

Limitations may be imposed in accordance with the conditions prescribed by law and only when such limitations are necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Particular relevance in military operations

Interference in private and family life occurs relatively frequently in international military operations in and outside of armed conflict. Such interference, for instance, may be in the form of:

- Searches of persons, private homes, or vehicles
- The use of private property for military camps or similar purposes in compliance with status agreements
- Obtaining or collecting personal data, including DNA or other *biometric data**⁶⁷
- Destruction of or damage to private property in connection with movements of military troops
- Interception of communications, i.e., communications of a private nature, including wiretapping and eavesdropping, monitoring of data traffic, etc.

5. Right to freedom of thought, conscience, and religion⁶⁸

Everyone has the right to freedom of thought, conscience, and religion. This right includes the freedom — either alone or in community with others and in public or private — to manifest one's religion or belief in worship, teaching, practice, and observance. In relation to freedom of religion, the right implies, for instance, that one may not be compelled to declare one's religion and that one has the right to practise or manifest one's religion in different ways. For instance, this may be in prayer, clothing, and special preparation of food, by preaching, propagating, and trying to persuade others to join one's religion, by participating in religious communities without undue State interference, or by assembling for worship and other activities.

The rights will be of the greatest relevance in situations where *territorial jurisdiction** exists, including cases of belligerent occupation, but they might also have significance in cases of *personal jurisdiction**.

Limitations

The right to freedom of religion may be subject only to such Limitations as are “prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”. The interests of national security cannot be used to justify such limitations.⁶⁹

Special considerations for military operations

Respect for this right is often challenged when Danish armed forces deprive individuals of their liberty but also in situations in which military operations may otherwise be said to interfere with the exercise of the right — for instance, in connection with public holidays. More particularly, with respect to wearing

⁶⁶ See, e.g., UNDHR, Art. 12, ECHR, Art. 8, and CCPR, Art. 17.

⁶⁷ Charter of Fundamental Rights of the European Union of 18 December 2000, Art. 8.

⁶⁸ See, e.g., UNDHR, Art. 18, ECHR, Art. 9, and CCPR, Arts. 18 and 19.

⁶⁹ ECHR, Art. 9(2).

particular clothing in the exercise of freedom of religion, headgear may be banned when and as appropriate in connection with access control or the taking of photographs for identity cards.⁷⁰

If there are grounds for finding a threat to public safety, measures may be taken to interfere in the affairs of a religious denomination to verify whether the denomination carries on activities that are harmful to the population or to public safety.⁷¹

6. Right to freedom of expression, assembly, and association⁷²

Everyone has the right to freedom of expression, freedom of peaceful assembly, and freedom of association with others. In areas in which territorial jurisdiction is established, these rights apply on an unrestricted scale, including the obligation of States to offer protection and ensure the exercise of such rights. Where no territorial jurisdiction exists, the only criterion is that the rights must be respected by the Danish armed forces. Limitations should be imposed only if it is necessary for the achievement of a goal relating to the accomplishment of the military mission, typically for maintaining or restoring public law and order.

Freedom of assembly implies that everyone is guaranteed the right to assemble peacefully. This human right is highlighted here because military operations are often conducted in areas in which people assemble publicly to present their views on a variety of things relating to developments in the territorial State. Freedom of expression, assembly, and association cannot be dealt with completely separately, however, because freedom of assembly often supports the right of individuals to express themselves, and freedom of association is illusory unless the members of the association have the opportunity to come together and pursue the interests of the association.

Limitations

States may subject the exercise of freedom of expression to such limitations as are prescribed by law and are necessary, for instance, in the interests of national security or public safety.⁷³ Limitations may also be imposed on the exercise of the rights to freedom of assembly and association if such limitations are prescribed by law and are necessary, for instance, in the interests of national security or public safety.⁷⁴

Special considerations for military operations

Occasionally, military forces are deployed to control demonstrations that threaten to develop into full-scale riots and unrest. There are also occasionally circumstances in which military forces have to impose limitations on freedom of assembly in areas plagued by particularly high levels of rioting and unrest.

7. Prohibition of discrimination

The prohibition of discrimination is embodied in various forms in various human rights conventions.⁷⁵ The prohibition of discrimination centres extensively on how States effectively implement their human rights obligations. States must therefore secure the enjoyment of all rights and freedoms without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, nation-

70 ECtHR, *Arac v. Turkey* (Appl. No. 69037/01) of 23 September 2006, ECtHR in the *Karaduman* case (App. No. 44774/98) of 3 May 1993 and ECtHR, *El-Morsli* (Appl. No. 15585/06) of 4 March 2008.

71 ECtHR, *Metropolitan Church of Bessarabia* (Appl. No. 45701/99) of 13 December 2001, para. 113.

72 UNDHR, Arts. 19-20, ECHR, Arts. 10-11 and CCPR, Arts. 20-22.

73 ECHR, Art. 10(2).

74 ECHR, Art. 11(2).

75 See, e.g., UNDHR, Art. 7, ECHR, Art. 14, and CCPR, Arts. 2 and 26.

al or social origin, association with a national minority, property, birth, or other status.⁷⁶

Limitations

There may be objective and reasonably justified grounds for discriminatory treatment. All people in the same situation must be treated equally. Discrimination is allowed only if based on an objective and reasonable justification.⁷⁷ What considerations constitute such an objective and reasonable justification depend on the right interfered with.

Special considerations for military operations

For instance, lawful discrimination could occur in mission areas in which conflicts take on, or have taken on, an inter-ethnic character, and it therefore may be necessary to maintain separation of ethnic groups in various contexts — for instance, in connection with elections, demonstrations, distribution of humanitarian aid, or the like.

8. Persons with disabilities and prohibition of discrimination on the basis of disability⁷⁸

Under the United Nations Convention on the Rights of Persons with Disabilities (CRPD), the States Parties are obliged to ensure and promote the full realisation of human rights for all persons with disabilities and to protect these persons against discrimination. Although the Convention, unlike most other conventions, does not explicitly define its scope of application, it must be assumed to be particularly relevant in cases of *personal and territorial jurisdiction**. Moreover, in cases in which extraterritorial jurisdiction is not established, the Convention must also be respected by the Danish armed forces to the extent possible and appropriate in the context of the tasks assigned to the force on a particular mission.⁷⁹

The Convention includes a provision aimed at “situations of risk”, including situations of armed conflict, humanitarian emergencies, and the occurrence of natural disasters. This provision commits States, in accordance with their obligations under IHL and HRL, to taking all necessary measures to ensure the protection and safety of persons with disabilities.⁸⁰

Particular relevance in military operations

In the above-mentioned situations of risk, various forms of interaction will occur that may also include persons who have physical or mental disabilities with or without relation to the conflict.

Persons with disabilities may need special support in such situations. This support must be provided primarily by the territorial State, but there may be situations in which the Danish armed forces should be attentive to the specific needs of persons with disabilities. This applies, for instance, in evacuation situations in which impaired mobility can be remedied or in communications with the civilian population in which steps must be taken to ensure that persons with disabilities are capable of engaging in dialogue with the Danish armed forces.

9. Protection of children⁸¹

The United Nations Convention on the Rights of the Child (CRC) gives primary consideration to the best interests of the child. For the purposes of the Convention, a child means every human being under the

⁷⁶ ECHR, Art. 14, and CCPR, Art. 26.

⁷⁷ ECtHR, D.H. and Others v. The Czech Republic (Appl. No. 57325/00) of 13 November 2007, para. 175.

⁷⁸ United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006 (CRPD).

⁷⁹ Addendum 3.3

⁸⁰ CRPD, Art. 11.

⁸¹ United Nations Convention on the Rights of the Child of 20 November 1989 and its protocols.

age of 18 unless, under the law applicable to the child, majority is attained earlier.⁸² It may be difficult in many situations to determine a young person's age. In the absence of reliable documentation, if there is uncertainty about a person's age, the person must be presumed to be below the age of 18. States Parties undertake, among other obligations, to ensure the survival and development of the child to the maximum extent possible. The State undertakes to respect the right of the child to preserve family relations. However, it may be necessary to separate the child from one or both parents. That may be the case when one parent (or both parents) or the child in question is subjected to the deprivation of liberty. See Chapter 12 for more information, for instance, about the duty of the State to notify relatives of the deprivation of liberty of the family member(s) and to provide them with information concerning the whereabouts of the family member(s).⁸³ The CRC secures a wide range of other rights, giving concrete expression to more general human rights from a child's perspective.

The Convention also imposes obligations on States to rehabilitate former child soldiers. The State Parties must take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse, torture or any other form of cruel, inhuman, or degrading treatment, or punishment or armed conflict. Such recovery and reintegration must take place in an environment that fosters the health, self-respect, and dignity of the child.⁸⁴ The obligation is of particular relevance in cases of territorial or personal jurisdiction.

Limitations

It is a basic principle that the State must recognise the rights of the child to freedom of expression, freedom of assembly, and freedom of association and must also respect the freedom of the child to manifest his or her religion. Limitations may be justified in special situations when justified by opposing considerations. It is a common rule that the exercise of freedom of religion may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.⁸⁵

Particular relevance in military operations

Danish armed forces will often be deployed to post-conflict areas in which children have been victims of armed conflict, abuse, or exploitation. Their situation will often play a significant role for humanitarian efforts and initiatives and will be a key focus of attention for States and civilian organisations, including NGOs, in the civilian part of their stabilisation and reconstruction work. In a series of international operations, Denmark has chosen to take part in civilian reconstruction efforts focusing on the conditions of children. In some missions, the Danish Defence has helped establish the appropriate security framework for the reconstruction of schools or other institutions for children. In a few operations, under the auspices of *CIMIC**, the Danish Defence has even been in charge of such projects — in particular, where the security situation has not yet allowed civilian organisations to carry out such work. These choices have been made as part of a coherent strategic approach to such efforts and not necessarily because Denmark considered itself obliged to do so under international law or HRL. Nevertheless, Denmark's priorities are in line with the Convention on the Rights of the Child as well as with the rules of IHL in the area.

In addition, the rights of children may be particularly relevant to the armed forces, for instance, when children and their parents are deprived of their liberty, wounded, or, perhaps, die in connection with the use of force by Danish armed forces or, regardless of the use of force by Danish armed forces, when children contact Danish forces for help to find their parents or other guardians. In such cases, the best interests of the child must be secured by providing information to any remaining family members. In situations in which children have no guardians, steps must be taken to establish contact with civilian

⁸² United Nations Convention on the Rights of the Child, Art. 1.

⁸³ United Nations Convention on the Rights of the Child, Art. 9(4).

⁸⁴ United Nations Convention on the Rights of the Child, Art. 39.

⁸⁵ United Nations Convention on the Rights of the Child, Arts. 13-15.

authorities in the territorial State or civilian organisations assigned to reunite the child with his or her guardian, if applicable. If there is no guardian, authorities must be contacted to enable them to attend to the best interests of the child during the temporary or permanent absence of the parents.⁸⁶

10. Protection of women

The protection of women is high on the human rights agenda. A key instrument in this area is the United Nations Convention on the Elimination of All Forms of Discrimination against Women to which Denmark is a State Party.⁸⁷ Another factor is the prohibition of discrimination on the basis of sex, which is dealt with above. This Convention may be of relevance to all types of jurisdiction.

In addition to the conventions on women's rights, the UN Security Council has also placed the protection of women on the agenda primarily with a view toward preventing any form of gender-related sexual violence. This initiative has resulted in the adoption of resolutions that turn the attention of States and UN organs to this area.⁸⁸

Assaults of a sexual nature, such as rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation, and any other form of sexual violence constitute war crimes.⁸⁹ Forced pregnancy may also constitute a crime against humanity.⁹⁰ For more information, see Chapter 6.

Particular relevance in military operations

The protection of women and respect for women's integrity are of relevance in many different situations in and outside armed conflict.

Where Danish jurisdiction applies, as described in Section 4.2.4 above, the responsibility to protect extends farther than in cases that do not fall within the jurisdiction of Denmark. In such situations, Danish armed forces must effectively protect women against violence, for instance, by keeping women and men separated during the deprivation of liberty. Guidelines for guards should be drawn up to direct special attention to dignity and integrity issues. In addition, surveillance systems should be installed in common areas, etc. For more detailed information, see Chapter 12.

In occupied territories, the responsibility to protect— besides more specific, practical protective measures in the form of law enforcement, etc. — may involve taking a closer look at the legislation of the territorial State to ensure that the protection of women is duly reflected in its domestic law.

⁸⁶ United Nations Convention on the Rights of the Child, Art. 20.

⁸⁷ Executive Order No. 83 of 9 September 1983.

⁸⁸ See, e.g., UN SC Resolution 2122 of 18 October 2013 aiming to Strengthen Women's Role in All Stages of Conflict Prevention.

⁸⁹ ICC Statute, Art. 8(b)(xxii) and Art. 8(e)(vi).

⁹⁰ ICC Statute, Art. 7(2)(f).

5. IHL

5.1

Introduction

IHL is essentially **only applicable in armed conflict**. This basic rule is subject to some important exceptions, however.

Firstly, the regulation of certain weapons is applicable “in all circumstances”, i.e., in armed conflict as well as in military operations outside the context of armed conflict. See Chapter 9 on weapons for a more detailed discussion of this topic. Secondly, IHL also includes provisions obliging States to ensure the implementation of conventions in their domestic legal systems and to facilitate different types of education and training in time of peace as described in Chapter 15. In relation to the use of distinctive emblems, i.e., the Red Cross, the Red Crescent, and the Red Crystal, the same restrictions on their use apply in time of peace, including in international military operations outside of armed conflict.⁹¹ Reference is made to Chapters 7 and 10.

When it is evident that a certain type of armed conflict exists and the parties have been identified, an examination should be made as to:

- 1) Which relevant treaties each of the parties to the conflict are party to. In NIACs, an examination must be made into the treaties to which each territorial State is party. More detailed information is available below. An overview of treaties of IHL and their application to the two types of conflict, including the three sub-categories of NIACs, is provided at the end of this chapter.
- 2) Whether any **customary international law** is applicable to the conflict. This, for instance, is important when a treaty does not apply to the specific conflict because its application is subject to the condition that all States taking part in the conflict have acceded to the relevant treaty and this condition has not been met. However, parts of the convention may have become customary international law. All parties to armed conflicts are bound by customary international law, and the challenge in such cases, therefore, will be to determine what constitutes the customary international law. See Section 5.4 below. In addition to these situations, conflicts may arise in which none of the parties to the conflict is party to any relevant treaties. In such situations,

91 GC I, Art. 44, and AP I, Art. 6, respectively.

the identification of applicable rules of customary international law is all the more relevant.

5.2

International armed conflicts (IACs)

This section reviews the principal conventions to assist in a clarification of whether the individual conventions are applicable in a specific conflict.

Hague Conventions (HC)

The Hague Conventions of 1907, including in particular 1907 HC IV and its annex: Regulations concerning the Laws and Customs of War on Land, apply in all IACs in which all parties to the conflict are party to them. The Conventions have achieved widespread acceptance and, therefore, will be applicable in the vast majority of IACs. Moreover, HC IV and its annex are today considered to constitute an instrument of customary international law, the effect of which is that the rules are to be observed regardless of whether one or more parties to the conflict have not acceded to them.

Geneva Conventions (GC)

The four Geneva Conventions are binding on States in relation to other States that are party to the Conventions.⁹² Every State in the world is party to the Geneva Conventions, which therefore apply in all cases of IAC regardless of why or how the parties have ended up in armed conflict or whether one or more of the parties actually fail to comply with the rules.⁹³ Common Article 3 (CA3) to the four Conventions has the same universal status providing a minimum level of protection for all NIACs.

Additional Protocol I (AP I)

AP I to the Geneva Conventions applies to the same extent as the Geneva Conventions.⁹⁴ AP I has not achieved the same level of universal acceptance. As a consequence, Denmark is not formally bound by AP I in relation to a party to a conflict that is not also a party to the Protocol unless the party in question accepts the application of the Protocol to a specific conflict.⁹⁵

⁹² GC, CA 2.

⁹³ GC, CA 1.

⁹⁴ AP I, Art. 1(3).

⁹⁵ AP I, Art. 96(2).

The study of customary IHL conducted by the International Committee of the Red Cross finds that a very large part of AP I must be assumed to constitute customary international law either in precisely or almost the same form as the form in which the rules are set forth in the Protocol.

3.1 To avoid the difficult identification of customary international law in conflicts in which one or more of the parties to the conflict are not party to the Protocol, Danish forces are required to comply with the provisions of the Protocol in IACs regardless of whether the other parties to the conflict are party to it.⁹⁶

As a general rule, AP I does not apply in NIACs unless the relevant conditions of the Protocol are fulfilled. This Manual, however, finds inspiration for certain obligations set forth in AP I even though the basis for doing so in customary international law may be questionable. Where this practice is followed, it is explicitly pointed out in a footnote with the text “Addendum”.

Weapons conventions

IHL covers a wide range of conventions that specifically prohibit or restrict the use of certain weapons.

Some of these conventions apply to Denmark **regardless of whether other parties to the conflict are party to them**. These primarily include:

- Biological Weapons Convention of 1972⁹⁷
- Chemical Weapons Convention of 1993 (CWC)⁹⁸
- Ottawa Convention on Anti-Personnel Mines of 1997⁹⁹
- Oslo Convention on Cluster Munitions of 2008.¹⁰⁰

Other conventions are based on **reciprocity** in the same way as the Geneva Conventions. This is true, for example, of the UN Weapons Convention of 1980 and its protocols (CCW).¹⁰¹

⁹⁶ Addendum 3.4.

⁹⁷ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972.

⁹⁸ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 January 1993.

⁹⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997.

¹⁰⁰ Convention on Cluster Munitions of 4 December 2008.

¹⁰¹ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980.

During the peace conferences at The Hague during the transition from the nineteenth to the twentieth century, the parties adopted a series of conventions and declarations,¹⁰² including declarations concerning the minimum weight of explosive projectiles¹⁰³ and the prohibition on the use of expanding bullets.¹⁰⁴ A common feature of these standards is that they only apply when **all the parties to an armed conflict** are party to the conventions in question. More information about the regulation of weapons in IHL is provided in Chapter 9. It also appears that some of these prohibitions and bans have gradually acquired the character of customary international law in which case the requirement of reciprocal obligations under treaty law ceases to apply.

Other IHL conventions

Additional Protocol III to the Geneva Conventions (AP III) was adopted in 2005 and introduces a new distinctive emblem. More information is available in Chapter 7.¹⁰⁵ The Protocol applies to the same extent as the Geneva Conventions, i.e., in relation to those States that are party to APIII.

Similarly, the **1954 Hague Convention for the Protection of Cultural Property (1954 Hague Convention)** and its two Protocols apply to the same extent as the Geneva Conventions, i.e., also in relation to the parties to the conflict that are party to the Convention or have agreed to comply with the Convention in a specific conflict.¹⁰⁶ Denmark is party to Protocol I to the Convention but is not yet party to Protocol II.

5.3

Non-international armed conflicts (NIACs)

States have adopted far fewer rules regulating the conduct of NIACs in comparison to IACs. Indeed, there has been — and still is — a tendency for States to consider NIACs to be of an internal character. Therefore, States have traditionally perceived the regulation of NIACs as a matter of domestic law rather than international law. Various special rules have been adopted over time, however, and a description of

102 See, for instance, Hague Convention IV respecting the Laws and Customs of War on Land of 18 October 1907, Art. 2.

103 Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, signed at Saint Petersburg on 11 December 1868.

104 Declaration concerning Expanding Bullets, signed at the Hague International Peace Conference on 29 July 1899.

105 AP III to the Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem of 8 December 2005.

106 Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and its two Protocols.

when these rules are applicable to a specific non-international armed conflict is set forth below. Then follows a presentation of international law rules applicable to both international and non-international armed conflict. Finally, the section addresses the contribution of other sources of international law to the overall regulation of the behaviour of parties during NIACs.

Common Article 3 to the Geneva Conventions

In cases in which the Additional Protocols do not apply, only CA3 provides the basis in treaty law for regulating NIACs — as far as the Geneva Conventions and their protocols are concerned.

However, Common Article 3 (CA3) only contains a very basic level of protection for persons taking no part in hostilities and for those who are placed *hors de combat**, as well as minimum humane treatment standards for all detainees.

It is important that the parties endeavour to reach a common understanding of the rules regulating an on-going armed conflict. CA3, therefore, calls on the parties to establish such an understanding by a mutual effort — for example, by concluding an agreement.¹⁰⁷ There are several examples of such agreements and cases in which the non-State party has notified its adversary of the rules that it considers itself bound by.

Example 3.1: During a NIAC between El Salvador and the FMLN rebel movement, FMLN stated that the movement's methods of combat would comply with both CA3 and AP II. The statement was made after El Salvador had announced that the State did not consider itself bound by AP II in the conflict in spite of its ratification of the Protocol.¹⁰⁸

Furthermore, the provision opens up the possibility for an impartial humanitarian organisation, such as the ICRC, to offer its services to the parties to the conflict.

CA3 applies in all NIACs.

Additional Protocol II to the Geneva Conventions

AP II develops and supplements CA3 in cases of NIAC if:

- 1) the territorial State is party to the Protocol, as the territorial State is the State

¹⁰⁷ GC, CA3(2).

¹⁰⁸ ICTY Tadić IT-94-1-T 1997, para. 107.

- in which the NIAC is taking place, and
- 2) the territorial State is itself party to the conflict, and
 - 3) organised armed groups (OAGs) exercise control over part of the territory of the territorial State in a way that enables them to carry out sustained and concerted military operations from the territory, and to comply with the Protocol.¹⁰⁹

3.2 Danish armed forces must comply with AP II in transnational NIACs in which the territorial State itself is party to the Protocol and the Protocol applies to the conflict following the three requirements mentioned above.

Additional Protocol I to the Geneva Conventions (AP I)

AP I includes a special provision that makes the four Geneva Conventions and the Protocol applicable to **certain conflicts of a non-international character**.¹¹⁰ These situations include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.¹¹¹

If an OAG believes that it meets the requirements of the above provision, **the party concerned must make a declaration to that effect, addressed to the depositary State***, Switzerland.¹¹² Subsequently, the Protocol and the Conventions will be equally binding on all parties to the conflict. This implies, among other things, that the non-State party is granted the privileges of combatant status if the OAG meets the requirements of Articles 43 and 44. More information is available in Chapter 5. The provision has only very rarely been used.

Other conventions applicable in NIACs

A number of other IHL conventions are also applicable in NIACs. This is primarily the case with respect to the **regulation of weapons**. More information is available in Chapter 9 of the Manual.

¹⁰⁹ AP II, Art. 1.

¹¹⁰ AP I, Art. 1(4).

¹¹¹ UN General Assembly Res. 2625 of 24 October 1970.

¹¹² AP I, Art. 96(3).

The Hague Convention for the Protection of Cultural Property (1954 Hague Convention) is also applicable to a wide extent in NIACs. The Convention obliges States to take various protective measures in time of peace as well as in times of armed conflict. The 1954 Hague Convention, therefore, distinguishes between rules applicable in IACs and rules applicable in NIACs. In NIACs, the overall requirement of the 1954 Hague Convention to respect and protect cultural property applies.¹¹³ Denmark is bound by the Convention for the Protection of Cultural Property in transnational NIACs even if the territorial State has not acceded to the Convention.

The 1907 Hague Conventions are only applicable in IACs. The vast majority of the rules have no relevance to NIACs. This is the case, for instance, for rules governing the treatment of prisoners of war, belligerent occupation, and neutrality. A few rules of the **Regulations concerning the Laws and Customs of War on Land (1907 Hague Regulations)**, however, have been manifested as customary international law with effect in all types of armed conflict.¹¹⁴ This Manual identifies and includes these rules where relevant in various chapters.

5.4

Customary international law in armed conflicts

5.4.1 Study on Customary IHL of the ICRC (SCIHL)

The International Committee of the Red Cross (ICRC) worked for a decade to identify customary law in the field of IHL. Published in 2005, the report identifies a total number of 161 rules of customary law across all aspects of IHL. In the view of the ICRC, these 161 rules must be deemed to constitute customary international law that is binding on all parties to IACs. The study also discusses whether, in the view of the ICRC, each rule concerned must also be deemed to apply in NIACs.¹¹⁵

The report has been the subject of some criticism: for instance, in relation to the method used to identify customary international law, as well as the precise wording and, consequently, scope of the individual rules, especially in cases in which the ICRC has chosen to formulate the rule of customary law differently from the rule of treaty law. In a number of cases in which a rule of treaty law exists (typically, applicable to IACs), the ICRC has found support for the conclusion that the rule of customary international law is more far-reaching. In some of these cases, this Man-

¹¹³ 1954 Hague Convention, Art. 19.

¹¹⁴ 1907 Hague Regulations, Section II on "hostilities".

¹¹⁵ Henckaerts and Doswald-Beck: "Customary IHL", ICRC 2005.

ual has chosen to use formulations in conformity with the rules of treaty law where the proof is not sufficiently clear to show the development of a rule of customary international law that is binding on States to a wider degree.

This Manual refers to the SCIHL as an **indication** of the customary international law nature of rules while giving due consideration to and taking into account well-known objections to the validity of the individual rules. Footnote references to the SCIHL may be seen as an indication that the SCIHL has identified a rule of importance but should not be taken as a sign that the Manual necessarily reflects the obligation in the area.

5.4.2 Thematic manuals

In recent years, a tradition of preparing thematic “manuals” (**thematic manuals**) has slowly emerged in areas of particular topicality and relevance. These manuals should not be confused with national military manuals like this one. The thematic manuals may be seen as an attempt to improve the tools at the disposal of parties to armed conflicts in areas in which international law is not particularly precise or well developed.

Thematic manuals are often prepared in collaboration between States and non-governmental organisations or universities with the assistance and support of distinguished experts in the relevant field. Thematic manuals **have, in and of themselves, no binding force in international law** but are an attempt to compile rules already in force within a given area.

In the following, the most important manuals, which may be useful tools in the work to identify applicable international law in a particular area that is not fully covered by this Manual, are introduced. The manuals do not have the status of sources of law in international law. In some cases, they have been met with scepticism from various quarters, including Denmark. Therefore, advice and guidance should be obtained prior to the implementation or other use of material from such manuals.

San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 12 June 1994 (SRM).¹¹⁶ The Manual contains a compilation of existing treaty and customary law in the field. It applies not only IHL but also the United Nations

116 International Institute of Humanitarian Law: “San Remo Manual on International Law Applicable to Armed Conflicts at Sea”, 1994

Convention on the Law of the Sea, international obligations under environmental law, and the regulation of the airspace over oceans in international law. The Manual provides a valuable contribution to international law pertaining to naval operations in armed conflicts and has been used in this Manual's discussion of the subject in Chapter 14.

Air and Missile Warfare Manual of 2009 (AMWM)¹¹⁷ is as essential to air warfare as the San Remo Manual is to naval warfare. The Manual endeavours to describe rules of international law already in force. In addition, this manual is an excellent reference work for use in air operations during armed conflict. Chapter 13 presents the core rules in the manual.

Tallinn Manual on the International Law Applicable to Cyber Warfare of 2013 (CWM).¹¹⁸ The Manual describes in 95 rules how existing international law has an impact on cyber warfare. The IHL we know today has evolved on the basis of our experience of kinetic warfare — the physical use of force. The manual seeks to apply the existing rules to cyber warfare but also covers rules on State sovereignty and right to use force, State responsibility, and neutrality. The field is highly topical and must be expected to grow in relevance. For more information about *CNO**, see Section 3.10 above and the relevant individual chapters of the Manual.

San Remo Manual on NIAC (SRM-NIAC).¹¹⁹ In common with the other thematic manuals, this Manual seeks to provide a comprehensive and coherent presentation of applicable international law. The rules on NIAC may be difficult to capture because case law and customary law account for a very substantial part of the overall legal basis. This manual is mainly used alongside the Study on Customary IHL of the ICRC in the attempt to identify applicable law in NIACs.

5.4.3 Other central documents

Montreux Document on Private Military Companies during Armed Conflict.¹²⁰ The document is the result of a collaboration between the ICRC and Switzerland.

117 Harvard Program on Humanitarian Policy and Conflict Research: "Manual on International Law Applicable to Air and Missile Warfare", 15 May 2009.

118 NATO Cooperative Cyber Defence Centre of Excellence: "Tallinn Manual on the International Law Applicable to Cyber Warfare", 2013.

119 International Institute of Humanitarian Law: "The Manual on the Law of Non-International Armed Conflicts", San Remo, 2006.

120 ICRC and Switzerland: "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", 17 September 2008.

The document addresses, in two parts, the international law challenges associated with the growing tendency for States to use private military and security companies. The first part outlines the rules of international law already applicable in the area, whereas the second part contains various recommendations or best practices. Denmark has officially given its support to the document.

Copenhagen Principles and Guidelines on the Handling of Detainees.¹²¹ In 2007, based on the experience gained from contemporary military operations, the Danish Government took the initiative to identify common guidelines and principles for how to handle detainees in complex, multinational military operations during NIACs. The result is a consensus document identifying general, common guidelines in this area. More information is available in Chapter 12.

ICRC's Interpretive Guidance on the Direct Participation of Civilians in Hostilities.¹²² Contemporary armed conflicts imply a renewed focus on the participation of civilians in hostilities. Civilians forfeit their protection when — and for such time as — they take a direct part in hostilities. But who can actually be considered to be civilians, what activities are construed as taking a direct part in hostilities, and what is the legal effect of this? With this document, the ICRC assists in interpreting the existing rules in the area. The document makes a significant contribution towards clarifying the conditions for the loss of protection for civilians. For more information, see Chapter 5.

5.5

Application of IHL in operations under UN military command and control.

As described in Section 3.4.3 of Chapter 2, missions under the military command of the UN may involve situations in which the United Nations, as an organisation, acts as a party to the conflict. In some cases, the specific circumstances could result in Denmark becoming a party to the same conflict.

In 1999, the UN Secretary-General at the time, Kofi Annan, issued a bulletin with directives to UN forces to be applied when such forces are engaged in armed conflict as combatants.¹²³ The bulletin was primarily issued to ensure a uniform approach to

121 "Copenhagen Principles and Guidelines on the Handling of Detainees in International Military Operations", 12 October 2012.

122 ICRC: "Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL", May 2009.

123 UN Secretary-General's Bulletin on the Observance by United Nations Forces of IHL, 12 August 1999.

the fundamental principles and norms of IHL.

As a general rule, Danish forces taking part in UN operations are required to meet the same obligations as those applicable in other types of operations. At the same time, however, the bulletin serves as a set of administrative regulations and, consequently, must be complied with by UN forces. In some places, the bulletin lays down stricter rules — for instance, in relation to the use of incendiary weapons and booby-traps. The individual chapters of this Manual, therefore, contain references to the provisions of the bulletin in order to facilitate the work involved in determining the applicable rules of international law when Danish armed forces are deployed to a specific mission under UN command. In practice, these conditions will be dealt with in greater detail in the legal basis of the mission and implemented in UN procedures, including in RoE and other mission-specific directives.

6. Mission-specific agreements

6.1 Introduction

Prior to or in connection with the deployment of Danish armed forces to a new mission, it will be necessary to enter into bi- or multilateral agreements. The purpose may be to regulate the legal status of the international force within the territory of the receiving State, to implement armistice agreements, to establish control regimes, or the like.

Such agreements are quite common in operations taking place outside armed conflict. However, agreements on the specific conditions governing Danish military operations within the territory of a State will also be relevant in situations in which a State has requested other States to provide assistance in fighting an insurgent group (transnational NIACs). See below for a description of the legal status of the force in the territory of a foreign State.

In an IAC, there is no inherent basis for negotiating such agreements with the opposing party to the conflict. However, IHL encourages the parties to IACs as well as in NIACs to enter into agreements on special protection, etc. For more information, see Chapter 6.

There have been a few cases of NIACs in which the circumstances engendered a need to secure an agreement with the receiving State on conditions related to the handling of persons deprived of liberty. Such a need may arise for various reasons — for instance, to ensure a mutual understanding of applicable international law for the treatment of detainees transferred by Denmark to the State concerned and to establish a procedure for retransfer, supervision, etc.¹²⁴

In most cases, there will also be a need to conclude agreements **between the various troop-contributing nations**. Such agreements are often of a highly technical nature. They regulate working relations between the troop-contributing nations, including specific provisions on command conditions, logistics, signal conditions, etc., and also lay down the basic principles for aligning expectations between or among the States.

Such agreements are referred to as Memorandums of Understanding (MoU), technical arrangements (TA), or supplementary agreements/arrangements. The latter two types are often used as instruments to set forth the details of more general agreements. Incidentally, these agreements will often have no binding force in international law but will strictly be commitments by the relevant authorities of the collaborating states with respect to the conditions mentioned. Such agreements are typically concluded in connection with all international deployments.

Finally, and particularly in connection with UN missions, status of mission agreements are entered into — also referred to as SOMAs. A SOMA is an agreement relating to the mission itself and to the status of the mission in the territories of the receiving States. SOMAs may be of relevance to the Danish armed forces. For instance, it has been agreed that personnel and/or materials forming part of the forces are required to be in uniform or/and display a distinctive emblem and be able to provide proof of identity verifying that they belong to the force. Such personnel and/or material will also have the benefits of the special privileges and immunities accorded to members of the force.

124 See, e.g., “Memorandum of Understanding between the Ministry of Defence of the Islamic Republic of Afghanistan and the Ministry of Defence of the Kingdom of Denmark concerning the Transfer of Persons between the Danish Contingent of the International Security Assistance Force and the Afghan Authorities” of 8 June 2005. The ICRC is likely to enter into an agreement with the receiving State on the organisation’s access to visit persons deprived of liberty. This is also covered by the above-mentioned MoU.

6.2

Status in international law of Danish forces in the territory of a foreign State

On one hand, any person physically present in the territory of a State is required to comply with the law of the territorial State. That requirement also extends to the armed forces of a foreign State.

On the other hand, a State and its representatives enjoy some form of **immunity**. It follows from the principle of sovereignty in international law that representatives of a State essentially cannot be prosecuted for official acts in the territorial State, i.e., acts performed or opinions expressed in an official capacity. This principle also applies to Danish soldiers deployed as representatives of the Danish State, for instance, in UN-led operations. The extent of this immunity from prosecution, however, is characterised by significant ambiguity. For instance, it may be unclear what acts are deemed to be performed in an official capacity, to what extent certain types of criminal offences are excluded from this principle, and how the group of protected persons could be more precisely delimited. Moreover, certain treaties provide for *ad hoc* waivers of immunity.¹²⁵

Specifically in relation to armed conflicts, these two principles are subject to certain modifications and qualifications, including with regard to prosecution for war crimes.

When Danish armed forces are deployed to the territory of a foreign State, therefore, the forces are required to comply with the law of the receiving State, but the right of the territorial State to prosecute such forces for any offences they may commit is subject to limitations. Acts committed by Danish armed forces fall within Danish criminal jurisdiction.¹²⁶

Compliance with all laws of territorial States presents a catalogue of logistical and operational challenges, for instance, in the following areas:

- To what extent are members of the Danish forces allowed to carry arms in the receiving State, and what rules follow from the receiving State's law on the use of force?
- Is the troop-contributing nation required — for the purpose of paying cus-

¹²⁵ See, e.g., ICC Statute, Art. 27.

¹²⁶ Sections 6-12 of the Danish Criminal Code and section 5 of the Danish Military Penal Code.

toms duties, taxes, and charges — to declare the value of material and supplies imported into the receiving State in accordance with the receiving State's normal rules of law?

- On what conditions are the troop-contributing nations allowed to use the resources that are available in the receiving State? This includes facilities for quartering, camps, depots, checkpoints, etc., supplies of water, heat and electricity, and other necessities.
- Does the deployed international force enjoy freedom of movement, or are the law enforcement agencies of the receiving State entitled to interfere with this freedom?
- How are claims for compensation against the deployed force determined and settled, including in cases in which the injured party or parties are civilian persons in the receiving State?
- To what extent may Danish forces use the receiving State's electromagnetic spectrum and computer network and pursuant to what conditions?
- What jurisdiction do the receiving State's law enforcement agencies exercise over the personnel of the deployed contingent and under which specific circumstances?
- What steps should be taken in the event of disagreement on the resolution of these questions?

These and other questions relating to the legal status of Danish armed forces in the receiving State may be resolved in different ways before or during deployment. The following sub-sections offer a general presentation of the most relevant instruments used to resolve these questions. Section 6.4 below outlines the legal position in cases in which no agreement has (yet) been concluded on this issue.

Sending and receiving States sometimes enter into Status of Forces Agreements (SOFAs) to find an appropriate balance between considerations of the sovereignty of the receiving State and the desire to achieve maximum operational flexibility for accomplishing the military mission. Such an agreement is a compromise that can only be reached when the parties are prepared to cooperate on such matters.

6.2.1 Operations under UN military command and control

States that deploy personnel in the form of individuals or actual troop contingents to peacekeeping operations deploy personnel to the UN as an international organisation. Such UN-led operations are conducted in accordance with various general basic rules of international law relevant to the legal status of the UN force in the

territories of the receiving States.

These basic rules are applicable when the UN **exercises military command and control** of the mission as opposed to cases in which the UN Security Council has mandated an operation that is subsequently carried out under NATO's military command or a coalition command.

Special protection of UN forces under international law

It follows from Article 105 of the Charter of the United Nations that the UN must enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the fulfilment of its purposes.¹²⁷ Representatives of UN Member States as well as UN officials must similarly enjoy such privileges and immunities as are necessary for the exercise of their UN-related functions.

This very general provision reflects a desire to commit the Member States to supporting the activities of the UN by recognising a certain level of special protection, which in this context takes the form of immunities and privileges.

1946 Convention on the Privileges and Immunities of the United Nations

The question concerning the content of Article 105 of the Charter has been elaborated by the Convention on the Privileges and Immunities of the United Nations.¹²⁸ Article VI of the Convention is of greatest relevance to Danish troop contingents in UN-led operations.¹²⁹ The provision states that “experts performing missions for the United Nations” are accorded immunity from personal arrest or detention and from seizure of their personal baggage. At the same time, such experts are accorded immunity from prosecution based on words written or spoken and all acts performed by them in their official capacity.

The commander and staff of the mission are assumed to be regarded as “experts on mission” within the meaning of the Convention.¹³⁰ This means in practice that **mission staff are protected under the Convention, whereas the individual national**

¹²⁷ UN Charter, Art. 105.

¹²⁸ Convention on the Privileges and Immunities of the United Nations of 13 February 1946, acceded to by Denmark on 10 June 1948.

¹²⁹ Art. VI, section 22 et seq., of the Convention.

¹³⁰ ICJ Mazilu Case (Advisory Opinion) 1989, para. 48.

contingents in the form of units, for instance, do not enjoy this protection. The question has not been finally resolved, however, and will eventually have to be settled on an ad hoc basis between the UN and the receiving State if such a situation should arise.

Such national troop contingents may be covered by a mission-specific SOFA concluded as a supplement to the 1946 Convention, see below.

1994 Convention on the Safety of United Nations and Associated Personnel¹³¹

In the wake of a series of attacks against UN forces—for instance, in UN missions in Rwanda and Somalia, the United Nations took the initiative to draft a convention that formally protects the UN and associated military personnel in peace-support missions under the military command of the UN from attacks or any other action that prevents the forces from discharging their mission.¹³² While Denmark is party to the Convention, it has generally received limited acceptance.¹³³

In 2005, an Optional Protocol to the Convention was adopted, extending the scope of protection under the Convention from peace-support operations to include other operations established by a competent UN organ. For instance, now the Convention also applies to the delivery of emergency humanitarian assistance and peace-building initiatives of a more political, development-oriented, or humanitarian nature, i.e., also in cases in which the personnel in question do not fall within the category of actual UN personnel.¹³⁴

UN SOFA model

The UN General Assembly has adopted a model SOFA for use in military operations under the command of the United Nations.¹³⁵ This is only a model or template that can provide a basis for mission-specific agreements. In other words, the model does not apply without an agreement between the receiving State(s) and the UN, but it

131 UN Convention on the Safety of United Nations and Associated Personnel of 9 December 1994.

132 Art. 7 of the Convention.

133 As of 19 November 2014, there are 91 States Parties to the Convention, and 28 States Parties to the Protocol, including Denmark.

134 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel of 8 December 2005.

135 UN General Assembly document A/45/594, “Model Status of Forces Agreement for Peacekeeping Operations” of 9 October 1990.

provides a basis for additional negotiations. In some cases, the Security Council has referred to the model in resolutions establishing new military operations. The purpose of such references is to oblige receiving States to accept the model as a transitional solution until a mission-specific SOFA is in place.¹³⁶ The model should not be confused with the model that exists for an agreement between the UN as an organisation and troop-contributing nations on the conditions for attaching personnel and equipment to peacekeeping operations.¹³⁷

The European Union has adopted a similar SOFA model for EU-led operations¹³⁸ and for EU-led civilian crisis management missions.¹³⁹

It is common practice for the UN to try to enter into a SOFA with the receiving State. The agreement will usually be based on the UN SOFA model referred to above. The UN missions in the Congo (ONUC), Cyprus (UNFICYP), Western Sahara (MINURSO), Ethiopia/Eritrea (UNMEE), and the former Yugoslavia (UNPROFOR) are all examples of missions in which the UN has concluded such mission-specific status of forces agreements. There are also cases, however, in which it has not been possible to conclude a mission-specific SOFA. That might occur, for instance, in situations in which the receiving State has completely or partially collapsed and simply does not have the State apparatus necessary for entering into agreements of this nature. The situation in Somalia in connection with the UNSOM II mission is one example of this.

The status of forces agreements establish a clearly defined basis for the legal status of the UN force in the territory of the receiving State. When a SOFA has been entered into, all UN personnel are covered — **including national troop contingents**.

Even if a SOFA is concluded on the basis of a UN model, the mission-specific agreements may vary in content.

For instance, the UN SOFA model contains provisions on

Respect for the law of the receiving State

¹³⁶ For instance, UN SC Resolution 1320 of 15 September 2000, para. 6, on the situation in Ethiopia and Eritrea.

¹³⁷ UN General Assembly document A/46/185, "Model Agreement between the UN and Member States Contributing Personnel and Equipment to UN Peace Keeping Operations" of 23 May 1991.

¹³⁸ Draft Model Agreement on the Status of EU-led Forces between the EU and the Host State of 20 July 2007, ed. on 5 September 2007.

¹³⁹ Draft Model Agreement on the Status of EU Civilian Crisis Management Missions in a Host State (SOMA) of 15 December 2008.

“Respect for” does not oblige the UN force to observe any law or regulation at all times (Article 6). The UN force is entitled to take all appropriate measures to ensure the accomplishment of the mission assigned. This does not imply any authorisation to breach the obligations under HRL, but any mission may engender operational needs to act in violation of, for instance, traffic regulations.

Right to prosecute

The right to prosecute personnel for any offences they may have committed lies exclusively with the sending State. However, this right does not extend to civil lawsuits relating to incidents in which the violation in question is committed by personnel outside their official capacity (Articles 46 and 47(b)). The regulation is in keeping with the basic principle of State immunity under international law as described in Section 4.1 above.

Example 3.2: During a deployment to Eritrea (UNMEE) in 2000, some of the Danish soldiers had been granted off-duty time (R&R). The soldiers went to the city of Massawa and took accommodation at a local hotel. Here, they engaged in relations with local women in violation of an applicable prohibition of fraternisation. Moreover, they had disturbed the public order by playing loud music and engaging in other noisy behaviour. The Danish Military Prosecution Service (MPS) investigated the case and found some of the soldiers guilty of an offence against the Danish Military Penal Code, which resulted in a fine.

At that time, no SOFA had been concluded for UNMEE. If the SOFA model had been adopted, the relevant Danish prosecution service (in this case, MPS) would have been the only party entitled to institute criminal proceedings against the soldiers. Since the matter was not related to the official duties of the soldiers, however, local courts would have had jurisdiction to hear and determine a civil action, if applicable. Even in cases that fall within the jurisdiction of a local court, the SOFA model contains specific rules on attendance in court and on the entitlement of the force commander to be consulted about whether or not the violation is related to official duties (Article 49).¹⁴⁰

Enforcement

Restrictions on the right of the receiving State to enforce laws and regulations. These restrictions are closely related to the necessary freedom of movement enjoyed by the members of the force in their endeavours to discharge the mission assigned (Articles 12-14).

Taxes, duties, charges, and tolls

Material, equipment, and supplies related to the mission are exempt from the payment of taxes, charges, tolls, and customs duties of any kind to the receiving State. No exemption may be claimed for charges for services rendered (Articles 14 and 15).

Facilities

The receiving State undertakes to place facilities, areas, and buildings at the disposal of the force and to ensure that the force has access to existing supplies and services as well as local personnel (Articles 16-22).

Claims for compensation

Procedure for handling claims for compensation as a result of harmful acts committed by the UN force.

140 Annual Report 2001 of the Danish Military Prosecution Service, page 42.

Entry, residence, and departure

All personnel and material related to the mission must have the right to enter into, reside in, and depart from the receiving State. All such personnel are exempt from passport and visa regulations, etc., but are required to have an individual or collective movement order as well as a personal identity card issued by the UN (Articles 32-34).

Right to wear uniform and carry arms (Article 37).**Discipline and good order in the UN force**

The force commander must take appropriate measures to ensure the maintenance of discipline and good order among members of the force. This includes a duty to enforce such discipline and order by using military police, who are allowed to exercise powers of arrest (Article 40).

Deceased members

Jurisdiction over deceased members of the force lies with the State of origin of the soldier/crew member.

6.2.2 NATO-led operations

In 1951, in connection with the establishment of the alliance, NATO's Member States adopted a SOFA, which is applicable to all NATO operations conducted within the territories of Member States.¹⁴¹ Concurrently with the conclusion of Partnership for Peace Agreements (PfP) with non-NATO States, a growing need emerged to pre-regulate military NATO/PfP presence—also in the territories of these PfP States. Such an agreement was made available for ratification, acceptance or approval in 1995, so that the NATO SOFA is also applicable within the territories of all PfP States that have become party to the agreement.¹⁴² A few PfP States have made their ratification subject to reservations. For instance, Russia has insisted that the presence of NATO/PfP States in Russian territory should be subject to visa requirements.

In addition, SOFAs have been adopted to regulate the status of NATO military headquarters¹⁴³ and the status of personnel attached to or associated with these military headquarters when such personnel are in the territories of PfP States,¹⁴⁴ and another agreement has been adopted on the status of representatives of non-NATO/PfP States participating in meetings and other activities at NATO military headquarters.¹⁴⁵ These agreements are not discussed in more detail here.

141 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 19 June 1951.

142 Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces (PfP SOFA), done at Brussels on 19 June 1995.

143 Protocol on the Status of International Military Headquarters set up Pursuant to the North Atlantic Treaty, done at Paris on 28 August 1952.

144 Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace regarding the Status of their Forces, done at Brussels on 19 December 1997.

145 Agreement on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organization, done at

The purpose of the agreements is to pre-regulate the legal status of the States' military forces when they are physically present in the territories of other States in connection with a NATO operation. These SOFA's, therefore, apply automatically when Danish military forces are physically present in the territory of another NATO/PfP State. This is true regardless of whether their presence involves travelling in an official capacity, exercise activities, or an international operation.

It is not an infrequent occurrence that Danish forces are physically present in the territories of other NATO/PfP States in connection with international missions, and these agreements have created a basis for determining the legal status of the members of forces taking part in numerous international operations over the years and continue to do so.

Below is a general description of the key provisions of the NATO SOFA.

Identification

Military personnel are generally required to carry a personal identity card (military identity card) and an individual or collective travel order to be presented on demand in connection with the crossing of borders, including at airports or ports of call for Danish marine vessels.¹⁴⁶ Members of armed forces are usually required to wear uniform. This implies, for instance, that units or formations of a force must always be in uniform when crossing a border. In addition to their registration number, military vehicles must carry a distinctive nationality mark — for instance, a flag.¹⁴⁷

Respect for the law of the receiving State

The law of the receiving State and the SOFA must be respected. It is the duty of the sending State to take necessary measures to ensure that the forces meet this requirement.¹⁴⁸

Weapons

Members of Danish forces may carry arms in the receiving State in compliance with their Danish orders thereon.¹⁴⁹

Brussels on 14 September 1994.

¹⁴⁶ NATO SOFA, Art. III(2).

¹⁴⁷ NATO SOFA, Art. V.

¹⁴⁸ NATO SOFA, Art. II.

¹⁴⁹ NATO SOFA, Art. VI.

Entry and departure

On entering or leaving the territory of a receiving State, members of a force are exempt from the passport, visa, and immigration regulations of the State concerned. The receiving State may, however, have established other forms of registration requirements for military forces entering its territory in which case such requirements must be met.¹⁵⁰

Jurisdiction¹⁵¹

The rules regulating the distribution of jurisdiction under the NATO SOFA reflect the equal bargaining position of States when the agreement is entered into.

In this context, a distinction is made among three aspects of jurisdiction. One concerns the right to legislate. This will not be addressed in more detail here since it is not affected by the status of forces agreement. The second aspect of jurisdiction concerns the right to prosecute for offences against the law of the State, and the third aspect concerns the right to enforce applicable law, including the right to arrest persons, conduct searches, or interfere in any other manner with the rights and freedoms of individuals. The two latter types of jurisdiction are dealt with in the SOFA.

The right to prosecute is distributed between the sending and receiving States in the SOFA as follows:

The sending State has exclusive jurisdiction over offences that are only punishable under the law of the sending State. The reverse is true of offences that are only punishable under the law of the receiving State, including espionage or treason.

In situations in which both States essentially have the right to exercise jurisdiction (concurrent jurisdiction), it is agreed that the sending State has the primary right to prosecute offences committed against another member of the contingent of the sending State. The sending State also has the primary right to prosecute for offences arising out of any act or omission in the performance of an official duty. In other cases, the receiving State will have the primary right to exercise jurisdiction.

If the State having the primary right decides not to prosecute, this right will pass to the other State. If, for instance, the receiving State has the primary right to prosecute but Denmark requests permission to take over the case for reasons of principle, the receiving State must give sympathetic consideration to such a request. Denmark will often make efforts to exercise jurisdiction over Danish soldiers and has often been successful.

Example 3.3: Danish forces are deployed to Albania pursuant to Albania's request for Denmark's support to deal with the many refugees flowing into the country in the wake of the Kosovo conflict. Since Albania is a PfP State, the NATO SOFA automatically applies to NATO's presence in the country. During a vehicle patrol, a Danish soldier collides with a civilian person, who dies. There is much to suggest that the speed of the vehicle was nearly 50% above the speed limit at the time of collision. Denmark has primary jurisdiction to prosecute because the collision took place in the performance of an official duty. Denmark decides to exercise jurisdiction by instructing the Danish Military Prosecution Service (MPS) to initiate an investigation.

The right to enforce the law has significance for the work undertaken by both the MPS and the military police in relation to investigating any possible criminal offences committed by Danish military personnel as well as for all deployed military personnel. This is because the rules applicable here also concern

150 NATO SOFA, Art. III.

151 NATO SOFA, Art. VII.

the question of whether Danish deployed soldiers/crew members must accept intervention by the receiving State's law enforcement agencies, including the police or military police. In the SOFA, the right to enforce applicable law is distributed as follows:

States undertake to provide mutual assistance in the arrest of personnel and other investigative measures that fall within the other State's jurisdiction to prosecute. If the receiving State has the primary right to exercise jurisdiction, an arrested person must remain in Danish custody until charged by the receiving State. If a Danish soldier is sentenced to imprisonment in the receiving State, the receiving State must give sympathetic consideration to a Danish request that the soldier be allowed to serve the sentence in Denmark.

Danish military forces, including the camp commander and the Danish military police, have the right to patrol Danish camps in the receiving State. They have the right (and duty) to maintain discipline and good order in the area. In this respect, a Danish camp is a camp under Danish command even if soldiers from other nations are also present in the camp.

On the other hand, the SOFA contains no rules on the right to exercise law enforcement jurisdiction over members of the military personnel of other sending States. However, the provision on camp patrol and the maintenance of discipline and order in such camps also implies the possibility that a sending State operating a multinational camp could have the right to take all necessary measures to maintain order in the camp area—also in relation to personnel from other States. Such conditions should, perhaps, be regulated in more detail.

Outside camp areas, military police may operate only to the extent necessary to maintain discipline among the forces of the sending State and only by agreement with local law enforcement agencies—typically, a local agreement with the chief of police.

Claims against members of the Danish forces¹⁵²

The NATO SOFA contains extremely detailed rules on the resolution of disputes over compensation arising out of the tortious acts of the sending State's military forces that have caused damage to public and private property. This includes a principle of a triviality limit and a distribution of the financial burden. Below is an outline of the rules most frequently used in this context.

The rules provide that, in general, the States must waive all claims for damage to any **property owned by the armed forces** if such damage was caused by an employee of the armed forces of the other State in the execution of his duties. A special rule is provided for damage from the use of vehicles, aircraft, or vessels owned (or chartered) by the armed forces of the other State: Claims must be waived if the damage was caused while the means of transport was being used (regardless by whom) in the execution of official duties.

Disputes over claims for compensation for damage to **other State property** must be settled by arbitration when the claims exceed a lower threshold of DKK 9,670 or equivalent. Claims for damage assessed at smaller amounts are waived.

If the military personnel of a State suffer **personal injury or death** as a result of acts committed by any member of the military personnel of other States while such member was engaged in the performance of his official duties, all claims for compensation must be waived.

Claims relating to personal injury and/or property damage inflicted on **private individuals or organizations** by members of the military personnel of the sending State in the performance of official duties must be considered and settled by the receiving State in accordance with the laws and regulations of

152 NATO SOFA, Art. VIII.

the receiving State. Any amount of compensation must be paid by the receiving State, but 75% of the amount awarded or adjudged is chargeable to the sending State.

Other provisions

The NATO SOFA also contains detailed rules on the import and export of material and equipment and exemption from payment of taxes, customs duties, and charges and on the rights and obligations arising out of the occupation or use of buildings, goods, and services in the receiving State that are mainly of a technical nature.

The NATO SOFA is applicable only in the **territories of NATO/PfP States**. One of the effects of this is that the SOFA does not apply to NATO-led military operations undertaken in States that are neither NATO members nor PfP States — known as “out-of-area operations”. In addition, the SOFA is not applicable to the relations between NATO/PfP States during such out-of-area operations. In such scenarios—for instance, the “*Resolute Support Mission*” in Afghanistan, the NATO SOFA is not directly applicable. Here, the legal status of the forces is based on a mission-specific agreement, which was negotiated with Afghanistan in connection with the launch of the mission on 1 January 2015.¹⁵³ Consequently, legal disputes between NATO Member States cannot be resolved by referring to the NATO SOFA. However, in this context, the SOFA may serve as inspiration for States involved in the event of disputes on an ad hoc basis in the absence of a general agreement on this between NATO/PfP States.

Another area that requires increased attention is the right of Danish forces to use the receiving State’s computer network and the terms and conditions for such use. As the area is relatively newly developed, there are still no SOFAs that take this into account.

6.3

Legal status of the force in the absence of a status agreement

As illustrated above, there are countless good reasons to ensure that the circumstances surrounding the presence of the Danish forces in one or more other States in connection with military operations outside of armed conflict are in place. If no permanent SOFA is applicable, a mission-specific basis should be secured.

In situations in which one or a few persons are deployed in an advisory or similar

153 Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan of 30 September 2014.

capacity, the legal basis will often comprise an exchange of diplomatic notes between the States involved that describe the task and legal status of Danish military personnel in the territory of the receiving State. Here, the distribution of jurisdiction will be in focus in order to ensure deployed Danish personnel and materiel the best possible protection from the jurisdiction of the receiving State.

If actual contingents of troops are deployed, a broader spectrum of legal issues becomes relevant in which case a genuine status agreement will be preferable. Such agreements are typically concluded by the mission-leading organisation with effect for all troop-contributing nations.

In a few cases, there will not be sufficient time for the parties to negotiate and conclude an agreement prior to the deployment of individuals or troops. Furthermore, the situation in the recipient State may be of such a nature that it is not possible to negotiate a status agreement. In these circumstances, therefore, existing international law, including treaties and other agreements as well as customary international law, will constitute the legal status.

First, a close examination should be made to determine whether resolutions of the UN Security Council or other relevant regulation are applicable. These might be, for instance, peace agreements or invitations from the receiving State, or it might be SOMAs or other instruments containing provisions relevant to the status of the force in the territory of the receiving State.

Second, existing international law offers a certain level of functional protection for UN missions. See Section 6.2.1 above on Article 105 of the UN Charter and the 1946 Convention on the Privileges and Immunities of the United Nations although, as mentioned, they are subject to restrictions.

In operations that are not covered by the rules on UN forces, it is assumed in international law that, as a general rule, the military forces of troop-contributing nations enjoy what is known as **functional immunity**.

This construction reflects an effort to balance considerations of the sovereignty of the sending and receiving States and their equality as States. The intention is to protect the sending State and its representatives — in this case, the military personnel — and, in particular, to ensure the operational effectiveness of the sending State. This means that such forces cannot be prosecuted in the receiving State for offences arising out of acts/omissions in the performance of an official duty that is associated with the

sending State's functional contribution to accomplishing the task.

Given these circumstances, functional immunity entails two significant restrictions.

- 1) The law of the receiving State must still be **respected**. Functional immunity is not a carte blanche to commit offences against the law of the receiving State. Prosecution for such offences must take place in Denmark within the framework of Danish legislation or before an international court, provided that the necessary jurisdiction has been established under the statute of such a court as in the case of the International Criminal Court (ICC).¹⁵⁴ For more information, see Section 4.1 of Chapter 15.
- 2) Immunity is **functional**. This implies that only acts pursuant to the official functions of military personnel are protected by immunity. The immunity does not extend to any acts that are not committed on behalf of the Danish State, including, for instance, acts committed by the members of a deployed force during their off-duty hours.

This special “default position” is mentioned here because it accords a certain level of legal protection to soldiers/crew members in Danish armed forces during military operations. Any deployment of Danish armed forces that is undertaken without specifying its legal status, however, leaves a wide range of questions unresolved. Therefore, endeavours should always be made to ensure that such an agreement is entered into.

7. Use of force in international military operations

7.1

Introduction on international law and domestic law

Chapter 2 discusses the requirements of international and domestic law for the deployment of Danish armed forces to the territory of a foreign State, including requirements for the use of force. This section gives a general presentation of the framework for the use of force by Danish military forces in international military operations.

¹⁵⁴ ICC Statute, Art. 27.

7.2

Framework for the use of force in international law

In resolutions of the UN Security Council, including on the authorisation of military operations outside of armed conflict, the right to use force will often be addressed with a passage stipulating that, under the powers conferred by Chapter VII of the UN Charter, the authorised military force may use “all necessary force” or “all necessary means”.

Example 3.4: “4. Decides that the mandate of UNMISS shall be as follows, and authorizes UNMISS to use all necessary means to perform the following tasks...”¹⁵⁵

By the qualification “necessary” is understood the force necessary to accomplish the mission assigned. On one hand, that involves relatively broad discretionary latitude for the commander of the military force to assess what resources are actually deemed necessary. On the other hand, the wording requires a correlation between the use of force and the accomplishment of the mission assigned. In addition, any use of force must be exercised within the framework of other rules of international law.

In operations involving the deployment of Danish forces **in armed conflicts** and authorised by the UN Security Council in accordance with Chapter VII of the UN Charter, see above, any use of deadly armed force is required to take place within the framework of the resolution and other applicable international law, including IHL and HRL. These formulations appear relatively frequently both in resolutions of the UN Security Council and in Danish parliamentary resolutions. These formulations merely reflect the fact that both sets of rules are of relevance to the use of force in armed conflict.

IHL regulates attacks against military objectives, including military objectives as well as combatants, MOAGs, and civilians taking a direct part in the hostilities. In relation to the use of deadly armed force, HRL is primarily of importance during armed conflicts when they regulate the use of force against civilians who do not, or no longer, take part in the hostilities but who, in some other way, provide the deployed contingent grounds for using force. For instance, this could be the case in connection with law enforcement in occupied territory, law enforcement in internment camps, prisoner of war camps or, perhaps, refugee camps placed under the protection of Danish forces during armed conflict. Section 4 of Chapter 6 provides

155 UN SC Res. 2155 of 27 May 2014 on the situation in South Sudan, para. 4.

more information about the right to life as a fundamental guarantee, including in armed conflict.

In **operations outside of armed conflict**, the general principle is that all use of force must be carried out with respect for the right to life and, accordingly, that deadly armed force may be used only where it is absolutely necessary within the international law mandate for the action. Reference is made to Section 7.4 below on the protection of the right to life.

In both types of operation, the use of force will primarily be regulated by rules of engagement, which are introduced below.

7.3

Rules of engagement — use-of-force directives

The concept of use of force in this context should be construed in a very broad sense, providing for the regulation of **any interference with the integrity of a State or an individual**. At the soft end of the scale, rules of engagement cover the geographical positioning of forces, the implementation of exercises, and other forms of *show of force**. This category also includes warnings that are not a manifestation of the actual use of force but which form part of the efforts of the force to maintain escalation control. The intermediate category includes the use of means to combat riots or certain monitoring methods/resources. At the more robust end is the use of weapons and other physical interventions, such as deprivation of liberty.

Regardless of the type of operation to which Danish forces have been deployed, the degree of the authorised use of force must be strictly regulated. When Danish forces are deployed to serve with an international force, the use of force will usually be regulated by rules of engagement (RoE). This does not rule out the possibility, however, that the use of force may be regulated by other rules or instruments, for instance, by the so-called Special Instructions (*SPINS*)*, but RoE are often the tool that is used to control the military use of force.

RoE in a nutshell

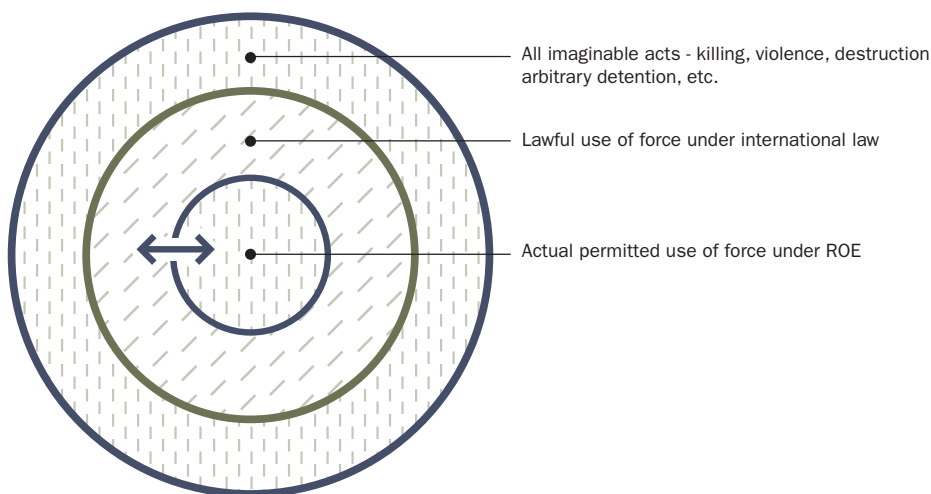
Rules of engagement are an operational control tool. It is the commander's order on the use of force and, in that context, also the commander's dynamic opportunity — within the overall framework of international law and operational directives — to raise or lower the level of intensity in the use of force by subordinate forces. In many

international operations, the mission's OPLAN is adopted at the political level. The OPLAN also contains the intentions of the force commander relating to the use of force. Therefore, the commander will have to stay within this framework, unless adjustments to the OPLAN also obtain political approval.

In this context, 'force commander' means the **commander of the international force**. Any subordinate unit commander is, in principle, allowed to impose additional restrictions or qualifications on the use-of-force directives as long as such measures are within the authorisation received by the commander in question. For instance, sometimes, a commander wants to be involved in the use of certain types of force. Examples are indirect fire, certain types of deprivation of liberty, or types of objectives or movements that the commander considers to be so sensitive that he/she decides to withhold the release of such information (release authority) below the commander's own level.

RoE constitute an order. Any person acting contrary to this order may be disciplined as is the case with violation of other orders. Besides, a violation of RoE may constitute a violation of applicable international law or domestic law. For more information, see Chapter 15.

RoE



• FIGURE 3.3 •

• FIGURE 3.3 •

The figure illustrates that, where international law restricts the lawful use of force in military operations, RoE constitute the tool which, within this framework of international law, is used to regulate the nature and degree of the use of force that is actually authorised in the mission. The arrow illustrates that RoE are dynamic and may be expanded and reduced during the mission but only within the framework of international law.

The chart above illustrates that RoE do not constitute international law or other law.¹⁵⁶ RoE are, however, restrictions on applicable international law. The reasons for such restrictions may vary. They may be imposed because of a desire to show some restraint in the use of force in periods when the parties are negotiating with one another. There could also be more specific areas in which international law legitimately warrants a relatively robust use of force but other concerns make it advisable to restrain the authorised use of force. Such concerns, for example, might be the safety of the civilian population and/or an effort to support positive developments in the mission area.

Example 3.5: In Afghanistan in 2009, during the “Courageous Restraint” OPOD, the Commander-in-Chief of ISAF ordered the imposition of restrictions on the applicable RoE for the NATO force. For some time, the Afghan civilian population had been suffering not insignificant collateral damage, which provoked a reaction from the Afghan President Karzai. To minimise collateral damage to the civilian population, it was decided to make certain adjustments to RoE and to some of the SoPs. The adjustments resulted in more restrictive use-of-force authorisations for the ISAF mission than those guaranteed under IHL.

Example 3.6: A military operation **outside of armed conflict** is carried out under “robust RoE”. This means that the force commander basically intends to authorise the use of force to the maximum permissible limit. In a RoE regulating certain weapons, however, the commander expresses the view that “the use of expanding bullets (dum-dum) must under no circumstances be used by forces under his command.” The rule is a restriction on the right of the armed forces to use force that goes beyond applicable international law in military operations outside armed conflict. More information about expanding bullets is provided in Section 3.8 of Chapter 9.

Defence Command Denmark’s use-of-force directive

In some cases, Defence Command Denmark (DCD) will issue a use-of-force directive to force commanders, which will typically be appended as an annex to the mission-specific DCD directive. The directive may contain in-depth explanations of concepts or authorisations, and special conditions may apply to Danish forces on the basis of Danish policy or the like. Such a special Danish directive, however, **may**

¹⁵⁶ The chart is inspired by a chart published by J. Ashley Roach in the *Naval War College Review*, Vol. 36, No. 1, of 1983.

never authorise a more far-reaching use of force than the use authorised by the mission's RoE without the prior submission to and authorisation by the issuing authority/commander. As illustrated by the chart above, the issuing authority is always limited by applicable international law.

In situations in which it is ascertained that DCD's use-of-force directive sets out a broader framework for the use of force compared to that authorised by the mission's RoE, it must be authorised by the issuing authority. For instance, this could be the case in relation to the duty of Danish soldiers to act in accordance with applicable national directives.

On the other hand, **special restrictions** may be imposed on Danish forces in addition to those flowing from the RoE. This practice is known as a reservation or a "caveat". Caveats restrict the flexibility of the international force commander in using the units available. Therefore, superior authorities will seek to minimise such reservations. However, caveats may be necessary restrictions imposed in the national mandate of the Danish forces, for instance, because of Danish legal obligations.

Example 3.7: In a mission, the use of anti-personnel mines has been authorised to protect coalition camps. Other authorisations include the use of riot control agents (*RCA**), including CS gas, to suppress riots. Finally, the detention of individuals has been authorised. It is described in the RoE that it is at the sole discretion of the military commander to decide whether the detainees should be released immediately or instead be turned over to local security forces, if available. This solution has been chosen because law enforcement responsibility at this stage of the operations rests with local law enforcement authorities.

These authorisations will give rise to comments from a number of States, including Denmark. Denmark has acceded to the Ottawa Convention on the prohibition to use anti-personnel mines (see Section 3.5 of Chapter 9 for more details) and may, therefore, inform the coalition commander about the restrictions this implies in relation to the perimeter defence of Danish camps and other restrictions applying to Danish forces. The 1993 Chemical Weapons Convention contains certain restrictions on the use of CS gas during riots. If such riots develop into armed conflict — NIAC being most relevant in this context, the use of CS gas is prohibited. Finally, depending on the circumstances, the transfer authorisation may induce Denmark to comment the extent to which the authorised procedure may be followed by the Danish forces. The procedure requires some reflection on the willingness and ability of the receiving State to treat persons deprived of liberty in accordance with relevant human rights. For more information, see Chapter 12.

Decisions to issue national reservations are made by DCD. If military legal advisers or other personnel in missions become aware of authorisations that, after an initial assessment, could give rise to more principled considerations about any reservations,

the issue must be reported through the chain of command.

Introduction to RoE catalogues

In most operations, the mission's rules of engagement (RoE) will appear in Annex E to operational plans, typically, divided into two main parts: a general part on rules and principles for the use of force and a more specific part on the use of force in individual areas — also known as numbered RoE. This applies across alliance, coalition, and UN-led operations. NATO, the European Union, and the United Nations in cooperation with their Member States have developed detailed RoE catalogues which are designed to facilitate the preparation and adoption of mission-specific RoE.¹⁵⁷

7.4

Special considerations on the protection of the right to life

The protection of the right to life basically implies that no individual may be arbitrarily deprived of life.¹⁵⁸ The use of armed force, therefore, is always closely linked to the right of individuals not to be arbitrarily subjected to the use of deadly armed force.

The ECtHR found that British forces in Iraq were bound by the provision of the ECHR concerning the right to life. The provision of the Convention on the right to life was applicable not because of territorial or personal jurisdiction but because the UK exercised *some of the public powers* that would normally be exercised by the State of Iraq. This included the execution of security operations and, thereby, the “**public powers**” type of jurisdiction referred to under Section 4.2 above.¹⁵⁹

The judgment concerned a particular aspect of the right to life, i.e., the duty of States, at their own initiative, to conduct an effective, transparent, and independent investigation of suspicious deaths. In Denmark, these civil investigation powers are held by the police, whereas the Danish Military Prosecution Service (MPS) handles military investigation with the necessary support from, primarily, military authorities. The reporting procedures, etc., of the Danish Defence, therefore, must support the requirements of these investigations in a way that enables the MPS to carry out qualified assessments to determine whether a death is suspicious and, if so, to conduct an effective investigation into it. See also Section 4.4 of Chapter 15.

¹⁵⁷ For NATO: MC 362 (ed. 1), for the UN: MPS 98 and for the EU: EU Use of Force Directive.

¹⁵⁸ For instance ECHR, Art. 2, Protocols No. 6 and 13 to ECHR, CCPR, Art. 6, and its Second Optional Protocol.

¹⁵⁹ ECtHR, *Al-Skeini and Others v. UK* (Appl. No. 55721/07) of 7 July 2011, para. 149.

The use of military force is regulated in greater detail by mission-specific and dynamic use-of-force directives — for instance, RoE — that strictly relate to the authorised degree of the use of force, including deadly armed force. These directives will usually be issued by the military commander of the mission as part of the overall operational plan. In the case of NATO-led operations, the mission OPLAN, including RoE, is approved by the North Atlantic Council. RoE must be applied and interpreted in accordance with applicable international law, including the troop-contributing nations' obligations under HRL.

It is the responsibility of DCD to ensure that mission-specific RoE comply at all times with Denmark's obligations under international law, including HRL, insofar as they apply to the relevant mission.

One aspect relevant to all types of operation is the use of deadly armed force by Danish military forces. Against this background, any person's right to life is described with a focus on the obligations this right entails for the use of force by Danish armed forces, particularly, in military operations outside armed conflict. This is, first of all, based on Article 2 of the ECHR and the extensive case law of the ECtHR regarding the right to life.

3.3. No one may be arbitrarily deprived of life. The ECHR contains an exhaustive list of cases in which use of force which is absolutely necessary should not be regarded as arbitrary deprivation of life. Such acts are:

- the use of force which is absolutely necessary in defence of any person from unlawful violence;
- the use of force which is absolutely necessary to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- the use of force which is absolutely necessary in an action lawfully taken for the purpose of quelling a riot or insurrection¹⁶⁰

Military operations conducted **in armed conflict** are regulated by IHL. This implies, among other things, that combatants are allowed to take a direct part in the hostilities, including the right to direct attacks against the armed forces of the adversary. **Therefore, such use of force within the framework of IHL is not arbitrary in relation to Article 2 of the ECHR.** This does not mean, however, that the protection of the right to life in HRL is not relevant to armed conflicts. For instance, the protection will include situations in which armed forces use deadly armed force against civilians in situations that do not relate directly to the armed conflict — for example,

160 ECHR, Art. 2.

when occupying powers engage in law enforcement in the occupied territory. More information is available in Chapter 11.

Military operations **outside of armed conflict**, on the other hand, are not allowed to involve or authorise the use of deadly armed force unless such use is within the framework of one of the three scenarios described above. Moreover, deadly armed force may only be used when it is deemed **absolutely necessary**. This standard is incorporated into Danish domestic law — for instance, the Danish Police Act.¹⁶¹

The overall duty of the Danish armed forces is to ensure the protection of the right to life on three levels:

First, the ECHR states that the right to life **must be guaranteed/protected by law**. The use of deadly armed force, therefore, needs to be **provided for in domestic law**. Directives, etc., are not required to use exactly the same wording as the ECHR as long as the directives are to be understood and construed in accordance with the Convention.¹⁶² This means that the extent to which deadly armed force may be used must be specified and that *the overall legal authority must be specifically addressed in orders* — typically, *use-of-force directives, RoE, guard or patrol instructions, SOP, or the like, which translate the authority into very specific orders for the operational units*. It is also a requirement that persons equipped with weapons should have **received appropriate training** not only in the use of the weapon but also in other operational procedures that can be crucial to ensuring that deadly armed force is used within the framework of the Convention. This obligation rests with military authorities and commanders.

Example 3.8: Danish forces are going to be deployed to an operation outside of armed conflict. The assessment is that the forces will encounter situations in which deadly armed force may become relevant. Prior to the deployment of troops, steps must be taken to ensure that the use of deadly force is sufficiently warranted by a parliamentary resolution or the like in the cases defined by the mission directive in RoE. Then, whether the mission's RoE are formulated in a manner that is consistent with the right to life is examined. This will require, for instance, that the authorised use-of-force rules can be embodied in the three conditions set forth above: 1. defence from unlawful violence, 2. lawful arrest or prevention of escape, or 3. action to quell a riot or insurrection.

Second, such operations must be adequately **planned and prepared**, and supervisory measures must be taken to ensure that the operation is conducted within

¹⁶¹ Danish Act No. 444 on Police Activities of 9 June 2004 (Consolidation Act No. 956 of 20 August 2015)

¹⁶² ECtHR, *McCann and Others v. The United Kingdom* (Appl. No. 18984/91) of 27 September 1995, para. 152.

the defined framework. This obligation rests with the authorities and units that are responsible for specific operations, including, in particular, their responsible superiors in cooperation with relevant advisers.

Planned operations outside of armed conflict must be carefully organised with a view to minimising the risk that the use of lethal force will become necessary. If lethal force becomes necessary, the framework for the use of such force must be subjected to careful scrutiny so that the operation may be conducted in an adequate manner since the protection of one's own military personnel may be included in the operational considerations.¹⁶³ The scenarios presented below provide examples of conditions that, according to ECtHR practice, should be in place before the relevant tasks are performed. The examples focus exclusively on various aspects of the right to life.

Example 3.9: Guard duty: Instructions preparing guards for the situations that may arise must be drawn up. Guards must be appropriately trained/instructed to act in an appropriate manner in critical situations, as well as in how to use the forcible means available. Guards must have received a situation report when taking over guard duty. In cases of checkpoint control, it must be ensured that guard facilities — including access roads — are established in a way that gives the guard ample time to react and reflect.

Example 3.10: Patrol of the local area: The patrol must be briefed on the situation in the area, including the overall threat assessment and other factors that might give rise to critical situations. Use of force instructions must be available. The patrol must have been briefed on and trained in the relevant parts of the RoE. The patrol must be armed and authorised in a way that allows for an appropriate response to incidents. Good communication with the patrol must be maintained for the establishment of contact with superior commanders.

Example 3.11: Planned arrest operations: Adequate knowledge of the suspect is required — for instance, whether the suspect is expected to be armed as well as the suspect's movement patterns and expected reaction when coming into contact with the force.¹⁶⁴ It should be considered whether the person concerned is likely to be alone or in the company of others and how the people in the vicinity are expected to react to the arrest. The force must be dimensioned for and briefed on the task, including on the RoE for the operation. The force must be appropriately armed for the task, leaving adequate room for escalation. The different reaction scenarios must be subjected to careful scrutiny; for instance, RoE must contain clear, legal rules governing the use of deadly armed force if the suspect attempts to escape.¹⁶⁵ How adequately to prevent the arrested person from escaping must be considered, and command conditions and communications must be in place.¹⁶⁶

Third, the actual use of force must be lawful, i.e., it must take place within the scope of the provisions on the protection of the right to life as embodied in the Convention.

163 ECtHR, *McCann and Others v. The United Kingdom* (Appl. No. 18984/91) of 27 September 1995, paras. 148-150.

164 ECtHR, *Andronicou and Constantinou v. Cyprus* (Appl. No. 25052/94) of 9 October 1997, paras. 185-186.

165 ECtHR, *V.S. Petrov v. Bulgaria* (Appl. No. 63106/00) of 10 June 2010, para. 45.

166 ECtHR, *Ogür v. Turkey* (Appl. No. 21594/93) of 20 May 1999, para. 83.

As a result of the more stringent assessment of necessity (“absolutely necessary”), the basic requirements are as follows:

- that an ‘imminent’ danger must be present;
- that less severe force, for instance, arrest, etc., must be deemed unsuitable in the specific context;
- that advance warning must be given to the extent possible before the use of deadly armed force; and
- that the burden of proof to establish that it was absolutely necessary to use lethal force lies with the authorities that have been involved in the use of force.

The responsibility here rests with the person who uses the deadly armed force.

Example 3.12: The commander must ensure that subordinate units/personnel are prepared for the forthcoming mission — including that they are familiar with and trained in the applicable RoE. The commander must be sincerely confident that the subordinates are capable of reacting appropriately in critical situations and that the commander himself is capable of handling the situations that could be expected to occur during the patrol/mission. For instance, a good overview of rules of engagement, authorisations, support conditions, etc., is needed.

Example 3.13: The individual soldier must have received clear rules of engagement which, together with other training, enable the individual soldier to react if a spontaneous need to use deadly armed force arises. The individual member is required to know exactly when and how to give a comprehensible verbal warning, when it is appropriate to fire warning shots, and when it is allowed to fire a shot aimed at a person escaping.

Certain missions outside of armed conflict authorise RoE that include the right to use deadly armed force against persons who seek to prevent the military force from discharging its mission. This authorisation is sometimes referred to a “mission defence”.

Examples of use of force for mission defence purposes that will be compatible with Article 2 of the ECHR if the use of force is absolutely necessary include the use of force to avert an on-going or imminent dangerous attack on a person or to prevent imminent danger to the lives of persons or grievous bodily harm.¹⁶⁷

In this connection, however, it should be noted that the ECtHR has established no case law interpreting Article 2 in relation to these special use-of-force authorisations in international military operations.

The use of deadly armed force could also be authorised in defence of mission-specific

¹⁶⁷ See the Danish Police Act, s. 17(1)(i) and (ii), which allows the police to use firearms in these situations.

objects/property. Such objects, for instance, could be emergency relief supplies or classified military equipment. These objects are sometimes referred to as “Property Designated Special Status”.

Example 3.14: Kosovo: Resolution 1244 called on the international security forces to perform a range of tasks, including helping to ensure that humanitarian aid could be delivered, and, at the same time, authorised the use of “all necessary means” for the fulfilment of their responsibilities.¹⁶⁸ In this connection, RoE may authorise the use of lethal force in the event and to the extent that it is absolutely necessary for performing this part of the task even though the protection of equipment is not explicitly mentioned in Article 2 of the ECHR.

Examples of use of force in defence of mission-specific objects that will be compatible with Article 2 of the ECHR if the use of force is absolutely necessary include the use of force to avert an ongoing or imminent dangerous attack on institutions, businesses, or facilities of importance to society.¹⁶⁹

When RoE ultimately authorise the use of deadly armed force for mission defence purposes or in defence of “Property Designated Special Status”, this is usually because the peace-support forces have been assigned a special protection task by a resolution of the UN Security Council.

Extensive case law from the ECtHR shows the need to **plan operations in which the use** of deadly armed force may become relevant. In many cases, such operations will be launched only after a certain warning has been given, which will leave the forces with a chance of thoroughly considering the most appropriate way to conduct the operation. This applies, for instance, in relation to the protection of civilians and one’s own troops, but it also provides an opportunity to avoid or limit the use of deadly armed force to situations in which it really is absolutely necessary and proportionate.

Proportionality in this context means that the use of force must be proportionate to the advantage achieved by the use of force. In other words, consideration of the individual must be balanced specifically against the opposing considerations. As can be seen, this principle of proportionality differs from the one applicable in IHL. More information is available in Chapter 4.

For instance, in the event of a situation in which a unit intervenes in a fight in a camp

168 UN SC Res. 1244 of 10 June 1999, paras. 7 and 9(c).

169 See the Danish Police Act, s. 17(1)(iii), which allows the police to use firearms in these situations.

for displaced persons that is under the protection of the patrol, the use of deadly armed force will not automatically be proportionate. If a thief attempts to escape after having stolen emergency relief rations or if a vandal has spray-painted abusive words on the gate to the military camp with an aerosol can, these cases will not be sufficiently proportionate to authorise or in fact use deadly armed force.

First, the situations have to fall within the scope of the three exceptions set out in Article 2 of the ECHR. Second, in the planning of military operations, the necessary preparatory work has to be performed to minimise the risk of using deadly armed force. And if use-of-force situations occur after all, then potentially lethal force will be used exclusively in cases in which it is absolutely necessary and suitable for bringing the situation under control.

7.5

Special considerations on self-defence

It goes without saying that the concept of self-defence is used in many contexts — and often quite indiscriminately. The concept has common features in its different uses, but it has also *different* meanings and qualifications. Below is a description of four of the principal contexts in which self-defence will often occur.

- 1) Individual self-defence: The acts of an individual to avert an imminent or ongoing attack.
- 2) The right of States to exercise self-defence: The right of States to defend themselves against imminent or ongoing armed attacks. (See Section 2.3.3 of Chapter 2)
- 3) The self-defence concept of UN peacekeeping forces: It is assumed that the deployment of UN forces under Chapter VI of the UN Charter on the peaceful settlement of disputes requires the consent of the host State and a certain degree of impartiality in the performance of tasks and that the use of force by the armed forces is limited to self-defence. Over the decades, this self-defence concept has evolved from a narrow definition to its present-day meaning, now covering the defence not just of UN forces but also of equipment, material, and even the purpose of the mission.
- 4) Right of self-defence under section 19(2) of the Constitution of the Kingdom of Denmark: It follows from section 19(2) of the Constitutional Act of the Kingdom of Denmark that the Government may not use military force against any foreign State without the consent of Parliament except for purposes of defence against an armed attack on the Realm or Danish forces. This

special constitutional angle on the self-defence concept is dealt with in more detail in Section 2.2 of Chapter 2.

3.4 Everyone has the right to defend oneself against unlawful attacks.

7.5.1 International law background

The right of individual self-defence may be deduced from the respect for human life and everyone's right to protection of the right to life. The principle is reflected in the rules of domestic and international criminal law on immunity from criminal prosecution for acts committed in self-defence.¹⁷⁰ It is the responsibility of the Danish State to ensure that members of the Danish armed forces are appropriately trained to handle such situations within the framework of international law and that relevant instructions have been prepared.

7.5.2 Requirements for the act of self-defence

The right to act in self-defence is linked to a requirement that the force used must not exceed the level necessary to prevent an imminent attack or to suspend an on-going attack coupled with a requirement that the attack must be proportionate to the act of self-defence. Reference is made to the discussion of the right to life immediately above.

7.5.3 Self-defence and necessity

Every State has its own wording of the right to self-defence in its domestic law. Such regulation is necessary because any use of force by citizens in their mutual interactions is subject to criminal punishment as violence or the like. Rules governing self-defence, therefore, are a prerequisite for allowing any use of physical force by a citizen against another citizen to qualify as legitimate self-defence. More information about the rules of Danish domestic law on self-defence and necessity is provided in Section 4.1 of Chapter 15.

170 For instance, section 13 of the Danish Criminal Code and the ICC Statute, Art. 31(1(c)).

7.5.4 Self-defence under command

The right of self-defence, on the other hand, cannot be invoked by an individual soldier as a reason for disobeying an order to cease fire or to wait to fire shots until the adversary is sufficiently close or the like. Similarly, the right of self-defence cannot be invoked as a legal argument for a requirement to be armed or to carry a special type of weapon. Accordingly, when military personnel are **under command**, all orders issued by the commander must be followed—also in relation to the use of force in special cases in which such an order could be perceived by the individual soldier as a restriction on his right of self-defence.

To put it in another way: although a soldier or crew member under command may be acting within the scope of the self-defence rule of the Danish Criminal Code, such an act could constitute a dereliction of duty, which, depending on the gravity of the offence, could be punishable under the Danish Military Penal Code.

Example 3.15: During a peace-support operation, the battalion is ordered to go to a demonstration on a bridge in its area of responsibility. The demonstrators are very aggressive, and it is foreseeable that the demonstrators might decide to throw stones and, perhaps, even fire shots at the Danish battalion. A company of soldiers in riot gear with helmets, shields, and other protective equipment is instructed to prevent the demonstration from passing the bridge as this would increase the risk of collision with the population on the other side. The soldiers are placed in lines. The first line is ordered not to bare weapons in order to prevent the demonstrators from wresting the weapons out of the hands of the Danish soldiers and the escalation in violence that could follow from that. Two of the soldiers refuse to obey the order. They find the order clearly unlawful since it would deprive them of their only chance to defend themselves if the situation escalates. The order is lawful and must be obeyed even if it could be perceived as a restriction on the soldier's right of self-defence.

Example 3.16: A Danish infantry unit conducts a dismounted patrol during its deployment to a NIAC. One of the patrol members observes something that looks like a small unit of enemy soldiers who are patrolling the area in the same way as the Danish unit. He signals this to the squad commander, who orders the squad to take cover. The squad is now lying behind a small terrain rise facing the enemy soldiers, who are moving slowly towards the Danish unit, clearly without having seen the Danish soldiers. In a few minutes, they will be within 50 metres of the Danish patrol and will enter from the left side of the squad. The squad commander signals that they may only open fire on his command. He waits and waits. Finally, the enemy soldiers are so close that conversation can be heard. Rifleman 2, who is on the left flank of the squad, thinks that the enemy soldiers have come a little too close for comfort now. He decides to open fire although he has not yet received the squad commander's "fire at will" order. In this situation, rifleman 2 disobeys the lawful order of the squad commander even though he has the impression that, in the circumstances, his life was in imminent danger.

7.6

Extended self-defence

How far can the right of self-defence be extended? Should the prefix “self” in self-defence be construed literally or must it be assumed that Danish forces have the right to act in defence against unlawful attacks against allies or civilians? If the latter question is answered in the affirmative — is this right applicable at all times or only under certain circumstances?

As was the case with the right of Danish forces to exercise collective self-defence (see Section 2.2.3 of Chapter 2), the answers must be found in the basis for the presence of the Danish forces in the territory of a foreign State.

7.6.1 With or without a parliamentary resolution

These questions present no significant challenges to resolutions on missions that have a broad mandate under international law and which have been submitted to the Danish Parliament for approval in accordance with the procedural rules set out in the Constitution of the Kingdom of Denmark.¹⁷¹ Thus, if a **parliamentary resolution** to deploy a Danish contingent has been adopted, the armed forces are authorised to use force within the scope of the mandate provided by the resolution. In contemporary military operations, both self-defence and extended self-defence will be allowed in the RoE for the force.

Legal challenges may arise in cases in which Danish soldiers or crew members take part in exercises or the like or cases in which Danish armed forces take part in some other international activity **without prior adoption of a parliamentary resolution**. Such cases may also give rise to situations in which it is found necessary to use force in the defence of another person — for instance, when a Danish naval unit on its way home from an exercise voyage is subject to a pirate attack on the high seas or when a Danish infantry unit on exercise with live ammunition witnesses an unlawful attack on another participant in the exercise or a civilian.

The scenario has a general theme relating to parliamentary control of the use of military force by Danish armed forces. In other words, the Danish Government has a duty to submit any measures involving the deployment of Danish armed forces to the Danish Parliament for approval in situations in which the Government assesses

171 Constitutional Act of the Kingdom of Denmark, section 19(2).

that a need exists to use military force or where it cannot be ruled out that such force will be employed, following a comprehensive assessment. This question primarily concerns the minister's responsibility to Parliament. Reference is made to Section 2.2.3 of Chapter 2 for more information on the interpretation of section 19(2) of the Constitution of the Kingdom of Denmark and on the scope of the Danish Royal Decree concerning Rules of Engagement.

7.6.2 Extended self-defence at the tactical level

The question of the legal framework for the specific use of force is important to the Danish armed forces, i.e., the question of whether the soldier, crew member, pilot, or unit acting in defence of a third person against an unlawful attack is acting within the framework of the applicable law.

Just as the right of self-defence may be “administered” by the military command system, this practice may also be followed with respect to other forms of use of force, for instance, in connection with the defence of a third person exposed to an unlawful attack.

Occasionally, a mission's **RoE may not authorise the use of force that** — depending on the circumstances — might be lawful under the provisions of the Danish Criminal Code on self-defence or necessity. This may be due to two things: Either that the mandate to use force does not permit it or that the mission commander found it necessary to impose special restrictions on the use of force.

In such cases, the RoE must be observed even if a specific use of force might be exempt from punishment in accordance with the rule of self-defence. If rules of engagement are violated in the territory, such violations may, depending on the circumstances, constitute a punishable offence under the relevant rules of the Danish Military Penal Code on dereliction of duty.

Example 3.17: In a peace operation, the right to use force has been restricted by the RoE with the effect that a contingent is not authorised to intervene with the use of armed force in cases of common assault between civilians in the mission area. The consideration behind the rule is that the UN force does not want to act as a law enforcement authority in a mission where the police of the territorial State are relatively well-functioning and should handle tasks such as this. UN personnel, therefore, must report such events but are not allowed to intervene.

During a foot patrol, such an incident is witnessed. Apparently, this is a spontaneous fight without the use of weapons. The patrol tries unsuccessfully to warn the rowdies verbally. Then, one of the patrol members fires a warning shot in violation of the RoE.

The soldier who fired the warning shot has acted in violation of the RoE for the force and,

consequently, is guilty of a dereliction of duty. The point here is that, due to the restriction on the right to use force, the soldier cannot invoke the provision of the Danish Criminal Code on self-defence as a legal basis for committing the act although the provision would otherwise be applicable. This is true regardless of whether the preamble to the RoE contains a rule specifying that “nothing in these RoE shall limit the inherent right of self-defence” or the like.

Annex: Overview of current treaties in the field of IHL in armed conflicts

Source of law	IAC	NIAC CA3	NIAC AP II ¹⁷²	NIAC AP I, Art. 1(4) ¹⁷³
General rules of protection				
HC IV with 1907 Hague Regulations				
GC I — IV				
CA3	N/A			
AP I				174
AP II			175	
AP III				
Weapons				
Explosive projectiles				
Dum-Dum				
Biological weapons				
UN Weapons Convention with Protocols ¹⁷⁶				
Chemical weapons				
Anti-personnel mines				
Cluster munitions				
Specifically on naval warfare				
HC VI relating to the Status of Enemy Merchant Ships				
HC VII relating to the Conversion of Merchant Ships				
HC VIII relative to the Laying of Automatic Submarine Contact Mines				
HC XI relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War				
HC XIII concerning the Rights and Duties of Neutral Powers in Naval War				
Other topics				
HC V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land				
Convention for the Protection of Cultural Property and its AP				
ENMOD Convention on Environmental Modification Techniques of 1977				

172 In cases in which the territorial State has acceded to AP II. The comment is relevant because there are examples in which Denmark has participated in transnational NIACs at times when the territorial State had not acceded to AP II, which, therefore, was not applicable to the conflict.

173 In principle, the same comment as in note 1 above.

174 If the conditions of Art. 96(3) of the Protocol are met.

175 If the conditions of Art. 1(1) of the Protocol are met by the non-State party to the conflict.

176 Because Denmark has acceded to the 2001 amendment to Article 1, which widens the scope of application to include any type of NIAC.

Comments

- Only treaties concluded in the context of IHL have been included here. Other rules of international law may be applicable, including HRL.
- When a treaty is not applicable to the conflict, customary international law will usually fill the gap.
- Denmark may have decided that its obligations under a particular convention should extend beyond its international law obligations: i.e., the “Addendums”.

Legend

0	1	2	3	4
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0: Denmark is not legally bound by the convention under the rules of treaty law

1: Denmark is legally bound by the convention under the rules of treaty law if all other States to the conflict have acceded to it

2: Denmark is legally bound by the convention under the rules of treaty law in relation to other States to the conflict that have acceded to it.

3: Denmark is legally bound to the extent that Denmark itself is a territorial State or to the extent that Danish forces are deployed to support the territorial State in a NIAC.

4: Denmark is legally bound at all times.

Fundamental principles and norms

Fundamental principles and norms

1. Introduction

This chapter addresses the principles and norms of international law that are recognised as fundamental in armed conflict and describes general principles. It is particularly useful for educational purposes or as a short cut to understanding the motivation behind very comprehensive and detailed regulation in international law, which is often a specific strategy to implement and balance these principles, including in particular the principles of military necessity and humanity.

1.1

Chapter contents

In what follows is a description of the four principles and other relevant norms. Their meaning in practice is briefly analysed, and each section concludes with a comment on the applicability of these principles in NIAC.

1.2

Scope in relation to other chapters

The principles have a separate meaning and, at the same time, play a key role in the interpretation of the individual rules elsewhere in IHL. Therefore, they will be

addressed in each of the following chapters. Moreover, other international obligations, principles, and norms may have significance for the efforts of Danish forces in military operations.

2. Military necessity

The principle of military necessity permits a party to a conflict to use only the degree and kind of force that is required to achieve the legitimate purpose of the conflict, that is, to compel the complete or partial surrender of the adversary with the minimum loss of human life and resources.¹ Translated into more specific obligations, this means that the **use of force must be lawful, controlled, and necessary**. The requirement of **lawfulness** assumes that weapons, munitions, and methods of warfare do not violate the rules of IHL in this area — for instance, that operations do not involve the use of prohibited weapons such as chemical weapons or anti-personnel mines.

The use of force must be **controlled** to ensure that it is linked to the achievement of the strategic military objective. Accordingly, any use of force that is not for the purpose of achieving the complete or partial surrender of the adversary is unlawful. This is reflected in the requirement that, for an object to qualify as a military objective, it must make an effective contribution to the adversary's military action, and its destruction, capture, or neutralisation must offer a definite military advantage to the attacker.² For more information, see Chapter 8.

The phrase “**complete or partial surrender**” implies that it will not be necessary in all circumstances to force the complete surrender of the adversary's armed forces.

Example 4.1: During the Falklands War in the spring of 1982, the only military goal of British forces was to drive Argentine armed forces from the Falkland and Malvinas Islands, which was accomplished with the capitulation of the Argentine armed forces on 15 June 1982. Even though this merely involved the Argentinian surrender of the islands, any further use of force would have been contrary to the requirement of military necessity since the British strategic objective had been achieved.

1 Preamble to the 1868 Declaration of Saint Petersburg Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. See also the International Military Tribunal at Nuremberg, *The United States of America v. Wilhelm List*, 1948, para. 66.

2 API, Art. 52(2).

In several of the war-crime trials that followed in the wake of World War II, some of the accused German officers argued that violations of IHL could be justified by military necessity.³ The courts ignored this point of view on the grounds that the consideration of military necessity is already an element of IHL. The rules of IHL, therefore, may not lawfully be overridden using the argument that it be necessary to reach a strategic military goal.

The IHL requirements for military objectives, as set out in AP I, Art. 52(2), are of greatest practical relevance to the operationalisation of the principle of military necessity. The provision states that, in order to qualify as a military objective, an object is required to make an effective contribution to the adversary's military action, which, at the time of the attack, corresponds to a definite military advantage to the party planning the attack. The provision is dealt with in more detail in Chapter 8.

In other provisions, consideration of military necessity is expressly reflected as a parameter of a specific intervention or specific protection. This applies, for instance, in the following two examples:

Example 4.2: According to Art. 23(g) of the 1907 HC IV, it is prohibited to destroy or seize the enemy's property unless such destruction or seizure is "imperatively demanded by the necessities of war". For more information, see Section 2.7.3 of Chapter 10.

Example 4.3: The Hague Convention for the Protection of Cultural Property of 1954 (1954 Hague Convention) introduces the protection of cultural property. States undertake to refrain from using such cultural objects for military purposes and to refrain from directing attacks against them. This protection may be waived only in cases in which such a waiver is required by imperative military necessity.⁴ The Convention grants immunity to cultural property under special protection, and such immunity can be withdrawn from the property only in exceptional cases of unavoidable military necessity.⁵ More information about these rules is provided in Section 5 of Chapter 6.

In practice, Rules of Engagement (RoE) serve as an instrument to control the use of force, see Section 7 of Chapter 3. More recently, Defence Command Denmark has drawn up a use-of-force directive for the issuing of directives applicable to major Danish military contingents.⁶ The use of military force is regulated by RoE in any contemporary military operation whether it takes place in the framework of an alliance or a coalition on land, at sea, or in the air. Such a regulation may be seen, for

3 See note 1 and the British Military Court for the Trial of War Criminals, *Peleus*, 1945.

4 1954 Hague Convention, Art. 4(2).

5 1954 Hague Convention, Art. 11(1).

6 DCD DIR 096-1, "Directive for the Danish Armed Forces' Participation in International Operations", revised as of 1 December 2014, para. 6.3.

instance, as a desire from military strategists to ensure that the use of military force is subject to control that aligns it with the purpose of the overall military operations and, therefore, with the principle of military necessity.

Any infringement of the principle of military necessity may, under certain circumstances, be prosecuted as a war crime by the International Criminal Court (ICC).⁷

Military necessity in NIAC

As mentioned, the principle of military necessity derives from the preamble to the Declaration of Saint Petersburg, which deals with the conditions applicable in IAC. However, the overall strategic requirement to control the use of force in order to achieve the complete or partial surrender of the adversary with the minimum loss of human life, time, and resources must today be assumed to be of such a universal nature that it is also applicable in NIAC. The same goes for the maxim that military necessity cannot be applied to justify violations of IHL in NIAC. The principle was formulated the first time for use in a non-international armed conflict in what was known as the Lieber Code, developed as a manual for compliance with international law for the Union Army in the American Civil War in 1863.⁸

Ambiguous terms

The concept of “military necessity” (or simply “necessity”) is used in other contexts with a slightly different meaning than it has in IHL.

In NATO’s RoE catalogue, the concept of “necessity” is defined in a **self-defence context** in which force – including deadly armed force – may be used to the extent necessary and proportionate in the case of a commenced or imminent attack on NATO forces.⁹ Here, “necessary” means that, in each case of self-defence, response options other than the use of direct fire must be considered. This is fully consistent with the rules on legitimate acts of self-defence. On the other hand, the rule does not automatically apply in armed conflicts in which enemy forces may be attacked immediately and irrespective of whether less forceful means could have been used. More information about RoE and self-defence is provided in Section 7 of Chapter 3.

⁷ See also ICC Statute, Art. 8(2)(a)(iv).

⁸ US War Department, General Orders No. 100, Art. 14-16, 1863.

⁹ MC 362, ed. 1 of 30 June 2003, para. 7.a.

3. Humanity

The principle of humanity expresses a fundamental prohibition against the infliction of suffering, injury, or destruction that is not actually necessary for the accomplishment of legitimate military purposes. The principle also implies the basic requirement of humane treatment. According to the International Court of Justice, the principle of humanity is regarded as fundamental, “intransgressible”, and a manifestation of customary law. It, therefore, holds a central place in international law.¹⁰

There are three aspects to the principle of humanity.

The first aspect concerns the fact that **belligerents are limited in their use of means and methods of warfare**. A belligerent State is not allowed to use weapons, ammunition, or methods of a nature to cause superfluous injury or unnecessary suffering. In common with the principle of military necessity, this prohibition derives from the preamble to the Declaration of Saint Petersburg of 1868. Today, the prohibition is set out in AP I as follows:

”It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.¹¹

The Statute of the ICC establishes that any infringement of the principle constitutes a war crime.¹²

More specifically, this aspect of the principle of humanity has manifested itself through the adoption of a number of conventions, including the UN Weapons Convention of 1980, which prohibits or restricts the use of certain conventional weapons and munitions. Chapter 9 takes a closer look at the regulation of weapons and ammunition, and Chapter 10 deals with prohibited methods.

The second aspect of the principle of humanity is the requirement that certain **precautions** — for instance, in the choice of means and methods — must be taken in connection with the planning and execution of attacks and in the defence against attacks. The purpose is to minimise or completely avoid loss of civilian life and,

10 ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996, para. 79.

11 Original text of AP I, Art. 35(2), “(...) of a nature to cause”. See also SCIHL, Rule No. 70.

12 ICC Statute, Art. 8(2)(b)(xx).

correspondingly, minimise damage to civilian objects.¹³

The third aspect of the principle concerns a **minimum standard for the humane treatment of any person** who is held in the custody of a belligerent State.

The requirement specifically finds expression in all conventions that deal with the treatment of persons in the custody of belligerent States, including in the four Geneva Conventions,¹⁴ in AP I,¹⁵ and AP II¹⁶ as well as in the definition of war crimes in the Statute of the International Criminal Court.¹⁷ Chapter 12 provides more information about the requirements for the treatment of persons deprived of liberty, including the requirement of humane treatment.

Humanity in NIAC

All aspects of the principle of humanity must be assumed to apply in NIAC. That is the case for the prohibition on the use of weapons, ammunition, and methods that are of a nature to cause unnecessary suffering or superfluous injury to the adversary.¹⁸ It also includes precautionary measures¹⁹ as well as the requirement of humane treatment of any person who is held in the custody of a belligerent State.²⁰

4. Distinction

Perhaps, the most central and operational principle of IHL is the principle of distinction. The principle is sometimes referred to as the “principle of discrimination”. The requirement that attacks must be limited to military objectives and combatants and that civilian objects and civilian persons must be protected.²¹ It is this principle that provides the foundation for the rules of IHL on civilian objects, military objec-

¹³ AP I, Art. 57 and 58.

¹⁴ GC, CA 3, GC I and II, Art. 12, GC III, Art. 13, 20 and 46, and GC IV, Art. 5, 27, 37 and 127.

¹⁵ AP I, Art. 10(2) and Art. 75.

¹⁶ AP II, Art. 4(1) and Art. 5(3).

¹⁷ ICC Statute, Art. 8(2)(a)(ii) and Art. 8(2)(c)(i) etc.

¹⁸ ICTY Tadić IT-94-1-A 1995, para. 119, and SCIL, Rule No. 71.

¹⁹ ICTY Kupreskic IT-95-16-T 2000, para. 524.

²⁰ See note 18 and GC, CA 3.

²¹ See, e.g., ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996, para. 61, and ICTY Tadić IT-94-1-A 1995, para 99.

tives, civilians, and combatants.²² Like the principle of humanity, the principle of distinction is regarded as fundamental, “intransgressible”, and a manifestation of customary law.²³ The principle of distinction is today described in AP I as follows:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.²⁴

The principle in itself is formulated clearly and precisely. On the other hand, there may be significant practical challenges associated with determining which objects constitute military objectives and – not least – which persons are protected civilians. Difficulties may arise, in particular, when it comes to the distinction between civilians and combatants. In NIACs, non-State organised armed groups (OAGs) are not recognised as combatants; and, in this context, the principle of distinction, therefore, relates primarily to the distinction between civilians and the members of the organised armed groups that continuously take part in the hostilities (MOAGs). These challenges are analysed in more detail in Chapter 5 of the Manual, which provides an introduction to the actors on the battlefield and their status under international law.

In case of doubt as to whether a person is a combatant or whether an object is a military object, a presumption in favour of protected civilian status will apply.²⁵ The military commander must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives.²⁶ That applies to information about the objective itself but also about the civilian activity that may be seen in the area for the purpose of assessing proportionality and other precautions. In the assessment of what can be considered to be reasonable in such a situation, factors such as time, intelligence resources, and protection of one’s own troops are included.

The principle of distinction is not merely a requirement to distinguish between military objectives and civilian objects when conducting an attack. The principle is also intended to ensure that the parties to the conflict help **facilitate the distinction for the adversary**. Against this background, international law establishes certain

²² See, e.g., AP I, Art. 52, or SCIHL, Rules Nos. 1 and 7.

²³ ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996, para. 79.

²⁴ AP I, Art. 48.

²⁵ AP I, Art. 50(1), and AP I, Art. 52(3).

²⁶ AP I, Art. 57(2)(a)(i).

requirements obliging combatants to display distinctive signs.²⁷ Furthermore, the parties to the conflict must endeavour to remove civilians and civilian objects from the vicinity of military objectives and take other precautions to protect the civilian population against the dangers resulting from military operations.²⁸ This aspect of the principle of distinction should not be seen as a requirement to facilitate the adversary's path to military success. The rules are designed to provide a framework for armed conflicts in international law which, to the extent feasible, spares the civilian population and civilian objects, including schools and hospitals, and which contributes to maintaining the basis for the continuation of civil society in the States that are parties to the conflict, also after the conflict has ended.

Infringements of the principle of distinction may be characterised as war crimes and are subject to prosecution by the ICC.²⁹ For more information, see Chapter 15.

Application of the principle of distinction in NIAC

The principle of distinction is also applicable in NIAC.³⁰

However, in NIACs, the domestic law of any State will specifically prohibit the **taking up of arms against the State**. Consequently, by definition, any person who has participated in an insurgent force is guilty of subversive activity and could be prosecuted for this offence by national courts.

However, the purpose of the regulation in international law of these conditions — also in NIACs — is not designed to protect States against subversive forces but to create space for humanity and protect innocent civilians and other vulnerable groups when the conflict has broken out. Although States have not granted the privileges of combatant status to non-State entities under international law, the rules on distinction are also applicable in NIAC. If an OAG commits a serious infringement of the rules of international law — for instance, by intentionally directing attacks against civilians or other protected persons or objects, the OAG members are guilty of a war crime.³¹ Any war crimes committed by an OAG in a NIAC will be subject to prosecution in addition to the offence already committed by the OAG against the

27 GC III, Art. 4, and AP I, Art. 43 and 44.

28 AP I, Art. 58.

29 ICC Statute, Art. 8(2)(b)(i) and (ii).

30 SCJHL, Rules Nos. 1 and 7, ICJ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996, para. 78, and ICTY Kupreskic IT-95-16-T 2000, para. 521.

31 ICC Statute, Art. 8(2)(e)(i-iv) and (xii).

territorial State as a consequence of the subversive activity involved in its participation in armed insurgency.

Proportionality

The principle of proportionality holds that the expected civilian casualties resulting from the military operation are not to be excessive in relation to the concrete and direct military advantage anticipated. The principle of proportionality is geared to balancing the often conflicting considerations between the principles of military necessity and humanity when precautions are taken in connection with an armed attack.

The principle is described in AP I. According to the protocol, an attack must be described as indiscriminate and, therefore, unlawful if it acquires the character of

*“an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”*³²

A more detailed presentation of the precise scope and importance of the principle (for instance, in the designation of objectives and attacks) is provided in Chapter 8. Therefore, only a few general comments on how to understand the principle will be made here.

The principle of proportionality is a rule that reflects State recognition of the need to relate to the realities of armed conflicts, i.e., the fact that military objectives are not always isolated from civilian objects and persons.

The principle involves a requirement to assess the injury and damage an attack on the objective must be expected to cause to civilian persons or civilian objects even in cases in which a military objective has been identified. In this Manual, the combination of injury to civilian persons and damage to civilian objects as a result of an attack on a military objective is referred to as collateral damage. If the collateral damage is assessed to be excessive in relation to the concrete and direct military advantage anticipated, the attack is not allowed to be executed as planned.

³² AP I, Art. 51(5)(b), and AP I, Art. 57(2)(a)(iii).

The collateral damage is closely related to the means to be used for the attack. Therefore, it cannot be precluded that, by choosing a different means or method, a better proportionality balance between the value of the military objective and the anticipated collateral damage might be created.³³

In common with the principle of distinction, the assessment contains some very difficult elements of discretion. This means that an estimate will often have to be made under a certain pressure – for instance, time pressure. The commander must make reasonable efforts to gather information about civilian activity in and around the objective and is required to know how the means that are planned to be used for the attack are expected to impact on the objective. This issue is addressed in greater detail in Chapter 8 on military objectives.

Principle of proportionality in NIAC

There is no explicit rule in either CA 3 or in AP II that corresponds to the requirement of proportionality as expressed in AP I. However, it is assumed that, by virtue of its customary law nature, the principle also applies in NIAC.³⁴

Ambiguous terms

In common with the concept of military necessity, the concept of proportionality is also used with other meanings elsewhere in international law.

In connection with **acts of self-defence**, a requirement of proportionality is also applicable. To be lawful, the military force used to counter an attack is required to be adjusted to the degree, intensity, and duration of the attack by the adversary.³⁵ In military operations in which force is only authorised in self-defence, it will often be this variant of the requirement of proportionality that applies in the RoE for the operation.

This requirement of proportionality must not be confused with the requirement of proportionality set forth in IHL, which (see above) concerns the relationship between the value of the military objective and the collateral damage anticipated if the attack is executed.

³³ AP I, Art. 57(2)(a)(ii).

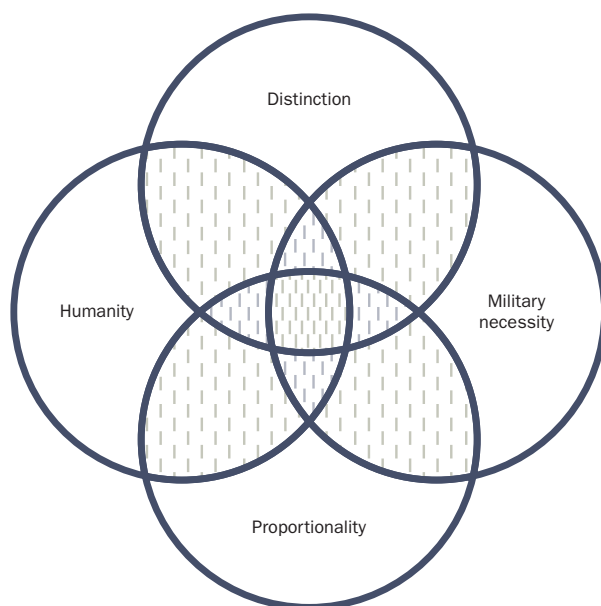
³⁴ ICTY Kupreskic IT-95-16-T 2000, para. 524, ICTY Galic IT-98-29-A 2006, para. 191. See also SRM NIAC, Rule No. 2.1.1., and SCiHL, Rule No. 14.

³⁵ NATO MC 362, ed. 1, Rules of Engagement, para. 7(b).

6. Summary of the meaning of the principles

4.1. Combined, the principles imply a requirement for parties to a conflict to control their use of force to ensure that they do not use more force than necessary to achieve their strategic objectives quickly and efficiently (military necessity). Attacks may be directed only against military objectives, combatants, and others taking a direct part in the hostilities. The civilian population as well as individual civilians and civilian objects must be protected (distinction). Recognising that civilian casualties are inevitable in armed conflict, an attack against military objectives may be conducted even if there is a risk of causing harm to civilians and/or civilian objects if the expected harmful effect on civilians and civilian objects is not excessive in relation to the concrete and direct military advantage anticipated from the attack (proportionality). The parties to the conflict are not free to choose the means and methods to fight the adversary. Means and methods must not be of a nature to cause superfluous injury or unnecessary suffering to the adversary. Any person deprived of liberty must be treated humanely (humanity).

THE FOUR BASIC PRINCIPLES



• FIGURE 4.1 •

This figure illustrates the interrelationship between the basic principles of IHL. They each have a well-defined, separate meaning but overlap in content.

7. Obligations, principles, and norms

Denmark is a party to international conventions that, depending on the circumstances, may entail a special responsibility for the participation of Danish armed forces in international operations. Under Article 1 of the Genocide Convention (1948), the States Parties undertake to prevent and punish genocide. In practice, this means that Danish forces must pay special attention to any warning signs of impending genocide and take appropriate action. A similar obligation to prevent certain attacks is reflected in Article 2 of the UN Convention against Torture (1984), which deals with acts of torture. In practice, this means that, for instance, Danish forces are not allowed to resort to torture or other cruel, inhuman or degrading treatment or punishment against individuals deprived of liberty or to transfer such persons to other forces that use torture.

At the 2005 UN World Summit, world leaders endorsed the principle of Responsibility to Protect (R2P) by which States and the international community carry the primary responsibility for protecting civilian populations from four types of crime: 1) genocide, 2) war crimes, 3) ethnic cleansing, and 4) crimes against humanity. R2P applies in peacetime as well as in IAC and in NIAC. The principle provides a coherent framework for preventing and stopping such atrocities and directing response by specific actors both before and during a given conflict. The principle of R2P was a key element in UN Security Council Resolution 1733, which authorised States in March 2011 to take all necessary measures to protect the Libyan civilian population from attacks by the Gaddafi regime.³⁶ More information is available in Section 2.2.4 of Chapter 2.

Depending on the circumstances of the specific Danish military operation, a need may arise pursuant to more general obligations under international law or UN standards, such as a duty to report, to issue warnings, to initiate reporting systems, to interpret mandates in the light of these obligations and principles, or to take specific actions, etc., in relation to measures to oppose conditions such as genocide, other serious international crimes, torture, etc.

³⁶ UN Security Council Resolution 1733, 17 March 2011, para. 4.

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Introduction to the actors on the battlefield and their status under international law

Introduction to the actors on the battlefield and their status under international law

1. Introduction

Generally speaking, the law of armed conflict makes a distinction between the armed forces and the civilians of the parties to the conflict. In international armed conflicts (IACs), any person who is not a combatant must be regarded as a civilian.¹

Combatant status, and the associated prisoner of war status, do not exist in the regulation of non-international armed conflicts (NIACs) under international law.

Members of any armed forces of a State Party to a NIAC are inherently authorised to use force within the bounds of applicable law, including IHL, and therefore may not be prosecuted for lawful participation in hostilities.

¹ API, Art. 50(1).

Non-State actors such as individuals, insurgencies or other organised armed groups (OAGs) that take direct part in hostilities are considered civilians who lose protection from direct attack for such time as the direct participation continues. They may also be prosecuted in the State where the conflict takes place for any crimes committed against the authority of the State.

1.1

Summary of chapter contents

This chapter provides an overview of the various actors on the battlefield and outlines the contents of and background to the status and protection under international law afforded to the individual groups.

Section 2 presents the actors in IACs. Next, Section 3 illustrates the distinctive features related to the protection of the principal actors in NIACs.

1.2

Scope in relation to other chapters

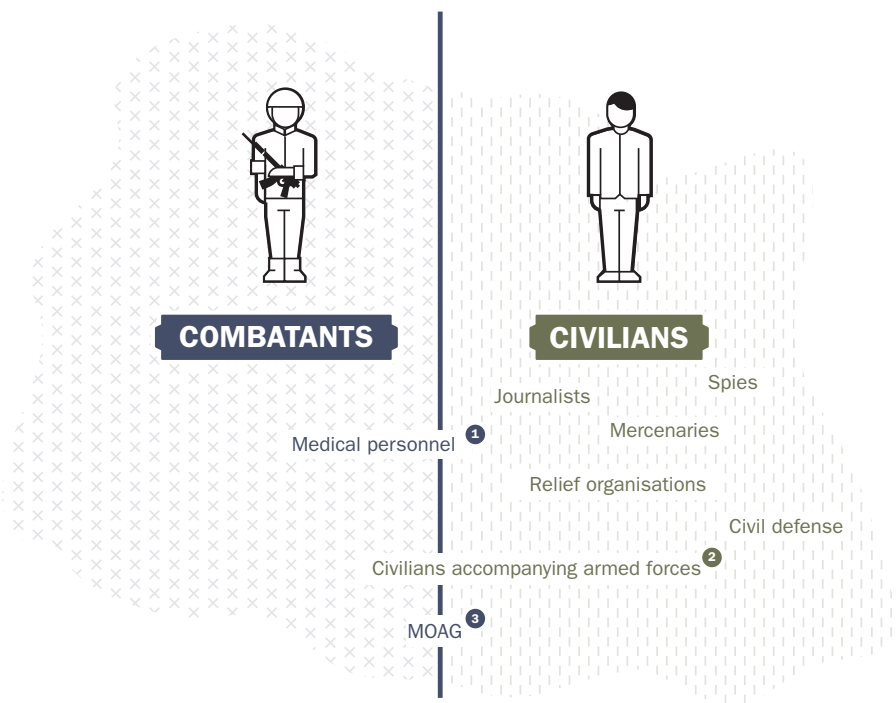
This chapter is closely related to chapters describing the status under international law of persons in a given context. For instance, the legal status of Danish forces in operations outside armed conflict is dealt with in Chapter 3, and Chapter 6 is concerned with, e.g., the contents of the protection to which civilians are entitled in armed conflict. Chapter 7 considers the extent of the protection enjoyed by medical personnel, and Chapter 12 describes in detail the rights and treatment of persons deprived of liberty, which depend on the international law status of the person deprived of liberty.

1.3

The importance of human rights to this chapter

The main difference between combatants and civilians is associated with the implementation of the principle of distinction, which constitutes the very cornerstone of IHL. For more information, see Chapter 4. In terms of the detailed protection of individuals in armed conflict, human rights supplement IHL in a great many areas. This issue is considered in more detail in Chapter 6.

ACTORS ON THE BATTLEFIELD



• FIGURE 5.1 •

This figure illustrates the general relationship between actors on the battlefield. Fundamentally, a distinction is made solely between combatants and civilians. The personnel categories on the civilian side to the right are all regarded as civilians under IHL but are treated differently in detail and have different

Re 1: “Medical personnel” are military medical personnel who represent a special category in terms of protection. Such personnel belong to the armed forces but may not take an active part in the hostilities or be made the object of (direct) attack.

Re 2: Civilians accompanying the armed forces remain civilians but must be assigned the status

of prisoners of war in the event of capture.

2. International armed conflict (IAC)

2.1

Combatants

Generally speaking, the principle of distinction is about discerning (being able to discern) protected persons and protected property, on one hand, and combatants and military objectives, on the other. It is essential relative to the principle of distinction that a visible difference exists between civilians and combatants on the battlefield.

The individual combatant may face very serious consequences upon failure to comply with the combatant rules — not least, the requirement to carry arms and bear distinctive signs. A combatant who falls into the power of the adversary under circumstances in which the combatant fails to meet the requirement to distinguish oneself from the civilian population, or the requirement to carry arms openly, will lose status as a combatant.²

Classic rules for combatants

The classic combatant status requirements divide combatants into two main groups.

The first group is comprised of the regular armed forces, national guards, and other similar voluntary armed corps of a party to the conflict that might form part of the armed forces of a State. In a Danish context, this group primarily includes members of the Danish Armed Forces and the Danish Home Guard.

The second group is comprised of other voluntary armed forces, including resistance movements, etc., that are not part of a State's regular armed forces but may nevertheless obtain combatant status if they fulfil the following four conditions:

- 1) that of being commanded by a person responsible for the conduct of subordinates;
- 2) that of having a fixed distinctive sign recognisable at a distance;
- 3) that of carrying arms openly; and
- 4) that of conducting their operations in accordance with IHL.³

² AP I, Art. 44(4).

³ 1907 Hague Regulations, Art. 1, and GC III, Art. 4A(1) and (2).

In addition to these groups, there is a special situation in which civilians in a non-occupied territory take up arms to resist the approaching enemy. Such civilians will be regarded as combatants under the rules on *levée en masse**. This presumes that the civilians in question have not had the time to form themselves into regular armed units.⁴

The modern rules for combatants

The combatant requirements were modified as part of the preparation of AP I. The above-referenced classic **rules for combatants were consolidated but also relaxed**. These modifications are outlined below. The background for these modifications was a desire to allow combatant status for a number of armed groups that engage in armed conflict to achieve self-determination pursuant to the Charter of the United Nations, etc.⁵ These are situations in which peoples are fighting against alien occupation, racist regimes, or colonial domination. A new and more up-to-date set of rules was needed because the majority of States during the negotiations were not of the opinion that it was fair to require the members of such groups always to distinguish themselves visually from the civilian population.

Danish armed forces must comply with the modern rules for combatants when determining their own or the adversary's combatant status **in all IACs regardless of whether the enemy has ratified AP I or not**. Reference is made to Chapter 12 for more information about the determination of the status of persons deprived of liberty.

On armed forces, command, and disciplinary systems

The armed forces of a party to the conflict are **combatants**, except medical and religious personnel.⁶

5.1 The armed forces of a party to a conflict consist of:

All organised armed forces, groups, or units which are under a command responsible to that party for the conduct of its subordinates even if that party is represented by a government or an authority not recognised by an adverse Party. Such armed forces must be subject to an internal disciplinary system which, inter alia, must enforce compliance with the rules of international law applicable in armed conflict.⁷

⁴ GC III, Art. 4A(6), see AP I, Art. 44(6).

⁵ AP I, Art. 1(4).

⁶ SCIH, Rule No. 3.

⁷ AP I, Art. 43(1), and SCIH, Rule No. 4.

5.2 Combatants have the right to participate directly in hostilities.⁸ If they fall into the power of the adverse Party, they are entitled to the status of prisoners of war.⁹

The requirement of **organisation** is not described in detail. Armed forces may organise themselves in numerous ways. What is essential is that they are not a loose private initiative but form a collective military unit. The requirement of organisation must be considered in close connection with the requirement of **responsible command**. This requires some hierarchical structure. The organisation must include commanders who are responsible for subordinates in the organisation.

OAGs do not necessarily have to form part of a State Party's regular armed forces. Nevertheless, they must belong to a State Party, and all MOAGs must be responsible for acts committed by them during the conflict against a State party to the conflict. No express agreement between the State and OAG is required. The affiliation may sometimes be established and ascertained on the basis of the State's acts and/or in form of statements indicating such support or backing for the group.

It is no longer a condition for combatant status that IHL is in fact observed by individuals. What is essential is that the individual armed forces have established a **disciplinary sanctions system** and that the party actually enforces compliance with IHL.¹⁰

Since the Hague Regulation concerning the Laws and Customs of War on Land of 1907, it has been recognised that a State's armed forces **may consist of both military and civilian personnel**.¹¹ Danish armed forces consist of a number of different categories of personnel from combat troops to combat support elements to logistical and administrative units and personnel. **They are all combatants**. Any military legal advisers, staff judge advocates, military investigation officers, and civilians in the Danish armed forces who bear a crown and, perhaps, an oak leaf are members of the Danish armed forces and, as such, combatants. They have a right to take a part in the hostilities although national orders may contain provisions as to how these and other special groups of personnel may be armed and when and how military force, if necessary, may be applied. Common to these groups is the requirement to issue them an identity card that indicates their combatant status.¹²

⁸ AP I, Art. 43(2).

⁹ AP I, Art. 44(1).

¹⁰ AP I, Art. 43(1).

¹¹ 1907 Hague Regulations, Art. 3.

¹² GC III, Art. 17.

These integrated civilians differ under international law from civilians who accompany the armed forces but are not members of them, see Section 2.4 below.

The requirement for combatants to distinguish themselves from the civilian population

The modern rules for combatants contain a provision that addresses the special terms applicable during guerrilla warfare.¹³ This provision has not been adopted with a view toward amending the rules on the wearing of State uniforms. The general rule is still that the Danish armed forces must be in uniform. Moreover, the intention has not been to treat States Parties and OAGs differently in terms of combatant status in conflicts covered by AP I.¹⁴ This being the case, it should also be possible to apply the options of Article 44 of AP I to Danish armed forces in exceptional situations. More detailed information is available below.

In relation to **visible distinctive signs** and the **carrying of arms**, the modern rules for combatants now contain the following requirements:

Principal rule:

Combatants are required to distinguish themselves from the civilian population **during an attack or military operation preparatory to an attack**. In this context, military operations preparatory to an attack must be understood rather broadly to comprise any preparatory military activity but also ordinary patrolling or any other visible presence outside military camps in the area of conflict. However, this principal rule also points out that armed forces, including Danish armed forces, may appear out of uniform away from the battlefield. This applies, for example, to secluded camps in which the individual is not standing guard or working on imminent or ongoing military combat operations.

The rules do not specify how combatants are to distinguish themselves. At a minimum, however, all combatants should be required to wear a characteristic garment or other characteristic distinctive sign visible from a distance for as long as the combatant is armed, regardless of the type of arms. What is essential is that the method used makes it clear to the adversary that a person is a combatant.

¹³ AP I, Art. 44(3).

¹⁴ For instance, AP I, Art. 1(4).

Exception – extraordinary situations:

Especially as regards the above-mentioned OAGs, *extraordinary situations* may arise in which it is not possible for or fair to require combatants to distinguish themselves from the civilian population. In such extraordinary situations, international law requires at a minimum that a combatant **carry arms openly when participating in an attack or – to the extent that he is visible to the enemy – when preparing an attack in which the combatant will participate.**

Within the meaning of international law, **visible to the adversary** means that the adversary must be assumed to be able to see the combatant. Denmark interprets “visible to the adversary” to mean that arms must be carried from the moment the combatant can be seen with the naked eye or by means of modern optical or electronic means.

Even though the rule has been adopted in order to allow for the special circumstances applicable to OAGs covered by the Protocol, Danish armed forces may in **extraordinary situations appear out of uniform or without other visible distinctive signs.** However, this must respect the rule to carry arms openly when the activity involves participation in an attack or collection of intelligence or other preparations for an attack in which the combatant in question is to participate.

When such an extraordinary situation exists is to a great extent up to States to decide. Examples of such activities are general collection of intelligence behind enemy lines or holding meetings under the auspices of *CIMIC**. Other examples are advisory services provided by members of the Danish armed forces or certain types of *CNO**.

In relation to the execution of *CNO**, the rules on distinction and the carrying of arms are the same as in relation to more conventional attacks. In the event that a member of the Danish armed forces is the person who is planning or launching a *CNA** or is otherwise involved in the preparation of military attacks (see above), special attention must be paid to the requirement of distinction. This applies even if the *CNO** activity in question is launched from Denmark. The requirement of distinction concerns the personnel participating in the planning or execution of the operation in question. However, the requirement of distinction does not mean that Danish armed forces must identify themselves as such by means of, for example, code during the execution of *CNO**.

If a combatant who does not bear a distinguishing mark falls in the hands of the enemy in an IAC, there may be a risk that the capturing party will consider the captured person to be a spy. For more information, see Section 2.6 below.

Depending on the circumstances, a risk may also exist that the enemy considers acts committed in civilian clothes to be **perfidy**. Reference is made to Chapter 10, which also addresses situations in which a Danish soldier must be assumed to be covered by the requirement to carry arms openly. The Chapter also addresses the risks involved, including the risk of deprivation of liberty by the enemy on suspicion of espionage or perfidy.

Considerable restraint and risk management should be exercised in connection with decisions to refrain from wearing a uniform in extraordinary situations. Hence, any decision in that respect should be made at the Danish force commander level at a minimum.

The rule on *levée en masse** also applies under the modern rules for combatants.¹⁵

2.2 Civilians

5.3 Any person who is not a combatant is a civilian.¹⁶ Civilians may not be attacked unless and for such time as they take a direct part in hostilities.¹⁷ In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.¹⁸

IHL does not recognise any intermediate categories; a person is either a civilian or a combatant.¹⁹ Only medical personnel and chaplains can be said to form an intermediate category on the basis of their status as members of the armed forces but with special protection under international law that requires the personnel not to take a direct part in hostilities.²⁰ This personnel category is dealt with in more detail in Section 3 of Chapter 7.

Civilians enjoy general protection against the effects of military operations and a

¹⁵ AP I, Art. 50(1).

¹⁶ AP I, Art. 50(1).

¹⁷ AP I, Art. 51(3), and UNSG Bulletin, Section 5.2.

¹⁸ AP I, Art. 50(1).

¹⁹ AP I, Art. 50(1), and SCIHIL, Rule No. 5.

²⁰ AP I, Art. 43(2).

wide range of more specific protections. Chapter 6 addresses the extent of these protections in more detail.

The prohibition of IHL against direct attacks on civilians is not absolute in the sense that the prohibition is conditional upon civilians refraining from **taking a direct part in hostilities**.²¹ If civilians take direct part in hostilities, they lose their protection against attack for such time as they do so.²² This section is concerned with the conditions for maintaining civilian protection against direct attack.

IHL does not prohibit civilians from taking a direct part in hostilities. Under international law, the intention of the provision is merely to establish the consequences if civilians actually take a direct part in hostilities. The consequences under international law are very severe. The civilians will lose their protection against direct attack and, thus, may be attacked on an equal footing with combatants for such time as they take a direct part.

In practice, the loss of protection is significant for both the civilian and the armed forces. For the civilian, it may mean that an activity that might otherwise seem harmless and, perhaps, even natural leads to a loss of protection with the effect that the civilian may be made the object of lawful attack. To the armed forces, the status of the individual is essential to whether the person can be attacked directly or not. The authority to decide whether a person constitutes a military objective will often be regulated in more detail by the RoE for the armed force. In the majority of today's military operations, it will be an extremely sensitive issue to direct an attack against civilians even if they take a direct part in the hostilities and, therefore, constitute military objectives. Reference is made to Section 7 of Chapter 3 for RoE.

To the individual civilian, therefore, it is essential to know **what activities** may result in a loss of protection. This issue is not precisely regulated in international law. However, two criteria may be deduced from the wording of the relevant provision: that the participation in the **hostilities** must be **direct** (the functional criterion) and that the protection will only be lost **for such time as** the direct participation in the hostilities continues (the time criterion).

Denmark and other countries have adopted total defence concepts, based on the notion that everyone is responsible for defending the State against foreign aggression.

21 AP I, Art. 51(3).

22 AP I, Art. 51(3), see Art. 51(2) and SCIHL, Rule No. 6.

For instance, civilians are to contribute observations and reports of hostile activity, if any, or make property or vehicles, etc., available. It was not the intention of States that such indirect aid should result in loss of protection—only more direct participation in hostilities was envisaged to have such an effect.

Against the background of Denmark's experience participating in conflicts from 1999-2015, the issue is particularly relevant to Danish armed forces in the following types of situations:

- 1) The use of **civilian collaborators** by Danish armed forces. What does it mean to the employees of private companies who perform their duties close to the battlefield?
- 2) The use of force to **combat crime** and riots in occupied or controlled territory.
- 3) Classification of the **MOAGs that take a direct part in hostilities** as opposed to support activities to and in such groups wherein such support does not amount to direct participation in hostilities.

In the following is a description of the Danish approach to the two criteria for direct participation with a view toward providing the Danish Defence with some tools for more conflict-specific consideration of the issue.

Direct participation in hostilities

The functional criterion

The following three cumulative criteria must be fulfilled before the participation of a civilian person constitutes direct participation in hostilities within the meaning of IHL.²³

Criterion no. 1 The act must be likely to adversely affect the military operations or military capacity of the adversary.

Alternatively, the act must be likely to inflict death, injury, or destruction on persons or objects protected against attack (taking part in hostilities – threshold of harm); and

Criterion no. 2 There must be a direct causal link between the civilian's act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct participation – direct causal link); and, finally,

²³ AP I, Art. 51(3). In the following, inspiration for defining direct participation in hostilities has been taken, for instance, from the ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL", 2009. Reference is made to Section 5.4.3 of Chapter 3 for more information about this guidance.

Criterion no. 3 The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

On the basis of the previously mentioned scenarios that are particularly relevant for Danish forces, a number of *examples of acts that constitute direct participation in hostilities* in which all three criteria have been fulfilled are set forth below. The list is not exhaustive. There are comments to a number of the examples.

Example 5.1: The use of weapons to fire directly at the adversary or the operation of weapons systems from a distance. *Comment:* There is no requirement that the civilian must be on the battlefield. Protection will be lost even if the weapons system is operated far from the objective.

Example 5.2: Laying mines, IEDs, or the like. *Comment:* It is not essential that the weapon detonates instantly, and there is no requirement of a temporal connection between participation and the occurrence of the (likely) harm.

Example 5.3: Clearing of mines, IEDs, etc., laid by the adversary. *Comment:* Particularly relevant to private military and security companies. When such private military and security companies neutralise mines or IEDs laid in the community to eliminate the risk for children and other civilians physically present in the community, the act does not fulfil the third criterion above. This is because the act was not committed with the purpose of benefiting one party to the conflict.

Example 5.4: Guarding and other protection of facilities, persons, or equipment that constitute military objectives when the task entails protection against attack from the armed forces of the adversary. *Comment:* The example is particularly relevant to private military and security companies (PMSCs).

Example 5.5: Civilians who voluntarily position themselves at or around military objectives to create a physical obstacle to the adversary or protect forces they want to support. *Comment:* These voluntary human shields must not be confused with civilians forced or lured into military objectives.

Example 5.6: Sabotage of supplies, logistics, or communications affecting the military operations of the adversary. *Comment:* The requirement of adversely affecting the military operations of the adversary does not require the act to result in physical harm or destruction.

Example 5.7: Participation in the deprivation of liberty, the guarding of prisoners, or other control of the adversary, including hindrance of movement. *Comment:* The example is particularly relevant to private military and security companies.

Example 5.8: The performance of CNAs* even if the person in question is not physically present on the battlefield and regardless of whether physical destruction is a result as long as the adversary's military operations or capacity is adversely affected. This means that some CNE* or CND* activities may constitute direct participation based on the view that, by definition, acts strengthening a State's own defences have an adverse effect on the adversary's manoeuvrability.²⁴ Civilians who design *malware** targeted to exploit the adversary's identified

24 CWM, Rule No. 35.

vulnerabilities will be engaging in direct participation.

Example 5.9: Providing input for tactical targeting. *Comment:* In this case, a distinction must be made between contributions that will not be characterised as sufficiently direct, on one hand, and contributions to specific attacks, on the other. If an attack far away from the objective is planned or launched, for instance, through the use of a drone or CNO*, the act committed by the civilian does not in itself have to entail the required adverse effect on the adversary's military operations. It suffices that the contribution forms part of a coordinated military operation. Reference is made to criterion no. 2 above.

Example 5.10: Sniper attacks on other civilians or other protected persons or objects. *Comment:* To fulfil criterion no. 3, the act must be related to the conflict.

In particular, with regard to criterion no. 2 – direct causation – the following examples are listed as situations in which, *prima facie*, **no such direct causal link exists**.

Example 5.11: Financial support to the adversary or other similar support in the form of other such supplies as fuel, electricity, or building materials.

Example 5.12: Scientific support for the development or enhancement of military capabilities or equipment.

Example 5.13: Participation in the production and transport of weapons and other military equipment unless such support is provided for specific military operations. *Comment:* A civilian who gathers and stores IEDs* for use by the adversary may, depending on the circumstances, be deemed to have taken a direct part in hostilities and, thus, lose his or her protection. A civilian lorry driver who delivers ammunition to the battlefield for use there loses his protection. However, he did not take a direct part in hostilities when he transported the same ammunition from the factory to the mission area. In such cases, the IEDs, lorry, and cargo constitute military objectives.

Example 5.14: General recruitment and training of personnel for the adversary's armed forces — for instance, distribution of information material or first-aid training. Conversely, a direct causal link will exist if the recruitment or the training/instruction takes place with a view toward participation in the hostilities, such as training in weapons and battle drills.

Example 5.15: Provision and preparation of meals for combatants, not even if meals are prepared on the battlefield and play a key role in the ability of combatants to perform the operation in question.

As described in more detail under criterion no. 3, the act must be designed and carried out in support of a party to the conflict and to the detriment of another.

What is essential is how the act is perceived in the context and the process of which it forms a part. However, it is not essential whether the person committing the act is aware that the act will result in a loss of protection. For instance, civilians who are forced to become human shields in hostage situations or the like will not lose their protection because it is not fair to say that such hostages have committed an “act” in support of a party to the conflict. However, so-called “voluntary human shields”, who of their own free will position themselves at military objectives, will lose their protection.

The third criterion that the act must be related to the armed conflict (belligerent nexus) means that the following, for instance, does not constitute direct participation in hostilities:

Example 5.16: Armed participation in a crime. This also applies to criminal acts aimed at either of the parties if the intention of the act was not to support the adversary — for instance, theft or robbery for the purpose of a private gain. Comment: In this case, the legal presumption here implies that the act requires something specific indicating that the intention was to support the adversary in the conflict. If this is not the case, the person in question will be considered a protected civilian. Reference is made to cases of doubt below.

Example 5.17: Large numbers of civilians who, by their mere presence, prevent military advancement on roads or the like, but where this was not the intention — for instance, columns of refugees, etc.

Example 5.18: Situations in which civilians protect themselves against unlawful attacks in self-defence, including attacks from members of the armed forces.

Example 5.19: Situations in which civilians, by means of violent demonstrations in occupied territory, wish to express their displeasure with the occupying power, for example. However, the intention of such demonstrations is not to harm one of the parties in support of the other but simply to express antipathy towards the presence of one of the parties.

The assessment of whether a specific civilian is taking a direct part in hostilities or not may be difficult in practice and will typically be based on intelligence gathered from the interception of signals (SIGINT), from a person on the ground (HUMINT), from networks in the form of open-source intelligence (OSINT), and from computer network operations (CNO). This gathering of intelligence will improve the possibility of distinguishing among the different groups of persons with and without protection against direct attack.

5.4 The decision as to whether a civilian may be said to be taking a direct part in hostilities must be based on the acts committed by the civilian and the circumstances at the given location and time, that is, whether the acts and the circumstances in general can reasonably be perceived to mean that the purpose of the act is to support one of the parties to the detriment of the other in a sufficiently direct manner and with the required level of harm as the result. The final decision on the use of force must be made on the basis of intelligence that can reasonably be expected to be available at the time to the person having to make the decision to use force or not.

Direct participation in hostilities

The time criterion

Civilians taking a direct part in hostilities lose their protection against attack only temporarily unless their participation takes on the character of a “Continuous Combat Function”, see Section 3 below. In other words, the protection is **suspended** for such time as the direct participation continues. Afterwards, the civilian will once again enjoy protection against direct attack. Note that this does not prevent a civilian who has taken a direct part in the hostilities from being prosecuted for the act if it is a criminal offence. The apprehension of the person in question must then take place with respect for the protection enjoyed by civilians under IHL and HRL.

It is not only during the act itself that the protection is lost. The civilian’s loss of protection also extends to **preparations** for the direct participation and the **trip to and from** the place of launching of an attack if this constitutes the direct support. If a civilian makes an *IED** and/or sets off to plant it, his protection against direct attack will be suspended during the period from when he starts making the explosive charge until he has returned. The acts characterised as preparatory vary, but the preparations must be related to the actual act that constitutes direct participation. It is to be noted that the house in which the *IED** is made constitutes a military objective. Reference is made to Chapter 8 for information on this.

Cases of doubt

In a number of cases, it will be difficult to determine whether a person is a member of a non-State organised armed group, and, if that is the case, whether the person as a member of a non-State organised armed group actually takes a direct part in hostilities and, therefore, loses protection against attack. Hence, not all MOAGs take a direct part in hostilities. Some play a more remote role that typically does not fulfil the criteria outlined above.

Cases of doubt might also include a civilian who commits an isolated act that results in a loss of protection. Or it might just be a civilian who expresses his antipathy towards the Danish armed forces in a manner that does not completely fulfil the criteria for direct participation and, therefore, does not result in a loss of protection for the person.

In such cases of doubt, the person in question is presumed to be a civilian and, thus, protected against direct attack.²⁵

This does not leave Danish armed forces without any options for taking action if required. In cases of doubt, the person in question may not be attacked directly. The person may be kept under observation; and if he or she does anything else to eliminate the doubt or, perhaps, if he or she even initiates an actual attack, there is no longer any doubt, and the civilian in question may be attacked.

The legal presumption may be addressed through the extensive use of intelligence collection. Collection of intelligence on individuals but also *pattern of life** analyses, etc., will significantly increase the chances of distinguishing among the various groups of persons with and without protection against attack.²⁶ Reference is made to Section 3 below for more information about NIACs.

Chapter 6 provides more information about the relationship between civilians, including civilians taking a direct part in hostilities against members of non-State organised armed groups (MOAGs).

2.3

Private military and security companies

This Manual applies the term *private military and security companies (PMSCs)** and private military contractors (PMCs) to the civilian companies that, pursuant to an agreement with the Danish State, perform tasks in relation to international military operations.

The increased use of civilian private military and security companies in connection with international military operations, including the use in armed conflict, necessitates comment on the battlefield status of such civilians under international law.

²⁵ AP I, Art. 50(3).

²⁶ AP I, Art. 57(2).

The clear outset is that private military and security companies are civilians and, as such, entitled to protection in common with other civilians. This applies regardless of the type of conflict. Hence, the determination of whether private military and security companies take a direct part in hostilities is the same as described above in Section 2.2. Like other civilians who are in the vicinity of armed forces, they are vulnerable to attacks directed against military objectives.

Private military and security companies differ from the majority of other civilians in that their participation – direct or indirect – is by agreement with a party to a conflict. Provided that the agreement is lawful, their participation is not, as a general rule, sanctioned, either under international law or under the national law of the State to the agreement. In transnational non-international armed conflicts, private military and security companies will typically be subject to the national legal system of the receiving State. However, status of forces agreements will sometimes restrict the receiving State's right to exercise jurisdiction over such civilians.

Traditionally, States have not considered it a matter of international law to regulate the conduct of civilians in more detail in IHL. This being the case, IHL does not specifically prohibit civilians from taking a direct part in hostilities. This is a matter of national law. However, the principle of distinction in international law rests on the clear assumption that only combatants should have the right to take a direct part in hostilities provided that they distinguish themselves properly from the civilian population.²⁷ Therefore, private military and security companies – as such – should not perform actual combat functions.

In the event that the Danish State wishes to use private military and security companies to perform tasks involving direct participation in hostilities, the private military and security companies need to be integrated into armed forces within the notion of combatant described in Section 2.1 above.

This integration could be in the form of employment contracts entered into with civilian staff members. The agreement must ensure that they are subject to the relevant defence legislation and included in the chain of command system, as well as being subject to the requirement to distinguish themselves from the civilian population under the modern rules for combatants outlined above. Such private military and security companies will thereby also be subject to military penal and disciplinary codes on an equal footing with other military personnel.²⁸

²⁷ AP I, Art. 43(2).

²⁸ Section 2(i) of the Danish Military Penal Code and Section 3(i) of the Danish Military Disciplinary Code.

2.4

Civilians accompanying the armed forces without being members thereof

Civilian members of the armed forces, as described in Section 2.1 above, must not be confused with civilians who are **not part of Danish armed forces** but accompany the Danish Defence in the performance of military missions. Such civilians are genuine civilians who – should the Danish Defence so choose – may be assigned the status of **civilians accompanying Danish armed forces** without becoming members of Danish armed forces. In practice, they are assigned this status by being issued with an identity card of the type set forth in GC III to indicate their prisoner of war status were they to fall into the hands of the adversary in an IAC.²⁹ Another important consequence of this status is that the civilian is covered by the Danish Military Penal Code in armed conflicts.³⁰

Such civilians may be individuals, including local interpreters, journalists, researchers, troop entertainers, writers, politicians, etc. They may also be private military and security companies employed to perform certain tasks — typically, maintenance or other logistical duties. In cases in which such civilian companies are determined to be **accompanying** Danish military forces, they may be assigned the status of civilians accompanying the armed forces.

Civilians accompanying the Danish armed forces without being members thereof enjoy civilian protection unless they take a direct part in the hostilities.

Example 5.20: The Danish Defence has concluded an agreement with a Danish company to operate a Danish camp in a mission area. The operation involves cleaning, cooking, certain welfare services, including a (PX) kiosk, etc. The company's civilian personnel physically present in the camp wear civilian work clothes and have been issued a type C identity card by the Danish Defence, which indicates their status as that of civilians accompanying the Danish armed forces and, thus, their right to prisoner of war status if the situation should arise.

2.5

Mercenaries

Historically, private armies of mercenaries have been used extensively to fight wars of States. Against the background of a very extensive practice of recruiting and using

²⁹ GC III, Art. 4A(4).

³⁰ Section 2(ii) of the Danish Military Penal Code.

mercenaries in conflicts on the African continent, States have adopted a convention against the recruitment, use, financing, and training of mercenaries.³¹ Denmark is not party to the Convention. Moreover, the United Nations General Assembly and the United Nations Security Council have adopted a series of resolutions that prohibit the use of mercenaries in various contexts.³²

In more recent conflicts, the term “mercenary” has been used in connection with State use of private military and security companies, especially when such companies have undertaken tasks involving direct participation in hostilities. As illustrated below, the term “mercenary” is very strictly defined in international law. In practice, this means that very few examples exist in which the private military and security companies used in contemporary conflict scenarios are governed by the rules on mercenaries.

IHL contains no prohibition on the use of mercenaries, but AP I states that **mercenaries have no combatant privilege**. This is true whether or not they otherwise fulfil the combatant requirements set forth above. They are not entitled to prisoner of war status if they fall into the hands of the adversary, and they have no right to take a direct part in hostilities. Should they do so regardless, they may be prosecuted. However, like everyone else, a mercenary is entitled to the minimum protection to which anyone who is not favoured with better protection elsewhere under international law is entitled. Chapters 6 and 12 provide more information about the more detailed extent of minimum protection.

Under AP I, a mercenary is any person who:

- 1) is specially recruited in order to take part in the hostilities; and
- 2) does, in fact, take a direct part in hostilities; and
- 3) is motivated by the desire for private gain and, in fact, receives compensation substantially in excess of that paid to regular soldiers of similar functions and ranks; and
- 4) is neither a national – nor a resident – of the territory controlled by one of the belligerent States; and
- 5) is not a member of the armed forces of one of the belligerent States or is not sent by a belligerent State as a member of its armed forces.³³

31 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, dated 4 December 1989, see UN General Assembly document A/RES/44/34.

32 See, for instance, Security Council resolutions 239 and 241/1967 as well as 405/1977.

33 AP I, Art. 47..

2.6 Spies

A member of the armed forces of a State who falls into the power of an adverse party **while engaging in espionage** does not have the right to prisoner of war status.³⁴

Espionage presumes that information about the adversary is gathered by a member of the armed forces **falsely pretending not to be a combatant**.³⁵ Information gathered by Danish forces in uniform, thus, never acquires the character of espionage under IHL.

Ruses of war and other measures necessary for the purpose of gathering information about the adversary (so-called intelligence collection), including *CNE** operations, are considered to be in compliance with international law. However, when such intelligence collection takes place under the pretence of a status other than combatant status, there is a risk of being apprehended by the adversary without the subsequent right to claim prisoner of war status, and finally being accused of espionage.³⁶ Reference is made to Section 2.1 of Chapter 10 for a distinction between ruses of war and perfidy.

Thus, it is a requirement that the intelligence be collected from the adversary under the pretence of a status other than combatant status – i.e., clandestinely.

As regards *CNE**, the situation is atypical in relation to classic espionage since the intelligence is collected through computer networks.

*CNE** is not in itself considered to be espionage, but it may develop into so-called cyberespionage if, for instance, it takes place under the pretence of an authorised user in a restricted access domain in the adversary's territory or in another manner in which an attempt is made to hide the identity of the person performing the intelligence collection. To fulfil the requirements of espionage, the *CNE** activity must also be undertaken in an area controlled by the adversary in the conflict.

Hence, *CNE** activities undertaken by Danish cyber experts from Denmark or in the mission area in an area controlled by own forces or allied forces cannot fall

³⁴ AP I, Art. 46.

³⁵ AP I, Art. 46(2).

³⁶ 1907 Hague Regulations, Art. 24.

under the notion of espionage under IHL even though they may be punishable as espionage pursuant to legislation applicable in the country in which the intelligence is being collected.³⁷

2.7

Other persons

As outlined above, IHL fundamentally only distinguishes between combatants and civilians. The key distinction requires only one qualification: that permanent medical personnel and chaplains forming part of the armed forces of a State are considered neither combatants nor civilians.³⁸ Chapter 7 provides more information about medical personnel and their status.

Under IHL, a number of civilian groups enjoy special protection, including the sick and wounded,³⁹ women,⁴⁰ children,⁴¹ pregnant women and mothers of infants,⁴² and aged and infirm persons.⁴³ Persons included here enjoy protection in addition to the general protection of civilians.

Moreover, a number of organisations have been given a specific mandate or function under international law. For instance, these include, among other things, civilian healthcare professionals (medical personnel),⁴⁴ civil defence personnel,⁴⁵ personnel engaged in the protection of cultural property,⁴⁶ ICRC personnel,⁴⁷ and members of national Red Cross societies and other national voluntary aid organisations to the extent that they are properly recognised and authorised by a party to the conflict.⁴⁸

Chapter 6 describes these groups and their protection in more detail, and Chapter 3 also provides such a description with respect to women and children.

37 CWM, Rule No. 66.

38 AP I, Art. 43(2), see Art. 50(1).

39 AP I, Art. 10(1).

40 For instance, AP I, Art. 76.

41 AP I, Art. 77-78.

42 AP I, Art. 76(2) and (3).

43 GC IV, Art. 16 and 17.

44 AP I, Art. 8(1)(c).

45 AP I, Art. 62.

46 1954 Hague Convention, Art. 15.

47 For instance, CA 3, GC III, Art. 126, GC IV, Art. 143, AP I, Art. 81, and AP II, Art. 18.

48 AP I, Art. 8(1)(c)(ii), and AP I, Art. 81(1).

Chapter 6 introduces the rules of international law that prohibit parties to a conflict from using child soldiers. Particularly in certain NIACs, **children** have relatively frequently been recruited into especially OAGs armed forces in violation of international law.

In conflicts in which children are members of the armed forces of a party to a conflict or children take a direct part in hostilities as civilians, **the status of children under international law is the same as that of adults** in relation to the rules on distinction, etc., of IHL. Chapters 3, 6, 11, and 12 provide more information on the special protection of children in other contexts, including occupation and the deprivation of the liberty of children.

Journalists

Journalists enjoy the same protection as other civilians⁴⁹, with the special qualification that a journalist may carry a press identity card issued by the government of the State of which he is a national.⁵⁰ The scheme, which in Denmark is administered by the Prime Minister's Office, does not entail any special rights for or protection of journalists. Depending on the circumstances, parties to a conflict that are under an obligation to protect the civilian population may be obliged to deny journalists access to the battlefield. Some journalists have a right to prisoner of war status should they fall into the hands of the adversary: so-called war correspondents, who are included in the group of civilians accompanying the armed forces (see Section 2.4 above).

Representatives of international organisations

with a special mandate

In addition to the groups mentioned above, there are representatives of international organisations that have a specific mandate in a conflict. These include civilian representatives of the ICRC, the UN and UN organisations, the EU, the OSCE, the International Criminal Court, AU, INTERPOL, etc.

These organisations will often be present in conflict areas under a specific mandate. This mandate may be general such as the mandate given to UN special envoys under

⁴⁹ SCIH, Rule No. 34.

⁵⁰ AP I, Art. 79.

the Charter of the United Nations, or it may include ad hoc tasks authorised by the UN Security Council. Such mandates must be respected even when this has consequences for military operations. This may involve providing personnel to support and protect such civilians, or it may mean that the parties to a conflict refrain from undertaking activities in certain areas where such mandates are being exercised.

3. Non-international armed conflict (NIAC)

3.1

Members of non-State organised armed groups (MOAGs)

Aside from the special types of conflicts of an internal character covered by AP I,⁵¹ international law does not provide for any combatant privilege for *dissidents** and insurgent groups – known as non-State organised armed groups (OAGs).⁵²

The distinction between civilians and MOAGs is not addressed directly. AP II reiterates the fundamental protection of civilians as expressed in IACs.⁵³ At the same time, the non-State parties to non-international armed conflicts are described as organised armed forces (dissidents) and other organised armed groups under responsible command. Reference is made to Section 3.4 of Chapter 2.

If members of OAGs were given the same status as civilians, the result would be that such persons would have a right to the broad range of protection enjoyed by civilians under IHL. Therefore, AP II distinguishes between civilians and members of OAGs.⁵⁴

A non-State party often consists of a civil political wing, and a more military wing. Within the military wing, there is also a difference between the functions performed by its members. Some members participate in the planning or conduct of actual hostilities, while other members perform more remote functions. **A MOAG may only be made the object of attack, i.e., constitute a military objective, if the conditions for direct participation in hostilities are met.**

⁵¹ AP I, Art. 1(4).

⁵² See also the explanatory notes to L24 of 18 December 2015 to amend the Danish Criminal Code.

⁵³ AP II, Art. 13.

⁵⁴ AP II, Art. 1(1) as opposed to AP II, Art. 13.

The armed forces of a State party will often be easily recognisable by their uniforms, identity cards and insignias, etc., whereas this is normally not the case with OAGs. Thus, an association with an OAG will often have to be established by discovering or otherwise collecting intelligence. Intelligence collection may reveal something about the group's external characteristics in the form of distinctive attributes, etc., that may be interpreted to indicate an affiliation with the group. Moreover, the conduct and acts of individual persons may reveal whether an affiliation of a person with the group constitutes membership and what specific function the person may be performing.

The guidance prepared by the ICRC in 2009 introduces the term “**continuous combat function**”.⁵⁵ The term is used to operationalize what it is to be a MOAG, the effect being that the relevant member may be attacked directly throughout the conflict. Reference is made to Section 3.1 of Chapter 2.

The term implies, for instance, that some persons will be attached to or support OAGs, but the activity or the function performed by such persons will not, at the outset, be of such a character that it constitutes direct participation in hostilities. Reference is made to the examples under Section 2.2 above. For instance, this applies to persons who *exclusively* finance, provide general recruitment and training, or propagandise in support of OAGs.

Indirect support from such persons does not mean that they will lose their protection even if they are members of a non-State organised armed group, unless they also participate in a more direct sense. They maintain their protection as civilians under international law in spite of their indirect support and their OAG membership. They may not be attacked directly, but their presence at military objectives will increase their risk of being injured or killed during an attack; and, in some cases (for instance, for persons who manufacture weapons for OAGs), their product and facilities will often constitute military objectives. In this respect, such auxiliary personnel are comparable to civilians who accompany the armed forces of a State or private military and security companies, which also maintain their status as civilians.

On the other hand, there may be civilians who, in one or more cases, take a direct part in hostilities without automatically becoming members of an OAG. Such civilians will also lose their protection against attack to the extent and for such time as they take a direct part in hostilities.

55 ICRC, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL”, May 2009.

In what follows is a description of Denmark's approach to the term "continuous combat function".

5.5 In the event that a person takes a part on a more continuous basis in the activities of the organised armed group and **frequently performs tasks that, viewed separately, constitute direct participation in hostilities**, that person will lose protection as a civilian during the period from first participation until an active indication of leaving the group.

When a person takes a direct part in hostilities must be determined by the same functional criteria set forth in Section 2.2 above. When a person joins and, perhaps, leaves such a group is based on observations of the movements and patterns of activity of the individual person.

It is rather difficult to apply these criteria in practice. This is particularly true when a member **leaves** a group. When a person has participated sufficiently directly and continuously in the hostilities, he is required to act in a manner that clearly indicates that the direct participation in the hostilities has ceased. Such an act could consist of a surrender of weapons or some express and reliable expression of demilitarisation or some other unambiguous dissociation from the OAG to which the person has been attached.

When direct participation in hostilities is sufficiently **continuous** to constitute membership depends on the circumstances. In some contexts, it is quite clear already from the **first direct participation** that a person is a member of an OAG. For example, the person may indicate an attachment by wearing special garments and carrying weapons and, in this way, create a presumption of continuous direct participation based on appearance. In other cases in which the appearance of the person in question does not facilitate any determination of attachment, actions must determine the nature of participation. In the absence of clear indications of membership, the presumption will be that it is an isolated incident of direct participation.

3.2

Danish armed forces in non-international armed conflicts (NIACs)

International law contains no rules on combatants in NIACs, apart from conflicts covered by Article 1(4) of API. Hence, there is no formal requirement under international law for distinguishing visual signs or the open carrying of arms in NIACs as is the case with IACs, as described above.

However, requirements still exist for the protection of civilian objects and the civilian population that does not take a part in the hostilities. This being the case, a precondition for maintaining these aspects of the principle of distinction is that it must also be possible in NIACs to distinguish visually between the parties to the conflict and the protected civilians where hostilities are taking place.

Section 10 of this Manual describes the prohibition on perfidy, including in NIACs. Reference is made to Section 2.1 of Chapter 10 for a more detailed description of the prohibition.

5.6 In NIACs, Danish armed forces must also contribute to making this distinction possible by wearing uniforms.⁵⁶ In practice, this means that a decision to wear garments other than a uniform in NIACs cannot be made at a level lower than that of the Danish force commander.

Attention is also directed to the fact that the wearing of uniforms by foreign forces is often regulated in status of forces agreements (SOFAs) and/or general mission directives. Reference is made to Section 6 of Chapter 3.

⁵⁶ Addendum 5.1.

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Civilians

*Protection of individual civilians, the civilian population,
and civilian objects*

Civilians

Protection of individual civilians, the civilian population, and civilian objects

1. Introduction

The protection of the civilian population will often form part of the international legal basis for military intervention. This is true regardless of whether an armed conflict exists or not.

Especially since World War II, the protection of civilians in armed conflict has been on the international law agenda, and very few post-war treaties in the context of IHL have not been dictated, one way or another, by a desire specifically to address and, thereby, improve the protection of individual civilians and the civilian population at large. In this manner, the more specific rules are based on the fundamental principles of distinction and humanity embodied in IHL in relation to the necessary use of force in armed conflict.

In NIACs, the ability to distinguish between military objectives and civilian objects and between members of non-State organised armed groups (MOAGs) and civilians may be associated with special challenges. In addition, it is a well-known guerrilla tactic to seek out military engagements in urban areas. It will often be more difficult to work with the distinction in non-international armed conflicts than in the more classic international armed conflicts between the uniformed armed forces of States.

It is an absolutely fundamental principle that individual civilians, the civilian population, and civilian objects must be protected in all conflicts. The rules governing their protection in armed conflict are primarily embodied in IHL and in HRL. In addition, the organs of the United Nations have adopted special thematic resolutions.

1.1

Summary of chapter contents

Section 2 provides a brief description of key terms and concepts relevant to the protection of civilians in armed conflict. This is followed by **Section 3**, which describes the general protection of individual civilians, the civilian population, and civilian objects from the effects of military operations. The section mainly focuses on the obligation of belligerent States to take necessary precautions. **Section 4** describes the fundamental protection for individual civilians and the civilian population as well as the specific protection afforded to certain vulnerable groups by IHL. **Section 5** looks into the specific protection of certain objects, installations, and cultural property. **Section 6** introduces the possibilities for parties to a conflict to establish areas with special protection status. **Section 7** addresses civil defence, and **Section 8** focuses on humanitarian organisations and their personnel.

1.2

Scope in relation to other chapters

This chapter deals with only those obligations under international law that concern the protection of individual civilians, the civilian population, or civilian objects **if these obligations are not considered in detail in one or more of the other chapters of the Manual**, as is the case, for instance, in:

Chapter 3: On the identification of applicable law, including HRL. Here, there may be ascertained a high degree of consistency between the norms relating to the fundamental, individually-based guarantees in IHL and HRL, respectively.

Chapter 5: The definition of a civilian and when civilians may lose their protection against attack.

Chapter 7: On the obligations of parties to a conflict to treat sick and wounded civilians and the protection of the civilian health infrastructure in armed conflicts.

Chapter 8: On the obligations of parties to a conflict in selecting targets of attack and taking precautions in connection with attacks, including verification, proportionality, measures to minimise loss, injury or damage, etc.

Chapter 10: On methods of warfare and prohibitions and restrictions on the choice of methods, including in the interests of individual civilians, the civilian population, and certain civil objects.

Chapter 11: On belligerent occupation, including the more extensive obligation of occupying powers to ensure the protection of civilians in occupied territory.

Chapter 12: On the obligations and corresponding rights related to civilians who are deprived of their liberty by Danish armed forces.

Chapter 15: On complaint mechanisms, protecting powers and their role in the implementation of IHL in specific armed conflicts, etc.

1.3

Human rights issues addressed in the chapter

The obligations described in this chapter are primarily those embodied in IHL. Where relevant, they are supplemented by HRL, which is addressed in general terms in Section 4 of Chapter 3.

There is a high degree of consistency often, even identical wording — between the special guarantees, including the fundamental guarantees, afforded by IHL to individuals held in the custody of a party to a conflict and the corresponding human rights. Compare, for instance, Article 75 of AP I on fundamental guarantees and the ICCPR, which share several common features.

As described in Chapter 3, Danish forces operating abroad are bound by HRL in cases of personal or *territorial jurisdiction** or in cases in which Danish forces exercise public powers by agreement with the territorial State. These situations are largely identical to the description IHL of the obligations of the parties to the conflict towards civilians who are in their custody, power, or/and control. This is reflected, for instance, in the structure of GC IV in which Part III only protects (certain) persons who are physically present either in the territories of the parties to the conflict or in territories occupied by a party to the conflict. Here, in common with HRL, protection is afforded to persons who are within the jurisdiction of the parties to

the conflict. Another example is Article 75 of AP I, which deals with civilians “in the power of a Party”.¹

The opposite is the case with AP II, which provides that the fundamental guarantees must be ensured to all persons, whether or not their liberty has been restricted.² This should be seen in the light of the fact that AP II regulates NIACs conducted within a territory of a State where the territorial State exercises jurisdiction and, therefore, has to ensure fundamental guarantees to all persons, including in armed conflict.

2. Definitions and minimum protection

2.1 Definitions

6.1 In an IAC, a civilian is any person who is not a combatant.³ In a NIAC, in principle, a civilian is any person who is not a member of the armed forces of a State. Members of a State's armed forces possess a state authorization to use force and are authorised to use force within the bounds of national and international law and described in a use-of-force directive tailored to the specific NIAC. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.⁴

The civilian population comprises all persons who are civilians.⁵

A civilian object is any object that is not a military objective according to Article 52(2) of AP I. +NIAC⁶

More information about personnel on the battlefield is provided in Chapter 5, including Section 3 of Chapter 5, which stipulates that members of non-State organised armed groups acting as non-State actors in a NIAC are considered civilians who to the extent that they — continuously — take a direct part in hostilities lose their protection against attack.

1 AP I, Art. 75(1).

2 AP II, Art. 4(1).

3 AP I, Art. 50.

4 AP I, Art. 50(1).

5 AP I, Art. 50(2).

6 SCJHL, Rules Nos. 7 and 8.

2.2

Minimum protection

The rules governing the protection of individual civilians, the civilian population, and civilian objects guarantee a minimum protection. Any party to a conflict may choose a higher standard of protection. In international coalitions, for instance, measures will often be taken centrally to place restrictions on the use of force by the armed forces that go beyond the use of force permitted under international law. Such measures **do not require an agreement with the opposing party** to the conflict. However, IHL encourages parties to a conflict to conclude such agreements across a variety of conflict scenarios; and, in a few cases, the parties are under an actual obligation to seek the conclusion of agreements.

Example of an obligation under international law to seek the conclusion of specific agreements:

Example 6.1: It follows from GC IV that the parties to the conflict must endeavour to conclude mutual agreements for the evacuation of wounded, infirm and aged persons, children, and maternity cases from besieged or encircled areas.⁷

Agreements for the establishment of special protection areas as described in Section 6 must be seen in the light of this obligation.

Agreements may be concluded locally by the deployed armed forces within a defined scope of national powers. Agreements may be rights-oriented and legally binding or may be of a more practical character, and they may be concluded with adversaries or civilian contractors.

Furthermore, supplementary agreements may be suitable to create the legal and practical framework for combining the different sets of rules mentioned above that are applicable to a given armed conflict.

Civilians may in **no circumstances renounce in part or entirety** the rights afforded to them either by international law or separately by supplementary agreements – not even if this occurs with the voluntary consent of the civilian(s).⁸ Reference is made to Chapter 5 about the forfeiture of protection against direct attack in cases in which civilians take a direct part in hostilities.

⁷ GC IV, Art. 17.

⁸ GC IV, Art. 8.

Similarly, the parties to the conflict may not renounce the protection afforded by international law to their civilian populations. The same goes for any protection agreed between the parties to the conflict in addition to that prescribed by international law except in accordance with the terms and conditions of the agreement.

3. General protection from the effects of military operations

3.1

Introduction

The general protection of civilians in IACs follows from the provisions of AP I, which supplement relevant parts of GC IV.⁹ In GC IV, only the provisions of Part II afford protection to all segments of the civilian populations of the belligerent States. Only this part, therefore, is relevant to this chapter.

The remaining provisions of GC IV, i.e., from Article 27 onwards, protect only civilians who have been granted the status of “protected persons”.¹⁰ The specific protection afforded by the rest of GC IV relates to nationals of certain foreign States in the national territories of the belligerent States, i.e., in the case of Denmark, nationals of foreign States in Denmark. Since this manual addresses international law in international operations, measures taken with respect to persons in Denmark will not be discussed in more detail here.

The second area of primary protection for “protected persons” includes cases of occupation whereby a form of governmental authority is established over the territory of a foreign State. These issues are dealt with in Chapter 11 on belligerent occupation and in Chapter 12 on persons deprived of liberty, including internees.

For obvious reasons, the protection of civilians in NIACs is structured somewhat differently in international law, since neither occupation nor the issue of nationals of foreign States in Denmark is of particular relevance in this context. In NIACs, therefore, protection is afforded to all civilians within the territory of the party to the conflict as defined below.

⁹ AP I, Art. 49(3).

¹⁰ GC IV, Art. 4.

3.2

Overview of general protection against dangers arising from military operations

6.2 Individual civilians and the civilian population shall enjoy general protection against dangers arising from military operations.¹¹ +NIAC¹²

This general protection is regulated by AP I and AP II and by the rules of protection set forth in Geneva Convention IV, including Part II, in particular. This protection entails obligations for all parties to the conflict regardless of whether they are taking part in offensive, defensive, or stabilisation operations.¹³

This **general protection** against dangers arising from military operations is specified in AP I and AP II to address the following among other things:

- Prohibition of direct attacks against individual civilians, the civilian population, or/and civilian objects.¹⁴ The prohibition is discussed in Section 3.3 immediately below.
- Prohibition of acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.¹⁵ Reference is made to Section 2.11 of Chapter 10.
- Prohibition of indiscriminate attacks.¹⁶ Reference is made to Section 2.10 of Chapter 10.
- Prohibition to use the civilian population or individual civilians deliberately to shield, favour or impede military operations.¹⁷ Reference is made to Section 2.12 of Chapter 10.
- Qualified restrictions on attacks directed against certain objects and the natural environment.¹⁸ Reference is made to Section 5 below and to Section 2.15 of Chapter 10.
- Requirement to take precautions to protect individual civilians, the civilian population and civilian objects before and during attacks.¹⁹ Reference is made to Sections 4 of 5 of Chapter 8 and to Chapter 13.

11 AP I, Art. 51(1), GC IV, Part II, Art. 13(1), and UNSG Bulletin, Section 5.4.

12 AP II, Art. 13(1).

13 GC IV, Arts. 13–26, see AP I, Art. 49(3).

14 AP I, Art. 51(2), and AP I, Art. 52(2).

15 AP I, Art. 51(2), second sentence.

16 AP I, Art. 51(4).

17 AP I, Art. 51(7).

18 AP I, Art. 53–56.

19 AP I, Art. 57.

- Requirement to take precautions to protect individual civilians, the civilian population and civilian objects from the effects of attacks.²⁰ The prohibition is discussed in Section 3.4 below.
- Duty to allow the passage of relief supplies for the benefit of the civilian population, which is addressed in Section 3.5 below, and the status and protection of humanitarian personnel, which is dealt with in Section 8.

3.3

Prohibition on attacking individual civilians, the civilian population, or civilian objects

6.3 It is prohibited to conduct attacks directed against individual civilians, the civilian population, or/and civilian objects.²¹ +NIAC²²

The provision reflects the principle of distinction. As far as the individual civilian is concerned, the protection is subject to the condition that the civilian does not take direct part in hostilities (see Chapter 5). Similarly, objects may lose their protection and constitute military objectives if used for military purposes. In addition, civilians and civilian objects may lawfully in connection with attacks on military objectives become the object of injury or damage in accordance with the rules on **collateral damage**. The relevant rules are described in more detail in Section 4 of Chapter 8.

3.4

Precautions against the effects of military operations and attacks by the adversary

It is usually inevitable that military operations are conducted in the vicinity of civilian buildings or other civilian activity. It will be necessary in some cases to use civilian houses, civilian infrastructure, or other civilian objects for military purposes with the effect that the objects become military objectives. Some types of objects are afforded special protection, however, and this means that the parties to the conflict are not allowed — or allowed only in exceptional cases — to use such objects for military purposes. Cultural property is an example of objects that are afforded such

²⁰ AP I, Art. 58.

²¹ AP I, Art. 51(2) and Art. 52(1), CWM, Rule No. 32, SCIHL, Rules Nos. 1 and 7, ICC Statute, Art. 8(2)(b)(i-ii), and UNSG Bulletin, Section 5.1.

²² AP II, Art. 13(2), , SCIHL, Rule No. 7, and ICC Statute, Art. 8(2)(e)(i).

special protection. As a part of this protection, the conflicting parties should, **to the maximum extent feasible**, transport movable cultural property away from areas near military objectives or ensure adequate protection of such property and avoid establishing military objectives near cultural property.²³ More information about military objectives is provided in Chapter 8 and in Section 5 below on civilian objects subject to special protection.

The rules of protection do not prevent the military use of civilian objects, but they oblige the parties to the conflict to take precautions to protect individual civilians, the civilian population, and civilian objects that are not used for military purposes.

Parties to a conflict, therefore, must give due consideration to the effects of enemy fire directed at their own units and installations and to other dangers that may arise as a result of the positioning of own units and military installations in relation to the protection of individual civilians, the civilian population, and civilian objects.²⁴

6.4 To the maximum extent feasible, necessary precautions must be taken to protect individual civilians and civilian objects under Danish military control against the dangers resulting from military operations.²⁵
+NIAC²⁶

These obligations must be observed “**to the maximum extent feasible**”.²⁷ This corresponds to a requirement to “do everything feasible”. The content of this phrase is specified in Section 5 of Chapter 8.

The obligation is closely linked to the principles of military necessity and distinction, and it covers **any danger** resulting from **any military operation**.

The precaution of **evacuating** all or parts of the civilian population, individual civilians, or civilian objects and the precaution of endeavouring to **avoid locating military objectives** within or near densely populated areas are discussed in more detail below.

It will depend on the circumstances which precautions may be relevant to take. These might be, for instance, the preparation of contingency plans, the establishment of

23 1954 Hague Convention, Protocol II, Art. 8.

24 AP I, Art. 58.

25 AP I, Art. 58, and UNSG Bulletin, Section 5.4.

26 SCJHL, Rule No. 22.

27 AP I, Art. 58.

shelters, marking protected objects, the protection of civilian residential buildings, alternative choices of military transport routes, diversion of civilian traffic, advance warnings of danger to civilians, etc..

Objects that maintain a civilian function at the same time as they are used or are planned to be used for military purposes (dual use) may constitute, in their entirety, military objectives for the adversary. Therefore, Danish forces should consider the possibility of separating or protecting the civilian component of the objective in the best possible way from the effects of attacks. This applies particularly in situations in which the civilian component of the objective is considerable or of material civilian importance.²⁸ Reference is made to Section 2.3.1 of Chapter 8 for more information about dual use.

In this context, restraint should be exercised in using schools and other educational institutions in support of Danish military operations.²⁹ The reason for such special consideration of schools, etc., is that the military use of schools has severe consequences not only in that it immediately endangers the lives of children and youths who are present in and near such schools but also in regard to the longer-term consequences for the education of school children.³⁰ Reference is also made to Section 3.3 of Chapter 3 for information about the UN Security Council's focus on children in conflict areas.

In a CNO*, for instance, the protection of the civilian population may include the separation of military computer networks from the civilian network components that relate to the basic needs of the population – e.g., supplies – as well as the establishment of contingency plans for the protection and, if applicable, restoration of affected networks, etc.³¹

6.5 Avoid, to the maximum extent feasible, locating military objectives of the adversary within or near densely populated areas.³² +NIAC³³

This obligation relates to the location of military forces, etc., within or near densely

28 Addendum 6.1.

29 Addendum 6.2.

30 UN SC Res. 2143/2014, Children in Armed Conflict, para. 18, and the Safe School Declaration, signed by Denmark on 2 February 2017.

31 CWM, Rule No. 59.

32 AP I, Art. 58(b), and UNSG Bulletin, Section 5.4.

33 SCIHIL, Rule No. 23.

populated areas. However, endeavours should also be made to avoid locating such military objectives near smaller concentrations of civilians or individual civilian objects when alternative location options are readily available.

It is essential in connection with either a short-term or a longer-term presence at a specific location, therefore, that the Danish forces fully understand the associated risks posed to civilians. The obligation involves **no absolute** prohibition against the presence of armed forces and military installations in areas in which there is a concentration of civilians. **What is crucial is the risk posed by the positioning of a military objective to civilians, and whether there are any real alternatives.**

Example of a situation in which an alternative location of a military camp should be considered:

Example 6.2: In connection with a force advancing through the territory of the adversary, the need to establish a camp arises. The camp will be used as a logistical installation and for locating the forces necessary to ensure that the conquered area remains under their command. It seems a natural choice to use the adversary's abandoned brigade headquarters, which is favourably located in relation to other camps and close to the infrastructure that is to be used as routes of advance. However, the abandoned headquarters is located in a town closely surrounded by civilian dwellings and in buildings that housed a school before the war. Fighting with enemy forces is still intense, and the adversary must still be expected to direct artillery attacks against forces and installations in the area although they have been pulled away from the front. It should be considered whether alternatives to locating the camp somewhere closely surrounded by civilian buildings could be found and, if that is not deemed possible, whether steps should be taken to evacuate the civilians who live nearest to the camp from the area. The obligation is supplemented by the obligations described in Section 5 of this chapter. From these follows, among other things, various restrictions on the right to locate or position military objectives within or near areas subject to special protection and inside of protected objects.

In carrying out its risk assessment, the force is not under any circumstances allowed to take into account the fact that the adversary is itself obliged to take the safety of the civilians in the area into consideration or that the location among civilians is indeed favourable. This may be a violation of the prohibition on using civilians as human shields, depending on the circumstances. More information about this prohibited method of warfare is provided in Section 2.14 of Chapter 10.

6.6 Remove individual civilians and civilian objects from areas in the vicinity of military objectives of the adversary to the maximum extent feasible.³⁴ +NIAC³⁵

³⁴ AP I, Art. 58(a), AP II, Art. 17(1), SCIH, Rule No. 24, and UNSG Bulletin, Section 5.4.

³⁵ SCIH, Rules Nos. 24 and 129 B.

The obligation to evacuate civilians and civilian objects from an area requires a certain degree of military control of the area in question. Civilians may not be compelled to leave an area merely because they are located in the vicinity of a military objective. The need to evacuate an area must be weighed against any interest the civilians may have in remaining in their homes. It may ultimately become necessary to carry out forcible evacuation. Civilians are permitted to return to the areas from which they are evacuated as soon as an adequate level of safety has been restored.³⁶

Access to suitable shelters may eliminate the need to move individual civilians, and neutrality zones, demilitarised zones or the like may be established to improve the protection of civilians in the area. For more information, see Section 6 below.

During a NIAC, a party to the conflict may not compel civilians to leave their own territory (State of origin).³⁷ Displacement within the territory of a party to the conflict may be ordered only if imperative military reasons so demand.³⁸ If it is necessary to evacuate an entire civilian population, all possible measures must be taken to ensure that the civilians are received under satisfactory conditions.³⁹

In these situations, an omission to act might be in violation of the prohibition against using civilians as human shields for military operations. Reference is made to Section 2.14 of Chapter 10.

3.5

Duty to allow the passage of relief supplies for the civilian population

6.7 The parties to the conflict must arrange for the conclusion of agreements with impartial and humanitarian organisations or (conflict-neutral) States on relief supplies for the civilian population where the population is not adequately provided with such supplies essential to its survival.⁴⁰

The parties to the conflict must allow and facilitate such agreements and ensure the free and unimpeded passage of relief consignments, equipment, and personnel for the benefit of the civilian population in need, and the parties are required to protect such supplies and support the rapid distribution of relief consignments.⁴¹

+ NIAC⁴²

³⁶ GC IV, Art. 49, and SCIHL, Rule No. 132.

³⁷ AP II, Art. 17(2).

³⁸ AP II, Art. 17(1).

³⁹ E.g., AP II, Art. 17(1).

⁴⁰ AP I, Art. 71(1), and UNSG Bulletin, Section 9.9.

⁴¹ AP I, Art. 70, and SCIHL, Rules Nos. 55 and 32.

⁴² SCIHL, Rules Nos. 31, 32 and 55, AP II, Art. 18, and Addendum 6.3.

GC IV obliges States, on certain conditions, to allow the passage of relief consignments intended for the civilian population. This applies to medical and sanitary supplies for civilians, and it applies to essential food, clothing, etc., for children, pregnant mothers, and new parents.

API has extended this obligation to include all life necessities for the civilian population in territories controlled but not occupied by parties to a conflict. The obligation extends not only to ensuring free passage but also to facilitating the conclusion of appropriate agreements for the provision of supplies essential to the survival of the civilian population, such as food, medication, clothing, bedding, etc.⁴³

Since there may be a risk that relief supplies will benefit the armed forces of the adversary, however, parties to a conflict are entitled to condition such relief schemes on the conclusion of technical arrangements on how to implement the relief schemes, and that the actual distribution of assistance should be made under the local supervision of a protecting power, if applicable. The parties to the conflict must encourage and facilitate international coordination of impartial and humanitarian relief actions. They may not prevent or delay the delivery of relief consignments to the civilian population in need except in cases of urgent necessity. In cases of urgent necessity, the restrictive measures must be dictated by the interests of the civilian population concerned and, therefore, should cease to apply as soon as the interests of the civilian population no longer necessitate such measures.⁴⁴

Example 6.3: An impartial humanitarian aid organisation would like to gain access to an area controlled by Danish forces for distribution of relief supplies. Distribution is scheduled to take place in the market square, which, before the war, was the natural gathering point for local tradespeople and town residents.

Lately, however, there have been snipers in the area who have killed several civilians and have been particularly active in situations in which civilians have gathered in public spaces.

The Danish contingent commander agrees with the head of the organisation in question that they have to wait a few days until a planned operation against snipers has been completed and that, in any case, the distribution should take place under a roof – for instance, in a warehouse or something similar.

Protection and respect must be afforded to personnel participating in relief actions if participation has been approved by the territorial State. The State receiving relief consignments must assist the personnel in carrying out their relief mission. Only in cases of imperative military necessity may the activities of the relief personnel be

43 GC IV, Art. 23, and API, Art. 70.

44 API, Art. 70(3)(c).

limited or their movements temporarily restricted.⁴⁵

Relief personnel may not exceed the terms of their mission and any additional requirements, including security requirements, imposed by the territorial State. If these conditions are not respected, the task in question may be terminated.⁴⁶

CNOs* may not be organised or implemented in such a manner that they interfere with the relief actions of impartial humanitarian organisations.

Reference is made to Section 4.6.6 of Chapter 14 for more information about naval blockades and to Section 6.5 of Chapter 14 for information about naval embargoes.

3.6

Special considerations on assistance to the civilian population in besieged or encircled areas

Since the Hague Convention respecting the Laws and Customs of War on Land of 1907, special obligations have been imposed on parties to a conflict in connection with **sieges** of populated areas. At that time, the rules were designed to protect cultural property, for instance.⁴⁷ GC IV provides that a belligerent State that has besieged or otherwise encircled a populated area must endeavour to conclude an agreement with the adversary for two purposes: to evacuate the sick, the wounded, infirm and aged persons, children, and expectant or new mothers, and to create a right of passage for medical and religious personnel and equipment to such areas.⁴⁸

AP I prohibits the starvation of civilians as a method of warfare.⁴⁹ AP I supplements GC IV with a more general rule on technical arrangements (see Section 3.5 above) in recognition of the fact that the besieging State has a special interest in rules controlling such relief supplies. In siege situations, this could be of great importance to the adversary's capacity to defend the besieged area if the armed forces of the adversary benefit from such relief supplies.

45 AP I, Art. 71(3), and SCJHL, Rule No. 56.

46 AP I, Art. 71.

47 1907 Hague Regulations, Art. 27.

48 GC IV, Art. 17.

49 AP I, Art. 54(1).

4. Special considerations on fundamental protections of individual civilians and the civilian population

4.1

Introduction

In addition to the general protection against the effects of military operations, etc., described above, certain fundamental protections apply to all civilians in all armed conflicts under all circumstances. The fundamental protections have their origins in Common Article 3 of the Geneva Conventions and have later been developed in HRL as well as in IHL. No derogation from the rules establishing these protections is permissible under any circumstances.

4.2

Fundamental prohibitions

4.2.1 Wilful killing

6.8 It is prohibited to kill civilians.⁵⁰

+NIAC⁵¹

It is prohibited to kill civilians. The **wilful killing** of civilians may constitute a grave breach of the Geneva Conventions.⁵²

Combatants may be attacked directly. By contrast, civilians may not be made the object of direct attack and must, to the maximum extent feasible, be protected against the effects of military operations. Protection from being made the object of direct attack is subject to the condition that civilians refrain from taking a **direct part in hostilities**. For more information, see Section 2.2 of Chapter 5.

Civilian deaths that occur as a consequence of an attack against a military objective are not inconsistent with international law if the party executing the attack has taken all feasible precautions, which includes assessing that the expected civilian casual-

50 CA 3, GC I, Art. 50, GC II, Art. 51, GC III, Art. 130, GC IV, Art. 147, AP I, Art. 75(2)(a), AP II, Art. 4(2)(a), ECHR, Art. 2, ICC Statute, Art. 8(2)(a)(i) and SCiHL, Rule No. 89. UNSG Bulletin, Section 7.2.

51 AP II, Art. 4(2)(a), ICC Statute, Art. 8(2)(c)(i), and SCiHL, Rule No. 89.

52 GC IV, Art. 147, and AP I, Art. 85(3)(a).

ties will not be excessive in relation to the concrete and direct military advantage gained from the attack (**proportionality**). Reference is made to Chapter 8 for more information about the requirements for this process.

HRL also provides basic and mandatory rules for the protection of the right to life.⁵³ This protection usually finds expression in a provision emphasising that no one shall be **arbitrarily** deprived of his life. More information is available in Section 4 of Chapter 3.

In efforts to promote compatibility between IHL and HRL in the area, the International Court of Justice has interpreted the concept of “arbitrarily” to mean that the above-mentioned lawful attacks during armed conflict are not regarded as an arbitrary deprivation of life.⁵⁴

Under certain other circumstances, the use of force against civilians may become necessary in armed conflict, for instance, in connection with law enforcement in occupied territory. In such situations, the protection of the right to life under HRL continues to apply since IHL does not specify the framework for the use of force in such situations. More information about when HRL must be assumed to apply outside the borders of Denmark and the extent to which it is provided in Section 4.2 of Chapter 3.

4.2.2 Other offences of violence

6.9 Other violence to the life, health, and physical or mental well-being of persons is prohibited. This includes, in particular, torture and mutilation or⁵⁵ other inhumane treatment of all kinds, whether physical or mental.⁵⁶ Corporal punishment is prohibited.⁵⁷ +NIAC⁵⁸

In relation to the treatment of civilians, the universal and absolute prohibition against **inhuman** treatment is of vital importance in cases in which civilians are in the custody of Danish forces as persons deprived of liberty or for the treatment of diseases or injuries.

53 E.g., ECHR, Art. 2, and CCPR, Art. 6(1).

54 ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996, para. 25.

55 AP I, Art. 75(2)(a) and Art. 11, ICC Statute, Art. 8(2)(a)(ii), and SCIHL, Rule No. 90.

56 GC III, Art. 17, GC IV, Art. 32, CCPR, Art. 7, ECHR, Art. 3, UN CAT, Art. 1, SCIHL, Rule No. 90, and ICC Statute, Art. 8(2)(b)(xxi).

57 SCIHL, Rule No. 91. UNSG Bulletin, Section 7.2.

58 CA 3, AP II, Art. 4(2)(a), ICC Statute, Art. 8(2)(c)(i)-(ii), and SCIHL, Rules Nos. 90 and 91.

The scope of the prohibition is addressed in Chapter 12 on persons deprived of liberty and in Chapter 7 on the sick, wounded, and shipwrecked, etc. These chapters also describe the separate prohibition against subjecting any person to medical or other experimental treatment.

The prohibition does not restrict the lawful, proportionate use of force necessary to pacify persons, control riots, or the like within the mandate of the force. However, in all other respects, the prohibition is universal and non-derogable.

The prohibition against inhuman treatment comprises a prohibition against treating civilians – or other persons – in an inhumane manner and also involves, to a certain extent, a duty to take active measures to protect civilians against atrocities. The prohibition against inhumane treatment implies a special requirement in cases in which Danish forces exercise control and authority over civilians, for instance, in connection with the deprivation of liberty, medical treatment or belligerent occupation. In these cases, the Danish forces must **actively protect civilians** who are under such control against acts of violence, insults, and public curiosity.⁵⁹

Such protection requires consideration of how to protect civilians. Furthermore, it is necessary that sufficient resources have been allocated to ensure effective protection and that the protection needs of particularly vulnerable groups have been duly considered. In occupied territory, for instance, this could be ensured by patrolling particularly exposed areas on the basis of relevant RoE that authorise and, depending on the circumstances, require the patrol to intervene in cases of violence or the like.

4.2.3 Outrages on personal dignity

6.10 Outrages on personal dignity are prohibited. This includes, in particular, humiliating and degrading treatment, enforced prostitution, rape⁶⁰, and any other form of sexual violence.⁶¹ + NIAC⁶²

This prohibition applies to outrages on personal dignity, regardless of whether they involve indecent assault (i.e., sexual violation) or not. The aspect of indecent assault in relation to women and children is described in detail in AP I in the form of specially targeted protection of women and children.⁶³

59 E.g., GC IV, Art. 3, Art. 27, Art. 32, Art. 34, AP I, Art. 11, Art. 75(1), ECHR, Art. 3, and CAT, Art. 3.

60 ICC Statute, Art. 8(2),(b)(xxii), and SCIH, Rule No. 93.

61 CA 3, GC IV, Art. 27, and AP I, Art. 75(2)(b). UNSG Bulletin, Section 7.2.

62 AP II, Art. 4(2)(e), ICC Statute, Art. 8(2)(c)(iii) and (e)(vi), and SCIH, Rule No. 93.

63 AP I, Art. 76(1), and Art. 77(1).

Degrading treatment in the form of an affront to human decency might also violate the prohibition. That could be the case, for instance, if persons of one sex are compelled to submit to body searches, wholly or partially stripped, while persons of the other sex carry out or are present at the search.

The prohibition applies in situations, for instance, in which civilians are in the custody of the Danish armed forces. However, there may also be cases in which the prohibition may have been violated without the victim being deprived of his or her liberty. This is the case, for instance, if a patrol addresses persons in a way that deeply offends their dignity.

4.2.4 Collective punishments, etc.

6.11 Collective punishments as well as all measures of intimidation or terrorism or threats thereof are prohibited.⁶⁴ +NIAC⁶⁵

The Danish armed forces are not authorised to impose sentences or execute penalties on civilians. Only the courts have jurisdiction to impose sentences (of fines or deprivation of liberty), and the enforcement of sentences will usually be undertaken by an authority other than a military authority.

No sanction against individual civilians or groups of civilians that has the character of punishment, deterrence, or intimidation, etc., is allowed. This applies regardless of whether the sanction is aimed directly at individual civilians or civilian property, and regardless of whether the sanction acquires a character other than a traditional sanction under criminal law.

Example of unlawful sanctions against civilians:

Example 6.4: Within a single day, a force has been exposed to a range of violent IED* attacks and ambushes. The force has suffered substantial losses; seven men have died of their injuries; and five others have been critically injured.

The local civilians are usually kindly disposed to the force and have, by all appearances, no relation to the attacks or attackers. However, the insurgent forces must have been massively present in the territory prior to the attack; and, therefore, the locals could not have escaped noticing them. In view of the severe losses sustained, the force is annoyed that the local civilians with whom they normally cooperate well did not warn them about what was in the offing. In a mood of frustration, a platoon takes the initiative to pay a visit to the local village the following day. The platoon takes drastic measures: they encircle the village, kick in doors,

64 GC IV, Art. 33, AP I, Art. 75, and SCIH, Rule No. 103. UNSG Bulletin, Section 7.2.

65 AP II, Art. 4, Art. 6 and Art. 13, and SCIH, Rule Nos. 103.

rummage through the locals' homes, and forbid the inhabitants to leave the area while the action is in progress. Since the locals are assumed to have no connection to the attacks or are found to have no specific knowledge of the insurgents, the sole purpose of these measures is to punish someone.

4.2.5 Slaves

6.12 Slavery and slave trade in all their forms are prohibited.⁶⁶

+NIAC⁶⁷

Slavery or any other type of unpaid forced labour is prohibited under all circumstances. The prohibition is particularly relevant in relation to the use of civilian labour by occupying powers in occupied territory and in relation to the restrictions on the ability of detaining powers to force detainees to work. More information about these restrictions is provided in Chapter 11 and Chapter 12, respectively.

4.2.6 Enforced disappearance of persons

6.13 Enforced disappearance of persons is prohibited⁶⁸

+NIAC⁶⁹

The concept of the enforced disappearance of persons does not originally come from IHL but should be considered to be an inherent part of the prohibition against wilful killing and other offences of violence as well as respect for family life. The area is regulated to some degree by HRL, including a Convention for the Protection of All Persons from Enforced Disappearance to which Denmark has not become party at the time of release of this Manual, however.⁷⁰

In this Convention, “enforced disappearance” is defined to mean any form of deprivation of liberty by agents of the State or by persons acting with the authorisation or support of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, so that this person is placed outside the protection of the law.

66 ECHR, Art. 4, CCPR, Art. 8, SCIHL, Rules Nos. 94 and 95, ICTY Krnojelac (IT-97-25-T) 2002, para. 499. UNSG Bulletin, Section 7.2.

67 AP II, Art. 4(2)(f).

68 ICC Statute, Art. 7(1)(i) and Art. 7(2)(i), UN GA Declaration on the Protection of All Persons from Enforced Disappearance, and SCIHL, Rule No. 98.

69 ICC Statute, Art. 7(1)(i) and Art. 7(2)(i), UN GA Declaration on the Protection of All Persons from Enforced Disappearance, and SCIHL, Rule No. 98.

70 International Convention for the Protection of all Persons from Enforced Disappearance, 20 December 2006.

Failure to register and record the deprivation of liberty of any person, followed by a denial that the person in question is or has been held in Danish custody, may, depending on the circumstances, constitute a breach of the Convention.

Reference is made to Section 11 of Chapter 12 concerning the right of persons deprived of liberty to communicate with the outside world and to Section 13 of Chapter 12 concerning the duty to register and keep records of information on persons deprived of liberty.

4.3

Special protection of certain vulnerable groups of persons

Both IHL and HRL afford special protection to vulnerable groups. Moreover, the UN Security Council and General Assembly have adopted a series of resolutions that address the protection of civilians and certain groups of civilians in armed conflict.⁷¹

Sections 4.3 to 4.5 of Chapter 3 present an outline of certain human rights and discuss their relevance to military operations, including rights relating to particularly vulnerable groups such as women, children, and persons with disabilities.

This section addresses the rules of IHL on the special protection afforded to vulnerable groups while, to some extent, comparing the rules with HRL.

4.3.1 Sick and wounded civilians and civilian medical personnel, religious personnel, and civilian medical units

Chapter 7 describes the special protection afforded to sick and wounded civilians and civilian medical personnel as well as the protection resulting from the special status assigned to medical installations (hospitals, etc.). Issues relating to deprivation of liberty are dealt with in Chapter 12. Reference is made to these chapters for an in-depth discussion.

4.3.2 Children

The United Nations Convention on the Rights of the Child of 1989 and the Optional Protocol on the Involvement of Children in Armed Conflict of 2000 oblige Denmark to afford special protection to children in armed conflict, including a duty to take all

71 E.g., UN SC Res. 1502/2003 on civilians, UN SC Res. 2143/2014 on children and Res. 2122/2014 on women.

feasible measures to ensure the protection and care of children who are affected by an armed conflict.⁷² For the purposes of the CRC, a child means every human being below the age of 18 unless, under the law applicable to the child, majority is attained earlier.⁷³ In many situations, it will be difficult to determine a young person's age. In the event there is an absence of reliable documentation and there is uncertainty about a person's age, the person must be presumed to be below the age of 18 years.

The Convention on the Rights of the Child and its second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography are particularly relevant in cases in which children are subject to the territorial jurisdiction of a State. This means situations in which the child is physically present in a territory controlled by Danish armed forces. The protection under the Convention, therefore, is reflected in the relevant chapters on this topic. Reference is made, in particular, to Chapters 3, 11, and 12.

Children who are the victims of armed conflict must be provided with special care and aid. Whenever it is found necessary for the safety of children, children must be evacuated temporarily from areas in which hostilities are taking place during a NIAC to a safer area within the State. In such cases, the children must be accompanied by persons specially appointed to be responsible for their safety and well-being.⁷⁴

The same applies to IACs. Children may only be evacuated to areas outside their State of origin, however, if this is required for compelling reasons and, in that case, only provided that the parents or legal guardians have given their written consent to such evacuation.⁷⁵ Whenever such an evacuation occurs, the child's education, including religious and moral education, must be provided with the greatest possible continuity.⁷⁶ When there is sufficient knowledge, such education must be provided in a manner which, to the greatest possible extent, is consistent with the parents' desire.⁷⁷ When children are evacuated to foreign States outside the conflict area, an identity card with photo identification of each child must be issued. If possible, the card must contain various information, including the child's full name, sex, and place and date of birth as well as a wide range of other personal data.⁷⁸

72 United Nations Convention on the Rights of the Child, Art. 38. UNSG Bulletin, Section 7.4.

73 United Nations Convention on the Rights of the Child, Art. 1.

74 AP II, Art. 4(3)(e), and SCIHL, Rule No. 135.

75 AP I, Art. 78(1).

76 Also the UN Children's Convention, Art. 28, and the United Nations Security Council Resolution 2143/2014.

77 AP I, Art. 78(2).

78 More information is available in AP I, Art. 78(3).

Information about the increased focus on the protection of schools and other educational institutions is provided above.

The first Optional Protocol to the Convention on the Rights of the Child obliges States to ensure that persons who have not attained the age of 18 do not take a direct part in hostilities and are not compulsorily recruited into the armed forces.

⁷⁹Denmark does not deploy persons under the age of 18 to missions with its armed forces, and the legal minimum age for compulsory military service in Denmark is 18. The Protocol, therefore, has limited significance for Denmark. Nonetheless, Danish armed forces may be confronted with adversaries, including non-State organised armed groups (OAGs) in NIACs, who do not comply with the prohibition on the use of **child soldiers** and allow children to perform duties that amount to direct participation in hostilities. In such cases, international law **does not confer special protected status to children**. In other words, these children may be subjected to the same degree of use of force as adults, although it should be noted that special protection rules are applicable with respect to deprivation of liberty. More information is available in Chapter 12.⁸⁰

4.3.3 Women

Women and girls are often particularly vulnerable during armed conflict. The protection of women and girls against violence, including gender-related violence such as rape and sexual assault, is at the centre of the protections afforded by HRL, IHL⁸¹, and resolutions of the United Nations Security Council.⁸² However, the need for healthcare services⁸³ and the involvement of women in peace-making processes, internationally as well as locally, are among the obligations of belligerent States in this field. For more information, see Section 4.4 of Chapter 3.

79 First Optional Protocol to the UN Convention on the Rights of the Child, AP I, Art. 77(2), and SCIHL, Rules Nos. 136 and 137.

80 E.g., AP I, Art. 75(3) and (4), and AP II, Art. 4(3).

81 AP I, Art. 76(1), AP II, Art. 4(2)(e), ICC Statute, Art. 8(2)(b)(xxii) and (e), and SCIHL, Rules Nos. 93 and 134. UNSG Bulletin, Section 7.3.

82 E.g., UN Security Council Resolution 2122 of 21 October 2013, Aiming to Strengthen Women's Role in All Stages of Conflict Prevention.

83 SCIHL, Rule No. 134.

Moreover, IHL focuses on **the mother and the new-born baby**. This is reflected in an obligation for parties to a conflict to ensure that pregnant women and mothers of dependent infants who are arrested, detained or interned for reasons related to the armed conflict have their cases considered with the utmost priority.⁸⁴

Women are afforded the same protection as men under IHL, but women's special protection needs must be respected.

4.3.4 Other vulnerable groups

6.14 As far as military operations allow, Danish armed forces must take all necessary precautions to assist persons exposed to grave danger and to protect them against pillage and ill-treatment.⁸⁵

Other vulnerable individuals are also entitled to special protection. Such individuals may be elderly people or persons with physical or mental disabilities when their condition and situation require special protection.⁸⁶ The sick, wounded, and shipwrecked enjoy special protection. For more information, see Chapter 7.

It is the need of the situation that determines who can be said to have a special need for protection. Depending on the circumstances, this could be ordinary civilians who, for instance, have become homeless or who have been displaced as a result of the armed conflict.

It will sometimes be possible to assist displaced persons to reach special camps or to provide some other temporary shelter. What Danish armed forces cannot do themselves may be arranged through contributions by humanitarian organisations. Therefore, civilian organisations specialising in assisting civilian victims of armed conflict may indirectly support the parties to a conflict in fulfilling their obligations under international law to rescue civilians with special needs. They may also assist the parties to the conflict in identifying particularly vulnerable groups.

⁸⁴ See, e.g., GC IV, Art. 16, and AP I, Art. 76(2).

⁸⁵ GC IV, Art. 16, and UNSG Bulletin, Section 5.4.

⁸⁶ SCIL, Rule No. 138.

5. Special protection of certain civilian objects, installations, and property

5.1 Introduction

As is the case with civilians and the civilian population, civilian objects are afforded protection under international law on multiple levels.

First, civilian objects may not be the object of attack or reprisals.⁸⁷ Civilian objects are all objects which are not military objectives. Reference is made to Chapter 8, where it is also emphasised that, in case of doubt, a presumption in favour of civilian status will apply to buildings, areas, etc., which are normally dedicated to civilian purposes. This includes, for instance, educational institutions, dwellings, and buildings serving as places of worship.⁸⁸

Second, certain civilian objects are afforded special or enhanced protection because the objects have special significance to humanity, the objects are vital to the survival of the civilian population, or attacks could trigger very violent forces. Below is a description of objects subject to special protection.

5.2 Objects indispensable to the survival of the civilian population

6.15 It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population for the specific purpose of depriving the civilian population of such necessities.⁸⁹ +NIAC⁹⁰

As a general rule, these necessities will fall within the general protection afforded to civilian objects.

The obligation is a part of the prohibition against the starvation of the civilian population as a method of warfare. This prohibition is addressed in more detail in Section

⁸⁷ AP I, Art. 52(1).

⁸⁸ AP I, Art. 52(3).

⁸⁹ AP I, Art. 54(2), SCIH, Rule No. 54, ICC Statute, Art. 8(2)(b)(xxv). UNSG Bulletin, Section 6.7.

⁹⁰ SCIH, Rule No. 54.

10 of Chapter 10. The prohibition concerns the practice of depriving the civilian population of vital supplies or other life necessities as a method of warfare.

The objects that are indispensable to the survival of the civilian population include food, crops, livestock, drinking water installations and supplies, and irrigation works. The above list is not exhaustive, however, and may also include other objects such as vital medication and blankets.

Any act of attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population **does not constitute** a violation of the prohibition if:

- the object is used by the adversary as sustenance **solely** for the members of its armed forces,⁹¹ or
- the object is used in **direct support** of the adversary's armed forces, unless an attack in these circumstances must be expected to leave the civilian population with such inadequate food or water for its survival.⁹²

Moreover, if it is required by **imperative military necessity**, a party to a conflict may derogate from the prohibition in connection with the party's withdrawal within its own territory.⁹³

In operations under UN military command and control, the UN force is prohibited from attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population.⁹⁴

5.3

Dangerous forces

6.16 Works or installations containing dangerous forces, such as dams, dykes, and nuclear power plants, may not be made the object of attack – even where these objects are military objectives – if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. This protection will cease only if the conditions mentioned under 1) and 2) below are met.⁹⁵

Military objectives located at or in the vicinity of these works or installations may not be made the object of attack if such attack may cause the release of dangerous forces from

91 AP I, Art. 54(3)(a).

92 AP I, Art. 54(3)(b).

93 AP I, Art. 54(5).

94 UNSC Bulletin, Section 6.7.

95 AP I, Art. 56, first sentence, and SCIHL, Rule No. 42.

the works or installations and consequent severe losses among the civilian population. This protection will cease only if the conditions mentioned under 3) below are met.⁹⁶

The parties to the conflict must endeavour to avoid locating any military objectives in the vicinity of the works or installations. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible.⁹⁷

Such works or installations may only be attacked if the following conditions are met:⁹⁸

- 1) As regards dams or dykes:
 - If they are used for purposes other than their normal function;
 - If they are used in regular, significant and direct support of military operations;
 - If such attack is the only feasible way to terminate such support.
- 2) As regards **nuclear power plants**:
 - If they provide electric power in regular, significant and direct support of military operations;
 - If such attack is the only feasible way to terminate such support.
- 3) As regards other military objectives **located at or in the vicinity** of these works or installations:
 - If they are used in regular, significant and direct support of military operations;
 - If such attack is the only feasible way to terminate such support.

Even in these three exceptional cases, endeavours should be made to find alternatives to attack. In military operations under UN military command and control, the prohibition is absolute.⁹⁹

Military defence installations may be erected to defend the works or installations without resulting in the loss of protection against attack. This applies provided that the military defence installations are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.¹⁰⁰

⁹⁶ AP I, Art. 56, second sentence, SCIIHL, Rule No. 42.

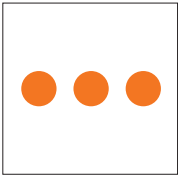
⁹⁷ AP I, Art. 56(5).

⁹⁸ AP I, Art. 56(2).

⁹⁹ UNSC Bulletin, Section 6.8.

¹⁰⁰ AP I, Art. 56(5).

Works and installations containing dangerous forces may be marked with a special sign in order to facilitate their identification. The absence of such marking has no impact on the protection under international law.¹⁰¹



The international distinctive sign for works and installations containing dangerous forces

Particular care must be exercised when undertaking a CNA * against digital networks and systems that control works and installations containing dangerous forces. This duty of particular care is emphasised because a CNA * intended to reduce the impact of, for instance, a nuclear power plant that supplies electricity to the adversary’s armed forces (e.g., dual use) may have implications in the form of a meltdown unless the planning of the attack takes into account that the reactor cooling systems must be left intact.¹⁰²

5.4
Civilian medical objects

The protection of medical objects includes, in particular, a prohibition against using hospitals for military purposes, special rules governing seizure, and a requirement to give a warning to the adversary prior to an attack on a hospital used for military purposes by the adversary.

Actual protection is described in Section 4 of Chapter 7.

5.5
Civil defence buildings and materiel

6.17 Buildings and materiel used for civil defence purposes and shelters provided for the civilian population are entitled to general civilian protection.¹⁰³

101 AP I, Art. 56(7).
102 CWM, Rule No. 80
103 AP I, Art. 62(3).

At the outset, the obligation covers all objects that are used directly for civil defence tasks.

Civil defence objects may become military objectives in accordance with the rules described in Section 3 of Chapter 8. Consequently, international law does not provide directly for enhanced protection *against attacks*. Protection against attacks on such objects may be assumed, however, in situations where the objects are marked as civil defence objects. This is because there is a presumption that such objects do not constitute military objectives.



The international distinctive sign of civil defence

6.18 Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the party to the conflict to which they belong.¹⁰⁴

The word ‘destroyed’ refers to ‘other destruction’ as described in Section 2.7 of Chapter 10.

In principle, the party to which a civil defence object belongs may use it for military purposes under the general rules of IHL. The party may commit an act of perfidy, however, if a marked civil defence object is used for hostile purposes. This is because the adversary will have a strong presumption that known civil defence objects are not expected to be used for military purposes.

Materiel and buildings belonging to military units which are permanently assigned to civil defence organisations may be seized and confiscated as war booty if they fall into the power of the adverse party. So long as they are required for the performance of civil defence tasks, however, they may only be diverted from the civil defence purpose when previous arrangements have been made for adequate provision for the needs of the civilian population. Exception is allowed in cases of **imperative military necessity**, i.e., in cases in which the seizure and confiscation of such material or buildings is crucial to avoid having to change large-scale military plans or operations.¹⁰⁵

¹⁰⁴ AP I, Art. 62(3).

¹⁰⁵ AP I, Art. 67(4).

AP I contains specific provisions on the identification and marking of civil defence objects.¹⁰⁶ Reference is made to Section 2.3.1 of Chapter 10, which addresses the prohibition to misuse protective emblems and distinctive signs.

5.6

Cultural property

5.6.1 Introduction

Cultural property belongs to the category of civilian objects which, in cases of doubt, must be presumed to have civilian status. Cultural property enjoys basic protection against attack.

In a tradition that dates back to the Enlightenment, there has been an inter-State desire to create in international law a system of special protection for cultural objects that represent a value for humanity at large, i.e., across peoples and State borders.

The protection of cultural property in armed conflict found expression for the first time in the 1907 Hague Regulations.¹⁰⁷ This protection was extended and clarified in the Roerich Pact of 1935 on the protection of cultural property.¹⁰⁸ However, pan-American States, primarily, are parties to it. With the adoption of the **1954 Hague Convention**, the desire was to provide a more widely-accepted protection of cultural property. The Convention has two Additional Protocols.

Moreover, cultural property in the form of “historic monuments, works of art or places of worship” is afforded protection by AP I and AP II.¹⁰⁹ Furthermore, international customary law provides protection in armed conflict for cultural property of great importance to the cultural heritage of every people.¹¹⁰ Finally, it follows from the Statute of the International Criminal Court that intentionally directing an attack against cultural property is considered a war crime in IACs as well as in NIACs.¹¹¹

5.6.2 The protection of cultural property in armed conflict

¹⁰⁶ AP I, Art. 66(1) and (2), Art. 66(4); see Art. 64(1) and (2), and Art. 67(3).

¹⁰⁷ 1907 Hague Regulations, Art. 27.

¹⁰⁸ Washington Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of 1935.

¹⁰⁹ AP I, Art. 53, and AP II, Art. 16.

¹¹⁰ SCJHL, Rules Nos. 38-41.

¹¹¹ ICC Statute, Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv).

The cultural property that enjoys special protection under international law through the 1954 Hague Convention is movable or immovable property **of great importance to the cultural heritage of every people**. This clear qualification of cultural property under special protection is repeated in AP I, which also requires the cultural property to constitute “the cultural or spiritual heritage of peoples.”¹¹²

The 1954 Hague Convention lists a range of examples, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.¹¹³

Similarly, buildings or centres that preserve or exhibit the cultural property listed above or contain a number of such cultural properties may be entitled to special protection under the 1954 Hague Convention.

6.20 There are three levels of protection in addition to the usual protection from attack afforded civilian objects.¹¹⁴

Extended protection is afforded to cultural property defined in Article 1 of the 1907 HC IV, in Article 53 of AP I, and in Article 16 of AP II, as well as cultural property marked with the UNESCO World Heritage Convention (WHC) emblem, based on the presumption of an overlap with the enhanced protection of the 1907 HC IV.

Special protection is afforded to centres and refuges used for the shelter of movable cultural property of very great importance. This requires registration in “The International Register of Cultural Property under Special Protection”¹¹⁵ and may be marked with three 1954 Hague Convention emblems as shown below.

Enhanced protection is afforded those cultural properties that are registered as “cultural heritage of the greatest importance for humanity.”¹¹⁶ This protection is granted subsequent to an approval procedure.¹¹⁷

The protection implies a restriction on the use of force that risks damage to or destruction of cultural property. The three levels of protection each have an effect

¹¹² AP I, Art. 53(a).

¹¹³ 1954 Hague Convention, Art. 1(a).

¹¹⁴ SCIH rule no. 40

¹¹⁵ 1954 Hague Convention, Art. 8(6)

¹¹⁶ 1954 Hague Convention Protocol II, Art. 10.

¹¹⁷ 1954 Hague Convention Protocol II, Art. 11.

on the extent of the restriction, as well as the ability, in exceptional cases, to use force against protected objects.

6.21 Danish armed forces undertake to refrain from any use of cultural property and its immediate surroundings for purposes which are likely to expose it to destruction or damage.¹¹⁸
+ NIAC¹¹⁹

The prohibition to **use** cultural property in support of military operations relates to the use of cultural property for purposes which are likely to expose it to danger. The prohibition does not only cover any use which makes an effective contribution to military action but also other uses in the military action, including the mere presence of military forces around the cultural property.

6.21a Danish armed forces undertake to refrain from **directing attacks and other acts of hostility** against cultural property with enhanced or special protection status.¹²⁰
+ NIAC.¹²¹

In addition, Danish armed forces must refrain from attacks or other acts of hostility that may be expected to cause incidental damage to cultural property with extended, special, or enhanced protection, the extent of which is clearly excessive in proportion to the direct military advantage gained.¹²²

The conflicting parties are obligated to do everything feasible to verify that the objects to be attacked are not cultural property with extended, special, or enhanced protection.¹²³

The latter obligation requires an evaluation of both whether the object is protected under the 1954 Hague Convention and whether an exception to the protection from attack may be made following the criteria in the Convention.

Waiver of the afforded extended protection may only take place in situations of **imperative military necessity**.¹²⁴ It is also a prerequisite that the cultural property in question is a military object and that no alternative means of achieving the resulting military advantage or an equivalent thereto exist. Reasonable alternative means of

118 1954 Hague Convention, Art. 4(1), and UNSG Bulletin, Section 6.6.

119 1954 Hague Convention, Art. 4 and Art. 19(1).

120 1954 Hague Convention, Art. 4, AP I, Art. 53, SCIHL, Rules Nos. 38 and 39, ICC Statute, Art. 8(2)(b)(ix), and UNSG Bulletin, Section 6.6.

121 1954 Hague Convention, Art. 4, see, Art. 19(1), AP II, Art. 16, SCIHL, Rules Nos. 38 and 39, and ICC Statute, Art. 8(2)(c)(iv).

122 1954 Hague Convention, Protocol II, Art. 7(c), and 1954 Hague Convention, Art. 4, and AP I Art. 51(5)(b).

123 1954 Hague Convention, Protocol II, Art. 7(a) and 1954 Hague Convention, Art. 4.

124 1954 Hague Convention, Art. 4(2).

attack on cultural property, therefore, must always be explored.¹²⁵ Moreover, any use of cultural property that would likely result in its damage or destruction may only take place if there are no alternative means of achieving the same or an equivalent military advantage.¹²⁶

The decision to invoke **imperative military necessity** must, at a minimum, be made by a Danish battalion commander/Commander *MTAA team** (for more information, see Chapter 13) or – if circumstances do not permit otherwise – assessed by a commanding officer at the highest possible inferior rank.¹²⁷ This may be the case, for instance, when communication with the *TOC** or Combined Air Operations Centre (CAOC) is not possible in a situation that requires immediate action.

In operations under UN military command and control, the prohibition is absolute.¹²⁸

The **transport** of cultural property may take place by prior agreement between the parties to the conflict. In such cases, the parties to the conflict must refrain from any act of hostility directed against such transport.¹²⁹ The transport of cultural property may also take place without prior agreement. In such cases, the adversary must be notified of the transport, and the parties to the conflict must, to the maximum extent feasible, take the necessary precautions to avoid acts of hostility directed against such transport.¹³⁰

Parties to the 1954 Hague Convention may also choose to establish **centres and refuges** that are registered in the *International Register of Cultural Property under Special Protection*.¹³¹ These are used to shelter movable cultural property of very great importance. This register should not be confused with the UNESCO World Heritage List. Such centres must meet a series of strict requirements; and, since the number of centres around the world is extremely limited, they will not be discussed in more detail here.

Immunity afforded centres and refuges may only be withdrawn in exceptional cases of **unavoidable military necessity** and then only for as long as this necessity per-

125 1954 Hague Convention, Protocol II, Art. 6(a).

126 1954 Hague Convention, Protocol II, Art. 6(b).

127 Hague Convention, Protocol II, Art. 6(c).

128 UNSC Bulletin, Section 6.6.

129 1954 Hague Convention, Art. 12.

130 1954 Hague Convention, Art. 13.

131 1954 Hague Convention, Arts. 8(6).

sists.¹³² In such cases in which circumstances permit, the party concerned must notify the adversary of the decision to withdraw immunity, and the adversary must be given an opportunity to cease the military activity that necessitates the attack.¹³³ The decision to withdraw immunity must be taken at the level of division commander at a minimum.

Objects may also be registered as “**cultural heritage of the greatest importance for humanity**”¹³⁴ pursuant to an **approval procedure**.¹³⁵ Derogation from this level of protection may only be made when the object is removed from the register or when the object becomes a military objective as a result of its use as defined in AP I, Art. 52 and, even then, only when:

- The attack on the cultural property is the **only feasible option** to terminate the unlawful military use of the cultural object, and
- **All feasible precautions** are taken in the choice of means and methods of attack with a view to terminating such use, as well as avoiding or, in any event, minimising damage to the cultural object.
- In additional, unless it is impossible due to the requirement of immediate action in self-defence to stop or prevent an imminent attack, the attack may only be carried out if:
 - The attack is ordered at the highest operational level of command, which by Danish standards is the Chief of the Joint Operations Staff of Defence Command Denmark, and
 - An effective advance warning requiring the termination of such unlawful use of the cultural property is issued, and
 - The opposing forces are given reasonable time to redress the situation.¹³⁶

In multinational military deployments, situations may arise in which cooperating States have not become a party to all or parts of the 1954 Hague Convention and its protocols. Therefore, when cooperating with other States, Danish armed forces, must pay attention to whether their partners apply the same rules. This applies, for instance, in connection with the designation of objectives, the joint location of troops, etc.

¹³² 1954 Hague Convention, Art. 11.

¹³³ 1954 Hague Convention, Art. 11(2).

¹³⁴ 1954 Hague Convention, Protocol II, Art. 10(a).

¹³⁵ 1954 Hague Convention, Protocol II, Art. 11.

¹³⁶ 1954 Hague Convention, Protocol II, Art. 13.

5.6.3 UNESCO's World Heritage Convention

Parallel to the regulation in international law of cultural property in armed conflict, a protection of cultural property has developed without any particular focus on armed conflict, including the WHC.¹³⁷ The Convention and its protection, introduced in Chapter 3, must be considered to be of the greatest relevance to military operations outside armed conflict where 1907 HC IV and other parts of IHL are not applicable.

In compliance with the provisions of the WHC, UNESCO has created a World Heritage List, i.e., a list of properties forming part of the cultural and natural heritage. States submit requests for the inclusion of their own cultural and natural heritage on the list, which can be seen at UNESCO's website. **This list is only associated with the WHC** and entitles national authorities to use UNESCO's special emblem to indicate UNESCO's recognition that the property concerned is part of the world cultural or natural heritage.

6.19 In armed conflict, UNESCO's World Heritage Emblem may be used as an indication that the territory contains cultural properties that are also worthy of protection under the 1954 Hague Convention in cases in which the property does not bear the distinctive emblem that it is protected under the 1907 HC IV. + NIAC



The World Heritage Emblem for cultural properties protected by the World Heritage Convention

The WHC provides wider protection than the 1907 HC IV however. Thus, the WHC also encompasses rules on the identification, recognition, and protection of certain areas of natural heritage.

Natural heritage should be understood to mean natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view. Natural heritage may also be geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstand-

137 Convention concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972.

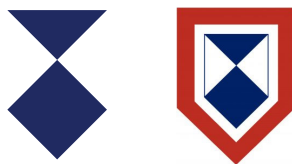
ing universal value from the point of view of science or conservation. Finally, natural heritage may be natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The coastal cliff of Stevns Klint and the Wadden Sea were included on the list in 2014. These properties are examples of natural heritage which, in spite of being protected by the WHC, would not be granted special protection under the 1954 Hague Convention or other rules of IHL beyond the basic protection afforded to civilian objects. In 2015, the par force hunting landscape in North Zealand and the Moravian Church settlement of Christiansfeld were also included on the list.

If a party to a conflict would like to protect such natural heritage properties against the effects of armed conflict, the parties to the conflict may mutually agree on the establishment of non-defended localities.¹³⁸

5.6.4 Identification of protected cultural property

What is left is to **identify** such cultural property in armed conflict. In order to facilitate its identification by the parties to the conflict, the 1954 Hague Convention introduces a distinctive emblem, which can be used by the parties to the Convention to mark the property under protection.¹³⁹ It is not mandatory to use the distinctive emblem in armed conflict.



The distinctive emblems of the Hague Convention for the Protection of Cultural Property

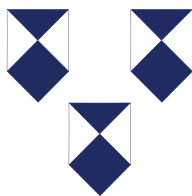
Therefore, if an item of cultural property is not marked, this is not an indication that cultural property is ineligible for special protection status. Military authorities must endeavour to provide an overview of the cultural property situated within the territory in which acts of war are taking place.

The centres and refuges under special protection referred to above are character-

¹³⁸ AP I, Art. 59(5).

¹³⁹ 1954 Hague Convention, Art. 6; see Art. 15.

ised by bearing the distinctive emblem indicating protection under the 1954 Hague Convention, repeated three times as follows:



The emblem of the Hague Convention for the Protection
of Cultural Property to mark special protection

The existence of cultural property within a territory is identified through intelligence gathering based on open and closed sources. Contact with local civilian authorities and other partners may be particularly important in territories where Danish armed forces are present themselves.

There may also be other authorities or organisations, both in Denmark and internationally, that can assist in providing an overview of cultural property in a mission area. They may possess specific knowledge about the location of certain cultural property, or they may be capable of indicating where this information may be found. These authorities and organisations include, among others, the Danish Agency for Culture, Blue Shield Denmark, the International Committee of the Blue Shield (ICBS), the Association of National Committees of the Blue Shield (ANCBS), and UNESCO.

The assessment of whether cultural property is of “very great importance” (1954 Hague Convention¹⁴⁰) or constitutes “cultural heritage of the greatest importance for humanity” (1954 Hague Convention, AP II¹⁴¹) is not determined by the individual parties. This assessment can only be made by UNESCO or by a committee of the 1954 Hague Convention set up for that specific purpose. Relatively few items of cultural property are recognised as being of such importance; and when this happens, the property will appear on a special list or a special register.¹⁴² The lists are available on the Internet.

140 1954 Hague Convention, Art. 8.

141 1954 Hague Convention AP II, Art. 10.

142 1954 Hague Convention Regulations, Arts. 12-16.

5.6.5 Theft, etc., of cultural property

6.22 Theft, pillage or misappropriation of cultural property and any act of vandalism directed against cultural property are prohibited. Parties to a conflict undertake to prevent and, if necessary, put a stop to such acts.¹⁴³ +NIAC¹⁴⁴

The parties to the conflict must refrain from requisitioning movable cultural property situated in the territory of another party to the conflict. +NIAC¹⁴⁵

The prohibition is absolute and cannot be derogated from.

The obligation is more extensive when Danish armed forces have responsibility as an occupying power. For more information, see Chapter 11.¹⁴⁶

Danish operational staff undertake to recruit and employ personnel who are specially trained in cultural property and its protection and whose purpose will be to ensure respect for cultural property in connection with military operations.¹⁴⁷ This task could be added to existing functions in the staff structure, including CIMIC*, LEGAD, or similar. It is essential that the personnel have received special training in these issues and have been formally entrusted with that function.

5.6.6 Personnel engaged in the protection of cultural property and inspection personnel

Personnel who are responsible for protecting cultural property or for making inspections to ensure compliance with the 1954 Hague Convention must be respected.¹⁴⁸ If such personnel fall into the hands of the adverse party, they must be allowed to continue to carry out their duties whenever the cultural property for which they are responsible has also fallen into the hands of an adverse party.

The obligation is only relevant in IAC.

The protection comprises, above all, a prohibition against directing attacks against personnel engaged in the protection of cultural property as well as a duty to allow

¹⁴³ 1954 Hague Convention, Art. 4(3), and UNSG Bulletin, Section 6.6.

¹⁴⁴ 1954 Hague Convention, Art. 4(3), see Art. 19.

¹⁴⁵ 1954 Hague Convention, Art. 19.

¹⁴⁶ 1954 Hague Convention, Art. 5.

¹⁴⁷ 1954 Hague Convention, Art. 7.

¹⁴⁸ 1954 Hague Convention, Art. 15, and, in regard to inspection personnel, deduced from Art. 17(2)(b) and 1954 Hague Convention Regulations, Art. 21.

such personnel to carry out their tasks as far as this is consistent with the interests of security. Such personnel are civilians who have been entrusted with the task of protecting cultural property. Consequently, the protection does not extend to the specially trained personnel that are part of military staffs as described above. Such personnel are military and have combatant status, see Chapter 5.

The 1954 Hague Convention and the Regulations for its execution also establish specific rules on personnel who are appointed by different States to determine compliance with the requirements of international law for the protection of cultural values. Such inspection personnel must be respected on equal terms with personnel engaged in the protection of cultural property.

Personnel engaged in the protection of cultural property and inspection personnel lose their enhanced protection to the extent that they commit acts which take on the character of direct participation in hostilities.

5.7

Protection of the natural environment

6.23 It is prohibited to cause widespread, long-term and severe damage to the natural environment and, thereby, prejudice the health or survival of the population.¹⁴⁹ + NIAC¹⁵⁰

The obligation relates to a prohibited method of warfare and, therefore, is described in more detail in Section 2.15 of Chapter 10.

5.8

Civilian detention facilities

International law provides special rules governing the protection of detention facilities. Generally speaking, the rules only apply to facilities used for the housing of individuals who are deprived of liberty in relation to hostilities and security considerations. Ordinary prisons, etc., for the confinement of common criminals who are either awaiting judgment or are serving sentences are generally only provided the ordinary protection afforded civilian objects and persons. Information about the protection of detention facilities is provided in Chapter 12.

149 AP I, Art. 35(3), AP I, Art. 55(1), AP I, Art. 85(3)(b) in regard to civilian objects, ICC Statute, Art. 8(2)(b)(iv), and SRM-NIAC, Rule No. 44.

150 ICTY Tadić IT-94-1-T 1997, para. 119, and SCJHL, Rule No. 45. Addendum 6.5

6. Areas for the protection of vulnerable groups etc.

6.1

Introduction

IHL provides that, **unilaterally or by agreement**, parties to a conflict are allowed to establish different types of areas, which are subsequently afforded special protection in relation to the general protection of civilian objects, etc., as described above. The content of the protection depends on the specific type of area concerned.

Danish forces will only be allowed to establish such areas in the territory of a foreign State when they assume the role of an occupying power or act in cooperation with the territorial State. Thus, the relevance of such areas to Danish armed forces in international military operations relates primarily to the territorial State's use of such zones or other similar zones that may have been established by the UN Security Council or organisations authorised by the Security Council.

It is an important point that the agreements concluded within the framework of IHL are different from other agreements on areas with special protection status or areas declared by the UN Security Council to be under UN protection. Such areas are commonly known as “**(UN) safe areas**”, which were established, for instance, in the town of Srebrenica and its environs during the war in Bosnia in 1993.¹⁵¹ Areas established by the UN Security Council enjoy general protection as civilian objects under IHL. The special protection afforded to such UN areas is found outside the scope of IHL. That includes, in particular, the specific basis for the establishment of the zone, which may be binding on the Member States of the United Nations. In addition, the 1994 Convention on the Safety of United Nations and Associated Personnel may be important although the protection inherent in this convention is afforded to the UN's own camps.¹⁵²

6.2

Zones under special protection established by agreement between the parties to the conflict

¹⁵¹ UN SC Resolution 819 of 16 April 1993.

¹⁵² Art. 7 of the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994.

6.24 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 a demilitarised zone if such extension is contrary to the terms of this agreement.¹⁵³

Directing an attack against such zones is prohibited.¹⁵⁴

+NIAC¹⁵⁵

The Geneva Conventions — including, in particular, GC IV Relative to the Protection of Civilian Persons in Time of War — provide an opportunity for parties to a conflict to conclude agreements on the establishment of special zones for the protection of vulnerable groups in armed conflict. The Convention contains an annex which sets out a draft agreement relating to hospital and safety zones.

Any State may establish a **hospital or safety zone** — even prior to the outbreak of hostilities. The purpose of this zone must be to protect certain particularly vulnerable groups of persons from the effects of war, i.e., sick, wounded,¹⁵⁶ and aged persons, children under 15 years, expectant mothers, and mothers of children under seven. Here, healthcare and medical personnel must be able to assist such groups without having to fear the immediate effects of the conflict.¹⁵⁷ The parties to the conflict may conclude an agreement on the specific content of the area protection, and they may choose to involve protecting powers. Even if they are unable to achieve such an agreement, the zone will enjoy general protection.

Hospital and safety zones may be marked with the sign shown below, possibly with more oblique red bands:¹⁵⁸



The distinctive sign for hospital and safety zones under the Geneva Conventions

Reference is made to Section 8 of Chapter 7 for more information about hospital zones in the context of the medical services generally.

¹⁵³ API, Art. 60(1).

¹⁵⁴ SCIH, Rules Nos. 35 and 36, and ICC Statute, Art. 8(2)(b)(ix).

¹⁵⁵ SCIH, Rules Nos. 35 and 36, and ICC Statute, Art. 8(2)(e)(iv).

¹⁵⁶ See GC I, Art. 23.

¹⁵⁷ GC IV, Art. 14

¹⁵⁸ GC IV, Annex I, Art. 6.

Demilitarised zones

API develops the concept of hospital and safety zones from the Geneva Conventions by emphasising that parties to a conflict may agree that other civilians should also be admitted to such areas or that zones may be established for other purposes, for instance, to protect fragile nature or wildlife in a designated area. In other words, the parties to the conflict enjoy freedom of contract.

If the parties to the conflict have decided by agreement that such a zone should be demilitarised, this must be respected by the parties to the agreement unless one party commits a breach in the terms of the agreement.¹⁵⁹ The terms of such an agreement might typically be that no military personnel or mobile military equipment may be present in the area, that no acts of hostility may be committed by the population or authorities present in the zone, and that any other activity linked to the military effort must have ceased.¹⁶⁰

A demilitarised zone shall be marked by such signs as may be agreed between the parties to the conflict.¹⁶¹

6.2.1. Neutralised zones

Neutralised zones may be established within any territory by agreement between the parties to the conflict. Any party to the conflict may propose to the adverse party the establishment of such zones either directly or through a neutral State.¹⁶²

Neutralised zones are intended to shelter all civilians, and not only particularly vulnerable groups, from the effects of war. Precisely for that reason, neutralised zones are located in areas where fighting is taking place, and they are generally established on a temporary basis.

The civilian need for such zones may arise very suddenly and very locally. Therefore, it is possible to establish zones exclusively on the basis of agreements between the fighting units in the area. In principle, such agreements could be concluded orally — even over the radio, but attempts should be made to conclude them in writing. Article 15 of GK IV specifies the requirements for such agreements.

¹⁵⁹ API, Art. 60(7).

¹⁶⁰ API, Art. 60(3).

¹⁶¹ API, Art. 60(5).

¹⁶² GC IV, Art. 15.

Civilians are not allowed to perform work of a military character while they remain in neutralised zones. No discrimination is allowed in relation to the persons who gain admission to the zone.

6.2.2 Non-defended localities (open towns)

Any party to a conflict may **unilaterally declare** a locality an “open town”.

Declaring a place an open town or non-defended locality involves, basically, that a party to a conflict chooses to surrender control of a locality in order to spare it from any additional effects from hostilities. In this way, one party to the conflict allows the adverse party to invade the locality with an assurance that the invasion will not be met with military resistance.

Example 6.5: During World War II, a number of large European cities were declared open at various stages of the conflict since both the Axis States and the Allies availed themselves of this opportunity, which was already available at that time on the basis of customary international law and Article 25 of the Hague Land War Regulations. Some of these cities were Paris, Oslo, Brussels, Belgrade, Rome, and Athens.

Non-defended localities are today regulated by AP I with the particular aim of providing a framework for the mutual protection of the locality in question. This protective framework is primarily intended for individual civilians, the civilian population, and civilian objects that may be present in the locality, which will often be a densely built-up area and which may also contain cultural property and other objects enjoying enhanced protection.¹⁶³

6.25 It is prohibited for the parties to the conflict to attack non-defended localities by any means whatsoever.¹⁶⁴ +NIAC¹⁶⁵

The protection has two main elements: first, the protection that comes from having no hostile military forces present to defend the locality and, second, the prohibition against attacking the locality. This also applies to fixed military installations and establishments that have been abandoned in the locality. An advancing party may lawfully move into or through a non-defended locality, and it may do so with a view toward capture. All parties to the conflict may also lawfully fly over the locality.

¹⁶³ AP I, Art. 59.

¹⁶⁴ 1907 Hague Regulations, Art. 25, AP I, Art. 59(1), SCIHL, Rule No. 37, and ICC Statute, Art. 8(2)(b)(v).

¹⁶⁵ SCIHL, Rule No. 37.

In principle, any non-defended locality is protected as such. For an advancing party to be expected to know that a given locality will not be defended, however, it is necessary for the adverse party to make a declaration to that effect or for the parties to the conflict to come to an agreement to that effect.

Declarations or agreements may be issued and concluded at all levels from tactical to political/diplomatic. What is crucial is that the actors in question are actually prepared to vouch for the implementation of the declarations or agreements.

When a locality is unilaterally declared to be a non-defended locality, it is required:

In regard to the declaration that it

- is issued to the adverse party and
- defines and describes, as precisely as possible, the limits of the locality.

In regard to the locality that it

- is located near or within an on-going combat or fire support zone (this may be both direct and general support activity), and
- is open for occupation by the adverse party (this implies, for instance, that road blocks are dismantled, mines removed, etc.).

The advancing party must acknowledge receipt of the declaration and must consider the locality as non-defended if the following conditions are satisfied:

- all combatants as well as mobile weapons and mobile military equipment have been evacuated;
- no hostile use is made of fixed military installations or establishments;
- no acts of hostility are committed by the authorities or by the population in the locality; and
- no activities in support of military operations are undertaken — for instance, troop transports and support activities such as the transport of ammunition or supplies to military forces.

The last-mentioned condition does not preclude more general activities, however, such as producing ammunition or supplies for the armed forces. It is also irrelevant whether sick and wounded combatants or police forces are present in the locality, notwithstanding the fact that the police forces are formally a part of the armed forces as long as the police forces are retained for the sole purpose of maintaining law and order.

If the advancing party does not agree that the locality satisfies the conditions, the adversary must immediately be notified thereof.

If a non-defended locality is established by agreement, derogation from these conditions is allowed.

An advancing party may lawfully establish defences of the locality after having captured it. A declaring party may also lawfully resume hostile activity in such localities. Advance warning should be given to the adverse party, however. Failure to give advance warning, depending on the circumstances, may mean that hostile acts in the locality will be regarded as perfidy. More information about perfidy is provided in Section 2.1 of Chapter 10.

6.3

Centres designated for the protection of cultural property pursuant to the rules of the Cultural Property Convention

The parties to a conflict may establish centres designated for the protection of cultural property within any territory over which they exercise military control.¹⁶⁶

The size of the centres may vary from small localities to entire zones. In the latter case, the centres will typically constitute neighbourhoods or whole towns. What is crucial is whether the centres contain ‘a large amount of cultural property’. If this is the case, the entire centre, in itself, will be regarded as cultural property and will be covered by the same rules that apply to cultural property.

7. Civil defence

7.1

Civil defence and functional protection

The adoption of AP I was the first time IHL incorporated special rules on the protection of civil defence, i.e., organisations assigned to the task of protecting civil society.

¹⁶⁶ 1954 Hague Convention, Art. 1(c).

The protection is functional. The protection is linked to the performance of tasks that are intended to protect the civilian population against dangers associated with hostilities and disasters, to help the civilian population to recover from the immediate effects of hostilities and disasters, and to provide the conditions necessary for its survival. These tasks are¹⁶⁷

- Warning and evacuation
- Management of shelters and blackout measures
- Rescue and fire-fighting
- Medical services, including first aid, and religious assistance
- Detection and marking of danger areas
- Decontamination and similar protective measures
- Provision of emergency accommodation and supplies
- Emergency assistance in the restoration and maintenance of order in distressed areas
- Emergency repair of indispensable public utilities, etc.
- Emergency disposal of the dead
- Assistance in the preservation of objects essential for the survival of the population
- Supplemental activities necessary to carry out any of the tasks mentioned above, including but not limited to administration, planning, organisation, and maintenance

In Denmark, these tasks are undertaken by the Danish Emergency Management Agency and, increasingly, by local fire and rescue authorities.

7.2

Civil defence personnel and civil defence organisations

6.26 The following **organisations and personnel** shall be entitled to perform their civil defence tasks except in cases of imperative military necessity¹⁶⁸

- Civilian civil defence organisations of the parties to the conflict and their personnel¹⁶⁹
- Civilian civil defence organisations of other States and their personnel when the organisations have obtained the consent of the territorial State and are under its control¹⁷⁰
- Members of the armed forces and military units permanently assigned to civil defence organisations¹⁷¹ as well as
- Civilians who – although not members of civilian civil defence organisations – respond to an appeal from the competent authorities and perform civil defence tasks under

¹⁶⁷ AP I, Art. 61(1)(a)(xv).

¹⁶⁸ The obligation is a combination of AP I, Art. 62(1) and (2), Art. 64(1), and Art. 67(1).

¹⁶⁹ AP I, Art. 62(1).

¹⁷⁰ AP I, Art. 64(1).

¹⁷¹ AP I, Art. 67(1).

The enhanced protection primarily implies that relevant organisations and their personnel may not be prevented from discharging their civil defence duties, including being allowed adequate access and freedom of movement.

Civil defence may include national authorities or organisations but also foreign States and organisations provided that their activity takes place with the consent of the territorial State and under its control.¹⁷³ As it appears in the box above, ordinary civilians also enjoy protection if they participate in the performance of civil defence tasks but only if they do so at the invitation of the territorial State.¹⁷⁴ The State receiving the assistance must notify the adverse party to the conflict of such assistance as soon as possible.

International organisations possessing specialist knowledge are likewise protected by the rules to the extent that they have been assigned a coordinating role.¹⁷⁵

The fact that organisations and personnel are entitled to perform their civil defence tasks except in case of **imperative military necessity** implies that the performance of such tasks must be respected by military authorities. Measures to interfere with or limit the work of such personnel may be taken only where the choice lies between changing large-scale, significant military plans and managing without civil defence personnel.

Military personnel and military units may be assigned to civil defence organisations. This is allowed only within their own territory, however.¹⁷⁶ As a consequence, Danish military units or Danish military personnel may not be assigned to civil defence organisations outside the territory of Denmark unless they have been re-designated in advance to the Danish Emergency Management Agency or a corresponding authority.

Military personnel and military units must be exclusively and permanently assigned to civil defence organisations to be afforded enhanced protection. They are required

¹⁷² AP I, Art. 62(2).

¹⁷³ AP I, Art. 64(1).

¹⁷⁴ AP I, Art. 62(2).

¹⁷⁵ AP I, Art. 64(2).

¹⁷⁶ AP I, Art. 67(1)(f).

at all times to display the distinctive sign and to carry a special identity card certifying their civil defence personnel status.¹⁷⁷

AP I contains specific provisions on distinctive signs¹⁷⁸ and identity cards by which States must endeavour to ensure that civil defence organisations and their personnel, buildings, and material as well as shelters provided for the civilian population are identifiable.¹⁷⁹

The distinctive sign that is used to identify civil defence organisations, personnel, material, buildings, and shelters is shown in Section 5.5 above and in Section 2.3.1 of Chapter 10.

7.3 Cessation of protection

As in the case of medical units, the civil defence protection may cease if the personnel, material, etc., are used to commit acts harmful to the adverse party. However, protection may cease only after **a warning** has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

AP I does not list every circumstance that may result in the cessation of protection. Instead, the Protocol mentions various circumstances that do not, per se, result in the cessation of protection:

- That civil defence tasks are carried out under the direction or control of military authorities (as is the case, for example, in the structure of Danish emergency services, which fall within the responsibilities of the Danish Minister of Defence)¹⁸⁰
- That civilian civil defence personnel cooperate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organisations¹⁸¹
- That the performance of civil defence tasks may incidentally benefit military victims, particularly those who are hors de combat¹⁸²
- That civil defence personnel are carrying light individual arms in self-defence

¹⁷⁷ AP I, Art. 67(1).

¹⁷⁸ AP I, Art. 66(4).

¹⁷⁹ AP I, Art. 63(3), see Art. 64(1) and (2), and Art. 67(1)(c).

¹⁸⁰ AP I, Art. 65(2)(a).

¹⁸¹ AP I, Art. 65(2)(b).

¹⁸² AP I, Art. 65(2)(c).

or for the purpose of maintaining order. Individual arms should be understood to mean arms that are traditionally handed out to and used by a single person, i.e., pistols, rifles/carbines and machine pistols, and guns up to and including a calibre of 7.62 mm.

8. Humanitarian organisations

As a general rule, humanitarian organisations and their personnel enjoy general protection under IHL, i.e., protection on equal terms with any other civilian.

The **enhanced protection**, therefore, primarily implies that the parties to the conflict are obliged to grant to humanitarian organisations all facilities and other assistance necessary for carrying out their activities.¹⁸³ The parties to the conflict must respect the humanitarian function performed, which includes facilitating and supporting the treaty-based work of such impartial, humanitarian organisations.

The UN Security Council and the UN General Assembly have accentuated the obligations of the parties to the conflict 1) to allow and facilitate full, unimpeded access to all civilians in need of assistance (humanitarian access) in accordance with IHL, including the rules of AP I,¹⁸⁴ 2) to make available, as far as possible, all necessary facilities for their operations, and 3) to promote the safety, security, and freedom of movement of humanitarian personnel, including, in particular, the United Nations and its associated personnel, material, etc.¹⁸⁵

See Section 3.5 above for information about the obligations of parties to a conflict to support relief actions carried out by impartial humanitarian organisations.

Special considerations on the ICRC

The International Committee of the Red Cross (ICRC) has been given a specific mandate under IHL with respect to protecting the victims of armed conflict, including making itself available as a protecting power when the parties to the conflict

¹⁸³ AP I, Art. 81.

¹⁸⁴ AP I, Art. 70.

¹⁸⁵ E.g., UN SC Resolution 1502 of 15 August 2003, condemning violence against humanitarian workers.

have failed to designate other States for this role.¹⁸⁶ The ICRC is entitled to offer humanitarian initiatives both in IACs and in NIACs. Therefore, the parties to the conflict cannot criticise such initiatives as an interference in the internal affairs of a State or a party to the conflict. The ICRC may also assist in the provision of other forms of support to victims of armed conflict by specific agreement with the parties to the conflict.

The ICRC is responsible for the tasks related to the *central information agency** for prisoners of war, protected persons, and internees.¹⁸⁷ This work is often undertaken in close cooperation with national Red Cross societies.

Danish armed forces are required to grant to the ICRC all facilities necessary for carrying out the functions assigned to the organisation.¹⁸⁸ The organisation and its members are entitled to use this protected emblem to indicate the affiliation.¹⁸⁹



ICRC

National Red Cross, Red Crescent, Red Lion and Sun, and Red Crystal

Societies

These societies must be granted the facilities necessary for carrying out their activities in compliance with the Geneva Conventions and AP I, and their assistance activities shall be facilitated in every possible way.¹⁹⁰ More information about protective emblems and distinctive signs is provided in Section 5 of Chapter 7 and in Section 2.3.1 of Chapter 10.

¹⁸⁶ AP I, Art. 5(3).

¹⁸⁷ See GC III, Art. 123, and GC IV, Art. 140.

¹⁸⁸ AP I, Art. 81(1).

¹⁸⁹ GC I, Art. 44.

¹⁹⁰ See e.g. AP I, Art. 81, and AP II, Art. 18.

Other humanitarian organisations

The parties to the conflict shall, as far as possible, make facilities available to other humanitarian organisations to which reference is made in the Geneva Conventions and AP I, which perform their humanitarian tasks in compliance therewith, and which have been duly authorised by the parties to the conflict.

Examples of specific IHL provisions involving humanitarian organisations include the following

- Civilian correspondence with family members¹⁹¹
- The role of humanitarian organisations in connection with the establishment of hospital and safety zones, etc.¹⁹²
- The reunion of dispersed family members¹⁹³
- The right of civilians to make an application to humanitarian organisations, including their right to make complaints¹⁹⁴
- Humanitarian relief actions¹⁹⁵
- Provisions to facilitate the work of the organisations in the context of more specific topics — for instance, by responding to applications by protected persons.¹⁹⁶

See Section 3.5 above for information about the protection of personnel from relief organisations.

¹⁹¹ GC IV, Art. 25.

¹⁹² GC IV, Art. 14.

¹⁹³ GC IV, Art. 26, and AP I, Art. 74.

¹⁹⁴ GC IV, Art. 30.

¹⁹⁵ AP I, Art. 70-71.

¹⁹⁶ GC IV, Art. 30.

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Medical Services

*The sick, wounded, shipwrecked, and dead and the duties
and protection of medical services*

Medical Services

*The sick, wounded, shipwrecked, and dead and the duties
and protection of medical services*

1. Introduction

The rules on collecting and caring for the wounded on the battlefield are among the oldest rules in contemporary international humanitarian law. The first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted as early as 1864 at the initiative of a committee, which was reorganised into the International Committee of the Red Cross (ICRC) in 1876. In this way, a long-standing tradition of regulation under international law for the protection of victims of armed conflict (the Geneva rules) was established.

The first convention from 1864 introduced the structure of protection that today has developed into more up-to-date rules in the area. The wounded must be collected and treated regardless of nationality. Medical personnel and civilians attending to this duty shall be neutral and inviolable, and a protective emblem is introduced in the form of a red cross against a white ground to signal the protection for the wounded and the personnel caring for them provided by the rules under international law.

In a Danish context, it is interesting that ICRC delegates were deployed for the first time during the Second Schleswig War in 1864, e.g., in the battle of Dybbøl Banke, which resulted in about 1,200 dead or wounded on each side.¹ The dispatch of delegates was at the initiative of the Geneva Committee and not under the Geneva Convention, which was not adopted until months later.

The Geneva Convention focused at that time on wounded “officers and soldiers and other persons officially attached to the armed forces” on land. Following the First Peace Conference in The Hague in 1899, the Third Convention extended the principles of the 1864 Convention to apply to naval warfare as well. The final act of the peace conference recommended a revision of the 1864 Convention also to include war-related illness, such as shell shock, in the protection provided. The recommendation was followed with the adoption of a revised convention in 1906.

The work undertaken during World War I to protect millions of prisoners of war resulted in the adoption after the war in 1929 of a convention to protect prisoners of war, but international humanitarian law did still not include any special rules on the protection of civilians. Such protection only won support in the wake of the atrocities during World War II with the adoption of the Geneva Conventions of 1949, which replaced the regulation existing in the area.

The First Geneva Convention (GC I) provided for the treatment of the sick and wounded on land, and the Second Geneva Convention (GC II) provided for the sick, wounded, and shipwrecked at sea. At the time, the protection still included only the groups of people who, under the Third Geneva Convention (GC III), were entitled to the status of prisoners of war, i.e., combatants and civilians accompanying the armed forces, crews on the merchant marine or civilian aircraft of parties to the conflict.²

The 1949 Conventions contributed a great many material innovations, including obligations to care for sick and wounded civilians.³ One material innovation was a modest regulation of NIACs in which the obligation to collect and care for the sick and wounded is included as one of only two operational provisions.⁴

However, the 1949 Conventions contained no clear rules establishing the transition from combatant to the status of *hors de combat**, incapacitated, or even general definitions of what it means to be sick or wounded. These issues were not regulated

1 See, for instance, Tom Buk-Swienty in Slagtebænk Dybbøl, p. 78ff.

2 GC I and II, Art. 13.

3 GC IV, Art. 16.

4 GC, CA 3(2).

until 1977 with the adoption of Additional Protocol I (AP I), which supplements the Geneva Conventions. The Additional Protocol combines the obligation towards sick or wounded civilians and combatants, so that the definition of ‘sick and wounded’ now includes a right to protection for anyone who is sick or has been wounded in war provided that the need for treatment is related to the conflict. With these definitions, AP I provides a number of clarifications that contribute to the regulation of the area in international law by providing an overall perspective of the efforts – civilian and military alike – to come to the aid of victims of armed conflict.

1.1

Chapter contents

This chapter provides a review of the rules in international law on care for the sick, wounded, shipwrecked, and dead in armed conflict. The introduction in Section 1 contains general comments on the regulation of the subject in international humanitarian law in NIACs and its relationship with HRL, followed by a description of the background to contemporary rules.

Next, **Section 2** is concerned with the requirements of international humanitarian law for the parties to a conflict in time of peace and in connection with the outbreak of a conflict. In addition, the section outlines the parties’ obligations to protect and respect, including the duty to search for and collect, the sick, wounded, and shipwrecked. The special requirements for medical treatment services are reviewed. **Section 3** is concerned with medical personnel, their duties and protection, and **Section 4** with medical units, transports, and material. Section 5 describes international law requirements for the identification of medical personnel, etc., including the use of the protective emblems and identity cards by medical personnel. **Section 6** outlines the parties’ obligations to search for the dead and prevent their ill-treatment or pillage. **Section 7** deals with the work undertaken by humanitarian organisations with the sick, wounded, shipwrecked, and dead; and, finally, **Section 8** outlines State options for the use of hospital zones.

A summary is provided at the end of the chapter to help in the preparation of relevant training and education or merely to gain an overview of the most material obligations.

1.2

Scope in relation to other chapters

Hospital zones are dealt with in Chapter 6 in connection with the protection of civilians. Chapter 11 on belligerent occupation considers the increased responsibility of the occupying power for the civilian population in the occupied territory, including healthcare. Chapter 12 on persons deprived of liberty provides additional consideration on the need of persons deprived of liberty for medical treatment, including the extent of the responsibility of the detaining power for the state of health of persons deprived of liberty. Chapter 13 considers special issues related to medical services in air operations. Reference is made to Chapter 14 for medical matters in naval operations.

1.3

Human rights law implications

IHL in the area has been adopted on the basis of the very special conditions applicable during armed conflict. Access to the battlefield and, thus, to victims of the conflict is often rendered difficult due to continued hostilities. Therefore, very special rules must apply to protected personnel, taking both military effectiveness and of humanity into account. It will often be difficult to collect the dead and bury them according to the same standards as those applicable in time of peace. Experience from World War II, in particular, has proved it necessary to impose special requirements for the medical treatment of captured members of the armed forces of the enemy. Here, too, there are rules based on the special conditions applicable during armed conflict.

Even though HRL, therefore, will generally be of secondary importance to the topic of this chapter in both international and non-international armed conflicts, Danish armed forces will have to pay attention to compliance with human rights law, including the right to life and the prohibition against torture or any other form of cruel, inhuman, or degrading treatment or punishment, see Section 4 of Chapter 3. The regulation in international law is limited especially in relation to medical examination of the dead, burial, exhumation, return of the mortal remains of the dead, and notification to families of the fates of their relatives. In such cases, it may be relevant to follow human rights regulation and practice to fill the gaps, see Section 4 of Chapter 3. Obligations in connection with the treatment of the wounded are considered in Chapter 12 on persons deprived of liberty.

1.4

General information on the application of the rules in NIACs

The extent of treaty law in the area is limited in terms of NIACs. Prior to the Additional Protocols, the protection of the sick, wounded, and shipwrecked in NIACs was exclusively regulated in Common Article 3 of the four Geneva Conventions. AP II establishes a number of rules on the protection of the sick, wounded, and dead, medical services, and the respect for protective emblems. However, the AP II applies only to certain NIACs and only to conflicts in which both Denmark and the State in whose territory the conflict is taking place are parties to it. Many of these rules, however, reflect international customary law in NIACs. So, the rules apply in this respect regardless of whether parties to the conflict are parties to the Protocol or not.

This chapter describes the rules using the regulation of IACs as a starting point. The chapter also comments on the extent to which the rule must be assumed to apply to NIACs.

In cases in which the precise extent of an obligation is unclear in NIACs, the rules have been formulated to be very similar to the rules applicable in IACs. Therefore, in some cases, the rules will be referenced to in the form of Addendums. Such an approach has been adopted because it is an area very sensitive to distinctive humanitarian concerns with focus on reciprocal respect for the parties' sick, wounded, shipwrecked, and dead.

2. Protection of the sick, wounded, and shipwrecked

2.1

Obligations in time of peace

The obligations of States under IHL towards the sick, wounded, and shipwrecked take effect even in time of peace when the restrictions on the use of the emblems protecting medical services apply. This means, for instance, that, even in time of peace, a medical transport bearing the Red Cross emblem may not be used for transporting soldiers in good health or military equipment that is not medical equipment.⁵ It also means that personnel indicated to be medical personnel may not be used to perform

⁵ GC I and GC II, Art. 44.

non-medical duties. The actual emblem is what is protected, and so international law does not prevent a more flexible use of medical personnel, e.g., for guard duty assignments, as long as the personnel do not bear the emblem in the form of an armband, identity card, or some other way.

2.2

Obligations at the outbreak of hostilities

At or prior to the outbreak of hostilities, States must

- 1) Issue identity cards and identity discs to all military personnel, including medical personnel, and identity cards to civilians accompanying the armed forces. Special requirements apply to identity cards⁶ and the format and content⁷ of identity discs. The identity card serves to identify medical personnel that might fall into the hands of the enemy. The requirement to bear the double identity disc is primarily related to the identification of dead persons, however.
- 2) Institute a *national information bureau** for prisoners of war⁸ and civilian internees. This bureau must receive information about prisoners of war and internees held in the custody of the State and collect relevant information about their state of health, possible death, etc. The ICRC and the national Red Cross organisations have, to some extent, collected relevant information about persons deprived of liberty in these conflicts. To this point, it has not been found necessary for Denmark to initiate such a bureau in connection with Denmark's participation in IACs in Afghanistan, Libya, and Iraq.
- 3) Appoint a mixed medical commission, consisting of doctors from all parties to the conflict.⁹ The objective of the mixed medical commission is to give opinions on the state of health of prisoners of war with a view toward establishing whether a prisoner of war is entitled to repatriation.¹⁰
- 4) Appoint one or more States as protecting powers — possibly, through the intermediation of the ICRC. In the absence of normal diplomatic relations between the parties to a conflict, the protecting powers are to help safeguard the interests of the parties, for instance, through the conclusion of agreements with respect to medical services. In practice, States have only on rare occasions made use of the Geneva rules on protecting powers.¹¹

6 GC I, Art. 40, GC II, Art. 42, and GC III, Art. 17 and Art. 4A(4).

7 GC I, Art. 16 and Art. 40, and GC II, Art. 19 and Art. 42.

8 GC III, Art. 122, and GC IV, Art. 136.

9 GC III, Art. 112.

10 GC III, Art. 110.

11 GC I and GC II, CA 8, and AP I, Art. 5.

The obligations in time of peace are not assumed to apply in NIACs.

2.3

Definitions of sick, wounded, and shipwrecked

“Wounded’ and ‘sick’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.”¹²

Two conditions must be met to attain protection as a sick or wounded person.

First, a need for care must exist and, second, the wounded or sick person must refrain from any act of hostility.

The **need for care** requirement is relevant in a number of contexts. First, it is relevant to determine whether the person in question is to be considered *hors de combat*^{*13} and, therefore, entitled to protection. Another significant context is the question of when combatants may be conveyed in medical transports. This issue is considered below in the section on medical transports.

In the majority of cases, it will be obvious that a wounded person is in need of medical care. The same will apply in case of acute shock or other mental disorder resulting from hostilities. However, the definition also comprises maternity cases, new-born babies, and other persons who may be in need of immediate medical assistance or care. In such cases, it is not essential whether or not the patient has suffered physical or mental injury but whether a medical assessment leads to a need for acute medical care, including nursing care.

In all cases, in order to be considered sick, wounded, or shipwrecked and eligible for the ensuing protection requires the person in question to refrain from **any act of hostility**.

An act of hostility will, first and foremost, consist of continuing the armed combat. There are numerous examples of soldiers continuing hostilities regardless of seri-

¹² AP I, Art. 8(a) – assumed to apply also to NIACs.

¹³ AP I, Art. 41(2)(c), see Art. 41(1).

ous injuries and wounds. In such situations, a large degree of uncertainty may be involved in the assessment of whether wounded persons are, in fact, entitled to the protection granted under international law to persons that are *hors de combat**. It is perfectly legitimate to show caution when searching the battlefield after engagement, etc., especially in conflicts in which these or similar tactics have been used. So, it will often be the individual soldier who, face to face with the wounded adversary, must assess whether the adversary is prepared to continue the hostilities or, in fact, refrains from any act of hostility.

Another example of an act of hostility is when the wounded person tries to reach safety among his or her own forces in spite of wounds and injury inflicted during fighting. However, an act of hostility can also comprise other acts such as continuing radio communication or other communication with enemy forces, the destruction of military equipment, documents, or records in the possession of the wounded person, etc. Technically speaking, a person, despite an acute need for care, is not *hors de combat** in such cases and, therefore, does not enjoy protection as a sick or wounded person.

Whether the sick or wounded person is a **civilian or military** person makes a difference with regard to the status assigned to that person when held in the custody of the enemy. The military person will normally be entitled to prisoner of war status. However, it makes no difference as regards the obligation to collect and care for the sick and wounded.

2.4

The obligation to search for and collect the sick, wounded, and shipwrecked

7.1 At all times and, particularly, after an engagement, the parties to a conflict must without delay take all possible measures to search for and collect the wounded, sick, and shipwrecked to protect them against pillage and ill-treatment and to ensure their adequate care.¹⁴
+NIAC¹⁵

To allow medical personnel access to the battlefield, the parties must seek to make an **arrangement for an armistice** for the purpose of collecting the sick, wounded, shipwrecked, and dead and providing first aid and moving and/or exchanging the

14 GC I, Art. 15, GC II, Art. 18, SCIHL, Rule No. 109, and UNSG Bulletin, Section 8(d).

15 GC, CA 3(2), AP II, Art. 8, and SCIHL, Rule No. 109.

sick and wounded. Such arrangements may be made on the actual battlefield, and it will often be expedient to include considerations of how to rescue the wounded in the planning of military operations in which some risk of engagement and, thereby, losses exists. In practice, this can be achieved by considering how to contact the enemy. In some cases, it is a question of communicating by means of an interpreter through established radio contact or megaphone or, alternatively, by using the services of a parlementaire. A parlementaire could be, for example, a designated head of a medical division or similar person who bears a white flag while approaching enemy positions to seek an arrangement for suspension of fire for the purpose of collection.¹⁶ Numerous historical examples of this exist even though the procedure depends on a certain expectation that the enemy will respect the protective emblems and flags. Section 4 below deals in more detail with searches for the dead in.

The States must take **all possible measures** to search for and collect the sick and wounded.¹⁷ The military commander is responsible for making an assessment of what is practically feasible, including the extent to which medical personnel may be deployed. However, the medical need should be assessed already at the planning stage of military operations.

If the deployment of one's own medical resources is not considered feasible, it is sometimes a good idea to check whether other medical resources are located in the area. Only when circumstances permit it is there a requirement to rescue the sick and wounded. There are a number of recent examples of military operations that have been completed without ground troops during all or part of the conflict. In such situations, no requirement is made for the rescue of the sick and wounded.

Example 7.1: Rescue of the sick and wounded is only to be conducted when practically feasible:

During operations Odyssey Dawn and Unified Protector in Libya in March-October 2011, coalition and NATO aircraft conducted air-to-surface operations with a view toward contributing to the protection of the civilian population in Libya. The campaign did not involve any ground troops, which meant that no allied medical personnel were on the ground, either.

Often, national and international aid societies will be present and attend to the protection of the sick, wounded, and shipwrecked.

The sick, wounded, and shipwrecked must be rescued **as soon as possible**. The

¹⁶ 1907 Hague Regulations, Art. 32.

¹⁷ GC I, Art. 15, and GC II, Art. 18.

sooner serious war injuries are treated, the higher is the survival rate and the better are the prospects of treatment in general. In some cases, however, access to rescuing the wounded will be rendered difficult, for instance, by continued hostilities or mines, and it will not always be possible to come to the rescue of the wounded immediately without exposing the medical personnel to imminent danger.

2.5

Respect and protection

7.2 Anyone who is sick, wounded, or shipwrecked must be respected and protected under all circumstances. They must be treated humanely and receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. Any attack on their lives or persons is strictly prohibited. In particular, it is strictly prohibited to kill or exterminate them or subject them to torture or biological experiments. They may not intentionally be left without medical care or attention, and conditions may not be created that expose them to infection or contagion. +NIAC¹⁸

Treatment must be given without any adverse distinction founded on sex, race, nationality, religion, political opinion, or any other similar criteria. +NIAC¹⁹

Only compelling medical grounds may entitle a person to a preferential position in the order of treatment. +NIAC²⁰

Women must be treated with all consideration due to their sex.²¹ +NIAC²²

The sick, wounded, and shipwrecked must be **protected and respected**. The obligation to protect means to do something active: to search for, collect, and treat the sick, wounded, and shipwrecked and to protect them against ill-treatment and pillage of their personal effects.²³ The obligation to **respect** may be characterised as an obligation to refrain from committing certain acts, including continuing to attack persons who are sick, wounded, or shipwrecked, exposing the sick, wounded, or shipwrecked to medical experiments or other inhuman treatment, or to refrain from providing differential treatment on a non-objective basis.

If a party to a conflict has to leave behind wounded or sick persons in the power of

¹⁸ GC, CA 3(2), AP II, Art. 7(1), and SCIIHL, Rule No. 87.

¹⁹ AP II, Art. 7(2).

²⁰ AP II, Art. 7(2), and SCIIHL, Rule No. 110.

²¹ GC I, Art. 12, GC II, Art. 12, AP I, Art. 10, SCIIHL, Rules Nos. 87 and 110, ICC Statute, Art. 8(b)(x), and UNSG Bulletin, Section 9.1.

²² AP II, Art. 4, SCIIHL, Rule No. 134, and ICC Statute, Art. 8(e)(xi).

²³ SCIIHL, Rule No. 111.

the enemy, the party is under an obligation, to the degree allowed by military considerations, to leave behind some of its medical personnel and equipment to assist in their care. The rule cannot be considered applicable to NIACs.

A sick, wounded, or shipwrecked person may not renounce rights conferred pursuant to the Geneva Conventions or any agreements concluded between the parties to the conflict.²⁴ This rule applies also to NIACs.

2.6

Medical treatment of civilians

One of the dilemmas involved in the management of a State's military medical resources is the question of the extent of the obligation to treat sick and wounded civilians in armed conflict. The rule is considered to apply also to NIACs.

The fundamental rule is that medical support must be provided in the event that an acute need for such support exists. There are no grounds to provide different care to civilian and military sick and wounded persons in the event of acute medical need after military engagements. In such situations, the medical work must proceed in accordance with general principles, including the *principle of triage**, in a desire to help as many people as possible as quickly as possible. General medical priorities determine the order of treatment. Rules and principles have been established for pre-hospital care within the framework of both national and allied operations.²⁵

The obligations under international law in this area are not about conferring health-care resources to conflicting parties or using the healthcare systems of affluent States as a yardstick for the medical treatment provided in armed conflict. What is required is that all do their utmost to come to the rescue of the sick and wounded in the conflict.²⁶

Military treatment capacity is dimensioned according to the expected need for treatment of injured military personnel, and its objective is not to perform general healthcare duties in the territory of the party to the conflict. Once life-saving first

²⁴ GC I, Art. 7, and GC II, Art. 7.

²⁵ See, for instance, Allied Joint Publication (AJP) 4-10A, "NATO Allied Joint Medical Support Doctrine", and MC 326/2, "NATO principles and policies of operational medical support". The Danish Defence Health Service has laid down more detailed rules on pre-hospital care in DHS OHS 921-1 of May 2010.

²⁶ NATO AJMEDP-6 Allied Joint Civil-Military Medical Doctrine, October 2011.

aid and stabilisation have been performed after an engagement, the treatment of the sick and wounded may be continued to the extent necessary through various channels of treatment – even if a difference exists between the treatment facilities available, so that wounded military personnel, for instance, receive treatment at military medical units and wounded civilians are transferred to civilian hospitals or clinics. More information about the increased responsibility of the occupying power is provided in Chapter 11.²⁷

In situations outside of occupation scenarios, a need may also arise to treat civilians who are sick or have been injured in one way or the other and approach Danish forces directly — possibly, with an (often reasonable) expectation that the prospects of treatment are better at Danish military medical units than local medical clinics. There are numerous examples, for instance, from Iraq and Afghanistan of situations in which Danish forces on patrol or under the auspices of *CIMIC** work come into contact with civilians suffering from serious illnesses or wounds that may be life-threatening if they do not receive qualified medical treatment, but where the suffering is not directly related to the conflict.

The rules on respect for and protection of the sick, wounded, and shipwrecked have been adopted to reduce the suffering of victims of armed conflict. AP I refers specifically to the fact that the obligation to respect and protect the sick, wounded, and shipwrecked concerns anyone “who is **affected by an armed conflict**.”²⁸

On this basis, the obligations of the parties to a conflict in terms of collecting and caring for the sick and wounded must be assumed to focus on the protection of more direct victims of armed conflicts. Hence, international humanitarian law does not entail any obligation to provide treatment to sick, wounded, or injured civilians if the basis of their need for treatment is not directly related to the conflict.

The principle of humanity of international humanitarian law,²⁹ combined with the principle underlying Section 253 of the Danish Criminal Code, best reflects that, in the event of life-threatening injury, first aid must be provided to stabilise the injured person or that it must be ensured that assistance can be provided in time. For doctors, section 7 of the Danish Practice of Medicine Act on the Hippocratic Oath

27 GC IV, Art. 55-59.

28 AP I, Art. 9(1), see Art. 1.

29 See, for instance, AP I, Art. 1(2).

and international principles of medical ethics also apply.³⁰ The obligation assumes for both doctors and others that the assistance can be provided without any special danger to, or sacrifice of, anyone. This assessment must be made on a case-by-case basis. The obligation applies to both IACs and NIACs.

In addition to the rules on the search for, collection of, and care for the sick, wounded, shipwrecked, and dead, IHL also provides rules supporting the existing civilian healthcare sector of a party to a conflict, including respect for and protection of hospitals, medical clinics, and staff. The parties to a conflict are also encouraged to accept the humanitarian efforts of voluntary aid societies in the area.³¹

2.7

Special requirements for medical treatment services

7.3 The physical or mental health and integrity of persons who are deprived of liberty or who are otherwise in the power of the adverse party as a result of an armed conflict must not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject such persons to 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 if it was a soldier of one's own forces who was going to be cared for.³² +NIAC³³

Mutilation and medical or scientific experiments are prohibited under any circumstance.³⁴
+NIAC³⁵

Patients receiving medical treatment while in the custody of a party to a conflict have the right to refuse any surgical intervention. This applies even if the medical opinion is that the operation is vital. If the patient refuses a surgical intervention – e.g., the amputation of a leg with advanced blood poisoning, the refusal must be respected unless the patient is a minor or assessed to be mentally unable to assess the consequences of such refusal, e.g., due to shock, delirium, or the like. In cases of refusal, the medical personnel must endeavour to obtain a written statement to

30 International Code of Medical Ethics adopted by the 3rd General Assembly of the World Medical Association, London, England, October 1949, and amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968, and the 35th World Medical Assembly, Venice, Italy, October 1983, and the 57th WMA General Assembly, Pilanesberg, South Africa, October 2006 and Principles for Health Care of June 2016, adopted by the World Medical Association (WMA), the International Committee of Military Medicine (ICMM), the International Council of Nurses (ICN), the International Pharmaceutical Federation (FIP) and International Federation of Medical Students' Association.

31 GC IV, Art. 18-23, and AP I, Arts. 70-71.

32 AP I, Art. 11(1).

33 AP II, Art. 4(1) and 2(a) and (e), Art. 5(2)(e), and SCIHL, Rule No. 92.

34 AP I, Art. 11(2)(a)-(b), ICC Statute, Art. 8(2)(b)(x), and UNSG Bulletin, Section 7.2.

35 AP II, Art. 4(2)(a), and ICC Statute, Art. 8(2)(e)(xi).

that effect, signed or acknowledged by the patient.³⁶ These rules are not applicable to NIACs under international law.

The rules entail a right to refuse surgical intervention but not an unconditional right for the patient to make a decision on surgical intervention under all circumstances. If the patient is in a coma on arrival at the operating theatre, for instance, the necessary operation(s) may be performed even if the patient has had no actual possibility of making up his or her mind about treatment.

Borderline cases may arise as in the example above involving a leg with blood poisoning when the patient has refused amputation and then slips into a coma. In that specific situation, the medical opinion is still that amputation is the treatment offering the patient the best prospects of survival, but the patient did refuse amputation. So, the starting point must be that the operation is not an option. However, conditions such as these and similar cases must be individually assessed. For instance, it may be the case that, in refusing operation, the patient thought that he would survive; but, now that he has slipped into a coma, an operation is required to ensure his survival. In cases such as these, a medical assessment must be made, taking its starting point in the patient's documented statements on the operation.

Any operation or treatment must aim at improving the patient's state of health.

Organ donation *from* a patient held in the custody of a party to a conflict may not take place — not even with the consent of the donor, since the operation is not necessitated by the donor's own state of health. However, if the patient is a *recipient* of a donated organ, the transplant may be performed with the consent of the organ recipient, provided that the donation is in compliance with normal medical practice towards Danish soldiers. Obviously, the rule does not prevent the removal of impaired organs, including inflamed appendices or organs destroyed by war trauma, if a medical opinion warrants such removal and the patient has not refused operation.

A **tissue transplant** or **blood transfusion** *from* persons held in the custody by a party to a conflict *to* another patient may only be performed when

- 1) the same would have been done had the patient been a member of the party's own armed forces;
- 2) the patient voluntarily donates tissue or blood subject to non-induced consent;

36 AP I, Art. 11(5).

- 3) the procedure has a therapeutic purpose; and
- 4) the procedure is performed in compliance with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.³⁷

A medical record must be kept of cases in which persons held in the custody by a party to a conflict have donated tissue or blood.³⁸ The records should contain details about location, time, the nature of the intervention, and, obviously, details about the patient, including the patient's consent, if any. Furthermore, records should be kept of all medical procedures done for the benefit of a person held in the custody of the Danish armed forces. Such records should include surgical interventions, medication, diet, and treatment programmes. The records must be available for inspection by a protecting power, if any.³⁹

2.8

Duration of the protection of the sick, wounded, and shipwrecked

The protection commences from the time the sick, wounded, or shipwrecked are under the care of Danish forces and does not end until completion of treatment or repatriation.⁴⁰ If the wounded person is a member of the enemy's armed forces or a civilian in the company of these forces, the wounded will also be covered by the rules on the treatment of prisoners of war.⁴¹ In practice, this means that there will often be a period of time during which both sets of rules apply, i.e., from the time it is clear to Danish forces that a person has a right to the status of prisoner of war and until the treatment of the sick, wounded, or shipwrecked person has been completed or, as far as the shipwrecked person is concerned, until the shipwrecked person has recovered from the situation that led to his rescue. Similarly, the case may be that an injured civilian proves to represent such a threat to the security of the detaining power that internment of that person is found necessary. Reference is made to Chapter 12 for a more detailed determination of the status of a person deprived of liberty and the relevant rules.

When, for instance, members of the armed forces of the enemy are collected and admitted to hospital for treatment and convalescence, they are also prisoners of war.

³⁷ API, Art. 11(3).

³⁸ API, Art. 11(6).

³⁹ These rules are not applicable to NIACs under international law.

⁴⁰ GC I, Art. 5.

⁴¹ GC III, Art. 4 and 5.

This means that they must be registered and reported as both a wounded person and a prisoner of war and that they become eligible for the rights of prisoners of war. It also means that the detaining power may interrogate wounded persons while they are admitted to a field hospital or something similar, but they are still subject to respect for the rules on the protection of medical units, see below. Reference is made to Section 4.8 of Chapter 14 on the shipwrecked in naval warfare.

2.9

Identification of the sick, wounded, shipwrecked, and dead

7.4 The parties to the conflict must in each individual case and as soon as possible record any particulars that may help identify the adverse party's sick, wounded, shipwrecked, and dead persons in the power of such party.⁴²
+ NIAC⁴³

The consideration underlying the rule is to ensure that the family and next of kin of persons held in the custody by a State obtain assurance of the whereabouts and fate of their relatives. The information collected must be passed on to the *national information bureau** for prisoners of war and then to the home country and family of the sick, wounded, shipwrecked, or dead person via the *international central information bureau**, which is set up in Geneva, Switzerland and run by the ICRC.⁴⁴

The efforts to identify the sick, wounded, shipwrecked, or dead commence at the place of collection. It is important to collect the personal effects of the wounded, such as parts of a uniform, bags, or similar objects that may lie scattered across the battlefield and which may contain important information about the identity of the person collected.

If possible, the information should include the following:

- 1) the nationality of the person;
- 2) military service number/employee number;
- 3) full name;
- 4) date of birth;
- 5) any other particulars shown on the identity card or disc. Note, however, that the identity card may not be taken from the wounded person;
- 6) date and place of capture or death; and
- 7) wounds, illness, or cause of death.

⁴² GC I, Art. 16, GC II, Art. 19, and UNSG Bulletin, Section 8(a).

⁴³ ECHR, Art. 8, and CCPR, Art. 17.

⁴⁴ GC III, Art. 122. The bureau is not used in NIACs.

The rules on recording of information about the sick, wounded, shipwrecked, and dead are supplemented by human rights rules and practice in terms of the right to respect for family life, including information about family members' whereabouts, fate, and right to reunion, etc.⁴⁵ This applies particularly to NIACs in which the regulation of international humanitarian law is sparse.

3. Medical and religious personnel – duties and protection

An efficient medical service with well-educated personnel is a condition for effective protection of the sick, wounded, and shipwrecked in an armed conflict. It is also important that the medical personnel enjoy protection under international law and that this protection is respected by the parties to a conflict. The parties' respect for the medical services is closely related to the medical personnel's restraint from committing acts that are not related to medical services and that can be harmful to the enemy.

3.1

Definitions of various groups of medical personnel

Medical personnel are those persons assigned exclusively to medical purposes by a party to a conflict.⁴⁶ Such personnel are traditionally referred to as **permanent medical personnel**. The term may be a little misleading since, today, it is recognised that permanent medical personnel do not necessarily work as such during the entire conflict. Permanent medical personnel are protected even though their function may vary over the course of the entire conflict.⁴⁷ An obvious example is a reserve doctor who is deployed in an international operation but exclusively to serve as a doctor on a specific team. It has no effect on the protection of the doctor in question that he had been deployed with a *CIMIC** (combatant) function in a previous team in an earlier phase of the same mission.

The rule is designed to ensure the protection of the permanent medical personnel for as long as the function of the personnel is to perform medical duties. Moreover, the rule offers some flexibility on the personnel side for the parties to the conflict and

⁴⁵ See, for instance, ECHR, Art. 8, and CCPR, Art. 17.

⁴⁶ AP I, Art. 8(c).

⁴⁷ AP I, Art. 8(k).

paves the way for increased protection of the sick and wounded through temporary allocation of combatants to the performance of medical duties as medical personnel and vice versa.

However, it remains a condition for protection that the medical personnel are exclusively devoted to the performance of medical duties during the designated period. The opportunity must not be exploited to provide “false protection”— for example, if combatants, during their return from the battlefield, are assigned the status of medical personnel for the specific purpose of allowing for withdrawal from an area of operations under an increased level of security. If the status of medical personnel changes too often, the general trust in the protection of medical personnel or the protective emblem will be compromised. On the other hand, in some cases, the addition of medical resources will quite obviously be able to facilitate the protection of a large number of sick and wounded persons. Danish practice in the area must balance these considerations.

Example 7.2: Example of medical personnel who do not perform the functions of such personnel during the whole conflict:

In an international military operation, an assessment determines a need to boost medical efforts in the mission area. The battalion commander, therefore, decides to convert personnel from the logistics company into medical personnel for the purpose of performing medical duties with effect for the remainder of the team's tour. The personnel are relieved from the logistics company and issued with a new type A-2 identity card and, subsequently, perform medical duties exclusively.⁴⁸

Auxiliary medical personnel are combatants who have been specifically trained to provide first aid and perform other medical duties if the need should arise. These are members of the armed forces, i.e., combatants who have received specific training, should the need arise, to serve as orderlies or other medical personnel for the purpose of treatment, search, collection, evacuation, or the like. They still enjoy protection when performing such duties.⁴⁹ For instance, Danish army groups of all military capabilities have been assigned such an “**auxiliary medic**” with specific training in first aid and equipment for the purpose of providing the necessary medical assistance if the need should arise.⁵⁰

Given the new comprehensive rules of AP I, the term ‘medical personnel’ means both military and civilian medical personnel/healthcare personnel. In addition, the term includes medical personnel with national aid societies who have been duly

⁴⁸ DPO OHS 404-1 2016-03.

⁴⁹ GC I, Art. 25.

⁵⁰ This section applies also to NIACs.

recognised and authorised by a party to a conflict and neutral international aid societies and humanitarian organisations made available to a party to a conflict by neutral States or other non-belligerent powers.

The **duties of the medical service** comprise not only any activity related to the collection, evacuation, and treatment of the sick, wounded, shipwrecked, and dead. Preventive healthcare functions, pharmacists, and dentists are also included. In addition to doctors and nurses, the term ‘medical personnel’ also covers administrative staff, porters (handlers), ambulance drivers, etc. The idea underlying this broad definition is that such functions also need to work if the protection of the sick, wounded, shipwrecked, and dead is to be effective. On the other hand, there are requirements that medical personnel are designated to perform such duties exclusively although the parties to a conflict may assign the personnel on a permanent or temporary basis, see above.

3.2

The extent and status of protection for persons deprived of liberty

7.5 All medical personnel – military and civilian – must be respected and protected under all circumstances and the above-mentioned “auxiliary medic” must be respected and protected to the extent that this person, in fact, performs these medical duties.⁵¹

+NIAC⁵²

First and foremost, to respect and protect means that the parties may not direct hostilities against protected personnel. It also means that the parties must seek to establish conditions under which the medical personnel can perform their duties.⁵³ Medical personnel may not be compelled to perform acts or to refrain from performing acts contrary to the rules of medical ethics or to other rules designed for the protection and care of the sick, wounded, and shipwrecked.⁵⁴

Permanent medical personnel who fall into the hands of the enemy may **be deprived of liberty** only to the extent and only for as long as required by the number, state of health, and spiritual needs of prisoners of war. Medical personnel are not deemed prisoners of war but nevertheless enjoy the same treatment as prisoners of war for

51 GC I, Art. 24 and 25, GC II, Art. 30, and UNSG Bulletin, Section 9.4.

52 AP II, Art. 9, and SCIHL, Rules Nos. 25 and 27.

53 GC I, Art. 12 and 15, AP I, Art. 16, and AP II, Art. 9(1) regarding NIACs.

54 AP I, Art. 16(2), and AP II, Art. 9(1) regarding NIACs, and SCIHL, Rules No. 26.

as long as they remain deprived of liberty, and they may only be ordered to perform their medical and spiritual duties on behalf of prisoners of war – preferably, those of the armed forces to which they themselves belong.⁵⁵

Auxiliary medics must be considered prisoners of war in the event that they are deprived of liberty. While held in captivity, they must be employed for medical duties in so far as the need arises.⁵⁶ If, when being deprived of liberty, they were in the process of performing duties as an auxiliary medic, the enemy must allow the medical duties to be completed before the deprivation of liberty becomes effective.⁵⁷

The rules on deprivation of liberty also apply to NIACs.⁵⁸

3.3

The cessation of protection for medical personnel

Medical personnel must be respected and protected on the condition that they do not commit acts harmful to the enemy. This does not include any harmful effect on the enemy that may be the result of medical personnel's contribution to the maintenance of their own forces' combat capability through medical treatment and recovery.⁵⁹ Therefore, it is essential to establish what acts outside the medical duties may be said to be harmful to the enemy. These rules apply also to NIACs.⁶⁰

GC I, Art. 22 gives examples of circumstances related to medical units that **cannot be regarded as acts harmful to the enemy**. The provision is also assumed to be of guidance for acts carried out by medical personnel. Of greatest relevance to the medical personnel is the rule that the protection will not cease even if the medical personnel carry **light individual arms** for self-defence or defend the sick, wounded, and shipwrecked in their charge.⁶¹ Individual arms are arms that are traditionally provided to and used by a single person, i.e., pistols, rifles/carbines, and machine pistols and guns up to and including 7.62 mm calibre weapons.

A classic example of lawful use of force is a situation in which thieves or robbers try to plunder field hospitals, or when an attempt is made to gain unauthorised access

⁵⁵ GC I, Art. 28, and GC II, Art. 37.

⁵⁶ GC I, Art. 29.

⁵⁷ AP II, Art. 9(1).

⁵⁸ AP II, Art. 9(1).

⁵⁹ GC I, Art. 21-22 by implication.

⁶⁰ SCIL, Rules Nos. 25 and 27.

⁶¹ GC I, Art. 22(1), as read with AP I, Art. 13(2)(a).

to patients in order to commit acts of violence or prevent patients from receiving the treatment they need. Situations may also arise in which the enemy attacks protected medical personnel in violation of IHL. In such situations, the medical personnel must be able to defend themselves and the sick and wounded persons in their charge without any effect on their protection.

The enemy in the conflict may not attack but may lawfully capture medical units and installations. This being the case, the medical personnel may not use arms to prevent the enemy from capturing a medical installation. If they do so, they lose their protection instantly.

The direct use of arms against the enemy in the conflict or its military objectives by medical personnel, apart from self-defence, will result in a loss of protection — not only of the personnel in question but, potentially, of the entire medical unit. The same applies to notification of observations of enemy movements or disclosure of any information obtained by the medical personnel to its own forces, for example, when a member of the medical personnel overhears a conversation between the sick or wounded person of the enemy admitted to a field hospital.

Other circumstances may also result in cessation of the protection of medical personnel, e.g., acts falling outside the medical duties that, at the same time, are harmful to the enemy. In this context, no direct harmful effect is required. It suffices if the effect is of a more indirect character.

In 2012, the Danish Military Prosecution Service investigated two independent cases from DANCON/ISAF involving chaplains who, according to the information at hand, had taken part in various activities that apparently were outside their ecclesiastical duties and harmful to the enemy. In one case, a chaplain had thrown an improvised explosive charge. In the other case, a chaplain had helped lift a crate of 12.7 mm ammunition on to an armoured personnel carrier. Both cases illustrate situations that clearly fall outside the boundaries of a chaplain's duties and result in a loss of the protection to which the two chaplains are entitled under the Conventions.⁶²

The protection of medical units does not cease until a **warning** has been issued. The idea underlying this rule is that the cessation of protection has potentially severe consequences for both the medical unit and patients under its protection. Where feasible, the warning issued must also be accompanied by a reasonable time limit within which the enemy is given the opportunity to correct the behaviour that is in violation of the Conventions or eliminate any misunderstandings in that respect

62 Danish Military Prosecution Service, annual report 2012, pp. 78–79.

and to evacuate the sick and wounded before a potential attack is conducted against the unit. **This rule does not apply to individual medical personnel who lose their protection instantly and, therefore, may be attacked without warning.**

Medical units are sometimes located in the vicinity of military units. In these cases, pressure on medical personnel to take part in performing duties in the camp is often part of their everyday life. The medical personnel may appear to be disloyal when their infantry colleagues return to the camp exhausted from a full day's patrol and then, immediately upon their return, have to stand guard at the camp, while the medical personnel have not performed any medical duties all day long. Yet, if medical personnel stand guard for military units, this alone constitutes an act that is harmful to the enemy. The same is true if medical personnel were to clean weapons or otherwise maintain military equipment. On the other hand, an extra cleaning or cooking job will typically fall below the threshold for acts qualifying as harmful to the enemy.

Against this background, it is important to prepare guidelines for medical personnel with respect to their work and, for example, their duties and the resort to use of force. The rules must also be assumed to apply to NIACs.

3.4 Specifically on religious personnel

The tradition of treating religious personnel on an equal footing with medical personnel dates back to the 17th century and has been associated ever since not only with pastoral care for the sick, wounded, dying, and dead but also with dialogue with soldiers and crew in good health who might have such a need. Religious personnel who are members of the armed forces enjoy the **same protection as the medical personnel** and on the same terms⁶³. The functional protection, however, is only related to the chaplain's spiritual duties rather than medical.

As in the case with medical personnel, the efforts of religious personnel may promote military operations and, thus, have a harmful effect on the enemy. In this case, too, such activities do not result in cessation of the protection of the religious personnel as long as their activities fall within the boundaries of their religious duties. The Danish Defence has described the framework for "religious services in the Danish Defence" in more detail.⁶⁴

63 Applies also to NIACs, see AP II, Art. 9, and SCIH, Rule No. 27.

64 DPS OHS 492-1 2011-10 about religious services in the Danish Armed Forces.



Field service in Afghanistan: Avisen.dk

4. Medical units, medical transports, and medical equipment

4.1

Special considerations for medical units

7.6 Medical units must be respected and protected at all times. A medical unit may not be made the object of attack⁶⁵ or used in an attempt to shield military objectives from attack by the enemy.⁶⁶ In so far as possible, medical units must be situated in such a manner that lawful attacks against military objectives in the vicinity do not imperil them.⁶⁷ +NIAC⁶⁸

Medical units are establishments and other units, whether civilian or military, organised for purposes exclusively related to the search for, collection, transport, and diagnosis or treatment of the sick, wounded, and shipwrecked or to the prevention of disease. Examples are civilian and military hospitals, medical clinics, healthcare centres, medical depots or blood transfusion centres but may also be battalion aid posts or collection points for the sick and wounded. Medical units may be fixed or mobile, permanent or temporary.⁶⁹

The conditions for the protection of **civilian medical units** are:

- that they belong to one of the parties to the conflict;
- that they have been recognised and authorised by the competent authorities of the party to the conflict. This may typically be the case with national Red

⁶⁵ AP I, Art. 12(1), GC I, Art. 19, and ICC Statute, Art. 8(2)(b)(ix) and (xxiv) and (e)(ii) and (iv).

⁶⁶ AP I, Art. 12(4).

⁶⁷ GC I, Art. 19, AP I, Art. 12(4), and UNSG Bulletin, Section 9.3.

⁶⁸ AP II, Art. 11(2), and SCIH, Rule No. 28.

⁶⁹ AP I, Art. 8(e).

Cross movements or other non-governmental humanitarian organisations operating in the medical area. The units may also be private hospitals and medical clinics; or

- that they have been made available for humanitarian reasons to a party to a conflict by other States or organisations recognised and authorised in the State making them available.

Above all, the obligation to respect and protect medical units involves an obligation to refrain from directing a **physical attack** against the unit. On the other hand, the enemy's lawful capture of medical units is recognised. For example, the case may be that a fixed medical unit has been surrounded by the enemy during its advance or that a mobile medical unit falls into enemy hands while changing location.

The right to capture medical units, transports, and equipment is not regulated in NIACs. The issue, therefore, remains unresolved in international law. It seems most consistent, however, to require the same respect for the enemy's medical units in NIACs. So, Danish forces should apply the same set of rules to NIACs.⁷⁰

It cannot, however, be assumed that the State party/States parties to a NIAC recognise(s) the right of OAGs to capture medical units. In the meantime, this does not mean that the medical personnel of the State party may use weapons against advancing units of OAGs.

Once the party to a conflict has captured a medical unit, it must allow the medical personnel of the enemy to continue the treatment of patients under care until it is possible and safe for the capturing party itself to assume control of the medical unit and the patients therein.⁷¹

This underlines another aspect of the obligation to respect and protect medical units: respect for the medical work. The example above illustrates the obligation to give the medical unit a free hand to continue the treatment, etc., of the sick and wounded in the charge of the unit at the time of capture. The obligation also means that it is prohibited to prevent supplies from reaching the medical units. An occupying power is subject to more extensive obligations in this respect. These are considered in Chapter 11.

⁷⁰ Addendum 7.1.

⁷¹ GC I, Art. 19.

The party conducting an attack against a military objective is under an obligation to meet requirements for the identification of military objectives (distinction), proportionality, and taking precautions; but, even with these rules, the party will not in every case be prevented from conducting attacks against military objectives that are located with – or in the vicinity of – medical units, which may suffer serious damage in connection with such lawful attacks.

Hence, the obligation to refrain from attacking a medical unit does not provide absolute protection for medical units against damage or injury from attacks against military objectives in the vicinity. If a party to a conflict, upon due consideration, decides to establish a medical unit in the vicinity of military units or other objectives, the medical unit, its personnel, and any patients therein will be imperilled. At the same time, attempting to shield military objectives behind the marked medical units protected under international law constitutes a war crime. This applies regardless of whether the attempt is made in connection with the establishment of the medical unit in the vicinity of military objectives or through a deliberate establishment of a military unit in a manner that places the medical unit between its own and enemy forces in order to use the protected medical unit as a shield against such attacks. The decisive difference between lawful decisions to establish medical units in the vicinity of military objectives and the use of medical units as a shield for military objectives is the intention behind the joint location. However, the premise remains clear that Danish forces must strive to keep a certain distance between military objectives and medical units. Reference is made to Chapter 8 for more information about military objectives.

The **protection of medical units will cease** if a unit is used for purposes outside its medical duties that are harmful to the enemy. The consequence of the cessation of the protection is that the medical unit becomes a military objective. In the light of the seriousness of this consequence, including for the sick and wounded receiving treatment from the unit, a party to a conflict that ascertains such use must issue a warning with a direction to end the behaviour in violation of the Conventions within a reasonable time limit; see also the section on the cessation of protection for medical personnel above.⁷²

No list of activities that may lead to the cessation of the protection of a medical unit has been prepared, but there are examples of conditions that **do not deprive medical units of their protection**.⁷³

⁷² GC I, Art. 21, and AP II, Art. 11(2).

⁷³ GC I, Art. 22, and AP I, Art. 13 (as regards civilian medical units).

Therefore, a medical unit **will not be deprived of protection** even if

- 1) the personnel of the unit or establishment are armed and use the arms for self-defence or to defend the sick and wounded in their charge;
- 2) the unit or establishment, in the absence of armed orderlies, is protected by a picket or by sentries or by an escort;
- 3) small arms and ammunition taken from the wounded and sick and not yet handed to the proper service are found in the unit or establishment;
- 4) personnel and material of the veterinary service are found in the unit or establishment without forming an integral part thereof; or
- 5) the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.

As regards item no. 2, it is noted that such pickets may not exceed in their use of force that allowed by armed medical personnel, i.e., force may be used exclusively to prevent or stop an unlawful attack against the unit and, thus, may not be used to prevent capture by the enemy. Such pickets will become prisoners of war if they fall into the hands of the enemy in connection with the capture of the medical unit, for instance.

Apart from these cases, the protection of a medical unit will cease if the medical unit is used to hide combatants in good health. The fact that patients are paid a visit by colleagues in good health does not lead to cessation of protection. However, such visits should be limited in order not to compromise the protection of the medical unit as a result of the presence of a large number of combatants who constitute a military objective even when they are visiting patients.

There are examples of hospital roofs being used as a platform for marksmen or observation posts or for military communication equipment. Such use results in the cessation of protection of the unit even if the hospital management is unaware of such activity. The cessation of protection still requires that the situation has not been rectified despite a warning, accompanied by a reasonable time limit for ending the activity that is in violation of the Conventions.

Example 7.3: A Danish medical unit is located in the vicinity of the battlefield as are other logistical units. The medical unit will sometimes get information that is relevant to the Danish armed forces for understanding the threat scenario. In such cases, the protection of the unit is not assumed to cease if the information passed on is of importance to the medical unit's own protection. For instance, the information could concern the planting of an IED* or mines in the vicinity of the medical unit. The opposite is the case if the information has been collected from the enemy's wounded who are being cared for by the unit and then passed on. If a patient wants to disclose information, reference must be made to an intelligence officer or the like.

4.2

Special considerations on medical transports

A **medical transport** means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a party to a conflict.⁷⁴

Medical transports by land are referred to as ‘medical vehicles’. Medical transports by air are referred to as ‘medical aircraft’, but transports by water have multiple names, including hospital ships, coastal rescue craft, or medical ships and craft. Chapters 13 and 14 provide more information about naval and air operations, respectively.

In general, the principles underlying the protection of medical units apply also to medical transports. Medical transports must be respected and protected on the same terms.

The reason that medical transports are nevertheless regulated separately in international law is their mobile and flexible character.

7.7 Medical vehicles must be respected and protected in the same way as mobile medical units,⁷⁵ including loss of protection if the medical vehicles are used for non-medical purposes that are harmful to the enemy. +NIAC⁷⁶

Example 7.4 of use for non-medical purposes that is harmful to the enemy and which results in the cessation of the protection of the medical vehicle

On a patrol, a medical vehicle is standing on a crest and, therefore, the conditions for sending and receiving radio signals are favourable. A unit requests the use of the medical vehicle as a relay station for communication with the command post about observations in the area. If the request is complied with, the use serves as an example of how a medical vehicle can be used for a non-medical purpose that is harmful to the enemy, which will result in the cessation of the protection of the medical vehicle.

Example 7.5 of use for a non-medical purpose that is harmful to the enemy and which may result in the cessation of the protection of the medical vehicle

A roadside bomb has hit a Danish patrol vehicle. A medical vehicle arrives at the scene and the personnel take over the treatment initiated by the patrol’s auxiliary medic. When the injured personnel have been placed in the medical vehicle or evacuated from the scene by a medical helicopter, the medical vehicle still has room. Of the personnel riding in the patrol vehicle when the vehicle was hit, one seriously injured member has been evacuated by air, one member apparently has superficial wounds, and one has apparently not received any

⁷⁴ AP I, Art. 8(g).

⁷⁵ GC I, Art. 35-36, AP I, Art. 21, and UNSG Bulletin, Section 9.5.

⁷⁶ AP II, Art. 11, and SCIHL, Rule No. 29.

physical injury but feels dizzy and would like a ride back to the patrol base as soon as possible. He is allowed a ride back by the medical platoon commander who is on board the medical vehicle. The medical platoon commander is entitled to transport the dizzy Danish soldier in the medical vehicle if his decision is based on the medical assessment that the dizzy soldier suffers from such mental combat injury that he is in need of treatment or the assessment that he had better take the soldier along for a more thorough examination of his physical and mental health following the violent incident. However, if the assessment is that the dizzy soldier does not require treatment, he may not be transported by a medical vehicle.

If a medical vehicle is **captured**, it may be used for any purpose.⁷⁷ If the vehicle is to be used for non-medical purposes, any markings must first be removed. The same considerations behind showing reticence to convert medical personnel, however, must also be assumed to apply to medical vehicles. Reference is made to Section 2.8 of Chapter 10 about the use of enemy vehicles after having captured them as war booty.

Example 7.6 of ad hoc conversion in violation of GC I

A Piranha type medical vehicle is on an operative mission with an infantry platoon in an armed conflict. It turns out that the medical transport was not needed; whereas an armoured personnel carrier broke down, and, as a result, six infantrymen need a ride back. It would be tempting to use the Piranha vehicle to take the six infantrymen back after covering of the protective emblem. Such an ad hoc conversion of the character outlined in the example would bend the rules too much. However, it would be in compliance with the relevant rules to alter the status of a medical vehicle into an infantry vehicle as part of an overall logistical restructuring.

When a party to the conflict has just captured a medical vehicle, it has that vehicle at its free disposal from the time of capture and may remove the protective emblem and use the vehicle to transport troops or the like.

However, the enemy must first ensure that any patients in the vehicle receive proper care and treatment. In some cases, the driver of the vehicle is not a member of the medical personnel. This does not affect the protection of the medical transport. However, in the event that the medical vehicle is captured, the driver will be considered a prisoner of war, and (see above) this will be the case even if the driver in question has been assigned the status and been issued the protective emblem of temporary medical personnel (auxiliary medic).⁷⁸ If the vehicle bears the protective emblem at the time of capture, the emblem must be removed or obscured if the vehicle is intended to be used for purposes other than medical purposes.

⁷⁷ GC I, Art. 35, second paragraph.

⁷⁸ GC I, Art. 25.

Medical convoys transporting sick and wounded civilians must be respected and protected and may not be made the object of attack.⁷⁹ They must bear the protective emblem with the permission of the State to which they belong.

4.3

Special considerations with respect to material used by medical units

7.8 The material of mobile medical units of the armed forces which fall into the hands of the enemy must be reserved for the care of wounded and sick.

In the event that material of the armed forces' fixed medical units is captured, it may be used for other purposes in accordance with the general principle of war booty unless the material in question, etc., is required for the care of the wounded and sick. Even if such medical material may be required for the care of wounded and sick, however, military commanders may, in case of urgent military necessity, decide to use the material, etc., in question for other purposes provided that prior measures are taken for the continued care for patients at the fixed medical unit.⁸⁰

+NIAC⁸¹

5. Identification of medical personnel, etc.

The parties must respect and protect the work undertaken by the medical services. This means, for instance, that medical personnel and units may not be attacked.⁸² This also means that medical personnel may not be taken as prisoners of war. Similarly, as described above, auxiliary medics enjoy some form of protection.

The premise for being able to afford this protection is that the medical services can be identified. The display of the protective emblem is to facilitate the enemy's identification of protected personnel, and the special identity card is to facilitate the identification of medical personnel who fall into the hands of the enemy.

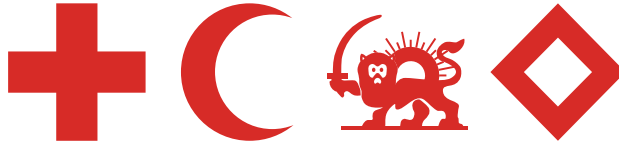
An identity card may have been lost or a Red Cross emblem removed. In such cases, the personnel maintain their protection as medical personnel under international law even though their identification may be rendered difficult for the enemy if these exterior distinctive emblems are not present.

⁷⁹ GC IV, Art. 21, see Art. 18.

⁸⁰ GC I, Art. 33, and UNSG Bulletin, Section 9.5.

⁸¹ Addendum 7.2.

⁸² SCJHL, Rule No. 30.



Protective emblems of medical services and their use

With the adoption of the Geneva Conventions, States decided that the protective emblems to be used to mark medical personnel, material, transports, and units must be a red cross, a red crescent, a red lion and sun⁸³, and/or a red rhombus (known as the Red Crystal in everyday parlance),⁸⁴ against a white background. Moreover, AP III permits the use of the Red Crystal with one of the other emblems inserted into it. Moreover, when Israel became party to the Geneva Conventions, it announced its reservation to use the red six-pointed Star of David against a white background, instead.

Denmark uses the Red Cross, which has been used and recognised as the emblem for protection of medical services since 1864. In addition to the protective emblems, a number of radio signals and audio-visual signals have been adopted under AP I for (optional) use by medical transports and units in the event of poor visibility.

Furthermore, national Red Cross and Red Crescent Societies are permitted to use the emblems to indicate their activities in the area in both time of peace and in armed conflict pursuant to more detailed regulation in national legislation.⁸⁵ The international Red Cross organisation and their properly authorised personnel may use the Red Cross against a white background at all times.⁸⁶

7.9 Medical personnel are always entitled to display a distinctive emblem. Unless a properly authorised military commander has specifically granted medical personnel and chaplains permission not to display the protective emblem in the form of a white armlet with a red cross on the left upper arm, they are under an obligation to wear such armlet.

+NIAC⁸⁷

The armlet must bear a stamp affixed by the relevant authority of the Danish Defence.

83 GC I, Art. 38, GC II, Art. 41, and GC IV, Art. 18 and Art. 20, and AP I, Art. 18, with Annex 1.

84 AP III.

85 Circular Letter No. 9738 of 21 March 2002 on the Red Cross Emblem for the police and the prosecution service.

86 GC I, Art. 44.

87 AP II, Art. 12.

The identity and protected status of the personnel shall also be made evident on the standardised identity card issued to medical personnel.⁸⁸ Medical personnel may under no circumstances be deprived of the right to bear the protective emblem, but exceptional situations may arise in which the military commander, at battalion level or higher in Denmark, may permit medical personnel to refrain from bearing the Red Cross emblem.⁸⁹

Example 7.7 of exceptional permission for medical personnel not to display a distinctive emblem

As regards the Danish forces of ISAF, Afghanistan, it has been customary practice for a period of time to recommend medical personnel not to display a distinctive emblem. The recommendation was motivated by a series of examples in which the enemy in the conflict, the Taliban, had apparently conducted attacks directly against medical vehicles and personnel on a number of occasions in violation of the relevant rules of international law. Under these extraordinary circumstances, the assessment was that both the medical personnel and the sick and wounded attended by the medical personnel were better protected by the camouflage of vehicles' markings and by the medical personnel leaving off any display of a distinctive emblem.

The use by the Danish Defence of the protective emblem shall be subject to regulatory control. Any decision to omit the display of a distinctive emblem in extraordinary cases or to camouflage transports or units must be made by the relevant military commander and not by individuals or drivers.

Any **auxiliary medic** who has received training to assist in the collection, evacuation, or treatment of the sick and wounded, if the need should arise, must wear a white armlet with a red cross and the stamp of the military authority for as long as the medical assistance is provided.⁹⁰ The red cross on these armlets must be smaller than the ones used by the permanent medical personnel. The auxiliary medics must be issued with a special identity card that indicates their special status in the event that they should be deprived of liberty as a prisoner of war.

Civilian personnel engaged exclusively in the treatment of the sick, wounded, and shipwrecked should bear a distinctive emblem and a civilian identity card that certifies their status in areas in which hostilities take place or are likely to take place.⁹¹

Medical units and medical transports normally indicate their protected status by displaying the Red Cross flag and/or a permanent emblem on buildings and vehicles,

88 GCI, Art. 40, and DPO OHS 404-1 on smartcard identity cards in the Danish Armed Forces.

89 See also NATO STANAG 2931.

90 GCI, Art. 41.

91 AP I, Art. 18(3), and AP I, Annex 1, Art. 1-3.

etc. As regards medical units, the protective emblem must be placed on the roofs of buildings/tents to the extent possible as well as walls, so that the protected status of the units is clearly visible from both the air and the ground.⁹²



Credit: Danish Defence

The rules on marking medical units and transports do not mean that the Danish flag, the Dannebrog, or the UN or NATO flag in relevant cases cannot be displayed concurrently.

The obligation to mark medical units and transports is the clear starting point, but there is no absolute requirement for marking in international law.⁹³

In consideration of the protected status of medical work and, ultimately, the protection to which the sick, wounded, and shipwrecked are entitled, the parties to a conflict must strive to mark medical units and transports. Therefore, there must be vital reason for not marking medical units and transports or for camouflaging or obscuring the emblem. Vital reasons might exist in cases in which military units are placed together with medical units or transports and the commander, for reasons of operational security, wants to obscure the conspicuous marking to prevent the location of the unit from being revealed. Another situation might be one in which, by obscuring the emblem or not displaying it, the military commander wants to counter any doubt as to whether the protected units or vehicles are being used as a shield against lawful attacks.

Medical equipment should bear the protective emblem. It is not possible to mark individual elements, but efforts should be made to mark the packaging.⁹⁴

⁹² GC I, Art. 42, see Art. 39.

⁹³ See the wording of AP I, Art. 18, as compared with GC I, Art. 42, see Art. 39.

⁹⁴ GC I, Art. 39.



Credit: Danish Defence

The protective emblems may exclusively be used for marking medical personnel, equipment, units, and transports.⁹⁵ Reference is made to Section 2.3 of Chapter 10.

6. The dead

The procedures for handling dead Danish soldiers will always attract considerable and justified attention. The Danish Defence has very detailed provisions for handling cases in which Danish soldiers die in international service. The provisions and procedures of the Danish Defence have been laid down on the basis of the respect for the soldiers who have had to pay with their lives for the cause for which they fought. Therefore, it is important for the Danish Defence that the remains of Danish soldiers are secured, that an inquest and an autopsy, if necessary, are carried out by the proper authorities, and that any special circumstances surrounding the death are looked into.⁹⁶ It is also important that the family members of the deceased are notified of the death and its circumstances and that burial can take place in Denmark in the manner requested by the deceased. The Danish Defence has established these procedures out of respect for the deceased and their next of kin.

The rules of international law on dead and missing persons are based on this respect for the dead person and on the family's need to know the fate of their relatives.

⁹⁵ GC I and GC II, Art. 44, AP II, Art. 12, ICC Statute, Art. 8(2)(b)(vii), Section 36(1) of the Danish Military Penal Code and UNSG Bulletin, Section 9.7.

⁹⁶ See, for instance, the Military Prosecutor General's statement no. 5/2016 and DHS OHS 963-1.

6.1

Protection of the dead

7.10 To the greatest possible extent, the parties to a conflict must search for the dead and prevent their ill-treatment or pillage.⁹⁷ The rules apply regardless of the nationality of the dead or whether they are civilians or members of the armed forces of the parties.⁹⁸ +NIAC⁹⁹

More particularly, a search is to be undertaken after an engagement, and the parties to a conflict are under an obligation to search for the dead on the battlefield, including the dead of another nationality. However, no obligation exists to search the battlefield if the hostilities continue or security risks exist, or if no personnel are present on the ground.

To the extent permitted by military considerations, a search must also be performed for civilians killed in action, and they must be protected against pillage and other ill-treatment.¹⁰⁰ The parties to a conflict are also encouraged to agree on arrangements for search teams that consist of representatives of both parties and which have been put together for the specific occasion. These teams must search for the dead — including, in particular, civilians — after the end of the hostilities and remove any dead found. Such teams must be respected and protected by the parties to the conflict while carrying out their duties.¹⁰¹

6.2

Examination of the dead

Bodies must be **evacuated from the area** to protect them against pillage or other ill-treatment and to establish the identity and cause of death as part of the information to be communicated to the *national information bureau**. Prior to such evacuation, all body parts must be collected to the extent possible along with personal effects assumed to belong to the deceased. In this respect, the purpose is to protect the deceased from pillage and other ill-treatment but also to facilitate the identification of the deceased.

The body must be **examined** with a view to confirming the cause of death prior to

⁹⁷ GC I, Art. 15, and GC II, Art. 18.

⁹⁸ GC IV, Art. 16.

⁹⁹ AP I, Art. 8, and SCIHL, Rules Nos. 112 and 113.

¹⁰⁰ GC IV, Art. 16, second paragraph.

¹⁰¹ AP I, Art. 33(4).

burial, cremation, or return. According to the Danish rules, this act may formally be carried out only by a doctor unless the condition of the body is incompatible with life, e.g., because the head has been severed from the body or because the trauma after a detonation or the like leaves no doubt that death has occurred.¹⁰² Moreover, a death certificate must be issued to provide the basis for the information that is sent to the home country of the deceased and then on to the next of kin.¹⁰³ This death certificate should be issued by medically qualified personnel. Medical examinations of dead civilians or combatants of the enemy may be done to the extent required to establish the cause of death or to clarify any suspicious circumstances surrounding the death.

As demonstrated by the review in Chapter 12, Denmark is subject **to increased responsibility for persons held in Danish custody**. Part of this increased responsibility has to do with protecting a person deprived of liberty, including the life of that person. Both the rules on the treatment of prisoners of war¹⁰⁴ and the rules on the treatment of internees¹⁰⁵ entail increased obligations for Denmark in the event that a death occurs while the deceased is held in the custody of Denmark.

If a person deprived of liberty dies while held in Danish custody, and death is suspected to have been caused by the acts or omissions of another person while the person was held in Danish custody, or the cause of death is unknown, an official enquiry of the death must be initiated.¹⁰⁶ The enquiry shall include the examination of witnesses, including other persons deprived of liberty. Such an enquiry must include forensic examinations of the body and the necessary technical examinations of the personal effects of the deceased.¹⁰⁷ If such examinations lead to a suspicion against one or more persons, the Danish authorities must take all measures to ensure prosecution.¹⁰⁸

6.3

Identification and notification

7.11 The parties to a conflict must record available information about dead and missing persons and communicate such information to the next of kin through channels established for that purpose, including national information bureaus and graves registration authorities.¹⁰⁹

102 DHS OHS 963-1, Section 2.5.3.1, which agrees with GC I, Art. 17 and GC II, Art. 20.

103 GC I, Art. 17, GC II, Art. 20, GC III, Art. 120, and GC IV, Art. 129.

104 GC III, Art. 120 and 121.

105 GC IV, Art. 129-131.

106 GC III, Art. 121, and GC IV, Art. 131.

107 GC III, Art. 121, and GC IV, Art. 131.

108 GC III, Art. 121. See Section 2(ii) of the Danish Military Penal Code.

109 GC I, Art. 16, and GC II, Art. 19.

The information to be recorded and communicated to the national information bureau is:

- 1) Full name of the deceased
- 2) Service number
- 3) Date of birth
- 4) Home country
- 5) Information about time and place
- 6) Cause of death
- 7) Any other particulars shown on the identity disc of the deceased

Annex IV to GC III contains a standard form for notification of the death of prisoners of war. In NIACs outside the territory of Denmark, information of this character may sometimes be communicated through the authorities of the territorial State, which will be able to communicate relevant information within the framework of national rules.

As regards the identification of persons, the necessary information will often be shown on the identity disc and card of the deceased and appear in other personal documents or insignia found on the body. One half of the identity disc is to be removed and sent to the national information bureau together with the particulars set forth above. If the identity disc is not a double identity disc, it must be removed in its entirety and sent to the national information bureau.¹¹¹ Typically, such identification markers mentioned in the Conventions are not found on MOAGs. In this case, identification must be established in another way — for instance, on the basis of other personal documents.

International law does not require it, but it is recommended that **photo documentation** be used in order subsequently to help clarify any doubt about identity or cause of death, etc. Pictures of the dead should be taken under controlled conditions and always in compliance with the provisions on photo documentation set forth by the Danish Defence. Publication of video recordings or photo documentation of the dead may – depending on the circumstances – be regarded as a violation of Article 15 of the First Geneva Convention, which prohibits, for instance, “ill-treatment” of the dead.

110 AP II, Art. 8, and SCIH, Rule No. 116.

111 GC I, Art. 16, and GC II, Art. 19 and Art. 20.

6.4

The personal effects and military equipment of the deceased

7.12 The personal effects and military equipment of a deceased person must be collected.¹¹² Military equipment, including military documents, weapons, uniform, etc., becomes State property when collected as war booty.¹¹³ No Danish military personnel are entitled to appropriate the deceased person's personal effects or items of military equipment.¹¹⁴ +NIAC¹¹⁵

The personal effects of the deceased, including letters, wills and other documents of importance to the next of kin, money, or other articles of an intrinsic or sentimental value, must be collected and sent to the national information bureau together with one half of the double identity disc and a list of the contents of the parcel. Reference is made to Section 2.7 of Chapter 10 for the prohibition on pillage.

6.5

Burial

7.13 The dead must be buried or cremated, individually as far as circumstances permit. If possible, burial must be conducted according to the rites of the religion to which the deceased belonged.¹¹⁶ +NIAC¹¹⁷

In certain cases, the circumstances do not permit an individual burial in accordance with the deceased's preferred rites, etc. This may be the case, for instance, when, after engagement, a small group of infantry is unable to evacuate the dead from the area. An **emergency burial** may then be required.¹¹⁸ Even in these cases, the graves must be able to be relocated and, therefore, should be marked, so that the deceased can later be exhumed for the purpose of proper burial. Such exhumation, which may only take place for the purpose of a proper individual burial, is not to be regarded as an exhumation as defined by international law (see below).

Cremation may only take place if it is in accordance with the religion of the deceased or for imperative reasons of hygiene. However, if the deceased's own wish was to be cremated, this wish must be taken into account to the greatest possible extent. Such

¹¹² GC I, Art. 16, and GC II, Art. 19.

¹¹³ But see GC III, Art. 18.

¹¹⁴ 114 Danish Military Penal Code, Section 38 on looting of the property of the dead.

¹¹⁵ AP II, Art. 4(2)(g) and Art. 8, and SCIHL, Rules Nos. 52, 113 and 114. Addendum 7.3

¹¹⁶ GC I, Art. 17, GC II, Art. 20, and GC IV, Art. 130.

¹¹⁷ AP II, Art. 8, and SCIHL, Rule No. 115. Addendum 7.4

¹¹⁸ See, for instance, NATO STANAG 2070 ATP-92.

a wish may be expressed in written statements found on the body. Upon cremation, the ashes of the deceased must be safeguarded by the graves registration authority until it is agreed with the home country of the deceased how to handle the ashes. In case of cremation, the reason for cremation must be stated in the death certificate.¹¹⁹

The rules in this area aim predominantly at ensuring proper treatment of the deceased and that the next of kin can obtain certainty about the fate of relatives. Therefore, the rules do not prevent the **return of bodies**, so that the deceased may be laid to rest by the deceased's own kin.¹²⁰ In the event a body is returned in this way, it should be documented. The body may be returned to the enemy in the conflict or the family of the deceased. If the deceased is a civilian, the body may be returned to family or relevant civilian authorities. The above identification requirements apply whether or not the deceased is buried, cremated, or returned.

6.6

Graves and exhumation

7.14 Where possible, graves must be grouped according to the nationality of the deceased and properly maintained and marked, so that they can always be found.¹²¹

For NIACs, this is governed exclusively by AP II, Art. 8, with a more general wording. The consideration here seems to be that, during NIACs, the territorial state will typically have laws that fulfil such fundamental requirements for burial and respect for the dead, etc.

Not later than at the outbreak of hostilities, a national graves registration authority must be appointed or established with responsibility for registration of graves and safeguarding of the remains of the deceased when the deceased has been cremated.

Moreover, as soon as circumstances permit, the parties to a conflict are encouraged to conclude an agreement with the adverse party on access to the graves by relatives of the deceased, maintenance of graves, and the return of the remains, etc., of the deceased to his or her home country.¹²²

119 GC I, Art. 17, and GC III, Art. 120(5).

120 GC I, Art. 15-17, and GC II, Art. 18-21.

121 GC I, Art. 17(1), and AP I, Art. 34(1).

122 AP I, Art. 34(2).

In the absence of such agreements, the State on whose territory the graves are situated may offer to facilitate the return of the mortal remains of the deceased to the deceased's home country. If the home country, within a period of five years, does not accept such an offer, the territorial State may, after due notice has been given to the home country, deal with the grave sites in accordance with its own laws relating to cemeteries and graves.¹²³

Exhumation may only take place in the instances outlined above on repatriation or the treatment of graves in accordance with national legislation or if exhumation is a matter of overriding public necessity for medical or investigative reasons. The mortal remains must always be treated with respect, and notice must be given to the home country of the intention to exhume the remains together with details of the intended place of reinternment.¹²⁴

7. The work of humanitarian organisations with the sick, wounded, shipwrecked, and dead

7.15 Even in invaded or occupied areas, States must permit the inhabitants or voluntary relief societies spontaneously to collect and care for wounded and sick.¹²⁵ +NIAC¹²⁶

Humanitarian organisations will be present in any armed conflict in the countries of conflict. Some of these organisations, including voluntary aid societies, assist in the collection, evacuation, and treatment of the sick and wounded or in reuniting families that have been separated as a result of the conflict.

In conflicts sanctioned by the UN Security Council, resolutions, etc., may contain text about the tasks relief societies may perform and the framework thereof. If this is the case, the rules of IHL in the area are to be interpreted and construed in an international law context.

The parties to a conflict may appeal to the civilian population or voluntary aid societies for assistance in collecting and treating the sick and wounded.¹²⁷ If a party to a

123 AP I, Art. 34(3).

124 AP I, Art. 34(4).

125 GC I, Art. 18, see Art. 9, and AP I, Art. 17.

126 AP II, Art. 18.

127 AP II, Art. 18.

conflict avails itself of this option, such actors must be granted, subject to military consent, the necessary framework to do their work.

In besieged or encircled areas, the controlling party to the conflict must endeavour to conclude local agreements with the enemy and any voluntary aid societies, etc., to ensure that the sick and wounded, aged persons, children, and maternity cases can receive the assistance required by their condition.¹²⁸ Moreover, IHL sets out rules on the passage of relief consignments to the civilian population, the reunion of dispersed families, etc.¹²⁹ These rules are dealt with in more detail in Chapter 6 on civilians and the civilian population.

8. Hospital zones

In time of peace or after the outbreak of the conflict, the parties to a conflict may decide to establish hospital zones in order to improve the conditions for the treatment of the sick and wounded. GC IV also paves the way for the protection to include aged persons, persons with disabilities, children under 15, and expectant mothers.¹³⁰ Hospital zones may be established in territories under the control of the relevant party, including occupied territory. However, hospital zones have no legally binding character and, therefore, do not enjoy any protection beyond the protection provided to civilians and the sick, wounded, and shipwrecked who may be in such a zone.¹³¹ Recognition by the enemy will strengthen the protection. Therefore, the parties to a conflict are encouraged to enter into an agreement on the mutual recognition of such zones. GC I provides a draft agreement to the parties, and the ICRC is encouraged to be available with assistance for the conclusion of such agreements.¹³² Reference is made to Section 6.2 of Chapter 6 for protected zones in IHL.

¹²⁸ GC IV, Art. 17.

¹²⁹ See, for instance, GC IV, Art. 23 and Art. 26, and AP I, Art. 70, 71, and 74.

¹³⁰ GC IV, Art. 14.

¹³¹ SCIHL, Rule No. 35.

¹³² GC I, Art. 23, and GC IV, Art. 14.

Chapter summary

This summary lists the most significant rules in the area. For a more complete overview of the rules, reference is made to the chapter text. Apart from no. 18, the rules listed must be assumed to apply to both IACs and NIACs.

The sick, wounded, and shipwrecked

1. Collect and examine: All precautions must be taken to collect and examine the sick, wounded, and shipwrecked to protect them against pillage and ill-treatment.

2. Respect and protect: Anyone who is sick, wounded, or shipwrecked and refrains from carrying out any hostile act must be respected and protected under all circumstances. They must be treated humanely and receive to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition.

3. Equal treatment: The treatment given must be given without any adverse distinction founded on sex, race, nationality, religion, political opinion, or any other similar criteria. Only compelling medical grounds may entitle a person to a preferential position as regards the order of treatment.

4. Medical treatment: Special requirements apply to the medical treatment of sick, wounded, and shipwrecked particularly when it comes to persons held in Danish custody.

5. Identification of the sick, wounded, and shipwrecked: In each individual case and as soon as possible, the parties to a conflict must record all the circumstances that may help identify the sick, wounded, shipwrecked, and dead of the enemy who have fallen into their hands.

Medical personnel

6. All medical personnel must be respected and protected. The protection will cease only if the personnel commit acts outside their medical duties that are harmful to the enemy. The auxiliary medic must be respected and protected to the extent that the duties are in fact being performed.

7. Medical personnel are entitled to wear insignia identifying themselves as such. Unless a properly authorised military commander has granted medical personnel and chaplains permission not to display the protective emblem in the form of a white armlet with a red cross on the left upper arm, they are under an obligation to wear such armlet.

Medical units, medical transports, and medical equipment

8. Medical units must be respected and protected at all times. A medical unit may not be made the object of attack unless the unit is used for activities falling outside its medical duties that are harmful to the enemy. The protection will not cease unless a warning has not resulted in the cessation of the harmful activities. If possible, such a warning must be accompanied by a reasonable time limit.

9. Medical units may not be used in an attempt to shield military objectives from attack. As far as possible, medical units must be situated in such a manner that lawful attacks against military objectives in the vicinity do not imperil their safety.

10. Medical vehicles must be respected and protected in the same way as mobile medical units, and the rules on cessation of protection are the same if the medical vehicles are used for non-medical purposes that are harmful to the enemy.

11. Medical units and medical vehicles normally indicate their protected status by displaying a flag with the Red Cross and/or a permanent emblem on buildings and vehicles, etc.

12. Medical equipment belonging to the mobile medical units of the armed forces that falls into the hands of the enemy must be reserved for the care of the wounded and sick. Therefore, such

equipment should be marked with the Red Cross.

13. The protective emblems may be used exclusively for designating medical personnel, equipment, units, and transports.

The dead

14. To the widest extent possible, the parties to a conflict must search for the dead and prevent their ill-treatment or pillage. The rules apply regardless of the nationality of the dead and regardless of whether they are civilians or members of the armed forces of the parties.

15. The parties to a conflict must record available information about dead and missing persons and communicate such information to the next of kin through channels established for that purpose, including national information bureaux and graves registration authorities.

16. The personal effects and military equipment of a deceased person must be collected. Military equipment, including military documents, weapons, uniform, etc., becomes State property when collected as war booty. No Danish military personnel are entitled to appropriate the deceased person's personal effects or military equipment.

17. The dead must be buried or cremated — individually insofar as circumstances permit. If possible, the burial must take place in accordance with the rites of the religion to which the deceased belonged.

18. Where possible, graves must be grouped according to the nationality of the deceased and properly maintained and marked so that they can always be found.

The population and voluntary aid societies

19. Even in invaded or occupied areas, States must permit the inhabitants or voluntary aid societies on their own initiative to collect and care for the wounded and sick.

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Military objectives

Attacks on military objectives and limitation of collateral damage

Military objectives

Attacks on military objectives and limitation of collateral damage

1. Introduction

An attack is only lawful

- when it is directed against a military objective and
- when the foreseeable collateral damage is not excessive in relation to the concrete and direct military advantage anticipated and when such damage is minimised to the extent feasible.

The rules and obligations addressed in this chapter are at the core of IHL. The purpose of these rules is to focus the conduct of hostilities on military objectives and to limit the harmful effects of an armed conflict.

Generally speaking, the rules on military objectives provide a modern and balanced foundation in international law for the execution of military attacks. These rules apply whether the conflict is being fought with conventional weapons or modern technology and regardless of whether it is an IAC or NIAC. Therefore, in-depth knowledge of these rules is essential for accomplishing a mission in a modern military organisation.

As far as IACs are concerned, the present rules on military objectives are set forth to a wide extent in AP I dating back to 1977. These rules have been developed over time, and supplemented by customary international law.¹ The precise phrasing of the obligations set forth in this chapter have been specified in relation to the phrasing found in the original versions and Danish translation of AP I.

To a broad extent, AP I's rules on military objectives and the conduct of hostilities are a manifestation of customary international law in both IACs and NIACs. In this chapter, the rules have been described in such a way to ensure that all the rules can and must be applied by Danish armed forces in both types of conflict.

1.1

Chapter contents

Section 1 briefly presents the scope of the chapter, including the background for the obligations outlined in the chapter and their area of application.

Sections 2 to 4 describe the rules specifying how military forces may lawfully plan and decide on attacks. These sections are inextricably interlinked: an attack is only lawful when it is directed against military objectives (Section 2), when proportionality has been assessed and collateral damage has been avoided or minimised (Section 3), and when sufficient measures have been taken to verify the information and the degree of conviction is satisfactory (Section 4).


Section 5 addresses the obligation to suspend an attack if it becomes apparent that it is unlawful. This obligation is relevant for the time after planning has been completed and a decision to launch an attack has been made.


¹ For instance, SCIIHL.


LAWFUL ATTACKS ON OBJECTS
PLANNING STAGE

Step 1 WHAT ARE THE CONTEMPLATED OBJECTS OF ATTACK? sec. 2.1.1

Define and delimit objects.










Step 2 IS THE OBJECT A MILITARY OBJECTIVE? sec. 2.3.1, sec. 2.3.2

First criterion:
The object makes an effective contribution to the adversary's military action by its nature, use, purpose or location.

Second criterion:
The total or partial destruction, capture or neutralisation of the object offers a definitive military advantage.

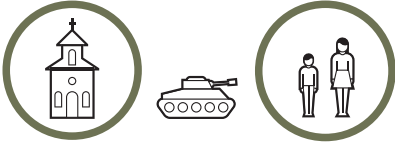








Step 3 WHAT COLLATERAL DAMAGE CAN BE FORESEEN? sec. 3.1, sec. 3.2

Identify protected persons and objects in the target area and calculate the collateral damage.







Step 4 IS THE FORESEEN COLLATERAL DAMAGE LAWFUL? sec. 3.3, sec. 3.4

First criterion:
Foreseeable collateral damage may under no circumstances be clearly disproportionate to the concrete and direct military advantage anticipated to be gained.

Second criterion:
All feasible precautions must be taken to avoid or minimise foreseeable collateral damage as far as practically possible.





TIME AFTER THE DECISION HAS BEEN MADE

THE ATTACK CAN BE LAUNCHED, BUT:

sec. 5

The attack must be suspended if it becomes apparent:

- that the objective is not a military one,
- that the objective is subject to extended protection or,
- that the attack must be expected to cause collateral damage which is excessive in relation to the concrete and direct military advantage anticipated.

• FIGURE 8.1 •

Outlines the relevance of international law at various stages of the planning and decision-making processes for attacks, and for the time after orders for the attack have been issued.

Except for stages 1 and 2, which solely examine the criteria for identifying objects as military objectives, the model may be used to illustrate the impact of international law on the processes in connection with military attacks against all types of military objectives. The special criteria that apply when individuals become military objectives are dealt with separately in Chapters 5, 7, and 12.

The requirements in international law for verification and for the degree of conviction relating to the status of individuals and objects must be satisfied at all stages. For more information, see Section 4 below.

On the right-hand side of the figure, reference is made to chapter sections in which the individual elements are addressed in greater detail.

1.2

Scope in relation to other chapters

The obligations addressed in this chapter arise in particular from the principles in international humanitarian law of distinction, military necessity, and proportionality. There is also a close correlation with obligations described elsewhere in the Manual. This applies primarily to Chapter 4, which describes general principles and standards, Chapter 6 on the protection of civilians, etc., which includes a more detailed presentation of precautions against the effects of attacks, etc., as well as Chapter 10 on unlawful methods of warfare, including the prohibition against indiscriminate attacks, etc. The chapter also touches on passages in Chapter 15 describing the potential responsibility of personnel for violation of the rules, see Section 1.4.2 immediately below.

1.3

The relevance of human rights to this chapter

IHL deals with the regulatory framework for attacks on military objectives and the lawfulness of collateral damage relatively exhaustively. Although HRL includes specific rights that may be relevant when military objectives are designated and attacked (including the right to life and the right to privacy), the special regulation of the area under IHL will be applicable as a general rule. For more information about human rights in armed conflict, see Section 4.4. of Chapter 3.

Thus, in cases in which both sets of rules provide relevant regulation, HRL will often incorporate rules that, in terms of content, are compatible with IHL. Therefore, the specific obligations in this chapter are based exclusively on IHL.

1.4

Application of the rules

1.4.1 Where are the obligations in this chapter applicable?

8.1. Obligations addressed in this chapter apply to any operation which, regardless of whether it is carried out from land, from the sea, or from the air,

- is directed against objectives on land or
- affects protected persons or protected objects on land²

+ NIAC³

Danish armed forces are required to meet the obligations described in this chapter during **both** IACs and NIACs.⁴

Example 8.1 of operations that are not directed against objectives on land but which may affect civilians on land:

Shooting down an enemy aircraft over urban areas or attacks on warships in civilian ports where harm may also be caused to civilians or nearby structures on land.

The rules applicable to attacks on objectives in the air or at sea where the operation does not affect protected persons or protected objects on land are dealt with in

² AP I, Art. 49(3). Addendum 8.1

³ For information about the application of the obligations in NIAC, see the introductory text above as well as references in the footnotes to the consecutive NIAC numbers below.

⁴ For information about the application of the obligations in NIAC, see the introductory text above as well as references in the footnotes to the consecutive NIAC numbers below.

Chapter 13 on air operations and in Chapter 14 on naval operations.

Computer Network Operations (CNO)* are also covered by this chapter. Where considered particularly relevant, text and examples have been inserted, and references from the Tallinn Manual on the International Law Applicable to Cyber Warfare (CWM) have been provided.

As mentioned in Section 3.10 of Chapter 3, *CNO** refers to a type of military, armed operation conducted in a very special environment, i.e., in cyberspace. Although *CNO** should not be assessed in a vacuum in relation to any concurrent or immediately subsequent conventional military operations, Danish armed forces working with cyber capacities must pay special attention to the impact of IHL on the application of such capacities. This applies, in particular, to cases in which the operations constitute attacks under IHL, see Section 2 below, but also in which, for instance, the results of Computer Network Exploitation operations (*CNE**) may be capable of contributing to the procedures of Danish armed forces for identifying and designating objectives.

1.4.2 To whom are the obligations in this chapter of relevance?

The obligation dealt with in Section 2 applies to any person who plans, makes decisions about, or conducts an attack.

The obligations dealt with in Sections 3 and 4 address primarily the planning of and the decision to conduct an attack. In a Danish context, these obligations apply to any person who formally or actually participates in the planning and decision-making process, including the contribution of advisory services, regardless of rank and position.⁵ In practice, such persons include the force commander, the military decision-maker, operations and intelligence officers and advisers, including the military legal adviser (LEGAD).

Examples of personnel covered by the obligations set forth in Sections 3-4:

Example 8.2a: The planning of military operations typically involves personnel in staff functions including, in particular, the force commander and the chief of staff, operations and intelligence officers, 'red card holders', senior national representatives (SNRs), LEGADs, and the personnel involved in the gathering of information. The force commander and/or the chief of staff, for instance, can ensure that elements such as proportionality are present in the issuing of directives when the task is presented to the staff. Moreover, the force commander and/or the chief of staff hold(s) the overall responsibility, including command responsibility, for allocating resources correctly and, to some extent, ensuring that subordinate personnel have

5 AP I, Art. 57(2)(a).

complied with their obligations under international law (see Section 4.5.3 of Chapter 15 for command responsibility).

Example 8.2b: In attacks in which there is no time for actual planning, the personnel with these obligations may be the duty officer at the tactical operations centre (TOC)* and the personnel involved in information gathering and the preparation of the intelligence framework.

Example 8.2c: In connection with a request for close air support (CAS)* and in clear situations of self-defence, lower-ranking personnel will be involved to a greater extent than is normally the case. Therefore, these obligations are also of importance to the infantry group and even the individual soldier when he or she decides to act in self-defence.

The nature of individual responsibility may vary in detail; obviously, the individual person cannot be held responsible for the entire verification process, the assessment of the intelligence basis, etc., but only for the tasks he or she has been assigned to perform. This applies regardless of whether the person in question is a member of staff under Danish or foreign command.

The obligation of Section 5 concerns the execution of attacks and **primarily personnel conducting an attack**. The section also describes other derivative obligations that address the same group of persons addressed in Sections 3-4 and any individual who, through his or her own observations, information, or intelligence, learns about matters that manifestly call into question the lawfulness of an attack.

Example 8.3 of personnel covered by the obligations set forth in Section 5:

Such personnel are typically commanders of units, personnel participating in the attack, the operator of a weapons system, or a UAV* with reconnaissance equipment, pilots, gunners, or CIMIC* personnel who might receive new information etc.

1.4.3 Special considerations with respect to coalition operations

Danish units are frequently ordered to conduct attacks planned in whole or in part by foreign forces. In such situations, foreign staff will have made the assessments in terms of international law and intelligence that are essential to the lawfulness of the attack.

Commanders of such units **must** consider whether the assessments made by the foreign staff meet Denmark's obligations under international law as set out in this Manual or whether an independent Danish assessment should be made as regards all or part of the basis for the decision.

Examples of levels at which such assessments are to be made:

Example 8.4a: Considerations at the strategic level prior to deployment (e.g., considerations of the troop-contributing nations' individual obligations, etc. under international law; considerations of whether Danish armed forces should be equipped with caveats or be given special mandates or advisory services such as LEGADs, etc.?).

Example 8.4b: The considerations may also address the Danish unit deployed: Danish units must consider whether the tasks assigned to them are in compliance with Denmark's obligations under international law. Depending on the specific mission, the lawfulness of the assigned tasks generally need not be questioned in some situations. In such situations, the task can be completed without any separate Danish assessment. In other situations, it may be necessary to make a separate Danish assessment of the legal or operational basis of the task. The necessity depends on the national mandate, prior knowledge of differences with respect to collaborative partners, specific experience gained during the mission, etc.

Crucial is whether Danish commanders know or should have known that, from a Danish perspective, tasks assigned to them by foreign units have an **incorrect or even unlawful** basis. If this is the case, a Danish assessment should be made of the basis for the decision.

The willingness or lack of willingness of partners to hand over information required for a Danish assessment does not change this. Depending on the circumstances, insight into the type of information underlying the collaborative partners' assessments will suffice.

The same applies to intelligence received by a Danish unit from foreign collaborative partners for the purpose of planning an attack. Danish personnel must assess whether such intelligence can be put to direct use in the unit's planning or whether it should be further verified.

2. Attacks on military objectives

8.2. Attacks must be limited strictly to military objectives.⁶

+ NIAC⁷

The use of the term *strictly* underlines the indispensability of the rule and is inextricably linked to the principle of distinction. International law does not stipulate

⁶ AP I, Art. 52(2), SCIHL, Rules Nos. 1 and 2. See also ICC Statute, Art. 8(2)(a)(i), (iii) and (iv), Art. 8(2)(b)(i), (ii), (iii), (v), (ix), (xi), and (xxiv).

⁷ SCIHL, Rules Nos. 1 and 7. See also ICC Statute, Art. 8(2)(c)(i) and Art. 8(2)(e)(i), (ii), (iii), (iv), (ix), and (xii).

any obligation to use the least intrusive or least injurious means against a military objective. In the event that the other requirements under international law have been fulfilled for the lawful attack against a military objective (including the requirement for the lawfulness of collateral damage), it is permitted not only to neutralise but also to **destroy** military objectives.

If parts of a military objective are also of material civilian importance, **Danish armed forces should additionally limit the harmful effects** to that part of the objective that is of military interest when this is safe for their own forces.⁸ This may be the case, for instance, whenever the choice of weapons permits.

Any military objective may be attacked in the territories of the parties to a conflict regardless of whether fighting is already taking place in the area. In NIACs, including transnational NIACs, military objectives may only be attacked in the territory of the State to the conflict. Section 2.3.5 provides additional information about the geographical extent of conflicts.

2.1

What is an “attack”?

API defines attacks as “acts of violence against the adversary, whether in offence or in defence”.⁹

As a term IHL, “attack” has a different meaning than the one normally associated with it in military doctrines. IHL, the term is **understood as an act that causes injury or damage**. Thus, the consequences of an act characterise it as an attack.

As far as **individuals** are concerned, the term **injury** covers personal injury, illness, or death.

As far as damage to **objects** is concerned, the term covers any physical damage. However, the term does not cover *temporary inoperability** and other neutralisation which does not involve physical damage (e.g., a digital “freeze” of a communication control system). The concept of object under IHL is described immediately below in Section 2.1.1.

⁸ Addendum 8.2

⁹ AP I, Art. 49(1).

International law does not describe clearly how to distinguish between attacks and **other destruction** such as damage to fields, which is limited but necessary for military purposes. Section 2.9 of Chapter 10 describes such other destruction.

Example 8.5 of typical acts of attack:

Direct or indirect fire aimed at enemy battle positions.

However, it is **not essential whether the act in itself involves the use of violence** or whether it is at all conventionally kinetic.

This means, for instance, that network-based operations must be regarded as attacks under IHL if the consequence is that they cause physical damage.¹⁰ This applies regardless of whether they are characterised in doctrine as a *CNA** or *CNO** in a broader sense.

Example 8.6 of attacks through non-kinetic action:

A *CNO** unit hacks into the adversary's *C4/IS** system servers with a view to switching off the thermostatically controlled ventilation. The act constitutes an attack because it is injurious since the servers are physically damaged due to overheating.

Moreover, it does not matter whether the injurious act is performed as part of an offensive or defensive operation or a shaping operation.

In general, the act must be directed against the adversary, but an injurious act constitutes an attack regardless of whether the actual injury/damage – lawfully or unlawfully – is inflicted on military objectives, protected persons, or objects.

Examples of attacks in which the injury/damage is not inflicted on the actual objective:

Example 8.7: Such injury or damage will typically be injury or damage inflicted on civilian persons or objects. Hacking into the software of a dam, which changes the programming so that potentially destructive waters could be released, or into the software of a waterworks so that drinking water and wastewater would be mixed are examples of attacks in which the injury/damage is not inflicted on the military objective.

2.1.1 What is an “object” under international humanitarian law?

Whereas the term “individual” or “person” scarcely requires any additional explanation, the meaning of the term “object” in IHL needs to be described.

¹⁰ CWM, Rule No. 30.

Under IHL, objects may consist of smaller components, larger terrain objects, areas (which may be *point targets** or *area targets**), animals (alive or dead), and corpses. Generally speaking, however, (digital) data do not in general constitute an object.¹¹

The assessment of when **one or more objects** exist will frequently have to be based on an estimation, e.g., as to whether an area of land or a building structure naturally divides into multiple objects.

Example 8.8 of large, indivisible areas of land:

To qualify as individual objects, areas of land must be continuous and their sizes should preferably be limited to the exact area that would constitute a contribution to the adversary's military action. That is, only areas that do not naturally divide into separate areas can be regarded as one total object. A small woodland area or a mountain pass are examples of areas that can typically be regarded as indivisible objects that, depending on the circumstances, may constitute a military objective in their entirety.

The same applies to building structures. Often, a small building can easily be regarded as a single object, but this is far from always the case with building complexes or physically connected structures. For building complexes or building lots to be regarded as single objects, it must not be possible in practice to treat them as multiple separate objects.

Elements that may play a part in this assessment include, for example, the structural connection between the individual parts of the object/objects, the size of the whole object, and the operational capability for treating the object as separate objects.

Examples 8.9a of indivisible building structures:

Bridges consist of multiple components. A suspension bridge, for instance, consists of pylons, cables, decks, etc. Often, modern bridge structures also have other fixed components such as communication cables. All these components must be regarded as one object.

Example 8.9b: In case of multi-storey buildings, the floors can only be seen as an integrated whole. This applies regardless of whether the individual floors serve different purposes.

Example 8.10 of a divisible building complex:

Generally, building complexes must be regarded as separate buildings even though they may be physically connected or merely nearby buildings. Ultimately, it depends on a specific assessment of the potential division of the total structure, including the size of the individual buildings, etc.

¹¹ CWM, Rule No. 38.



SUSPENSION BRIDGE. The Sloboda Bridge, Serbia, was bombed by NATO in 1999. The reconstruction of the bridge began in 2002, and it was reopened in 2005. Photo: ES Consult A/S



MULTI-STOREY BUILDING. The former Shell House in Copenhagen was seized by the German occupation forces and used as Gestapo headquarters. Towards the end of the war, the Gestapo detained people from the resistance movement, etc., in the top floor in an attempt to shield the headquarters from air attack. The building was bombed by Allied forces in 1945. Photo: The Royal Library, Picture Collection.



BUILDING COMPLEX. The photo shows a building complex consisting of three wings and an extension of the left wing. The photo was taken after the strike. As a starting point, the individual wings and the extension constitute separate objects whose status as protected or military objectives is independently determined. Photo: Danish Defence.

Even though modern types of weapons allow a more accurate and limited effect on the objective, which alone can limit the physical effect, this does not in itself define the assessment of the physical extent of objects. Ultimately, it will be an overall estimation.

Most often, it is not possible to consider small objects separately. Therefore, small objects contained within a large object are normally regarded as part of the object.

Examples of when small objects form part of one large object:

Example 8.11a: A transport vehicle for which the vehicle and its cargo are regarded as one single object. In this case, the vehicle and its cargo must be assessed together in accordance with the criteria applicable to military objectives.

Example 8.11b: Similarly, a building and the items inside the building, including fixtures, large items, and small movable objects, are generally regarded as one single object.

In other cases, typically large items inside or on an object will have to be assessed as separate objects. This applies, for instance, to vehicles on a bridge.

If any individuals are found inside an object, e.g., a building or a vehicle, they will **always** have to be assessed separately. Whether or not the individuals constitute

military objectives or are protected persons can be determined only on the basis of this separate assessment.

Once an assessment has been made to establish which separate objects are found in or around the target area, the status of each object as a military objective or a protected object must also be assessed separately. The lawfulness of an attack will, then, depend on a number of other factors — not least, an assessment of the extent of lawful collateral damage.

2.2

Individuals as well as objects may constitute military objectives

A “**military objective**” is a lawful target of attack under IHL. Terms such as “objectives”, “targets” or “targeting” have a broader military meaning and, therefore, must not be confused with the terms used in IHL.

Lawful targets of attack **may consist of individuals or objects**. As regards individuals, the general principle is that only combatants may constitute military objectives.

However, combatants are protected against attack when they are recognised as *hors de combat** or attempt to contact the adversary as parlementaires. Reference is made to Chapters 5, 7, and 12.

In exceptional cases, civilian persons may become military objectives when they take a direct part in hostilities. The relevant criteria are outlined in Section 2.2 of Chapter 5.

Similarly, depending on the circumstances, other protected persons – including medical personnel and combatants who are *hors de combat** – may also become military objectives when they act contrary to their protected status. The criteria are described in more detail in Chapters 5, 7, and 12.

This gives rise to special considerations as to whether **heads of state and political leaders** constitute military objectives. What matters is not what they are in name but what they do in fact. Heads of state in uniform who may well have a rank but do not, in reality, exercise any military command or otherwise participate in military planning or the execution of military operations are not combatants and do not constitute military objectives. The members of the Royal Danish House, who only

wear their uniforms in connection with ceremonies, are one such example.

Sometimes, civilian politicians, including ministers, participate in the military planning process and/or decision-making process. Because these persons are considered civilians under international humanitarian law, the issue of their potential loss of protection must be determined according to the same rules as those applicable to other civilians. The starting point, therefore, is that they are protected. This protection can be lost if and as long as the politician in question takes a direct part in hostilities. For more information, see Chapter 5.2.

2.3

When do objects constitute military objectives?

This section outlines the criteria for determining whether an object constitutes a military objective. A determination is not made as to whether an attack is lawful. Its legality also depends on other factors — particularly, the lawfulness of the collateral damage.

What determines whether an object constitutes a military objective is whether there is **some reasonable connection between the destruction of property and the defeat of the enemy forces**.¹² IHL sets out two overall criteria for when this is the case, i.e.,¹³

- 1) when objects (by their nature, location, purpose, or use) make **an effective contribution** to the military action of the adversary (first criterion); **and**
- 2) when the total or partial destruction, capture, or neutralization of objects in the circumstances ruling at the time offers **a definite military advantage** (second criterion).

The general principle in international law is that any object is protected as a civilian object and subject to **general protection under international law** against attack. However, when both of the above criteria are fulfilled, the object loses its protection and, subsequently, constitutes a military objective. This is also illustrated by stage 2 in figure 8.1 at the beginning of this chapter.

In the event that just one of the criteria is not fulfilled, the object retains its protection.

¹² Nuremberg Tribunal, *The United States of America v. Wilhelm List* 1948, p. 66.

¹³ AP I, Art. 52(2), and SCIHL, Rule No. 8.

Furthermore, international law lays down special rules for objects subject to enhanced protection. Typically, this means that such objects only constitute military objectives when they make an effective contribution to the adversary's action by their use. If, on this basis, an assessment is made that the object constitutes a military objective, international law also stipulates that a **warning** must be given to the adversary, i.e., a : real possibility of restoring the use of the object to its original protected purpose after which the object will again enjoy protected status. Hence, the warning must indicate that the military use of the object must cease.

This type of warning must not be confused with the rules on warnings given to civilian persons as part of precautionary measures aimed at minimising collateral damage. More information about such warnings is provided in Section 3.4.1.

Example 8.12: Such special requirements may be made in relation to:

- Medical installations, etc. (see Section 4 of Chapter 7)
- Civilian objects that have enhanced protection (places of worship, cultural values)
- Civil defence objects, objects containing dangerous forces (see Section 5 of Chapter 6)
- Prisoner of war camps, internment camps, etc.
- Protected areas, zones, etc. (see Section 6 of Chapter 6)

The examples used below **do not express a total assessment of whether an object constitutes a military objective**. The examples merely serve to illustrate the individual criterion or sub-criterion being considered.

2.3.1 First criterion: Effective contribution to the adversary's military action

The first criterion is the requirement that an object must make an effective contribution to the military action of the adversary.

An object can make an **effective contribution** in four ways. This may be by its:

- nature (see below)
- use (see below)
- purpose (see below)
- location (see below)

The list is exhaustive, and each item is clarified in detail below. Typically, objects become military objectives by their nature or use.

The phrase "**military action**" should be construed broadly. It includes the adver-

sary's military activities and operations as well as military capabilities and capacity in a broader sense.

The fact that the contribution to the adversary's military action must be **effective** means that the contribution must be actual. The easiest way to assess this is to establish whether it is possible to explain the elements of the contribution. There is no requirement that the contribution must be significant, i.e., noticeably effective or material to the adversary. However, it is clear that the contribution cannot be unimportant since, then, it would scarcely constitute a contribution at all.

Not even objects of a military nature may automatically be deemed to constitute an effective contribution to the adversary's military action.

Example 8.13 of an object of a military nature which does not make an actual contribution:

The Russian AK-47 is weapon manufactured for military forces. In some countries, however, especially in rural districts, the weapon is popular among the civilian population. In such cases, the weapons do not make an effective contribution to the adversary's military action.

Moreover, the contribution is only *effective* if it is not merely hypothetical or speculative. In relation to the future importance of an object, for instance, it may become more difficult to decide whether the contribution is "effective". (This is particularly relevant to the aspects of *purpose* and *location*, see subsections below.)

The contribution may have a direct or indirect character: direct if the object itself has a military function or application or otherwise contributes to the adversary's tactical options, indirect if the contribution consists of a restriction on the room for manoeuvre available to one's own forces, thereby favouring the adversary. This could apply to an object that provides cover or the like (location).

This chapter provides specific examples of what makes an effective contribution by considering below the individual sub-criteria of "nature", "use", "purpose", and "location" (examples 8.14-8.22).

Nature

Objects which, by their nature, make an effective contribution to the adversary's military action are objects, so to speak, of military origin or quality.

Military weapons, weapons systems, ammunition, military vehicles, barracks,

depots and installations, *military digital infrastructures**, etc., will undoubtedly be of a military nature. Often, it will be possible to recognise such objects visually (e.g., a camouflage-painted lorry or military weapon – as opposed to hunting weapons, for example). Recognisable exterior physical characteristics are not in themselves decisive, and recognisability is not always a given — particularly, in NIACs.

Examples of an object which, by its nature, makes an effective contribution:

Example 8.14a: An enemy reconnaissance unit has left its vehicles (camouflage-painted opened 4WD vehicles) in a thicket to continue its reconnaissance on foot. By its nature, the vehicle, which is an ordinary military vehicle, meets the first criterion.

Example 8.14b: Two insurgents have hidden a small number of mortars and rocket equipment in a cave. By their nature, these weapons, which are not natural civilian objects, make an effective contribution to the military action of the insurgents when in their possession (regardless of whether the weapons are in storage).

When it comes to its nature, the contribution does not have to be of practical significance to the adversary here and now to meet the criterion.

Example 8.15 of an object which, by its nature, makes a future effective contribution:

Three enemy tanks are parked in a military car park while waiting to be repaired. The tanks are not directly functional but will be after they have been repaired. This being the case, the three tanks make a contribution by their nature although the contribution cannot take place until the repair has been completed.

Objects that cannot be said to be of military origin but which, nevertheless, are included in the adversary's permanent stocks and daily operation will typically have to be assessed on the basis of their use. This applies to computers and other non-military equipment, for instance.

Use

The parties to a conflict often use objects that are inherently civilian. Under the circumstances, such objects may constitute military objectives by virtue of the adversary's military use of them.

Use is to be understood in a broad sense and does not depend on whether the object belongs to the user. Use includes the following, among other things:

- *specific operation* or *use* of an object for military purposes, e.g., a vehicle, weapon, or mobile phone;
- *transit*, e.g., driving on a road or bridge;
- *positioning*, e.g., observation from a transformer station, establishment of a

battle position from a department store or behind a wall, a stop in a waiting area, meeting area, or at a factory site, etc.; or

· *connection to and/or electronic use* of server-based application, etc., including computer networks, communication infrastructure, etc. — for instance, in connection with storage or exchange of data or electronic impulses.¹⁴

Examples of an object, by its use, making an effective contribution to the adversary's military action:

Example 8.16a: In connection with the rotation of forces, a civilian bus is used to transport soldiers from a base in a mission area to a nearby airport. By its use for personnel transport, the bus makes a contribution to the military action of the party to a conflict.

Example 8.16b: Civilian contractors are using excavating machines to grade an area where a new explosion-resistant main gate for a military base is to be established. By their use, the excavating machines make a contribution to the military action of the party to a conflict. The civilian workers are as a starting point protected as civilians.

It is conceivable that an object may be put to civilian and military use simultaneously (so-called **dual use**). In such cases, the object in its entirety may become a lawful military objective even if the object's primary use is civilian. In dealing with cases of dual use, it is helpful to keep the fundamental criteria for qualification as a military objective in mind, namely, that the object is indivisible (see Section 2.2.1) and that the object makes an effective contribution to the adversary's military action (see Section 2.3.1), the total or partial destruction, capture, or neutralisation of which offers a direct military advantage for the attacker (see Section 2.3.2).

As a point of departure, dual use scenarios encompass no obligation to include the object's civilian application in the proportionality assessment since the object in its entirety becomes a military objective. Danish armed forces, however, as per Chapter 6, Section 3.4, must consider the possibility of separating or protecting the civilian component of a military objective as well as they can from the effects of attacks – this is especially true in situations in which the civilian component is considerable or has considerable civilian significance.

Generally, civilians employed in a dual use enterprise are to be considered as protected civilians but may lose their protection under certain circumstances if they take direct part in hostilities. For more information on this topic, reference is made to Chapter 5, Section 2.2 as well as example 5.13.

¹⁴ CWM, Rule No. 38.

Damage to civilians and civilian objects in the vicinity of the objective must always be included in the proportionality assessment, and precautionary measures must be taken in attack.

Examples of dual use objects:

Example 8.17a: Bunkers used by military forces that are also used by civilians as a refuge.

Example 8.17b: Communications infrastructure, such as radio stations and IT communications servers used to inform the civilian population of the ongoing conflict and its dangers, that is also used by armed forces.

Example 8.17c: Infrastructure, such as bridges and roads, that is used by both civilian and military vehicles.

Example 8.17d: Electricity networks that serve both military radar systems and communications networks but also deliver electricity to the hospitals and water supply and wastewater systems.

The objects concerned, therefore, are objects that are used by civilians but may also be considered indispensable to the adversary's military activities.

Even though the category relates to the current use of an object, such use does not necessarily have to be continuous. Use is considered **permanent** if it is recurring to an adequate degree. It is not possible in advance to specify the exact criteria for when this is the case. For instance, how **regular and frequent** the use is may be taken into consideration.

In some cases, for example, frequency must mean daily. In other cases with a high degree of regularity, a lower frequency may suffice, on balance, for the use to be considered permanent.

Examples of cases in which an object, by its permanent use, makes an effective contribution to the adversary's military action:

Example 8.18a: A classic example of dual use, which also illustrates permanent use, is communication masts that are used for both civilian and military communication. This type of mast constitutes a dual-use object. The military communication need not necessarily be constant and continuous. If the mast is used on a daily basis as a permanent element in the forms/habits of communication by the force, however, it could be deemed as a permanent (dual-use) object. The same applies when rebel forces make use of communication masts.

Example 8.18b: Another example of permanent use is the use of a civilian car by two enemy soldiers to cover a good deal of ground over a period of two days. They spend the night in an abandoned hut, while the car is parked on the road. When, according to plan, the car is used again the next morning, its use must be regarded as permanent — also through the night.

Example 8.18c: An example relating to CNO* is the adversary's periodic use of social net-

works for military purposes, e.g., for recruitment/organisation of the adversary's armed forces or the exchange of encrypted intelligence. The example necessitates two additional detailed comments: First of all, such use does not imply that the entire social network, such as Twitter or Facebook, thereby constitutes a military objective. In this respect, it will often be possible to separate relevant parts that are used for military purposes. Second, the question of the legality of *CNO** against such social networks does not become relevant in relation to international humanitarian law until the efforts to end such use are of the nature of an actual *CNA** which is of the nature of an actual attack.

If the use is brought to an end, the object must instead be assessed in accordance with one of the sub-criteria below.

Purpose

The purpose criterion refers to objects that the adversary **intends** to use for military purposes. Thus, this means *future* use.

Two scenarios are highlighted:

- An object which the adversary specifically intends to use for military purposes; or
- an object which, for the moment, is not used for military purposes but which has been designed or manufactured with a future military purpose in mind.

The requirement of intention means that it does not suffice for the object in question to have a potential or even obvious use for the adversary. An intention to use it also needs to exist. Such an intention is often established on the basis of intelligence that contributes to the knowledge about the adversary's actual plans or intentions or when there is otherwise no doubt that the adversary intends to use the object for military purposes.

Examples of cases in which an object makes an effective contribution to the adversary's military action by virtue of its future use:

Example 8.19a: The adversary plans to use a local village school as an ammunition depot in connection with the preparation of a future offensive. The school constitutes an effective contribution to the adversary's military action.

Example 8.19b: Insurgents regularly set up sniper's nests in a valley region by carving out gun slits in *abandoned compounds** and selected walls, and hidden access and escape routes have even been prepared in several places. The nests are unmanned. An armoured infantry battle group comes across an unmanned and, until now, unknown nest on a foot patrol. The nest has not previously been used but has been prepared for future use. The group may assume that, by virtue of its purpose, the nest makes an effective contribution to the adversary's military action.

Example 8.19c: Reliable intelligence confirms that the adversary has ordered a particularly

powerful server from a civilian manufacturer and that this server is being manufactured at an identified factory located in the adversary State. In this respect, there is no requirement to postpone an attack until the server is, in fact, put to use. The factory becomes a military objective as soon as the purpose is clear.

Hence, the sub-criterion of purpose requires the adversary to show intention. Such intention may be **unconditional** or **conditional** upon other matters.

In this context, ‘unconditional’ means that the adversary has a straightforward intention to use a transformer station, for instance, as an observation post.

‘Conditional’, however, means that the adversary’s intention is to use a military object if, for instance, such use would prove advantageous or relevant or if certain circumstances should arise. In other words, the intention may be in the form of a “contingency plan”.

In both cases, the object would constitute an effective contribution to the adversary’s military action if the intention were clear. However, the fulfilment of the second criterion may be more uncertain (the requirement that the attack must offer a definite military advantage). Section 2.3.2 below deals with the second criterion.

Examples of cases in which an object, by its purpose, makes an effective contribution to the adversary’s military action and the adversary’s intention is conditional upon other matters:

Example 8.20a: The adversary has planned how to use objects in a specific territory if the adversary is given the opportunity to advance to this territory or has to retreat from a current position. In this respect, the intention is clear – even if it depends on whether the need arises. However, the second criterion of an anticipated definite military advantage may prove more difficult to meet. For more information, see Section 2.3.2 below.

Example 8.20b: Up until the outbreak of the armed conflict, the adversary has been investing heavily in infrastructure. For instance, the adversary has built a motorway bridge across a river, traversing the southern and northern halves of the country. Although the bridge has been built as a civilian motorway bridge, the real intention is to facilitate large troop movements during war. It, therefore, constitutes an effective contribution to the adversary’s military action. Here, too, the intention is clear in this case, and the second criterion of an anticipated definite military advantage may prove more difficult to meet. For more information, see Section 2.3.2 below.

As in the case of use, the purpose of a future use of an object may be both civilian and military at the same time. Such **future dual use** has the same effect, meaning that the entire object may be regarded as making an effective contribution to the adversary’s military action. It is also a condition here that the object is one object that cannot be divided into multiple separate objects (see the description of the term

“object” above).

Location

An object, by its location, may make an effective contribution to the adversary’s military action.

Location means:

- Objects that must be assumed to have a direct military function or use due to their location even though the adversary does not (yet) have an intention in that respect. Such objects include objects with a military application and where the location of an object means that it will, in fact, be used.
- Objects that do not in themselves have or are expected to have a military function or application but, due to their location, make an effective contribution to the adversary’s military action. For example, these may be objects whose destruction will shape the terrain and the movements or options of the adversary.

When the future importance of an object is assessed on the basis of its location, objective requirements must be met: The location of the object must attach the military importance to the object. This may be the case, for instance, when on-going or imminent operations will induce the adversary to use the object in question even though the adversary has not (yet) thought along those lines.

Example 8.21 of cases in which an object, by its location, makes an effective contribution to the adversary’s military action:

During a detention operation, it turns out that only one *extraction route** is suitable. The adversary will be able to render extraction difficult from a specific place along the route, i.e., an *abandoned compound** conveniently located on a hilltop. The *compound** may, depending on the circumstances, make an effective contribution to the adversary’s military action by virtue of its location.

Example 8.22 of cases in which objects, by their location, do not make an effective contribution to the adversary’s military action:

On the other hand, general circumstances cannot to a sufficient degree justify the destruction of all walls within a distance of five metres from a frequently used road just as a precaution to prevent *IEDs** from being placed on the side of the road even though the location of the walls along the road make them useful for the purpose.

2.3.2 Second criterion: an attack must offer a definite military advantage

The second criterion is a requirement that a **definite military advantage** must be **offered** by the total or partial destruction, capture, or neutralisation of an object in the circumstances ruling at the time of the attack.

The requirement that the advantage must be definite means that it must be **concrete and direct** (e.g., possible to explain) and it must be **anticipated** (i.e., obvious and probable) and not merely a potential consequence of the attack.

The definite military advantage may arise as a direct consequence of the attack and consist of:

- the actual destruction of an object; or
- the elimination of the obstacle or danger that the object might (otherwise) represent to one's own forces.

However, a definite military advantage may also consist of a more derivative effect.

Examples of cases in which the attack offers a definite military advantage (second criterion):

Example 8.23a: (Direct consequence) Enemy positions preventing the current advance are destroyed with the help of air support. The destruction offers a definite military advantage because it reduces the adversary's combat capability and facilitates the advance.

Example 8.23b: (Derivative effect) In connection with the invasion of Iraq in 1991, the aim of the US forces with Operation Left Hook was to mislead the Iraqi forces into believing that the invasion would take place by water up the Shatt Al-Arab. Therefore, forces were deployed by water to execute attacks against military objectives. The military advantage did not consist of the actual destruction of these objectives but the fact that the Iraqi forces concentrated its capabilities in the wrong place. This paved the way for the real offensive through the desert from the west against fewer opposing forces.

In rare cases, a derivative effect may be the weakening of the adversary's morale or a spur to the opposing military commander's will to negotiate. However, it may be difficult to predict that morale or the will to negotiate will, in fact, be influenced and what the real significance of this will be. It may be difficult, therefore, to consider such an advantage to be sufficiently definite. Furthermore, it may be difficult — particularly, in such situations — to distinguish between military and other advantages, e.g., political advantages. Reticence should be shown, therefore, in acknowledging this type of effect as a definite military advantage.

Nevertheless, the purpose and, thus, also the military advantage offered by attack-

ing an adversary will sometimes be more than simply military neutralisation. The military advantage may also be to force the adversary to pursue or desist from some specific behaviour. This could be the case at the strategic, operational, and even tactical level. The mandate for the mission under international law may also play a role in this respect. For example, this could be the case if the deployment of forces was based on a Security Council resolution that allows military intervention, the specific purpose of which is to prevent attacks and assaults on civilians. So, in specific cases, any military advantage should be viewed in the light of the overall mandate of the mission.

Example 8.24 of cases in which the protection of civilians constitutes the military advantage:

Strategic examples are the NATO campaign against Serbia in 1999 and the deployment of a coalition of forces in Libya in 2011. These two deployments were very different, based on very different mandates. Both aimed at protecting the civilian population. Therefore, the focus in the identification and selection of targets was not necessarily on the neutralisation of an adversary or ending the conflict as soon as possible. Instead, the focus was on motivating the parties to the conflict to desist from assaults on civilians. So, the military advantage was to achieve protection of civilians by motivating the parties to the conflict to change their behaviour.

A military advantage may also consist of the total or “accumulated” effect of multiple attacks. As regards ongoing or longer-term operations, an explanation must be given of why each individual attack is necessary to achieve the intended effect. In the majority of cases, this is only possible if such attacks or **operations are coherent, limited in time and planned** beforehand.

Examples of cases in which a definite military advantage consists of the total effect of an attack on multiple objects (second criterion). They are dual-use examples, but this is far from always the case:

Example 8.25a: A motorway crosses a river with two separate bridges, each going in their separate direction. The adversary uses this motorway section on a daily basis for logistic transports with heavy vehicles. An attack on one of the bridges is unlikely to offer a military advantage since the adversary would, then, just use the remaining bridge. The military advantage of denying the adversary passage across the river will not be attained until both bridges have been destroyed or their use otherwise prevented.

Example 8.25b: The adversary uses the same communication servers and broadband connections as the civilian population. The data flow passes through connections and servers where free capacity is at its highest. Therefore, an attack on a single server or broadband connection will not make any difference. If large numbers of connections were immobilised, however, it would provide the desired military advantage: to destroy the adversary’s internal communication capacity and, thus, its efficacy.

The time aspect of a definite military advantage

The phrasing “in the circumstances ruling at the time”¹⁵ of the attack relates to the time of the attack and not the time the military advantage arises. This means that there is no requirement for the military advantage to be near in time or even immediate; instead, it must, be deemed reasonably certain to arise.

Example 8.26 of cases in which a military advantage that subsequently arises is deemed sufficiently definite (second criterion):

(Future effect) An otherwise civilian factory that manufactures special components for belts on the adversary's infantry fighting vehicles has been designated as a potential target. By their nature, the special components make an effective contribution to the adversary's military action. (However, had the components been more generic spare parts, they might have been assessed on the basis of their purpose. However, since they are special components, they must be assessed on the basis of their nature).

In this example, the factory constitutes in its entirety a contribution based on its use. The special components are merely consumer goods that the adversary will not be using at present but are produced to avoid back orders for them. So, the military advantage is not immediate but will undoubtedly arise over time. Thus, the advantage is also definite because the adversary will experience problems with the belts once the stocks of the special components have been depleted. There is a great risk that civilian lives will be lost during an attack, in which only the factory (which employs civilian workers and is otherwise of a civilian nature) constitutes a military objective. This is a question of collateral damage and proportionality, which are dealt with in Section 3.

A speculative future materialisation of a military advantage can hardly be said to be sufficiently definite. Therefore, it may be difficult to assess whether the military advantage offered by the destruction of an object is sufficiently definite when the adversary's intention to use such object is only conditional. (For “conditional intention”, see Section 2.3.2 above under “purpose”). In other words, the higher the number of conditions that need to be met for the adversary to put the object to use at all, the more indefinite the anticipated advantage seems to be.

2.4

Special considerations regarding non-international armed conflicts (NIAC)

The types of objects that, in the possession of regular armed forces, are normally regarded as military by virtue of their nature will be regarded as such only to a lower degree when in the possession of OAGs. In NIACs, the assessment of whether these

¹⁵ AP I, Art. 52(2).

objects constitute military objectives will more often depend on the use of the object (or its purpose or location, depending on the circumstances). In practice, therefore, this limits the period during which such objects can be made military objectives.

Examples of the meaning of OAG and permanent and time-limited use of objects, respectively:

Example 8.27a: When an insurgent cell is activated, its members use private cars. These cars are used as commercial taxis during the day. Therefore, their contribution to the adversary's military action will have to be assessed on the basis of their use.

Example 8.27b: If the insurgent cell is regularly active and always uses the same member's car, the use of the car under the circumstances may be regarded as permanent (for the more detailed meaning of this, see the above subsection on "use").

Example 8.27c: If the cell is activated on only rare occasions or if it randomly uses different cars, this may mean under the circumstances that the car will only constitute a military objective during the hours of actual use.

The same applies to persons as military objectives. See, for instance, Chapter 5 on the loss of protection of civilians and other persons. For the presumption of civilian status, see Section 4.1 of this Chapter.

3. Permitted extent of collateral damage

8.3. Foreseeable collateral damage¹⁶

- must under no circumstances be clearly disproportionate to the concrete and direct military advantage anticipated to be gained (Section 3.3 below),¹⁷ and
- all feasible precautions must be taken to avoid or minimise foreseeable collateral damage (Section 3.4 below).
+ NIAC¹⁸

The obligation, as it is formulated here, is a consolidation of multiple provisions of AP I pertaining to the lawfulness of **collateral damage**.

Each of these provisions specifies the rules regulating the relationship between military advantages, on one hand, and collateral damage (commonly referred to as proportionality), on the other. Precautions to minimise collateral damage are another central aspect of these provisions.

¹⁶ AP I, Art. 57(2)(a)(ii), Art. 57(2)(a)(iii) and, in part, Art. 51(5)(b), Art. 57(3), and SCIHL, Rules Nos. 14, 15, and 17. UNSG Bulletin, Sections 5.3 and 5.5.

¹⁷ See also ICC Statute, Art. 8(2)(b)(iv).

¹⁸ SCIHL, Rules 14, 15 and 17.

In principle, there is no fixed or absolute upper limit to the extent of collateral damage as long as it is proportionate and minimised.

International law, however, lays down various specific restrictions on lawful methods. One of these restrictions places direct limits on the extent of lawful collateral damage, regardless of whether it is proportionate and minimised. It is prohibited, for instance, to cause widespread, long-term, and severe damage to the natural environment. In practice, however, quite serious acts of misconduct must be committed to violate this prohibition. For more information, see Section 2.15 of Chapter 10.

3.1

What is collateral damage?

Collateral damage is the **incidental or consequential damage, injury, or casualties inflicted on protected persons or objects** as a result of an attack directed against a military objective.

Military operations and, in particular, attacks will always cause **inconveniences** to protected persons. Such inconveniences are below the threshold for actual (collateral) damage and are one of the circumstances any person must endure during an armed conflict. Therefore, they should not be counted as collateral damage and are of no significance to the assessment of the lawfulness of an attack.

Collateral damage to individuals

Protected persons in this context are comprised of individuals who are accorded ordinary and special protection. Protected persons are:

- Civilians (unless they take a direct part in the hostilities and, in such case, only for as long as they do so. For more information, see Section 2.2 of Chapter 5);
- medical and religious personnel (for more information, see Chapter 7);
- prisoners of war and internees (see Chapter 12); and
- parlementaires, sick, wounded and shipwrecked persons, and others *hors de combat** (see Chapter 7).

Collateral damage to objects

Protected objects should be understood to mean any object that does not meet the conditions for *military objectives* as described in Section 2.3 above. For a definition of an “object” in IHL, see Section 2.1.1 above.

As previously mentioned, data are not regarded as “objects” under IHL. Damage to or deletion of certain types of data, however, may have the same impact on civilians as damage to an object. This may be of relevance, for instance, in the case of irreplaceable data that can be directly translated into a valuable asset (typically, money) or are in themselves irreplaceable, such as digital art.

When the loss of—or damage to—such **data** is foreseeable, Danish armed forces are required to recognise this as collateral damage in their *Collateral Damage Estimation (CDE)**.¹⁹

As far as dual-use objects are concerned, the entire object constitutes a military objective. Under international law, this means that damage to the dual-use object in itself is not regarded as collateral either in whole or in part if the object is effectively indivisible. As a general rule, the non-military ‘share’ of the object should not be taken into consideration in the proportionality assessment. More information about dual-use objects is provided in Section 2.3.1 above.

However, Danish armed forces are required to **recognise damage** to the non-military “share” of the dual-use object as collateral damage when the non-military share is of particular and direct importance to protected persons.²⁰

This will typically apply to objects that are normally *dedicated* to civilian purposes but currently used for military purposes. (Such objects are described in more detail in connection with the discussion of the presumption of civilian status in Section 4.1 below).

Example 8.28: This may be of relevance, for instance, with respect to a building structure that is used for military purposes but, at the same time, houses civilians.

¹⁹ Addendum 8.3

²⁰ Addendum 8.4

3.2

What does it mean that collateral damage must be foreseeable?

Only collateral damage that is foreseeable must be included in the proportionality assessment.

Collateral damage is regarded as foreseeable when

- 1) its potential is known to the attacker; and
- 2) it is a consequence of the attack.

The first condition emphasises that the collateral damage must be **foreseeable** by the attacker. The condition is related to the attacker's ability to assess the effect on the target and the consequences of the attack based on knowledge of the target, its nature, the target area, etc. Only collateral damage which the person planning or deciding on an attack knew or should have known would occur can be expected to be known to the attacker. See also Section 4 below addressing the requirements for verification.

The second condition primarily relates to the **causal link**, i.e., the natural connection between the attack and the occurrence of the collateral damage. Such damage need not follow directly from the attack, but there should be more of a direct than merely indirect connection. Other intermediate factors may be decisive in determining whether the collateral damage can be attributed to the attack and the attack alone. This is particularly relevant the longer time that passes between the attack and the occurrence of the collateral damage, when other factors, depending on the circumstances, have an opportunity to interfere with an otherwise predictable course of events. This may have a major influence on whether the link between the attack and the collateral damage is estimated to be sufficiently direct. For instance, it must be expected to some extent that the adversary's civilian or military authorities, civil society or the civilians themselves, civil defence organisations, humanitarian organisations, etc., have an opportunity to adjust to the altered conditions caused by the attack and to remedy the situation. If this does not happen and the damage occurs, it may very well be ascribed to this neglect, depending on the circumstances. In that case, the damage will not be regarded as collateral.

Examples 8.29 of damage, some of which may be regarded as collateral and others

not: In connection with an attack on a military unit located in a transformer station, the transformer station will be damaged, and the area will immediately experience a power failure. The discontinued provision of electricity means that the pumps at the local waterworks stop. This, in turn, will result in the mixture of wastewater with the public water supply, contaminating

it with bacteria. The water is usually used for bathing, washing laundry, irrigating crops, etc. Members of the local population rarely drink from the water as it is often not sufficiently clean.

Some cases of illness must be expected to arise shortly after the attack until the local population knows about the bacterial contamination. The water will not be suitable for cropland, which is therefore at risk of drying out. Moreover, it will be necessary to boil the water before it can come into contact with the skin or be used for laundry washing.

While the transformer station may constitute a military objective because of its use, this is not the case of the waterworks. As a starting point, only damage to the waterworks the water's loss in value and the predictable and unavoidable cases of illness that immediately arise are to be deemed as collateral damage. Other aftereffects, including those caused by the collateral damage, are not regarded as collateral. Such aftereffects, as a general rule, will not be taken into consideration in the proportionality assessment, which is described below.

Examples 8.30 of damage which, depending on the circumstances, can be regarded as collateral and effects which cannot: In restricted terrain, air attacks are directed against bridges that are used on a daily basis by the adversary's military vehicles. As dual-use objects, the bridges constitute military objectives and, therefore, are not recognised as collateral damage in the proportionality assessment.

The destruction of the bridges will undoubtedly impede the civilian traffic in the area quite a bit since all traffic will now have to be redirected to small, bad mountain roads. As a general rule, this is to be considered an inconvenience which is below the threshold for what can be regarded as collateral damage under international law – no matter how foreseeable this effect will be.

Over the longer term, the restricted passability will also affect supplies of emergency aid to the civilian population, especially after the onset of winter when the smaller roads will be impassable for trucks. This could ultimately result in the loss of civilian lives since the area will be struggling with shortages of food, medication, and blankets.

As a starting point, the difficulties involved in delivering emergency aid must exclusively be considered a nuisance and, therefore, are not collateral damage. Over the longer term, shortages of food, medication, blankets, and fuel may cause illness and death among civilians. Although this is undoubtedly the type of damage that could be regarded as collateral, the link between the destruction of the bridges and the future cases of illness, etc., that may arise is too indirect and insufficient to attribute to the attack itself. Nor, for the same reason, are they foreseeable. Therefore, they do not qualify as collateral damage and should not be included in the proportionality assessment described below.

In connection with specific prohibitions against certain methods of warfare, longer-term effects also need to be taken into account. This applies, in particular, to the prohibition against causing widespread, long-term, and severe damage to the natural environment and thereby prejudicing the health or survival of the population. For more information, see Section 2.15 of Chapter 10.

3.3

The requirement of proportionality: a weighing of two considerations

Proportionality involves an assessment of the relationship between:

- 1) foreseeable collateral damage to protected persons or protected objects, on one hand; and
- 2) the concrete and direct military advantage which the attacker expects to achieve, on the other hand.

Although this is often referred to as a requirement of proportionality, it is more appropriate to talk about a **qualified requirement of proportionality**: the lawfulness of collateral damage depends on whether such damage **is not clearly excessive in relation** to the concrete and direct military advantage (and that attempts have been made to avoid or minimise such damage, see Section 3.4 below for more information).

What is a concrete and direct military advantage?

The requirement for the military advantage to be **concrete and direct** is a **qualification**, which, when collateral damage is associated with an attack, “raises the bar” in relation to the requirement of the definite military advantage described in Section 2.3.2 above.

The two types of military advantages are related, however. For example, here, too, the military advantage must be clear and able to be articulated, and it may be constituted by both the damage caused and a more derivative effect of the attack. The elimination of the danger represented by a military objective may also provide a concrete and direct military advantage.

The requirement for the advantage to be **definite** means that it must be specific and not merely general. To some extent, this may exclude military advantages that may be gained from weakening the adversary’s will or morale, including attacks conducted with a view to *DETER**. Depending on the circumstances, a *DETER-operation** with a specific objective in mind, however, could be considered sufficiently concrete. By contrast, a more general deterrence of the adversary — for instance, with a view toward avoiding certain behaviour during combat — could hardly be considered sufficiently concrete.

The word **direct** also indicates that there must be a causal link between the attack and the military advantage. While such a military advantage may be remoter in time, it must be so certain that it is basically only subject to the successful completion of the operation and the natural consequences thereof.

Example 8.31 of deterrence of the adversary as a “concrete and direct” military advantage:

One’s own forces plan to conduct a massive fire attack from the air on company combat positions of a hostile brigade. The fire attack may be expected to have such a deterrent effect on the adversary, who has no air defence and whose other brigades are already weakened, that the adversary at division level will order the withdrawal of the rest of the relevant brigade from the area.

This is an example of a direct and concrete military advantage because it is immediate and has tangible success criteria. At any rate, the fire attack itself will cause damage, injury, and casualties for the adversary, which in itself provides concrete and direct military advantages.

How is proportionality measured?

First, the total impact of the collateral damage is assessed on the one hand, followed by the concrete and direct military advantage on the other hand.

Weighting of collateral damage

The age, state of health, etc., of the protected person(s) has no bearing on the “calculation” of collateral damage under international law. Each individual life is accorded the same weight. The extent to which the loss of individuals forming part of a civilian shield must be recognised as collateral damage depends on an assessment of whether they retain or have lost their protection. For more information, see Section 2.2 of Chapter 5.

An overriding presumption is that, protected human lives will be accorded greater importance than protected objects in the *CDE**. It cannot be ruled out that, in some situations, certain protected objects or an accumulation of protected objects should be accorded the same weight as or even greater weight than a protected human life. Objects can be weighted differently, depending on their importance.

Weighting of the military advantage

The concrete and direct military advantage is accorded weight on the basis of, among other factors, its importance to the future development of the conflict.

The identification of the relationship between collateral damage and military advantages, i.e., the actual comparison between these two considerations, is ultimately

based on an **estimate**. This estimate is to be made on the basis of a **factual assessment** of the information available and **in good faith**.

As a starting point, protected human lives are accorded greater weight than objects. As described earlier, however, the military advantage does not necessarily consist of an effort to protect one's own or destroy the adversary's objects, nor does it consist of an effort to protect one's own combatants or cause casualties among the adversary's combatants. The actual military advantage may consist of a derivative effect of such casualties. It is the importance of this effect that must be weighed against the extent of collateral damage.

Collateral damage and military advantages, therefore, cannot be calculated mathematically and are often difficult to compare. **Although the comparison is difficult, excessive relationship will usually be recognisable.**

When speaking of **coherent and time-limited operations** that have been **planned** beforehand, and when, among other things, a *CDE** for the entire operation has been prepared beforehand, proportionality must be seen in total context. During the planning of individual attacks, therefore, it is lawful to expect collateral damage which, considered in isolation, appears to be disproportionate unless a clearly disproportionate relationship exists in the comprehensive plan.

The *CDE** may be continuously updated on the basis of a *Battle Damage Assessment (BDA)**. Collateral damage, on the other hand, cannot be seen in a context involving more continuous operations that, for instance, may follow from an ongoing *OPLAN**.

Example 8.32 of a disproportionate attack, considered in isolation, which is proportionate in the overall attack conducted during a planned, coherent, and time-limited operation:

A Danish frigate, representing the only contribution to the Danish contingent in an international coalition during an armed conflict in the Indian Ocean, is requested by the superior foreign unit to open fire at a military depot located near the shore on the adversary's land territory. The locality is equipped with air defences which are basically only intended for its own protection. The target is located in an area inhabited by civilians. It is not possible to avoid civilian casualties which, considered in isolation, appear to be disproportionate.

The task that has been assigned to the Danish frigate, however, is a necessary part of an overall operation designed to facilitate an air campaign to be followed by the disembarkation of ground troops. The other single attacks included in the operation to be conducted by other contingents are not expected to cause significant civilian casualties. Moreover, the disembarkation of ground troops will make it possible to control decisive terrain that can provide a bridgehead for additional ground troops.

Overall, the inevitable collateral damage envisaged in the comprehensive plan is proportionate. Therefore, the frigate may perform its assigned task lawfully.

3.4

The obligation to avoid or minimise collateral damage

Collateral damage can be minimised either by taking precautions in connection with attacks or by selecting the objective among multiple potential objectives that will cause the least possible collateral damage.

8.4. Danish armed forces must seek to avoid or minimise collateral damage even if such damage is not disproportionate to the concrete and direct military advantage. To accomplish this, they are required:

- 1) to take all feasible precautions with a view to completely avoid, and in any event to minimise collateral damage,²¹ including but not limited to a duty to give effective advance warning of attacks unless circumstances do not permit²²; and
 - 2) to select the objective of an attack where it is expected to cause the least danger to protected persons and objects when a choice is possible among several military objectives to obtain a similar military advantage.²³
- + NIAC²⁴

Collateral damage that can practically be avoided by taking feasible precautions must be avoided.

When feasible precautions cannot be taken to avoid any type of collateral damage, damage to civilian objects will usually be preferable to loss of protected human life or injury to protected persons.

The obligation to minimise collateral damage applies to **each individual** attack even when the attack is part of a coherent operation comprising multiple attacks.

3.4.1 Minimising collateral damage by taking precautions

A wide range of precautions may be taken to help reduce the extent of collateral damage.

21 AP I, Art. 57(2)(a)(ii), CWM, Rule No. 54, and SCIHL, Rules Nos. 15 and 17.

22 AP I, Art. 57(2)(c), CWM, Rule No. 58, and SCIHL, Rule No. 20.

23 AP I, Art. 57(3), CWM, Rule No. 56, and SCIHL, Rule No. 21.

24 SCIHL, Rules Nos. 15, 17, 20 and 21.

Examples 8.33 of precautions capable of minimising the extent of collateral damage:

- 1) Choice of forces deployed in the target area;
- 2) Choice of weapons and ammunition, detonation delay, etc.;
- 3) Choice between traditional kinetic attacks and CNA*;
- 4) Issuance of warnings through the media, dropping of leaflets, provision of information to local older people, etc. This may be supplemented, for instance, with information about when the attack will be launched (at the earliest or latest), where to take safe refuge, etc.;
- 5) Choice of the time of the attack (hour, day of the week, etc.). This may be intended to avoid times of the day when protected persons are inside or near the object or to attack the object before it presents an increased danger — for instance, to attack an empty building before it is filled with ammunition;
- 6) The order in which various military objectives are hit within one target area, to ensure that civilians have sufficient time to respond to the first strike;
- 7) Possibilities of follow-up measures after an attack to prevent or mitigate collateral damage (e.g., supply of power generators, drinking water, etc.).

AP I explicitly emphasises the requirement to give **effective warning** prior to an attack that can cause collateral damage.²⁵ This requirement means that a warning must always be considered and may only be omitted if circumstances do not permit such a warning to be given — for instance, because a warning is assessed to result in the adversary's evacuation from the target area. A warning may be specific and refer to a particular objective or area or it can be more generic and still be effective. 'Effective' means that protected persons must be given a real possibility of seeking timely protection.

Certain types of objects are accorded special protection, which in some cases involves, for instance, an explicit requirement to give effective warning prior to an attack. See Section 2.3 above. The primary purpose of such warnings, however, is not to mitigate collateral damage but to allow the adversary to rectify the situation which, at the time of the warning, makes an otherwise protected object a military objective.

Only **feasible** precautions must be taken. This brings an element of pragmatism to the process: parties to a conflict engaging in attacks undertake to do what can reasonably be required within the limits of the time and resources available and without exposing their own forces to unnecessary danger.

²⁵ AP I, Art. 57(2)(c). A similar provision is set out in SCJHL, Rule No. 20.

Examples 8.34 of causes which, depending on the circumstances, may justify failure to take precautions:

- 1) The time available: if delaying an attack poses unnecessary danger to one's own forces or precludes the possibility of executing the attack;
- 2) if the precaution reveals the plan of attack and rules out the chance of success;
- 3) Danger to one's own forces;
- 4) Resources available – shortage of or limited availability of units, supplies of ammunition, weapons, or other equipment (for more information, see Chapter 9);
- 5) Inadequate communication facilities — for instance, to the local population or to other units;
- 6) Accumulated experience — for instance, if experience shows that warnings actually induce more civilians to move into the target area in an attempt to shield it.

Provided that the foreseeable collateral damage is within the limits prescribed by the principle of proportionality, international law does not require a party to a conflict to expose its own forces unnecessarily to risks in an endeavour to minimise them even more.

3.4.2 Minimising collateral damage in connection with the choice of objectives

In cases in which more than one objective is recognised in the identification of military objectives and the same military advantage may be gained, the objective to which an attack may be expected to pose the least danger to protected persons and objects must be chosen.²⁶

‘The same’ military advantage should basically be understood to mean exactly the same advantage.

Examples of identified objectives offering the same military advantage but different outcomes in the extent of collateral damage:

Example 8.35a: The adversary has commenced the advance of an infantry division along the main road in a southerly direction. The main road runs through a mountainous and rough terrain with three bridges crossing three rivers.

The military advantage of an attack is the same for all three bridges: to prevent the continued advance of a sizeable hostile force. It is assumed that the chances of a successful attack are equally good, no matter which bridge is attacked, and that none of the attack options will expose one's own forces to greater danger than the other options available.

Water mills with mill houses, inhabited by small families, are installed adjacent to two of the bridges. The third bridge stands alone but a civilian transport truck with consumer products is left on the bridge.

²⁶ AP I, Art. 57(3), and SCIHL, Rule No. 21.

The military advantage is estimated to carry more weight than the foreseeable collateral damage to civilian persons and objects, and an attack seems to be proportionate, no matter which of the bridges the attack is directed against.

An attack on a bridge that is only going to cause damage to the parked truck, however, will inflict less collateral damage.

Therefore, an attack will only be lawful if directed against the last-mentioned bridge.

Example 8.35b: Another classic example is railway infrastructure. A train station and a railway line section have been designated as military objectives. An attack on a station located in a city, however, will pose danger to civilians.

A nearby switch point outside the city offers the same advantage, i.e., the adversary will no longer be able to use the station for military purposes, but involves practically no collateral damage. In both cases, the collateral damage is proportionate, but the collateral damage is less if the attack is launched outside the city.

Therefore, an attack will only be lawful if directed against the switch point (or against the open railway terrain).

Limited operational capabilities or an increased risk of harm to one's own forces may, depending on the circumstances, justify an attack on an objective, even if the attack in question is not the attack among multiple potential attacks that poses the least danger to protected persons or objects.

4. Verification of military objectives and collateral damage

The presumption of civilian status and the requirement of verification play a key role in the effective operationalisation of the principle of distinction.

International law requires:

- Confidence and presumption: How convinced the attacker must be about the military status of designated objectives, the lawfulness of the foreseeable collateral damage; and
- Verification: How much the attacker must do to verify this.

The requirements are absolute in the sense that they have to be observed **every time** an “attack” is conducted, i.e., every time an injurious act is committed. This applies, in principle, regardless of whether it is a pre-planned operation or an act

of self-defence.

The obligations are multi-faceted, providing the framework for the various estimates to be made. This section outlines these estimates and the requirements imposed on them.

4.1

The degree of confidence as to whether individuals and objects constitute military objectives

IHL applies a presumption of civilian status. Because of the presumption, individuals or objects cannot be regarded as military objectives in certain situations of doubt.

8.5. The presumption of civilian status

- 1) In case of doubt as to whether a person is entitled to receive protection as a civilian, Danish personnel must give such person the benefit of the doubt.²⁷
- 2) In case of doubt as to whether an object makes an effective contribution to the adversary's military action, Danish personnel must ensure that the objects normally dedicated to civilian purposes are given the benefit of the doubt. + NIAC²⁸

The presumption, therefore, is only applicable in certain cases of doubt, see below for details.

Situations may arise in which different military commanders will perceive and assess similar situations differently, regardless of whether the presumption of civilian status is applicable or not. **In any case, a decision must be based on an estimate made in good faith**, relying on the available knowledge of specific facts and general conditions and on the experience of the commander.

It should be taken into consideration how far-reaching the consequences of an erroneous estimate might be assumed to be; **the greater the risk of extensive collateral damage, the more restraint should be exercised in attacking an objective.**

²⁷ AP I, Art. 50(1), second sentence. Addendum 8.5

²⁸ Addendum 8.6

4.1.1 Which situations of doubt are covered by the presumption of civilian status?

The presumption mainly concerns the doubt as to whether designated targets are actually military objectives. However, the presumption also plays a role in the assessment of collateral damage since the principle also relates to the doubt that may arise concerning individuals and objects present within or near a military objective. Accordingly, the principle has an influence on whether such individuals and objects should be taken into account when considering proportionality and minimisation efforts.

As far as **individuals** are concerned, the presumption is only applied when the doubt concerns the question of whether a person is entitled to receive protection as a civilian.

As far as objects are concerned, the presumption applies to any object that is normally dedicated to genuinely civilian purposes — for example, places of worship, dwellings, educational institutions,²⁹ i.e., objects about which civilians may be said to have a greater expectation of being safe.

Example 8.36 of objects which are not considered to be normally dedicated to civilian purposes:

These may be objects that are not dedicated to either genuinely civilian or military purposes (such as military medical installations). They may be objects which normally — perhaps, alternately — are used just as much for military as civilian purposes. These objects are “civilian” in the context of international humanitarian law but, as such, have not been created to provide civilian protection or satisfy human needs — for instance, a bridge that has been primarily constructed for general traffic, other forms of infrastructure, or uninhabited forest areas. Objects that are not normally considered to be dedicated to civilian purposes and, therefore, not covered by the presumption of civilian status will typically be objects that are assessed on the basis of their nature.

4.1.2 What does the presumption of civilian status cover?

The starting point for cases covered by the presumption is that individuals and objects must be assumed to be civilians and that special conditions need to be met for such individuals and objects to be regarded as military objectives. This means there must be reasonable grounds to assume that the individuals or objects in question constitute military objectives.³⁰

²⁹ AP I, Art. 52(3), and SCIH, Rule No. 16.

³⁰ ICTY Galic IT-98-29-T 2003, para. 51.

4.1.3 What is applicable in cases in which the presumption of civilian status is not used?

In such cases, a more subjective assessment must be made. Of course, the assessment must be made on an objective basis but often relies more on the commander's personal estimate. The key issue is whether the military commander makes a decision that any professional reasonable military commander – in principle – would make in those circumstances (although, as mentioned above, latitude must be built-in for commanders to assess identical situations differently).

4.2 Verification

8.6 Do everything feasible to verify that the individuals and objects to be attacked are military objectives and that the extent of collateral damage is lawful.³¹ + NIAC³²

Prior to any attack, measures must **always** be taken to assess specifically whether it is a military objective and whether the extent of (foreseeable) collateral damage is lawful. This process is known as verification.

Verification is designed to offer the military commander the best possible basis for considering the lawfulness of the objective, the extent of collateral damage, and, as a result, the lawfulness of the attack. The purpose of this obligation, therefore, is to specify the measures to be taken by military forces to verify the military status of the objective and the extent of collateral damage.

In contrast to the presumption of civilian status, the principle of verification is not restricted to certain situations of doubt but applies to anything that is capable of shedding more light on the specific nature of the individual or object and can be instrumental in raising the degree of confidence – **also beyond the minimum requirements described in Section 4.1 above** – whenever this is possible.

The requirements for verification as described above apply in all cases in which an attack is being considered — even when an attack is in self-defence. Indeed, it makes no difference to the individual unit or person whether axes of advance have been

31 AP I, Art. 57(2)(a)(i), and SCIHL, Rules Nos. 16 and 18. UNSG Bulletin, Section 5.3.

32 SCIHL, Rules Nos. 16 and 18.

assigned, fire orders have been given, etc., in advance when an objective has not been designated in advance. For the purpose of this Manual, the person deciding to engage in a specific attack, regardless of level, is to be construed as a military commander, and all feasible verification precautions must be taken at all times.

Examples of situations in which permission has been given to engage in an attack without yet having designated or specifically decided on each individual military objective:

Example 8.37a: A soldier has been given a latest trigger line and a right/left limit. This does not mean that the soldier is allowed to shoot at everything that moves within this space. The soldier is still required to verify whether it is a military objective before opening fire.

Example 8.37b: In connection with a coalition air operation, an operations area is established in which a Danish squadron is deployed. This does not mean that Danish pilots flying over the area are free to attack all objects or individuals found within the operations area. Any object or individual must be assessed separately before it can be engaged as a military objective. For more information about dynamic targeting in air operations, see Section 4.2.1 of Chapter 13.

Example 8.37c: A Danish battle group has been assigned an axis of advance by the superior foreign brigade and wants to deploy its operational units. The battle group must assess which individuals and objects are going to constitute military objectives during the attack operation. When the actual attack is conducted, new potential military objectives will emerge. Depending on the situation and the applicable use-of-force directives and RoE*, the advancing unit will continually have to assess whether the emerging objects and individuals constitute military objectives.

The phrase “**do everything feasible**” means that **all reasonable efforts must be made, time and circumstances permitting**. It implies an obligation to gather, record, assess, analyse, and interpret information and data intended to serve as an intelligence basis for the decision to launch an attack.

By time is meant, *inter alia*, the time available before making the decision to launch an attack. By *circumstances* is meant, *inter alia*, the operational conditions such as available resources, possibilities of additional reconnaissance, or dangers involved in delaying the attack, etc. The required degree of certainty must be attained under all circumstances.

Examples of how time and circumstances affect the requirement of verification:

Example 8.38a: A patrol unexpectedly comes under fire from a house. The advance patrol can see the muzzle flares and immediately returns the hostile fire. The advance patrol's decision to open fire is made in what is described as self-defence in the RoE of the force.

In the given situation, there is no time for verification other than that involved in establishing that the fire is directed against one's own unit, where the fire is coming from, and that a risk of

disproportionate collateral damage cannot be seen with the naked eye.

The time sensitivity involved in the need for a quick response to the opening of fire justifies in such a case a swift verification process and proportionality assessment.

Example 8.38b: When the hostile fire has been halted, the platoon commander orders the platoon to move into position to defeat the adversary in the house. The commander wants to request close air support* (CAS), which will destroy the house. It is now no longer a case of urgent self-defence, but an action allowing time for more reflection, i.e., more verification efforts. As a result of the operational conditions, it may no longer be possible to maintain observation around the house over a longer period of time. This may force a decision on the basis of the intelligence available at that point.

Military forces must, at a minimum, accept the danger necessary to be sufficiently convinced that an objective is military and that the collateral damage is lawful. **If it is not possible to attain the sufficient degree of certainty, even with more verification, an attack will be unlawful.**

Even if the required degree of certainty has been attained once, continued verification may still be required, depending on the circumstances, to ensure that the verification basis is sufficiently up-to-date. The verification should be updated in cases in which considerable activity is seen in the objective and/or in cases in which a certain period of time has passed since the last verification.

On the other hand, one's own forces are not required to be exposed to unnecessary danger once a sufficient degree of certainty as to the objective and the collateral damage has been attained. Unnecessary danger, for instance, may be the danger associated with additional reconnaissance or the risk of wasting the moment, thereby offering the adversary an advantage if an attack is delayed.

Example 8.39 of sufficient verification when a hostile act or hostile intent is observed:

The Duty Officer (DO) in *TOC**, via an *UAV**, can see three individuals. It appears in the slightly grainy pictures that three persons are installing what looks like mortars.

It is a remote area from which mortars have often before been fired over the Danish camp. *CIMIC** has no knowledge of any other activities in the area that could be confused with the suspected activity – to the contrary, it is a desolate and barren area. On the same morning, in connection with the morning briefing, intelligence has been received that small groups of insurgents intend to launch new mortar attacks against Danish camps on the same day.

The DO evaluates that it would be possible to better verify the intelligence basis by gathering further information, but that the given time and circumstances do not permit further reconnaissance, as the moment of opportunity would be wasted. Due to the given circumstances, the DO, therefore, decides that all feasible and practicable efforts have been made in light of humanitarian and military considerations, and that an attack may be carried out.

Example 8.40 of sufficient verification in a situation in which Positive Identification (PID)* has been established on the basis of Pattern of Life* (PoL) observations:

After five months of deployment, a company has acquired in-depth knowledge of the PoL* falling within their responsibilities. This knowledge of standard practice, in particular, has been gathered through patrols, CIMIC* work, and key leader engagement. During a patrol, a platoon observes activities in and around an otherwise deserted compound*. The platoon of officers report their observation back to TOC*, which orders the platoon to take the compound* under observation.

Based on the observations and knowledge of the local insurgent group, it is quite evident to the platoon that these persons must be insurgents. In the evening, the platoon is replaced by a SOF* patrol, which takes over the monitoring duty. The patrol observes that people arrive at and leave the building and that guards are stationed in front of the building, armed with Kalashnikovs, a weapon type used by both insurgents and ordinary civilians in the area. Ordinary civilians do not use guards, however. Yet, aside from the potential danger posed by lightly armed guards, there are no signs of hostile activity.

Around midnight, a car arrives at the building. Two persons get out of the car and are recognised by the patrol (PID*) as high-ranking leaders of the insurgents, who are subject to arrest warrant proceedings. Although there is no actual hostile activity, two insurgent leaders have been positively identified. In light of the activities in the compound*, this means that the degree of certainty for all individuals is sufficient — including within the limits of the presumption civilian status.

Since it is an abandoned compound*, which has not been approached by any ordinary civilians during the continued observation, no further verification is needed. Given the existing circumstances, a decision to attack may be made.

The framework is relatively broad for lawful intelligence gathering during armed conflict in order to identify, positively or negatively, what constitutes safety threats, potential objectives, etc., and what does not. It is therefore permissible to quite a great extent to engage in surveillance, wire-tapping, etc., and to record information for this purpose. **The intelligence basis must be reliable, substantiated, and up-to-date.** This will be elaborated on below.

4.2.1 What does the verification include?

International law provides no specific requirements as to the types of intelligence or number of intelligence reports or, for that matter, as to how or when information is gathered. The following examples, therefore, are only examples of elements that can contribute to the verification.

Examples 8.41 of elements that may be included in the verification efforts:

The intelligence basis may consist of specific knowledge of the objective/target area gathered through observations (local reconnaissance, monitoring from cameras, UAV*, satellite, etc.), general knowledge of the area (PoL*), intelligence that helps to identify hostile persons or objects (PID*, etc.), knowledge of the adversary's plans, etc.

Information about the objective can be gathered through common information and data gathering techniques and through other Danish or foreign units that have knowledge of the area and daily life, such as CIMIC*.

What is essential, is that an attempt is made to use all channels and tools capable of contributing relevant information about the objective and the target area which are available in the given situation and within the given time.

In practice, the *reliability* of intelligence is categorised according to the applicable rules and provisions of national law and coalition forces, NATO doctrines, etc.³³ It is essential that Danish personnel specify the level of confidence that can be placed on intelligence received from (and categorised by) foreign units.

The requirement that the intelligence basis must be *substantiated* is linked to the fact that, to the widest extent possible, the intelligence must be comprised of several types of information — preferably, independent of each other. Planners and commanders may base their assessments on their military experience, their general knowledge of the adversary's *modus operandi*, etc. In practice, this is also regulated by the applicable rules and provisions. The extent to which the intelligence forms a coherent intelligence picture, whether unfilled gaps remain, or whether intelligence that is actually available contains inconsistencies, and what consequences this should have on deciding whether to launch an attack, must be assessed.

The nature of the deployment and, consequently, the circumstances and operational capabilities at hand may vary considerably. In practice, the requirements for verification will be limited by circumstances — for example, when troops suddenly make enemy contact, including in self-defence situations, and there is a request for close air support*, etc. Similarly, such requirements will be much more comprehensive in connection with the planning of a protracted or long-term operation in which the attack is not time-sensitive in the same way.

Adequate verification must also be conducted when combat is likely to arise in a given situation or in the performance of certain tasks.

³³ Including HRN 818-010 "Tactical Intelligence Unit".

Under the auspices of NATO and often also in a coalition context, doctrinal analysis tools and staff procedures support the target designation process. Such tools and procedures may serve to comply with the obligation to verify but cannot always stand alone. In each individual case, it will depend on a specific assessment of whether all reasonable efforts have been made.

Example 8.42 of the use of analytic tools:

A unit wants to attack a suspected enemy position and, therefore, commences staff work. The staff work is undertaken in compliance with the NATO targeting cycle, and a *CDE** is performed. The staff work reaches the conclusion that it is a military objective and that the collateral damage is proportionate and minimal if a GPS-guided bomb is used. After the attack has been executed, a reconnaissance unit is deployed to perform a *BDA**.

4.2.2 For how long and how often must verification measures be taken?

Intelligence as well as opportunities for action may be time-sensitive. Continued information gathering, i.e., *updates*, may serve both to consolidate the intelligence basis and to ensure that circumstances are unchanged.

How new the information about the objective and target area needs to be depends on the time sensitivity of the objective and target area — in other words, on the extent to which there is a risk of changed circumstances. In this connection, it is not irrelevant whether the objectives are static or mobile. How quickly circumstances around the objective can change also plays a role (e.g., the influx of civilians) or, for that matter, over how long an uninterrupted period of time an individual or object has previously been observed as a military objective, seen in relation to the time when this was last verified.

From the moment an attack has been decided on, the verification should sometimes continue, and the information should be continually reassessed until the objective is attacked. This applies in situations in which the circumstances around an objective can change in a very short time span, or where the protected status of the objective itself can change in a short time span.

Even longer-term planning or the ongoing recording of objectives on a list of potential military objectives does not necessarily imply a requirement of continuous information gathering until it must be decided whether a given objective should be attacked. Conversely, the fact that an individual or object has been recorded on a list of military objectives at one point does not imply that the individual or object in question will uncritically be considered a military objective at all times.

Example 8.43 of adequate verification:

An individual recorded on a list of military objectives has been known for several years to be a leader of the local organised insurgent group. The last time intelligence was received about the leader's activities was two months ago. Over the entire period, however, new intelligence has been received at regular intervals, each time confirming her role as an insurgent leader. Now, for the first time in a year, a Danish unit observes the leader, physically present in her vehicle. Under the circumstances, the information available must be deemed to be sufficiently up-to-date, and a decision to launch an attack may be made on this basis.

Example 8.44 of inadequate verification:

Observations have shown that a transformer station has occasionally been used by the adversary as an observation post over a period of two weeks. This was last observed a week ago. Such observations are not in themselves sufficient to justify the assumption that the transformer station may still constitute a military objective. More up-to-date information is necessary.

Example 8.45 of the preparation of CNA* where continuous observation is planned:

CNO* staff have been working on the coding of a CNA* for an extended period of time. The attack is now ready, awaiting a launch order. The *digital infrastructure** must also be monitored in the period leading up to the issuance of the launch order in order to detect any changes in the nature and structure of the objective or the resulting foreseeable collateral damage.

Therefore, measures must always be taken to assess specifically whether new information needs to be gathered and how it could be acquired.

Where attacks are conducted in waves and time and circumstances permit, it may be necessary to repeat the information gathering for the purpose of continuous, renewed verification. For instance, this may be included in a BDA* in which such assessments are prepared from time to time.

5. Changed circumstances after an order is given

8.7. Suspend the attack if it becomes apparent:³⁴

- that the objective is not a military one,
- that the objective is subject to special protection, or
- that the attack is expected to cause collateral damage which is excessive in relation to the concrete and direct military advantage anticipated. + NIAC³⁵

34 AP I, Art. 57(2)(b), SCILHL, Rule No. 57, and CWM, Rule No. 19. See also ICC Statute, Art. 8(2)(a)(i), (iii) and (iv), Art. 8(2)(b)(i), (ii), (iii), (iv), (v), (ix), (xi) and (xxiv).

35 SCILHL, Rule No. 19. See also ICC Statute, Art. 8(2)(c)(i) and Art. 8(2)(e)(i), (ii), (iii), (iv), (ix) and (xii).

The obligations described earlier in this chapter related to the planning and decision-making process. The obligation addressed here relates to the time after an order has been issued, i.e., when an attack is about to be launched. It is of no relevance whether it is an attack under orders from staff or – typically, at lower levels – under oral orders from a commander.

The term '**apparent**' means that an attack must be suspended if the attack is clearly unlawful. This means if, contrary to expectations at the operation planning stage, the objective is not a military one or has been accorded special protection, or if the collateral damage will be excessive in relation to the concrete and direct military advantage.

The obligation entails a duty to **suspend** an attack and is thereby best implemented by persons who, formally or in practice, are authorised to cancel or delay an ordered attack. All personnel have a **derivative obligation** to inform the commander if it becomes apparent to them that an imminent attack will be unlawful.³⁶

Example 8.46 of a delay in an attack based on observations showing apparent deviations from what was expected:

An infantry unit is ordered to conduct an attack against an abandoned *compound**, which is used as an ammunition depot. The unit subsequently discovers that children are running about in the *compound**. There is nothing in the operation order to indicate that any knowledge of civilians in the target area was available; and, accordingly, there is no indication as to whether this factor has been taken into account. The unit commander, therefore, delays the attack, contacts TOC, and awaits a solution.

Example 8.47 of the suspension of an attack based on observations showing apparent deviations from what was expected:

An aircraft is ordered to fly over hostile territory to attack a railway bridge. Moving towards the objective, the aircraft flies along the railway line and sees that a passenger train is on its way to that very same bridge. The time between the attack and the point when the track reaches the bridge is too short to allow the aircraft to warn the engineer. The attack consequently risks causing immediate and hitherto unforeseen collateral damage which is very likely to be disproportionate. The pilot, therefore, suspends the attack and returns towards his base.

Example 8.48 of a delay in and the suspension of an attack based on observations showing apparent deviations from what was expected:

An armoured infantry company has just been ordered to launch an attack against the home of a local contingent leader, and it has been taken into account that the leader's immediate family members will be present. *HUMINT** receives a phone call from one of its reliable sources. The source reports that the contingent leader is celebrating his son's wedding and that, therefore, many civilian guests will be present at the location. *HUMINT** reports straightaway to *TOC**, which notifies the armoured infantry company to delay the attack, and immediately afterwards to the force commander, who orders a cancellation of the attack.

36 Addendum 8.7

In other words, there is a duty to react when – after an order has been issued – information emerges or observations are made that warrant such reaction.

The personnel taking action must reasonably be able to assume that the persons who have planned and decided on an attack have taken into consideration everything required under IHL.

Therefore, the personnel taking action must be placed in the best possible position to recognise when apparent deviations from what was expected warrant a suspension of the attack. **Planners and commanders, therefore, have an obligation** to put the acting personnel in a position to recognise matters that apparently give rise to doubt about the lawfulness of an attack.

In situations in which there is visual access to the objective or target area, for instance, coordinates will not be sufficient. The objective and the target area should instead be described in reasonable detail — for instance, a description of the types of collateral damage that have been taken into account. It may also be possible to specify some distinctive signs or indicators to help the unit confirm or disconfirm that circumstances are in line with expectations.

Examples 8.49 of indicators:

Such indicators, for instance, may be information that a vehicle with certain distinctive signs confirming the presence of the person to be attacked will be in the target area. Vehicles at the *compound** to be attacked may also be specified as indicators of the opposite — for instance, the presence of civilians who were not expected to be present at the time of the attack.

In some cases, it is acknowledged in connection with the planning of the operation that circumstances around a particular objective often change. In such situations, Danish personnel must be ordered to keep the objective under continuous observation until the attack is executed. Immediately before the attack, the latest observations are assessed as to whether it avoids the risks of disproportionate collateral damage, etc.

Where attacks are conducted in waves, the situation may easily change between the individual attacks. In such situations, it may become necessary to suspend the remaining attacks. Continuous observation and reassessment of the target area, therefore, may be needed.

Example 8.50 of a change in circumstances between separate attacks that dictates the suspension of a planned series of attacks:

A planned air attack on a military installation located in an open urban area is launched. The installation is comprised of separate buildings scattered over a small area. The attack is conducted at night when the number of civilians in the area is very limited.

The nature of the objective makes it necessary to execute the attack in three stages. It has even been contemplated that the small amount of civilian traffic in the area will automatically take a route around the area when the first and second waves of attack have been concluded.

However, already after the second wave, quite a few approaching ambulances are observed in the area. This circumstance was not anticipated, and the third wave of attack is cancelled.

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Weapons

International regulation of weapons in armed conflict

Weapons

International regulation of weapons in armed conflict

1. Introduction

Since about 1860, States have aimed at limiting parties to a conflict in their choice of means of warfare (weapons). Given their regulation in the area, which is quite comprehensive at present, States have also tried to protect combatants from exposure to weapons that inflict unnecessary wounds or injuries or subject them to suffering that is excessive in relation to the desired effect.

The regulation of weapons in international law applies regardless of the method of delivery of the weapon in question, that is, regardless of whether it is delivered from a weapons platform at sea, on land, or in the air, in space or even cyberspace. The regulation of weapons and the restrictions on their use are found in declarations, treaties, and customary international law. This comprehensive weapons regulation is quite detailed and technical, and the intention is not to consider each individual declaration or treaty in detail. Rather, the objective is to provide an overview of the regulation of weapons in armed conflict under international law and the significance of such regulation for the Danish Defence.

1.1

Chapter contents

This chapter deals with the regulation in international law of weapons in armed conflict. An overriding principle is that many of the weapons that are prohibited in IACs are also prohibited in NIACs.¹

Section 2 reviews the customary law principles in international humanitarian law relevant to the assessment of the lawfulness of weapons. Section 3 deals generally with weapons and ammunition that are specifically prohibited by international law. Section 4 deals with the IHL rules on lawful weapons, including restrictions on their use. Section 5 provides a few remarks on weapons in naval operations, which is considered in more thorough detail in Section 4.6 of Chapter 14.

Section 6 briefly lists specific conditions of relevance to personnel involved in air operations. Section 7 is concerned with the use of certain types of weapons in *law enforcement situations** and the impact of HRL on the use of weapons in such situations. Section 8 describes the rules on the clearance of land mines. Section 9 describes the rules on the clearance of other explosive remnants of war on land. Section 10 addresses the obligation of States to ensure that weapons and ammunition comply with international law. The chapter includes an annex of definitions of the individual weapons dealt with in this chapter.

In particular, with regard to anti-personnel mines and cluster munitions, Denmark often cooperates with countries which may use these weapons lawfully. The sections on anti-personnel mines and cluster munitions, therefore, contain a specific analysis of coalition operations and give examples of how Danish armed forces must act in order not to violate the total ban on the use of these weapons applicable to Denmark.

1.2

Scope in relation to other chapters

This chapter interfaces with multiple chapters of the Manual. The weapons that are subject to a total ban, such as chemical weapons, anti-personnel mines, and cluster munitions, are also prohibited outside armed conflict. Chapter 3 provides more information about international law in military deployments outside armed conflict.

Section 2 describes the principles of humanity and distinction. These principles are

¹ ICTY Tadić IT-94-1-AR72 1995, para. 119.

described in more detail in Chapter 4 on the fundamental principles of international humanitarian law. Section 6 on weapons used in air operations complements Chapter 13 on air operations and Chapter 8 on military objectives. Section 7 on the use of certain types of ammunition in *law enforcement situations** complements Chapter 11, which deals with the obligations of an occupying power.

Certain weapons are prohibited under any and all circumstances, including naval operations. If a weapons convention does not explicitly exclude naval operations, the strong presumption must be that the regulation also applies to use, etc., at sea. Weapons in naval operations are considered separately in Chapter 14.

1.3

Significance of human rights law

HRL is also significant as regards the degree of the use of force that is permitted in *law enforcement situations** in armed conflict, i.e., in situations in which a need for *law enforcement** arises but the situation has no direct bearing on the conflict. Individual rights, including the right to life, are the legal standard to which the degree of a State's use of force is subjected. Section 7 provides more information about the use of certain weapons in *law enforcement situations**.

1.4

Terminologies of key importance to the assessment of the lawfulness of weapons

International law does not contain one overall definition of weapons. This chapter uses the term “weapon” about, inter alia, conventional weapons, chemical, biological, and bacteriological weapons, ammunition, weapons systems, delivery systems, platforms, and instruments designed to kill, destroy, injure, or in any other way incapacitate or render *hors de combat** personnel and equipment.

The terminology is essential to the assessment of the lawfulness of weapons. The terminology is particularly relevant in relation to the specific weapons conventions that contain a specific prohibition with reference to the *design purpose** of a weapon, i.e., the specific purpose for which the weapon has been designed and is subsequently constructed to fulfil. For instance, Protocol I on Non-Detectable Fragments to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW P I) states: “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.”² The point of the Protocol is that weapons whose primary combat function is to injure by fragments that are detectable by X-rays are not prohibited.

However, such weapons may be prohibited under other rules, such as the prohibition against superfluous injury or unnecessary suffering.

This is reflected, for instance, in quite comprehensive weapons definitions, e.g., the definitions of chemical weapons and anti-personnel mines.

In general, this chapter focuses on ensuring that the terminology reflects the texts of the treaties in good faith and in accordance with the very special meaning accorded to certain terms in the treaties³.

Therefore, the **definitions found in the annex to this chapter** are reproduced directly from the relevant weapons conventions and rules of customary international law. The intention is to avoid the loss of material nuances in the meaning of a word in an attempt to paraphrase the text of a treaty. Previous translations of weapons treaties prepared in connection with the implementation of a treaty into Danish law may have overlooked these nuances.

The *design purpose** of a weapon consists of a combination of the specifications stated in the purchase order and the manufacturer’s technical description of the weapon. The *design purpose** is identified by reviewing the documents required in connection with the acquisition of the weapon in question. Thus, the *design purpose** is almost synonymous with the primary combat function of a weapon in the sense that it is difficult to imagine a weapon whose primary combat function is not the intended result of its design and construction.

The decisive difference between the *design purpose** and the combat function (the effect that a weapon can have on the objective) is that the effect alone does not determine the lawfulness of the weapon in question. Reference is made to Sections 3.7-3.9 below on certain projectiles and to Section 10 below on weapon-screening.

2 CCW P.I.

3 The Vienna Convention on the Law of Treaties, Art. 31

2. The significance of customary international law for the lawfulness of weapons and ammunition

The right of the parties to an armed conflict to choose means (weapons) and methods of warfare is not unlimited.⁴ The choice is limited by the prohibition on superfluous injury or unnecessary suffering⁵ (the principle of humanity) and the principle of distinction.⁶

The principles are essential to the assessment of the lawfulness of weapons and the limitations in international law on the use of weapons.

2.1

The prohibition on superfluous injury and unnecessary suffering (the principle of humanity)

The prohibition on the use of means and methods which are of a nature to cause superfluous injury or unnecessary suffering protects combatants and others taking an active part in hostilities.

The prohibition originates in the Saint Petersburg Declaration from 1868. The Declaration states that the only legitimate object which States should endeavour to accomplish in war is to weaken the military forces of the enemy and that, for this purpose, it is sufficient to disable the greatest number of combatants of the opponent. According to the declaration, this object is exceeded by the employment of weapons which uselessly aggravate the sufferings of disabled men or render their death inevitable.

Accordingly, this is suffering that does not serve any military purpose because the combatant has been rendered *hors de combat**, and, as such, it is unnecessary. The principle has most recently been drawn up in the form of an explicit prohibition to “employ weapons, bullets and material and methods of warfare of a nature to cause

4 AP I, Art. 35(1), AP I, Art. 57(2)(a)(ii), and 1907 Hague Regulations, Art. 22. Reference is also made to the preambles to the Ottawa and Oslo Conventions. See also UNSG Bulletin, Section 6.1.

5 AP I, Art. 35(2), 1907 Hague Regulations, Art. 23(e), Declaration of Saint Petersburg, Hague Declaration 2, Hague Declaration 3, CCW Preamble, CCW P II, Art. 6(2), CCW P II (1996), Art. 3(3), Preamble to the Ottawa Convention, SCIHIL, Rule No. 70, NIAC Manual, Sections 1.2.3 and 2.2.1.3, ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996, para. 78, and ICC Statute, Art. 8(2)(b)(xx). See also UNSG Bulletin, Section 6.3.

6 AP I, Art. 51(4), and SCIHIL, Rule No. 71. See ICC Statute, Art. 8(2)(b)(iv).

superfluous injury or unnecessary suffering”.⁷

A weapon is not prohibited merely because it may cause superfluous injury and unnecessary suffering. The correct assessment of the lawfulness of a weapon in relation to this principle is whether the weapon in connection with its **normal or expected use inevitably will** cause injury or suffering **clearly disproportionate** to the military advantage realised⁸.

The effect, i.e., the injury caused, must be measured against the injury that would be caused by **comparable** lawful weapons or munitions. The correct legal standard, therefore, would not be a comparison of the effect on soft tissue from a hunting projectile fired from a military rifle with the effect on soft tissue from a knife, regardless of the fact that both weapons are capable of causing superfluous injury and unnecessary suffering.

Examples of weapons that are prohibited because they continue to cause injury or unnecessary suffering after the military purpose has been achieved are explosive projectiles when used for anti-personnel purposes and projectiles which expand or flatten easily in the human body. Other examples of prohibited weapons are non-detectable fragments, i.e., fragments that escape detection by X-rays in the human body and which subsequently cannot be found and removed and, therefore, continue to cause injury. More information about explosive projectiles is provided in Section 3.7 below and the annex to this chapter, and information about non-detectable fragments is provided in Section 3.10.

The modern implementation of the prohibition on weapons that cause superfluous injury or unnecessary suffering reflects the first aspect of the principle of humanity as this is applied in the weapon-screening process. More information about the principle of humanity is provided in Chapter 4, and Section 10 provides information about weapon-screening.

2.2

Principle of distinction

The relevance of the principle of distinction in relation to the lawfulness of weapons is the protection of civilians from attack.

⁷ API, Art. 35(2). See also Preamble to Hague Declaration 3 1899, 1907 Hague Regulations, Art. 23 (e), Preamble to CCW, CCW P II (1996), Art. 5(3) and Preamble to the Ottawa Convention.

⁸ API, Art. 36.

In this context, the principle of distinction means, first of all, that the weapon **can be directed** at a specific military objective,⁹ and, second of all, that the **effects** of weapons can be limited in accordance with IHL.¹⁰

Thus, the use of weapons which cannot be directed at a specific military objective or whose effects cannot be limited is prohibited. Biological weapons are an example of weapons which cannot be used in keeping with the principle of distinction. The *design** and construction of a biological weapon, therefore, are decisive for whether its use in some or all circumstances is prohibited under IHL.

Information about biological weapons is provided in Section 3.4 below and the annex to this chapter. Chapter 6 provides information about the protection of individual civilians, the civilian population, and civilian objects.

The customary international law principles against superfluous injury or unnecessary suffering and distinction are interrelated: the injurious effect of a weapon on the target which does not cause superfluous injury or unnecessary suffering, and which complies with the principle of distinction, may be deliberate, planned, purposive, and carefully adhere to the *design purpose**. However, the injurious effect of a weapon may also be caused by malfunction or the use of the weapon in a manner other than intended.

Therefore, the *design purpose** and construction of a weapon are decisive in assessing whether:

- the injury is the result of the incorrect use of the weapon, i.e., the weapon has not been used in accordance with its *design purpose**,
- the injury is the result of a malfunction, or
- the weapon and the ammunition will inevitably in connection with its normal or expected use cause injury or suffering which is manifestly disproportionate to its military advantage.

9 AP I, Art. 51(4)(b), NIAC Manual, Section 2.2.1.1, ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996, para. 78, ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 127, and SCIL, Rules Nos. 12(b) and 71.

10 AP I, Art. 51(4)(c), and SCIL, Rule No. 71.

3. Prohibited weapons

3.1

Asphyxiating gases and other hazardous gases

9.1 It is prohibited to use projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.¹¹

It is prohibited to use asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.¹² + NIAC¹³

Situations may arise in which an adversary is not a party to or cannot become party to the international law instruments prohibiting the use of asphyxiating gases and other hazardous gases — for instance, because the adversary is an OAG. In such situations, the adversary is bound by customary international law.

Section 7.2 below provides information about the conditions for the use of CS gas in connection with *law enforcement**.

3.2

Poison and poisoned weapons

9.2 It is prohibited to use poison and poisoned weapons.¹⁴

+ NIAC¹⁵

The prohibition against using poison and poisoned weapons forms part of customary international law¹⁶ and covers two issues: using poison as a weapon, e.g., by poisoning drinking water or food, and using poison with a view to increasing the injurious effect of another weapon, e.g., by smearing poison on a bladed weapon, on and in ammunition, or on other weapons used to injure an adversary.

11 Hague Declaration 2. See ICC Statute, Art. 8(2)(b)(xx).

12 Gas Protocol, Preamble to CWC and ICC Statute, Art. 8(2)(b)(xviii). See also UNSG Bulletin, Section 6.2.

13 ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 126, and NIAC Manual, Section 2.2.2(c).

14 1907 Hague Regulations, Art. 23(a) and (e), Gas Protocol, ICC Statute, Art. 8(2)(b)(xvii), and SCIHL, Rule No. 72. UNSG Bulletin, Section 6.2.

15 ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 126, NIAC Manual, Section 2.2.2(a), SCIHL, Rule No. 72, and ICC Statute, Art. 8(2)(e)(xiii).

16 Trial of the Major War Criminals 1946, p. 218, and SCIHL, Rule No. 72.

3.3

Chemical weapons

9.3 It is prohibited under any circumstances to use, develop, produce, otherwise acquire, stockpile or retain chemical weapons, or directly or indirectly transfer chemical weapons; to engage in any military preparations to use chemical weapons; and to assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Chemical Weapons Convention (CWC).¹⁷ + NIAC¹⁸

Chemicals that are normally prohibited may be used for military purposes that are not connected with the use of chemical weapons and are not dependent on the use of the toxic properties of chemicals as a method of warfare.¹⁹ One example is the establishment of CBRN defence and instruction and training related thereto. Certain chemicals that are normally prohibited under the CWC may also be used for riot control purposes during armed conflict.²⁰

Such use is conditional upon the following:

- The chemicals may not be used as a method of warfare or in connection with combat;²¹ and
- The types and quantities of the chemicals are consistent with purposes not prohibited under the Chemical Weapons Convention.²²

Reference is made to Section 7.2 below on the use of CS gas and pepper spray in connection with *law enforcement**.

3.4

Bacteriological and biological weapons

9.4 It is prohibited under any circumstances to use, develop, produce, stockpile, otherwise acquire, retain or transfer bacteriological (biological) weapons²³ and in any way to assist, encourage or induce any State, groups of States or international organisations to produce or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery prohibited under the Biological Weapons Convention.²⁴ + NIAC²⁵

¹⁷ CWC, Art. I, and SCIHL, Rule No. 74. UNSG Bulletin, Section 6.2.

¹⁸ CWC, Art. I(1).

¹⁹ CWC, Art. II(9)(c).

²⁰ CWC, Art. II(9)(d).

²¹ CWC, Art. I(5), and SCIHL, Rule No. 75.

²² CWC, Art. II(1)(a), see CWC, Art. VI(I).

²³ Gas Protocol, Biological Weapons Convention, Art. I and III, and SCIHL, Rule No. 73, and Executive Order No. 197 of 21 June 1930, as well as Executive Order No. 78 of 6 September 1976.

²⁴ Gas Protocol, Biological Weapons Convention, Art. I and III, and SCIHL, Rule No. 73. UNSG Bulletin, Section 6.2.

²⁵ Biological Weapons Convention, Art. I, NIAC Manual, Section 2.2.2(b), SCIHL, Rule No. 73, and ICTY Tadić IT-94-1-AR72 1995,

The Convention was originally adopted without an explicit prohibition on use, but such a prohibition has subsequently been adopted.²⁶ It is currently assumed that the Convention also prohibits ownership of bacteriological (biological) weapons. The prohibition encompasses the full definition of bacteriological (biological) weapons of the Convention. Reference is made to the annex to this chapter.

Herbicides

Herbicides are not regulated directly by international law through treaty law provisions. Therefore, the use of herbicides is to take place in strict accordance with the current rules and prohibitions of international law, including customary international law.²⁷ This applies **regardless of the type of conflict**.²⁸

First, this means that, if the chemical composition of the herbicide is of such a character that it is included within the definitions set forth in **the Biological Weapons Convention, the Gas Protocol or CWC** or the chemical composition is to be regarded as a **poison**, the use of the herbicide is prohibited.²⁹ The annex at the end of this chapter lists the definitions of poison, asphyxiating gas and similar liquids, and chemical and bacteriological (biological) weapons.

Second, it means that its use is limited by the prohibition on **weapons or methods of warfare** which are of a nature to cause superfluous injury or unnecessary suffering³⁰ and that the use must comply with the **principle of distinction**.³¹ More information on these principles is provided in Sections 2.1.-2.2 above.

Use is also limited by the prohibition against employing weapons which cause widespread, long-term, and severe damage to the **natural environment** and thereby prejudice the health or survival of the population.³² Section 2.15 of Chapter 10 provides more information about the prohibition against causing damage to the natural environment.

paras. 119 and 126.

26 Preamble to and Article 3 of the Final Declaration from the fourth review conference in 1996 on the Biological Weapons Convention.

27 See, for instance, SCIHL, Rule No. 76.

28 ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 126, and SCIHL, Rule No. 76.

29 See, for instance, the Preamble to CWC, paragraph 7, and SCIHL, Rule No. 76. UNSG Bulletin, Section 6.2.

30 1907 Hague Regulations, Art. 23(e), AP I, Art. 35(2), SCIHL, Rule No. 70, and NIAC Manual, Rule No. 1.2.3.

31 AP I, Art. 51(4), and SCIHL, Rule No. 11. See NIAC Manual, Rule No. 1.2.2.

32 AP I, Art. 35(3), and AP I, Art. 55(1). See SCIHL, Rules Nos. 43-45, and Rule No. 76(e).

3.5

Anti-personnel mines

9.5 It is prohibited under any circumstances to use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; or assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Ottawa Convention.³³

The retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The number of such mines may not exceed the minimum number absolutely necessary for these purposes.³⁴

The transfer of anti-personnel mines for the purpose of their destruction is permitted.³⁵

+ NIAC³⁶

3.5.1 Introduction

The definition of anti-personnel mines in international law, which comes from the Ottawa Convention, is quite extensive. The definition is reproduced in the annex at the end of this chapter.

Denmark has ratified the Ottawa Convention. However, since a number of States with which we often cooperate may not necessarily have done so, certain special considerations are linked to coalition operations with Danish participation in relation to the possible use of land mines by other countries.

3.5.2 Special considerations with respect to coalition operations

In the review of the prohibition below, a number of cooperation-related issues are addressed with a view to reducing the number of cases in which doubt may arise as to how Danish forces should act to avoid violating the Convention.

Denmark is precluded from using anti-personnel mines, but this does not apply to the same extent to all States, and this may pose special challenges to Danish forces in connection with coalition operations. However, the prohibition does not prevent Danish armed forces from being able to participate in a military cooperation and in

³³ Ottawa Convention, Art. 1. UNSG Bulletin, Section 6.2. and Executive Order No. 38 of 27 May 1999.

³⁴ Ottawa Convention, Art. 3(1).

³⁵ Ottawa Convention, Art. 3(2).

³⁶ Ottawa Convention, Art. 1. See also SCIHL, Rule No. 82.

military operations with States that are not parties to the Ottawa Convention and which, therefore, are not bound by the total ban on anti-personnel mines.

As a consequence of this total ban, Danish armed forces need to pay special attention to two issues:

- whether cooperating States in coalition operations bring along anti-personnel mines, and
- whether one's own conduct could be interpreted in any way as engaging in the use, development, production, acquisition, stockpiling, transfer, assistance, encouragement, or inducement to activity that is prohibited under the Convention

International law does not contain any precise demarcations for the individual distribution of responsibilities between States. Therefore, it may be difficult to assess on site whether any particular conduct constitutes a violation of the Convention or how one should act to avoid violation of the Convention.

Very **specific factors** determine the extent to which Danish forces are allowed to participate in an operation with one or more States which may lawfully use anti-personnel mines. Therefore, it is not possible to make an exhaustive list of conduct that could be interpreted as a violation of the Convention.

For the purpose of specifying the prohibitions of the Convention, **examples** are presented below of situations that may arise in connection with coalition cooperation and, therefore, about which it could be useful for Danish forces to be aware.

3.5.3 Examples of situations covered by the prohibition on using, developing, producing, otherwise acquiring, stockpiling, retaining or transferring anti-personnel mines to anyone, directly or indirectly.

Use

Should a coalition partner want to **secure the perimeter** of a Danish camp with anti-personnel mines, this must be refused with reference to the fact that the Convention prohibits such use, encouragement, assistance, or inducement.

Moreover, Danish armed forces are prohibited from requesting an **anti-personnel minefield** in support of an operation because such a request could also be regarded as use, encouragement, assistance or inducement.

Development and production

The Convention prohibits the development and production of anti-personnel mines and parts thereof: for example, the development of new technology based on something other than, say, magnetic, seismic, acoustic or contact fuses, intended for future use in anti-personnel mines. Since the Convention also prohibits assistance, encouragement, or inducement in any way, Danish armed forces would also violate the Convention if they were to participate in projects for the purpose just mentioned, e.g., in the form of financial support.

Otherwise acquired

The rule of IHL on the confiscation of war booty means that a State's armed forces may lawfully acquire the adversary's military equipment, including vehicles, weapons, etc. Section 2.8 of Chapter 10 provides additional information about the rules on war booty.

In such situations, the interplay between the rules on war booty and the rules set forth in the Ottawa Convention³⁷ has the effect that stockpiled anti-personnel mines taken as war booty must be destroyed. The transfer of anti-personnel mines for the purpose of destruction is permitted. Thus, the confiscation or capture of stockpiled anti-personnel mines will not be regarded as having acquired anti-personnel mines if the mines are subsequently destroyed.

Stockpiles

Danish forces must ensure that anti-personnel mines are not stockpiled in areas under Danish control. This includes, for instance, Denmark's own camps and bases, which are on loan to Danish forces and, therefore, temporarily controlled by them. If Danish forces — e.g., as part of an occupation — gain control of stockpiled anti-personnel mines, they have an obligation to ensure that the mines are destroyed.³⁸

In situations in which Danish forces gain control of stockpiled anti-personnel mines while operating under the mandate of an international organisation, such as NATO or the UN, the mandate must be carefully considered to establish whether the obligation to destroy them rests with Denmark or the international organisation.

³⁷ Ottawa Convention, Art. 1(b), see also Art. 4.

³⁸ Ottawa Convention, Art. 4, see Art. 1(2).

Transfer

The prohibition on transfer in the Ottawa Convention encompasses both the physical movement of anti-personnel mines into or from a national territory and the transfer of title to and control of the mines.³⁹ The transfer in the form of physical movement of anti-personnel mines thereby also includes actual transport of the mines.

Danish forces are required to deny specific requests to transfer (including to transport) anti-personnel mines unless such transfer takes place with a view toward their destruction.⁴⁰

If a Danish aircraft or carrier ship is lent for the purpose of transport, the *loadmaster** should ensure that the *cargo manifest** is reviewed in order to ensure that equipment is not transported in violation of Danish obligations. Obviously, the same applies to other weapons that are subject to a similar total ban, such as chemical weapons, bacteriological (biological) weapons, and cluster munitions. Reference is made to Section 6 on weapons used in air operations and Chapter 13 about special considerations in air operations.

However, the term “transfer” does not cover situations in which Danish forces take control of part of a territory where anti-personnel mines have already been laid.⁴¹ This is of particular importance when, for instance, Danish forces expropriate property or occupy territory in accordance with the relevant rules. These situations are not to be regarded as a transfer of anti-personnel mines which may have been laid in the territory. However, an obligation to ensure destruction of the anti-personnel mines arises.⁴²

3.5.4 Comments on the prohibition against assisting, encouraging, or inducing anyone to use anti-personnel mines in any way

The Ottawa Convention’s prohibition against assisting, encouraging, or inducing the use of anti-personnel mines in any way is not elaborated in detail in the Convention.⁴³

³⁹ Ottawa Convention, Art. 2(4).

⁴⁰ Ottawa Convention, Art. 3(2).

⁴¹ Ottawa Convention, Art. 2(4).

⁴² Ottawa Convention, Art. 4, see Art. 1(2).

⁴³ Ottawa Convention, Art. 1(c).

This very broad prohibition means that Danish forces are left with limited latitude for activities that cannot be considered assistance, encouragement, or inducement to engage in activities prohibited under the Convention. Therefore, national interpretation and implementation are required. The very broad prohibition should lead to **a very cautious approach for Danish forces in terms of participation in the planning and execution of operations involving the use of anti-personnel mines.**

As far as Denmark is concerned, the prohibition may be assumed to be most relevant in **coalition operations**. Typically, it will not pose the same challenges in alliance operations, which are executed within the framework of previously concluded agreements, including STANAGs*.

Generally, assistance, encouragement, or inducement encompasses positive action. However, it cannot be precluded that, depending on the special circumstances of a situation, passivity can be interpreted as assistance, encouragement, or inducement. Danish forces, therefore, are required to **show caution in any conduct** that can be interpreted in any way to mean assistance, encouragement, or inducement to anyone to use, develop, produce, otherwise acquire, stockpile, retain or transfer (including transport) anti-personnel mines.

Danish armed forces may not participate in the planning of the use of anti-personnel mines in operations or the implementation of activities which concern the use of anti-personnel mines.

Any advantage that Danish armed forces might gain from the laying of anti-personnel mines by other States will not constitute a violation of the Ottawa Convention by Denmark provided that the Danish armed forces have complied with the prohibition set forth in Article 1 of the Convention, including the prohibition to assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Convention.

Example 9.1 of a situation illustrating permissible conduct

Billeting of Danish personnel at a camp whose perimeter has been secured and which belongs to a State that has not acceded to the Convention or billeting of Danish military personnel for a period of, for instance, six months in part of a coalition camp whose perimeter has been secured by anti-personnel mines is permissible conduct.

Billeting does not mean that a situation has arisen in which Denmark can be said to have used, developed, produced, transferred, etc., anti-personnel mines contrary to the Convention. Reference is made to Chapter 15, which provides a general outline of the rules on State responsibility.

3.6

Cluster munitions

9.6 It is prohibited under any circumstances to use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions; or to assist, encourage or induce anyone to engage in any activity prohibited to Denmark under the Convention on Cluster Munitions (Oslo Convention).⁴⁴ + NIAC⁴⁵

Denmark is precluded from using cluster munitions, but this does not necessarily apply to all States with which we cooperate, and this may pose special challenges to Danish forces in connection with coalition operations.

The section on coalition operations aims at fulfilling the need for clarification in situations in which doubt may arise as to how Danish forces should act to avoid violating the Convention.

3.6.1 Special considerations with respect to coalition operations

9.7 Notwithstanding the prohibition set out in Article 1 of the Oslo Convention, Danish armed forces may engage in military cooperation and operations with States that are not party to the Convention and which, therefore, are not bound by the prohibition on the use of cluster munitions.⁴⁶

Cooperation is not unlimited since Danish armed forces may never expressly request the support of other States in the form of cluster munitions in cases in which the choice of munitions used is within the exclusive control of Danish armed forces.⁴⁷ + NIAC⁴⁸

As opposed to the Ottawa Convention on anti-personnel mines, the Oslo Convention contains a ***special interoperability provision***⁴⁹ allowing military cooperation between States Parties and non-States Parties.

The provision expressly states that Denmark and Danish armed forces may participate in military cooperation and operations with non-States Parties – even if such participation could result in the use of cluster munitions in connection with a military operation.⁵⁰

⁴⁴ Oslo Convention, Art. 1.

⁴⁵ Oslo Convention, Art. 1, and ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 126.

⁴⁶ Oslo Convention, Art. 21(3).

⁴⁷ Oslo Convention, Art. 21(4)(d), see Art. 1.

⁴⁸ Oslo Convention, Art. 1.

⁴⁹ Oslo Convention, Art. 21(4).

⁵⁰ Oslo Convention, Art. 21(3).

Danish armed forces, therefore, may lawfully cooperate with non-States Parties allowed to use cluster munitions without automatically violating international law.

However, Denmark's cooperation with non-States Parties is not lawful if it engages in conduct whose result is that Denmark:

- itself develops, produces, or otherwise acquires cluster munitions;
- itself stockpiles or transfers cluster munitions;
- itself uses cluster munitions; or
- expressly requests the use of cluster munitions in cases in which the **choice of munitions used is within its exclusive control**.⁵¹

The provision on interoperability is not limited to particular situations. However, any cooperation with a non-State Party which results in the actualisation of one of the four prohibitions above constitutes a violation of international law.⁵²

The last prohibition listed above can be a challenge in practice. What is **essential** in this context is the **exclusive control of the actual choice of munitions**. In practice, exclusive control means the **final decision-making power** in the choice of munitions.

This means, for instance, that the Danish contingent in the *joint targeting process** must ensure in the **planning** of operations that Danish military personnel are not left with decision-making powers in the choice of munitions in situations in which cluster munitions are used in the attack.

When **executing** operations, Danish forces may request neutralisation of a specific objective with a specific effect, such as suppression, destruction or the like. However, Danish forces may **not** expressly request the use of cluster munitions in cases in which Danish forces have exclusive control of the choice of munitions.

The Convention, thus, allows for *interoperability** with States which are not party to it on the condition that the framework for *interoperability** of the Convention is complied with.

Any questions about the stockpiling, retention, transfer, etc., of cluster munitions must be resolved by following the **chain of command** to the Danish Ministry of Defence.

⁵¹ Oslo Convention, Art. 21(4).

⁵² Oslo Convention, Art. 21(3), see Art. 1(1)(c).

Reference is made to Chapter 13 about special conditions in air operations and Section 4.5.1 of Chapter 15, which provides a general outline of the rules on State responsibility.

3.7

Explosive projectiles

9.8 It is prohibited to use against personnel explosive projectiles which explode within the human body or are charged with fulminating or inflammable substances.⁵³ +NIAC⁵⁴

The prohibition was first formulated in the Declaration of Saint Petersburg of 1868, which prohibits the anti-personnel use of projectiles of a weight below 400 grammes which are either explosive or charged with fulminating or inflammable substances. The weight limit of 400 grammes stipulated in the Declaration is not relevant today as a result of technological developments.

The *design purpose** of the ammunition is essential to the assessment of the projectile's compliance with international law. If the *design purpose** of a projectile is that its normal or expected use is to explode in the human body, then, the projectile is an explosive projectile, which is prohibited. The prohibition is ascribable to the fact that the injury caused by the explosion unnecessarily aggravates the suffering of the persons hit or that their injuries render death inevitable.⁵⁵

The explosion taking place in the human body is the primary combat function, i.e., the effect, and the effect is a result of the *design purpose**.

Compared with other types of ammunition used in modern armed conflict, the use of this type of ammunition inevitably causes superfluous injury or unnecessary suffering that is clearly disproportionate to its military advantage since the disablement of the adversary can be achieved by using, for instance, ordinary live ammunition that, through its expected or normal use, causes less injury in the human body.

Normal, planned anti-personnel use of explosive projectiles, therefore, will be in conflict with the prohibition.

⁵³ Declaration of Saint Petersburg, 1907 Hague Regulations, Art. 23(e), ICC Statute, Art. 8(2)(b)(xx), and SCIH, Rules Nos. 70 and 78. UNSG Bulletin, Section 6.2.

⁵⁴ SCIH, Rules Nos. 70 and 78, NIAC Manual, Section 2.2.2(d), and ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 126.

⁵⁵ Saint Petersburg Declaration.

However, the projectiles may be used lawfully to neutralise vehicles even if this means that the personnel inside a vehicle will be wounded in the process. In this context, the types of fulminating or inflammable substances contained in the projectile are not determinative of the lawfulness.

Section 2.1 above provides information about the prohibition on superfluous injury or unnecessary suffering, while Chapter 4 provides information about the principle of humanity.

3.8

Bullets which expand or flatten easily in the human body

9.9 It is prohibited to use bullets which expand or flatten easily in the human body.⁵⁶
+ NIAC⁵⁷

The prohibition encompasses all ammunition designed and constructed to expand or flatten easily in the human body, e.g., bullets with a hard envelope that does not entirely cover the core or which has been pierced with incisions.

Such ammunition is typically referred to as **dum-dum bullets** or **expanding bullets**. Examples of this type of ammunition are soft point bullets, characterised by a hard envelope that does not entirely cover the core, and hollow point bullets, the tip of which is pitted. The prohibition may also include bullets which have a “normal” ballistic tip but, nevertheless, expand or flatten easily in the human body.

The key terms are “expand”, “flatten” and “easily”. **Expand** focuses on the circumference of the bullet. If the bullet explodes, it has not expanded according to the terminology applied in international law. **Flatten** is to be understood in the sense that the bullet becomes flatter. If the bullet curves, bends, or otherwise changes shape into something that is not flat, it has not flattened according to the terminology used in international law. **Easily** in this context means in the majority of but not necessarily all situations.

Like explosive projectiles, the injury here caused by the expansion is a result of the *design purpose**. Thus, the *design purpose** of the bullet is decisive in relation to its lawfulness under international law.

⁵⁶ Hague Declaration 3, 1907 Hague Regulations, Art. 23(e), ICC Statute, Art. 8(2)(b)(xix), and SCIHL, Rules Nos. 70 and 77. UNSG Bulletin, Section 6.2.

⁵⁷ ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 126, and SCIHL, Rules Nos. 70 and 77.

Its lawfulness under international law is determined by comparison with the principles of customary international law: an injury caused by expanding bullets is in violation of the prohibition if it causes superfluous injury or unnecessary suffering.

Compared with other types of ammunition, bullets that expand or flatten easily inevitably cause superfluous injury or unnecessary suffering that is clearly disproportionate to their military advantage since the disablement of the adversary can be achieved, for instance, by using full-jacketed ammunition that, through its normal or expected use, causes less injury in the human body.

The design and construction of bullets that expand or flatten easily in the human body, thus, constitute a violation of the prohibition on superfluous injury or unnecessary suffering. Therefore, the use of such bullets is prohibited. Reference is made to Section 7.1 below on the lawful use of the bullets in *law enforcement situations**.

Photos 9.1 and 9.2 below show a standard NATO 7.62 mm bullet before and after firing. For purposes of comparison, photos 9.3 and 9.4 show the expanding effect of the firing of a 7.62 mm bullet that has been designed to expand when it hits its target.



PHOTO 9.1 | The photo shows an unfired standard NATO bullet of the 7.62 x 51 mm full-jacketed type. Photo: P.Thiis Knudsen, Surg. Cdr RDNR.



PHOTO 9.2 | The photo shows a fired NATO bullet of the 7.62 x 51 mm full-jacketed type. The bullet has been recovered from gelatine blocks. Photo: P.Thiis Knudsen, Surg. Cdr RDNR.



PHOTO 9.3 | The photo shows an unfired expanding bullet of the 7.62 mm soft point type, that is, the jacket does not cover the lead core, and the lead, therefore, is visible at the tip. Photo: P.Thiis Knudsen, Surg. Cdr RDNR.



PHOTO 9.4 | The photo shows a fired expanding bullet of the 7.62 mm soft point type, that is the jacket does not cover the core and the lead, therefore, is visible at the tip. The bullet has been recovered from gelatine blocks. Photo: P.Thiis Knudsen, Surg. Cdr RDNR.

3.9

The prohibition on superfluous injury or unnecessary suffering applied to other types of ammunition

The prohibition on weapons and ammunitions in armed conflict that cause superfluous injury or unnecessary suffering also applies to other bullets than those regulated individually by international law.

These include bullets that normally *tumble** more than most other bullets that are normally used for the same purpose and, as a result, transfer more energy to the target and, therefore, inevitably cause injury or suffering for which no similar military advantage exists.

Included are bullets that normally fragment or deform on impact and, thus, cause injury or suffering for which no similar military advantage exists.

Therefore, the lawfulness of these types of bullets must be carefully assessed in order to establish whether their normal or intended use under any or all circumstances is designed inevitably to cause superfluous injury or unnecessary suffering for which no similar military advantage exists, so that their use, therefore, is clearly disproportionate to the expected military advantage. If this is the case, their use is prohibited. Reference is made to Section 10 below on weapon-screening.

3.10

Non-detectable fragments

9.10 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.⁵⁸ + NIAC⁵⁹

Examples of non-detectable fragments are glass fragments, plastic fragments, or *nanotechnology** based on plastic.

58 CCW P I and SCIHL, Rule No. 79. UNSG Bulletin, Section 6.2., Executive Order No. 114 of 12 December 1983, and Executive Order No. 20 of 21 July 2005.

59 CCW, Art. 1, NIAC Manual, Section 2.2.2(e), and SCIHL, Rule No. 79.

3.11

Blinding laser weapons

9.11 It is prohibited to employ 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.⁶⁰
+ NIAC⁶¹

If a laser weapon is used specifically against the eye, such use is prohibited if the laser weapon has been specifically designed, as its sole combat function or as one of its combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye.⁶² The eye will still be regarded as **naked** even if glasses or contact lenses are worn.

The prohibition also covers laser weapons that, prior to their acquisition, cannot cause permanent blindness but which are **modified** for that specific purpose after their acquisition.

Collateral damage caused by an incidental or collateral effect of the military employment of laser systems used against the naked eye or optical equipment, such as night vision goggles, periscope, optical sights, or binoculars, is not covered by the prohibition.

The use of target designation equipment, such as the Royal Danish Air Force's *laser target designator** and the Royal Danish Army's *ground laser target designator (GLTD)** or *rangefinder**, should take place in *eye-safe mode** if possible, meaning that the frequency (wavelength) is adjusted to a band that does not harm the eye.

CCW P IV also prohibits the transfer, including **transport**, of blinding laser weapons to any State or non-State entity. However, the Protocol does not prohibit States from owning, developing, studying, borrowing, or selling blinding laser weapons. Reference is made to Section 10 below on weapon-screening.

⁶⁰ CCW P IV and SCIH, Rule No. 86. UNSG Bulletin, Section 6.2.

⁶¹ CCW, Art. I, NIAC Manual, Section 2.2.2(f), SCIH, Rule No. 86, and ICTY Tadić IT-94-1-AR72 1995, Art. 119 and 126.

⁶² CCW P IV.

3.12

Environmental modification techniques

This section is concerned with the prohibition on using the natural environment as a weapon.

9.12 It is prohibited 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 Party⁶³; and
- to assist, encourage or induce any State, groups of States or international organisations to engage in activities contrary to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.⁶⁴

The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) prohibits any technique, the purpose of which is to change – through the deliberate manipulation of natural processes – the dynamics, composition, or structure of the Earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space.⁶⁵

The crux of the matter is the specific prohibition on military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as a means of destruction, damage or injury to any other State Party.⁶⁶

Examples of natural phenomena that it is prohibited to cause with a view to military or hostile use are:

- earthquakes;
- tsunamis;
- changes in weather patterns (clouds, precipitation, cyclones, and tornadic storms); or
- changes in ocean currents and the state of the ozone layer.⁶⁷

Reference is made to Section 2.15 of Chapter 10 on the prohibition against exposure of the natural environment to irreparable damage.

⁶³ ENMOD, Art. 1(1). See SCJHL, Rule No. 45.

⁶⁴ ENMOD, Art. 1(2).

⁶⁵ ENMOD, Art. 2.

⁶⁶ ENMOD, Art. 1(1).

⁶⁷ ENMOD, Art. 2.

4. Lawful weapons

This section outlines the limitations in international law on the use of lawful weapons. The limitations follow, in part, from treaties and, in part, from the customary international law principles of humanity and distinction. The section is not concerned with the requirements in international law to limit attacks to military objectives or the proportionality requirement. Reference is made to Chapter 8 in that respect.

4.1

Mines, booby-traps, and other devices

9.14 To the extent feasible, remotely-delivered mines must be equipped with an effective self-destruction or self-neutralisation mechanism and have a back-up self-deactivation feature that ensures that the mine will no longer function when its use no longer serves a military purpose.⁶⁸

When booby-traps and other devices are used in towns, cities, or other areas with civilians, they must be placed on or in close vicinity of a military objective. Effective advance warning must be given.⁶⁹

+ NIAC⁷⁰

In connection with its ratification of CCW Protocol II, Denmark issued a statement that the provisions set forth in the Protocol “which, according to their contents and nature can also apply in time of peace, must be complied with at all times”.⁷¹

4.1.1 General limitations on the use of mines, booby-traps, and other devices

Effective advance warning must be given of any emplacement of mines, booby-traps, and other devices which may affect the civilian population unless circumstances do not permit.⁷²

The following activities are **prohibited** when mines, booby-traps, and other devices are used:

68 CCW P II (1996), Art. 6(3).

69 CCW P II (1996), Art. 3(11) and Art. 7(3)(a) and (b).

70 CCW, Art. 1, and CCW P II (1996), Art. 1.

71 See EOI No. 50 of 17 June 1999.

72 CCW P II (1996), Art. 3(11).

- the use of any mine, booby-trap, or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering;⁷³
- the use of mines, etc., against the civilian population or civilian objects;⁷⁴
- the carrying out of indiscriminate attacks, i.e.,
 - attacks that cannot be directed against a military objective;
 - attacks in which a method or means of delivery is employed which cannot be directed at a specific military objective; or
 - attacks that must be expected to cause collateral damage to an extent that would be excessive in relation to the military advantage anticipated;⁷⁵
- the use of mines, booby-traps, and other devices as reprisals; and⁷⁶
- the use of mines, booby-traps, or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.⁷⁷

4.1.2 Prohibited use of mines

The following prohibitions apply specifically to the use of **mines**:

- It is prohibited to use mines produced after 3 December 1998,⁷⁸ unless they are marked with the following information: name of the country of origin, month and year of production, and serial number or lot number. The information must be written in English or in the respective national language or languages, and it should be visible, legible, durable and resistant to environmental effects, as far as possible.⁷⁹
- It is prohibited to use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.⁸⁰ An anti-handling device is a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine.⁸¹

73 CCW P II (1996), Art. 3(3).

74 CCW P II (1996), Art. 3(7).

75 CCW P II (1996), Art. 3(8-9), see Art. 2(6). See AP I, Art. 51(4) and (5), and SCIHL, Rule No. 81.

76 CCW P II, Art. 6(1) and Art. 3(2), and CCW P II (1996), Art. 7(1) and Art. 3(7).

77 CCW P II (1996), Art. 3(5), see Art. 2(10)-(12).

78 CCW P II (1996), Technical Annex, Art. 1(d), and EOI No. 50 of 17 June 1999.

79 CCW P II (1996), Technical Annex, Art. 1(d).

80 CCW P II (1996), Art. 3(6), see Art. 2(14).

81 CCW P II (1996), Art 2(14).

- It is prohibited to use **remotely-delivered mines**
 - that are not recorded in accordance with the specifications set out in the Technical Annex to the Protocol;⁸²
 - unless they, to the extent feasible, are equipped with an effective self-destruction or self-neutralisation mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.⁸³

4.1.3 Prohibited use of booby-traps and other devices

Booby-traps may not in any way be attached to or associated with:⁸⁴

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

It is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically ***designed**** and **constructed** to contain explosive material,⁸⁵ such as a radio, computer, camera, or mobile phone.

The use of booby-traps is **prohibited in operations under UN command**.⁸⁶

A booby-trap does not necessarily have to be a physical object. It is possible to conduct CNAs* using a ***cyber booby-trap**** so that when an apparently harmless e-mail is

82 CCW P II (1996), Art. 6(1), see Technical Annex, Art. 1(1)(b).

83 CCW P II (1996), Art. 6(3), see Technical Annex, Art. 1(3)(a).

84 CCW P II, Art. 6(1) and Art. 7(1)(a-j), NIAC Manual, Section 2.2.3.1, and SCJHL, Rule No. 80.

85 CCW P II (1996), Art. 7(2).

86 UNSG Bulletin, Section 6.2.

opened, the cyber booby-trap spreads its harmful effects into the adversary's systems. Such systems include military traffic control systems, supply systems, or the like whereby a breakdown results in qualified physical damage as a result of the CNA*.

A cyber booby-trap must be *designed** to **cause injury to persons** to qualify as a mine. In such cases, the apparently harmless act – the opening of the e-mail in this case – may not be associated with the objects and persons listed above.

Not all of these objects and persons make direct sense in a CNO* context; but *malware**, for instance, which has been designed to be triggered when an e-mail is opened, will constitute prohibited booby-trapping if the sender of the e-mail is seemingly associated with one of the groups of persons listed above, such as a supplier of medicine or food.⁸⁷

4.1.4 Permitted use of booby-traps and other devices

Booby-traps and other devices may be used in accordance with the relevant rules of IHL. Hence, booby-traps and other devices may be used in any **city, town, village, or other area containing a similar concentration of civilians** even if combat is not taking place or does not appear to be imminent.

In such situations, their use is **conditional upon**

- The placement of booby-traps or other devices on or in the close vicinity of a military objective; or
- measures being taken to protect civilians from the effects of the booby-traps or other devices, for example, posting sentries, issuing warnings, or setting up fences.⁸⁸

It is not possible to prepare a full list of objects that may be booby-trapped. IHL contains specific prohibitions, such as the prohibition on the use of booby-traps attached to sick or wounded persons, and a more general prohibition, such as the prohibition on the use of booby-traps that cause superfluous injury or unnecessary suffering.⁸⁹ Consequently, this does not mean that objects that are not specifically referred to on the list in Section 4.1.3 above may automatically be booby-trapped.

⁸⁷ CWM, Rule No. 44.

⁸⁸ CCW P II, Art. 4(2), and CCW P II (1996), Art. 7(3).

⁸⁹ CCW P II, Art. 6(2), and CCW P II (1996), Art. 3(3).

4.1.5 Mines designed to detonate by the presence of a vehicle

It is lawful to use mines designed to detonate by the presence of a vehicle, but their use is limited.⁹⁰

At the third review conference of the UN Convention on Certain Conventional Weapons in 2006, Denmark and a number of other States adopted a declaration⁹¹ in which the States commit

- not to use the mines outside a perimeter-marked area if the mines are not detectable;
- not to use the mines outside a perimeter-marked area if they do not incorporate a self-destruction or self-neutralisation mechanism;
- not to use the mines outside a perimeter-marked area unless they also incorporate a back-up self-deactivation feature; and
- to prevent the transfer of the mines to recipients other than States.

Moreover, the declaration aims at implementing the limitations on the use of the mines at the national level. Danish armed forces must act in accordance with the declaration.⁹²

4.2 Incendiary weapons

Incendiary weapons are weapons such as flame throwers, fougasses, grenades, rockets, mines, bombs, and other containers of incendiary substances.⁹³

9.15 Air-delivered incendiary weapons may only be used against a military objective located within a concentration of civilians if such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to limiting or reducing incidental losses of civilian lives, injury to civilians, and damage to civilian objects.⁹⁴

Incendiary weapons may only be used against forests or other kinds of plant cover if such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.⁹⁵

+ NIAC⁹⁶

⁹⁰ SCJHL, Rule No. 81.

⁹¹ Document CCW/CONF.III/WP.16 adopted on 16 November 2006.

⁹² Addendum 9.1.

⁹³ CCW P III, Art. 1(a).

⁹⁴ CCW P III, Art. 2(3).

⁹⁵ CCW P III, Art. 2(4).

⁹⁶ CCW, Art. 1, NIAC Manual, Section 2.2.3.3, and SCJHL, Rules Nos. 84-85.

Incendiary weapons that are not air-delivered may be used lawfully against combatants even if they are located in an area with a concentration of civilians.⁹⁷ The use of incendiary weapons shall occur in accordance with the rules on attacks set out in IHL. Reference is made to Chapter 8 on military objectives.

Incendiary weapons may be used against military objectives, such as tanks, even if their use means that combatants inside the tank receive burns.

Incendiary weapons must be used in accordance with the prohibition on superfluous injury or unnecessary suffering and in accordance with the principle of distinction.

The use of incendiary weapons is prohibited in military operations under UN command.⁹⁸

4.3
White phosphorus

White phosphorous is not directly subject to international law treaty regulation; but, depending on the circumstances, its use will be regulated by, for instance, the Chemical Weapons Convention or Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons to the UN Convention on Certain Conventional Weapons. The use of white phosphorus is also regulated by principles of customary international law, particularly the prohibition on superfluous injury or unnecessary suffering.

The anti-personnel use of white phosphorus may result in severe burns because burning phosphorus cannot be extinguished. Moreover, the lungs and respiratory organs may suffer serious damage by inhalation.

9.16 White phosphorus may not be used to directly attack combatants. ⁹⁹	+NIAC ¹⁰⁰
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White phosphorous must in all circumstances be used in accordance with the prohibition on superfluous injury or unnecessary suffering and the principle of distinction.

97 CCW P III, Art. 1(2).
98 UNSG Bulletin, Section 6.2.
99 SCIH, Rule No. 70. Addendum 9.2.
100 ICTY Tadić IT-94-1-AR72 1995, paras. 119 and 126, and SCIH, Rule No. 70. Addendum 9.2.

This does not prevent Danish armed forces from using white phosphorus to create a smokescreen against an adversary in armed conflict.

Example 9.2 of lawful use of white phosphorus to create a smokescreen:

The grenades land between the objective (military object) and the advancing unit. A company (CMP) is to attack and take an objective. The adversary at the objective is observing the CMP's advance towards the objective. The company commander, therefore, orders his artillery observer* (AO) to create a smokescreen to hide the company's advance towards the objective. Considering the direction of the wind, the AO orders the smoke grenades to land between the objective and the company.

4.4

Cyber weapons

9.17 It is prohibited to employ means or methods of cyber warfare that are of a nature to cause superfluous injury or unnecessary suffering.¹⁰¹ + NIAC¹⁰²

Cyber weapons are means of warfare which, by their design, use, or intended use, are capable of causing either injury to or the death of persons or damage to or destruction of objects, i.e., fulfilling the requirements for qualification of the means as a CNA*.

Means of warfare here include any cyber instrument, mechanism, equipment, or software used for such an attack as opposed to the Internet, which is used only as a platform for conducting the attack and which is not controlled by the attacking party.¹⁰³

5. Weapons in naval operations

The rules on distinction and humanity in international law also apply to the use of weapons at sea. This means, for instance, that the weapons considered in Sections 3.1-3.13 above are also prohibited when delivered from a weapons platform at sea.

Similarly, the description of the *design purpose** above also applies to weapons at sea.

101 Tallinn Manual on the International Law Applicable to Cyber Warfare (CWM), Rule No. 42, and SCIHIL, Rules Nos. 70 and 71.

102 SCIHIL, Rule No. 70.

103 CWM, Rule No. 41.

The regulation of mines set forth in the amended CCW Protocol II (1996) does not apply at sea except for the laying of mines in waters close to the coast, e.g., for the purpose of rendering landing difficult.¹⁰⁴ The specific weapons in naval warfare that are of relevance to Danish Armed Forces are considered separately in Section 4.6 of Chapter 14 about means and methods specific to naval warfare.

6. Weapons in air operations

The Royal Danish Air Force uses conventional precision weapons. In a Danish context, therefore, the weapons rules in IHL have the greatest relevance in areas of cooperation between the personnel of the Royal Danish Air Force and coalition partners.

Danish forces must pay special attention to the weapons arsenals of their coalition and alliance partners and establish whether, in specific operations, they use anti-personnel mines, cluster munitions, or other weapons that Denmark is under an obligation not to use, etc. See Sections 3.5 and 3.6 above, which have a particular focus on operations with coalition partners.

As mentioned above, a number of conventions contain not only prohibitions on use but also on transport, retention and stockpiling, etc. Weapons that are prohibited to Denmark may not be transported on behalf of other States. This applies even if the weapons are not prohibited to the State in question.

Therefore, a procedure needs to be established for the Royal Danish Air Force to ensure that such transport involving the use of Danish aircraft does not take place because, depending on the circumstances, this could result in State responsibility. Reference is made to Section 4.5.1 of Chapter 15, which outlines the rules on State responsibility.

¹⁰⁴ CCW P II (1996), Art. 1, and CCW P II, Art. 1.

7. Special considerations with respect to law enforcement* operations in armed conflict

Situations frequently arise in which Danish armed forces perform *law enforcement** tasks in an armed conflict. *Law enforcement** tasks in armed conflict have materialised particularly in two types of scenarios:

Scenario 1 – Transnational NIACs

First of all, there are transnational NIACs in which Danish forces not only engage in actual fighting against a non-State *organised armed group (OAG)** but also assist the territorial State with *law enforcement** subject to a request from this State and/or a mandate from the United Nations Security Council. Chapter 2 provides information about the different types of conflict.

Scenario 2 – Occupation

The second type of situation occurs during an occupation in which *law enforcement tasks** rest to some extent with the occupying power. See Section 4.2 of Chapter 11 about law enforcement in occupied territory.

Three special comments follow that relate exclusively to *law enforcement tasks** in the scenarios described above.

The first comment is about the limited use of bullets that expand or flatten easily in the human body. The second specific comment addresses the use of CS gas and pepper spray. The third comment is about the use of *non-lethal or less-lethal weapons**.

7.1

Use of projectiles which expand or flatten easily in the human body

The rules under international law of the lawfulness of certain projectiles, presented above in Sections 3.7-3.9, regulate the relationship between the parties to a conflict on the battlefield pursuant to considerations of humanity and distinction. In the rela-

tionship between enemy combatants or civilians taking direct part in hostilities, the rules apply regardless of the type of situation in which the ammunition is intended to be used during armed conflict.

Hence, the prohibition concerns situations in which the projectile is used as a means of warfare against enemy combatants or civilians taking direct part in the hostilities. See Section 3.8 above in this respect, and Section 2.2 of Chapter 5 on the direct participation of civilians in hostilities.

However, the prohibition on use cannot be presumed to apply in situations away from the battlefield where the ammunition is used, for instance, against a particularly dangerous perpetrator in an endeavour to minimise the risk of injury to hostages or others or the ammunition is intended to be used in one of the types of scenarios outlined above.¹⁰⁵

In individual and, most likely, very rare cases, the ammunition may be necessary to resolve a *law enforcement** task. In such cases, the ammunition should be used in a weapon that does not cause injury to the perpetrator which is superfluous in relation to the purpose of the use of force. Potential use of such ammunition in special cases should be regulated in more detail. The regulation should also specify the level at which the decision to use the ammunition should be made. In the special situations in which the use of expanding bullets is authorised, the ammunition must be supplied by the Danish Defence, and it must be used only in weapons handed out by the Danish Defence.

7.2

Use of CS gas and pepper spray

The second special comment addresses the use of CS gas and pepper spray. These agents are also known as *riot control agents** or *RCAs** and have been defined in the Chemical Weapons Convention (CWC).

The CWC defines *RCAs** as any chemical not listed on a schedule to the Chemical Weapons Convention which can rapidly produce in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.¹⁰⁶

¹⁰⁵ See SCJHL, Rule No. 77.

¹⁰⁶ CWC, Art. II(7).

*RCAs** may lawfully be used for riot control purposes¹⁰⁷ provided that they are intended for purposes not prohibited under the Convention and that their types and quantities are consistent with such purposes.¹⁰⁸

CS gases and pepper spray may not be used as a method of warfare.¹⁰⁹

Due to the permanent effect of the gas, urban use of granular CS gas is advised against; and, depending on the circumstances, such a use of force might constitute a violation of HRL. Information about chemical weapons is provided in Section 3.3 above and the annex to this chapter. See Chapter 3, example 3.7, on the use of CS gas as an *RCA**.



PHOTO 9.5 | CS gas hand grenade, bursting M/01.

Photo reprinted with the permission of the Danish Military Police.

7.3

Use of less-lethal weapons* or non-lethal weapons

The third special comment addresses the choice of weapon for the solution of tasks of a *law enforcement** character, including less-lethal weapons* or non-lethal weapons.

The terms *less-lethal weapons** and *non-lethal weapons* are used interchangeably by the Danish Armed Forces, and no difference is intended in the understanding or use of the terms.

Less-lethal weapons are weapons designed to have a lower probability of being lethal, causing permanent injury or damage, or destroying electronic equipment, etc., dur-

107 CWC, Art. II(9)(d).

108 CWC, Art. II(1)(a).

109 CWC, Art. I(5), and SCJHL, Rule No. 75.

ing normal or intended use than weapons, the *design purpose** of which is to have a destructive effect on the target.

Less-lethal weapons using kinetic energy include rubber bullets, plastic bullets, plastic balls, or water cannons.

One example of a less-lethal electrical weapon is an *electroshock gun**, which causes a temporary disruption of muscle functions in the area of the body that comes into contact with the weapon.

Other less-lethal weapons, such as so-called *dazzlers** and *flashbangs**, are composite less-lethal weapons.

HRL does not address the lawfulness of weapons but regulates the degree of the use of force on the basis of individual rights, including the right to life. Therefore, HRL is also applicable to the degree of use of force in *law enforcement situations**, i.e., situations in which the need for law enforcement arises during an armed conflict without the situation having any direct bearing on the conflict. This is assumed to be the case because IHL does not address the degree of the use of force in such situations. For more information, see Section 7.2 of Chapter 3.



PHOTO 9.6 | Electroshock gun



PHOTO 9.7 | Live pneumatic cartridge 6.4 m.
Photo reprinted with the permission of the Danish
Military Police.

8. Mine clearance on land

Section 8.1 below is concerned with the rules on mine clearance, etc., as set forth in the Technical Annex to CCW P II (1996). Section 8.2 below is concerned with the removal and destruction of mines, Section 8.3 with recording, marking and exchange of information about the emplacement of mines, and Section 8.4 with other precautions in mine clearance on land.

Section 8.5 below is concerned with the provisions on clearance of anti-personnel mines set forth in the Ottawa Convention. Minesweeping at sea is dealt with in Section 4.6.3 of Chapter 14 on naval operations.

8.1

The rules on mine clearance stated in CCW Protocol II (1996)

Denmark has issued a Declaration to CCW P II (1996), Article 1, to the effect that the provisions which, according to their contents and nature, can also apply in time of peace must be complied with at all times.¹¹⁰ The Protocol entered into force for Denmark on 3 December 1998.

9.17. Danish armed forces are required to:

- record the exact location, type, number, emplacing method, type of fuse, life time, date and time of laying and anti-handling devices and other relevant information about weapons laid for each single mine, booby-trap or other device.¹¹¹ See Section 8.3 below.
- record mine fields and mined areas in accordance with the Technical Annex to Protocol II for the purpose of subsequent mine clearance.¹¹² This entails, for instance, the recording of coordinates, the preparation of maps and diagrams with information about emplacing method, type of fuse, etc.¹¹³ See Section 8.3 below.
- utilise internationally recognised warning signs to mark mine fields and mined areas for the purpose of protecting the civilian population.¹¹⁴ See Section 8.2 below.
- take all feasible precautions to protect the civilian population in connection with the clearance, removal, destruction, or maintenance of mine fields, mined areas, mines, booby-traps, and other devices. This includes fencing, signs, warnings, or monitoring.¹¹⁵ See Section 8.2 below.

Denmark is under an obligation to **consult** other High Contracting Parties and cooperate

¹¹⁰ EOI No. 114 of 12 December 1983.

¹¹¹ CCW P II (1996), Technical Annex, Art. 1.

¹¹² CCW P II (1996), Art. 9(1). See SCIHL, Rule No. 82.

¹¹³ CCW P II (1996), Technical Annex, Art. 1. See SCIHL, Rule No. 82.

¹¹⁴ CCW P II (1996), Technical Annex, Art. 4. See SCIHL, Rule No. 81.

¹¹⁵ CCW P II (1996), Art. 10(1). See SCIHL, Rule No. 81.

bilaterally through the Secretary-General of the United Nations or through other appropriate international procedures to resolve any problems that may arise with regard to the interpretation and application of the amended Protocol II of 1996 to the UN Convention on Certain Conventional Weapons.¹¹⁶

The Danish Defence is required to issue relevant **military instructions** and operating procedures and ensure that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.¹¹⁷
+ NIAC¹¹⁸

8.2

Clearance, removal, and destruction of mines, etc.

The objective of CCW P II (1996) is to protect the civilian population, individual civilians, and civilian objects from the effects of mines, booby-traps, and other devices. The parties to the conflict must take all feasible precautions to achieve this objective — also in relation to the obligation to **clear and destroy** mines.

This obligation takes effect **immediately after the end of active hostilities**.¹¹⁹

The feasible **precautions** depend on the circumstances ruling at the time. These may include humanitarian and military considerations,¹²⁰ e.g., maintenance and fencing of minefields, erection of signs, ordering of sentries to monitor mine fields that still need to be fenced in.¹²¹

The requirement that the precautions must be practically possible and allow for military considerations, etc., means that, for instance, the obligation to fence in minefields only takes effect when an area is abandoned, but the obligation to post sentries may take effect earlier, i.e., when control has been taken of the area in which the minefield is located.

Danish forces must ensure that all mines, booby-traps, and other devices laid by them are cleared, removed, or destroyed or that minefields containing mines, booby-traps, and other devices are maintained in **areas under their control**.¹²²

¹¹⁶ CCW P II (1996), Art. 14(4).

¹¹⁷ CCW P II (1996), Art. 14(3).

¹¹⁸ CCW, Art. 1.

¹¹⁹ See SCIHL, Rule No. 83.

¹²⁰ CCW P II (1996), Art. 3(10). See SCIHL, Rule No. 81.

¹²¹ CCW P II (1996), Art. 3(10).

¹²² CCW P II (1996), Art. 10(1) and (2), and SCIHL, Rule No. 83.

The clearance, removal, or destruction of mines, booby-traps, and other devices must be undertaken in accordance with the provisions of the Protocol.¹²³ The term “to maintain” means, for instance, the maintenance of effective fences, signs, and security around a minefield.

If a party **does not exercise control of an area**, such party must provide to the party in control of the area, to the extent permitted by the controlling party, technical and material assistance for the removal of the mines, etc.¹²⁴ The removal of mines, booby-traps, and other devices must be undertaken in accordance with the provisions of the Protocol.

The parties may enter into agreements, including, where relevant, agreements on the technical and material assistance necessary to live up to the responsibility flowing from the Protocol.¹²⁵

The Protocol’s obligations are directed at States. Therefore, it should be ensured that, in **alliance and coalition operations** in which Danish forces participate, a procedure is established that takes into consideration any differences in ratification status and makes it possible to determine who (the individual nation or the coalition) exercises control of the area, including responsibility for marking, removal, clearance, etc.¹²⁶

Reference is made to Section 9.1 below, which recommends the establishment of a similar procedure in connection with clearance, removal, etc., of unexploded remnants of war.

8.3

Recording, marking, storage, and exchange of information

Under CCW P II (1996), Denmark is under an obligation to record all information about laid mines, etc., in accordance with the Technical Annex to the Protocol. The **Technical Annex**¹²⁷ stipulates the following specific requirements:

The location of minefields, mined areas, and areas of booby-traps and other devices must be specified accurately by relation to the coordinates of at least two reference

123 CCW P II (1996), Art. 10(1) and (2), see Art. 3 and Art. 5(2).

124 CCW P II (1996), Art. 10(3).

125 CCW P II (1996), Art. 10(4), see the commencement provision of EOI No. 50 of 17 June 1999.

126 See CCW P II (1996), Art. 10(4).

127 CCW P II (1996), Art. 2(9) and Art. 9(1) and (2), and CCW P II (1996), Technical Annex, Art. (1)(a)(i).

points and the estimated dimensions of the area containing these weapons in relation to those reference points.¹²⁸

Maps, diagrams, or other records must be made in such a way as to indicate the location of minefields, mined areas, booby-traps, and other devices in relation to reference points, and these records must also indicate their perimeters and extent.¹²⁹

For purposes of detection and clearance of mines, booby-traps and other devices, maps, diagrams or other records must contain complete information about 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 about all the weapons laid.¹³⁰

Whenever feasible, the minefield **record** must show the exact location of every mine, except in row minefields where the row location is sufficient. The precise location and operating mechanism of each **booby-trap** laid must be individually recorded.¹³¹

The estimated location and area of **remotely-delivered mines** must be specified by coordinates of reference points (normally corner points) and must be ascertained and when feasible marked on the ground at the earliest opportunity.¹³²

The total number and type of remotely-delivered mines, the date and time of laying and the self-destruction time periods must be recorded.¹³³

Copies of records must be held at a level of command sufficient to guarantee their safety.¹³⁴ Since an obligation exists to store and release the information to the Secretary-General of the United Nations or a party to a conflict, the information must be **stored at battalion level and at the same time submitted to Defence Command Denmark (DCD).**

The information must be submitted to DCD regardless of the size of the deployed unit.

128 CCW P II (1996), Technical Annex, Art. 1(a)(i).

129 CCW P II (1996), Technical Annex, Art. 1(a)(ii).

130 CCW P II (1996), Technical Annex, Art. 1(a)(iii).

131 CCW P II (1996), Technical Annex, Art. 1(a)(iii).

132 CCW P II (1996), Technical Annex, Art. 1(b), first sentence.

133 CCW P II (1996), Technical Annex, Art. 1(b), second sentence.

134 CCW P II (1996), Art. 9(2), and CCW P II (1996), Technical Annex, Art. 1(c).

Minefields and mined areas must be marked by the sign reprinted in the Technical Annex.¹³⁵

The parties to a conflict must take all necessary and appropriate measures without delay after the cessation of active hostilities. This includes the use of the recorded information to protect civilians from minefields, mined areas, mines, booby-traps, and other devices in areas under the control of the relevant party to a conflict.¹³⁶

Without delay after the cessation of active hostilities, the parties to the conflict must make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession about minefields, mined areas, etc., no longer under their control.¹³⁷

Under all circumstances, the parties to the conflict should seek by mutual agreement to provide for the release of such information at the earliest possible time,¹³⁸ but such information may be withheld from the Secretary-General of the United Nations and all parties to the conflict if the parties to the conflict are in the territory of the adverse party and security interests require such information to be withheld until neither party is in the territory of the other.¹³⁹ Recorded areas must be **marked** by internationally recognised signs that inform the local civilian population of the danger of the minefield or mined area in question in a language understood by it.¹⁴⁰

8.4

Other precautions

See the international sign to be used to mark minefields and mined areas in Section 2.3.1 of Chapter 10. CCW P II (1996) contains provisions about technological assistance and international cooperation.¹⁴¹ Three provisions in particular are highlighted here:

- All High Contracting Parties undertake to facilitate and have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information about mine clearance;
- the Parties undertake to provide information to UNMAS (the UNMAS mine

135 CCW P II (1996), Technical Annex, Art. 4.

136 CCW P II (1996), Art. 9(2). See SCJHL, Rule No. 82, see Rule No. 81.

137 CCW P II (1996), Art. 9(2), second paragraph.

138 CCW P II (1996), Art. 9(2), second paragraph.

139 CCW P II (1996), Art. 9(2), second paragraph.

140 CCW P II (1996), Technical Annex, Art. 4.

141 CCW P II (1996), Art. 11(1-7).

- clearance database established in the UN system); and
- the Parties undertake to provide assistance for mine clearance through the UN system or other international organisations, or bilaterally.¹⁴²

Moreover, the Protocol contains provisions on the protection of UN missions and humanitarian fact-finding missions against the effects of minefields, mined areas, etc.¹⁴³

8.5

Rules on mine clearance in the Ottawa Convention

The Ottawa Convention places the States Parties under an obligation to make every effort to identify all mined areas under their jurisdiction or control. Mined areas are areas that are dangerous due to the presence or suspected presence of anti-personnel mines.¹⁴⁴

The marking of mined areas and the destruction of the mines contained in them must comply with the rules set forth in CCW P II (1996), including the rules stated in the Technical Annex to the Protocol.¹⁴⁵ These rules are considered in Sections 8.1-8.4 above.

The obligation in relation to mine clearance comprises **that which is practically possible**.

Compliance with the provisions in the Ottawa Convention on international cooperation and assistance is qualified by the requirement that the assistance must be provided to the extent possible by the State Party. If, for instance, the State Party does not have the necessary resources to mark and monitor a mined area, it is under no obligation to do so. Instead, the State Party may be under an obligation to provide financial support to the territorial State for mine clearance and destruction or to provide assistance for rehabilitation, mine clearance information programmes, and mine clearance through, for instance, the UN, ICRC or other international organisations.¹⁴⁶

But if the State Party has the necessary resources, the State Party must, as soon as

¹⁴² CCW P II (1996), Art. 11(1-3).

¹⁴³ CCW P II (1996), Art. 12.

¹⁴⁴ Ottawa Convention, Art. 2(5).

¹⁴⁵ Ottawa Convention, Art. 5(2).

¹⁴⁶ Ottawa Convention, Art. 6(3-7).

possible, ensure that mined areas are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians until all anti-personnel mines contained therein have been destroyed.¹⁴⁷

The obligation to identify and perimeter-mark, etc., the mined areas takes effect as soon as possible after the State Party has obtained jurisdiction or control of the area.

If, for instance, part of a territory has been captured, the obligation of the capturing State Party to identify and mark mined areas does not take effect until the State Party has obtained jurisdiction or control of the area. In the specific situation, control will normally require positive knowledge about minefields and other mined areas. This means that, in practice, the mined areas will often have been marked before the Danish forces obtain full control of the area.

9. Clearance of explosive remnants of war other than mines, booby-traps, and other devices

9.18. Denmark must mark, clear, or destroy explosive remnants of war in areas under Denmark's control.¹⁴⁸

The user of explosive ordnance which has become explosive remnants of war who does not exercise control of the territory in which the explosive remnants of war are located must where feasible, after the cessation of the active hostilities, provide, — inter alia, technical, financial, material, or human resources — assistance to facilitate the marking and clearance, removal, or destruction of such explosive remnants of war.¹⁴⁹

Denmark must ensure that its armed forces and relevant agencies or departments issue appropriate instructions and operating procedures and that its personnel receive training consistent with the relevant provisions of Protocol V to the UN Convention on Certain Conventional Weapons.¹⁵⁰

Denmark must consult other High Contracting Parties and cooperate bilaterally or through the Secretary-General of the United Nations or through other appropriate international procedures to resolve any problems that may arise with regard to the interpretation and application of the provisions set out in Protocol V to the UN Convention on Certain Conventional Weapons.¹⁵¹

+ NIAC¹⁵²

147 Ottawa Convention, Art. 5(2).

148 CCW P V, Art. 3(1), first paragraph, see Art. 3(2-5).

149 CCW P V, Art. 3(1).

150 CCW P V, Art. 11(1).

151 CCW P V, Art. 11(2).

152 CCW P V, Art. 1(3), see CCW, Art. 1.

CCW P V and its Technical Annex regulate the disposal of **conventional munitions** such as cluster munitions, unexploded missiles, torpedoes, mortar grenades, artillery shells, and rockets. The Protocol applies to the entire territory and internal waters.¹⁵³

The Protocol's obligations **do not** apply to chemical, bacteriological, biological, or nuclear weapons or to mines (anti-personnel mines and mines designed to detonate by the presence of a vehicle), booby-traps or other devices.¹⁵⁴ Reference is made to Section 8 above for information on the rules with respect to the marking, clearance, removal and destruction of mines on land.

The Protocol contains five different definitions of the categories of explosive remnants of war, each of which is essential to the precise categorisation of the specific type of material and, thus, to the precise extent of the State's obligations with regard to its disposal. The annex at the end of this chapter lists the various definitions.

9.1

Clearance, removal, and destruction

The majority of the Protocol's obligations on the marking, recording, clearance, removal, or destruction of explosive and abandoned remnants of war apply to the High Contracting Party exercising **control of the territory** where the explosive remnants of war are.¹⁵⁵

If a High Contracting Party which has used explosive ordnance no longer exercises control of that part of the territory where the ordnance has been used, the High Contracting Party is required to provide technical, financial, material, or other assistance with a view to facilitating clearance, etc. Such assistance may be provided bilaterally or through the United Nations or other organisation.¹⁵⁶

The obligation to clear, remove, or destroy takes effect immediately after the cessation of active hostilities and as soon as feasible.¹⁵⁷

Clearance, removal, or destruction **must be prioritised in the areas in which the**

¹⁵³ CCW P V, Art. 1(2).

¹⁵⁴ CCW P V, Art. 2(1), and Ottawa Convention, Art. 5(2).

¹⁵⁵ CCW P V, Art. 3(1).

¹⁵⁶ CCW P V, Art. 3(1), second paragraph.

¹⁵⁷ CCW P V, Art. 3(2) and (3).

threat against the civilian population is considered highest.¹⁵⁸ To this end, the following measures must be taken:

- survey and assess the threat posed by explosive remnants of war;
- assess and prioritise needs and practicability in terms of marking and clearance, removal, or destruction;
- mark and clear, remove, or destroy explosive remnants of war; and
- take steps to mobilise resources to carry out these activities.¹⁵⁹

The clearance, removal, and destruction must take into account to the extent possible the International Mine Action Standards (IMAS), and Denmark must cooperate with other High Contracting Parties and international organisations, where appropriate.¹⁶⁰

Moreover, **all feasible precautions** must be taken to protect the civilian population, individual civilians, and civilian objects from the risks and effects of explosive remnants of war. Such precautions include warnings, risk education to the civilian population, and marking, fencing and monitoring.

The precautions must take into account all circumstances and considerations ruling at the time, including military considerations.¹⁶¹

A special challenge may arise in terms of abandoned explosive ordnance which is collected by an armed group but abandoned at a later time because, for instance, the necessary delivery system could not be obtained or because the group was unable to sell the ordnance.

If explosive ordnance is collected by a non-State organised armed group or members of such a group (OAG/MOAG), it will no longer be regarded technically as abandoned.

When the ordnance is subsequently abandoned — possibly, in another part of the territory, the obligation to clear takes effect again but for the party in control of the relevant part of the territory, i.e., not necessarily the same party as the one originally bound by the obligation.

¹⁵⁸ CCW P V, Art. 3(2), second paragraph, see Art. 3.

¹⁵⁹ CCW P V, Art. 3(3).

¹⁶⁰ CCW P V, Art. 3(4) and (5).

¹⁶¹ CCW P V, Art. 5.

In the same way stated in Section 8.2 above regarding **alliance and coalition operations**, the Protocol's obligations are aimed at States. Therefore, it should be ensured that, in alliance and coalition operations in which Danish forces participate, a procedure is established that takes into consideration any differences in ratification status and makes it possible to determine who (the individual nation or the coalition) exercises control of the area, including the responsibility for marking, removal, clearance, etc.

9.2

Recording, retaining, and transmitting information

The State that has used (or abandoned) explosive remnants of war must **record and retain the information** and, where relevant, transmit it to other parties to a conflict, the territorial State, the UN, or a third party.

The **recording** must be undertaken to facilitate rapid marking and clearance, removal or destruction of explosive remnants of war, risk education, and the provision of relevant information to the party in control of the territory and to civilian populations in that territory.¹⁶² To the greatest possible extent, the recording should be undertaken in accordance with the Technical Annex.¹⁶³

The recorded information must be submitted to the DCD and, as soon as possible, shared with the party in control of the relevant areas or an organisation that the recording party is satisfied will undertake risk education, marking, clearance, removal, or destruction. The information may be transmitted through the United Nations or another third party.¹⁶⁴

9.3

Other measures

The High Contracting Parties and parties to an armed conflict must protect humanitarian missions and organisations from the effects of explosive remnants of war.¹⁶⁵

Each High Contracting Party in a position to do so must

- provide assistance for marking, clearance, etc.;

¹⁶² CCW P V, Art. 4(1).

¹⁶³ CCW P V, Art. 4(3).

¹⁶⁴ CCW P V, Art. 4(2).

¹⁶⁵ CCW P V, Art. 6.

- provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war;
- contribute to trust funds within the United Nations system as well as other relevant trust funds to facilitate the provision of assistance under CCW P V;
- exchange equipment, material and scientific and technological information other than weapons-related technology necessary for the implementation of the Protocol; and
- provide information to the databases on mine action established within the United Nations system, especially information about means and technologies of clearance of explosive remnants of war, lists of experts, etc. in relation to clearance of explosive remnants of war.¹⁶⁶

9.4

Technical Annex to CCW P V

The Technical Annex contains voluntary best practices to ensure, inter alia, that production processes are designed to achieve the greatest possible reliability of munitions, that certified internationally recognised quality assurance standards are applied in the production of explosive ordnance, that acceptance testing is conducted through live-fire testing, and that high reliability standards are required for transactions involving and transfers of explosive ordnance and safe storage, transport, and testing to ensure the best possible long-term reliability of the explosive ordnance.¹⁶⁷ The Danish Defence is required to ensure that the provisions set out in the Technical Annex are complied with to the fullest possible extent.

10. Weapons review

9.19. In connection with Denmark's study, development, acquisition, or adoption of a new weapon, means, or method of warfare, Denmark is under an obligation to determine whether its **employment, in some or all circumstances**, would be prohibited by AP I or by any other rule of international law applicable to Denmark.¹⁶⁸

¹⁶⁶ CCW P V, Art. 8.

¹⁶⁷ CCW P V, Technical Annex.

¹⁶⁸ AP I, Art. 36. See the Declaration of Saint Petersburg, HC 1907, Art. 1, see 1907 Hague Regulations, Art. 23(e), AMW, Rule No. 9, and CWM, Rule No. 48(a).

This legal assessment of the lawfulness of weapons is known as **weapon review**.

Weapons review encompasses **all weapons, weapons systems, and delivery systems** that the State in question is studying with a view toward acquisition or is developing or acquiring and which the State uses in armed conflict,¹⁶⁹ regardless of whether their employment is at sea, on land, in the air, in space, or in cyberspace.

The purpose of weapon reviews is to establish whether a weapon's normal or expected use in some or all circumstances (i.e., the injury and damage caused by the weapon when used pursuant to its *design purpose**) would be prohibited by the international law applicable to the State. The normal or expected use of the weapon is found by looking at its *design purpose*.*

In other words, Denmark must establish whether any current international law applicable to Denmark prevents or limits the use of the new weapon, weapons system, or delivery system under consideration. If so, acquisition must be avoided or, depending on the circumstances, cancelled or its use must be subjected to restrictions or limitations.

As regards Denmark, international law encompasses IHL as derived from treaties and customary law, as well as certain human rights. In particular, the right to life and the right not to be subjected to torture and other degrading or inhuman treatment or punishment are relevant, for instance, in connection with the investigation of *less-lethal weapons*.*

Other issues included in weapons review relate to the natural environment¹⁷⁰ and considerations regarding future technologies such as nanotechnologies. Nanotechnologies are aimed at changing the structure of molecules and, therefore, affect the way in which weapons or ammunition can cause injury or damage, e.g., by changing the structure of the core or the envelope of a bullet, thereby changing the input of energy and the way the bullet behaves in soft tissue or by producing fragments that escape detection by X-rays.¹⁷¹ Cyber technologies are another area of attention in which the principle of distinction is challenged in connection with cyber attacks.

As mentioned, *less-lethal weapons** must also be subjected to weapons review. As *less-lethal weapons** are designed to have a lower probability of being lethal during

169 AP I, Art. 36, amended CCW, Art. 1.

170 AP I, Art. 35(3) and Art. 55(1), and SCIIHL, Rules Nos. 44-45.

171 See CCW P I.

normal or intended use, the weapons review is not to be done on the same basis of international law as that applicable to weapons designed to be lethal. The standard of reference in this weapons review is other weapons that have also been designed to be *less lethal*^{*}, and the weapons review must demonstrate whether *less-lethal weapons*^{*} during normal or intended use are more lethal than the other *less-lethal weapons*^{*} with which they are compared and, if so, to what extent.

The obligation to perform weapons review encompasses weapons, means, or methods of warfare, and it takes effect in connection with the study of a new weapon, weapons system, or delivery system and includes the actual acquisition. If a weapon is subsequently changed or modified in relation to the original design and construction of the manufacturer, the weapon is considered a new weapon, and a new weapons review must be performed. It may also be necessary to perform a new weapon-screening if the weapon has another effect on the target than originally assumed. Furthermore, ratification of new treaties in the area and policy amendments may also be assumed to call for an assessment of the need for a new review of already existing weapons.

The weapons review is an internal national screening. Denmark is under no obligation either to share the results of the review with other States or to publish them. Therefore, in connection with the acquisition of new weapons, weapon systems, or delivery systems, Denmark cannot take review results from other countries and manufacturers and rely exclusively on them to fulfil its weapon review obligation.¹⁷²

172 The Danish Ministry of Defence has consolidated Denmark's procedures pertaining to weapons review in Service Regulation no. 9494 on the international legal evaluation in connection to the study, development, acquisition, or adoption of a new weapon, means, or method of warfare.

Weapons technology definitions

The section on terminology in the introduction points out that the terminology used to define a weapon and the description of the *design purpose** are essential for understanding the effects of the weapon and the weapons review. The definitions contained in this annex follow the texts of the treaties in English.

Poison and poisoned weapons

Traditionally, international law has regarded poison or poisoned weapons as being weapons whose primary effect is to poison or asphyxiate.¹⁷³ Poison can be extracted from animals and, thus, be naturally made. Poison can also be produced through chemical processes. See the modern definition under the definition of chemical weapons. Reference is made to Section 3.2 above on the prohibition against the use of poison and poisoned weapons.

Chemical weapons

The Chemical Weapons Convention does not specifically describe the prohibited weapons but describes the chemical components and their effects and stipulates that weapons are prohibited if they have the effects set out in the Convention.¹⁷⁴ The definition also describes when it is permitted to use chemicals, the use of which would normally be prohibited. Reference is made to Section 3.3 above on the prohibition on the use of chemical weapons.

A chemical weapon is understood to mean the following elements, together or separately:

Toxic chemicals and their precursors

Munitions and devices specifically designed to cause death or other harm through the toxic properties of toxic chemicals and their precursors which would be released as a result of the employment of such munitions and devices.

Any **equipment** specifically designed for use directly in connection with the employment of munitions and devices referred to immediately above.¹⁷⁵

Toxic chemicals mean any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The definition

includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.¹⁷⁶

A **precursor** means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.¹⁷⁷

A **key component** of a binary or multicomponent chemical system means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.¹⁷⁸

Toxic chemicals and their precursors which meet the criteria of the definition set out in the Convention are covered by the prohibition of Article 1 of the Convention.

The Hague Declaration (IV) concerning **asphyxiating gases** and the Geneva Protocol on poisonous gas prohibit use but do not contain any definition of asphyxiating gases or other hazardous gases. Moreover, the Chemical Weapons Convention does not contain any definition of asphyxiating gases or other hazardous gases. Reference is made to Section 3.1 above on the prohibition on the use of asphyxiating gases or other hazardous gases.

No international convention specifically regulates **herbicides**. The Chemical Weapons Convention refers to herbicides in the preamble but does not contain any definition of herbicides. Reference is made to Section 3.4 above on the limited use of herbicides.

Bacteriological (biological) weapons

The Biological Weapons Convention defines biological weapons as:

1) microbial or other biological agents or toxins,

173 ICJ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996, para. 55.

174 CWC, Art. II(1)(a)(b) and (c).

175 CWC, Art. II(1).

176 CWC, Art. II(2).

177 CWC, Art. II(3).

178 CWC, Art. III(4).

whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; and

2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.¹⁷⁹

Prior to the adoption of the Biological Weapons Convention, the General Assembly of the United Nations passed a resolution on biological agents, which describes them as living organisms, whatever their nature, or infective material derived from them, which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.¹⁸⁰ The description, while not inconsistent with the definition set out in the Convention, exemplifies a type of biological weapon.

Reference is made to Section 3.4 above on the prohibition on bacteriological (biological) weapons.

Anti-personnel mines

Anti-personnel mine means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.¹⁸¹

A **mine** means 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.¹⁸²

An anti-personnel mine is, first and foremost, a mine. The use of mines in itself is not prohibited, apart from the type of mine designed and described in the Ottawa Convention and which reacts in this way.

This means, for example, that a munition which has been buried and is designed to detonate due

to tremors in the ground produced by an explosion 1 km away, is not a prohibited mine. Reference is made to Section 4 above on mines, booby-traps and other devices.

Therefore, the design purpose* and the requirements concerning prohibited mines are of crucial importance.

Anti-personnel mines may be equipped with an anti-handling device. An **anti-handling device** means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.¹⁸³

Such device is an “accessory” to the actual anti-personnel mine. This means that the anti-personnel mine is not considered an ordinary mine or a mine designed to detonate by the presence of a vehicle merely because it has been equipped with this device.

In other words, anti-personnel mines continue to be prohibited even if they are equipped with an anti-handling device.

This applies regardless of whether the manufacturer has equipped the anti-personnel mine with the device or whether it is equipped with the device at a later time. What is determinative is the design and construction of the mine, not its effect.

Reference is made to Section 3.5 above on the total ban on anti-personnel mines.

Cluster munitions

The Convention on Cluster Munitions contains a rather technical definition of cluster munitions. Cluster munitions are primarily defined on the basis of what they are not. Subsequently, a number of terms are defined, and they are necessary for the understanding of the definition.

Cluster munition means a conventional munition that is designed to disperse or release **explosive submunitions** each weighing less than 20

179 Biological Weapons Convention, Art. I(1) and (2).

180 UNGA RES 2603A 1969.

181 Ottawa Convention, Art. 2(1), first sentence, and CCW P II (1996).

182 Ottawa Convention, Art. 2(2).

183 Ottawa Convention, Art. 2(3).

kilograms, and includes those explosive submunitions.¹⁸⁴

Cluster munition is not:

(a) A munition or submunition designed to dispense flares*, smoke, pyrotechnics or chaff* or a munition designed exclusively for an air defence role;¹⁸⁵

(b) A munition or submunition designed to produce electrical or electronic effects;¹⁸⁶ or

(c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:

(i) Each munition contains fewer than ten explosive submunitions;

(ii) Each explosive submunition weighs more than four kilograms;

(iii) Each explosive submunition is designed to detect and engage a single target object;

(iv) Each explosive submunition is equipped with an electronic self-destruction mechanism; and

(v) Each explosive submunition is equipped with an electronic self-deactivating feature.¹⁸⁷

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.¹⁸⁸

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.¹⁸⁹

A **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.¹⁹⁰

Self-deactivating means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition.¹⁹¹

A **dispenser** means a container that contains bomblets during transport and which is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release.¹⁹²

The Convention also defines failed cluster munition, unexploded submunition, abandoned cluster munitions, cluster munition remnants, transfer, cluster munition-contaminated area, mine and unexploded bomblet.¹⁹³ Reference is made to Section 3.6 above on the prohibition on the total ban on cluster munitions.

Explosive projectiles

The Declaration of Saint Petersburg defines explosive projectiles as projectiles that are either explosive or charged with fulminating or inflammable substances. Reference is made to Section 3.7 above on the prohibition on explosive projectiles.

Bullets which expand or flatten easily in the human body

The Hague Declaration 3 of 1899 concerning Expanding Bullets defines such bullets as 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”.

The definition is not exhaustive. This means that

184 Oslo Convention, Art. 2, first paragraph.

185 Oslo Convention, Art. 2(2)(a).

186 Oslo Convention, Art. 2(2)(b).

187 Oslo Convention, Art. 2(2)(c).

188 Oslo Convention, Art. 2(12).

189 Oslo Convention, Art. 2(3).

190 Oslo Convention, Art. 2(9).

191 Oslo Convention, Art. 2(10).

192 Oslo Convention, Art. 2(14).

193 Oslo Convention, Art. 2(4-8), (11-13) and (15).

other types of bullets may be unlawful regardless of their precise shape if they have been designed to produce the required effect.

Reference is made to Section 3.8 above on the prohibition in armed conflict on bullets which expand or flatten easily in the human body. Reference is made to Section 7.1 above on the use of these bullets in law enforcement situations.

Non-detectable fragments

CCW P I defines non-detectable fragments as fragments “which in the human body escape detection by X-rays”. Reference is made to Section 3.10 above on the prohibition on weapons whose primary effect is to injure by non-detectable fragments.

Blinding laser weapons

CCW P IV defines blinding laser weapons as “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.” Reference is made to Section 3.11 above on the prohibition on blinding laser weapons.

Environmental modification techniques

The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) prohibits environmental modification techniques, which mean any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or outer space.¹⁹⁴

A series of interpretations of ENMOD were adopted, elaborating and explaining the use of the Convention. These interpretations are to be used exclusively for interpretation of the Convention itself.

The interpretation to Article 1 of the Convention states that:

“**widespread**” means an area on the scale of several hundred square kilometres;

“**long-lasting**” means lasting for a period of months, or approximately a season; and

“**serious**” means involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

All the conditions do not have to be fulfilled simultaneously.

The limits for harmful effects on another State Party caused by environmental modification techniques are, thus, harmful effects on an area of at least several hundred square kilometres, harmful effects lasting for at least three months, or harmful effects that kill or otherwise injure many human lives, natural and economic resources or other assets. Reference is made to Section 3.12 above on environmental modification techniques.

Cyber weapons

A cyber weapon is a means that, in a cyber context, by design, use, or intended use is capable of causing either injury to or the death of persons or damage to or destruction of objects, i.e., that meet the requirements for the means to constitute a CNA*.

Cyber means of warfare include any cyber instrument, mechanism, equipment or software used for such an attack as opposed to the Internet, which is used only as a platform for conducting the attack and is not controlled by the attacking party.¹⁹⁵ Reference is made to Section 3.13 above on the prohibition to use cyber weapons.

Mines, booby-traps and other devices

A **mine** means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity

194 ENMOD, Art. 2.

195 CWM, Rule No. 41.

or contact of a person or a vehicle.¹⁹⁶

See elsewhere in this annex for the definition of an anti-personnel mine, which means a mine designed to be exploded by the presence, proximity or contact of a person and to incapacitate, injure or kill one or more persons.

A remotely-delivered mine means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar or similar means or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be remotely delivered, provided that they are used in accordance with the Protocol.¹⁹⁷

A booby-trap means any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.¹⁹⁸ Booby-traps as defined in CCW P II and CCW P II (1996) are activated by the victim — for example, a trip wire connected to a hand grenade or the alarm mine M/87.

Other devices mean manually-emplaced munitions and devices including IEDs* designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.¹⁹⁹

Other devices may be activated by an operator or the victim when the victim is within the area of explosion and fragmentation.

Close protection weapon M/80 is considered an “other device”. An example of the lawful use of the weapon during armed conflict is the firing of the weapon against a military vehicle or for the protection of a camp. Whether IEDs* are activated by the victim or operator depends exclusively on the construction of the device. Reference is made to Section 4.1 above on the limited use of mines, booby-traps and other devices.

Mines as described above also include mines de-

signed to detonate by the presence of a vehicle. Such mines are characterised by having been designed to be exploded by the presence, proximity or contact of a vehicle as opposed to a person.²⁰⁰

The mines may be equipped with an anti-handling device. An anti-handling device means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.²⁰¹

This device is an “accessory” to the actual mine. This means that the mine is not considered an ordinary mine or an anti-personnel mine merely because it has been equipped with such a device.

In other words, the use of the mines will not be prohibited if they are equipped with such a device. This applies regardless of whether the manufacturer has equipped the mine with the device or whether it is equipped with the device at a later time. What is determinative of its lawfulness is the design and construction of the mine, not its effect.

Reference is made to Section 4.1.5 above on the restricted use of mines designed to be exploded by the presence of a vehicle.

Incendiary weapons

CCW P III defines incendiary weapons as any weapon or munition which is primarily designed to set fire to objects or to cause burn injuries to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.²⁰²

Incendiary weapons do not include:

- (i) munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems; or²⁰³
- (ii) munitions designed to combine penetration, blast or fragmentation effects with an additional

196 CCW P II, Art. 2(1), first sentence, and CCW P II (1996), Art. 2(1).

197 CCW P II, Art. 2(1), second sentence, and CCW P II (1996), Art. 2(2).

198 CCW P II (1996), Art. 2(4).

199 CCW P II (1996), Art. 2(5).

200 CCW P II (1996), Art. 2(1).

201 Ottawa Convention, Art. 2(3).

202 CCW P III, Art. 1(1).

203 CCW P III, Art. 1(b)(i).

incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injuries to persons but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.²⁰⁴

The definition set out in Protocol III is important because it means that certain weapons are not incendiary weapons under the definition of the Protocol.

This applies to weapons which are not primarily designed to set fire to objects or to cause burn injuries to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target but which may have this effect. Reference is made to Section 4.2 above on the limited use of incendiary weapons.

White phosphorus is not subject to regulation by treaty. Therefore, there is no authoritative and internationally adopted definition of white phosphorus. Depending on the circumstances, its use could fall within the Chemical Weapons Convention and/or Protocol III to the Convention on Certain Conventional Weapons. Reference is made to Section 4.3 above on the limited use of white phosphorus.

Explosive remnants of war

Protocol V on explosive remnants of war to the UN Convention on Certain Conventional Weapons (CCW P V) contains the following definitions:

Explosive remnants of war means unexploded ordnance and abandoned explosive ordnance.²⁰⁵ These explosive remnants of war are the subject of consideration in the Protocol. Explosive remnants of war are referred to as UXO (Unexploded Ordnance) in the Technical Annex to the Protocol.²⁰⁶

Explosive ordnance means conventional munitions containing explosives, with the exception of mines, booby-traps and other devices as defined in CCW P II (1996).²⁰⁷

Unexploded ordnance means explosive ordnance that has been primed, fused, armed or otherwise prepared for use and used in an armed conflict. The ordnance may have been fired, dropped, launched or projected and should have exploded but failed to do so.²⁰⁸ Thus, the provision includes explosive ordnance whose design purpose* is to explode on impact or at a later time.

Abandoned explosive ordnance means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it.

Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use.²⁰⁹ Abandoned explosive ordnance is referred to as AXO (Abandoned Explosive Ordnance) in the Technical Annex to the Protocol.

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The provision covers explosive ordnance used

204 CCW P III, Art. 1(b)(ii).

205 CCW P V, Art. 2(4).

206 CCW P V, Technical Annex, Art. 1(1).

207 CCW P V, Art. 2(1).

208 CCW P V, Art. 2(2).

209 CCW P V, Art. 2(3).

210 CCW P V, Technical Annex, Art. 1(1).

for training or education purposes regardless of whether it actually exploded.

The provision also covers bombs, missiles and other munitions abandoned in a so-called 'dump area' of a State Party's territorial waters.

Existing explosive remnants of war means unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of the Protocol for the High Contracting Party on whose territory it exists.

The obligations which relate to existing explosive remnants of war are not nearly as comprehensive as those relating to explosive remnants of war, etc., defined in Article 2 of CCW P V. For instance, the obligations set out in the Protocol on recording, retaining and transmission of information, clearance, removal, destruction, precautions for the protection of the civilian population or cooperation and assistance do not apply.²¹¹ Reference is made to Section 9 above on explosive remnants of war other than mines, booby-traps and other devices.

211 CCW P V, Art. 1(4).

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Prohibited methods of warfare

International regulation of methods of warfare in armed conflict

Prohibited methods of warfare

International regulation of methods of warfare in armed conflict

1. Introduction

The military commander has wide discretion regarding the choice of methods or means of warfare in the planning and execution of military operations in armed conflict. As with the choice of weapons, however, the choice of methods of warfare is not unlimited.¹

This chapter deals with the specific methods of warfare prohibited in armed conflict by IHL.

The chapter is structured so that each method of warfare is considered separately in a section. The individual sections are not interdependent and, in the majority of cases, may be used separately for training and educational purposes. The summary at the end of the chapter may also be used for such purposes or for obtaining an overview of the regulations applicable in the area.

¹ 1907 Hague Convention, Art. 22, AP I, Art. 35(1) and (2), and SCIH, Rule No. 38. UNSG Bulletin, Section 6.1.

1.1

Chapter contents

Section 2 is concerned with the individual methods of warfare and falls into 16 subsections. Section 2.1 is concerned with perfidy and section 2.2 with ruses of war. Section 2.3 is concerned with the prohibition against the improper use of distinctive emblems and signs and other internationally recognised distinctive emblems. Section 2.4 is concerned with the prohibition against the use of the flags, uniforms, and insignia of neutral States. Section 2.5 is concerned with the prohibition against the use of the flags, uniforms and insignia of the adverse Party. Section 2.6 is concerned with the prohibition against ordering that no quarter be given. Section 2.7 is concerned with the prohibition on pillage. Section 2.8 is concerned with the right to seize and confiscate property as war booty. Section 2.9 is concerned with the right of destruction and seizure. Section 2.10 is concerned with the prohibition on engaging in indiscriminate attacks. Section 2.11 is concerned with the prohibition on spreading terror among the civilian population. Section 2.12 is concerned with the prohibition against starving the civilian population. Section 2.13 is concerned with the prohibition against taking hostages. Section 2.14 is concerned with the prohibition against using civilians as human shields, Section 2.15 with the prohibition against causing widespread, long-term, and severe damage to the natural environment, and Section 2.16 with the prohibition on individual soldiers and commanders from using force in the form of reprisals. The chapter ends with a summary in Section 3.

All of the above methods of warfare are prohibited with the exception of the ones dealt with in Sections 2.2, 2.8, and 2.9 below. These three sections consider the right to use ruses of war and the limited right of confiscation, destruction, and seizure.

Ruses of war are considered to illustrate the tension between perfidy and ruses of war, especially in relation to military personnel wearing civilian clothes. The limited lawful destruction and seizure and the rule on the lawful confiscation of war booty are dealt with to describe circumstances that are often seen in connection with the execution of military operations and which are useful for consideration in this chapter on prohibited methods of warfare due to their context.

1.2

Scope in relation to other chapters

This chapter touches on matters that are considered in more detail in other chapters of the Manual, including Chapter 5 with respect to the requirements for combatant

status and espionage in relation to this chapter's consideration of perfidy and ruses of war and on the consequences when civilians voluntarily choose to take up a position at or around military objectives, Chapter 6 regarding the protection of civilians and civilian objects during armed conflict, Chapter 7 regarding the proper and improper use of the protective emblems of the medical service, and Chapter 8 regarding the execution of an attack. Furthermore, Chapter 11 on belligerent occupation is key to the section on the right to seize enemy property, and Chapter 14 on naval operations is material with respect to the ability to use ruses of war since ruses of war are of very special importance in naval operations.

1.3

Human rights law issues addressed in the chapter

This chapter is concerned with the specific regulation in international law of certain matters in armed conflict. A few prohibitions and restrictions regarding the use of methods of warfare are also influenced by HRL, such as the protection of the right to own property and the right to privacy, security of the person, and the right to life, etc. These obligations will not – or only in rare cases – affect the implementation of the IHL prohibitions described in this chapter.

Situations may arise in which the dead, sick, or wounded are under Danish *personal jurisdiction**. In these cases, the IHL prohibition on pillage supports the protection of the right to own property that follows from HRL.

The IHL prohibition against starving the civilian population, see Section 2.12 below, may touch on circumstances in which there may be *territorial jurisdiction** and, therefore, HRL may apply to a wide extent. In this scenario, too, the prohibition against starving the civilian population is generally considered to be in harmony with HRL — for instance, the right to life, specifically.

Typically, in other areas governed by the IHL rules on methods of warfare, there is neither *personal jurisdiction** nor *territorial jurisdiction**. This is the case, for instance, with respect to the prohibition against indiscriminate attacks or the area of other necessary destruction. In these cases, it can be said that Denmark's desire to respect human rights in situations in which no formal obligation exists to do so may be overridden in certain cases by military necessity in armed conflict.

Reference is made to Section 3.4 of Chapter 3 on the obligations of Danish armed forces under HRL and the application of jurisdictional concepts.

1.4

Application of the rules in NIACs

Generally, the rules also apply in NIACs. However, some separate remarks are relevant in relation to perfidy, the use of the protective emblems, and the use of the adverse Party's uniforms, insignia, etc., in this respect. The comments are made in subsections on the individual methods of warfare.

2. Individual methods of warfare

2.1

Perfidy

The rules applicable in this area are based on a fundamental respect for people enjoying protected status under international law. From this protection follows that the parties to an armed conflict must be able to trust that persons who purport to be protected are in fact protected.

Violation of the prohibition against perfidy, thus, entails an infringement of that part of the principle of distinction, which requires the members of the armed forces of the parties to distinguish themselves from the civilian population and other protected groups.

10.1 It is prohibited to kill, injure² or capture an adversary by resort to perfidy.³
+ NIAC (see, however, capture below)⁴

In NIAC, there is not a sufficient basis in international law for the prohibition to extend to capture.

Perfidy is about **deceiving** the adversary to believe that you have protected status under international law for the purpose of **taking advantage** of the adversary's misapprehension to kill, injure or capture the adversary.

² ICC Statute, Art. 8(2)(b)(xi).

³ AP I, Art. 37(1), 1907 Hague Convention, Art. 23(b), SRM, Rule No. 111, and SCIH, Rule No. 65.

⁴ ICTY, Tadić IT-94-1-AR72 1995, para. 125, SCIH, Rule No. 65, ICC Statute, Art. 8(2)(e)(ix), AMW Manual, Rule No. 111, and NIAC Manual, Section 2.3.6.

The prohibition against perfidy has two main elements:

- 1) Pretending to have protected status to deceive the adversary in order to
- 2) Take advantage of the adversary's misapprehension to kill, injure or capture the adversary

The misapprehension will often be that the adversary quite simply does not notice the person orchestrating the misapprehension. The combatants' true identity is hidden by wearing civilian clothes, pretending to be unconscious on the battlefield, or perhaps by appearing to be designated medical personnel. The combatant mixes with a crowd of protected persons and, therefore, escapes the attention of the deceived adversary.

The prohibition, which reflects customary international law, will not be violated until the deceived adversary **is, in fact, killed, injured, or captured**.

Below are examples of perfidy that are related to the different types of protected status.⁵

- a. Feigning an intent to negotiate under a flag of truce or of a surrender⁶

Example 10.1 of an act of perfidy committed while feigning intent to negotiate under a flag of truce:

An infantry group under fire decides to attempt to achieve a more favourable attack situation by putting a white cloth on an antenna and waving it towards the adversary a few hundred metres away. The intent is to have the adversary cease fire, approach the adversary while feigning intent to negotiate – and continue firing at the order of the squad commander when the group has come closer.

- b. Feigning an incapacitation by wounds or sickness.⁷

Example 10.2 of an act of perfidy committed while feigning incapacitation by wounds:

A soldier feigns being wounded and acts accordingly by laying down his weapons and refraining from fighting. The soldier has now pretended to have protected status as *hors de combat**, which obliges the adversary to protect him under IHL. It constitutes perfidy if the soldier, pretending to enjoy protected status, intends to take advantage of the adversary's misapprehension to capture or fire at the enemy when the chance presents itself, and succeeds.

However, if the soldier pretending to enjoy protected status merely intends to save his life and surrender when the adversary approaches or to try to escape if given the chance, such conduct does not constitute perfidy since it lacks the second element of taking advantage of the misapprehension engendered in the adversary to kill, injure, or capture him.

Example 10.3 of perfidy in naval operations:

A warship feigns to be in distress by putting lifeboats in the water and sending a distress sig-

⁵ AP I, Art. 37(1)(a-d).

⁶ 1907 Hague Convention, Art. 34, AP I, Art. 37(1)(a), and SCIIHL, Rule No. 58.

⁷ AP I, Art. 37(1)(b).

nal. When an auxiliary vessel flying the flag of the adversary comes to the rescue, the warship opens fire, and the auxiliary vessel is sunk.

c. Feigning civilian, non-combatant status.⁸

Example 10.4 of an act of perfidy committed while feigning civilian status:

A soldier takes off his uniform and, dressed in civilian clothes, goes to a local village of evacuated civilians in the vicinity. The purpose is to escape the attention of the adversary by verifying information that enemy armed forces are located there and to booby-trap a building. If the operation is successful and the booby-trap actually injures or kills members of the enemy armed forces, the prohibition against perfidy has been violated.

Example 10.5 of an act of perfidy committed while displaying a protective emblem:

The adversary has allowed the collection of a number of wounded soldiers in an area under its control. It is agreed that the wounded soldiers may be collected by a medical helicopter. A decision is made to use the opportunity to attack the adversary, whose number is expected to be small at the landing zone. When the helicopter marked as a medical helicopter lands, it launches an attack, betraying the adversary's confidence that the medical helicopter will be collecting wounded soldiers.

d. Feigning protected status by the use of signs, emblems, or uniforms of the United Nations⁹ or of neutral or other States not parties to the conflict.¹⁰

Example 10.6 of an act of perfidy committed while displaying protective emblems:

An infantry patrol has been cut off from its own forces and is located in an area controlled by the adversary after an engagement. In a small nearby building complex, the patrol discovers a characteristic vehicle painted white and marked as belonging to the United Nations. The patrol decides to "borrow" the vehicle to regain contact with its own forces. On its way back, the patrol has to pass through a checkpoint under enemy control. The commander says: "Let us attack them, there are only two of them". The adversary does not notice them until it is too late, and as the white vehicle approaches, the patrol opens fire through the window, neutralising the two guards.

Perfidy committed by multiple persons jointly

Perfidy can be committed by multiple persons jointly. This means that the person who causes the misapprehension in the adversary (the first main element) and the person who subsequently commits the act of hostility against the adversary (the second main element) does not have to be the same.

However, a **close temporal connection** must exist between the act of perfidy committed against the adversary and the exploitation of such perfidy to kill, injure, or capture. In other words, a **causal link** must exist between the misapprehension engendered in the adversary and the act of hostility.

⁸ AP I, Art. 37(1)(c).

⁹ SCIHIL, Rule No. 60.

¹⁰ SCIHIL, Rule No. 63, and AP I, Art. 37(1)(d).

Below are examples of cases in which there is no duality of roles between the party committing the act of perfidy against the adversary and the party carrying out the act of hostility.

Example 10.7 of an act of perfidy committed by multiple persons jointly:

Two soldiers in a foxhole decide to try to fight their way out of a difficult situation by having one of them wave a white flag and have the other open fire when the adversary approaches.

Example 10.8 of an act of perfidy committed by multiple persons jointly:

Two special forces soldiers in civilian clothes are operating in an area with civilian buildings under enemy control. They realise that "Bravo", a high-ranking member of the organised armed group that represents the adversary in the conflict, is present. They decide to try to place an explosive charge with an electronic detonator in his car at a time when the car is parked and he is assumed to be at a meeting. The intent is to detonate the explosive charge when "Bravo" returns to his car. As the two soldiers are placing the explosive charge, "Bravo" unexpectedly returns from his meeting, and one of the two special forces soldiers in civilian clothes needs to distract him briefly, while the other finishes the work of placing the explosive charge. The placement of the explosive charge is successful, and the car is blown up a few hours later, producing the desired result.

2.2

Ruses of war

Perfidy must not be confused with **ruses of war** or **stratagems**. Ruses of war are a tool that may be used for strategic, operational, or tactical purposes and are permissible.

Ruses of war consist of acts that aim to **support a party's own military interests** by deceiving the adversary to act against its own interests. The purpose is to surprise the adversary or make the adversary act against its own interests but also to help ensure the feasibility of a party's own operation, increase the latitude of a party's commander, and reduce a party's own losses and resource consumption.

In hindsight, the acts of the adversary will often appear to be tactical or operational errors from the adversary's point of view.

Acts committed as part of ruses of war may not infringe the provisions of international law regulating armed conflict and may not be perfidious in a manner to induce the adversary's belief of being entitled to receive or provide protection.¹¹

¹¹ 1907 Hague Convention, Art. 24, and AP I, Art. 37(2).

Examples of ruses of war are presented in the following. Moreover, reference is made to Chapter 14 on naval operations because IHL allows for greater latitude for ruses of war at sea.

Example 10.9 of ruses of war in the form of a false operation:

One example of a ruse of war is the Allies' completion of Operation Overlord, the code name of the invasion at Normandy in World War II. To induce the Germans to believe that the invasion would take place at Pas-de-Calais, the Allies launched Operation Fortitude South. A fictitious First U.S. Army Group (FUSAG) was deployed in southeast England. First and foremost, FUSAG consisted of a number of radio operators transmitting false radio messages similar to the ones that would be expected from real units. Messages were transmitted about recruitment from various American states and appointment of fictitious commanders. Reports from baseball and football matches between teams from the various units were also transmitted. Messages from non-existing soldiers to their homeland were also read aloud. Everything confirmed the Germans' belief that a massive invasion force was ready to cross the English Channel at Pas-de-Calais. Moreover, dummy landing craft were deployed in ports in southeast and eastern England. They were photographed by German reconnaissance aircraft and helped fortify the belief that an invasion was imminent at Pas-de-Calais.

Example 10.10 of ruses of war in the form of a false operation:

During World War II, the U.S. Army had a unit, which was known as "The Ghost Army" because of the very specific task with which it was charged: deception of the adversary, misleading him in terms of the strength and location of U.S. units. The unit numbered about 1,100 men, who were tasked with conjuring up fake convoys, phantom divisions, and credible headquarters. The unit used recorded sounds of armoured and infantry units that were played from loudspeakers mounted on trucks. The unit had radio operators who created credible radio communication that the adversary could listen in on. Finally, the unit also used inflatable tanks, trucks, artillery and aircraft so that enemy reconnaissance could see the units and report them. The interplay among radio communication, sounds from armoured units, and inflatable equipment made everything seem credible.

Special considerations on military personnel wearing civilian clothes

The fundamental element of the principle of distinction is the obligation to distinguish between civilians and combatants and between civilian objects and military objectives. The parties to a conflict must facilitate such a distinction.

Therefore, Danish armed forces are normally required to be in uniform. As described in more detail in Sections 2.1 and 3.2 of Chapter 5, exceptional circumstances may arise in which it is assessed to be a military necessity to perform military missions in civilian clothes. This applies in both IAC and NIAC.

IAC always involves a risk that such combatants wearing civilian clothes will be regarded as spies by the adversary and be prosecuted accordingly if they are revealed

and detained. Section 2.6 of Chapter 5 provides more information about spies and their status under IHL.

As described in Chapter 5, too, the rules applicable in IAC and NIAC are not completely identical because under IHL, the requirement for combatants to distinguish themselves from civilians is formulated in a clearer manner in the regulation of IAC.

In the context of NIAC, the wearing of a uniform or other visible distinction from the civilian population is not regulated in detail in treaty law. However, as discussed in Chapter 4 and Section 3.2 of Chapter 5, the **principle of distinction** applies in **all armed conflicts**. Consequently, Danish armed forces are generally required to be in uniform in NIACs in order to help protect the civilian population during the conflict.

With the exception of capture, the prohibition against perfidy also applies in NIAC. In the exceptional circumstances in which civilian clothes are authorised, special attention must be paid to the **intent** behind wearing civilian clothes. The intent may not be to deceive the adversary into believing that the Danish armed forces enjoy civilian protection in order to achieve a more favourable position for attacking the adversary.

2.3

Prohibition against making improper use of distinctive emblems and signs protected by IHL and misusing other internationally recognised distinctive emblems

10.2 It is prohibited to make improper use of the emblems of the Red Cross, the Red Crescent, the Red Crystal, the Red Lion and Sun, or other internationally recognised distinctive emblems or uniforms of the United Nations¹² and other inter-State organisations. +NIAC¹³

12 1907 Hague Convention, Art. 23(f), GC I, Arts. 38, 44, and 53, GC II, Arts. 41 and 44, AP I, Art. 38, AP III, Arts. 2 and 6, 1954 Hague Convention, Arts. 16-17, SRM, Rule No. 110(a) and (f-g), SCIHL, Rules Nos. 59-61, ICC Statute, Art. 8(2)(b)(vii), and UNSG Bulletin, Section 9.7.

13 AP II, Art. 12, AP III, Art. 2 and 6, 1954 Hague Convention, Art. 19, NIAC Manual, Rule No. 2.3.4, SCIHL, Rules Nos 59-61, and CWM, Rules Nos. 61-62.

2.3.1 Prohibition against making improper use of distinctive emblems and signs protected by IHL

The distinctive emblems and signs protected by IHL are specifically stated in GC I-IV and AP I, AP II, and AP III.



The illustration shows the following protective emblems, left to right: the Red Cross,¹⁴ the Red Crystal,¹⁵ the Red Crescent,¹⁶ and the Red Lion and Sun emblems.¹⁷

The emblems are symbols of the International Committee of the Red Cross (ICRC) and its related national societies.

Currently, the emblems of the Red Cross, the Red Crescent, and the Red Crystal are used almost exclusively. The use of the emblem of the Red Lion and Sun was discontinued around 1980 when Iran began using the Red Crescent emblem. However, Iran has reserved the right to resume its use of the Red Lion and Sun emblem. The national society in Israel used the Star of David until 2008. However, given Israel's ratification of AP III, the emblem of the Red Crystal is likely to be used as well. Nevertheless, it is possible that Danish forces will encounter the Star of David during operations abroad. Following the adoption of AP III, it is also possible to use the protective emblems in a combination of the Red Crystal with, for instance, the Red Cross or the Red Crescent inside.¹⁸ **All emblems must be respected and may not be used improperly.**¹⁹

¹⁴ GC I, Art. 38, GC II, Art. 41, and AP II, Art. 12.

¹⁵ AP III, Art. 2.

¹⁶ GC I, Art. 38, GC II, Art. 41, and AP II, Art. 12.

¹⁷ AP II, Art. 2.

¹⁸ AP III, Art. 3.

¹⁹ Addendum 10.1.

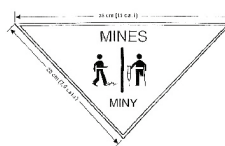


The illustration shows the following protective emblems, left to right: The flag of truce,²⁰ the Hague Convention for the Protection of Cultural Property's protective emblem,²¹ the international distinctive sign of civil defence,²² the sign for works and installations containing dangerous forces,²³ and the protective emblem of hospital and safety zones and localities.²⁴

The illustrations show the following protective signs:



Illustration of the indication of a prisoner-of-war camp (PG or PW),²⁵ so that it is visible from the air.



The sign indicating the location of mines, mine-fields, and other explosive remnants of war.²⁶

Reference is made to Sections 8.3 and 8.5 of Chapter 9 for information about when the sign is to be used. Moreover, IHL allows the parties to a conflict to agree to the indication of civilian internment camps with the letters "IC"²⁵, signs indicating non-defended localities²⁶, and signs indicating demilitarised zones.²⁷

The only correct use of distinctive emblems and signs protected under IHL is their intended use, which is stated in GC I-IV and AP I, II, and III. All other use is improper regardless of the use of the distinctive emblem or sign and the purpose.

Example 10.11 of improper use in connection with unlawful appropriation and use of protective emblems:

When Serb forces took over the Prijedor district in northwest Bosnia in May 1992, they also took control of the local Red Cross. They subsequently used the Red Cross emblem improperly while operating Trnopolje, one of at least four torture camps in the area.²⁸

20 1907 Hague Convention, Art. 23(f), AP I, Art. 38, SCIHL, Rule No. 58, and ICC Statute, Art. 8(2)(b)(vii).

21 1954 Hague Convention, Arts. 17-19, AP I, Art. 38, and SCIHL, Rule No. 61.

22 AP I, Art. 66, and SCIHL, Rule No. 61.

23 AP I, Art. 56, and SCIHL, Rule No. 61.

24 GC I, Art. 23, GC III, Annex I, Art. 6, GC IV, Art. 14, GC IV, Annex 1, Art. 6, and SCIHL, Rule No. 61.

25 GC IV, Art. 83, and SCIHL, Rule No. 61.

26 AP I, Art. 59, and SCIHL, Rule No. 61.

27 AP I, Art. 60.

28 See, for instance, ICTY, Stanišić & Župljanić IT-08-91-T 2013, para. 518, 618-636, and 657.

Reference is made to Chapter 7 for more information about the persons and objects with a right to display medical service emblems. Chapter 7 describes in detail the protection offered by the display of such emblems.

2.3.2 Prohibition against making improper use of other internationally recognised distinctive emblems and signs

Below are other internationally recognised distinctive emblems and signs that, in armed conflict, are often seen side by side with the emblems and signs protected under IHL. The emblems and signs may not be used improperly.

It is prohibited to make improper use of **the emblem of the United Nations**,²⁹ and it is prohibited to use it unless the organisation has authorised its use.³⁰

The military and police components of a UN mission and their vehicles, ships, and aircraft must display the emblem. This applies to the UN and related personnel in peace-supporting and peacekeeping missions. It also applies to the logos of affiliated funds, programmes, agencies, etc., such as the World Food Programme (WFP), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), and the World Health Organization (WHO), etc.



The NATO logo, the OSCE logo, and the EU emblem (including the emblems of its institutions) may be used only with the express permission of the organisations,³¹ e.g., during the execution of military actions.

29 31 AP I, Art. 37(1)(d), SRM, Rules Nos. 110(d) and 111, and ICC Statute, Art. 8(2)(b)(vii).

30 UN Flag Code and Regulations 1952, Art. 5, AP I, Art. 38(2), SCIHL, Rule No. 60, and CWM, Rule No. 63.

31 Paris Convention for the Protection of Industrial Property of 1883 as amended and Administrative agreement with the Council of Europe regarding the use of the European emblem by third parties (2012/C 271/04), published in the Official Journal of the European Union C 271, 2012.



From left to right: The emblems and logos of the Organization for Security and Co-operation in Europe, the European Union, the United Nations, and the North Atlantic Treaty Organization. Photo credit: The UN as regards the UN flag.

NIAC

The prohibition against making improper use of protective emblems and signs and internationally recognised emblems also applies in NIACs.³²

Example 10.12 of improper use of the protective emblem of the Red Cross:

In July 2008, the Colombian army initiated an extensive operation to rescue 15 people held hostage by the Revolutionary Armed Forces of Colombia (FARC). The operation involved infiltration of FARC's radio network, the purpose of which was to lead FARC to believe that the Venezuelan government had donated a humanitarian airlift to move the hostages to another and safer location. The helicopters used in the operation were painted white and displaying the logo of a fictitious humanitarian NGO. The Colombian government had instructed the army not to use protective emblems. Following the successful rescue mission, it was revealed, however, that a member of the Colombian rescue forces had worn a jersey with the Red Cross emblem.

The "PW" or "PG" markings used to indicate the location of a prisoner-of-war camp may be used only in IACs. Consequently, they are not of relevance in NIACs.

2.4

Prohibition against making use of the flags, military emblems, insignia, or uniforms of neutral States

10.3 It is prohibited to make use of the flags, military emblems, insignia, or uniforms of **neutral** or other States not parties to the conflict.³³ +NIAC³⁴

The background to this prohibition is the consideration and respect for the ability of neutral States to enforce their rights and duties, including their territory, and to receive sick and wounded troops from the belligerent parties³⁵ and lend support of a purely humanitarian character.

³² NIAC Manual, Rule No. 2.3.4, and SCIHL, Rules Nos. 58-61.

³³ AP I, Art. 39(1).

³⁴ 36 SCIHL, Rule No. 63, NIAC Manual, Rule No. 2.3.4, and CWM, Rule No. 65.

³⁵ HC V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907.

For example, medical personnel and medical units, including hospital ships and medical aircraft of neutral States, may operate under their own flag as long as they display the protective emblems.

International law does not prohibit **embassies** and **consulates** from using the flag of the State to which they belong. Nor does it prohibit civilians – who belong to a neutral State but are present in the territory of one of the parties to a conflict – from displaying their own flag. In neither situation may the flag be used to signal support for one of the parties to the conflict or to signal participation in military operations.

Reference is made to Section 3.5.1 of Chapter 2 for more information about conflict neutrality.

2.5

Prohibition against making use of the flag, military emblems, insignia, or uniforms of the adverse Party while engaging in attacks or in order to shield, favour, or protect one's own military operations or in order to impede the adverse Party's military operations.

10.4 It is prohibited to make use of the flag, military emblems, insignia, or uniforms of the adverse Party while engaging in attacks or in order to shield, favour, or protect one's own military operations or in order to impede the adverse Party's military operations.³⁶
+ NIAC³⁷

The prohibition applies during **the entire period** for the launch of an attack, i.e., during any march, movement, or advance in connection with offensive, defensive, stabilisation, and shaping operations. The prohibition helps define what manoeuvres may be performed in connection with operations, including ruses of war and information gathering.

The prohibition also includes the use of **the artillery, tanks, ships, and aircraft, etc., of the adverse Party**. If such equipment is captured, the flag, military emblems, and insignia of the adverse Party must be removed by the capturer before using the objects in one's own military operations. This also applies to aircraft serial numbers and hull numbers of ships, etc. However, it does not entail any obligation to paint

³⁶ 1907 Hague Convention, Art. 23(f), AP I, Art. 39(2), SCIH, Rule No. 62, CWM, Rule No. 64, and ICC Statute, Art. 8(2)(b)(vii).

³⁷ Addendum 10.2. See NIAC Manual, Rule No. 2.3.5, and SCIH, Rule No. 62.

over the special camouflage of vehicles or artillery, for instance, in the event of capture.

International law is ambiguous in terms of the use of **the adverse Party's uniform** for the purpose of facilitating a party's own **withdrawal** or **exfiltration**. The clear principle is that it is **prohibited to use the uniforms of the adverse Party to the extent that such use is instrumental in facilitating or covering a party's own operation**.

However, the use of the uniform of the adverse Party is permitted in the following situations:

- If the uniform is used as part of training and education.
- If a prisoner of war dresses in enemy uniform in connection with an escape attempt.
- If a prisoner of war dresses in enemy uniform during his deprivation of liberty (for instance, in order to adapt to extreme weather conditions), provided that all national flags and military emblems and insignia have been removed.

Special rules apply to the use of the flag of the adverse Party in naval operations. Reference is made to Chapter 14 and example 10.6 for illustrative purposes.

NIAC

Compliance with the principle of distinction in NIACs assumes that it is possible to distinguish between the parties to the conflict and the rest of the civilian population. If non-State organised armed groups and members of such groups (OAGs and MOAGs) actually use the flag, uniforms, or insignia which are suitable for distinguishing them visually from the civilian population and indicating that they are parties to the conflict, these flags, uniforms, or insignia may not be used in attacks or to shield, favour, or protect one's own military operations or to impede the adverse Party's military operations.³⁸

³⁸ See NIAC Manual, Rule No. 2.3.5, and SCIH, Rule No. 62.

2.6

Prohibition against ordering that no quarter be given

10.5 It is prohibited to order and declare that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.³⁹ +NIAC⁴⁰

It is the issuing of the order itself that is unlawful.

On the battlefield, international law protects combatants from execution and threats of execution with a view to forcing surrender. Thus, an order or threat to exterminate the army of the adversary is clearly unlawful and is not to be obeyed.

Anyone wishing to surrender must be given the opportunity to do so, and no threats of extermination may be made.

Reference is made to Chapter 15 on the duty not to obey manifestly unlawful orders and the consequences thereof.

2.7

Prohibition of pillage

10.6 Pillage is prohibited.⁴¹

+ NIAC⁴²

Pillage is when the members of the armed forces of a party to a conflict **unjustifiably** appropriate **private property** for the purpose of making a **private gain**. This means that pillage represents a specific, qualified form of theft committed by military personnel for the purpose of enriching themselves or others.

Military personnel **may never appropriate** private property or trophies. This applies regardless of whether such property or trophies have been “found” on the battlefield, are belongings found in connection with a search of persons deprived of liberty,

39 1907 Hague Convention, Art. 23(d), AP I, Art. 40, SCIHL, Rule No. 46, SRM, Rule No. 43, and ICC Statute, Art. 8(2)(b)(xii). UNSG Bulletin, Section 6.5.

40 AP II, Art. 4(1), NIAC Manual, Rule no. 2.3.1, SCIHL, Rule No. 46, SRM, Rule No. 43, and ICC Statute, Art. 8(2)(e)(x).

41 1907 Hague Convention, Art. 28 and 47, GC IV, Art. 33, SCIHL, Rule No. 52, and ICC Statute, Art. 8(2)(b)(xvi).

42 AP II, Art. 4(2)(g), NIAC Manual, Rules Nos. 4.1.c and 4.2.2.c, SCIHL, Rule No. 52, and ICC Statute, Art. 8(2)(e)(v). See ICC, Katan-ga ICC-01/04-01/07, 7 March 2014, para. 952-953 and 957.

sick, wounded, or dead, or are objects surrendered during safe conduct operations or the like.

In cases in which IHL permits destruction and seizure or confiscation, this right is assigned to **the party to the conflict**, i.e., the Danish State in the case of Denmark. Any decision in this respect must be made as part of military order and within the scope of domestic law.

Therefore, this section should be read in conjunction with Section 2.8 below on the right to seize and confiscate property as war booty and Section 2.9 below on the limited right of destruction and seizure of the property of the adversary.

2.8

Right to seize and confiscate property as war booty

10.7 A party to a conflict in IAC may lawfully seize and confiscate war booty.⁴³

The adversary's military materiel, including vehicles, weapons, etc., is subject to the rules on war booty. The rules are embodied in customary international law. Moreover, **private property** used by the armed forces of the adversary⁴⁴ may be confiscated as war booty, e.g., vehicles or private weapons.

This is of great importance in modern armed conflicts in which the parties to a conflict cooperate extensively with civilian businesses with respect to various kinds of military services, including logistics. In practice, this means that it is not crucial which party owns a piece of equipment in the event of confiscation. What is **crucial** is **whether the equipment is used in military operations**.

Hence, if the **military equipment** of a party to a conflict falls into enemy hands, the enemy may decide to **confiscate** such war materiel. Confiscation is characterised by the fact that **ownership rights are transferred to the State confiscating** the military equipment. Thus, the confiscating State is free to treat the equipment as it sees fit.

In some cases, the proper and most practical thing will be to destroy the equipment or render it harmless. In other cases, it will be better to store the equipment until

43 1907 Hague Convention, Art. 4, GC III, Art. 18, and SCIHL, Rule No. 49.

44 Israel, High Court, Al-Nawar case 1985, para. 414.

the end of the conflict and, then, return it or, possibly, repatriate it for museum or educational purposes in compliance with the specific rules.

In **multinational campaigns**, it may be unclear which party attains the ownership rights and right of disposal of the equipment: Is it the State that has performed the actual confiscation, the international force, or even the United Nations? The answer to this question may often be found in the relevant *Standard Operating Procedures** (SOPs), which sometimes also regulate the destruction and, possibly, permission to repatriate equipment confiscated in United Nations, alliance, or coalition operations.

Special rules apply to **civilian and military medical equipment**. Such equipment may not be destroyed, and it is earmarked for medical purposes to a wide extent even if it falls into enemy hands.⁴⁵ For more information, see Chapter 7.

Prisoners of war are permitted to keep certain effects and articles of their **protective equipment** and **personal belongings**.⁴⁶ This subject is considered in more detail in Chapter 12 on persons deprived of liberty.

The right of confiscation applies only to **movable property**. Privately-owned buildings and other real property that do not constitute military targets may only be seized or destroyed in the event the rules below on imperative military necessity have been met or, during belligerent occupation, if the relevant rules have been observed.

Chapter 11 provides general information about the obligations of the occupying power. This section should also be read in conjunction with Section 2.7 above on the prohibition of pillage and Section 2.9 below on the limited right of destruction and seizure of the property of the adversary.

Confiscation of war booty in NIACs is not clearly authorised in international law. So, the right of capture is relevant in NIACs only in terms of persons deprived of liberty and medical equipment. See Addendum 7.2.

The rules applicable to the right of persons deprived of liberty to keep certain effects and articles, see Section 6.8 of Chapter 12, must also be assumed to apply in NIACs. This means that effects and articles that are not covered by these rules and are in the possession of persons deprived of liberty may be confiscated and considered to be

45 GC I, Art. 33 and 35, and AP I, Art. 22, 23, and 30.

46 1907 Hague Convention, Art. 4, and GC III, Art. 18.

war booty. The special rules applicable to capture of medical equipment apply both in NIACs and IACs, see Chapter 7.

2.9

Limited right of destruction and seizure

10.8 It is prohibited to destroy or seize enemy property unless required by imperative military necessity.⁴⁷ + NIAC⁴⁸

In addition to the rules on the right to attack military objectives and the right to confiscate war booty, as described in Section 2.8 above, IHL prohibits the destruction and seizure of enemy property unless required by **imperative military necessity**.

Under IHL, **seizure** differs from confiscation in that seizure does not include a transfer of ownership rights.¹

The term “**enemy property**” encompasses all property, whether privately owned or State-owned. The term covers buildings, infrastructure, means of transport, crops, fields, forests, or other real or movable property.

While it is permissible to seize and destroy enemy property, the rule is limited by the right to own private property and the general protection of civilians and civilian objects during armed conflict. The limitation may also be deduced from the general rule that the civilian population and civilian objects must be protected to the fullest possible extent against the dangers resulting from military operations.

Exactly when destruction or seizure is justified by imperative military necessity must be determined on the basis of the existing circumstances.

When Danish armed forces assess necessity, the military advantage must be compared with the nature and extent of the destruction, and considerable restraint should be exercised in destroying enemy property in general and private property in particular.

For example, a party to a conflict may only in highly exceptional circumstances pur-

47 1907 Hague Convention, Art. 23(g), GC I, Art. 50, GC II, Art. 51, GC IV, Art. 147, SCIHL, Rule No. 50, and ICC Statute, Art. 8(2)(b)(xiii).

48 NIAC Manual, Rule No. 4.1.b, SCIHL, Rule No. 50, and ICC Statute, Art. 8(2)(e)(xii).

sue a scorched earth policy, which entails the general destruction of civilian objects and objects indispensable to the survival of the civilian population.⁴⁹

The policy may be pursued only when the following criteria are met:

- the act of destruction is performed as part of withdrawal;
- the act of destruction is performed in a limited part of a party's own territory;
- this part of the territory is under the party's own control;
- the act of destruction is performed as a self-defence measure of national territory against invasion; and
- the act of destruction is required by imperative military necessity.

Example 10.13 of scorched earth policy:

Germany's Operation Barbarossa during World War II in which the Russian forces burned crops and destroyed buildings and installations during their long withdrawal. This significantly aggravated the German supply problems and, at the same time, increased German losses sharply from the dreaded Russian cold and Russian counter-attacks.

See also Section 4.2 of Chapter 15 on the obligation to disobey an unlawful order and Section 4.5.3 of Chapter 15 on the rules on command responsibility.

Example 10.14: Examples of destruction that, under the circumstances, could be regarded as imperatively necessary are the damage to – and destruction of – property, crops, infrastructure, etc., that is inevitable when many large and heavy vehicles drive on the battlefield.

Example 10.15: Example of destruction of enemy property that was not justified by imperative military necessity:

When more than 600 Kuwaiti oil fields were set ablaze during the Gulf War in 1991, it was not required by imperative military necessity and did not result in any military advantage. However, the setting of fires did raise questions of an environmental character.

Section 2.15 below and Section 3 of Chapter 8 provide more information about the prohibition against causing superfluous damage to the natural environment during armed conflict. A number of objects enjoy special qualified protection against destruction, seizure, or confiscation. The most important ones are listed below:

- It is prohibited – regardless of the reason – to attack, destroy, remove, or render useless **objects indispensable to the survival of the civilian population** for the specific purpose of denying subsistence to the civilian population or to

49 Von Leeb and Others (High Command Trial), Law of War Reports, Vol. X and XI, 1948, AP I, Art. 54(5), and SCIHL, Rule No. 54.

the adverse Party.⁵⁰ These objects include foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works. Reference is made to Section 5.2 of Chapter 6 and Section 3.2 of Chapter 8, example 8.29.

- **Occupying powers** enjoy an extended⁵¹ but **temporary** right of seizure of both public and private property belonging to the occupied State and its civilian population. The foundation for this extended right of seizure is that the occupying power is responsible for protecting the civilian population in the occupied territory and, therefore, that the resources of the occupied State in this area must be at the disposal of the occupying power to some extent.⁵² Chapter 11 provides more information about the obligations of the occupying power.
- **Cultural property** must be protected against acts of hostility, including destruction, seizure, and confiscation.⁵³ Additional information about protection of cultural property is provided in Section 5.6 of Chapter 6.
- **Civil defence property** is subject to the rules on war booty. As long as a property is required for performance of civil defence tasks, it may not be used for other purposes. The use of such property is only permitted if arrangements have been made prior to confiscation to provide adequately for the needs of the civilian population or if the use is considered an imperative military necessity.⁵⁴ More information about the protection of cultural property and the civil defence is provided in Sections 5.2 and 5.3 of Chapter 6.

In IACs, States are liable to pay **compensation** for damage and injury resulting from violations of IHL.⁵⁵ On the other hand, as a starting point, there is no liability to pay compensation for lawful acts of war, not even if such acts caused injury to civilians. The same is true for NIACs for which, however, it will often be national law that regulates any liability to pay compensation for harmful acts done by the territorial State. HRL also stipulates that States must make effective remedies available to any person under the jurisdiction of the States whose rights have been violated.⁵⁶

Moreover, special domestic rules occasionally apply to the payment of compensation

50 AP I, Art. 54(2), and SCIHL, Rule No. 54.

51 1907 Hague Convention, Arts. 42-56, GC IV, Art. 53, and SCIHL, Rule No. 51.

52 1907 Hague Convention, Arts. 51-56.

53 1907 Hague Convention, Art. 56, AP II, Art. 16, NIAC Manual, Rule No. 4.2.2c and d, SCIHL, Rules Nos. 38 and 40, and ICC Statute, Art. 8(2)(b)(ix) and Art 8(2)(e)(iv).

54 AP I, Art. 67(4).

55 HC IV, Art. 3, and AP I, Art. 91.

56 See, for instance, ECHR, Art. 13, and CCPR, Art. 2(3).

on an *ex gratia basis**. Such arrangements may be established by joint missions or by the individual troop-contributing nation, and they may be financed in various ways.

These arrangements often serve to guarantee the civilian population some compensation for the loss of, crops or cattle, for example, which, in a country with scarce resources, often constitute an essential element of a family's livelihood even if international law does not provide a basis for such compensation.

Under the rules on **naval warfare**, a belligerent State has wide latitude to engage in *capture**, that is, confiscation of enemy ships and their cargo. The same applies to certain neutral merchant vessels and aircraft under the rules on *capture** and *prize**.⁵⁷

For more information about these concepts, see Chapter 14 on naval operations. This section may also be read in conjunction with Section 2.7 above on the prohibition of pillage and Section 2.8 above on the right to seize and confiscate property as war booty.

2.10

Prohibition against indiscriminate attacks

10.9 Indiscriminate attacks are prohibited.⁵⁸

+ NIAC⁵⁹

This prohibition is based on the principles of distinction and proportionality.

IHL considers three types of indiscriminate attacks:

- 1) Attacks that **are not directed against** a specific military objective and, consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁶⁰

⁵⁷ SRM, Rules Nos. 98, 116, and 135-58.

⁵⁸ AP I, Art. 51(4) and Art. 85(3)(b), SCiHL, Rule No. 11, SRM, Rule No. 42, CCW P II, Art. 3(3), CCW P II (1996), Art. 3(8), ICTY, Tadić IT-94-1-AR72 1995, para. 126, ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 p. 78, ICC Statute, Art. 8(2)(b)(iv), and CWM, Rule No. 43. UNSG Bulletin, Section 5.4.

⁵⁹ SRM-NIAC Manual, Rule No. 2.1.1.3, SCiHL, Rule No. 11, CCW P II (1996), Art. 3(8), SRM, Rule No. 42, and ICTY, Tadić IT-94-1-AR72 1995, para. 126.

⁶⁰ AP I, Art. 51(4)(a), and SCiHL, Rule No. 12a.

Example 10.16 illustrating that the assessment cannot be based on a distance measurement made in advance:

During the Balkan conflict, a military operation aimed at retaking a region used artillery, which was deployed 18-27 km from the towns, and whose impacts were not specifically directed against military objectives. The impacts were so inaccurate that the ICTY felt compelled to construct an artificial limitation of 200 metres. This meant that any impacts within a radius of 200 metres from what the tribunal in the absence of other evidence had to assume was the attacker's target, was considered lawful, and all impact outside this radius was unlawful.

This assessment was dismissed on appeal because it could not be established that the attacker had, in fact, at all tried to hit military objectives.⁶¹

- 2) Attacks that employ a method or means of combat which **cannot be directed at a specific** military objective and, consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁶²

The classic example is the use of missile systems that are so inaccurate that they are not able to hit a specific military objective.

Example 10.17 of the use of inaccurate weapons:

M-87 Orkan rockets were used in an operation during the Balkan conflict. Each rocket was armed with cluster warheads, each containing about 288 bomblets, which were released at an altitude of 1 km. Each of these bomblets dispersed 40 steel balls, each with a deadly radius of 10 metres. A rocket could not travel more than 50 km.

The ICTY found that the weapon was one that could not be directed against a military objective and, therefore, that its use in areas with a concentration of civilians would result in serious injury.⁶³

Example 10.18:

A CNA* in the form of malware* is directed against a military objective but creates an uncontrollable spill-over effect, including on a civilian digital infrastructure*. In the cyber example, to qualify under this category, it is essential that actual, physical collateral damage is inflicted and that the spill-over effect does not merely cause a nuisance or irritation. Reference is made to Chapter 8 for more information.⁶⁴

- 3) Attacks that employ a method or means of combat, the **effects of which cannot be limited** as required by international law and, consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁶⁵ For instance, the use of nuclear weapons.

61 ICTY, Gotovina IT-06-90-A 2012, paras. 51-61.

62 AP I, Art. 51(4)(b), and SCIHL, Rules Nos. 12b and 71.

63 ICTY, Martić IT-95-11-A 2008, paras. 216-235 and 355.

64 CWM, Rule No. 43.

65 AP I, Art. 51(4)(c), and SCIHL, Rules Nos. 12c and 71.

IHL identifies three types of indiscriminate attacks, but the list is **not exhaustive**. Below are listed just **two methods** of conducting an attack that will also violate the prohibition against engaging in indiscriminate attacks and, therefore, **may not be used** by a military commander to conduct an attack.⁶⁶

- a. An attack by bombardment which, regardless of methods or means, treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects.
- b. An attack which must be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

The reason that indiscriminate attacks may also violate the principle of proportionality, as seen in example b), is that the attack is conducted even though it will cause collateral damage that is clearly excessive in relation to the concrete and direct military advantage anticipated.⁶⁷

Whether the collateral damage in each individual case is clearly excessive in relation to the concrete and direct military advantage anticipated, making the attack indiscriminate depends on the actual circumstances. What matters is that all available information has been considered and that it has been considered prior to launching the attack(s).

The assessment of a planned attack's anticipated concrete and direct military advantage is made in practice during the targeting process and, thus, is particularly relevant to the military commander and the persons planning military operations. This section, therefore, should be read in conjunction with Chapter 8, which describes the process in detail.

⁶⁶ AP I, Art. 51(5)(a-b).

⁶⁷ AP I, Art. 51(5)(b).

2.11

Prohibition against spreading terror among the civilian population

10.11 Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁶⁸ +NIAC⁶⁹

All armed conflicts expose the civilian population in conflicting States and areas to unpleasant experiences in the form of attacks and other military operations.

However, this rule is not concerned with the extent to which military operations actually spread fear among the civilian population. It is concerned with the acts or threats of violence whose primary purpose is to spread terror among the civilian population.

Example 10.19 of a situation in which terror was spread among the civilian population:

During the siege of Sarajevo, which lasted from 1992 to 1996, the civilian population was daily and systematically exposed to direct sniper attacks and shelling with mortars. The attacks were launched during funerals, on ambulances, on hospitals, on public transportation, on cars, on bicycles, on homes, on people gardening, during sports events, on schools, during play, and when civilians went to market and for water. It was found that the primary purpose of these attacks was to spread terror among the civilian population.⁷⁰

The prohibition applies even though the terror is spread with the overall strategic motive of ending the armed conflict quickly and more effectively.

The parties to armed conflicts often communicate with the armed forces of the adversary through different channels, including the Internet. Such communication may be of a threatening character, and threatening lawful use of force is not prohibited.

Example 10.20 of an overall strategy whose primary purpose was not to spread terror among the civilian population:

When the US engaged in its “shock and awe” strategy prior to military intervention in Iraq in March 2003, the primary purpose was not to spread terror among the civilian population. The strategy entailed communication with Saddam Hussein that the US and the coalition would apply overwhelming force if he did not surrender prior to a short time limit. The strategy is an example of issuing threats from the strategic level that may well have had the actual effect

⁶⁸ API I, Art. 51(2), second sentence, GC IV, Art. 33, SCIHL, Rule No. 2, and CWM, Rule No. 36.

⁶⁹ AP II, Art. 13(2) and 4(2)(d), SCIHL, Rule No. 2, and NIAC Manual, Rule No. 2.3.9.

⁷⁰ ICTY, Galić IT-98-29-T 2003, para. 63-134 and 591-594.

of spreading fear and terror among the civilian population, but its primary purpose was not do to so.

The acts or threats of violence do not have to be directed against the civilian population to violate the prohibition. Acts and threats of violence directed against military objectives may also be covered by the provision. What is **essential** is whether the primary purpose was to spread terror among the civilian population.

Military presence for the purpose of demonstrating military capacity and strength – **show of force** – may take place in areas with a civilian population and may spread terror among the civilian population. In the vast majority of cases, the point of the military presence will be a signal directed at the adversary in the conflict rather than specific threats of violence. In these cases, the primary purpose will be directed against the adversary in the conflict rather than the civilian population.

Example 10.21 of an overall strategy whose primary purpose is not to spread terror among the civilian population:

An infantry platoon has come under fire from a compound* in a town. The platoon command-er decides to call air support to do a show of force fly-by at a low altitude above the town. The fly-by is likely to spread terror among the civilian population, but, as in example 10.19, this is not its primary purpose. The purpose is to send a clear signal of military presence and superiority to the adversary's decision-makers.

The prohibition on acts or threats of violence against the civilian population for the primary purpose of spreading terror is **supplemented by a number of other rules of international law** and, therefore, should be read in conjunction with these other rules. Fundamentally, individual civilians and the civilian population as such may not be the object of attack and must enjoy general protection against dangers arising from military operations.⁷¹ Moreover, the civilian population may not be subjected to intimidation, collective penalties, or terrorism.⁷² Reference is made to Chapter 6 on the protection of individual civilians, the civilian population, and civilian objects.

Some conflict scenarios include *compounds** and other civilian buildings involving considerable hostile activity. In such cases, some military presence is normal. One tactic might be to try to induce the population in the area to report knowledge of hostile activity and/or to persuade civilians in the area to refrain from supporting the adversary's military activity.

71 AP I, Art. 51(1) and (2).

72 GC IV, Art. 33.

However, in such and similar cases, the military commander must ensure the following:

- 1) that the tactics do not take on the character of threats of violence against residents in the area as such if the operation does not have the desired effect; and
- 2) that such operations are not carried out in an attempt to take revenge or the like on the area in order to subject the civilian population to collective intimidation or punishment.

2.12

Prohibition against starving the civilian population

10.11 Starvation of civilians as a method of warfare is prohibited.⁷³

+ NIAC⁷⁴

Pursuant to the rule, it is prohibited to attack,⁷⁵ destroy, remove, or render useless objects indispensable to the survival of the civilian population **for the specific purpose of denying them for their sustenance value to the civilian population** or to the adverse Party, whatever the motive. One purpose might be to starve the civilians to induce them to move away or to starve a specific ethnic group.

Objects that are indispensable to the survival of the civilian population include food, agricultural areas for the production of food, crops, livestock, drinking water installations and supplies, and irrigation works. The list is not exhaustive. Today, the objects also include medicine, electricity, gas, clothes, blankets, and other objects that are indispensable to the survival of the civilian population, assessed, of course, on the basis of geographical, weather, and other relevant conditions. The prohibition applies to a party's own civilian population as well as that of the adverse Party.

The prohibition against attack also means that the military commander **may not plan** to displace the civilian population by starving it.

In **siege** situations, the parties to the conflict must allow and facilitate rapid and unimpeded passage of all food, medicine, relief supplies, equipment and personnel.⁷⁶ Reference is made to Chapter 14 on the rules on blockades at sea.

⁷³ AP I, Art. 54, AP II, Art. 14, ICC Statute, Art. 8(2)(b)(xxv), CWM, Rule No. 45, and UNSG Bulletin, Section 6.7.

⁷⁴ AP II, Art. 14, and SCIHL, Rules Nos. 53 and 54.

⁷⁵ AP I, Art. 52(2), see Art. 52(1).

⁷⁶ AP I, Art. 70, and SCIHL, Rules Nos. 55 and 56.

Furthermore, it is important that the civilian population is not forced against its will to remain in the besieged town but has a chance to leave it. Only if the civilian population has received an offer to leave the town but nevertheless chooses to stay may the supply of vital necessities be cut off temporarily. Reference is made to Section 3.5 of Chapter 6 on the duty to allow relief consignments for the civilian population and the duty to ensure the free and unimpeded passage of relief consignments, equipment and personnel.

The military commander must ensure that the barrier to the free movement of the civilian population in these circumstances does not develop into a situation in which the civilian population is used as a human shield. See Section 2.14 below for more information about the prohibition against using human shields, and reference is made to Chapter 11 for general information about the obligations of the occupying power.

If food and other of the above-mentioned objects are used by the adverse Party **as sustenance solely for the members of its armed forces or in direct support of military action**,⁷⁷ the objects may be attacked, destroyed, removed, and rendered useless. The use of the objects by the adverse Party means that they constitute military objectives.

In such a situation, it is also permitted to close roads and other food transport routes used by the adverse party. It is a condition that such attack or closing of roads, etc., does not leave the civilian population with such inadequate food or water as to cause its starvation or force it to move.⁷⁸

2.13

Prohibition against taking hostages

10.12 The taking of hostages is prohibited⁷⁹ as are threats to do so.⁸⁰

+NIAC⁸¹

⁷⁷ AP I, Art. 54(3).

⁷⁸ AP I, Art. 54(3)(b).

⁷⁹ GC IV, Art. 34 and 147, AP I, Art. 75(2)(c), AP I, Art. 85(2) and (5), SCIHL, Rule No. 96, ICC Statute, Art. 8(2)(a)(viii), and UNSG Bulletin, Section 7.2.

⁸⁰ AP I, Art. 75(2)(e).

⁸¹ CA 3, AP II, Art. 4(2)(c), SCIHL, Rule No. 96, NIAC Manual, Rule No. 1.2.4(13), ICC Statute, Art. 8(2)(c)(iii).

Hostages are persons

- unlawfully deprived of their freedom and
- exposed by the hostage-takers to killing, threats of death, threats of or actual personal injury or threats of continued deprivation of freedom,
- the purpose of which is to compel a third party, such as another party to a conflict, to act in a certain manner or **refrain** from acting in a certain manner.⁸²

Such persons include civilians, persons who are *hors de combat**, chaplains, or medical personnel. **Prisoners of war are not hostages** because prisoners of war enjoy specific and more favourable protection pursuant to the rules of GC III.⁸³ Reference is made to Chapter 12 for more information about prisoners of war and other persons deprived of liberty.

It is not a requirement under international law for hostages to be of the same nationality as the party to the conflict that the hostage-takers are trying to compel to act in a certain manner.⁸⁴

Example 10.22 of hostage-taking without consideration for the nationality of the hostages:

During the bombing of Sarajevo in 1995, NATO launched an air strike against Bosnian-Serb positions in retaliation. This air strike had the consequence that some 200 UN peacekeepers were taken hostage by the Bosnian-Serb forces. The hostages were physically and mentally maltreated, and the Bosnian-Serb forces issued threats to the UN and NATO that additional attacks would result in the killing of the hostages. The hostages were later released, however.⁸⁵

Example 10.23 of hostage-taking without threats of death or personal injury:

A party to a conflict detains a sheik and demands that his family pay a ransom for his release.

However, in other situations, it may be difficult to determine whether a hostage has been taken.

Example 10.24 of a situation that does not constitute hostage-taking but is a borderline situation:

A party to a conflict temporarily detains a person in connection with a lawful search of a compound*, and the adversary must cease firing at the compound* for the person to be released. This situation does not constitute hostage-taking because detaining a person temporarily during a lawful search does not mean that the detention is unlawful.

Example 10.25 illustrates a situation which does not constitute hostage-taking:

⁸² See, for instance, ICTY, Blaškić IT-95-14-T 2000, para. 158, ICTY, Blaškić IT-95-14-A 2004, para. 639, and ICTY, Kordić & Čerkez IT-95-14/2-T 2001, para. 313-314.

⁸³ AP I, Art. 75(2)(c), see Art. 75(1).

⁸⁴ ICC, Katanga ICC-01/04-01/07-717, 30 September 2008, paras. 291-292.

⁸⁵ ICTY, Karadžić IT 95-5/18-PT, Third Amended Indictment, 27 February 2009, paras. 4, 25 and 85-87.

Part of the civilian population in an occupied territory is under attack and seeks refuge with the occupying power for safety reasons, e.g., in buildings or restricted geographical areas controlled by the occupying power.

Example 10.26 illustrates a situation which does not constitute hostage-taking:

An occupying power interns the civilian population as part of its safety measures against the effects of attacks, and the civilian population agrees to the internment.

The following applies to examples 10.24 and 10.25: The situations do not constitute hostage-taking within the meaning of international law. However, the situations may develop into hostage-taking if the occupying power, once the immediate danger is over, does not let the civilian population go and, instead, actually detains it and makes demands or issues orders to gain advantages or privileges — for instance, for the adversary to withdraw and surrender certain positions.

2.14

Prohibition against using civilians as human shields

10.13 Using civilians or other protected persons as human shields is prohibited.⁸⁶

+ NIAC⁸⁷

The prohibition encompasses the **use of the civilian population as human shields against their will** for the purpose of protecting one's own positions and military objectives or preventing the adversary's military operations.

Notwithstanding that the examples presented in this section clearly demonstrate the unlawful use of civilians as human shields, the military commander should in all situations be aware of the risk that civilians might even unintentionally risk being used as human shields and thus are exposed to unnecessary danger.

Example 10.27 of the use of human shields:

During the Iraqi invasion of Kuwait in 1990, Saddam Hussein used civilians as human shields. In August, right after the invasion, foreign nationals were taken hostage by Iraqi forces, and they were placed at strategic objectives in both Iraq and Kuwait to protect them against attack. The objectives included refineries, dams, steel factories, and what was presumed to be arms depots.

The use of human shields to protect military objectives often means locating military objectives among the civilian population or locating the civilian population around

⁸⁶ GC I, Art. 19(1), GC III, Art. 23, GC IV, Art. 28, AP I, Art. 12(4), 51(7) and 85(3), ICC Statute, Art. 8(2)(b)(xxiii), and UNSG Bulletin, Section 5.4.

⁸⁷ AP II, Art. 13(1), first sentence, and Art. 17 by implication, and SCIHL, Rule No. 97.

or inside the military objectives.

Examples of the **locating of military objectives among the civilian population** are the storage of weapons in private homes or the use of residential areas for military purposes, **the specific purpose** of which is to protect or facilitate one's own military operations or to prevent the adversary's military operations.

The locating of military objectives among the civilian population does not deprive the population of its civilian character and protection,⁸⁸ but it may violate the obligations under customary international law⁸⁹ to avoid locating military objectives in or near densely populated areas.⁹⁰ Reference is made to Section 3.4 of Chapter 6.

For instance, the **locating of individual civilians or parts of the civilian population at military objectives** may include locating civilians at permanent installations, such as buildings, arms depots, barracks, in front of oil sources, or by mobile objects such as military headquarters and tanks.

Example 10.28 of the locating of civilians at military objectives:

In 2012, Syrian government forces and militias allegedly converted and used schools as military bases, detention facilities, and interrogation centres for both children and adults even as lessons continued to be given there.

Example 10.29 of the locating of civilians at military objectives:

In January 1991, during the Iraqi invasion of Kuwait, Saddam Hussein allegedly planned to use American prisoners of war as human shields by tying them to the front of the Iraqi tanks to protect the Iraqi forces from attacks by ground troops.

The prohibition also includes **cases in which the civilian population is moved** or its movements are used to protect and facilitate one's own military operations or to prevent the adversary's military operations.

This prohibition on movement aims at two situations: when **the civilian population moves on its own initiative**, such as a flow of refugees, or when the civilian population **is forced to move**, for instance, by an occupying power or as a result of inadequate food.⁹¹

In situations such as these, the prohibition means that, in the planning of military

⁸⁸ AP I, Art. 52(3).

⁸⁹ ICTY, Kupreškić et al IT-95-16-T 2000, para. 524.

⁹⁰ AP I, Art. 58(b).

⁹¹ AP I, Art. 54(2).

operations, the military commander must be attentive to whether and, if so, where there are streams of refugees and in what direction they are moving. In other words, the movement of a stream of refugees may not form part of the planning of military operations for the purpose of using its movement to one's own advantage, for instance, by moving troops under cover of the stream of refugees.

Example 10.30 of unlawful use of refugees as human shields:

Having conducted a failed attack on a town, the remaining, scattered units decide to withdraw. They realise that the adversary has air superiority and, consequently, is able to neutralise them during their withdrawal. Therefore, they decide to hide among the large stream of refugees fleeing from the attack on the town, thereby using the refugees as human shields for protection against air attacks.

The presence of civilian human shields at or around military objectives does not affect the military character of an objective.⁹² The civilians must be included in the assessment of proportionality and the safety measures required in exactly the same way and with the same weight as other civilian persons even if they are used as human shields.

Voluntary human shields

‘Voluntary human shield’ is the term used for civilians who, **on their own initiative**, take up position in front of or inside installations that are expected to be an object of attack.

Example 10.31:

During NATO's Operation Allied Force in 1999, large numbers of civilians took up position at bridges in Belgrade which would constitute military objectives according to NATO.

Under such circumstances, and for such time, civilians may lose their protection, due to the fact that they are taking direct part in hostilities through their decision to protect the military objectives of a party to the conflict.

See Section 2.2 of Chapter 5 and example 5.5 about civilians and their direct participation in hostilities.

92 AP I, Art. 57.

2.15

Prohibition against causing widespread, long-term and severe damage to the natural environment

10.14 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.⁹³
+ NIAC⁹⁴

The prohibition encompasses the use of methods or means of warfare which are intended or may be expected to cause this kind of damage to the natural environment, which that may thus prejudice the health or survival of the population, including the survival of future generations.⁹⁵

The natural environment is to be understood in its broadest possible sense and includes ecosystems, populations, objects indispensable to the survival of the population, forests, flora, fauna, and other biological or climatic elements. The survival of the population also includes unborn generations.

The conditions for the damage to be **widespread, long-term and severe** must all be met. “Long-term” means several decades, presumably 20-30 years. However, it is as yet unclear under international law what “widespread” and “severe” mean precisely.

The requirement that all conditions must be met results in the establishment of a **very high threshold of violation**. Such a threshold does not automatically mean, however, that acts falling below the threshold are permitted. For example, an act may be in violation of the rules on proportionality. Thus, the use of most types of **nuclear weapons** will exceed the threshold.⁹⁶

Reference is made to Chapter 6 for more information about the protection of the civilian population and civilian objects, including works containing dangerous forces, and to Chapter 8 about the permitted extent of collateral damage in attacks on military objectives.

93 AP I, Art. 35(3). See the Tallinn Manual, Rule No. 83, CCW, preamble, para. 4, ICC Statute, Art. 8(2)(b)(iv), SRM, Rule No. 44, and SCIHL, Rule No. 45. UNSG Bulletin, Section 6.3.

94 NIAC Manual, Rule No. 4.2.4, ICJ, Legality of the threat or use of Nuclear Weapons (Advisory Opinion) 1996, para 31, ICTY, Tadić IT-94-I-AR72 1995, para 119. See SCIHL, Rules Nos. 43-45.

95 AP I, Art. 55(1). See SCIHL, Rules Nos. 44-45, and AWM Manual, Rules Nos. 88-89.

96 ICJ, Legality of the threat or use of Nuclear Weapons (Advisory Opinion) 1996, para 31.

2.16

Prohibition to use force in the form of measures of reprisal

10.15 Danish forces may not use force as reprisal unless they have been given express authorisation to do so from the **highest strategic level**. Hence, reprisals cannot be approved by an immediate superior or the individual soldier.

Reprisals are acts that, under normal circumstances and in themselves, would constitute violations of IHL. They are carried out by a State for the **very concrete and specific purpose of forcing the adversary to end its violations of IHL that are directed against its own State**. It is this specific purpose that makes the acts lawful under very special circumstances.⁹⁷

It is prohibited under any circumstances to carry out reprisals against the following protected persons and objects:

- The wounded, sick, personnel, buildings, or equipment protected by GC I⁹⁸
- The wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention⁹⁹
- Chaplains¹⁰⁰
- Prisoners of war¹⁰¹
- Civilians present in occupied territory and in areas belonging to the parties to the conflict and property of such persons¹⁰²
- The civilian population or individual civilians¹⁰³
- Civilian objects¹⁰⁴
- Cultural objects and places of worship¹⁰⁵
- Objects indispensable to the survival of the civilian population¹⁰⁶
- The natural environment¹⁰⁷
- Works and installations containing dangerous forces¹⁰⁸

⁹⁷ See, for instance, SCIHL, Rule No. 145.

⁹⁸ GC I, Art. 46, and UNSG Bulletin, Section 9.6.

⁹⁹ GC II, Art. 47, AP I, Art. 20, and UNSG Bulletin, Section 9.6.

¹⁰⁰ GC III, Art. 33(1), and UNSG Bulletin, Section 9.6.

¹⁰¹ GC III, Art. 13(3), and GC II by implication.

¹⁰² GC IV, Art. 33, and UNSG Bulletin, Section 9.6.

¹⁰³ AP I, Art. 51(6), and UNSG Bulletin, Section 5.6.

¹⁰⁴ AP I, Art. 52(1), and UNSG Bulletin, Section 5.6.

¹⁰⁵ AP I, Art. 53, 1954 Hague Convention, Art. 4(4), and UNSG Bulletin, Section 6.9.

¹⁰⁶ AP I, Art. 54(4), and UNSG Bulletin, Section 6.9.

¹⁰⁷ AP I, Art. 55(2), and ICJ, Legality of the threat or use of Nuclear Weapons (Advisory Opinion) 1996, para. 31. UNSG Bulletin, Section 6.9.

¹⁰⁸ AP I, Art. 56(4), and UNSG Bulletin, Section 6.9.

Reference is made to Section 3.4 of Chapter 3 and Section 4.2.1 of Chapter 15 for general information about certain legal consequences for the State in the event of breaches of international law. Reference is made to Section 7 of Chapter 3 for the use of force in international missions, including RoE, or other use-of-force directives.

Chapter summary

3.1 Perfidy

It is prohibited to kill, injure or capture by resort to perfidy. Perfidy is about leading the adversary to believe that you have protected status under international law with the intent of taking advantage of this misapprehension to kill, injure or capture the adversary. An example of perfidy is to play dead on the battlefield while the adversary is walking by and then stand up afterwards and shoot him in the back.

3.2 Ruses of war

Ruses of war or deception of the adversary is permitted. Ruses of war differ from perfidy in that you do not feign protected status, which you the exploit afterwards. An example of a ruse of war is to carry out a false operation. Specific, expanded rules apply to ruses of war in naval operations.

3.3 Prohibition against making improper use of protective emblems and other internationally recognised distinctive signs

It is prohibited to make improper use of the following protective emblems and internationally recognised distinctive signs: The emblems of the Red Cross, Red Crescent, Red Crystal, Red Lion and Red Sun, the flag of truce, the protective emblem of cultural property, the distinctive sign of civil defence, the sign for works and installations containing dangerous forces, the protective emblem of hospital and safety zones, and the logos and emblems of the United Nations, NATO, the EU and the OSCE, etc.

3.4 Prohibition against making use of the flags, uniforms and insignia of neutral States

It is prohibited to make use of the flags, uniforms and insignia of neutral or other States not parties to the conflict.

3.5 Prohibition against making use of the flags, uniforms and insignia of the adverse Party

It is prohibited to make use of the flags, uniforms and insignia of the adverse Party. If the equipment of the adverse party (such as tanks and aircraft) is captured, the flag and military emblems and insignia, etc., must be removed before such equipment is used.

3.6 Prohibition against ordering that no quarter be given

It is prohibited to order that no quarter be given. Hostilities may not be conducted on this basis.

3.7 Prohibition of pillage

It is prohibited to appropriate the adversary's private property for the purpose of making a private gain. This also applies to finds on the battlefield, property found in connection with a search* for persons deprived of liberty, sick, wounded or dead persons, and objects surrendered in connection with safe conduct operations, for instance.

3.8 Right to seize and confiscate property as war booty

The war materiel and private property of the adversary used for military purposes may lawfully be captured as war booty in IACs. In the event of confiscation, the State becomes the owner of the war booty, not private individuals. The right of confiscation applies only to movable property, not real property.

3.9 Limited right of destruction and seizure

The property of the adversary may only be destroyed or seized if such destruction or seizure is justified by imperative military necessity. This applies to both private and public property, such as forests, crops, and state-owned buildings. Compensation may be paid on an ex gratia basis*.

3.10 Prohibition against engaging in indiscriminate attacks

It is prohibited to engage in indiscriminate attacks. An example of an indiscriminate attack is a bombardment that regards multiple, clearly separate military objectives as one military objective.

3.11 Prohibition against spreading terror among the civilian population

Acts or threats of violence the primary purpose of

which is to spread terror among the civilian population are prohibited.

3.12 Prohibition against starving the civilian population

It is prohibited to starve the civilian population, for instance, by attacking or otherwise destroying food, etc., indispensable to the survival of the civilian population.

3.13 Prohibition against taking hostages

It is prohibited to take hostages. Hostages are not prisoners of war.

3.14 Prohibition against using civilians as human shields

It is prohibited to compel civilians or other protected persons to protect one's own military objectives against attack from the adversary. If the adversary uses civilians as human shields, such use does not affect the military character of the objective.

3.15 Prohibition against causing widespread, long-term and severe damage to the natural environment

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.

3.16 Prohibition against the individual soldier and the commander from using force in the form of reprisal measures

Reprisals may only be carried out subject to express authorisation. Such decision may only be made at the highest strategic level.

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Belligerent occupation

Rights and obligations of Danish armed forces during occupation

Belligerent occupation

Rights and obligations of Danish armed forces during occupation

1. Introduction

During World War II, Denmark was occupied by Germany from 9 April 1940 until its liberation on 5 May 1945. The four Geneva Conventions adopted in 1949 contain a provision motivated by the German occupation of Denmark: that the Conventions are applicable even if an occupation meets with no armed resistance and, as a consequence thereof, no actual armed conflict exists between the occupying power and the State whose territory is occupied.¹

The operation in Iraq during the period from the end of the armed conflict around 1 May 2003 to 28 June 2004 was part of an occupation of the Iraqi State. Denmark contributed military forces, etc., to the operation but also appointed a temporary governor for the Basra area. Both military and civilian contributions were subject to the rules of occupation under HRL. During this specific occupation, the USA and the United Kingdom were the actual occupying powers, but a number of coalition States, including Denmark, also took part in meeting obligations arising from the occupation.

¹ GC,CA 2.

Stabilisation operations in the wake of IACs are likely to involve an occasional need for interim solutions, and international coalitions with mixed civilian and military contributions, will be subject to the rules of occupation under HRL.

1.1

Chapter contents

This chapter outlines the rights and obligations associated with responsibilities flowing from partial or total occupation of the territory of a foreign State. After some introductory remarks in Sections 1 and 2 below, the Chapter considers the issue of when occupation takes place (Section 3). Next, the Chapter examines the most important components of the rights and obligations of the occupying power (Sections 4 and 5).

1.2

Scope in relation to other chapters

This Chapter is concerned with the special rules applicable during an occupation. The rules are also relevant for Chapter 12 on persons deprived of liberty in the context of internment. This Chapter also describes a number of responsibilities and obligations with respect to the civilian population in the occupied territory. These sections of the Chapter, therefore, are closely related to Chapter 6. The description of law enforcement in Section 4.2 below, for instance, addresses the status under international law of different types of resistance in the occupied territory, including the legal effect of civilian participation in hostilities against the occupying power. In this context, the Chapter supplements the general consideration of the subject in Chapter 5.

1.3

Relevance of the rules to NIACs

Occupation may be said to constitute a part of an IAC involving one State's occupation of the territory of another State. Therefore, the rules have no relevance to NIACs.

1.4

Relevance of human rights to the Chapter

In some cases, HRL will be extremely relevant in situations of occupation. The concept of occupation assumes the qualified control of all or part of another State's territory. In some instances, this control will simultaneously meet the criterion of territorial jurisdiction²; in others, control might by alternative means bring individuals within the occupied territory under the jurisdiction of the occupying power and, thus, provide them protection under international HRL.² For more information, see Section 4.2 of Chapter 3.

When physical force is used in an endeavour to restore or ensure public order and security in the occupied territory,³ such use of physical force must respect the right to life of individuals as expressed in, for instance, the ECHR⁴ and ICCPR.⁵ However, the ECHR contains a provision to the effect that the right to life in armed conflict must be understood in accordance with HRL.⁶ The right to life under international HRL does not influence the rules of IHL, for example, providing that:

- the combatants of the adversary may be targeted;
- civilians taking a direct part in hostilities lose their protection from direct attack under international law. Such civilians, therefore, may be attacked to the extent and for such time as they take a direct part in hostilities;⁷ or
- if civilians lose their lives as part of the use of military force in compliance with HRL, the ECHR article on the right to life has not been violated

If a death has been caused by the occupying forces and may be considered suspicious, the occupying power is under an obligation to conduct an independent, prompt and transparent investigation thereof. This follows from case law developed by the European Court of Human Rights.⁸ Reference is made to Chapter 15 for more details about the requirements for such investigations.

If the occupying power deems it absolutely necessary, it may deprive persons of liberty for the purpose of the security of the occupying power. In such cases, this is possible without being brought before a judge in accordance with the rules on

2 ECtHR, *Al-Skeini and Others v. UK* (App. No. 55721/07) 7 July 2011, para. 142

3 1907 Hague Regulations, Art. 43.

4 ECHR, Art. 2.

5 CCPR, Art. 6.

6 ECHR, Art. 15(2).

7 AP I, Art. 51(3).

8 See, for instance, ECtHR, *Jaloud v. Netherlands* (App. No. 47708/08) 20 November 2014, para. 186.

internment.⁹ The rules on internment for security reasons set forth in HRL prescribe a special internment procedure that deviates to a considerable extent from human rights standards.¹⁰ This issue and other aspects regarding the deprivation of liberty, including in an occupied territory, are dealt with in more detail in Chapter 12.

2. Occupation and occupying power

2.1

Regulation in the area

The rules on the responsibility and obligations of occupying powers are predominantly set forth in the 1907 Hague Convention IV and GC IV. AP I adds a few simple rules but provides no other regulation. Moreover, the Hague Convention on the Protection of Cultural Property (1954 Hague Convention) of 1954 contains provisions on the special responsibility of the occupying power to protect cultural property in the occupied territory.

2.2

Occupation is a temporary situation

IHL does not consider the lawfulness of occupying the territory of another State. The rules on occupation apply whether or not the occupation is considered to be in compliance with international law. The regulation assumes that the situation is temporary and that control will be returned to the territorial State at a later time. It can be said that the territory is under the administration of the occupying power.

For the same reason, it is prohibited to transfer (deport) the inhabitants forcibly from the occupied territory to another country unless such evacuation is absolutely necessary for the inhabitants' own safety. The duration of such evacuation may last no longer than the security situation requires. Similarly, the occupying power may not transfer its own population into the occupied territory.¹¹

⁹ GC IV, Art. 68 and 78.

¹⁰ GC IV, Art. 78.

¹¹ GC IV, Art. 49 and ICC Statute, Art. 8(2)(b)(viii).

2.3

Occupation

The rules governing occupation in an international armed conflict only regulate situations in which all or parts of a State's territory is occupied by one or more other States using – or threatening to use – armed force. This means that the rules do not apply to situations in which an allied State invites other States to come to its rescue and, in the process, those States exercise significant control over all or parts of this ally's territory. In such situations, however, HRL may be applicable.

Moreover, the rules do not apply to situations in which the UN has assumed responsibility for the administration of States or territories, whether for a short or a long period of time. An example of this is the stabilisation of the situation in Kosovo from 1999 onwards. In such situations, United Nations Security Council resolution(s) will provide the international legal basis for action and allocate the responsibility among the organisations and other parties involved.¹²

2.4

Occupying power

Under the rules of occupation, the term “occupying power” applies to the power occupying the territory. The power may be a single State or, in some cases, multiple States forming a coalition of some kind. The rules must be read and understood in this context. If the occupying power consists of two or more States, the States share the responsibility. Therefore, it is recommended that such States enter into mutual agreements on the exercise of obligations and rights.

2.5

Geographical extent of the occupied territory

Occupation may take place with respect to all or parts of a State's territory. The deciding factor is whether or not the foreign military force exercises control and authority over a territory. For more information, see below.

¹² For an example, see UN SC Res. 1244/1999

3. The beginning and end of occupation

3.1

When does occupation occur?

The responsibility of an occupying power takes effect when the advancing military force has gained control and authority over an adversary's territory by force.¹³

Mere military control over a territory resulting from the advancement of military units on the ground does not suffice to constitute occupation. Not even if the ground won is an urban area. Occupation calls for more qualified control, including control of the territory's civilian administration. Treaty law does not cover much more than this, but case law arising out of World War II establishes a number of factors that, in combination, indicate when and whether occupation occurs:¹⁴

- Have the adversary's armed forces been driven out of the territory? Occupation may occur even with intermittent skirmishes, but the adversary's regular armed forces must essentially have been driven out of the territory.
- Have opposition forces, if any, been disarmed?
- Has the adversary's continued administration and authority in the territory actually rendered the military control over the territory impossible?
- Can own forces take over the exercise of this authority?
- Has a governor/administrator or the like actually been appointed?
- Are personnel and other resources available so that authority and control over the territory may be assumed?
- Has anyone proclaimed the territory to be under occupation and taken express responsibility for it?

In the vast majority of cases, occupation occurs locally when the armed forces of the territorial State are driven out by the advance of other military forces. Their presence is subsequently consolidated by additional military forces. In this way, control over the territory is enhanced and gradually takes on a more stable character whereby the advancing forces attend to the safety and well-being of the civilian population.

¹³ The 1907 Hague Convention IV, Art. 42.

¹⁴ Case of Wilhelm List and Others at the Nuremberg Tribunal (Hostages Trial) 1948, UN War Crimes Commission, Law Reports, Vol. VIII, pp. 55-56

The declaration that a territory is occupied should be issued at the military strategic level, subsequent to consultation with all relevant authorities, and the declaration should be accompanied by necessary agreements with allies on the management and allocation of obligations and rights.

3.2

When does occupation end?

Occupation continues until the occupying power leaves or is driven out of the occupied territory.¹⁵ The fact that the occupying power meets armed resistance in the occupied territory does not in itself mean the end of the occupation as long as the occupying power is able to counter such resistance and control over the territory is not affected. In the period between 2003 and 2004, the occupation of Iraq ended formally with the appointment of an Iraqi interim government and a clear indication thereof in United Nations Security Council Resolution 1546/2004.

4. Obligations of the occupying power

The following sections review the general obligations resting with an occupying power. The obligations related to the overall administration and management of the occupation rest primarily with the States and organisations that assume these obligations as was the case in Iraq.¹⁶ In future international operations that may involve the occupation of foreign State territories, therefore, Danish forces must also be expected to play an executive role in relation to the overall obligations of the occupying power.

4.1

Respect for the constitutional system and the laws of the territorial State

As mentioned, sovereignty over a territory does not pass from the occupied State to the occupying power upon occupation. Rather, the constitutional system of the

¹⁵ AP I, Art. 3(b).

¹⁶ Letter dated 8 May 2003 from the UK and the US, see UN SC Res. 1483 of 22 June 2003 on the security situation in Iraq.

country must be maintained. Moreover, the occupying power must respect the laws of the country unless new legislation or amendments to existing legislation are required to ensure the occupying power's **own security or performance of its obligations**.¹⁷

A need may arise for legislative intervention where the occupied State has very liberal weapons legislation or in relation to the right to freedom of assembly and movement. These issues concern so-called civil and political rights that, depending on the circumstances during occupation, may place Denmark under obligations pursuant to the rule on effective control of an area (*territorial jurisdiction**). For more information, see Section 4 of Chapter 3. Such rights may however be restricted by law to the extent necessary in a democratic society. This applies in particular to situations in which the security of the State – the occupying power in this case – is at stake.

Situations may arise in which the legislation of the occupied State is incompatible with Denmark's human rights obligations applicable during occupation. In such situations, GC IV must be assumed to allow the occupying power to pass legislation to bring the laws applicable in the occupied territory in line with such obligations.¹⁸ This may be the case in a number of respects, including general, regional, and rights-specific obligations. Therefore, a legal analysis that compares the applicable legislation in the occupied territory with Denmark's obligations must be made. Subsequently, a dialogue should be opened with other countries sharing the responsibility of the occupation with respect to implementing the necessary rules.

Example 11.1: During the occupation of Iraq in 2003-2004, the Coalition Provisional Authority (CPA) issued in excess of 150 orders and regulations with binding effect. CPA Order No. 7 implements a number of amendments to the Iraqi penal code with reference to the fact that *'the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards'*.

4.2

Law enforcement in the occupied territory

Perhaps, the most important duty of the occupying power is to restore and ensure public order and safety as far as possible.¹⁹ The duty goes beyond what the wording immediately suggests. Thus, the occupying power is to restore or ensure as far as possible conditions for the population to go about its daily business safely. In other

¹⁷ GC IV, Art. 64, and The 1907 Hague Convention IV, Art. 43.

¹⁸ GC IV, Art. 64.

¹⁹ The 1907 Hague Convention IV, Art. 43.

words, the population must be able to move as freely as possible to and from work, institutions, authorities, etc., and to do what is needed to support their families. In other words, the occupying power must establish safe conditions for the population in the occupied territory to continue living as unhindered a life as possible during occupation.

This may be done by existing police forces or similar institutions in the territorial State - for example, through routine patrols and maintenance of order as well as criminal investigations and crime fighting in the occupied territory. However, neither the police nor other citizens in the occupied territory may be forced to participate in military operations, such as measures targeting organised or unorganised resistance activity.²⁰ Such a requirement would place the persons involved in an unfair conflict of loyalty.

Threats to the public order in the occupied territory may arise in numerous ways. In the context of international law, a distinction must be made among the following activities:

- organised resistance activity
- unorganised resistance activity
- unrest and other crime not directed at the occupying power directly

These three types of activities are elaborated on below.

Organised resistance activity

Such activity is directed against the occupying power. In some cases, the resistance will be organised into an actual resistance movement fulfilling the requirements for combatant status set forth in AP I: For instance, the requirement of organisation and the open carrying of arms prior to and during the launching of an attack in which the person in question is to participate.²¹ For more information, see Chapter 5. If the resistance movement meets the combatant requirements, its members are entitled to participate in the hostilities, and they qualify for prisoner of war status if deprived of liberty by an adverse party. Similarly, the occupying power may target them at all times.

²⁰ GC IV, Art. 51.

²¹ AP I, Art. 43-44, see Art. 1(4).

Unorganised resistance activity

Unorganised hostile activity by civilians directed against the occupying power constitutes direct participation in the hostilities, which results in a loss of protection against direct attack for the participating civilians. In practice, this means that any person attacking the occupying power or undertaking another activity immediately prior to such an attack may be directly targeted. For more information, see Section 2 of Chapter 5.

If such persons are deprived of liberty, they do not qualify for prisoner of war status but may be interned in accordance with the relevant rules, for the sake of the security of the occupying power.²² For more information, see Chapter 12. Such civilians may also be prosecuted under the applicable law of the territorial State, depending on the detailed nature of the hostile activity.

Unrest and other crime

not aimed directly at the occupying power

This category comprises criminal acts that are not directed against the occupying power. The occupying power must protect civilians against acts of violence or threats thereof.²³

HRL forms the international legal framework for how such criminality can be fought. For instance, the ECHR restricts the use of potentially lethal force to the situations, referred to in Article 2 of the ECHR, in which it is absolutely necessary as well as proportional to the specific violation.²⁴ Depending on the circumstances, the occupying power may be responsible for the security forces working for it. If, for instance, local police forces are used for law enforcement*, Denmark maybe responsible, depending on the circumstances, for ensuring that the subordinate local police forces act in accordance with Denmark's human rights obligations, which includes those specified in the ECHR.²⁵

²² GC IV, Art. 78.

²³ GC IV, Art. 27

²⁴ ECHR, Art. 2.

²⁵ See, for instance, ECtHR, *Al-Skeini and Others v. UK* (App. No. 55721/07), 7 July 2011, Paragraph 138.

4.3

Administration of the occupied territory

As mentioned, the occupying power must allow the population in the occupied territory to continue living as uncomplicated a life as possible in the situation. IHL imposes a number of obligations on the occupying power in this respect. These obligations must be balanced against the relatively far-reaching opportunities for exploiting the resources available in the occupied territory.

As is the case in the field of healthcare, for example, the level of protection and welfare in Denmark may differ significantly from that in the territorial State. International law contains no obligation to provide the civilian population in the occupied territory with the standard applicable in the Danish healthcare system or to implement the standards and legislation applicable in the Danish labour market.

Rather, the conditions in the territorial State prior to occupation constitute the relevant standard in international law. Only one modification may be necessary: If the standard prior to occupation was at a level that must be regarded as life-threatening to all or parts of the civilian population, the occupying power must – to the extent possible – raise the level to a minimum that ensures the basic vital healthcare necessities for the population. More detailed information is available below.

Whether and to what extent such protection must be provided may depend on a number of factors: for example, the security situation, the available resources, the local expertise, and any joint initiatives that are aimed towards reconstruction and assistance to a higher level than before, perhaps in combination with a desire to promote a focus on human rights, including working conditions, security, etc.

This means that, in this area as well, HRL establishes the **minimum degree of protection** to be offered civilians who are victims of armed conflict. Therefore, a higher degree of protection may always be afforded.

Food and other basic needs

The occupying power is responsible for ensuring that the civilian population does not starve or lack other basic needs. In addition to food and drink, these include medical supplies, clothing, shelter, bedding, and other supplies essential to the survival of the civilian population and objects necessary for religious worship.²⁶

²⁶ GC IV, Art. 55-59, and API, Art. 69.

The standard to be upheld is one that ensures the survival of the civilian population.

On one hand, the occupying power is not under any obligation to maintain a higher standard in these areas than the one applicable prior to the outbreak of hostilities. On the other hand, the occupying power may need to improve conditions for the civilian population in areas where a shortage of essential supplies already exists prior to the hostilities. See also above about minimum protection.

The occupying power must ensure that the basic needs outlined above are met to the fullest extent within the means available to it. In situations in which an occupying power does not have access to the necessary means, the occupying power is under an obligation to enter into **relief schemes** with organisations or States that are able to secure the provision of essential supplies.²⁷ Such schemes do not limit the responsibility of the occupying power. All States must endeavour to allow for the transit and transport of such supplies intended for the population in need,²⁸ and the occupying power must allow for the reception of relief consignments by the civilian population for which they are intended. There may be cases in which security related considerations render it absolutely necessary to limit such access. These include cases in which the relief consignments benefit organised resistance movements in full or in part.

Against this background, HRL recognises that the occupying power may employ the necessary means to control whom the relief consignments actually benefit.²⁹ Even in situations in which it may be necessary to block relief consignments, however, the occupying power is under an obligation to ensure necessities of life for the civilian population.

Healthcare

In addition to securing medical supplies as set out above, the occupying power is responsible for ensuring the restoration or maintenance of the existing healthcare system to the fullest extent it is able. This includes hospitals, clinics, research centres, etc. HRL particularly highlights measures whose purpose is to combat and prevent the spreading of infectious diseases.

Medical personnel of all categories must be allowed to carry out their duties.³⁰ Reference is made to Chapter 7 on the protection of medical personnel, material, and installations.

²⁷ GC IV, Art. 59-63, and AP I, Art. 69 and 71.

²⁸ GC IV, Art. 61.

²⁹ GC IV, Art. 62.

³⁰ GC IV, Art. 56.

Conditions for children

The Danish armed forces must consider any person under the age of 18 to be covered by the protection to which children are entitled pursuant to international law. Determining a person's age is difficult in some cases. In case of doubt, a person must fall under the rules for the protection of children until reliable documentation proving otherwise has been obtained.

In concert with the existing national and local authorities, the occupying power must ensure that proper care is taken of children and their specific needs. In addition, they must ensure the continued and unhindered operation of schools for children.

In order to prevent children from being separated from their parents and/or other family members, the occupying power must establish the necessary registration of children, including the names, etc., of their parents and/or guardians. A special section of the *national information bureau** shall be responsible for the identification of children whose identity is in doubt.³¹

The occupying power must ensure the sufficiency of local institutions for children who have been orphaned or separated from their parents as a result of the armed conflict and cannot adequately be cared for by close relatives or friends. As far as possible, the institutions must be staffed by people from the territorial State in order to ensure that the daily caregivers have the same culture, language, and religion as the children.³²

The protection of children in armed conflict is regulated by the UN CRC.³³ In particular, the First Optional Protocol of the Convention focuses on the involvement of children in armed conflict and applies, therefore, without a doubt, independently of legal considerations related to extra-territoriality, etc. Reference is made to Chapters 3 and 6. The rules are primarily concerned with the prohibition on recruiting children into armed forces. They do, however, also contain obligations to protect children against assault of a sexual or other nature and require States to pay special attention to orphaned children and children without guardians, when a result of armed conflict.

³¹ GC IV, Art. 50.

³² GC IV, Art. 50.

³³ UN CRC and First Optional Protocol on the involvement of children in armed conflict.

Protection of cultural property

An occupying power must, to the extent feasible, support the national authorities of the occupied country in safeguarding and preserving its cultural property.³⁴ In the event that the national authorities have failed to protect their own cultural property, which has already suffered damage as a result of military operations, the occupying power must take the necessary measures to protect such property.

The First Protocol to the Convention for the Protection of Cultural Property aims at increasing the protection of cultural property in the occupied territory. The occupying power must, for instance, take measures to prevent the exportation of cultural property from the occupied territory.³⁵

The **Second Protocol to the 1954 Hague Convention** provides that the occupying power must prohibit and prevent any illicit export or other removal or transfer of ownership of cultural property. Moreover, the occupying power must ensure that no archaeological excavation is undertaken unless such excavation is strictly required to safeguard, record, or preserve cultural property. Finally, the occupying power must prevent any alteration or change of use with respect to cultural property that is intended to conceal or destroy cultural, historical or scientific evidence.³⁶ If, nevertheless, archaeological excavations are performed or the use of cultural property is changed, etc., such excavations or changes must be done in close cooperation with the competent national authorities.

It will often be expedient to call upon UNESCO for technical assistance to fulfil the obligations in this area.³⁷ Reference is made to Chapter 6 on the protection of cultural property, which provides more detailed information about the meaning of cultural property.

34 1954 Hague Convention, Art. 5.

35 1954 Hague Convention, First Protocol, Rule No. 1.

36 1954 Hague Convention, Protocol II, Art. 9.

37 1954 Hague Convention, Art. 23.

5. Rights of the occupying power

So far, this Chapter has outlined the obligations resting with the occupying power. Recognising that resource-intensive obligations and responsibilities flow from the occupation of a foreign State, HRL also grants rights to the occupying power to use a number of resources already available in the occupied territory.

In this context, such resources include labour, building supplies, and other property as well as financial assets, etc. The following sub-sections are concerned with individual types of resources.

5.1 Employment of the civilian population

Any person who is 18 years of age and has not been interned may be used for work that is necessary either for the needs of army of the occupying power or public utility services or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied country. The work may only be carried out in the occupied territory where the requisitioned persons are.³⁸

No person may be compelled to serve in the armed forces of the occupying power or otherwise facilitate the military operations of the occupying power.³⁹ In keeping with this, the occupying power may not enlist local civilians for its own armed forces, for instance, through propaganda or threats of reprisal. However, international law does not prohibit civilians from undertaking such work of their own free will. Accepting such work will often constitute a violation of the law of the occupied State and may be regarded, for example, as treason.⁴⁰

Prior to such enlistment, then, an occupying power should examine the applicable law of the territorial State.⁴¹ Any penal law provisions or other legislation based on loyalty to the territorial State should be repealed, as was the case during the occupation of Iraq in 2003-2004.⁴²

38 GC IV Art. 51, and SCIHL rule no. 95.

39 GC IV, Art. 51, and ICC Statute, Art. 8(2)(b)(xv).

40 See Note 36.

41 GC IV, Art. 64.

42 Coalition Provisional Authority Order No. 7, Section 3(3).

Similarly, the occupying power may pass legislation that renders refusal to work punishable.

No person may be compelled to work when the demands of such work go beyond the person's physical or intellectual capacity.

Working conditions, including wages, holidays and time off, working hours, compensation for occupational accidents, training and education requirements, equipment, etc., must at a minimum be on a par with the conditions existing in the territory prior to occupation.⁴³ Reference is made to Section 4.3 above.

It remains unresolved how the provisions of the Geneva Conventions on the duty to work in an occupied territory will be considered in relation to, for instance, the prohibition against slavery and servitude set forth in the European Convention on Human Rights.⁴⁴ Additional information is available in Section 4.2.5 of Chapter 6. In the event that the rules on the duty to work set forth in the Geneva Conventions become applicable, this should be carefully considered and subjected to legal clarification.

The status and appointment of judges and other public officials may not be altered should they abstain from performing certain official acts for reasons of conscience, and the occupying power may not apply sanctions to or discriminate against them on these grounds. However, this does not affect the right of the occupying power to dismiss such public officials.⁴⁵

5.2

Sanctions imposed on persons who are deemed to pose a security risk

The occupying power may arrest, investigate, and prosecute criminals for offences committed after the occupation of an occupied territory as a natural component of the enforcement of public order and security. A person may be prosecuted by the territorial State for any criminal offences committed prior to the occupation. GC IV contains numerous procedural guarantees for persons accused, charged, and convicted.⁴⁶

43 GC IV, Art. 51.

44 ECHR, Art. 4.

45 GC IV, Art. 54.

46 GC IV, Art. 64-77.

Moreover, the occupying power may restrict or deprive civilians of their liberty if this is absolutely necessary for reasons of security.⁴⁷ Such restrictions or deprivations are subject to an individual assessment and must be imposed in accordance with special rules described in more detail in GC IV.⁴⁸

Chapter 12 describes the right to intern people or subject them to an assigned residence and the rights ensured to persons deprived of liberty.

5.3

Seizure and expropriation of resources in the occupied territory

Any **destruction** of private or public property in an occupied territory is prohibited except where such destruction is absolutely necessary for carrying out military operations.⁴⁹ The assessment of necessity referred to here differs from the one discussed in Chapter 8 with respect to military objectives. Thus, one reason for destruction may be a desire to erect something new on a site to support the carrying out of the occupying power's objectives.

The occupying power is entitled to **seize or expropriate** property to the extent necessary for the administration of the occupied territory. The term “seize” describes situations in which the taking by the occupying power does not entail a right to compensation, whereas “expropriation” describes situations in which the occupying power is entitled to take possession of the resource but must compensate the territorial State or the civilian population.

Assets of the occupied State

The occupying power may **seize** assets of the occupied State that are in the form of **movable property**, i.e. movable property that can be used in support of military operations, including funds, bonds, securities, and reserves as well as other financial instruments.⁵⁰

⁴⁷ GC IV, Art. 68 and 78.

⁴⁸ GC IV, Art. 79-135.

⁴⁹ GC IV, Art. 53.

⁵⁰ The 1907 Hague Convention IV, Art. 53

The **real property** of the occupied State, including buildings, forests, agricultural estates, etc., may be used by the occupying power. However, the occupying power may only be regarded as an administrator of the real property and is responsible for ensuring that such administration safeguards the value of the real property.⁵¹

The occupying power must treat certain properties as if they were private property. This applies to properties belonging to municipalities or other local or regional authorities and properties dedicated by the occupied State to religion, charity, education, arts, and sciences. Therefore, these properties may not be seized, expropriated, or used for any other purposes.⁵²

Works of art, historic monuments, and other cultural heritage may not be seized or in any other way subjected to military operations. Cultural heritage must be protected. Moreover, the occupying power must assist local authorities in their work to protect the cultural heritage of the occupied territory. If need be, the occupying power must take the necessary measures to protect the cultural heritage in the occupied territory by its own volition.⁵³

Privately owned movable and real estate

The right to own property must be respected. The few decisions issued by international courts on occupation typically address the right to privacy, including the right to have privately owned homes and items respected.⁵⁴

The Universal Declaration of Human Rights contains specific protection of the right to own property,⁵⁵ but the ECHR did not include such express protection until Protocol No. 1 to the Convention. The United Nations International Covenant on Civil and Political Rights contains no express protection of the right to own property. However, HRL does. A clear prohibition against the confiscation of private property was already set forth in the rules on occupation in the 1907 Hague Convention IV. It also sets forth a general provision for the occupying power to respect “family honour and rights, the lives of persons, and private property, as well as religious convictions and practice”.⁵⁶

51 The 1907 Hague Convention IV, Art. 55.

52 The 1907 Hague Convention IV, Art. 56

53 1954 Hague Convention, Art. 5.

54 For example ICJ Advisory opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, of 9 July 2004 or ECtHR, *Loizidou v. Turkey* (App. No. 15318/1989) dated 18 December 1996.

55 UN Universal Declaration of Human Rights, Art. 17.

56 The 1907 Hague Convention IV, Art. 46.

On balance, these rules mean that any intervention in the right to own property must have a legal basis and may only take place to the extent necessary to fulfil the obligations of the occupying power in the occupied territory. Under the ECHR, it is also required that the intervention be in the public interest.⁵⁷ The occupying power must therefore, among other things, ensure that any necessary intervention has a legal **basis with effect in the occupied territory**.

However, HRL grants the occupying power a number of options – on certain terms and conditions – to **intervene in the right to own property**:

- Weapons, munitions, and means of transport and communication may, even if privately owned, be taken into possession temporarily by the occupying power. If the occupying power does so, the property in question must be returned when peace is made, and appropriate compensation must be paid.⁵⁸
- The occupying power may expropriate requisitions in kind, including without limitation crops, cattle, and foodstuffs, as well as services from municipalities and the inhabitants to the extent that it is deemed necessary to meet the needs of the occupying power. Such expropriation must be reasonably proportional to the resources of the country and may not involve the inhabitants in obligations to take part in military operations against their own country. A decision to expropriate must be made by the military commander of the territory, and, if possible, compensation is to be paid in cash. Alternatively, a credit note must be issued, and the amount redeemed as soon as possible.⁵⁹

5.4

Taxation of the civilian population in occupied territory

The occupying power may decide to spend funds collected in the form of taxes, dues, and tolls imposed for the benefit of the territorial State. If the occupying power exercises this option, it must do so in the same manner and pursuant to the same legislation as existed prior to the occupation. Furthermore, expenses for public administration, etc., that are still payable by the territorial State must be reimbursed out of the funds collected. In this way, the relevant rules of international law support the

⁵⁷ ECHR, Protocol No. 1, Art. 1.

⁵⁸ The 1907 Hague Convention IV, Art. 53

⁵⁹ The 1907 Hague Convention IV, Art. 52.

reasonable financing of the expenses involved in the administration of the territory by the occupying power out of the occupied territory's economy.⁶⁰

In the event that these funds do not cover the occupying power's expenses for the administration of the occupied territory, extraordinary taxation may be imposed.⁶¹

⁶⁰ The 1907 Hague Convention IV, Art. 48.

⁶¹ The 1907 Hague Convention IV, Art. 49.

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Persons deprived of their liberty in the custody of Danish forces

Persons deprived of their liberty in the custody of Danish forces

1. Introduction

It is a basic principle of law that all people have the right to personal liberty and must not be deprived of liberty arbitrarily. Since such a deprivation involves a grave interference with personal liberty, responsibility for deprivation of liberty and the treatment of detainees lies with the acting soldiers, their commanders, and the Danish State.

This chapter discusses the actual deprivation of liberty, how persons deprived of liberty are to be treated, and the end of deprivation of liberty by transfer, release, or escape. The chapter covers all persons who are deprived of liberty by Danish armed forces during all forms of international operations – regardless of whether they are the adversary’s soldiers, members of non-State organised armed groups (MOAGs), or suspected criminals, and regardless of whether it occurs during armed conflict or in peacetime.

The chapter examines how persons deprived of liberty are to be treated, how they are to be accommodated, which procedures are to be followed, and what is to happen when they are released or transferred. The rules are numerous and varied, but one thing should always be kept in mind:

The purpose of these rules is to ensure that all persons deprived of liberty are treated humanely, with respect, and are guaranteed their rights.

The interests of the detainee must be safeguarded in accordance with the special circumstances of military operations. In armed conflict, for instance, the general principles of military necessity and humanity have to be balanced, see Chapter 4.

Given the right of State parties to a conflict to detain persons who constitute a security risk, the rules of IHL governing the treatment of persons deprived of liberty are primarily designed to ensure the humane treatment of any detainee, albeit with a particular focus on prisoners of war and civilians interned for security reasons. Depending on the circumstances, a significant number of people might be deprived of their liberty.

The rules of human rights law primarily focus on civilians who are deprived of liberty in the context of law enforcement.

To the widest extent possible, this chapter deals with the different categories of persons deprived of liberty and the different sets of rules collectively. This means that the rules highlighted in the boxes in this chapter apply to **all persons deprived of liberty in IAC, in NIAC, and in peacetime unless** otherwise stated.

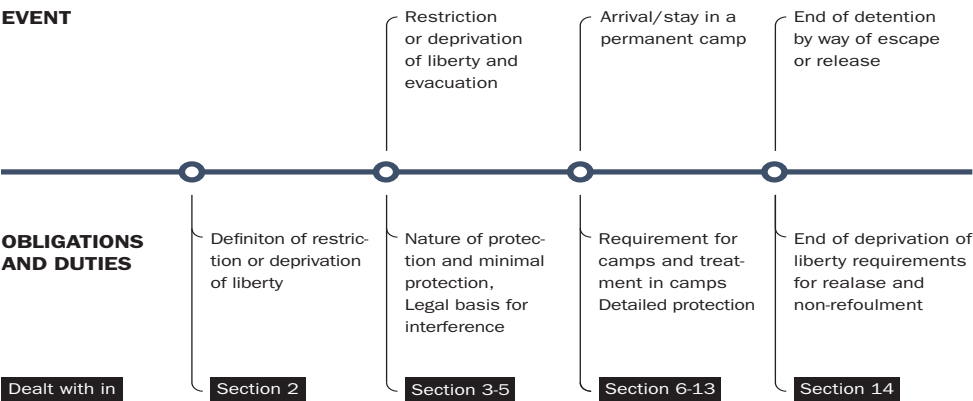
The chapter sets out rules for Danish armed forces in connection with the deprivation of liberty. The specific provisions and assessments do not merely reflect the Danish State's interpretation of the precise boundaries of the rules prescribed by international law. For instance, the chapter also contains a number of Addendums in which persons deprived of liberty are deliberately afforded extra protection which extends beyond the protection provided by applicable international law.

Moreover, as a source of inspiration for the description of the specific protection and treatment of persons deprived of liberty, the chapter also refers to various international instruments which are not directly binding on the Danish State. Some of these instruments are the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Council of Europe's Recommendation of 2006 on the European

Prison Rules. The Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations, which help ensure a minimum level of protection for detainees in NIAC, have also been used (CPG).

• FIGURE 12.1 •

CHAPTER OVERVIEW



1.1

Chapter contents

The discussion of deprivation of liberty in this chapter follows the chronological sequence of detention. Therefore, the Chapter is structured as follows:

- Definition of deprivation of liberty (Section 2).
- The characteristics of the protection of persons deprived of liberty (Section 3).
- Minimum requirements for the treatment of all persons deprived of liberty from the time of detention and during evacuation from the battlefield (Section 4).
- Categorisation of different types of deprivation of liberty and the basis in international law for continued deprivation (Section 5).
- Treatment of persons deprived of liberty and requirements for facilities, including rules that apply specifically to the different categories of persons deprived of liberty (Sections 6-13).
- End of deprivation of liberty (Section 14).

1.2

Scope in relation to other chapters

The purpose of this chapter is to compile all topics relevant to the deprivation of liberty. As a result, there may be references to general issues, for instance, relating to the interaction between international humanitarian law and human rights law in Chapter 3 or the actors on the battlefield in Chapter 5.

1.3

The relationship between human rights law and international humanitarian law in different conflict scenarios

HRL applies in all conflict scenarios and plays a particularly important role in the area of deprivation of liberty because, in these circumstances, Danish jurisdiction is established from the time Danish forces have physical power and control over the person concerned. See Section 2.4 below for more information

about this¹ and Section 4.2 of Chapter 3 for a general discussion of the issue of extraterritorial jurisdiction.

IHL does not apply **in peace operations**. In these scenarios, therefore, it is essentially HRL that governs the framework for deprivation of liberty.

During IAC, both HRL and IHL are applicable. IHL establishes a regime of detailed rules for the internment of combatants and civilians who represent a security risk to the belligerent States – for instance, the rules on prisoners of war and civilian internees. Therefore, IHL is the primary body of law in such situations.

During NIAC, the situation is slightly different in that there are no comprehensive treaty law provisions regulating the permissibility of depriving persons of their liberty. As discussed in Section 5 below, however, it must be assumed that internment for security reasons is also permissible in NIAC -- AP II containing certain fundamental guarantees for any person deprived of liberty. In this area, IHL and HRL share the same purpose to an important extent and are based on the same considerations. This will primarily be reflected in the chapter sections that deal with the rights of individuals during deprivation of liberty.

Naturally, in both IACs and NIACs, situations might arise in which civilian persons are deprived of their liberty by belligerents on suspicion of having committed criminal offences outside the context of the armed conflict. Such situations are solely regulated by HRL.

More information about categories of persons deprived of liberty and the legal authority for deprivation of liberty in peacetime in NIAC and in IAC, respectively, is provided in Section 5 below.

¹ ECtHR, *Hassan v. The United Kingdom* (Application No. 29750/09) of 16 September 2014, para. 76, and ECtHR, *Al-Skeini v. The United Kingdom* (Application No. 55721/07) of 7 July 2011, para. 136.

2. Definitions

2.1

The concept of “detainee”

The concepts of detention, arrest, deprivation of liberty, internment, other interference with freedom of movement, and assigned residence are used to describe the options available to Danish soldiers for interfering with the freedom of movement of individuals in one way or another.

The concept of “detention” is used synonymously with “deprivation of liberty” and is to be understood as a generic term for the situation that arises when Danish soldiers significantly restrict a person’s freedom of movement. In addition, the term “detainee” is used to refer to a category of persons deprived of liberty who are not prisoners of war.

As a general rule, this manual does not use the term “detention”. Instead, it uses two different types of interference with the freedom of movement of persons: “deprivation of liberty” and “other interference with freedom of movement”.

2.2

Deprivation of liberty and other interference with freedom of movement

The type of **interference with liberty** determines the procedures to be followed and the obligations of the Danish soldiers.

This section defines the two different types of interference: **deprivation of liberty and other interference with freedom of movement**

Deprivation of liberty will usually mean that the person concerned is completely deprived of his freedom of movement. Deprivation of liberty encompasses prisoners of war, persons interned for security reasons, and arrested persons.* For more information, see Section 2.2.1 below

Other interference with freedom of movement implies that a person's freedom of movement is restricted and that the restriction is not intended to result in actual deprivation of liberty.

The two types of interference are similar by nature, but there is a difference between deprivation of liberty and other interference with freedom of movement in terms of the intensity and degree of the interference.

2.2.1 Deprivation of liberty

12.1. Deprivation of liberty occurs when persons are deprived of their physical liberty against their will.²

No specific definition of deprivation of liberty is given in IHL. IHL merely talks about persons who are “in the power of the enemy”³ or “in the hands of”⁴ a party to the conflict. A more accurate definition of when deprivation of liberty commences is found in human rights practice.

This is because the exact time of when deprivation of liberty commences is mainly of relevance to the category of persons who are deprived of liberty with a view to prosecution.

The degree or intensity of the restriction of liberty determines whether an interference with liberty is categorised as deprivation of liberty or other interference with freedom of movement.⁵ **Four factors**, in particular, are of relevance to the overall assessment:

- The type of interference,
- The means or methods employed to carry out the interference,
- The effect of interference on the person concerned, and
- The duration of interference

² GC III, Art. 5, GC IV, Art. 4, and ECHR, Art. 5.

³ GC III, Art. 5.

⁴ GC IV, Art. 4.

⁵ ECtHR, *Engel and others v. Netherlands* (Appl. No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) of 8 June 1976, paras. 58-59, ECtHR, *Guzzardi v. Italy* (Appl. No. 7367/76) of 6 November 1980, paras. 92-93, ECtHR, *Austin and Others v. The United Kingdom* (Appl. No. 39692/09; 40713/09; 41008/09) of 15 March 2012, para. 57, ECtHR, *Gillan and Quinton v. The United Kingdom* (Appl. No. 4158/05) of 12 January 2010, para. 56, and ECtHR, *Foka v. Turkey* (Appl. No. 28940/95) of 24 June 2008, para. 74.

Certain **types of interference** are obvious cases of deprivation of liberty; whereas other types will require a closer assessment of the actions by Danish forces to determine whether actual deprivation of liberty has occurred or it is merely a case of other interference with freedom of movement.

During arrest operations, deprivation of liberty will occur as soon as the target of the operation is arrested. On the other hand, it may be more difficult to classify interference measures taken in connection with *crowd control** operations, *search** operations, or checkpoint operations to control access to military installations abroad.

A crucial factor is the **means and methods employed to carry out interference measures** since deprivation of liberty will occur if **physical force** is used to restrain persons against their will. In such a situation, it is not only a person's freedom of movement that is restricted but also the person's liberty in general. **In situations in which physical force is used to restrain persons, deprivation of liberty will occur independently of the other factors.**

The opposite is the case in situations in which no physical force is used -- for example, when someone is merely asked to wait in an area. Such a request will not in itself amount to deprivation of liberty.

Example 12.1: Example illustrating the distinction between voluntary compliance with a request and deprivation of liberty:

A *walk-in** arrives at a Danish camp to discuss compensation for field damage. He is asked to wait in a room for some time. This will neither be regarded as deprivation of liberty nor as other interference with freedom of movement. If, on the other hand, the person wants to leave the room and is not allowed to do so, the situation will change from voluntary compliance to interference with freedom of movement.

Example 12.2: Example illustrating the distinction between deprivation of liberty and other interference with freedom of movement:

Persons passing a checkpoint in Afghanistan are required to have their *biometric data** collected. Interference with their freedom of movement occurs during the data collection. One person is identified as belonging to a category to be deprived of liberty, and the Danish military personnel, therefore, grab him by the arm. At the moment the Danish military personnel grabbed his arm, he is considered to have been deprived of his liberty..

The effect of the interference on the person in question may be of significance for assessing whether deprivation of liberty has occurred. If, on balance, an interference has no significant effect on the person in question, it speaks against a deprivation of liberty

Example 12.3: Example illustrating the distinction between deprivation of liberty and other interference with freedom of movement

In connection with a house search, the persons present are instructed to stay in a certain room while the search is being conducted. If, apart from this physical restriction, they can freely talk to each other and move around the room, the interference has no significant effect on them. This may change to deprivation of liberty if the interference continues for a long time or if additional restrictions are imposed on them.

The duration of the interference is relevant if it is assessed that deprivation of liberty has not occurred immediately on the basis of other factors.

Any interference that, solely in terms of the other factors, would be regarded as interference with freedom of movement may be regarded as deprivation of liberty if the interference continues for a long period of time.

This may also be seen in connection with the effect the interference will have on the individual person since interference with freedom of movement that continues for a long time has a greater effect than short-term interference.

Example 12.4: Example illustrating the distinction between deprivation of liberty and other interference with freedom of movement:

A person is about to pass the same checkpoint as in example 12.2. While there is no desire to deprive the person of liberty, the person is found to be of interest for reasons of intelligence, and is therefore, ordered to wait in an area while an intelligence officer is sent for. This situation would not automatically be regarded as deprivation of liberty. However, if the restriction continues for a long period, that could change.

2.2.2.1 No deprivation of liberty

In exceptional circumstances in which interference takes place in the interest of public order, even instances of significant interference with freedom of movement will not amount to deprivation of liberty if the interference:

- is rendered necessary as a result of circumstances beyond the control of the Danish armed forces,
- is undertaken to avert a real risk of serious injury or damage, and
- is kept to the minimum required for that purpose⁶

Example 12.5: Example of interference which, because of the exceptional circumstances of the case, does not amount to deprivation of liberty:

A group of persons is ordered to stay in a square to avoid a violent clash with another group, thus restricting their movements. It will not be regarded as deprivation of liberty if

⁶ ECtHR, *Austin and Others v. The United Kingdom* (Appl. No. 39692/09; 40713/09; 41008/09) of 15 March 2012, para. 59.

the group is allowed to leave the square as soon as the risk of a clash no longer exists. It is assumed in the example that the use of force is provided for in domestic law and that the specific instance of interference is necessary and proportionate.

There may also be situations in which persons who are under the physical control of Danish armed forces are assigned a residence without this amounting to deprivation of liberty.

This is the case in two situations in particular.

The first situation is when persons are **voluntarily** located with Danish forces -- for instance, as employees of or visitors to Danish camps abroad. Although such persons are subject to various access restrictions or other restrictions on their freedom of movement, these cases do not amount to deprivation of liberty. The second situation is when the interference is solely **in the interest of the person concerned**.

Example 12.6: Example illustrating the distinction between safeguarding the interests of the person concerned and deprivation of liberty:

A wounded civilian is brought to a field hospital for treatment. The person will generally not be deemed to have been deprived of his liberty. If it becomes desirable to deprive the person of liberty for security reasons or with a view to prosecution, this will change. The deprivation of liberty commences at the time when the decision is put into effect with regard to the patient, even in cases in which the person concerned may still need treatment.

It should only be the interests and health of the person concerned that determine how long this person's liberty is restricted. When interference is in the interests of mental or physical health, interference with liberty is allowed only if justified by medical reasons, and the person may not be restricted more than other persons with similar treatment needs.

2.2.2 Other Interference with freedom of movement

Other interference with freedom of movement is a less severe coercive measure than deprivation of liberty, as measured in terms of the degree or intensity of interference. Again, the assessment is primarily made on the basis of the four factors: type, means, effect, and duration.

Other interference with freedom of movement is similar to deprivation of liberty in the sense that it is also a **coercive** measure against a person's freedom of movement.

The **main difference between the two types of interference** is that interference with freedom of movement is not a complete deprivation of freedom of movement in one place or in a very small area for a long period of time. See, for instance, example 12.3 above.

Example 12.7: Example illustrating the distinction between deprivation of liberty and other interference with freedom of movement:

A checkpoint has been established to search for material to be used for IEDs*. All persons who want to go through the checkpoint must submit to having their car searched and will have to answer a few questions about their conduct. This will be **interference with freedom of movement** even if the driver of the car is asked to get out while it is being searched.

If the person resists and Danish soldiers must physically force the driver to leave the car and remain in place, it will be a case of **deprivation of liberty**. The type of interference changes from being a search of the car to a coercive measure against the driver. If the car is searched without finding suspicious material and the driver gives a satisfactory explanation and is allowed to drive away, it has still been a case of deprivation of liberty.

2.3

Conclusion

In other words, deprivation of liberty commences when Danish soldiers deprive persons of their physical liberty against their will.

In **cases of doubt**, Danish armed forces must treat a person as a **person deprived of liberty** in relation to protection and registration.

Interference with freedom of movement is a restriction on the right of a person to move freely that is less intensive than deprivation of liberty.

2.4

Danish responsibility for persons deprived of liberty

Responsibility for persons deprived of liberty may follow from IHL or from HRL and may commence at different times with different consequences, depending on the considerations on which the regulation under international law is based. What is crucial here is when the rules of this manual must be complied with by Danish forces.

In coalitions in which units from two or more countries operate together, it is essential to know which country or countries are responsible for persons deprived of liberty. Since it is important in this regard to ensure that the responsibility of Danish forces is known, the issue will often be regulated by national, mission-specific directives.

Generally speaking, when Danish units work together with foreign units, it does not imply that deprivation of liberty imposed by foreign units entails Danish responsibility.

It is the responsibility of Danish forces to ensure adherence to the guidelines enumerated in Chapter 12 if:

- 1) a person is deprived of liberty by Danish forces, or
- 2) Danish units assume control of a person who has been deprived of liberty by the units of another country.

The assumption of control may be effected by way of a formal transfer, which will typically include the exchange of **documents**. In such cases, the transfer is considered to be completed when the documents have been exchanged.

A transfer is also possible without a prior transfer of documents. In such cases, the transfer is considered to occur when control of the person deprived of liberty is **actually** assumed by the other State. This requires the person deprived of liberty to be left alone in the custody of the receiving State. As long as forces from the State that has deprived the person of liberty are present, the receiving unit has not assumed control of the detainee.

Example 12.8: The fact that a Danish military helicopter assists in flying a group of foreign soldiers who have a detainee in their custody back to the base after an operation does not imply that Danish forces have assumed control of the detainee. If, on the other hand, the foreign soldiers – instead of accompanying the detainee on the Danish helicopter – transfer the detainee to the custody of Danish soldiers on board the helicopter, the Danish forces will have assumed control of the detainee. If the crew on the Danish helicopter in a situation in which the Danish forces have not assumed control learn that the group of foreign soldiers are subjecting the detainee to degrading treatment, they will have a duty to try to counteract this.

For a more detailed description of the duty to act, reference is made to Chapter 15. Section 4.2 of Chapter 3 discusses various situations in which jurisdiction exists under the ECHR and, therefore, Danish forces are obliged to observe the rights set out in the Convention.

2.5

Persons deprived of liberty in military operations under UN command and control

In UN operations in which UN forces act as combatants, the UN Secretary-General's Bulletin on the Observance by United Nations Forces of IHL is applicable. The Bulletin commits UN forces to treat detained persons in accordance with a common standard, taking the Third Geneva Convention on prisoners of war as a point of departure.⁷

As a general rule, Danish units taking part in UN operations are required to comply with the same obligations as those that apply during other types of operations in connection with the treatment of persons deprived of liberty as long as such persons are in Danish custody.

The issue will typically be addressed in mission-specific directives, one of the aims of which will be to strike a legal balance between Denmark's obligations under international law and any procedures issued by the United Nations for use in the mission. More information about the process is provided in Section 6.2.1 of Chapter 3.

3. The character of the protection

Interference with liberty is often carried out under operational circumstances on the battlefield. The deprivation of the liberty of combatants, in particular, will normally occur during hostilities. The extent of the protection afforded to persons deprived of liberty increases gradually in tandem with the increased control exercised over the situation and the person in question.

⁷ UNSG Bulletin, Section 8

This can be seen in the provisions of GC III on the treatment of prisoners of war. Denmark's obligations arise gradually as the detainee is evacuated farther away from the battlefield and are assumed to a full extent upon internment in a permanent prisoner-of-war camp.

The same applies to GC IV concerning persons interned for security reasons and, to some extent, to arrested persons since obligations under HRL may vary according to what is possible in the light of circumstances.

Since the period in which interference with freedom of movement will always be of short duration, only the very basic obligations will be relevant. More information about this is provided in Section 4 below.

3.1

Obligations and prohibitions

The protection of persons who are deprived of liberty or subjected to other interference with freedom of movement consists of both obligations and prohibitions.

Obligations are **courses of action required to be taken for the benefit of** persons subjected to an interference with liberty. Prohibitions are **actions which are not permitted in relation to** persons subjected to an interference with liberty.

The obligations that are intended to protect persons deprived of liberty and persons subjected to interference with freedom of movement in the form of necessary medical assistance and protection against the dangers of hostilities and the rigours of the climate arise immediately, whereas other obligations only arise upon the arrival of such persons to permanent camps. Prohibitions come into full effect at the time the interference with liberty commences.

Example 12.9: Example of obligations and prohibitions and their commencement:

A prohibition to commit acts of violence against a person deprived of liberty commences immediately when the person is deprived of liberty on the battlefield. On the other hand, an obligation to ensure that persons deprived of liberty have opportunities to engage in physical exercise and pursue educational interests can only be fulfilled in permanent camps and, consequently, commences later.

The same protection may embody elements of both obligations and prohibitions, such as the right to receive sufficient food and water. A minimum of basic requirements must always be met when it comes to food and water.

Example 12.10: Example of an obligation and a prohibition together in the same right:

A person deprived of liberty must always have access to sufficient food and water. A clear violation of this requirement -- for instance, several days without water -- may in itself constitute torture. However, it is acceptable that it may not be possible to provide food that is entirely customary and culturally appropriate for the persons deprived of liberty at the place of detention.

The obligations concerning prisoners of war, persons interned for security reasons, and arrested persons, respectively, differ to some extent; whereas prohibitions and the basic protection of persons deprived of liberty are the same regardless of category.

Therefore, to the widest possible extent, the different categories of persons deprived of liberty will be discussed collectively. This means that, where the same substantive obligations apply and the only difference is the source of the obligation or minor linguistic differences, there will be no separate discussion of the three categories.

The focus of this manual is on the rights of the person deprived of liberty and not on where the rights are derived from.

Therefore, the chapter will first address the basic protection to be afforded to everyone before giving an in-depth presentation of the different categories of persons deprived of liberty.

3.2

Mandatory protection

12.2. A minimum level of protection must be afforded to persons deprived of liberty, from which no derogation is permitted. Persons deprived of liberty may not renounce this minimum level of protection.⁸

⁸ GC III, Art. 7, GC IV, Art. 8.

3.3

Requirements for the treatment of persons and requirements for facilities

The protection of persons deprived of liberty encompasses various requirements for the treatment of the detained person and requirements for the facilities in which the person is placed.

3.3.1 Persons

All persons who are subjected to an interference with liberty are entitled to equal treatment based on their individual needs.⁹ This is why **equal treatment does not necessarily mean identical treatment**.

It is necessary to focus on the needs of the individual and on the category of persons deprived of liberty.

All persons deprived of liberty are entitled to protection, but some categories of persons are entitled to specific protection. These particular categories will be discussed in more detail in Section 12 below.

Particular attention must be given to the following factors:

- 1) age
- 2) gender
- 3) race
- 4) religion
- 5) state of health

3.3.2 Facilities

Certain minimum requirements have been established for detention facilities. The requirements for permanent facilities will be dealt with in Section 9 below.

There is general acceptance that temporary detention facilities in the process of being converted to permanent camps do not necessarily need to comply fully with

9 GC III, Art. 16, and GC IV, Art. 27.

all obligations under IHL and HRL that are applicable to such permanent facilities¹⁰. A temporary facility may be a transit camp or any other facility at which persons deprived of liberty stay for only a short period of time.

However, transit camps must also satisfy various requirements for safeguarding the security of persons deprived of liberty.¹¹

Example 12.11: Example of requirements for a transit camp:

A transit camp is required to provide physical security, the opportunity for medical treatment, and other basic necessities but not necessarily access to literary diversions or access to training facilities.

Highly inadequate facilities may constitute unlawful treatment in themselves -- for instance, very small or overcrowded cells, poor hygiene conditions, lack of ventilation, no access to natural light, and a shortage of beds.¹²

4. Basic minimum requirements for treatment

Irrespective of the category of interference with liberty, the background to the interference, and its duration, all persons must be treated humanely and with respect at all times.

This section exclusively addresses the minimum requirements from the commencement of the interference with liberty and during evacuation from the battlefield.

Sections 4.1 to 4.4 principally cover persons deprived of liberty as well as persons subjected to other interference with freedom of movement. The rest of the chapter only deals with persons deprived of liberty. For persons who are subjected to interference with freedom of movement other than deprivation of liberty, the interference will be of short duration as a matter of course, and Danish forces will not gain physical control over these persons.

10 The Greek Case (1969) 11th Yearbook of the European Convention on Human Rights, para. 481.

11 GC III, Art. 23 and Art. 24, and ECHR, Art. 2.

12 For instance, ECtHR, *Dougoz v. Greece* (Appl. No. 40907/98) of 6 March 2001, para. 48, ECtHR, *Peers v. Greece* (Appl. No. 28524/95) of 19 April 2001, para. 75, ECtHR, *Kalashnikov v. Russia* (Appl. No. 47095/99) of 15 July 2002, para. 102, ECtHR, *Malechkov v. Bulgaria* (Appl. No. 57830/00) of 28 June 2006, paras. 136-147, and ECtHR, *Yakovenko v. Ukraine* (Appl. No. 15825/06) of 25 October 2007, paras. 81-89.

For this reason, some of the basic rights will be more relevant to persons deprived of liberty than to persons subjected to other interference with freedom of movement, and examples have been provided which will be of no direct relevance to persons whose liberty has been restricted since, for instance, sensory deprivation or the use of physical restraint will change the nature of the situation from other interference with freedom of movement to deprivation of liberty. The starting point for discussing the issue, therefore, will be situations involving deprivation of liberty..

For **persons who are subjected to interference with freedom of movement other than deprivation of liberty**, therefore, the aspects of primary relevance are the prohibitions against subjecting these persons to ill-treatment and the obligation to protect them from external hazards for as long as they are subjected to the interference by Danish forces.

Individuals are entitled to humane treatment as soon as the interference with liberty commences. This involves:

- 1) Protection against ill-treatment (Section 4.1).
- 2) Necessary first aid (Section 4.2).
- 3) Protection against the dangers of hostilities and the rigours of the climate (Section 4.3).
- 4) Sufficient food and water (Section 4.4).
- 5) Battlefield evacuation as soon as possible (Section 4.5).

4.1

Prohibition against torture or any other form of cruel, inhuman, or degrading treatment or punishment

12.3. All persons who are subjected to interference with freedom of movement must be protected against acts of violence, torture, or any other form of cruel, inhuman, or degrading treatment. This prohibition is non-derogable and, therefore, applicable at all times.¹³

With respect to treatment by Danish soldiers of persons deprived of liberty, it is not decisive whether a prohibited activity is an act of violence, torture, or any other form of cruel, inhuman or degrading treatment. What is crucial is the demarcation between violations and lawful treatment – i.e., the lower limit for violations.

¹³ GC III, Art. 13 and 17, GC IV, Art. 27 and 32, AP I, Art. 75, AP II, Art. 4, GC, CA 3, ECHR, Art. 3, CAT, Art. 1(2), ICC Statute, Art. 8(2) (a)(ii), (b)(xxi) and (c)(i) and (ii), and SCIH, Rules Nos. 87 and 90. UNSG Bulletin, Sections 7.1 and 8(b).

12.4. As far as Danish soldiers are concerned, therefore, the prohibition applies to all forms of act and omission that aggravate the suffering of persons deprived of liberty beyond what is an inevitable part of the deprivation of liberty.¹⁴

Violations may consist of the infliction of both physical pain and mental suffering.¹⁵

Acts of torture or inhuman or degrading treatment are prohibited at all times.¹⁶ Any physical force that is not strictly necessary due to the detainee's own conduct is, in principle, a violation of the prohibition.¹⁷

All other acts that do not constitute torture or inhuman or degrading treatment are subject to the following rules: Any use of physical force¹⁸ or any other form of ill-treatment¹⁹ that serves no legitimate purpose will be a violation of the prohibition on Danish soldiers described in text box 12.4.²⁰ If physical force is used to achieve a legitimate purpose, the use of force must be limited to actions necessary for the achievement of that purpose.

A legitimate purpose for the use of force may be force that is used to deprive someone of liberty.²¹ What is crucial is that the use of force stops when a person is under control.

It is also legitimate to use some forms of compulsion in connection with transport or to stop escapes.²² This force must be necessary and proportionate to the risk posed by the person attempting to escape.

If deadly armed force is used, the conditions set out in Article 2 of the ECHR must be complied with. Reference is made to Section 7.4 of Chapter 3.

14 Addendum 12.1

15 ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* (Appl. No. 39630/09) of 13 December 2012, para. 202.

16 See, for instance, ECHR, Art. 3, or CAT, Art. 2(2).

17 Danish Weekly Law Reports, 2014.3045Ø, page 45.

18 ECtHR, *Selmouni v. France* (Appl. No. 25803/94) of 28 July 1999, para. 99.

19 Addendum 12.2.

20 CPG.

21 ECtHR, *Rehbock v. Slovenia* (Appl. No. 29462/95) of 28 November 2000, paras. 68-78

22 CoE Rec(2006)2, Art. 64-67, and ECtHR, *Romanov v. Russia* (Appl. No. 41461/02) of 24 July 2008, para. 57

Torture or any other form of cruel, inhuman or degrading treatment

The assessment of whether an act is classified as **torture or as other cruel, inhuman or degrading treatment** depends on:

- 1) The character of the act, i.e., its level of severity
- 2) The intensity of the suffering caused by the act
- 3) The duration of the act
- 4) The effects of the act on the victim's physical and mental health.

Other relevant factors include the victim's age, sex, and state of health.²³

Acts will be considered to be cruel, inhuman, or degrading, for instance, if they inflict bodily injury or intense physical or mental suffering on the person deprived of liberty, if they humiliate or debase the person concerned, or if they arouse feelings of fear, anguish, or inferiority.²⁴

Example 12.12: Example of degrading treatment:

An asylum-seeker was deprived of liberty and placed in accommodations measuring 100 sq. metres together with 145 other persons. There was, on average, one bed for every 14 persons, and mattresses were not available to everyone. Nor was there space for everyone to sleep at the same time. There was no free access to clean drinking water and very limited access to toilets. There was no soap, and the sanitary installations were dirty and without doors. Because of overcrowded cells and limited ventilation, it was extremely hot. The detainees had no access to outdoor areas. The deprivation of liberty lasted respectively four and seven days, respectively. The European Court of Human Rights considered this to be degrading treatment.²⁵

Acts will be classified as torture if they cause severe pain or suffering and are of a particularly serious and cruel nature.²⁶

Example 12.13: Example of torture:

A person deprived of liberty was subjected to various forms of ill-treatment. He was, for instance, beaten multiple times, pulled around by the hair, urinated on, and threatened with a syringe and a blow torch. The European Court of Human Rights considered this to be torture.²⁷

²³ ECtHR, *Kalashnikov v. Russia* (Appl. No. 47095/99) of 15 October 2002, para. 95.

²⁴ ECtHR, *M.S.S. v. Belgium and Greece* (Appl. No. 30696/09) of 21 January 2011, para. 220.

²⁵ ECtHR, *M.S.S. v. Belgium and Greece* (Appl. No. 30696/09) of 21 January 2011, para. 233.

²⁶ ECtHR, *Gäfgen v. Germany* (Appl. No. 22978/05) of 1 June 2010, para. 90, ECtHR, *Maslova and Nalbandov v. Russia* (Appl. No. 839/02) of 24 January 2008, para. 106, ECtHR, *Selmouni v. France* (Appl. No. 25803/94) of 28 July 1999, para. 105.

²⁷ ECtHR, *Selmouni v. France* (Appl. No. 25803/94) of 28 July 1999, paras. 103-105.

Torture may consist of **single acts**, each of which is individually and in itself sufficient to amount to torture.²⁸ Torture may also consist of **multiple acts** that would not amount to torture individually and in themselves but amount to torture when applied in combination.²⁹

Example 12.14: Example of multiple acts which, combined, amount to torture:

During an operation, armed forces have deprived a person of his liberty. For a long period of time, the person is deprived of the chance to sleep by the playing of loud music, by frequent heavy-handed relocations involving the curtailment of vision, and by forcing him into various stress positions. During this period, the person is interrogated and told that he will not receive food or be allowed to rest until he provides information.

The individual acts may be cruel, inhuman, or degrading treatment in themselves. If a person is prevented from sleeping for a period of several days, this in itself may amount to torture.

In relation to **physical** treatment, any act that **is intended** to inflict actual bodily injury or intense physical pain is a violation of the prohibition. The act need not cause permanent injury.

This applies to all physical suffering unless it is an inevitable element of a legitimate response and punishment.³⁰

Example 12.15: Example of lawful physical use of force:

A person deprived of liberty assaults one of two guards during an attempted escape. The other guard comes to the rescue of his colleague and finds it necessary to use his baton on the detainee.

Mental coercion

The prohibition against acts of **mental coercion** includes explicitly a prohibition to use **threats** and **intimidation**.

12.5. Threats and acts causing fear and intimidation are prohibited.³¹

28 ECtHR, *Bati v. Turkey* (Appl. Nos. 33097/96 and 57834/00) of 3 June 2004, para. 123, ECtHR, *Mammadov v. Azerbaijan* (Appl. No. 4762/05) of 17 December 2009, para. 69, ECtHR, *Aksoy v. Turkey* (Appl. No. 21987/93) of 18 December 1996, para. 64

29 ECtHR, *Ireland v. The United Kingdom* (Appl. No. 5310/71) of 18 January 1978, para. 167.

30 ECtHR, *Tyrer v. The United Kingdom* (Appl. No. 5856/72) of 5 April 1978, para. 35.

31 GC III, Art. 13, GC IV, Art. 27, ECHR, Art. 3, ECtHR, *Campbell and Cosans v. The United Kingdom* (Appl. No. 7511/76; 7743/76) of 25 February 1982, para. 26, and ECtHR, *Gäfgen v. Germany* (Appl. No. 22978/05) of 1 June 2010, paras. 61-69. UNSG Bulletin, Section 8(d).

This also applies to threats that are not aimed directly at the individual person deprived of liberty but contribute to creating general insecurity -- including, for instance, threats to the detainee's family.

Example 12.16: Example of a prohibited threat.

A person deprived of liberty is told that his family is exposed to danger due to his deprivation of liberty.

4.1.1 Physical restraint

The use of physical restraint in the form of handcuffs and plastic restraints or forcing persons deprived of liberty into a special position is lawful when it is operationally necessary and when the discomfort following from the use is not disproportionate to the purpose.³² Such physical restraint may not be used as punishment.³³

Example 12.17: Example of lawful use of physical restraint:

A person deprived of liberty may be forced into a special position, for example, during a search or in an attempt to stop or counter an attack or escape. Similarly, handcuffs or plastic restraints may be used in cases of operational necessity, for instance during transport.

The use of physical restraint must cease when it is no longer necessary. If it is necessary to use a physical restraint for a long period of time, steps must be taken to reduce any physical discomfort the detainee may experience from the restraint.

Moreover, the physical restraint must be used in a way that does not expose the detainee to danger.

4.1.2 Sensory deprivation

Measures to curtail persons vision or hearing may only be applied in cases of operational necessity and must be limited to actions necessary for the achievement of the purpose.

Sensory deprivation engenders a particularly strong feeling of discomfort for persons deprived of liberty and, therefore, may be used only if the purpose of such sensory deprivation cannot be achieved by, e.g., concealing sensitive material or choosing another route for transporting the person concerned.³⁴

32 UNSMR, Art. 33 and 34, CoE Rec(2006)2, Art. 68, see e.g. ECtHR, *Caloc v. France* (Appl. No. 33951/96) of 20 July 2000, para. 98, or ECtHR, *Berlinski v. Poland* (Appl. No. 27715/95, 30209/96) of 20 June 2002, para. 59.

33 UNSMR, Art. 33. Addendum 12.3.

34 Addendum 12.4.

If sensory deprivation is necessary, it must be done in a way that causes minimum discomfort to the person deprived of liberty.³⁵ This means that sensory deprivation must be carried out in a way that does not inflict pain on the person or impede breathing.

Example 12.18: Example of sensory deprivation concerning curtailment of a person's vision:

The use of hoods or other clothing that cover the nose and mouth must be minimised to the extent feasible. Instead, attempts should be made to use glasses or other devices that only cover the eyes and do not inflict suffering on the person deprived of liberty.

The person deprived of liberty must not be unduly exposed to noise.³⁶

Persons deprived of liberty should not be subjected to places where it is necessary to wear hearing protection, but it may be difficult to avoid noise, for instance, during transport. Hearing protection should be voluntary to the extent possible.

4.1.3 Search

Searches must be carried out in a way that causes minimum discomfort and is proportionate to the legitimate aim pursued.³⁷ Searches may not be carried out in a way that is likely to degrade or humiliate the person being searched.³⁸ The person conducting the search should pay attention to cultural norms.

During a search, it is legitimate to ask the person being searched to assume a position that is necessary to facilitate the search. Such positions may be required only for as long as they are necessary to facilitate the search.

To the extent feasible, searches must be conducted by persons of the same sex.³⁹ A strip search may only be carried out in cases of operational necessity or for security reasons, and the dignity of the person being searched should be protected to the greatest degree possible.

Example 12.19: Example of how to conduct a strip search:

Before carrying out a strip search, it should be considered whether a search with a metal detector is capable of achieving the objective. A strip search should be carried out behind a screen by a person of the same sex as the person being searched.

³⁵ Addendum 12.5.

³⁶ Addendum 12.6.

³⁷ ECtHR, *Wainwright v. The United Kingdom* (Appl. No. 12350/2004) of 26 December 2006, paras. 43-49.

³⁸ CoE Rec(2006)2, Art. 54.

³⁹ GC IV, Art. 97.

4.1.4 Use of weapons against persons deprived of liberty

Similar to other use of force, the use of weapons against persons deprived of liberty must be necessary and proportionate. If deadly armed force is used, the conditions set forth in Article 2 of the ECHR must be complied with. Reference is made to Section 7.4 of Chapter 3.

The use of weapons against persons deprived of liberty must be avoided to the widest extent possible, and weapons may only be used as a last resort.⁴⁰ Detention facilities, staffing, and procedures must be designed and constructed so as to minimise the risk that the use of force in general and the use of weapons, in particular, become necessary. Persons deprived of liberty must be informed that, in the event of an escape attempt, for instance, weapons could be used against them if necessary.

If time and the situation permit, the use of weapons must be preceded by a warning appropriate to the circumstances.⁴¹

If the use of weapons is necessary, less lethal weapons* must be used to the greatest possible extent if the situation permits. Reference is made to Section 7.3 of Chapter 9, which addresses less lethal weapons*.

4.2 Necessary first aid

From the outset of the interference with liberty, any person deprived or restricted of liberty is entitled to receive necessary first aid. Only the provision of lifesaving first aid in order to prepare a person deprived of liberty for evacuation from the battlefield is required at this stage.

More information about the medical obligations to persons deprived of liberty is provided in Section 8 below. For general information about the sick and wounded, reference is made to Chapter 7.

⁴⁰ GC III, Art. 42, and ECHR, Art. 2

⁴¹ GC III, Art. 42.

4.3

Hostilities and climate

To the maximum extent possible, persons deprived or restricted of liberty must be protected from the dangers of hostilities. This means that, if they cannot be evacuated immediately, persons deprived or restricted of liberty must be afforded the best possible protection within the place of detention.

They must also be protected against the rigours of the climate. For instance, this might involve exposure to extreme weather conditions in the form of heavy rainfall or extreme temperatures.⁴²

Example 12.20: Example illustrating how persons deprived of liberty are to be protected before evacuation:

Depending on the adversary and the given situation, it may be necessary for persons deprived of liberty to remain in military vehicles within the place of detention or in nearby buildings, but they may also be accommodated in other places where they are afforded the best possible protection from hostilities.

One example of protection against “the climate” is the provision of persons deprived of liberty at sea with lifejackets during their transport from the ship in which the deprivation of liberty occurred to a Danish warship.

4.4

Food and water

Persons deprived or restricted of liberty must be supplied with sufficient food and water to ensure that they are not exposed to health hazards. In view of the short period of time that is likely to precede an evacuation, the focus will be on drinking water in a hot climate.

As a result of operational conditions, access to and the quality of food and water may vary and, for short periods, be limited. Under such conditions, persons deprived of liberty must be supplied with food and water of a quality in line with the Danish forces.⁴³

More information about food and water is provided in Section 6.1 below.

⁴² CPG 9.4.

⁴³ Addendum 12.7.

4.5

Evacuation from the battlefield

12.6. Persons deprived of liberty must be evacuated from the battlefield as soon as possible after their deprivation of liberty commences to facilities located far enough from the combat zone so that they are out of danger.⁴⁴

During evacuation, persons deprived of liberty must be supplied with sufficient quantities of food and drinking water as well as necessary clothing and medical attention. All suitable precautions must be taken to ensure the safety of these persons during evacuation.⁴⁵

For information about the special requirements for the part of the evacuation that relates to transport, reference is made to Section 6.11 below.

5. Categories of persons deprived of liberty and legal basis

Besides the minimum level of protection, different rules apply to the treatment of persons deprived of liberty, depending on the category of deprivation. This applies, in particular, to administrative procedures and, to a lesser extent, to the actual treatment. This section presents the different categories and the different sources of legal authority.

The category to which a person deprived of liberty belongs depends on the type of situation in which the deprivation of liberty occurs, the type of person who is deprived of liberty, and the purpose of the deprivation of liberty.

There are three relevant types of situations:

- 1) international armed conflict (IAC)
- 2) non-international armed conflict (NIAC)
- 3) peacetime

⁴⁴ GC III, Art. 19, AP II, Art. 5(2)(c), GC IV, Art. 27, ECHR, Art. 2, and ICRC SCIHL, Rule No. 121. UNSG Bulletin, Section 8(b).

⁴⁵ GC III, Art. 20

Moreover, there are three relevant types of persons and purposes to which the deprivation of liberty applies:

- 1) combatants who are deprived of liberty for security reasons (prisoners of war). This category comprises all prisoners of war, regardless of whether the intention is to prosecute them during their deprivation of liberty
- 2) civilians who pose a qualified security risk and are deprived of liberty for security reasons (persons interned for security reasons)
- 3) civilians who are suspected of having committed a criminal offence and are deprived of liberty with a view to prosecution (arrested persons*)

All three types of deprivation of liberty may occur in IAC.

Example 12.21: Example of deprivation of liberty in IAC:

During the invasion of Iraq in 2003, the members of the Iraqi armed forces who surrendered themselves to the coalition became prisoners of war and were detained in prisoner-of-war camps primarily in Saudi Arabia and Kuwait. Members of militias and other civilians who were deemed to pose a security risk were interned for security reasons. Particularly in the period when the United States and the United Kingdom were occupying powers, civilians who had committed criminal offences were also arrested* with a view to prosecution.

In **NIAC**, it is not relevant to talk about prisoners of war. The only categories occurring in this type of situation are **persons interned for security reasons** and **persons deprived of liberty with a view to prosecution**. Reference is made to Section 5.2.1.2 below for information about the legal basis to intern civilians for security reasons during NIAC.

Example 12.22: Example of deprivation of liberty in NIAC:

During the ISAF operation in Afghanistan, a number of countries supported the Afghan government in its fight against a non-State armed adversary that wanted to prevent the Afghan Government from promoting security and stability in Afghanistan. During this conflict, Danish forces were mandated to deprive persons of liberty for two different purposes. They could deprive a criminal of liberty with a view to transferring the person to the Afghan authorities for prosecution or they could deprive the person of liberty with a view to interning the person for imperative reasons of security.

In **time of peace**, it is not possible, as a rule, to intern persons for security reasons in international operations. It will require explicit legal authority to intern civilians in the form of a resolution by the UN Security Council. Deprivation of liberty with a view to prosecution, therefore, will be the only type of deprivation observed in this scenario. Such cases also require the existence of a legal basis for deprivation of liberty, see box 12.7 immediately below.

Example 12.23: Example of deprivation of liberty in time of peace:

During the Royal Danish Navy's counter-piracy operation in the Indian Ocean, alleged pirates detained of liberty were either transferred for prosecution or released.

Legal basis

In both IHL⁴⁶ and HRL,⁴⁷ it is a fundamental principle of law that all people have the right to personal liberty and must not be arbitrarily deprived of liberty.⁴⁸

Deprivation of liberty is lawful only if there is an adequate legal basis for establishing the grounds on which persons may be deprived of their liberty.

12.7. Deprivation of liberty must always be based on proper legal authority.⁴⁹

The legal authority needs to be derived from international law as well as from domestic law.⁵⁰ This manual focuses on the **authority under international law** for enforcing different categories of deprivation in different conflict scenarios.

5.1

Prisoners of war

The concept of prisoner of war is linked to a great extent with the concept of combatant. Chapter 5 provides more information about the categories of persons mentioned below. Chapter 7 provides more information about medical and religious personnel.

In this section, two categories of persons are approached from a general perspective: Persons who are accorded the status of prisoner of war or are treated as prisoners of war in Section 5.1.3 below, and persons who are not accorded such a status in Section 5.1.4. The last category is included to clarify how to handle persons in the grey zone.

⁴⁶ GC IV, Art. 79.

⁴⁷ CCPR, Art. 9(1), and ECHR, Art. 5(1).

⁴⁸ SCiHL, Rule No. 99.

⁴⁹ GC III, Art. 21 and 118, GC IV, Art. 42 and 78, ECHR, Art. 5, and SCiHL, Rule No. 99.

⁵⁰ ECHR, Art. 5

5.1.1 Authority under international law for the deprivation of liberty of prisoners of war

IHL contains no explicit rule or article stipulating that it is permitted to deprive the adversary's combatants of liberty. Yet, there is no doubt that such a possibility may be derived from the principle of military necessity and is assumed to exist in other rules of international law.⁵¹

Indeed, an international legal basis has been established for maintaining the deprivation of liberty of prisoners of war. It appears in GC III that the detaining power may subject prisoners of war to internment.⁵²

5.1.2 Determination of prisoner-of-war status

5.1.2.1 No doubt as to the status of the person deprived of liberty

12.8. A person who, during IAC, takes part in hostilities and falls into the power of Danish forces must be presumed to be a prisoner of war and must therefore be protected by GC III if that person claims the status of prisoner of war or appears to be entitled to such status, or if the party on which the person depends claims such status on the person's behalf.⁵³

5.1.2.2 Doubt as to the status of the person deprived of liberty

12.9. Should any doubt arise as to whether a person deprived of liberty is entitled to the status of prisoner of war, that person must retain such status and, therefore, be protected by GC III and AP I until such time as his or her status has been determined by a competent tribunal.⁵⁴

A tribunal is not a court in this context. The tribunal is more in the nature of an administrative body, and its sole purpose is to determine the status of the person deprived of liberty.

Even if Danish forces make an assessment that a person deprived of liberty is not entitled to the status of prisoner of war and have no doubt about this, it is possible for the person or his or her home country to claim prisoner-of-war status and to demand that his status be adjudicated by a tribunal.

⁵¹ GC III, Art. 4, and AP I, Art. 44(4) and (5).

⁵² GC III, Art. 21.

⁵³ AP I, Art. 45(1).

⁵⁴ GC IV, Art. 5, and AP I, Art. 45.

It is not specified how a tribunal should be composed. It is up to Denmark, therefore, to decide this. It need not necessarily be a military tribunal; but, in practice, this will often be the case.

The exact composition of a Danish tribunal in connection with a specific deployment should be described in relevant directives, which may be either general or mission-specific directives.

There are various examples of how such tribunals may be composed.

Example 12.24: Examples of tribunals to determine the prisoner-of-war status:

A US tribunal during Operation Just Cause in Panama in 1989 was composed of a military legal adviser, an intelligence officer, and a military police officer. During Operation Desert Storm in 1991, the United States established a series of tribunals with a similar composition. At the time of this writing, this is governed by US Army Regulation (AR) 190-8.

Once the doubt concerning prisoner-of-war status has been determined, the person deprived of liberty must be treated in accordance with the procedures set forth in the relevant set of rules.

It may also be necessary to **determine the status before the detainee is transferred to another State**. This is because Denmark must ensure that the receiving State will treat the detainee in accordance with the international law obligations that Denmark deems to be applicable.

5.1.3 Prisoner-of-war status or treatment as prisoners of war

The category of persons who are entitled to prisoner-of-war status or treatment equivalent to that provided to prisoners of war primarily consists of:

- 1) the adversary's combatants who have not forfeited their entitlement to prisoner-of-war status,
- 2) the adversary's medical and religious personnel,
- 3) specific persons who are not combatants but who are nevertheless entitled to prisoner-of-war status or equivalent treatment.

5.1.3.1 Combatants

The rules for combatants are addressed in Section 2.1 of Chapter 5.

Members of the armed forces of a party to a conflict (other than medical personnel and chaplains) are combatants.⁵⁵

The armed forces of a party to a conflict consist of all organised armed forces, groups, and units that are under a command responsible to that party for the conduct of its subordinates. This applies even if that party is represented by a government or an authority not recognised by an adverse party. Such armed forces must be subject to an internal disciplinary system which, *inter alia*, must enforce compliance with the rules of international law applicable in armed conflict.⁵⁶

5.1.3.2 Medical and religious personnel

If medical and religious personnel are deprived of liberty, they must receive at a minimum the benefits and protection to which prisoners of war are entitled.⁵⁷

They will not formally become prisoners of war, however, when they fall into the power of Danish forces.

5.1.3.3 Auxiliary medical personnel

In the event of detention, auxiliary medical personnel must be considered prisoners of war. While held in captivity, they must be allowed to fulfil their medical duties in so far as the need arises.⁵⁸

5.1.3.4 Civil defence

Military personnel serving in civil defence organisations must be considered as prisoners of war.⁵⁹

5.1.3.5 Sick and wounded

Sick and wounded combatants are prisoners of war and must be treated as such.⁶⁰ For as long as required by their state of health, however, these persons enjoy “double protection”: They are both entitled to the protection afforded to the sick and wounded by GC I⁶¹, as specified in Chapter 7, and to the protection afforded to prisoners of war by GC III.

⁵⁵ AP I, Art. 43(2).

⁵⁶ AP I, Art. 43(1).

⁵⁷ GC III, Art. 4 C, and Art. 33(1), GC I, Art. 28, and GC II, Art. 37.

⁵⁸ GC I, Art. 29.

⁵⁹ AP I, Art. 67(2).

⁶⁰ GC I, Art. 14.

⁶¹ GC I, Art. 12.

5.1.3.6 Deserters and defectors

The adversary's *deserters** may claim prisoner-of-war status if they are deprived of liberty. By contrast, *defectors** will not be entitled to this status if they have defected before they were deprived of liberty. In the event that a prisoner of war defects during deprivation of liberty, however, this person will not forfeit his or her protected status as prisoner of war.⁶²

5.1.3.7 Civilians entitled to prisoner-of-war status

It is not only members of the adversary's armed forces who are entitled to prisoner-of-war status.

Three special categories of civilians are entitled to prisoner-of-war status:

- 1) civilians accompanying the armed forces
- 2) members of crews of the merchant marine and civilian aircraft
- 3) *levée en masse**

5.1.3.7.1 Civilians accompanying the armed forces

This category is primarily comprised of civilians who perform tasks for the armed forces without actually being members thereof.⁶³

5.1.3.7.2 Members of crews

The term 'members of crews' encompasses personnel of the merchant marine, including masters, pilots, and apprentices as well as the crews of civilian aircraft of the Parties to the conflict, provided that they do not benefit by more favourable treatment under any other provisions of international law.⁶⁴

Since Denmark has ratified Hague Convention XI, this means that members of crews of enemy merchant vessels may not be made prisoners of war⁶⁵ if they guarantee in writing not to undertake any service connected with the operations of the war. However, the Convention is only applicable if all the parties to the conflict are parties to the Convention.⁶⁶

⁶² GC III, Art. 7.

⁶³ GC III, Art. 4A(4).

⁶⁴ GC III, Art. 4A(5).

⁶⁵ Hague Convention XI, Art. 5 and 6

⁶⁶ Hague Convention XI, Art. 9. (Only ratified by 32 States).

5.1.3.7.3 *Levée en masse**

Persons participating in a *levée en masse** are technically not civilians.⁶⁷ These persons are also accorded prisoner-of-war status provided that they carry arms openly and respect the laws and customs of war.⁶⁸

5.1.3.8 Persons entitled to treatment as prisoners of war

In addition to these three categories of civilians, there are two special categories of persons who are not to be regarded as prisoners of war but are entitled to receive the same treatment as prisoners of war.

These persons are:

- 1) 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.⁶⁹
- 2) Persons belonging to one of the categories entitled to prisoner-of-war status who have been received by neutral or non-belligerent powers on their territory, and whom these powers are required to intern under the rules of international law.⁷⁰

Therefore, Denmark may be obliged to intern a person as a prisoner of war, even if Denmark is not engaged as a party to the armed conflict.

5.1.4 Persons who do not have prisoner-of-war status

5.1.4.1 Members of armed forces not afforded prisoner-of-war status

Not all members of the armed forces are entitled to prisoner-of-war status.

Thus, there may be situations in which members of the armed forces, because of their acts, forfeit their right to prisoner-of-war status. This will occur in the following two situations.

5.1.5.1.1 *Lack of distinction*

If members of the adversary's armed forces do not sufficiently comply with the

⁶⁷ AP I, Art. 50(1), and GC III, Art. 4(A).

⁶⁸ GC III, Art. 4A(6).

⁶⁹ GC III, Art. 4B(1).

⁷⁰ GC III, Art. 4B(2).

requirements to distinguish themselves from the civilian population⁷¹, they will forfeit the right to prisoner-of-war status.⁷²

Nevertheless, they are to be given protections equivalent in all respects to those accorded to prisoners of war by GC III and TP I.⁷³

The main difference is that such a person may be prosecuted for participation in the hostilities in the period during which the person concerned did not satisfy the requirements for combatant status.

5.1.4.1.2 Spies

Any member of the adversary's armed forces who is deprived of liberty by Danish forces while engaging in espionage and who, while so acting, is not in the uniform of his or her armed forces does not have the right to the status of prisoner of war and may be treated as a spy.⁷⁴ More information about spies is provided in Section 2.6 of Chapter 5.

5.1.4.2 Special categories of persons without the right to prisoner-of-war status

5.1.4.2.1 Mercenaries

A mercenary⁷⁵ is not entitled to the status of combatant or prisoner of war.⁷⁶ More information about mercenaries is provided in Section 2.5 of Chapter 5.

5.1.4.2.2 Non-State organised armed groups (OAGs)

Members of OAGs, who are not part of the armed forces as defined in Section 1.3.1 of Chapter 5 (combatants), are not entitled to prisoner-of-war status.

Members of OAGs will usually be presumed to pose a security risk and, therefore, may be interned for security reasons subject to an individual assessment. This issue will be dealt with in more detail in Section 5.2 immediately below.

Their participation in the hostilities will, for the most part, constitute a violation of domestic criminal law; and, therefore, they may also be deprived of liberty with a view to prosecution. This category is addressed in Section 5.3 below.

71 AP I, Art. 44(3).

72 AP I, Art. 44(4), and SCIHL, Rule No. 106.

73 AP I, Art. 44(4).

74 AP I, Art. 46(1), and SCIHL, Rule No. 107.

75 AP I, Art. 47(2).

76 AP I, Art. 47(1), and SCIHL, Rule No. 108.

5.1.5 Commencement of prisoner-of-war status

12.10. The status of prisoner of war commences as soon as a combatant has fallen into the power of Danish forces.⁷⁷

“Power” means a **certain degree of control** over the person concerned -- for instance, when an order is issued to lay down weapons or the like -- and there is physical proximity between the prisoner of war and the Danish forces.

Example 12.25: Example of combatants who surrender but are not in the “power” of the adverse party:

During the Gulf War in 1991, there were several examples of Iraqi soldiers signalling their surrender to UAVs or aircraft. For example, a few hundred Iraqi soldiers surrendered themselves to a UAV from the USS Missouri on 1 March 1991. This protected them against being made the object of attack, but did not make them prisoners of war since they had not yet fallen into the power of the adversary.⁷⁸

Example 12.26: Example of combatants who are in the “power” of the adverse party:

In the same war, Iraqi soldiers surrendered to the rapidly advancing coalition forces. Because speed of advancement was the focus of attention for the coalition forces, the coalition forces accepted the surrender, disarmed the enemy soldiers, and then continued their advance. The soldiers who surrendered were ordered either to stay where they were and wait or to move in the direction of pick-up sites. In this case, they had become prisoners of war since power was exercised over them in spite of the fact that they were not immediately transported to prisoner-of-war camps. Such action must take into consideration the obligations relating to protection against the dangers of hostilities and the rigours of the climate.

The rules for prisoners of war apply from the time they fall into the power of Danish forces until their successful escape or their final release and repatriation.⁷⁹

Danish forces are not obliged to intern the adversary’s combatants who fall into their power. **Prisoners of war may generally be released** as long as this is done in a way that does not violate the obligations applicable to prisoners of war.

Example 12.27: Example of logistical challenges with respect to prisoners of war:

During Operation Desert Storm, more than 20,000 prisoners of war were taken, beginning on 24 February 1991 when the land offensive started. The handling and the transport of prisoners of war presented the coalition forces with significant logistical problems because the number of prisoners of war exceeded all expectations by far and because the prisoner-of-war camps were established in Saudi Arabia. On top of this, it became necessary to modify the initial procedures for handling prisoners of war in the front-line units and to ensure that medical units were dedicated exclusively to attending to the needs of prisoners of war.

⁷⁷ GC III, Art. 4, and AP I, Art. 44(1).

⁷⁸ HPCR Manual on International Law Applicable to Air and Missile Warfare, Rules Nos. 125-127.

⁷⁹ GC III, Art. 5.

If persons entitled to protection as prisoners of war have fallen into the power of Danish forces under **unusual conditions of combat** which prevent evacuation as provided for in GC III, these persons must be released, and all feasible precautions must be taken to ensure their safety.⁸⁰ This may be the case, for instance, if a special operations force is operating deep behind enemy lines.

5.2

Persons interned for security reasons

Persons interned for security reasons are civilians who are deprived of liberty because they are considered to pose a qualified security risk.

Civilians may be interned under certain conditions for security reasons in IAC:

- 1) On foreign territory by an occupying power or similar thereto if “the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures” concerning civilians,⁸¹ see Section 2.1.1.1 of Chapter 5.
- 2) In Danish territory, when the security of Denmark makes such a measure “absolutely necessary”,⁸² see Section 2.1.1.2 of Chapter 5.

Civilians may be interned under certain conditions for security reasons in NIAC:

- 1) In the territory in which the conflict takes place, when the security of the State or other States makes such a measure absolutely necessary,⁸³ see Section 2.1.2 of Chapter 5.

5.2.1 The legal basis under international law for deprivation of liberty with respect to the internment of civilians for security reasons

Internment for security reasons is a preventive measure and does not have the character of punishment. As described, the internment of civilians for security reasons is permitted under certain conditions in both IAC and NIAC.

⁸⁰ AP I, Art. 41(3).

⁸¹ GC IV, Art. 78

⁸² GC IV, Art. 42.

⁸³ AP II, Art. 5, ICRC Commentary on the Additional Protocols, para. 4568, and SCIHL, Rule No. 128 C. for example as expressed by ICRC Opinion Paper 2014, Internment in armed conflict: Basic Rules and Challenges and the ICRC process “Strengthening IHL Protecting Persons Deprived of Their Liberty in Relation to Non-International Armed Conflict”.

Although there is a legal basis to intern civilians for security reasons in both IAC and NIAC, the level of detail and clarity differs considerably for the two types of conflict. Therefore, they will be addressed separately below.

Outside armed conflict, the internment of civilians will require **explicit legal authority** in the form of a resolution by the UN Security Council.

In addition to the rules of international law on internment for security reasons, mission-specific regulations will usually contain detailed procedures for the implementation of internment. This may also include cooperation agreements with coalition States or other partners on the transfer and accommodation of persons interned for security reasons.

5.2.1.1 The legal basis for interning civilians for security reasons during international armed conflict (IAC)

It follows from IHL that, as a general rule, civilians may not be interned.⁸⁴

There are two situations, however, in which a clear basis exists for authorising the internment of civilians during IAC. One situation is when civilians are interned in the territory of Denmark⁸⁵ and the other is when Danish forces, as an occupying power, intern civilians in the territory of another State.⁸⁶

Both cases require an individual assessment of whether the civilian in question poses a qualified security risk that makes internment absolutely necessary. It is not permitted to intern civilians collectively on the ground of their nationality, religion, or other characteristics.

The European Court of Human Rights (ECtHR) has considered and ruled on the interaction between IHL and the European Convention on Human Rights (ECHR) in a dispute over the co-existence of Article 5 of the ECHR and the rules of IHL on the internment of civilians for security reasons. The ECtHR ruled in this connection that the safeguards under the ECHR continue to apply during IAC but that the ECHR must be interpreted against the background of IHL, thereby allowing preventive deprivation of liberty in situations of IAC.⁸⁷

⁸⁴ GC IV, Art. 79.

⁸⁵ GC IV, Art. 42.

⁸⁶ GC IV, Art. 78.

⁸⁷ ECtHR, *Hassan v. The United Kingdom* (Appl. No. 29750/09) of 16 September 2014, para. 104

5.2.1.1.1 Internment of civilians for security reasons during the belligerent occupation of a foreign State's territory

For a more detailed presentation of the criteria for determining when the rights and obligations of an occupying power arise, reference is made to the general discussion of belligerent occupation in Chapter 11.

12.11. If the occupying power considers it necessary, for imperative reasons of security, to take safety measures in relation to protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding assigned residence or internment must be made according to guidelines to be prescribed by the occupying power in accordance with the provisions of the Fourth Geneva Convention. Such guidelines must include the right of appeal for the persons concerned. Appeals must be decided with the least possible delay. If the decision is upheld, it is subject to periodical review, if possible every six months, by a competent body set up by the above-mentioned power.⁸⁸

In other words, States may decide the composition of the “competent body” that is responsible for reviewing cases of internment. There is no requirement of an independent court, but it must be a competent body which should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness.⁸⁹

Nothing in the rules directly prevents the body from consisting of just one person, but the ICRC is of the opinion that the body should consist of two or more persons.⁹⁰

If Danish forces are deployed in situations in which they are likely to carry out and continue the internment of civilians for security reasons, the Danish Defence should establish a procedure for handling such situations – even at the operational planning stage – within the framework of international law.

5.2.1.1.2 Internment of civilians for security reasons in own territory

12.12. The internment or placing in assigned residence of protected persons may be ordered only if the security of Denmark makes such a measure absolutely necessary.⁹¹

⁸⁸ GC IV, Art. 78.

⁸⁹ ECtHR, *Hassan v. The United Kingdom* (Appl. No. 29750/09) of 16 September 2014, para. 106.

⁹⁰ ICRC Commentary on GC IV, Art. 78.

⁹¹ GC IV, Art. 42.

Any protected person who has been interned or placed in assigned residence is entitled to have such action reviewed as soon as possible by an appropriate court or administrative board designated by the detaining power for that purpose. If the internment or placement in assigned residence is maintained, the court or administrative board must periodically, and at least twice a year, give consideration to the case, with a view to the favourable amendment of the initial, if circumstances permit.⁹²

Civilians may be interned for security reasons in Denmark only if the security of Denmark makes such a measure absolutely necessary or if the person concerned requests internment.⁹³ The focus of this provision is the situation in which Denmark is at war with another State and, for security reasons, chooses to intern nationals of that State who are resident in Denmark.

Example 12.28: Example of prisoners of war and persons interned for security reasons in own territory:

In 1991, during Operation Desert Storm, 77 people (primarily Iraqi nationals) were interned for up to seven weeks in the United Kingdom. Most of these persons were students. If their stay in the UK was paid for by the Iraqi military forces, they were treated as prisoners of war and interned in a camp. All others were interned in three different prisons.

The topic will not be discussed in more detail since this manual focuses on the participation of Danish forces in international operations and since this form of internment will take place in Denmark and will not necessarily be conducted by the Danish Defence.

5.2.1.2 The legal basis for interning civilians for security reasons during non-international armed conflict (NIAC)

The internment of civilians for security reasons during NIACs may occur both in Denmark's own territory and where Danish forces have been deployed to support a State party in the territory of that State, known as transnational NIACs. For more information, see Chapter 2.

⁹² GC IV, Art. 43

⁹³ GC IV, Art. 42.

It is presumed in AP II that civilians may be interned for security reasons during NIAC.⁹⁴ Generally, there is also a basis in customary international law for the internment of civilians in NIAC.⁹⁵

Furthermore, CA3 of GC I-V instructs the parties to a NIAC to provide a certain level of protection to persons taking no active part in the hostilities.⁹⁶ This entails an implicit recognition that persons who actually take an active part in the hostilities do not enjoy the same protection and, consequently, may be made the object of direct attack. If MOAGs can be fought directly, therefore, the less restrictive measure of apprehension and internment for security reasons must exist as an alternative option.

As described above, there are specific rules and processes that govern this area during IAC, whereas the same is not the case during NIAC.

This lack of clear rules has an impact on the interaction between the rules of HRL and IHL. In certain cases in which IHL is not precise in its regulation, one may look to the rules of HRL. However, where there are specific rules that are particularly oriented towards armed conflicts, they supersede the more general rules of HRL, for instance, in relation to the right to be brought promptly before a judge so that the lawfulness of the deprivation of liberty may be determined.⁹⁷

94 AP II, Art. 5.

95 ICRC, Customary Law Study, Rule No. 128 C., ICRC, Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-International Armed Conflicts - Background paper, p. 10, ICRC, Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-International Armed Conflicts – Synthesis Report, p. 14, Copenhagen Process, Rule No. 12. It should be noted that the ECtHR has not yet addressed the question of whether the internment of civilians for security reasons should be permitted during NIAC. The ECtHR, on the other hand, addressed the question of the internment of civilians for security reasons during IAC in the case *Hassan v. The United Kingdom* (Appl. No. 29750/09) of 16 September 2014 which is mentioned in Section 5.2.1.1 above. In this connection, the ECtHR stated that it can only be in cases of international armed conflict in which the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law that Article 5 could be interpreted as permitting the internment of civilians for security reasons (see para. 104). On the other hand, there are weighty arguments supporting the view that the internment of civilians for security reasons during NIAC is properly authorised and, accordingly, consistent with Article 5 of the ECHR. For instance, as mentioned above, Article 5 of AP II regulates how civilians interned for security reasons should be treated. Moreover, there is a basis in customary international law for the general internment of civilians in NIAC. In this connection, reference could be made, for instance, to the fact that, on 10 December 2015, all States Parties to the Geneva Convention and the National Red Cross Societies adopted Resolution No. 32IC/15/R1 entitled “Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty”, which confirmed that States, under international humanitarian law and in all forms of armed conflict, have the power to detain persons.

96 GC I-IV, CA3, para. (1).

97 ECtHR, *Hassan v. The United Kingdom* (Appl. No. 29750/09) of 16 September 2014, para. 110.

The special situation in which the State finds itself during armed conflict is essential in connection with the internment of civilians during NIAC. That calls for an internment model inspired by the model applicable during IAC. It is crucial that the model from international humanitarian law is followed as a minimum standard and that no one is subjected to arbitrary internment for security reasons under any circumstances.

The ground for the internment of civilians during NIAC is that such a measure is considered to be absolutely necessary for security reasons. The person interned for security reasons may demand that the decision to intern be reviewed on appeal, and appeals must be decided within the shortest possible time. If the decision to intern for security reasons is upheld, it is subject to periodical review -- if possible, every six months -- by a competent body.⁹⁸

In addition to what can be deduced from IHL, extra protection may be afforded, if possible, based on inspiration from HRL. (See examples below). This should be seen as an indication that the rules of HRL are also, as a starting point, applicable to deprivation of liberty situations even during armed conflict⁹⁹ and that they have not been expressly superseded in NIAC by specific rules of IHL.

In practice, there have been various examples of such extra protection in connection with the review of orders to intern civilians for security reasons in NIAC.

Example 12.29: Example of best practices* in a review of the legal basis for internment for security reasons in NIAC:

Both in the Multi-National Force Review Committee procedures in the Iraq Coalition Provisional Authority, Memorandum No. 3, and in the US Detention Review Boards in Afghanistan, extra procedural protection has been accorded to civilian internees whenever possible from an operational point of view. They have been given the right to be present while their internment orders are reviewed, to acquaint themselves with the material on which the decision is made, to be assigned a form of representation by, for instance, family members, tribal elders or, in some cases, a lawyer, and have also been given the opportunity to call witnesses.

In relation to the basis for internment, it is essential to avoid the risk of arbitrary deprivation of liberty. To avoid this, for instance, the extra protection may be provided as follows:

⁹⁸ GC 4, Art. 78, ICRC Customary Law Study, Rule No. 99, and Copenhagen Process, Rule No. 12.

⁹⁹ ECtHR, *Hassan v. The United Kingdom* (Appl. No. 29750/09) of 16 September 2014, para. 104

- 1) By informing the internee of the reason for the deprivation of liberty in a language the internee understands. The only reason may be that the internee poses a qualified security risk.
- 2) By informing the internee of the basis for the assessment if this is possible with due consideration for the classification of the material
- 3) By giving the internee the opportunity to be represented by a lawyer or another person
- 4) By giving the internee the opportunity to call witnesses.

5.2.2 Who may be interned for security reasons?

Civilians may be interned during IAC and NIAC if internment is “**absolutely necessary**” for security reasons or if internment is necessary for “**imperative reasons of security**”.

The fact that a security risk qualification is required must be seen in the light of the severity of the interference associated with being interned for security reasons. Internment for security reasons takes place without trial by an actual court of law and can be maintained as long as the conflict lasts and the security risk exists.¹⁰⁰ It is, therefore, the gravest interference with personal liberty that can be undertaken. As a result, whether a less restrictive measure may be sufficient to address effectively the security risk the person in question is thought to pose should be considered -- for instance, an assigned residence, home detention, or similar arrangements.

There is no substantive difference between the requirements of “absolutely necessary” and “imperative reasons of security”. The decisive question is whether internment for security reasons is considered to be **necessary** because a person’s **activities or intention** poses a **qualified security risk** to Denmark or to Danish forces.

Thus, it is not sufficient that a person has the same nationality, religion, or political opinion of the adverse party. Nor is it sufficient that the person is a “fighting age male”.

Relevant activities might be participation in an attack or some other form of direct participation in the hostilities, but this need not be the case. It might also be other acts that pose a qualified security risk

100 GC IV, Art. 41.

It must be a security risk related to the conflict, and the security risk has to be directed against Danish or allied forces. This means that common criminals cannot be interned for security reasons even if they have committed or are suspected of planning the commission of dangerous criminal offences.

Example 12.30: Example of the basis for internment for security reasons:

Internment for security reasons may be used, for instance, as a precaution against persons who recruit enemies, spy, or incite rebellion. It may also be used against persons who take part in the conflict.

5.2.2.1 Non-State organised armed groups (OAGs)

General aspects of OAGs are addressed in Section 2.1 of Chapter 5.

There will be a clear presumption that MOAGs pose a qualified security risk, but membership in an organised armed group may not automatically lead to a decision to intern for security reasons. An assessment is required to be made on an individual basis in each case.

In practice, membership in such organised armed groups will be identified through intelligence. At the same time, this intelligence will provide a basis for assessing whether internment is necessary for imperative reasons of security.

5.2.2.2 Civilians taking a direct part in hostilities

General aspects of civilians who take a direct part in the hostilities are addressed in Section 2.2 of Chapter 5.

A civilian who has taken a direct part in the hostilities will be presumed to pose a security risk. However, there must be indications based on the available intelligence framework that the person will also pose a qualified security risk in the future.

Although a person in a specific situation has lost protection as a civilian and may be made an object of attack by military means, this does not necessarily mean that the person in question may be interned for security reasons.

Nevertheless, direct participation in hostilities may constitute a criminal offence. In that case, a civilian who takes a direct part in the hostilities may be deprived of liberty with a view to prosecution as discussed below.

5.2.3. Commencement and termination of internment for security reasons

At the moment a civilian is deprived of liberty, it may not necessarily have been determined whether Denmark wishes to prosecute or intern the person in question. Both options, for instance, may be available at the time of deprivation of liberty in the sense that there is proper legal authority for deprivation of liberty under the rules for internment for security reasons as well as under the rules for prosecution.

The person will not be considered to be interned until the body set up by Denmark has so decided.¹⁰¹ This decision must be taken as soon as possible.

Internment for security reasons may only continue as long as it is necessary, i.e., as long as the person is considered to pose the necessary security risk. Internment must cease as soon as it is no longer necessary.¹⁰² The necessity of internment is subject to periodical review at least twice a year.¹⁰³

Beyond the requirement for internment to cease if the person is no longer considered to pose the necessary security risk, internment measures must be cancelled as soon as possible after the cessation of hostilities.¹⁰⁴

5.3

Deprivation of liberty with a view to prosecution

During armed conflict as well as in time of peace, there may be a legal basis for deprivation of liberty with a view to prosecution, and both civilians and combatants may be arrested.

In arrest situations, there are strict requirements for the review of the decision to deprive someone of liberty. These include time limits but also requirements for the body reviewing the legitimacy of the deprivation of liberty.

An *arrested person** is to be brought promptly before a judge or similar government official for a review of the basis for that person's deprivation of liberty. According to

101 GC IV, Art. 43 and Art. 78.

102 GC IV, Art. 132.

103 GC IV, Art. 43 and Art. 78.

104 GC IV, Art. 46 and Art. 133.

case law of the ECtHR, it is acceptable for a certain amount of time to go by due to logistical difficulties, for instance. It must be able to be documented that all possible steps have been taken to reduce the delay as much as possible.¹⁰⁵

If the *arrested person** is subject to Danish criminal jurisdiction and is to be prosecuted in Denmark, the provisions of the Danish Criminal Code and the Danish Administration of Justice Act are applicable. Reference is made to Section 4.2 of Chapter 15 for more information on Danish criminal authority.

5.3.1 Legal Basis under international law for deprivation of liberty with a view to prosecution

The rules of HRL are those that are applicable to the deprivation of liberty with a view to prosecution. This is true, as a general rule, regardless of whether the deprivation of liberty occurs during armed conflict or in time of peace.

Review of such deprivation of liberty is to take place before a judge or other officer authorised by law to exercise judicial power, and the review must:

- 1) be prompt,¹⁰⁶
- 2) be effective,
- 3) be based on fact,
- 4) if possible, take place with the physical participation of the person deprived of liberty,
- 5) accommodate the possibility of representation, for instance, by a lawyer, and confidential contact between the representative and the person deprived of liberty, and
- 6) provide access to materials.

For Danish forces, the specific legal authority under international law for deprivation of liberty with a view to prosecution will usually be established by the UN Security Council.

¹⁰⁵ ECtHR, *Medvedyev and Others v. France* (Appl. No. 3394/03) of 29 March 2010, para. 131, ECtHR, *Rigopoulos v. Spain* (Appl. No. 37388/97) of 12 January 1999, ECtHR, *Ali Samatar and Others v. France* (Appl. Nos. 17110/10 and 17301/10) of 4 December 2014, ECtHR, *Hassan and Others v. France* (Appl. No. 46695/10, 54588/10) of 4 December 2014; see also the ruling of the Danish Eastern High Court in the Danish Weekly Law Reports (*Ugeskrift for Retsvæsen*) (2014), page 1044.

¹⁰⁶ ECHR, Art. 5(4), and CCPR, Art. 9(3).

A few examples of legal authority for deprivation of liberty with a view to prosecution are described in the next section:

Special obligation for an occupying power to maintain law and order

Occupying powers have a special obligation to maintain law and order in territories under their control.¹⁰⁷ This means that Danish forces may be primarily responsible for maintaining public order when Denmark is an occupying power. It follows that Danish forces may be responsible for arresting* dangerous criminals in particular.

Support to fragile States

During operations conducted under the mandate of the UN Security Council and/or at the invitation of the territorial State -- for example, in Iraq in 2004 and the ISAF operation in Afghanistan in 2002, deprivation of liberty with a view to prosecution will require the mandate of the UN Security Council to provide a legal basis for such action and/or the conclusion of an agreement on such actions with the territorial State. Depending on the existing institutional framework in the area of operation, the actual prosecution, as a general rule, will be undertaken by the territorial State.

Special peacetime operations to combat crime

The legal basis for deprivation of liberty will be available under a mandate of the UN Security Council in the form of a Security Council Resolution.

Example 12.31: Example of an international legal basis for deprivation of liberty in time of peace:

During the counter-piracy operation off the coast of Somalia, the Security Council – after having assessed that piracy constituted a threat to international peace and security – authorised the Member States to use all necessary means available in international law to combat piracy. In the case of piracy, the legal basis is derived at the same time from the United Nations Convention on the Law of the Sea (UNCLOS).

Special obligation to arrest persons who, according to

certain conventions, are subject to international warrants of arrest

There is an obligation to detain persons who are the subject of international arrest warrants issued by international courts of law, such as the International Criminal Court.

107 1907 Hague Regulations, Art. 43.

More information about international legal proceedings is provided in Chapter 15.

Example 12.32: Example of deprivation of liberty based on an international arrest warrant:

At the beginning of 1995, a Danish unit under UNPROFOR established a checkpoint to keep an eye on movements in the area. Its presence was based on Security Council Resolution 947. At the checkpoint, the force discovered a person sought by the International Criminal Tribunal for the former Yugoslavia (ICTY). The person was deprived of liberty on the basis of the arrest warrant issued by the ICTY

Self-defence

Even though there is no explicit legal basis for deprivation of liberty, Danish forces operating in a foreign State may deprive persons of liberty if such deprivation is absolutely necessary in the context of appropriate legitimate personal self-defence.¹⁰⁸

In such exceptional circumstances, the deprivation of liberty is to be terminated as soon as the situation permits. This may be achieved, depending on the circumstances, by handing over the detainee to local authorities.

Example 12.33: Example of deprivation of liberty in the context of appropriate self-defence:

A Danish soldier who is abroad to sign on to a vessel in connection with Operation Ocean Shield is attacked on the street. He will be permitted to use appropriate force to counter the threat, including the right to detain the attacker. When the local authorities arrive at the scene, the attacker is handed over to them.

Section 4.2 of Chapter 15 provides more information about self-defence.

The examples above illustrate situations in which Danish forces are authorised to deprive persons of liberty with a view to prosecution. Below is a description of who may be deprived of liberty with a view to prosecution.

5.3.2 Who may be deprived of liberty with a view to prosecution?

Fundamentally, there are two different types of alleged offenders:

- 1) Persons suspected of committing a criminal offence in relation to the conflict.
- 2) Persons suspected of committing a criminal offence without a relation to the conflict.

There are no differences in the way these two groups of criminals should be treated.

¹⁰⁸ Derived from the universal right to life under ECHR, Art. 2, and CCPR, Art. 6. See also section 13 of the Danish Criminal Code.

Persons who commit a criminal offence in relation to the conflict may pose a qualified security risk depending on the circumstances and, in such cases, may be interned for security reasons as described above.

In this situation, it would be necessary to clarify whether a State wants to prosecute or, for security reasons, detain persons who have committed a criminal offence and pose a qualified security risk. Prosecution is the only option available in regard to criminals who do not pose a qualified security risk.

This must be clarified as quickly as possible, especially in the light of the requirement of prompt appearance before a judge in the event of prosecution.

5.3.3 When does deprivation of liberty with a view to prosecution commence?

In armed conflict, it may be unclear for a period whether a person should be prosecuted or interned for security reasons. This has no significance for the physical treatment of the person concerned since a basic minimum level of protection applies as described in Section 4 above.

On the other hand, the point at which the deprivation of liberty commences will affect the right to have the legal basis for the deprivation reviewed. When it has been decided to prosecute a person, the point at which the deprivation of liberty commenced is decisive for an assessment of whether the person concerned has been brought promptly “before a judge or other officer authorised by law to exercise judicial power”.¹⁰⁹

Every person deprived of liberty must always be informed promptly in an understandable language of the reasons for the deprivation of liberty.¹¹⁰

In the event of prosecution, the duration of the conflict and the duration of the deprivation of liberty will not necessarily be consistent, since the prosecution aims at punishment for an offence and not internment for security reasons.

¹⁰⁹ ECHR, Art. 5(3).

¹¹⁰ See, for instance, ECHR, Art. 5(2).

6. Treatment in detention facilities

The rules governing the individual categories of persons deprived of liberty are primarily found in:

- 1) GC III for prisoners of war
- 2) GC IV and AP II for civilian internees
- 3) The rules of HRL applicable to civilians deprived of liberty with a view to prosecution.

As previously described, the issue of protection will be discussed comprehensively when it is possible. Where special rules apply to the individual categories of persons, this will appear under the individual sections below.

Detention facilities are the starting point for discussing the issue of protection in this section. This is a situation in which control is assumed to be exercised over both the person and the situation. In addition, it is assumed that the deprivation of liberty is of some duration. As described in Section 3 above, the extent of protection afforded may increase gradually in relation to what is possible. Similarly, there will also be a gradual increase in the precautions that need to be taken with due consideration for the duration of the deprivation of liberty.

6.1

Food and water

12.13. The supply of food and drinking water must be sufficient to keep persons deprived of liberty in good health and to prevent weight loss or damage to health. Danish forces must take account of the person's cultural and religious habits to the greatest possible extent.¹¹¹

While in detention facilities, persons deprived of liberty must be offered three meals a day and must have access to clean drinking water.¹¹²

¹¹¹ GC III, Art. 20 and 26, GC IV, Art. 76 and 89, AP II, Art. 5, UNSMR, Art. 20, CoE Rec(2006)2, Art. 20, CPG, Art. 9.1, and SCIHL, Rule No. 118. UNSG Bulletin, Section 8(b) and (d).

¹¹² Addendum 12.8.

No person deprived of liberty may be denied food and water as a punishment. A violation of this prohibition could, in itself, amount to torture or some other form of cruel, inhuman, or degrading treatment.

6.2

Clothing and bedding

12.14. Persons deprived of liberty must be provided with suitable clothing. All clothing must be clean and kept in suitable condition. If possible, persons deprived of liberty must be allowed to wear their own clothing. Suitable bedding must also be available to persons deprived of liberty.¹¹³

6.3

Rest

12.15. Persons deprived of liberty must be allowed eight hours of daily rest, if possible. At least four of these hours must be consecutive.

Neither IHL nor HRL contain any specifications for how much rest to which a person deprived of liberty is entitled other than the requirement that the rest should be adequate. The specified number of hours of rest, therefore, has been set with regard to humane treatment and studies on sleep needs.

It is also accepted, therefore, that operational conditions may result in fluctuations, for short periods, in the amount of time available for rest and sleep.

6.4

Freedom of religious worship

12.16. Persons deprived of liberty must enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith.¹¹⁴

This applies to the personal liberty of the detainee but also involves certain requirements for the detention facilities.

113 GC III, Art. 20, 25, and 27, GC IV, Art. 85 and 90, UNSMR, Art. 17-19, CoE Rec(2006)2, Arts. 20-21, CPG, Art. 9.3, and SCIHL, Rule No. 118.

114 GC III, Art. 34, Art. 35 and Art. 37, GC IV, Art. 86 and Art. 93, AP II, Art. 5, and UNSMR, Arts. 41-42, CoE Rec(2006)2, Art. 29, and SCIHL, Rule No. 127, UNSG Bulletin, Section 7.1.

Persons deprived of liberty must have the opportunity to receive support and guidance from appropriate spiritual ministers, and the facility must be designed and equipped in such a way that the detainees have opportunities for practising their religion. Danish forces are under no obligation to hold religious services or anything similar for persons deprived of liberty. Persons deprived of liberty must, be allowed to the extent possible and when security permits to have books of religious observance in their possession.

Religious duties may be exercised within such reasonable framework as may be prescribed to maintain order and security in the facility.¹¹⁵

Rules specific to prisoners of war and internees

Chaplains and ministers of religion who are taken prisoners of war must be allowed to minister freely to prisoners of war of the same religion in accordance with their religious conscience.¹¹⁶

6.5 Complaints

12.17. Persons deprived of liberty must have a real opportunity to make complaints. This means that they must be informed about the possibility of making complaints, and that complaints are to be dealt with effectively.¹¹⁷

All complaints must be investigated unless they are manifestly groundless. Complaints must be handled by an independent and impartial authority. Therefore, the unit that was responsible for the person deprived of liberty during the period to which the complaint relates is not permitted to investigate the complaint. If the complaint is found to relate to criminal offences, it must be passed on to the Danish Military Prosecution Service.

Any type of reprisal against a complainant is prohibited. When released or transferred to another State, unit, or facility, persons deprived of liberty must be asked whether they have any complaints relating to the time they were under Danish responsibility.¹¹⁸

¹¹⁵ GC III, Art. 34, and GC IV, Art. 93.

¹¹⁶ GC III, Art. 35 and Art. 36, and GC IV, Art. 93.

¹¹⁷ GC III, Art. 78, GC IV, Art. 101, UNSMR, Art. 35, CoE Rec(2006)2, Art. 70, and CPG, Art. 14.

¹¹⁸ Addendum 12.9.

6.6

Protection from public curiosity

12.18. Persons deprived of liberty must be protected from public curiosity. This includes the general public and the media but also non-relevant military personnel. Persons deprived of liberty may not be photographed or filmed except for an official purpose.¹¹⁹

6.7

Physical and intellectual pursuits

Prisoners of war and internees must have opportunities to engage in sports or other physical exercise for at least two hours a day.¹²⁰ For other persons deprived of liberty, the minimum standard is one hour.¹²¹ In that connection, they must have an opportunity to be outdoors unless the weather conditions are of such a nature to be considered a health hazard.¹²²

Necessary equipment and adequate facilities must be available to persons deprived of liberty. For this purpose, sufficient open space or something similar must be provided in the detention facility.

Persons deprived of liberty must also have the opportunity to engage in intellectual and educational pursuits.¹²³

With regard to civilians deprived of liberty and children, in particular, it is necessary to take all practical measures to ensure that they are able to continue or begin their studies.¹²⁴

6.8

Personal property of persons deprived of liberty

If persons deprived of liberty are not allowed to retain their personal effects (perhaps, for reasons of security or hygiene), such effects must be kept in safe custody, and the

119 GC III, Art. 13, GC IV, Art. 27, and ECHR, Art. 8. UNSG Bulletin, Section 8(d).

120 GC III, Art. 93, GC IV, Art. 125, UNSMR, Art. 21, and CoE Rec(2006)2, Art. 27

121 UNSMR, Art. 21, and CoE Rec(2006)2, Art. 27.

122 GC III, Art. 38, GC IV, Art. 94, and CPG, Art. 9.3. Addendum 12.10

123 GC III, Art. 38, GC IV, Art. 94, UNSMR, Art. 40 and 78, CoE Rec(2006)2, Art. 27.6 and 28.

124 GC IV, Art. 94, UNSMR, Art. 77, and CoE Rec(2006)2, Art. 28. Addendum 12.11.

detainee must be given a valid receipt. This applies, in particular, to valuables and money. On the release of the person deprived of liberty, all such effects and money must be returned to the detainee, who is required to sign a receipt for the effects and money returned.¹²⁵

If it is necessary for hygienic or other objective reasons to destroy articles of clothing and the like, the person deprived of liberty must be informed of the reason for such destruction.

Rules specific to prisoners of war

Special rules apply to the property of prisoners of war.¹²⁶ Prisoners of war are allowed to retain:

- 1) All effects and articles of personal use, except arms, horses, military equipment, and military documents
- 2) Helmets, fragmentation vests, gas masks, and similar articles issued for personal protection.
- 3) Identity documents. Denmark must supply such documents to prisoners of war who possess none
- 4) Badges of rank and nationality, decorations, and articles having primarily a personal or sentimental value
- 5) Denmark may only deprive prisoners of war of articles of value for reasons of security

Articles of value or sums of money may be taken from prisoners of war only on the order of an officer, and necessary receipts, etc., must be provided.

Rules specific to internees

Internees are also permitted to retain articles of personal use. Articles which have primarily a personal or sentimental value may not be taken away from internees.¹²⁷

6.9 Work

If persons deprived of liberty undertake work, they must do so under reasonable and appropriate conditions. This applies both in relation to health and safety at work

¹²⁵ UNSMR, Art. 43, CoE Rec(2006)2, Art. 31, and SCIHL, Rule No. 122.

¹²⁶ GC III, Art. 18.

¹²⁷ GC IV, Art. 97.

but also in relation to the right to receive working pay. Work may not be used for disciplinary punishment.¹²⁸

Rules specific to prisoners of war

The labour of prisoners of war is subject to detailed regulation under GC III.

The main rules are that:

- 1) Denmark is entitled to utilise the labour of prisoners of war who are physically fit, taking into account their age, sex, rank, and physical aptitude, and with a particular view toward maintaining them in a state of good physical and mental health
- 2) Non-commissioned officers who are prisoners of war may only be required to do supervisory work
- 3) Officers or persons of equivalent status may in no circumstances be compelled to work
- 4) Officers and non-commissioned officers may apply for suitable work, which is to be assigned to them so far as possible¹²⁹

Moreover, Articles 49 to 57 of GC III contain various rules analogous to labour law. Article 62 contains rules on working pay.

In this connection, it should be noted that Denmark is obliged to grant all prisoners of war a monthly advance of pay.¹³⁰ This does not refer to pay for work that may be performed for Denmark but advances of the pay earned by prisoners of war for their employment in the forces to which they belong.

Rules specific to internees

GC IV contains rules with respect to internee labour. The main rules are that:

- 1) Generally speaking, internees may not be put to work unless they themselves wish it
- 2) Internees may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport, and health of human beings and which is not directly related to the conduct of military operations¹³¹

128 CoE Rec(2006)2, Art. 26, and UNSMR, Art. 71. UNSG Bulletin, Section 8. Addendum 12.12.

129 GC III, Art. 49.

130 GC III, Art. 60.

131 GC IV, Art. 40.

- 3) If internees are compelled to work, they must have the benefit of the same working conditions and the same safeguards as Danish workers¹³²
- 4) Employment in work which is of a degrading or humiliating character is prohibited in all cases.¹³³

In addition, GC IV contains a number of detailed rules analogous to labour law.

6.10

Solitary confinement

Solitary confinement may only be used in exceptional cases and only when such a measure is necessary to achieve a specific objective. Security, discipline, investigation, and the protection of the individual may necessitate the use of solitary confinement, which is not in itself a human rights abuse.¹³⁴

Solitary confinement may also be necessary for health reasons -- for instance, to prevent the spread of infectious diseases or to safeguard the interests of a person deprived of liberty who is suffering from mental health problems. Such use of solitary confinement may only be based on a medical opinion.

Before a person deprived of liberty is placed in solitary confinement, a medical opinion must be rendered to determine whether the person is able to withstand solitary confinement. Solitary confinement for long periods of time should be used with extreme care.¹³⁵

If solitary confinement arises because only one person is detained in a facility, the negative consequences must be remedied to the greatest extent possible. For instance, this may be done by paying particular attention to contact with the outside world, extra efforts by guard personnel, or similar measures.

¹³² GC IV, Art. 40.

¹³³ GC IV, Art. 95.

¹³⁴ ECtHR, *Rohde v. Denmark* (Appl. No. 69332/01) of 21 July 2005, para. 93.

¹³⁵ UNSMR, Art. 32, CoE Rec(2006)2, Art. 43.2 (Danish reservation) and 60.5, ECtHR, *Ramirez Sanchez v. France* (Appl. No. 59450/00) of 4 July 2006, para. 150, ECtHR, *Rohde v. Denmark* (Appl. No. 69332/01) of 21 July 2005, para. 98, Human Rights Committee's Concluding Observations on Denmark 2000, 12.

GC III, Art. 21.

Rules specific to prisoners of war

As a general rule, prisoners of war may not be subjected to confinement in cells or solitary confinement. Penal and disciplinary sanctions or the prisoners' own interests, however, may necessitate confinement and, depending on the circumstances, also solitary confinement.¹³⁶

Officers may never be subjected to confinement as a result of a disciplinary sanction.¹³⁷

6.11

Transport and transfer of persons deprived of liberty between camps

12.19. When transporting persons deprived of liberty, all feasible precautions must be taken to ensure their safety. To the greatest possible extent, persons deprived of liberty should not be transferred to camps that impede family contact.¹³⁸

Before being transported or transferred, persons deprived of liberty must be informed thereof, and they must be given an opportunity to notify their family and others of their new place of residence either themselves or through Danish forces.

In practice, this notification may be handled by the ICRC or another similar impartial organisation.

Rules specific to prisoners of war and internees

A number of special rules apply to the transport and transfer of prisoners of war and internees. The main rules are as follows:¹³⁹

- Denmark is obliged to take all reasonable precautions to ensure the safety of prisoners of war and internees during transfer.
- The transfer of prisoners of war must always be effected humanely and in conditions no less favourable than those under which the Danish forces are transferred.

¹³⁶ GC III, Art. 21.

¹³⁷ GC III, Art. 89.

¹³⁸ Addendum 12.13.

¹³⁹ GC III, Arts. 46, 47 and 48, and GC IV, Arts. 127 and 128.

- Under no circumstances may the conditions of transfer be prejudicial to the health of prisoners of war and internees. During transfer, Denmark must supply internees with drinking water and food, adequate shelter from the climate, and the necessary medical attention.
- Denmark must create a complete list of all prisoners of war and internees to be transferred before their departure.
- Sick, wounded, or infirm prisoners of war and internees and maternity cases may not be transferred if the journey would be seriously detrimental to their health, unless their safety imperatively demands it.
- If the combat zone draws close to a camp, the prisoners of war or internees in said camp may not be transferred unless their removal can be carried out in adequate conditions of safety or unless they are exposed to greater risks by remaining on the spot than by being transferred.
- In the event of transfer, the prisoners of war and the internees must be officially advised of their departure and of their new postal address. They must be allowed to take their personal effects with them.
- When making decisions regarding the transfer of prisoners of war and internees, Denmark is required to take their interests into account and, in particular, may not do anything to increase the difficulties of repatriating them or returning them to their own homes.
- *The national information bureau** and the *central information agency** must be provided with information about the transfers.¹⁴⁰ For more information, see Section 13 below.

7. Punishment and discipline

The rules on the behaviour of persons deprived of liberty and the general rules on detention facilities must be issued and communicated to the persons deprived of liberty in a language they understand. This applies to regulations, commands, notices, and orders of every kind. Such regulations, commands, and orders should be posted in places where everyone may read them; and, if a representative has been selected for the persons deprived of liberty, the representative must receive a copy.

¹⁴⁰ GC III, Art. 122, and GC IV, Art. 136.

Likewise, every order and command addressed individually to persons deprived of liberty must be given in a language they understand.¹⁴¹

Persons deprived of liberty must be informed of any offence against discipline of which they are accused. The information must be specific and conveyed in a language the accused person understands. Accused persons must be given the time and opportunity to explain their conduct and to defend themselves.¹⁴²

The procedural rules of protection relating to punishment and discipline are very similar, and it is the same considerations that are safeguarded.

No person deprived of liberty may be punished more than once for the same act or on the basis of the same charge.¹⁴³

7.1

Penal sanctions

12.20. Collective punishments are prohibited.¹⁴⁴

In addition to the general rules governing physical treatment, there are specific prohibitions against subjecting persons deprived of liberty to any form of corporal punishment.¹⁴⁵

If persons deprived of liberty commit criminal offences while in the custody of Danish forces, they may be punished for such offences. Both IHL and HRL establish a wide array of procedural requirements for how to conduct a prosecution. The requirements include the following:

- No person deprived of liberty may be tried or sentenced for an act which is not an offence under Danish law or the rules of international law in force at the time of the said act.
- No moral or physical coercion may be exerted on persons deprived of liberty in order to induce them to admit guilt of the act of which they are accused.

141 GC III, Art. 41, GC IV, Art. 99, and UNSMR, Art. 35.

142 GC III, Art. 96, GC IV, Art. 123, CoE Rec(2006)2, Art. 59, and UNSMR, Art. 30.2.

143 GC III, Art. 86, GC IV, Art. 117, CoE Rec(2006)2, Art. 63, and UNSMR, Art. 30.1.

144 GC III, Art. 99, GC IV, Art. 71 and 72, AP I, Art. 75(4), AP II, Art. 4(2), ECHR, Art. 6, and SCIHL, Rule No. 103. UNSG Bulletin, Section 7.2.

145 GC III, Art. 87, GC IV, Art. 32, AP I, Art. 75(2), AP II, Art. 4, CAT, UNSMR, Art. 31, SCIHL, Rule No. 91.

- Accused persons who are prosecuted by the occupying power must be promptly informed, in writing in a language they understand of the particulars of the charges against them and must be brought to trial as rapidly as possible.
- No person deprived of liberty may be convicted without having had an opportunity to present his or her defence and the assistance of a qualified defence counsel.¹⁴⁶

Rules specific to prisoners of war

If, prior to captivity, a combatant has committed war crimes or, during captivity, commits other serious offences, the combatant will not forfeit his or her status. The prisoner of war will be able to be prosecuted in accordance with applicable rules.¹⁴⁷

A prisoner of war is subject to the same laws and regulations that apply to Danish armed forces. Legal or disciplinary measures may be taken with respect to any offence that is committed by a prisoner of war against such laws and regulations.

If Denmark declares certain acts committed by a prisoner of war to be punishable when the same acts would not be punishable if committed by a member of Danish forces, such acts may only lead to disciplinary punishments.¹⁴⁸

To the extent possible, offences should be dealt with by disciplinary measures rather than by way of judicial proceedings.¹⁴⁹

As a general rule, prisoners of war are subject to trial by a military tribunal. Since Denmark has no military tribunals, prisoners of war may, exceptionally, be tried by the ordinary courts of law in Denmark. Such trials are allowed only on the condition that the ordinary courts would be able to exercise jurisdiction over a member of the Danish armed forces who had committed the same offence with which the prisoner of war is charged.

Under no circumstances may a prisoner of war be tried by a court of any kind which does not offer the generally recognised, essential guarantees of independence and

¹⁴⁶ GC III, Art. 99, GC IV, Arts. 71-72, AP I, Art. 75(4), ECHR, Art. 6, and SCIH, Rules nos. 100, 101, 102, and 103.

¹⁴⁷ GC III, Arts. 82-108 and 129, and AP I, Art. 44(4).

¹⁴⁸ GC III, Art. 82.

¹⁴⁹ GC III, Art. 83.

impartiality, including, in particular, courts which do not afford the accused the rights and means of defence provided for in Article 105 of the GC III.¹⁵⁰

The prisoner of war has

- 1) the right to be assisted by a fellow prisoner of war;
- 2) the right to be defended by a qualified lawyer or counsel of his or her own choice;
- 3) the right to call witnesses; and
- 4) the right to have recourse, if he or she deems it necessary, to the services of a competent interpreter.

The prisoner of war must be advised of these rights by Denmark in due time before the trial.¹⁵¹

7.2

Disciplinary sanctions

12.21. Collective disciplinary measures are prohibited.¹⁵²

Disciplinary penalties in the form of confinement in premises without daylight or under conditions that are inhuman, brutal, or dangerous to the health of the detained persons are prohibited without exception. The age, sex, and health condition of the detainee must be taken into account.¹⁵³

Disciplinary measures may not include a total prohibition on family contact or contact with the outside world in general.¹⁵⁴

Rules specific to prisoners of war and internees

Every Danish prisoner-of-war camp must be placed under the immediate authority of a responsible commissioned officer belonging to the Danish armed forces.¹⁵⁵

¹⁵⁰ GC III, Art. 84, and ICC Statute, Art. 8(2)(a)(vi).

¹⁵¹ GC III, Art. 105.

¹⁵² GC III, Art. 87, GC IV, Art. 33, CoE Rec(2006)2, Art. 60.3, and SCIH, Rule No. 103.

¹⁵³ GC III, Art. 87 and 89, GC IV, Art. 118 and 119, CoE Rec(2006)2, Art. 60.3, and UNSMR, Art. 31.

¹⁵⁴ GC III, Art. 98, GC IV, Art. 125, and CoE Rec(2006)2, Art. 60.4.

¹⁵⁵ GC III, Art. 39.

Moreover, special rules address the disciplinary sanctions applicable to prisoners of war and internees.

It is, among other things, expressly stated that the following disciplinary penalties may be used:

- 1) A fine which may not exceed 50 percent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of not more than thirty days
- 2) Discontinuance of privileges granted over and above the treatment provided for by GC III
- 3) Fatigue duties not exceeding two hours daily when such duties are connected with the maintenance of the place of internment
- 4) Confinement.¹⁵⁶

These disciplinary penalties may in no case be inhuman, brutal or dangerous to the health of prisoners of war/internees.¹⁵⁷

Women serving a sentence or undergoing disciplinary punishment must be confined in separate quarters from male prisoners/internees and must be under the supervision of women.¹⁵⁸

8. Medical attention, sickness, and death

This section looks into Denmark's responsibility for the state of health of persons deprived of liberty and the protection of such persons against unwanted treatment and experiments. More information about the duties of medical services and the requirements for medical treatment services is provided in Chapter 7.

¹⁵⁶ GC III, Art. 89, and GC IV, Art. 119.

¹⁵⁷ See note 158.

¹⁵⁸ GC III, Art. 97 and Art. 108, and GC IV, Art. 124.

8.1

Medical treatment

12.22. Persons deprived of liberty must be provided with the necessary medical assistance. This applies during evacuation and during confinement in permanent facilities.¹⁵⁹

Attention must be focused on the needs of the individual. Any failure to provide necessary medication may, in itself, constitute a violation of the prohibition on torture or any other form of cruel, inhuman, or degrading treatment.¹⁶⁰

In permanent installations, monthly medical inspections must be conducted for the purpose of supervising the general state of health of persons deprived of liberty and to combat the spread of contagious diseases in the camp.

8.2

Unwanted treatment and experiments

12.23. It is prohibited to subject any person deprived of liberty to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental, or hospital treatment of the person concerned nor carried out in his or her interest.¹⁶¹

To the widest possible extent, all medical treatment and, in particular, surgery and similar treatment may be carried out only if the valid consent of the person deprived of liberty has been obtained.¹⁶²

Unwanted treatment which is evidently in the interests of the person deprived of liberty and motivated by reasons of vital medical necessity may be lawful.¹⁶³ What is decisive is that the treatment is necessary for the person deprived of liberty and that

159 GC I, Art. 12, GC III, Arts. 20 and 30, GC IV, Arts. 91 and 92, AP I, Arts. 10 and 11, AP II, Art. 5, UNSMR, Arts. 22-26, CoE Rec(2006)2, Arts. 39-48, CPG, Art. 9.5, and SCIHL, Rule No. 118. UNSG Bulletin, Section 8(c).

160 ECtHR, Kudla v. Poland (Appl. No. 32010/96) of 26 October 2000, paras. 93-94, ECtHR, Keenan v. The UK (Appl. No. 7229/95) of 3 April 2001, paras. 111-116, ECtHR, McGlinchey and others v. The UK (Appl. No. 50390/99) of 29 July 2003, paras. 47-58, ECtHR, Istratii and Others v. Moldova (Appl. Nos. 8721/05, 8705/05 and 8742/05) of 27 June 2006, para. 58.

161 GC I, Art. 12, GC II, Art. 12, GC III, Art. 13, GC IV, Art. 32, AP I, Art. 11, AP II, Art. 5(2)(e), CA 3, ICC Statute, Art. 8(b)(x) and (c)(xi), CPG, Art. 9.5, and SCIHL, Rule No. 92. UNSG Bulletin, Section 8(d).

162 UN Human Right Committee, General Comment No. 20 on Article 7, 1992.

163 UN Human Rights Committee, Brough v. Australia (Com. No. 1184/2003) of 17 March 2006, ECtHR, Bogumil v. Portugal (Appl. No. 35228/03) of 7 October 2008, paras. 76-82, and ECtHR, Juhnke v. Turkey (Appl. No. 52515/99) of 13 May 2008, paras. 71-72.

the medical intervention does not go beyond the point of necessity. One example of such an intervention might be force-feeding.

Example 12.34: Example of prohibited and lawful force-feeding:

As a rule, force-feeding should not be undertaken if the person deprived of liberty is still capable of forming an unimpaired and rational judgment and his or her refusal of nourishment is not life-threatening.¹⁶⁴ Force-feeding at this point may amount to torture.¹⁶⁵ Force-feeding is only lawful if it is needed to save a life, if the decision to force-feed is made on medical grounds, and if force-feeding is undertaken as gently as possible.¹⁶⁶

8.3 Death

In every case, the death of persons deprived of liberty must be certified by a doctor, and a death certificate shall be made out, showing the cause of death, the conditions under which it occurred, and, where necessary, the identity of the deceased.¹⁶⁷

Every death or serious injury of a person deprived of liberty, caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, must be immediately followed by an official enquiry by Denmark.¹⁶⁸ The same applies in the event of any death, the cause of which is unknown.

All deaths among persons deprived of liberty in the custody of Denmark must be immediately reported to the Danish Military Prosecution Service.

If the enquiry indicates the guilt of one or more persons, Denmark must take all measures to ensure the prosecution of the person or persons responsible for the death.¹⁶⁹

Special considerations on the burial of prisoners of war and internees

Denmark must ensure that the deceased are honourably buried according to the rites of the religion to which they belonged. The grave of the deceased must be respected, properly maintained, and marked in such a way that it can always be recognised.

¹⁶⁴ World Medical Association, Declaration of Tokyo, Art. 5

¹⁶⁵ ECtHR, *Nevmerzhitsky v. Ukraine* (Appl. No. 54825/00) of 5 April 2005, paras. 93-98.

¹⁶⁶ Special Rapporteur on Torture, Joint Report on Guantanamo (E/CN.4/2006/120) of 27 February 2006, paras. 72-82.

¹⁶⁷ GC III, Art. 120, GC IV, Art. 129, and ECHR, Art. 2.

¹⁶⁸ GC III, Art. 121, GC IV, Art. 131, and ECHR, Art. 2.

¹⁶⁹ GC III, Art. 121, and GC IV, Art. 131.

Wherever possible, deceased prisoners of war who depended on the same power must be interred in the same place.¹⁷⁰

Deceased prisoners of war must be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased, or in accordance with the express wish to this effect of the deceased. In cases of cremation, the fact of the cremation and the reasons for it must be stated in the death certificate of the deceased.¹⁷¹

Wills of prisoners of war and internees must be transmitted to the protecting power together with a copy to the *central information agency*.^{*172} More information about Protecting Powers is provided in Section 2 of Chapter 15.

9. Physical conditions for the deprivation of liberty

9.1

Location of camps

The location of permanent detention facilities has to satisfy certain requirements. The detailed rules for the location of camps are embodied in the Geneva Conventions. In this section, it seems natural to take into account the special circumstances applicable during armed conflict. The general protection afforded under human rights law means that the same precautions must be taken in relation to the location of camps for persons deprived of liberty with a view to prosecution.

The location of camps must meet the following criteria:

- 1) Camps may not be set up in areas particularly exposed to the dangers of war.¹⁷³
- 2) Camps must be located on land and afford every guarantee of hygiene and healthfulness.

170 GC III, Art. 120, GC IV, Art. 130, and SCIHL, Rule No. 115.

171 GC III, Art. 120, and GC IV, Art. 130.

172 GC III, Art. 120, and SCIHL, Rule No. 116

173 GC III, Art. 23, GC IV, Art. 83, AP II, Art. 5(2)(c), and SCIHL, Rule No. 121. UNSG Bulletin, Section 8(b).

- 3) Prisoners of war interned in unhealthy areas or in places where the climate is injurious for them must be removed as soon as possible to a more favourable climate.¹⁷⁴

In a conflict with no clearly defined front lines, it may be necessary to locate detention facilities in military camps because such a location is considered to be in the best interests of the safety of the persons deprived of liberty. One example is the detention facilities that were set up in the military camps in Afghanistan.

Through the intermediary of the Protecting Powers, Denmark is required to give the interested Powers all useful information regarding the geographical location of camps. Whenever military considerations permit, prisoner-of-war camps must be indicated by the letters PW or PG, and internment camps must be indicated by the letters IC, placed in such a way as to be clearly visible from the air.¹⁷⁵ See Section 2.3.1 of Chapter 10.

In time of peace, there is no direct ban on the establishment of permanent detention facilities at sea. HRL, however, establishes that persons deprived of liberty should be so under conditions that seek to minimise any differences between life as a detainee and life at liberty.¹⁷⁶ This means that permanent detention facilities should also not be established at sea in time of peace.

The considerations above do not preclude short-term deprivation of liberty at sea in naval operations, but it is not allowed to establish permanent facilities at sea.

9.2

Layout and design of camps

The layout and design of camps must comply with a wide range of requirements established by IHL and HRL. In IHL, particular focus is on safety and security and the presumption of long-term detention.

Extremely poor conditions in the form of very small or overcrowded cells, inadequate sanitary facilities, no ventilation, no natural light, insufficient number of beds, and no possibility of physical exercise may in themselves constitute an infringement

¹⁷⁴ GC III, Art. 22, GC IV, Art. 85, and SCIHL, Rule No. 121. UNSG Bulletin, Section 8(b).

¹⁷⁵ GC III, Art. 23, and GC IV, Art. 83.

¹⁷⁶ UNSMR, Art. 60, and CoE Rec(2006)2, Art. 5.

of the prohibition on torture or any other form of cruel, inhuman, or degrading treatment in regard to all persons residing in the camps.¹⁷⁷

9.2.1 Accommodation

The different categories of persons deprived of liberty must be **accommodated separately** because they are deprived of liberty for different reasons. Persons interned for security reasons must be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.¹⁷⁸

9.2.2 Safety in the camps

In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection must be installed. In case of alarms, the persons deprived of liberty must be free to enter such shelters as quickly as possible. Any protective measures taken in favour of the population must also apply to persons deprived of liberty.¹⁷⁹

Protection is not only afforded against the hazards of war but also against the rigours of the climate. The facility must be designed and equipped so as to provide protection against the climate.¹⁸⁰ This includes protection from dampness, adequate heating in a cold climate, and ventilation in a hot climate.

Rules specific to prisoners of war

Prisoners of war must be quartered under conditions as favourable as those for Danish units who are billeted in the same area. This applies, in particular, to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the conditions must also make allowance for the habits and customs of the prisoners.¹⁸¹

177 ECtHR, *Ilascu and Others v. Moldova and Russia* (Appl. No. 48787/99) of 8 July 2004, para. 445, ECtHR, *Dougoz v. Greece* (Appl. No. 40907/98) of 6 March 2001, paras. 45-49, ECtHR, *Peers v. Greece* (Appl. No. 28524/95) of 19 April 2001, paras. 64-75, and ICTY, *Prosecutor v. Kvočka IT-98-30/1-T* 2001, para. 67 and paras. 78-84 and 116-117.

178 GC III, Art. 22, and GC IV, Art. 84.

179 GC III, Art. 23, and GC IV, Art. 88. UNSG Bulletin, Section 8(b).

180 GC III, Art. 25, GC IV, Art. 85, UNSMR, Art. 10, and CoE Rec(2006)2, Art. 18.1.

181 GC III, Art. 25.

Denmark is entitled:

- 1) to subject prisoners of war to internment, .
- 2) to decide that, beyond certain limits, they are not allowed to leave the camp in which they are interned, and
- 3) to decide that, in the event the camp is fenced, they are not allowed to leave the perimeter of the fence.

Officers and prisoners of equivalent status must be treated with the regard due to their rank and age.¹⁸² This means that officers must be accommodated separately from enlisted personnel. It also means that, when circumstances require, officers will have enlisted personnel at their disposal in order, therefore, to exempt the officers from physical work.

9.3

Physical conditions

12.24. A person deprived of liberty is entitled to adequate space and light.¹⁸³

This applies, in particular, when persons deprived of liberty are quartered in cells. The cells must be sufficiently spacious, heated, and well-ventilated, and they must be adequately lighted, in particular, between dusk and lights out.¹⁸⁴

The provisions regulating the exact size of the cells are a national matter. It appears in Danish national legislation that detainees must be accommodated in rooms with a floor area of not less than six square metres for single cells and not less than eight square metres for double cells.¹⁸⁵

Compliance with these standards must be attempted wherever possible, but the circular is not directly binding on Denmark with regard to persons deprived of liberty by Danish soldiers during international operations outside Denmark. However, the cells are not allowed to be significantly smaller, since this may in itself constitute inhuman treatment.

¹⁸² GC III, Art. 44.

¹⁸³ GC III, Art. 25, GC IV, Art. 85, UNSMR, Art. 10, and CoE Rec(2006)2, Art. 18.1. UNSG Bulletin, Section 8(b).

¹⁸⁴ GC III, Art. 25, GC IV, Art. 85, and UNSMR, Art. 10.

¹⁸⁵ Circular No. 66 of 29 September 2011, Circular concerning the Size and Equipment of Prisoners' Day Rooms in the Facilities of the Danish Prison and Probation Service, section 1. Addendum 12.14.

If possible, the cells must be provided with windows large enough to let in natural light, but this must be weighed against the requirement of protection against the dangers of war.¹⁸⁶

Persons deprived of liberty must be accommodated in individual cells, if possible. If it becomes necessary to use dormitories, due regard must be paid to the safety of the detainees, and the detainees must be protected against mutual acts of violence or intimidation in such circumstances.¹⁸⁷

If detainees themselves request not to be accommodated in individual cells, two or more detainees may share accommodation where this can be done with satisfactory conditions for safety and hygiene.

Rules specific to prisoners of war

With the exception of the penal and disciplinary sanctions discussed above, prisoners of war may not be held in close confinement except where necessary to safeguard their health and, in that case, only while those circumstances make such confinement necessary.¹⁸⁸

With respect to accommodation, prisoners of war must be quartered under conditions as favourable as those for Danish forces who are billeted in the same area.¹⁸⁹

9.4

Sanitary facilities in the camps

12.25. Denmark is bound to take all necessary and possible measures to ensure that, from the outset of their internment, protected persons are accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health.¹⁹⁰

Conditions of hygiene in the facility and the possibility for persons deprived of liberty to attend to their personal hygiene must be of such a standard that it keeps pris-

¹⁸⁶ UNSMR, Art. 11.

¹⁸⁷ UNSMR, Art. 9.2, and CoE Rec(2006)2, Arts. 18.5-18.7.

¹⁸⁸ GC III, Art. 21.

¹⁸⁹ GC III, Art. 25.

¹⁹⁰ GC III, Art. 29, GC IV, Art. 76 and 85, CoE Rec(2006)2, Art. 19, and UNSMR, Art. 10, 12, 13, 15 and 16. UNSG Bulletin, Section 8(b).

oners in good health.¹⁹¹ Persons deprived of liberty must have for their use sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness. Adequate bathing and shower installations must be provided to ensure that persons deprived of liberty may have a bath or shower as frequently as necessary in relation to the climate and for the maintenance of good hygiene and personal dignity.¹⁹²

Persons deprived of liberty must be provided with sufficient soap and water for their daily personal toilet and for washing their personal laundry. The installations and facilities necessary for that purpose must be made available.¹⁹³

The sanitary facilities must be designed, if possible, in accordance with the culture and religion of the persons deprived of liberty.¹⁹⁴

9.5

Surveillance in the camps

Surveillance is normally inconsistent with individual rights.¹⁹⁵ However, in the interests of the safety of Danish forces but also the safety of prisoners, the use of surveillance measures in detention facilities is lawful if such measures are necessary and serve a legal purpose.¹⁹⁶ Such a purpose, for instance, could be a suspicion that persons interned for security reasons are planning an escape or an attack on camp management or other prisoners, or it could be a suspicion that persons interned for security reasons are in contact with militant groups outside the camp.

10. Interrogation

This section deals exclusively with the rules for the interrogation by Danish soldiers of persons deprived of liberty. How Danish soldiers should conduct themselves during captivity and interrogation is not regulated by this manual.

¹⁹¹ GC III, Arts. 22 and 29, GC IV, Arts. 85, 91, and 92.

¹⁹² GC IV, Art. 85.

¹⁹³ GC III, Art. 29, and GC IV, Art. 85. Addendum 12.15.

¹⁹⁴ GC III, Art. 22, and GC IV, Art. 82.

¹⁹⁵ ECHR, Art. 8.

¹⁹⁶ ECtHR, *Van der Graaf v. The Netherlands* (Appl. No. 8704/03) of 1 June 2004.

No distinction is made between different forms of interrogation. What is decisive is that questions are asked to obtain information from a person who is deprived of liberty by Danish forces.

Interrogation must be conducted in a language which the person deprived of liberty understands.¹⁹⁷

The rules for the treatment of persons deprived of liberty during interrogation are the same as the rules that apply generally. This means that no methods may be employed during interrogation that are inconsistent with the general prohibition against acts of violence, torture, or any other form of cruel, inhuman, or degrading treatment. Moreover, the usual rules with respect to food, water, rest, sensory deprivation, and stress positions should be complied with.

An interrogation must be conducted within reasonable periods of time to ensure that no method of interrogation is employed that impairs the detainee's capacity for decision-making or judgement.¹⁹⁸ A person deprived of liberty may not be kept awake to weaken his judgment during interrogation.

The rule above will not prevent a person who is deprived of liberty at night from being interrogated before being given the opportunity to sleep or, after four hours of sleep, from being wakened to continue the interrogation.

The time and duration of any interrogation session and the person(s) conducting the interrogation should be recorded.¹⁹⁹

Rules specific to prisoners of war

When questioned, prisoners of war are bound to give only their surname, first name(s) and rank, date of birth, and military service number or, failing this, equivalent information.

197 GC III, Art. 23.

198 Advisory Council of Jurists, The Asia-Pacific Forum of National Human Rights Institutions, Final Report on Reference Torture 2005, Minimum Interrogation Standards, Rules Nos. 3 and 4, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Resolution 43/173 1988, Principle 21(2). Addendum 12.16.

199 GA Resolution 43/173 1988, Principle 23.

Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.²⁰⁰

Special considerations with respect to interrogation

in connection with prosecution

If interrogation is conducted with a view toward prosecution, attention should be paid to the special procedural protective rules applicable in connection with the institution of legal proceedings.²⁰¹ This means, *inter alia*, that persons must be informed of their rights. Promises and the submission of false information may not be used during interrogation.

If the interrogation is conducted within the criminal jurisdiction of a Danish court or other official body – perhaps, the Danish Public Prosecutor for Serious Economic and International Crime – and with a view toward prosecution in Denmark, the provisions of the Danish Criminal Code must be complied with.

11. Communication with the outside world

12.26. All persons deprived of liberty have the right to communicate with the outside world including, in particular, with their family.²⁰²

Any prohibition of communication with the outside world for military or political reasons may be only temporary, and its duration must be as short as possible.²⁰³

The opportunity to communicate with the outside world helps protect the person deprived of liberty from enforced disappearance and is instrumental in supporting

200 GC III, Art. 17.

201 GC IV, Art. 71, ECHR, Art. 6, and, where relevant, Part 68 of the Danish Administration of Justice Act.

202 GC III, Art. 70, GC IV, Art. 106, AP II, Art. 5(2)(b), UNSMR, Art. 37-38, CoE Rec(2006)2, Art. 24, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 18, CPG, Art. 10, and SCIH, Rule No. 125.

203 GC III, Art. 76, GC IV, Art. 112, and CoE Rec(2006)2, Art. 24(2). Addendum 12.17

some of the other rights enjoyed by the detained person. Lack of opportunity for communication may in itself constitute inhuman treatment of family members.²⁰⁴

Under HRL, any failure to allow persons deprived of liberty to keep themselves regularly informed of what is going on in the world has also been found to be an infringement of their rights.²⁰⁵ This means that persons deprived of liberty must have access to news, to the extent possible, through newspapers, radio transmissions, etc.

11.1

Visits

12.27. Persons deprived of liberty must be allowed to receive visitors -- especially, near relatives -- at regular intervals and as frequently as possible.²⁰⁶

Such visits may consume substantial resources both for Danish forces and for the visiting family members. When operational conditions do not facilitate frequent visits, other methods that could be used to ensure that the person deprived of liberty has contact with his or her family must be considered -- for example, by using a telephone, VTC, or something similar.

Rules specific to prisoners of war

IHL provides no rules to ensure that prisoners of war receive visits by their families. This is due to the circumstances under which prisoners of war are deprived of liberty and the facilities in which prisoners of war are held.

11.2

Right to communicate with the ICRC/protecting power

12.28. Representatives and delegates of the ICRC/protecting power have permission to go to all places where protected persons may be, particularly to places of internment, imprisonment and labour.

204 ECtHR, *Bazorkina v. Russia* (Appl. No. 69481/01) of 27 July 2006, paras. 139-142, ECtHR, *Luluyev v. Russia* (Appl. No. 69480/01) of 9 November 2006, para. 118, ECtHR, *Zaurbekova v. Russia* (Appl. No. 27183/03) of 22 January 2009, paras. 94-99.

205 UNSMR, Art. 39, and CoE Rec(2006)2, Art. 24(10).

206 GC IV, Art. 116, UNSMR, Art. 37, CoE Rec(2006)2, Art. 24(1), and SCIHL, Rule No. 126.

They must have access to all premises occupied by persons deprived of liberty, and they must be able to speak with them without witnesses, either personally or through an interpreter.²⁰⁷

Such visits may not be prohibited except for reasons of imperative military necessity and, then, only as an exceptional and temporary measure. The duration and frequency of these visits may not be restricted.²⁰⁸

The rules have been made with a view to IAC, but the ICRC may also offer similar services during NIAC. If this happens, the ICRC must have access in the same way as during international armed conflict.

12. Special categories of persons deprived of liberty

As mentioned in Section 3.3.1 above, the treatment and protection of persons deprived of liberty must be based on the individual needs of the detained person. Certain categories of persons are identified as particularly vulnerable and, therefore, entitled to special protection.

12.1

Children and youth

12.29. Children and youth are entitled to special protection during deprivation of liberty.²⁰⁹

Youth in this context should be understood to mean persons who are under 18 years of age, and children should be understood to mean persons who are under the age of 15. It may sometimes be difficult to determine the precise age of a person deprived of liberty when they have no identity documents and do not know their date of birth. Where appropriate, their age must be assessed as accurately as possible and, in cases of doubt, the person must be assumed to be a child or youth.

207 GC III, Art. 81 and 126, GC IV, Art. 30 and 143, and SCIHL, Rule No. 124. UNSG Bulletin, Section 8(a).

208 GC III, Art. 126, and GC IV, Art. 143.

209 GC III, Art. 76, 89, and 94, AP I, Art. 75(5) and Art. 77, AP II, Art. 4(3), CoE Rec(2006)2, Art. 18.8(c) and Art. 35 and 36, UNSMR, Art. 8(d), 21(2) and 23, Convention on the Rights of the Child, Art. 37(b) and (c), SCIHL, Rule No. 120, and UNSG Bulletin, Section 8(f).

Special protection includes the following:

- Depriving children of their liberty should be used only as a measure of last resort and for the shortest appropriate period of time.
- Children must be the object of special respect and must be protected against any form of indecent assault. The parties to the conflict must provide them with the care and aid they require, whether because of their age or for any other reason.
- Proper regard must be paid to the special treatment due to minors.
- Youth deprived of liberty must go through the same administrative procedures but, if possible, must be separated from adults.
- Children and youth must be held in quarters separate from the quarters of adult detainees, except where families are accommodated as family units.
- Children under 15 years of age must be given additional food in proportion to their physiological needs.
- The education of children and youth must be ensured. They must be allowed to attend schools either within the place of internment or outside.
- Special playgrounds must be reserved for children and youth.
- Children should not be interrogated.
- Infants are allowed to be accommodated together with their parents if this is in the interests of the infant. In that case, they must be suitably quartered with their parents and may not be treated as persons deprived of liberty.

12.2

Women

12.30. Women are entitled to special protection during deprivation of liberty. This applies in particular to pregnant women and women who are deprived of liberty with their children.²¹⁰

Women must be the objects of special respect and must be protected, in particular, against rape, enforced prostitution, or any other form of indecent assault.

In any camp in which both female and male detainees have been accommodated, women must be confined in separate quarters, and separate dormitories must be made available to the women. The dormitories must be under the supervision of women.

210 GC III, Art. 14 and 25, GC IV, Art. 76, 85, 89 and 91, AP I, Art. 75(5), Art. 76 and Art. 77(1), AP II, Art. 5(2)(a), CoE Rec(2006)2, Art. 18.8(b) and Art. 34, UNSMR, Art. 8(a) and Art. 23, CPG, Art. 9.6, SCIHL, Rule No. 119, and UNSG Bulletin, Section 8(e).

Women must be treated with all the regard due to their sex and must in all cases benefit from treatment as favourable as that granted to men.

Mothers with small children and pregnant women who are deprived of liberty for reasons related to an armed conflict must have their cases considered with the utmost priority.

Maternity patients must be provided access to institutions where adequate treatment can be given and must receive care not inferior to that provided for the general population.

Pregnant women and breastfeeding mothers must be given additional food in proportion to their physiological needs.

Rules specific to prisoners of war

When accommodation in a neutral country is not possible, women prisoners of war must be repatriated directly if they suffer from a serious disease particular to women, are pregnant, or are mothers of infants or small children.²¹¹

12.3

Rules specific to families interned for security reasons

Special rules apply to families interned for security reasons.

Throughout the duration of their internment, members of the same family -- and, in particular, parents and children -- must be lodged together in the same place of internment. There may be a derogation from this rule, however, if separation of a temporary nature is necessitated for reasons of employment or health or to enforce penal or disciplinary sanctions. Internees may request that their children who are left on their own without parental care be interned with them.

Wherever possible, interned members of the same family must be housed in the same premises and given separate accommodation from other internees. They must also be given facilities for leading a proper family life.²¹²

211 GC III, Annex I, Model Agreement concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War, which should be read in conjunction with GC III, Art. 110, last paragraph.

212 GC IV, Art. 82, and SCIHL, Rule No. 105.

12.4

Other categories

In addition to women and children, there may be other categories of people who need special treatment and protection during their deprivation of liberty. No in-depth discussion will be given here, but the section on women and children provides inspiration for the individual protection to which persons deprived of liberty are entitled.

Examples of other categories of persons who may need special protection include: Elderly people, persons with disabilities, and sick persons.

13. Registration and records

12.31. Personal information concerning persons deprived of liberty must always be recorded, and full and accurate records must be kept and maintained.²¹³

The obligation to record personal information concerning persons deprived of liberty is important for reasons of international law as well as for administrative reasons. In relation to international law, the recording of information concerning persons deprived of liberty will be regarded as an integral part of the prohibition against enforced disappearance and arbitrary deprivation of liberty.

Therefore, HRL and IHL also contain detailed requirements for the recording of personal information concerning persons deprived of liberty. Any failure to keep such records may constitute human rights abuse in itself.²¹⁴

213 GC III, Art. 122, GC IV, Art. 136, CoE Rec(2006)2, Art. 15, UNSMR, Art. 7, CPG, Art. 8, and SCiHL, Rule No. 123. UNSG Bulletin, Section 8(a).

214 ECtHR, Kurt v. Turkey (Appl. No. 24276/94) of 25 May 1998, paras. 125-129.

If possible, the records must include the following information about the person deprived of liberty:²¹⁵

- 1) First name(s) and surname
- 2) Date and place of birth
- 3) Nationality
- 4) Most recent address
- 5) The date, time, and place of the deprivation of liberty and the grounds for the deprivation of liberty
- 6) The authority that ordered the deprivation of liberty
- 7) Health information
- 8) Information regarding rank and unit in case of a military person.

This information goes beyond the information prisoners of war are obliged to provide. If a prisoner of war does not wish to provide information other than his name, rank, date of birth, and military service number, he or she is not obliged to do so.²¹⁶

The information regarding the person deprived of liberty must be kept up to date. This means that the information must be continuously updated, for instance, in regard to:

- 1) State of health and, if applicable, medical treatment or examinations
- 2) Complaints made by the person deprived of liberty and how such complaints have been handled, by whom, and what the conclusion was
- 3) Information relating to the proceedings instituted against the person deprived of liberty if disciplined, sentenced, etc.
- 4) Information on whether force or physical restraints have been used to control the person deprived of liberty and the reason for such use.

If the person deprived of liberty is released, the following information must be available:

- 1) The date, time, and place of the release
- 2) The state of health at the time of the release
- 3) The authority responsible for the release
- 4) Other relevant matters relating to the release.

These records must be available, with due regard for the person's right to privacy, to all persons or organisations with a legitimate interest in the information. This may

²¹⁵ GC III, Art. 122, GC IV, Art. 138, CoE Rec(2006)2, Art. 15, UNSMR, Art. 7, and International Convention for the Protection of All Persons from Enforced Disappearance, Art. 17.

²¹⁶ GC III, Art. 17.

include the relatives of the person deprived of liberty or his or her representative or counsel, and it may be the ICRC or similar organisations, including regional human rights organisations.

Informational records of concerning any person deprived of liberty must be treated as confidential with due consideration for the person's right to privacy.

Rules specific to prisoners of war and internees

Upon the outbreak of an armed conflict and in all cases of belligerent occupation, Denmark is under an obligation to institute a *national information bureau** for prisoners of war and internees who are in its power.

The bureau, through the intermediary of the protecting powers and the *central information agency**, must immediately forward relevant information by the most rapid means to the powers concerned. Such information will make it possible quickly to advise the next of kin concerned.²¹⁷

The *Central Information Agency** for prisoners of war and internees is located in Switzerland. If the Agency in Switzerland, for some reason, is not used in the specific conflict, the Agency must be created in a neutral country.

The function of the Agency is to collect all the information it is able to obtain through official or private channels concerning prisoners of war and internees and to transmit it as rapidly as possible to their country of origin or to the Power on which they depend.²¹⁸

14. End of deprivation of liberty

Deprivation of liberty may cease by **release, transfer, or escape**.

Persons deprived of liberty may not be transferred to territories where their lives and freedoms might be at risk. This is known as the principle of non-refoulement.

217 GC III, Art. 122, GC IV, Art. 136, and UNSG Bulletin, Section 8(a).

218 GC III, Art. 123, and GC IV, Art. 140.

Before any form of transfer or release, persons deprived of liberty must:

- 1) Have all their personal effects and articles returned or be given a receipt for any effects not returned
- 2) Submit to a medical examination to document their state of health
- 3) Be asked whether they have any reason to complain about their treatment while in the custody of Denmark.

This information must be documented as described in Section 13 above concerning registration and records.

14.1

Release

Persons deprived of liberty must be released as soon as it becomes apparent that a legal basis no longer exists for continuing the deprivation of liberty.

This will generally be the case:

- 1) For **prisoners of war**, after the cessation of hostilities,
- 2) For **internees**, when they are no longer deemed to pose a qualified security risk or after the cessation of hostilities, whichever is earlier, and
- 3) For **persons deprived of freedom with a view to prosecution** when prosecution is waived, charges are dismissed, the person is acquitted, or punishment is served.

When persons are released, regardless of the reason for the release, as mentioned in the section on information and records, steps must be taken to ensure that the following information is recorded:

- 1) The date, time, and place of the release
- 2) The state of health at the time of the release
- 3) The authority responsible for the release
- 4) Other matters relating to the release.

It is necessary to ensure that the release is real. This means that a factual transfer to another Power may not be deemed as a release. Rather, a genuine release of the person concerned is necessary.

Rules specific to prisoners of war

12.32. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities.²¹⁹

It is assumed that Denmark **may release prisoners of war at any time during the armed conflict** -- for example, by exchanging prisoners with the adversary.

Prisoners of war may be partially or wholly **released on parole** or promise in so far as is allowed by the laws of the power on which they depend.²²⁰

Repatriation of seriously sick or injured prisoners of war against their will is not allowed.²²¹ The mental or physical fitness of the sick and wounded must have been gravely diminished.²²² This must be seen in light of the fact that the reason for depriving combatants of liberty is not punishment. It is a preventive measure with respect to the alleged security threat posed by combatants. If prisoners of war are not able to resume fighting, they are generally not found to pose a security threat.

Annex 1 to GC III contains a non-exhaustive list of medical conditions and disorders that may provide a basis for direct repatriation or accommodation in a neutral third country.²²³

Repatriation must be effected in conditions similar to those laid down in GC III²²⁴ for the transfer of prisoners of war.

Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same applies to prisoners of war already convicted for an indictable offence.²²⁵

The *national information bureau** and the *central information agency** must receive information regarding releases.²²⁶

219 GC IV, Art. 118, and SCIHL, Rule No. 128 A.

220 GC III, Art. 21.

221 GC III, Art. 109.

222 GC III, Art. 110.

223 Annex I to GC III.

224 GC III, Art. 119.

225 GC III, Art. 119.

226 GC III, Art. 122.

Rules specific to persons interned for security reasons

12.33. Any person interned for imperative reasons of security must be released by Denmark as soon as the reasons that necessitated internment no longer exist.

Internment for security reasons must end as soon as possible after the cessation of hostilities.

The parties to the conflict must, 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. This applies, in particular, to children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.²²⁷

The *national information bureau** and the *central information agency** must receive information regarding releases.²²⁸

14.2 Transfer

Transfer is understood to mean that deprivation of liberty does not cease, but the person deprived of liberty is transferred from Danish jurisdiction to the jurisdiction of another State.

Example 12.35: Examples of transfers of persons deprived of liberty:

Examples may be, for instance: the persons deprived of liberty in 2002 during Task Group Ferret who were transferred from Denmark to the United States, persons who were deprived of liberty in Iraq in the interests of security or for having committed criminal offences and were transferred to the UK in 2003-2007, or pirates transferred for prosecution in Kenya, the Seychelles, or the Netherlands during Operation Ocean Shield.

No transfers of persons deprived of liberty may be to situations of unlawful treatment,²²⁹ for instance, if there are substantial grounds for believing that the person will be treated contrary to Article 3 of the ECHR.

²²⁷ GC IV, Art. 132.

²²⁸ GC IV, Art. 136.

²²⁹ GC III, Art. 12, GC IV, Article 45, ECHR, Art. 3, CAT, ICC Statute, Art. 8(2)(a)(vii), and CPG, Art. 15.

Rules specific to prisoners of war

Article 12 of GC III contains detailed rules on the transfer of prisoners of war. For example:

- 1) Prisoners of war may only be transferred to a State which is a party to the GC III and which has the willingness and ability to apply the Convention.
- 2) When prisoners of war have been transferred, responsibility for the prisoners rests with the receiving State.
- 3) If the receiving State fails to carry out the provisions of the Convention in any important respect, Denmark must take effective measures to correct the situation or must request the return of the prisoners of war.²³⁰

The *national information bureau** and the *central information agency** must receive information regarding releases.²³¹

Rules specific to internees

Similarly, Article 45 of GC IV contains rules for the transfer of internees in IAC. In this context, the following rules apply:

- 1) Internees may only be transferred to a State which is a party to the GC IV and which has the willingness and ability to apply the Convention.
- 2) When internees have been transferred, responsibility for the internees rests with the receiving State.
- 3) If the receiving State fails to carry out the provisions of the Convention in any important respect, Denmark must take effective measures to correct the situation or must request the return of the internees.
- 4) In no circumstances may an interned person be transferred to a State where he may have reason to fear persecution for his political opinions or religious beliefs.²³²

The *national information bureau** and the *central information agency** must receive information regarding releases.²³³

²³⁰ GC III, Art. 12.

²³¹ GC III, Art. 122.

²³² GC IV, Art. 45.

²³³ GC IV, Art. 136.

In NIACs, internees may not be transferred to States that do not have the willingness and ability to comply with CA3 or AP II.²³⁴

14.2.2 Non-refoulement requirements for transfer

As described, IHL contains various rules protecting against transfer to unlawful treatment and undocumented transfers.

HRL also contains such rules, and the principle of non-refoulement is derived therefrom.

In some areas, IHL affords extra protection. For instance, only GC III gives Denmark the formal right to request the return of prisoners of war if there are signs of abuse and obliges the receiving State to comply with such a request.²³⁵

In other areas, HRL specifies the obligations of a transferring State prior to a transfer. This is primarily seen in CCPR, ECHR, and CAT.

Therefore, it follows that Denmark may not transfer a person deprived of liberty to another State if there are substantial grounds for believing that there is a real risk that the person will be subjected to torture or any other form of cruel or degrading treatment. Nor is a transfer allowed if the transferred person risks the death penalty or a life sentence without the possibility of a reduction of sentence.²³⁶ Furthermore, case law indicates that, in exceptional instances, the transfer of a person deprived of liberty may be inconsistent with the ECHR if the person has already suffered or risks suffering a flagrant denial of a fair trial in the receiving State.²³⁷

Whether a real risk exists must be based on an individual assessment.²³⁸ The general conditions are also relevant to assessing the risk, but the crucial factor is the real risk to which the person deprived of liberty is exposed.

234 Addendum 12.18.

235 GC III, Art. 12.

236 ECtHR, *Trabelsi v. Belgium* (Appl. No. 140/10) of 4 September 2014, paras. 136-139.

237 ECtHR, *Soering v. the United Kingdom* (Appl. No. 14038/88) of 7 July 1989, para. 113, ECtHR, *Mamatkulov and Askarov v. Turkey* (Appl. No. 46827/99 and 46951/99) of 4 February 2005, para. 99.

238 ECtHR, *M.E. v. Denmark* (Appl. No. 58363/10) of 8 July 2014, paras. 48-65.

A **real risk** means that there must be more than a purely theoretical risk or suspicion,²³⁹ but the risk of unlawful treatment does not have to meet the test of being highly probable.²⁴⁰

If there is no general risk, it is only the individual conditions that can be the reason a transfer is not possible. As a general rule, the person who does not want to be transferred has to present some evidence supporting the existence of a real risk. Subsequently, the burden will be on Denmark to show how the risk has been remedied.²⁴¹

The individual review must be fair and effective.²⁴² Therefore, it is not sufficient to have a list of States that are considered safe and to which persons may always be transferred. Before each transfer, an actual review must be undertaken.²⁴³

A general risk, on the other hand, may oblige Denmark to prove there is no real risk in the individual case. It is generally appropriate to assess the risk in relation to the State to which the person is transferred. Where highly fragile states are involved, however, it may be necessary in regard to the overall risk assessment to include the risk from armed insurgents in the event of a breakdown in security.²⁴⁴

The prohibition is absolute, which means that it cannot be derogated from.²⁴⁵

This prohibition applies to the transfer of persons from Danish territory or from a foreign territory in cases in which Danish jurisdiction is established, see Section 4.2 of Chapter 3. The prohibition applies not only to the primary State to which Denmark transfers a person but also to any subsequent transfer to a third State.

14.2.3 Supervision of transferred detainees

239 ECtHR, *Vilvarajah and Others v. The United Kingdom* (Appl. No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87) of 30 October 1991, paras. 109-116

240 Committee against Torture, General Comment No. 1 (n 131), para. 6.

241 Committee against Torture, General Comment No. 1 (n 131), para. 5.

242 HRC, *Alzery v. Sweden* (Com. No. 1416/2005) of 25 October 2006, para. 11.8, HRC, *Maksudov and Others v. Kyrgyzstan and Uzbekistan* (Com. No. 1461/2006; 1462/2006; 1476/2006; 1477/2006) of 16 July 2008, para. 12.7.

243 ECtHR, *Jabari v. Turkey* (Appl. No. 40035/98) of 11 July 2000, para. 40, CAT, *Agiza v. Sweden* (Com. No. 233/2003) of 20 May 2005, paras. 13.7-13.8, and CAT, concluding observations, Finland, 1996, UN Doc A/51/44, paras. 131 and 136.

244 ECtHR, *N.A. v. The United Kingdom* (Appl. No. 25904/07) of 17 July 2008, paras. 115-16, ECtHR, *Sufi and Elmi v. The United Kingdom* (Appl. No. 8319/07 and 11449/07) of 28 June 2011, para. 217, ECtHR, *Savridin Dzhrayev v. Russia* (Appl. No. 71386/10) of 25 April 2013, para. 153, and ECtHR, *H.L.R. v. France* (Appl. No. 24573/94) of 29 April 1997, para. 40.

245 ECtHR, *Chahal v. The United Kingdom* (Appl. No. 22414/93) of 15 November 1996, para. 79, and ECtHR, *Saadi v. Italy* (Appl. No. 37201/06) of 28 February 2008, paras. 137-149.

No rules of international law fully describe the situations in which supervision is required, including when, how, and how long inspections should be conducted. Specifically in relation to the contribution of Danish troops to UN missions, they are subject to the UN command structure, which includes the mission-specific Rules of Engagement and procedures drawn up by the Department of Peacekeeping Operations (DPKO). Chapter 3 provides more information about Denmark's obligations under international law.

Example 12.36: The UN peacekeeping mission MINUSMA.

The United Nations has drawn up guidelines for cases in which UN forces deprive persons of liberty, and MINUSMA has made them operational in mission-specific procedures. In this connection, MINUSMA decides on the implementation of any supervision, and there is no national supervision by the Danish authorities.

In a Danish context, the question of supervision was addressed in the case of Ghusouallah Tarin versus the Danish Ministry of Defence²⁴⁶ in which the Danish Supreme Court rendered its decision on a claim for damages or compensation as a result of a transfer to US forces in Afghanistan in March 2002. The Danish Supreme Court ruled in favour of the Ministry of Defence since no information was available at the time of transfer that indicated that the Ministry of Defence or the Danish forces knew or should have known that a transfer would entail a real risk that the person concerned would be subjected to inhuman treatment. Thus, the question was determined in accordance with the Danish law of tort liability for governmental entities.

On the issue of supervision, the Danish Supreme Court stated: "Taking into account the short period of time²⁴⁷ in which Ghusouallah Tarin was detained by the US forces, the Danish armed forces have not disregarded a duty of supervision."

This statement must probably be understood to mean that a duty of supervision may exist in certain circumstances – at least, if the deprivation of liberty is not of short duration. The judgment does not address which specific conditions in a given case may give rise to such a duty of supervision, nor does it specify the extent of the duty.

In specific cases, Denmark may decide to request a State to allow Danish authorities to conduct monitoring visits with respect to persons transferred from the units of the Danish Defence to the State concerned.

Over the last decade, Denmark has entered into agreements on transfers in connec-

²⁴⁶ Danish Weekly Law Reports, 2013.2696H.

²⁴⁷ The court took into consideration the fact that Tarin was deprived of his liberty for two to three days.

tion with the deployment of Danish troops to three different mission areas.²⁴⁸ There are no requirements as to the form of this type of agreement. These agreements have been in writing, however, and drafted in such a way that they are adapted to the specific circumstances of the operation and describe the obligations of both Denmark and the host State in relation to the deprivation of liberty and transfer of persons.

The agreements generally contain the following common elements:

- Provisions relating to the cases in which a person may be deprived of liberty and transferred to the authorities of the host State.
- Provisions to the effect that persons deprived of liberty must be treated humanely and in accordance with relevant international obligations.
- Provisions on free access for Danish authorities to the facilities where persons deprived of liberty are accommodated after being transferred to the host State. Depending on the circumstances, the provisions may also include free access for relevant international and local humanitarian organisations.
- Provisions relating to situations in which Denmark has to be notified by the host State (for instance, in connection with release, transfer, or conviction).
- Provisions prohibiting the carrying out of the death penalty if the courts of the host State pass such a sentence on the transferred person. There may also be provisions allowing for the reduction of sentences.
- Provisions prohibiting the re-transfer of the transferred person without the consent of Denmark.

The individual agreements may – depending on the nature of the specific operation – also contain provisions regulating the extent to which Denmark must contribute to investigations and the extent to which the parties to the agreement are required to ensure documentation as well as other technical matters which, according to circumstances, may be relevant.

In cases in which it is decided to conduct supervision, it will be necessary to take a number of considerations into account, including:

248 "Operation Iraqi Freedom" (OIR), International Security Assistance Force/Resolute Support Mission in Afghanistan (ISAF/RSM), and the efforts to combat piracy off the Horn of Africa (Task Force 150/151 and Operation Ocean Shield).

The effectiveness of supervision visits

Supervision visits must be conducted regularly, in which connection due consideration should be given to developments in the security situation, operational conditions, and any logistical constraints that may occur. Access should be given to all relevant parts of the facility where the detainee is accommodated. It must also be possible to communicate with facility staff and the detainee, which, depending on the circumstances, requires foreign language skills. Finally, supervision must be documented in writing, including – if possible – an update on the legal steps taken in the matter.

The period for conducting supervision

It is generally assessed (for instance, by human rights organisations) that torture or other ill-treatment usually occurs during the period leading up to conviction in order to extort a confession. Therefore, Denmark should be particularly attentive to such acts of ill-treatment during this period, which does not rule out the possibility that persons may also be at risk at other times during their deprivation of liberty. Practice from the nations contributing troops to the ISAF mission dictates that the supervision of transferred detainees should typically be conducted until the detainee has either been released or convicted of a crime. However, a specific and individual assessment of the need for supervision after conviction must always be made.

Notice of monitoring visits

Both announced and unannounced inspections should be facilitated. By their nature, unannounced inspections typically provide a more accurate picture of conditions in the facility since it will not be possible for facility personnel to prepare for the visit. Unannounced inspections, on the other hand, may impose increased administrative burdens on the facility, which, in developing countries, may weaken the ability to absorb the impact of any capacity-building initiatives.

Example 12.37: Supervision of the NDS facility in Helmand, 2008.

In the first half of 2008, the Danish combat group in the Helmand Province paid a visit to the NDS facility in Lashkar Gah for purposes of supervision. The supervision visit was unannounced and coincided with visits from detainees' family members. The visit, thus, gave an accurate picture of conditions in the facility but increased at the same time the administrative burden for the facility personnel, who now had to handle the supervision visit in combination with family visits to the detainees. At the same time, contrary to the original plan, the supervision visit was extended since it was necessary to wait for the family visits to end.

Therefore, all reasonable efforts should be made to conduct unannounced inspections if there is uncertainty about whether the treatment of detainees in the facility is acceptable. Finally, it will be necessary to consider the operational capabilities, including, in particular, the security situation and logistical resources.

Confidentiality

Supervisors must be able to interview the detainee without any facility personnel being present in the room and without the possibility that such personnel will overhear the interview.

Participation of medical experts

Efforts must be made to ensure that supervision visits are conducted with the participation of medical experts. If it is not possible from an operational point of view to conduct a supervision visit with the participation of medical experts, conducting the supervision is still a key priority. Medical examinations must be carried out with the consent of the persons deprived of liberty. In cases in which no consent is obtained, this must be specified in the supervision report, and the report must, instead, provide an overall assessment of how the detainee appeared during the interviews.

Example 12.38: ISAF. The Danish contingent to the ISAF mission has continuously monitored persons who have been transferred to the Afghan authorities. The supervision has evolved on a running basis throughout the Danish participation in the mission, although visits have been conducted up to the date of release – including while the detainees were serving their sentences after conviction. On 26 February 2014, the Danish Ministry of Defence concluded an agreement with the Afghan Independent Human Rights Commission (AIHRC) under which the organisation agrees to supervise detainees who have been transferred from the Danish contingent to the Afghan authorities. In that connection, the Danish Defence receives copies of the AIHRC's supervision reports on the people who were originally transferred by the Danish forces.

14.3

Escape

A deprivation of liberty is considered to have ceased if the detainee has escaped. The escape must be recorded.

In cases in which prisoners of war and internees have escaped successfully, the *national information bureau** and the *central information agency** must be notified.²⁴⁹ og *centraloplysningskontoret** underrettes.²⁵⁰

Rules specific to prisoners of war

The escape of a prisoner of war is deemed to have succeeded when:

- 1) He has joined the armed forces of the Power with which he depends or an allied Power;
- 2) He has left the territory under the control of Denmark or a Power allied with Denmark;
- 3) He has joined a ship flying the flag of the Power on which he depends, or an allied Power in the territorial waters of Denmark on the condition that said ship is not under Danish control.²⁵¹

²⁴⁹ GC III, Art. 122, and GC IV, Art. 136.

²⁵⁰ GK III art. 122 og GK IV art. 136.

²⁵¹ GC III, Art. 91.

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Air operations

Air operations

1. Introduction

Denmark has participated in a series of armed conflicts in which airborne forces have used force, such as Operation Odyssey Dawn and Operation Unified Protector in Libya in 2011 and Operation Inherent Resolve in Iraq in 2014-2016.

The purpose of this chapter is to address issues of specific relevance to the participation of Danish forces in air operations. All general aspects of attack, identification of military objectives, and lawful and prohibited weapons are considered in the relevant general chapters.

The ordinary rules of international law described in the Manual also apply to air operations. They apply whether or not the operations are air-to-air operations or air-to-surface operations. This means that the general chapters in the Manual describe a number of issues that are material to air operations -- particularly, Chapter 8 on military objectives, Chapter 9 on weapons, and Chapter 10 on methods of warfare.

Surface-to-air issues are not subject to special regulation in international humanitarian law. Reference, therefore, is made to the other chapters in the Manual for a more detailed review of the rules applicable to such operations.

1.1

Chapter contents

This chapter starts by defining a number of key terms, e.g., airspace and aircraft. Moreover, it describes a number of issues specific to air operations.

The Hague Rules of Air Warfare of 1923 have been applied although Denmark has not adopted them because they are generally considered to reflect customary IHL¹. The rules have not been incorporated into Danish law or translated officially into Danish.

To a great extent, reference is made to the HPCR Manual on International Law Applicable to Air and Missile Warfare (AMW Manual) for inspiration even though the document as such is not legally binding and has not been adopted by States.

A number of treaties and documents are of relevance to air operations, e.g., the Chicago Convention on International Civil Aviation,² which, despite its title, includes rules on aircraft used for military purposes. This Convention encompasses rules on interstate air traffic in time of peace as well as in war but stipulates that, in the event of war, the Convention shall not interfere with the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals.³ Section 3.7 of Chapter 3 provides more information about the Convention on International Civil Aviation.

A number of older treaties regulating maritime relations and the San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 12 June 1994⁴ (SRM) are also of relevance because the rules on the establishment of specific zones and aerial blockades follow the rules on similar matters at sea and because the SRM gives a detailed review of the rules of international law on aircraft in armed conflict. Reference is made to Section 4.2.2 of Chapter 14 for more information about the particular relevance of the Manual to naval warfare.

1 Danish Government's Red Cross Committee, "Humanitær Folkeret" ("International Humanitarian Law"), Copenhagen 2004, p. 12.

2 Executive Order on Denmark's Ratification of the Convention on International Civil Aviation signed in Chicago on 7 December 1944.

3 See Art. 89 of the Convention on International Civil Aviation.

4 International Institute of Humanitarian Law, "San Remo Manual on International Law Applicable to Armed Conflicts at Sea", 1994.

1.2

Scope in relation to other chapters

As stated in the introduction, some of the other chapters describe the general international humanitarian law that is also of relevance to air operations. Some of the rules applicable to aircraft, as stated above, are outlined in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. In this chapter, however, these rules are described as part of an overall review of the different types of aircraft in Section 3 since they must be assumed to reflect applicable international law in relation to these types of aircraft – even when they are not part of a naval context. Reference is made to Section 4.2.2 of Chapter 14 for more information about naval warfare.

2. Airspace

Airspace means the air up to the highest altitude at which an aircraft can fly. Airspace is below the lowest possible perigee of an earth satellite in orbit, also known as outer space.⁵

Outer space, thus, begins at the point the airspace of States terminates. The boundaries of outer space are not clearly delimited by international law, and the subject is a matter of discussion. The Outer Space Treaty contains restrictions on State use of outer space, including celestial bodies.⁶ Reference is made to Section 3.5.1 of Chapter 2.

National airspace is the airspace over the land territory and the territorial sea. International airspace is the airspace over the contiguous zone, the *exclusive economic zone*,* and the high seas.⁷ Chapter 14 provides additional information about the various zones under the law of the sea.

The areas in which hostilities may be conducted encompass the airspace over the belligerent States' land territories and territorial seas as well as their exclusive economic zones and the airspace over the high seas. In a NIAC, the State in whose territory the conflict takes place may use its airspace to conduct hostilities. This also applies to other States supporting the State party in accordance with a relevant agreement.

⁵ AMW Manual, Rule No. 1(a).

⁶ Danish Executive Order on the Outer Space Treaty of 27 January 1967.

⁷ Convention on International Civil Aviation, Art. 1 and Art. 2.

3. Different types of aircraft and their protection

The rules under IHL -- including customary IHL, in particular -- have developed during conflicts between States. To a great extent, therefore, they are concerned with the right to intervene in relation to other States' military and civilian aircraft. The rules have only very limited relevance to NIACs even though the fundamental rules of international humanitarian law dealt with in this section apply to both IACs and NIACs, see Chapter 4 and Chapter 8.

3.1

What is an aircraft?

The term 'aircraft' means any vehicle that can derive support in the atmosphere from the reactions of the air. In this context, it makes no difference whether a pilot is in the vehicle, the vehicle is remote-controlled by a pilot, or it is automated.⁸

The principle of distinction must also be followed in air operations, which means that it is crucial to define military aircraft in relation to civilian aircraft. As in the case of civilians on the ground, a civilian aircraft may lose its protection if it is used to the detriment of either of the parties to an armed conflict. The rules on the protection of civilian aircraft, including the potential cessation of the protection, are comparable to the rules applicable to similar civilian ships and ferries. For more information, see Section 4 of Chapter 14.

3.2

Military aircraft

Military aircraft means any aircraft operated by the armed forces of a State.⁹ It must bear exterior marks to that effect, including nationality marks.¹⁰ The use of false exterior marks is forbidden.¹¹

⁸ AMW Manual, Rule No. 1(d).

⁹ AMW Manual, Rule No. 1(x), and SRM, Rule No. 13(j).

¹⁰ Hague Rules of Air Warfare of 1923, Art. 3.

¹¹ Hague Rules of Air Warfare of 1923, Art. 19.

A military aircraft must be commanded by a member of the armed forces of a State.¹² Members of the crew may be civilians, but civilian members of the crew must also be subject to regular armed forces discipline. **Only military aircraft may participate in hostilities.**

All military aircraft belonging to the adversary in an armed conflict constitute military objectives and may be attacked.¹³

Military personnel and uniforms

A number of auxiliary functions for air operations constitute direct participation in hostilities¹⁴ and, therefore, should be performed by military personnel. Section 2.3 of Chapter 5 provides more information about personnel in general.

The auxiliary functions include:

- Refuelling, whether on the ground or in the air, in direct connection with combat operations.
- Mounting weapons or other mission-critical equipment in direct connection with combat operations.
- Servicing or repair of an aircraft in direct connection with combat operations.
- Preparation of an intelligence framework for the purpose of a specific mission or uploading mission data to the aircraft or weapon..

Example 13.1: Example of “direct connection with” combat operations:

A Danish aircraft is en route from Sigonella, Italy to Libya to perform an operation. The refuelling of the aircraft in the air is in direct connection with the combat operation. The weapons technician who has mounted the weapons for the specific operation has also acted in direct connection with the combat operation.

The crews of military aircraft must bear a fixed, distinctive emblem which is recognisable at a distance in the event that they become separated from their aircraft.¹⁵ A uniform may be a fixed distinctive emblem.

¹² Hague Rules of Air Warfare of 1923, Art. 14, and SRM, Rule No. 13(j).

¹³ AP I, Art. 49(3), AMW Manual, Rule No. 26, and SRM, Rule Nos. 65-66.

¹⁴ AP I, Art. 51(3).

¹⁵ Hague Rules of Air Warfare of 1923, Art. 15.

3.3

Civilian aircraft

Civilian aircraft means any aircraft other than military aircraft.¹⁶

Civilian aircraft are protected and may not take part in hostilities or be made the object of attack.¹⁷ Subsequently, different rules apply to the cessation of the protection of enemy civilian aircraft and neutral civilian aircraft, respectively.

3.3.1 Common rules on interception*, visit, search, and capture

Outside neutral airspace, the belligerent States in IACs may *intercept** civilian aircraft if there are reasonable grounds for suspecting they are subject to capture. If, after interception, reasonable grounds for suspecting that a civilian aircraft is subject to capture still exist, the aircraft may be diverted to an airfield on Danish or allied territory that is safe for the type of aircraft for visit and search.¹⁸

If, in connection with *interception**, doubt arises as to whether an aircraft with neutral marks in fact has enemy character, the aircraft may be visited and searched.¹⁹

As an **alternative to visit and search**, an enemy civilian aircraft may be diverted from its declared destination. A neutral civilian aircraft may be diverted from its declared destination only with its consent.²⁰

The parties to an IAC should promulgate and adhere to procedures for *interception** issued by the International Civil Aviation Organization. Moreover, a series of specific requirements apply to *interception** and supervision of civilian aircraft flight plans and routes.²¹

3.3.2 Special considerations on neutral civilian aircraft

The rules on neutrality are introduced in Chapter 2 and are also dealt with in a naval context in Section 4.1 of Chapter 14 on the basis of rules that, to a very large extent,

¹⁶ AMW Manual, Rule No. 1(h), and SRM, Rule No. 13(l).

¹⁷ AMW Manual, Rule No. 47(a), and SRM, Rule No. 41.

¹⁸ AMW Manual, Rule No. 137(b), and SRM, Rule No. 125.

¹⁹ SRM, Rule No. 115.

²⁰ SRM, Rule No. 126.

²¹ AMW Manual, Rules Nos. 53-57, and SRM, Rules Nos. 128-134.

are the same for vessels and aircraft. Below is a review of the special rules applicable to the protection of neutral civilian aircraft and of the right of belligerent States to conduct attacks and to take other less radical measures.

The rules applicable to neutral civilian aircraft entitle them to continue flying with due respect for the neutral status of the State to which they belong. Therefore, applicable international law authorises certain types of **control interception** (*interception**, visit, and search) of such neutral civilian aircraft to provide the parties to a conflict certain options to ensure that they do not carry *contraband** and, thus, violate the rules on neutrality. International humanitarian law also provides belligerent States certain options to keep neutral civilian aircraft at a distance from military operations (*interception** and diversion) -- for example, to protect the civilian aircraft.

In the event that a neutral civilian aircraft acts in violation of the rules of international humanitarian law, it may under certain circumstances lose its protection with the legal effect that the aircraft may be attacked. Under other circumstances, the aircraft and its cargo may be captured under the rules on *prize**.

During armed conflict, military aircraft of the parties to the conflict may not penetrate the jurisdiction of neutral States.²² Correspondingly, all aircraft, including neutral civilian aircraft, must maintain a **distance from potentially hazardous airspace**.²³

If a military commander finds that a neutral civilian aircraft endangers the success of an ongoing military operation, the military commander may forbid the passage of the aircraft in the immediate vicinity of the military activities or oblige them to follow a particular route. If the neutral civilian aircraft does not comply with such instructions, it may become a military objective, see below.²⁴

3.3.2.1 Protection of neutral civilian aircraft against attack and the conditions for such protection

Neutral civilian aircraft enjoy protection and may not be attacked unless one or more of the following conditions are met:²⁵

²² Hague Rules of Air Warfare of 1923, Art. 40.

²³ AMW Manual, Rule No. 54.

²⁴ Hague Rules of Air Warfare of 1923, Art. 30, and AMW Manual, Rule No. 174(e).

²⁵ SRM, Rule No. 70, and AMW Manual, Rule No. 52.

- 1) on reasonable grounds, the aircraft is believed to be carrying *contraband**; and, after prior warning or interception, it intentionally and clearly refuses to follow orders to divert from its destination and intentionally and clearly refuses to follow orders on visit and search at a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
- 2) the aircraft engages in belligerent acts on behalf of the enemy;
- 3) the aircraft acts in support of the enemy's military operations;
- 4) the aircraft is incorporated into or assists the enemy's intelligence system;
- 5) the aircraft otherwise makes an effective contribution to the enemy's military action.

Any attacks on neutral civilian aircraft must comply with the rules of international humanitarian law on distinction and proportionality. Reference is made to Chapter 4 and Chapter 8.

3.3.2.2 Capture of neutral civilian aircraft according to the rules on *prize**

If, after *interception**, reasonable grounds for suspecting that a civil aircraft is subject to capture still exist, the aircraft may be diverted to an airfield on Danish or allied territory that is safe for the type of aircraft involved.²⁶

Neutral civilian aircraft are subject to **capture** if they:²⁷

- carry *contraband** (in which case, such *contraband** may also be captured),²⁸
- are on a flight especially undertaken to transport individual passengers who are members of the enemy's armed forces,
- are operating directly under enemy orders,
- bear no exterior marks, bear false marks or present irregular, fraudulent, or forged documents, or seek to deface or destroy documents,
- violate a flight ban issued by a military commander in connection with a military operation, or
- breach a blockade.²⁹

As an **alternative to capture**, a neutral civilian aircraft may be diverted from its declared destination.³⁰ If the aircraft is captured, the safety and personal effects of

²⁶ AMW Manual, Rule No. 137(b), and SRM, Rule No. 125.

²⁷ Hague Rules of Air Warfare of 1923, Art. 53, AMW Manual, Rule No. 140, and SRM, Rule Nos. 116 and 153.

²⁸ SRM, Rule No. 154, and AMW Manual, Rule No. 141(b).

²⁹ SRM, Rule No. 153, and AMW Manual, Rule No. 140

³⁰ SRM, Rule No. 157.

the crew and passengers, if any, must be ensured. The documents and papers relating to the capture must also be safeguarded.³¹

3.3.3 Special considerations on the loss of protection of enemy civilian aircraft

If enemy civilian aircraft take part in hostilities, they may lose their protection against attack.³² Participation in hostilities includes:

- *intercepting** or attacking other aircraft,
- laying mines or assisting in the identification or sweeping of mines,
- using the aircraft for electronic warfare,
- transporting military equipment or personnel,
- using the civilian aircraft for air-to-air refuelling of military aircraft,
- sharing intelligence for direct use by one of the parties to the armed conflict, or
- being armed with air-to-air or air-to-surface weapons.³³

3.3.3.1 Special considerations on the capture of enemy civilian aircraft

Civilian aircraft belonging to the enemy and the cargo of such aircraft are liable to capture during an IAC in accordance with the rules on *prize** outside neutral airspace.³⁴ Prior visit and search are not a requirement.³⁵

Medical aircraft³⁶ and aircraft granted safe conduct by agreement between the parties to the conflict are, to some extent, exempt from capture.³⁷ The exemption applies only if these aircraft:

- 1) are innocently employed in their normal role,
- 2) do not commit acts harmful to the enemy,
- 3) immediately submit to identification and inspection when required by the enemy,
- 4) do not intentionally hamper the movement of troops and, consequently, obey orders to stop or change their course when required by the enemy, and
- 5) are not in breach of any prior agreement.³⁸

³¹ SRM, Rule No. 158.

³² AMW Manual, Rule Nos. 27, 49 and 50, and SRM, Rule Nos. 62-64.

³³ Haag Rules of Air Warfare of 1923, Art. 16, and SRM, Rule No. 63.

³⁴ AMW Manual, Rules Nos. 49 and 134.

³⁵ SRM, Rule No. 141.

³⁶ AP I, Art. 24-30.

³⁷ AMW Manual, Rules Nos. 67 and 87, and SRM, Rule No. 142.

³⁸ AMW Manual, Rules Nos. 67 and 87, and SRM, Rule No. 143.

Capture, if relevant, must be performed by *intercepting** the aircraft and ordering it to proceed to an airfield on Danish or allied territory that is safe for the type of aircraft involved and reasonably accessible. Upon landing, the aircraft is taken as a *prize** unless the capture was performed as an alternative to an attack.

If the conditions for an attack were met, see Section 3.3.3 above, the aircraft may be captured according to the rules on **war booty**. More information about the rules on war booty is provided in Chapter 9. Whether the conditions for taking an aircraft as a *prize** were fulfilled must be tried before a court of law.³⁹

3.4

Specially protected aircraft

Certain aircraft are given special protection against attack under international humanitarian law, i.e., **special protection in relation to the protection given to other civilian aircraft**.

Such aircraft are medical aircraft, aircraft granted safe conduct, i.e., free passage by agreement between the parties to the conflict, and civilian *airliners**.⁴⁰

3.4.1 Medical aircraft⁴¹

Medical aircraft means any aircraft assigned exclusively to the evacuation of wounded, sick, or shipwrecked persons and the transport of medical personnel and equipment.⁴² Medical aircraft must be respected and protected in the same manner as other medical facilities and personnel.⁴³ For more general information, see Chapter 7.

Such aircraft must be clearly marked with a distinctive emblem of the Red Cross or similar protected emblem, together with its national colours, on its lower, upper, and lateral surfaces.⁴⁴

³⁹ SRM, Rule No. 144.

⁴⁰ SRM, Rule No. 53.

⁴¹ GC I, Arts. 35-37, GC II, Art. 39, AP I, Arts. 24-31, and SRM, Rule No. 54 and Rule Nos. 174-183.

⁴² GC I, Art. 36, AP I, Art. 8(j), AMW Manual, Rule No. 1(u), and SRM, Rule No. 13(f).

⁴³ GC I, Art. 36, and AP I, Art. 24.

⁴⁴ GC I, Art. 36, and AMW Manual, Rule No. 76(a).

Medical aircraft must not be equipped with technology, the purpose of which is to collect or transmit intelligence data, and must not be armed, except for (small) arms for the self-defence of medical personnel. Moreover, they may only carry wounded, sick, or shipwrecked persons and medical personnel and equipment.⁴⁵

As a condition for **the special protection** of medical aircraft, the following applies:

- The aircraft has, in fact, been recognised by the parties as a medical aircraft;⁴⁶
- The aircraft is acting in compliance with any agreements entered into with respect to the flights of medical aircraft;⁴⁷
- The aircraft flies in areas under the control of its own or allied forces;⁴⁸ *or*
- The aircraft flies outside areas of armed conflict.⁴⁹

If medical aircraft fly over an **area controlled by the enemy** in the conflict or an area the control of which is not clearly established by one of the parties to the conflict, the aircraft must obey the order to land and permit inspection.⁵⁰ The rule protects against the improper use of aircraft marked as medical aircraft. In the event an aircraft has been forced to land, it is entitled to continue its flight with its occupants after examination, if any.⁵¹

The medical aircraft of the parties to a conflict may fly over the **territory of neutral powers**, provided that the aircraft has provided advance notice of the flight over the territory and any agreement on course, altitude, speed, etc., is followed.⁵²

If a medical aircraft enters neutral airspace in the absence of a prior agreement to that effect, the aircraft must make every effort to identify itself and respect any requirements of the neutral State to land with a view toward inspection. If the inspection reveals no suspicious circumstances in relation to the character of the aircraft as a medical aircraft, the aircraft must be allowed to resume its flight.⁵³ If the inspection reveals that the aircraft is not, in fact, a medical aircraft, it may be captured, and its crew are to be interned. For more information about internment, see Chapter 12.⁵⁴

⁴⁵ GC I, Art. 21, and SRM, Rule No. 178.

⁴⁶ SRM, Rule No. 54(a), see Rule No. 175.

⁴⁷ SRM, Rule No. 54(b), see Rule No. 177, GC II, Art. 39, and AP I, Arts. 26-27.

⁴⁸ SRM, Rule No. 54(c), and AP I, Art. 25.

⁴⁹ SRM, Rule No. 54(d).

⁵⁰ GC I, Art. 36, AP I, Art. 27, AMW Manual, Rule No. 78(a), and SRM, Rule No. 180.

⁵¹ GC I, Art. 36, and GC II, Art. 39.

⁵² GC I, Art. 37, AMW Manual, Rule No. 78, and SRM, Rule No. 181.

⁵³ AP I, Art. 31, AMW Manual, Rule No. 85, and SRM, Rule No. 182.

⁵⁴ GC I, Art. 37, AP I, Art. 31, and SRM, Rule No. 183.

3.4.2 Aircraft flying under a safe conduct agreement

Aircraft to which the parties have given special permission to fly enjoy special protection, provided that they do not hamper the manoeuvres of the parties to the conflict, that they perform the flights as agreed, and that they fulfil any other requirements under the agreement, including the requirement for the aircraft to be available for inspection.⁵⁵

3.4.3 Civilian airliners*

The background to the special protection of civilian *airliners** (as in the case of vessels used for passenger transport) is that the consequences of an attack will often be very severe.

It is also a condition for the special protection provided to civilian *airliners** that they are used exclusively for the transport of civilians, that they do not hamper the manoeuvres of the parties to the conflict, and that they do not refuse to comply with the orders from military authorities to land, visit, and, possibly, capture, or clearly opposes *interception**.⁵⁶

In case of doubt as to whether a civilian *airliner** is being used for purposes other than the transport of civilians, it shall be presumed not to be the case.⁵⁷

3.4.4. Consequences if the conditions for special protection are not met

In the event that the aircraft referred to under 3.4.1-3.4.3 above do not comply with the conditions for special protection, they may be attacked only if:

- 1) diversion for landing, visit, and search, and possible capture, is not deemed practically feasible; *and*
- 2) no other method is deemed available for exercising military control of the aircraft; *and*
- 3) the non-compliance with the conditions for special protection is sufficiently grave to mean that the aircraft could become a military objective; *and*

⁵⁵ AMW Manual, Rule Nos. 64-70, and SRM, Rule Nos. 53(b) and 55.

⁵⁶ AMW Manual, Rule Nos. 63 and 68-70, and SRM, Rule Nos. 53(c) and 56.

⁵⁷ AP I, Art. 52(3), and AMW Manual, Rule No. 59.

- 4) the anticipated collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.⁵⁸

In case of doubt as to whether a protected aircraft is being used in a manner that makes an effective contribution to the enemy's military action, it shall be presumed that this is not the case.⁵⁹

In cases in which the circumstances permit a warning to be issued, any attack against an aircraft granted safe conduct or a civilian airliner* may only be conducted if such prior warning has not been complied with.⁶⁰

3.5

Precautions for civilian aircraft

Civilian aircraft should avoid areas of potentially hazardous military activity.⁶¹

If a civilian aircraft flies over areas in which military operations are taking place, the aircraft must comply with instructions from the parties to the conflict regarding their heading and altitude.⁶² Moreover, belligerent and neutral States must ensure that a Notice to Airmen (**NOTAM**) is issued, providing information about military activities that are potentially hazardous to civilian air traffic. The notice must, among other things, include information about any restrictions on the use of airspace, the signal frequencies that the aircraft must monitor on a continuous basis, any restrictions issued on course, speed, and altitude, communication procedures, and warnings of options available to the belligerent States if the NOTAM is not complied with.⁶³

Belligerent and neutral States as well as relevant air traffic authorities should also establish procedures to increase emergency preparedness regarding civilian air traffic in areas in which military activities are taking place during armed conflict. In addition to destination, passenger counts, and cargo, such procedures should also address planned civilian air traffic and include information about communi

58 AMW Manual, Rule No. 68, and SRM, Rule No. 57.

59 AMW Manual, Rule Nos. 59 and 66, and SRM, Rule No. 58.

60 AMW Manual, Rule No. 70.

61 AMW Manual, Rules Nos. 54-57, and SRM, Rule No. 72.

62 AMW Manual, Rule No. 54, and SRM, Rule No. 73.

63 AMW Manual, Rules Nos. 55-57, and SRM, Rule No. 75.

cation frequencies, identification modes, and codes, if any, of the aircraft.⁶⁴ Military forces must use all available means of communication to identify and warn civilian aircraft.⁶⁵

Furthermore, civilian aircraft should ensure that a flight plan is filed with the relevant air traffic service, complete with information about destination, route, and altitude.⁶⁶

If, despite the procedures outlined, a civilian aircraft enters an area of potentially hazardous military activity, it must comply with any NOTAMs issued by the belligerent States.⁶⁷

4. Air operations

The general rules of international humanitarian law must be observed in air operations.

In particular, a distinction must be made between the civilian population and combatants and between civilian objects and military objectives. Accordingly, operations may only be directed against military objectives.⁶⁸

In the conduct of military operations, constant care must be taken to spare the civilian population, civilians, and civilian objects. Reference is made to Chapter 8 on attacks in general and to Chapter 6 about the protection of civilians in general.⁶⁹

4.1 Air-to-air

With respect to air-to-air attacks, every feasible effort must be made to ensure that the objectives attacked are military objectives.⁷⁰ The objectives may not be civilians, civilian objects, or objects subject to special protection, see above.

⁶⁴ AMW Manual, Rule No. 55, and SRM, Rule No. 74.

⁶⁵ SRM, Rule No. 77.

⁶⁶ AMW Manual, Rule No. 53(a), and SRM, Rule No. 76.

⁶⁷ AMW Manual, Rule No. 56.

⁶⁸ AP I, Art. 48.

⁶⁹ AP I, Art. 57.

⁷⁰ AP I, Art. 57(2).

The identification of such objectives must be the best possible under the existing circumstances, seen in the light of the threat to which the Danish aircraft may be exposed. All available means must be used, which may depend on the circumstances. Such means include verification by radio or radar, electronic identification, or visual identification.

4.2

Air to surface

As in the case of air-to-air attacks, every feasible effort must be made with respect to air-to-surface attacks to ensure that the objectives attacked are military objectives. The objectives may not be civilians, civilian objects, or objects subject to special protection.⁷¹

In this respect, the identification of the objectives must also be the best possible under the existing circumstances in the light of the threat to which the Danish aircraft may be exposed. All available means must be used – e.g., verification by radio or radar, electronic identification, or visual identification.

The rules on air-to-surface attacks do not mean that only precision weapons may be used. For some objectives, however, the consideration to spare the civilian population and civilian objects may mean that only such munitions may be used to attack the objective.

Example 13.2: Example of the use of precision weapons:

If the military objective consists exclusively of military objects and individuals in an otherwise deserted area, precision weapons are not required to be used as a precautionary measure. However, if the objective is a military facility in a town, the risk of collateral damage may require the use of precision weapons.

So, the objective to be attacked and the consideration of the risk of collateral damage determine the type of weapon to be used. Reference is made to Section 4.3 of Chapter 8 for more information about minimisation of collateral damage.

4.2.1 Responsibility for the delivery of weapons

Who is responsible for delivering a specific air-to-surface weapon may depend on the circumstances as in the case of, for instance, attacks with curved trajectory weapons or attacks from the sea against land.

⁷¹ AP I, Art. 57(2).

In some cases, the pilot will be responsible, but it may sometimes be a pilot on another aircraft, a person on the ground, or a person at headquarters.

What is **essential** is who performs the **assessment under international law** of:

- Whether the objective fulfils the requirements for military objectives,
- Whether the necessary precautions have been taken to minimise the risk of civilian casualties, and
- Whether the attack is proportionate.

Overall, a distinction is made between two different situations. These are situations in which:

- 1) The assessment is performed directly in connection with the attack – known as dynamic targeting.
- 2) The assessment is performed before a decision is made to attack an objective, and a *target pack** is prepared – known as deliberate targeting.

Dynamic targeting

Dynamic targeting can be undertaken in numerous ways. One way is to have an *MTAA team** perform the assessment on the basis of information from the pilot or others. In special cases, the pilot may also be the person to perform the assessment. Once again, it is important to bear in mind who is responsible for performing the actual assessment under international law.

If the pilot performs the assessment in the cockpit on the basis of information available, the situation is similar to the use of direct fire weapons as the pilot sees the target and has the opportunity to assess it. In this case, the pilot must ensure that the target is a military objective and that there is no risk of disproportionate collateral damage.

Example 13.3: Example of dynamic targeting performed by the pilot:

An aircraft has been assigned a geographical area and the mission to find and engage enemy forces. The pilot recognises a group of enemy tanks and decides to engage. The pilot is responsible for ensuring that the target is identified correctly, that consideration for the risk of collateral damage is taken into account, and that the necessary precautions prior to attacking the target are taken.

Normally, the geographical area and the type of objective with which the pilot may engage will have been assessed in advance under international law by the *MTAA team**. Therefore, the scope of the pilot's assessment will normally be limited, and the focus will be on the proportionality of the attack.

Situations may arise in which the pilot does not have the authority to assess the lawfulness of a target or has limited authority only. Such limitation may be the result of mission-specific directives, which may be either international or national.

The limitation may be that the pilot does not have the authority to assess objectives. In such cases, the aircraft must be able to communicate (via image, video, or audio) with an operations centre where the assessment of the lawfulness of the target is to be performed.

Example 13.4: Example of limited authority in dynamic targeting:

In general, Denmark will always have an MTAA team deployed together with a contingent of fighter aircraft. The MTAA team will normally always be involved in dynamic targeting. This was the case in Operation Unified Protector in Libya during which the *MTAA team** was involved in the assessment of a target as part of dynamic targeting.

There may also be situations in which the pilot may independently engage a target despite having assigned limited targets that may be engaged, but only when specific conditions are met.

Example 13.5: Example of limited authority to engage a target in dynamic targeting:

A Danish pilot has been assigned an OPS BOX within which he may engage a specific type of enemy tank, provided that the risk of collateral damage is non-existent or low. Before the pilot receives the order, the *MTAA team** has assessed that an attack on tanks in the assigned area with little or no collateral damage is in compliance with international law.

The above example illustrates the very limited scope of freedom for the pilot in dynamic targeting. *The MTAA team** has performed a full assessment under international law of a number of objectives in an area. The pilot is only to recognise the objectives and assess that the right circumstances exist – he is not required to perform an actual assessment under international law. However, it still constitutes dynamic targeting because the pilot identifies and engages targets. More information about verification requirements in general is available in Section 4 of Chapter 8, including the duty to react when the circumstances surrounding the objective change.

What is essential is whether or not the pilot performs an assessment under international law.

Deliberate targeting

Deliberate targeting means that a specific stationary objective is designated. This objective goes through a targeting process, which involves an assessment under international law of the lawfulness of attacks on the objective. A staff and, ultimately,

the military commander assess the lawfulness of a specific objective before an aircraft is ordered to attack it. Therefore, it is normally the military commander, and not the pilot, who is responsible for the assessment of the objective.

If, however, prior to delivering the weapons, the pilot discovers something at the objective that differs from the briefing he has been given, he or she must react.⁷² Reference is made to Chapter 8.

Example 13.6: Example of deliberate targeting when the circumstances are as described:

A pilot has been designated an objective: a military headquarters close to civilian buildings. The necessary precautions have been taken in terms of angle of attack, type of weapon, and *weaponeering**. The pilot recognises the objective and the circumstances are as outlined in the target briefing. The objective is hit as planned, but it subsequently turns out that the intelligence was incorrect and that a civilian building was hit. The responsibility does not rest with the pilot, but the staff and commander who prepared the *target pack**.

Example 13.7: Example of deliberate targeting when the circumstances are not as described:

The situation will be the opposite as that in the above scenario in which the pilot has been informed that the only people expected to be located at the objective are those who work in the building. If the pilot can see that a number of people are at the objective and they appear to be civilians, he must report this in order for a new proportionality assessment to be performed in a collaboration between the pilot and the staff.

Example 13.8: Example of deliberate targeting when the pilot has no line of sight on the objective:

Situations may arise in which the pilot engages objectives without having a line of sight on them. This may be because the pilot is above the clouds. In deliberate targeting, the pilot will normally still be able to deliver the weapon. It depends on the assessment of the objective and the assumptions applied for the approval of the attack on the objective. If the objectives are strictly military objectives in areas in which it is assessed that there is no risk there will be changes at the objective, the objective may be attacked even if the pilot cannot see it.

What is essential is who performs the assessment of a potential objective under international law.

This applies whether or not the pilot, an *FAC** or an *MTAA team** has performed the assessment. **However, the fact that others have performed the initial assessment does not exempt the executing party from reacting to knowledge that was not included in the initial assessment.**

72 AP I, Art. 57(2)(b).

5. Surrender and personnel in distress

In the event that military aircraft or crew members want to surrender, they must do everything possible to signal surrender. For instance, they can do so by communicating it on shared radio channels or by manner of flying. For surrender to be effective, orders from the adversary must be followed. Such orders include an order to fly at a specific altitude and in a specific direction or to land at a designated airfield.

No person parachuting from an aircraft in distress may be made the object of attack during his descent.⁷³ A person who has parachuted from an aircraft in distress and lands in a territory controlled by the enemy must be given an opportunity to surrender before being made the object of attack unless it is apparent that the person is engaging in a hostile act.⁷⁴

Airborne troops are not protected by this rule.⁷⁵ ‘Airborne troops’ includes in particular paratroopers, who, thus, are not protected against attack during their descent.

⁷³ AP 1, Art. 42(1), and Hague Rules of Air Warfare of 1923, Art. 21.

⁷⁴ AP I, Art. 42(2), and SCIH, Rule No. 48.

⁷⁵ AP I, Art. 42(3).

6. Blockades and zones

During armed conflict, the parties to the conflict may establish exclusion zones and no-fly zones, and blockades may be enforced against other parties to the conflict.

The rules are comparable to those that apply at sea and which are considered in Chapter 14. To a broad extent, the establishment of such zones helps to prevent civilian air traffic from being endangered. However, the violation of such zones and blockades of civilian aircraft does not mean that they may automatically be made the object of attack.

6.1

Exclusion zones

An exclusion zone is a zone that may be established by a party to an armed conflict in international airspace and waters.⁷⁶ The zone may be established to warn neutral aircraft or vessels and minimise the risk of their involvement in the hostilities.

Notice of the establishment of such a zone must be provided to all parties concerned. The zone may not be larger or enforced for a period longer than required by military necessity, and access to the airspace of neutral States must, to an adequate degree, be taken into account.

The rules of IHL on the identification of military objectives and precautions to avoid harm and injury to civilians still apply within the zone.

6.2

No-fly zones

A party to a conflict may establish a no-fly zone in its own or in enemy airspace.⁷⁷ In this zone, air traffic may be prohibited or restricted. The zone may be enforced using the lawful means and methods during armed conflict.⁷⁸

⁷⁶ AMW Manual, Rule No. 107.

⁷⁷ AMW Manual, Rule No. 108.

⁷⁸ AMW Manual, Rule No. 110.

This means that the rules of IHL on identification of military objectives and precautions to avoid harm and injury to civilians still apply within the zone.

Notice of the establishment of such a zone must be provided to all parties concerned.

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6.3 Blockades

A blockade is an attempt to prevent aircraft from entering or exiting a territory under the control of the enemy.⁸⁰ If Denmark establishes an aerial blockade, all States must be notified thereof.⁸¹

The notification must specify the commencement, duration, and location of the blockade.⁸² The blockade must be effective,⁸³ which requires a sufficient degree of superiority in the air over the area if it is enforced by military aircraft.⁸⁴ The blockade must be enforced impartially as regards the aircraft of all States.⁸⁵

A blockade may not bar access to the airspace of neutral States.⁸⁶ A blockade may not be established for the primary purpose of starving the civilian population or denying that population other objects essential for its survival.⁸⁷ Moreover, it may not be enforced if the resulting suffering of the civilian population is excessive in relation to the military advantage anticipated from it.⁸⁸

79 AMW Manual, Rule No. 109.

80 AMW Manual, Rule No. 147.

81 AMW Manual, Rule 148(A).

82 AMW Manual, Rule 148(b).

83 AMW Manual, Rule No. 151.

84 AMW Manual, Rule No. 154.

85 AMW Manual, Rule No. 155.

86 AMW Manual, Rule No. 150.

87 AMW Manual, Rule No. 157(a).

88 AMW Manual, Rule No. 157(b).

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Naval operations

In time of peace and during armed conflict

Naval operations

In time of peace and during armed conflict

1. Introduction

About 71 percent of the Earth's surface is covered in water. Therefore, access to and positioning of weapons systems at sea is of tremendous importance.

Military operations at sea involve special conditions, both in and outside armed conflict. Therefore, it is necessary to describe these special conditions in a separate chapter. This chapter deals with the legal rules regulating the full spectrum of naval operations from armed conflict to peacetime missions.

1.1

Chapter contents

The chapter contains the following sections:

- Section 2 contains definitions.
- Section 3 briefly presents certain rules of the law of the sea because there are great differences in the activities that a warship may undertake, depending on the location of the warship.
- Section 4 is concerned with the sets of rules regulating international armed conflict (IAC) at sea.
- Section 5 is concerned with non-international armed conflict (NIAC) at sea.
- Section 6 describes types of operation that take place outside armed conflict.
- Section 7 contains a glossary of naval terms.

1.2

Scope in relation to other chapters

This chapter is not concerned with attacks/delivery of weapons from the sea against objectives on land. These issues are addressed in Chapters 8 and 10 on the general rules on attacks and methods of warfare, etc.

National operations and general sovereignty enforcement are not considered, nor are national matters related to jurisdiction in the Danish territorial sea. These issues are addressed elsewhere in the applicable rules and provisions of the Danish Defence.

The chapter touches on areas considered in more detail in other chapters of the Manual, including Chapters 2, 3, 9, 10, 12 and 13.

2. Definitions

Certain definitions are crucial in the discussion of naval operations. This is the case, for instance, in the definition of different types of vessels and operations. A list of these definitions may be found in Section 7 at the end of the chapter.

3. Issues relating to the law of the sea

The legal framework governing the freedom of naval forces to navigate and operate in time of peace is essential to the influence that may be exercised by naval forces. This section addresses the rules and provisions that allow warships to navigate and operate.

3.1 Maritime zones

The maritime setting has many special operational and legal characteristics that require in-depth knowledge of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). The Convention addresses such matters as the division of the seas into maritime zones, each with its special characteristics in terms of sovereignty and jurisdiction, the freedom of the high seas, innocent passage, exercises (including the use of weapons in maritime zones), the sovereignty and immunity of warships, diplomatic permits, etc.

This section describes the division into maritime zones. Figure 14.1 in Section 3.2 below helps provide an overview of the various zones.

3.1.1 Baseline

The normal baseline for measuring the breadth of these maritime zones is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State.¹ Baselines are used, for instance, to determine the limits of the territorial waters, the fishing zone, and the exclusive economic zone and to determine the extent of the internal waters. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed to determine the baseline.² The drawing of straight baselines may not depart to any appreciable extent from the general direction of the coast.³

¹ UNCLOS, Art. 5.

² UNCLOS Art. 7, stk. 1.

³ UNCLOS art. 7, stk. 3

3.1.2 Internal waters

The waters on the landward side of the baseline of the territorial sea are called the internal waters. The internal waters primarily consist of inlets, bays, ports, etc., and areas behind the straight baselines.⁴ The internal waters form part of the territorial waters of the coastal State. These waters are included in the coastal State's jurisdiction. The navigation of foreign ships in internal waters and port exits is regulated by the coastal State in compliance with national law.

Where the establishment of a straight baseline (in accordance with the method set forth in UNCLOS art. 7) has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.⁵

When navigating internal waters, a foreign ship is subject to the sovereignty of the coastal State. When a foreign ship is in internal waters, the coastal State may take enforcement measures in compliance with international law with respect to any violation of its environmental rules in its internal waters, territorial sea, or exclusive economic zone.⁶

3.1.3 Territorial sea

The territorial sea is the area of water between the baseline, which constitutes the inner limit, and a line drawn which at every point is at a distance of 12 nautical miles measured from the nearest point of the baseline.⁷

Where the geographical location of neighbouring States prevents the full breadth of the territorial sea for both parties, the limit of their territorial sea is determined by agreement -- normally, according to the median line principle. The territorial sea forms part of the territorial waters of the coastal State and, thus, is subject to the sovereignty of the coastal State. Greenland has three nautical miles of territorial sea.

⁴ UNCLOS, Art. 8.

⁵ Law of the Sea Convention, Art. 8(2).

⁶ UNCLOS, Art. 220.

⁷ UNCLOS, Art. 3 and 4.

3.1.4 Territorial sea and internal waters – international and domestic alignment

UNCLOS uses the term ‘territorial sea’, which corresponds to the “outer territorial sea” in Danish legislation, and the term ‘internal waters’ corresponds to the Danish term “inner territorial sea”. Therefore, “territorial sea” within the meaning of UNCLOS is not identical to the broad Danish concept of “territorial waters”, which includes both internal waters and the territorial sea and has no equivalent in UNCLOS.

3.1.5 The contiguous zone

In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

- a. prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- b. punish infringement of the above laws and regulations committed within its territory or territorial sea.

The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁸ Denmark has established such a contiguous zone.⁹

3.1.6 International straits

International straits are straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.¹⁰

States may take the necessary measures in international straits when an infringement of laws and regulations has had or risks having an adverse impact on the marine environment in international straits.¹¹

3.1.7 Fishing zone

The fishing zone is a sea area in which the coastal State has an exclusive right to fish. The rules governing the breadth of the fishing zone have developed in customary

⁸ UNCLOS, Art. 33.

⁹ Danish Act on the Contiguous Zone, Act No. 589 of 24 June 2005.

¹⁰ UNCLOS, Art. 37.

¹¹ UNCLOS, Art. 39.

international law, and the fishing zone has been extended from three to six to 12 to the 200 nautical miles recognised today. The fishing zone comprises the entire area which extends 200 nautical miles from the baseline.¹² As far as Denmark is concerned, this area also includes its internal waters. Such zones have been established in Svalbard and the Faroe Islands, for instance.

3.1.8 The exclusive economic zone (EEZ)

The EEZ is an area that extends from the territorial sea. The exclusive economic zone may not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial waters is measured.¹³ The coastal State has certain rights and duties in the zone, including sovereign rights for the purpose of exploring, exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. The coastal State's rights and duties also apply to other activities for the economic exploitation and exploration of the zones, such as the production of energy from the water, currents, and winds.¹⁴ The zone does not form part of the territory of the coastal State. It is common practice for States to conduct military exercises in the exclusive economic zones of other States. However, some countries have made explicit reservations in this context, which must be considered to conflict with the provisions of UNCLOS.¹⁵

The installation of sonar surveillance systems on the seabed may constitute an important military means of surveillance. Sonar surveillance systems can probably be defined as installations under Article 60 of UNCLOS.¹⁶ Accordingly, the coastal State has an exclusive right to regulate sonar surveillance systems in its EEZ.

3.1.9 The high seas

The high seas are comprised of all parts of the sea that are not included in any State's exclusive economic zone, territorial sea, or internal waters of a State.¹⁷ However, the Law of the Sea Convention art. 58 (2) must be kept in mind. For further see Section 6.2.3.1.

¹² UNCLOS, Art. 56.

¹³ UNCLOS, Art. 57.

¹⁴ UNCLOS, Art. 56.

¹⁵ Churchill, R.R. & A.V. Lowe, "The Law of the Sea", 3rd ed., p. 427.

¹⁶ Churchill, R.R. & A.V. Lowe, "The Law of the Sea", 3rd ed., p. 427.

¹⁷ UNCLOS, Art. 86.

No State may validly purport to subject any part of the high seas to its sovereignty.¹⁸ This means, for instance, that, generally speaking, a State may not exercise power over the vessels of other States on the high seas.¹⁹ However, the flag State must issue rules for the protection of the marine environment that apply to ships flying its flag or entered in its registers. At a minimum, these rules must have the same effect as generally accepted rules and standards laid down by the International Maritime Organization (IMO) of the United Nations or another agreement. The flag State has a duty to take effective enforcement measures against any non-compliance with such rules.²⁰

3.1.10 Archipelagic waters *

An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. However, it is a condition that the waters within such baselines include the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1. The length of such baselines may not exceed 100 nautical miles. However, there is an exception under which up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.²¹

3.1.11 Continental shelf

The coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.²²

The rights to the continental shelf are not assumed to include wrecks and cargo that lie on the seabed and which may be covered with sand from the seabed.²³

18 UNCLOS, Art. 89.

19 UNCLOS, Art. 92(1).

20 UNCLOS, Art. 94.

21 UNCLOS, Art. 47(1) and (2).

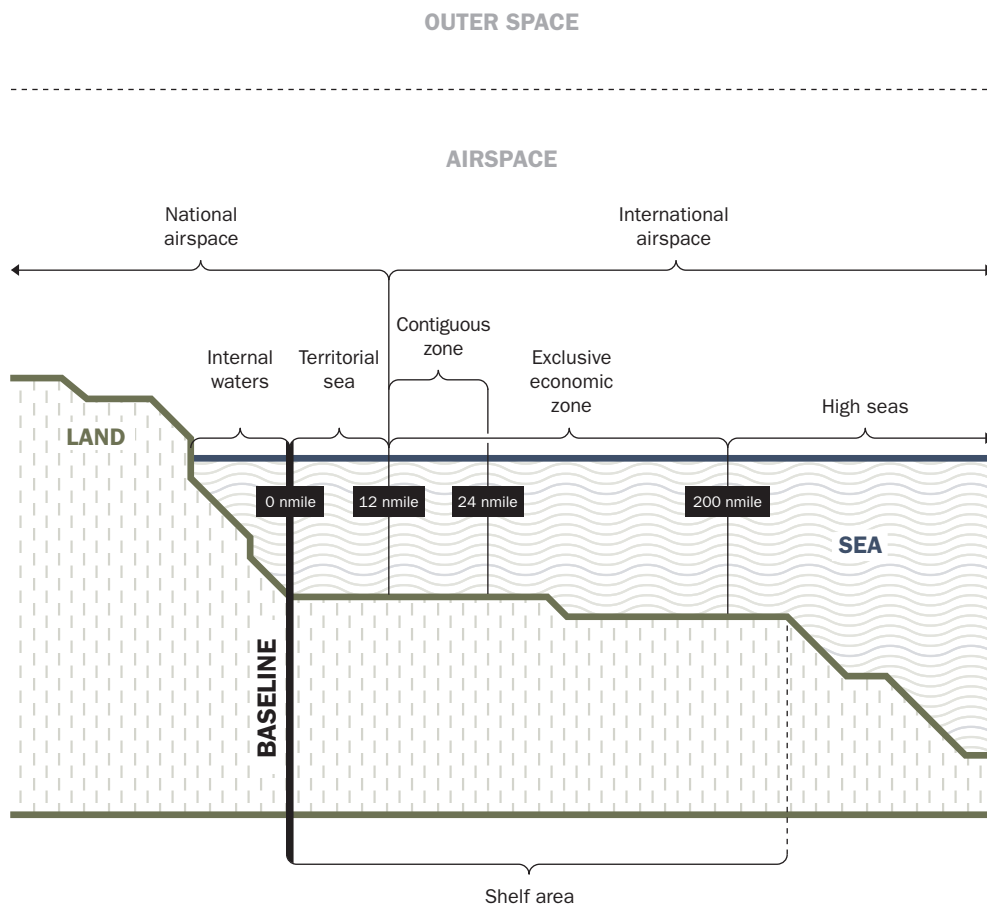
22 UNCLOS, Art. 77.

23 Nordquist & Nandan (ed.), "UNCLOS 1982 Commentary", Volume II, p. 896

3.2

Illustration of maritime zones under the law of the sea

• FIGUR 14.1 •



3.3

Special issues on the law of the sea in relation to military activity

This section is concerned with certain issues of particular relevance to naval operations.

3.3.1 The Bosphorus Strait and the Dardanelles – the Montreux Convention Regarding the Regime of the Straits of 1936

The Montreux Convention lays down detailed rules for the passage through the Bosphorus Strait and the Dardanelles. During daylight hours, warships displacing below 10,000 tonnes may transit the Bosphorus Strait and the Dardanelles in groups not exceeding nine ships.²⁴

3.3.2 Government ships – Brussels Convention on the Immunity of State-Owned Ships of 1926 and Additional Protocol

Government ships enjoy immunity under the Brussels Convention on the Immunity of State-Owned Ships of 1926, its Additional Protocol, and UNCLOS. A government ship may not be boarded, inspected, or subjected to any other form of compulsory measures when used on governmental, non-commercial service.

Focus is on the government's use of the ship, i.e., whether the ship can be considered to be on governmental, non-commercial service and thus be entitled to immunity. No formal requirements are presumed to exist that require re-registration or the like to acquire government ship status.

24 Churchill, R.R. & A.V. Lowe, "The Law of the Sea", 3rd ed., p. 115. See also www.bosphorusstrait.com

4. International armed conflict

4.1

Introduction

Due to the special conditions at sea, such as the considerations for the free navigation, safety, and economic interests of neutral States, naval warfare is governed by a number of special rules that apply exclusively to the maritime environment, including the rules governing the right of the parties to a conflict to take measures against the adversary's merchant vessels, the rules governing areas of naval warfare, and the rules governing special methods of naval warfare.

This section is concerned with the rules that apply exclusively to naval warfare, and it focuses on attacks and other naval warfare measures conducted by warships and directed against other ships, both surface and underwater vessels. The rules on attack and other measures directed against aircraft in connection with naval warfare are described in Chapter 13.

Moreover, this section exclusively addresses the relationship between the parties to a conflict. Matters relating to neutral States and actors, therefore, are addressed only when relevant to the legal position between the parties to a conflict or to their options for using neutral waters.

Even though Denmark as a nation has not been involved in actual naval warfare since the Battle of Heligoland in 1864, the rules on naval warfare are still relevant. However, they have been amended significantly – not least as a result of technological developments and changes in State practice.

4.2

Regulation of naval warfare under international law

Naval warfare is subject to the general principles of international humanitarian law, supplemented by a number of rules that apply exclusively to naval warfare. The opposite is the case with naval operations in time of peace, which most often have the character of law enforcement at sea and, thus, are governed by peacetime regulations such as UNCLOS, HRL, international resolutions, and domestic law.

The rules on naval warfare are codified to some extent in older treaties, while most of them form a part of customary international law. The most important treaties include the Paris Declaration respecting Maritime Law of 1856, the Hague Conventions of 1907 (Conventions VI-XIII address various aspects of naval warfare), and GC II. Furthermore, AP I contains provisions which exclusively apply to naval warfare,²⁵ just as general principles and rules of IHL that also apply to naval warfare have been extensively codified.

4.2.1 Special considerations on the application of the United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS is not directly applicable during armed conflict since it is aimed at peacetime regulation. However, this starting point is modified by the fact that the Convention continues to apply to relations between neutral States, between belligerent States and neutral States, and to matters that are not affected by the armed conflict. The inapplicability of UNCLOS is therefore only a reality for parts of the Convention and only as far as the relationship between the belligerent states is concerned.

Although UNCLOS does not apply directly to the relationship between the parties to a conflict or in their relationship with neutral States, the Convention has had significant influence on the rules of naval warfare.

Example 14.1: Example of UNCLOS's influence on naval warfare rules:

The extension of the territorial sea from three to 12 nautical miles and the introduction of *archipelagic waters** are measures that have limited the areas available to the parties to a conflict to conduct hostilities considerably. Furthermore, the establishment of the *EEZ** in UNCLOS has enlarged the area over which coastal States exercise jurisdiction and to which the parties to a conflict are restricted in their conduct of hostile acts because they are obliged to show due regard to the coastal State's economic rights and right to resources in the *EEZ**.²⁶ UNCLOS' influence on the rules of naval warfare is clearly reflected in the San Remo Manual which came into existence after UNCLOS entered into force and, therefore, reflects the amendments to State practice resulting from the Convention.

²⁵ AP I, Art. 23 and Art. 57(4).

²⁶ UNCLOS, Art. 58 and Art. 87.

The UNCLOS provisions that reserves the high seas for peaceful purposes and reiterates the prohibition of the use of Force in the United Nations charter art. 2(4)²⁷ have not resulted in the development of any treaty or customary international law rule prohibiting naval warfare on the high seas.

4.2.2 The San Remo Manual on International Law Applicable to Armed Conflicts at Sea

The San Remo Manual (SRM) of 1994 is the result of the efforts made by various international experts to prepare an up-to-date and contemporary manual on naval warfare, covering both existing law and progressive developments.

The SRM as such does not constitute a source of international law since it is not a treaty concluded by and between States but an academic text formulated by a number of experts in their personal capacity. Consequently, the SRM as such has not been adopted by Denmark or incorporated into Danish law, but it has gained great significance as the only modern comprehensive work on the rules of naval warfare, and the individual SRM rules are widely considered to reflect customary international law, which is binding on Denmark. This means that the SRM and Denmark's obligations under international law in this area are in accord. Where Denmark's interpretation of a rule differs from the SRM, it will be noted in the text or footnotes of this Manual.

4.3 Areas of naval warfare

The current regime of the law of the sea and its division of the world's oceans into different zones sets out the framework for where the parties to a conflict may conduct acts of naval warfare ("hostile actions").

Thus, the rules of this section are to be understood in relation to UNCLOS and its intention to balance considerations for the sovereignty and rights of coastal States against considerations for safeguarding the freedom of navigation and other lawful use of the seas by other states.

For the purpose of this manual, hostile actions include both attacks and measures short of attack as defined in the manual.

²⁷ UNCLOS, Art. 88 and Art. 301.

Hostile actions **may** be conducted in, on, or over the following areas:

- land territories, internal waters, and territorial seas or – where applicable – archipelagic waters, contiguous zones, and exclusive economic zones (EEZs) of the parties to the conflict;²⁸ and,
- with certain restrictions, the high seas²⁹ and the EEZ and continental shelf of neutral States.³⁰

Hostile actions **may not** be conducted in, on, or over the following areas:

- the land territory, internal waters, and territorial sea of neutral States, including neutral waters comprising an international strait or archipelagic sea lanes;³¹ and,
- neutralised zones, i.e., areas for which agreements under treaty law have been concluded to the effect that an area is to remain neutral and excluded from hostile acts. As regards the Antarctic, reference is made to Section 3.5.1 of Chapter 2.

For the purpose of this manual, hostile actions include, *inter alia*:³²

- attack on or capture of persons or objects located in, on, or over neutral waters or territory,
- use of neutral waters as a base of operations, including attack on or capture of persons or objects located outside neutral waters or territory,
- laying of mines,
- visit, search, diversion or capture, or
- blockade.

28 SRM, Rule No. 10(a).

29 SRM, Rule No. 36.

30 SRM, Rules Nos. 34 and 35.

31 SRM, Rule No. 15.

32 SRM, Rule No. 16, and HC XIII, Art. 2 and Art. 5.

4.4

Navigation and other peaceful uses of neutral waters, international straits and the territorial waters of belligerents

4.4.1 Neutral waters

The rules on neutrality and the use of the territory of neutral States serve a dual purpose. First, they are intended to protect neutral States against the harmful effects of armed conflict; and, second, they are intended to protect the parties to the armed conflict against harmful interference from neutral States and/or individuals.

These dual considerations of protection have resulted in an obligation to respect the inviolability and territorial integrity of neutral States and a corresponding obligation on neutral States to remain impartial throughout the duration of an armed conflict and to defend their neutral status if necessary. Reference is made to Chapter 2 for a general description of the rules on neutrality.

The warships and auxiliary vessels of the parties to a conflict **may** exercise the right of **mere passage** through the territorial sea of neutral States.³³ However, neutral coastal States are entitled to condition, restrict, or prohibit the parties' entrance into or passage through their territorial sea, except for those parts that constitute or extend from an international strait, provided that this is done on a non-discriminatory basis. In this way, the belligerents are placed on an equal footing with regard to access to the waters of the neutral State in question.³⁴

The parties to a conflict may not extend the duration of the passage through neutral waters or their presence in those waters for replenishment or repair longer than necessary. Only when it is unavoidable due to weather conditions or damage to the ship may the passage exceed the duration of 24 hours.³⁵

Moreover, the parties to a conflict may not use neutral waters as a sanctuary.³⁶

33 The rights of innocent passage follows from Article 17 of UNCLOS. The right to restrict or suspend the right to undertake innocent passage follows from Rule No. 19 of the San Remo Manual and UNCLOS Article 25.

34 SRM, Rule No. 19, and HC XIII, Art. 9.

35 SRM, Rule No. 21, and HC XIII, Art. 9 and 13.

36 SRM, Rule No. 17.

Neutral States must – as the means at their disposal allow – take the necessary measures to enforce this prohibition and, thus, prevent the violation of their neutrality.³⁷

Should a belligerent State violate any of the rules of neutrality laid down in this section, for instance, by remaining **present in neutral waters** for more than 24 hours or by using neutral waters as a basis for attack, the neutral state is under an obligation to take the measures necessary to terminate the violation. If the neutral state fails to terminate the violation of its neutral waters, the opposing belligerent must notify the neutral state and demand that the violation be terminated within a reasonable time. If the violation of neutrality constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, that belligerent may use such force as is strictly necessary to respond to the threat posed by the violation.³⁸

Without jeopardising their neutrality, neutral States may permit the vessels of the parties to a conflict to **replenish** so that they can reach a port in their own territory. Furthermore, **repairs** of vessels are permitted in order to make them seaworthy as long as such repairs do not restore or increase their fighting strength.³⁹

The conduct of hostile acts within the *EEZ** or continental shelf of neutral States, including the laying of mines, is permitted, provided that due regard is exercised in order not to harm the economic and resource interests of the neutral coastal State and to protect the marine environment. If mines are laid in the exclusive economic zone of a neutral State, the neutral State must be notified.⁴⁰

4.4.2 The territorial sea of the belligerents

In general, neutral warships maintain their right of innocent passage through the territorial sea of the belligerent states during armed conflict. However, since UNCLOS remains applicable in respect of the relationship between belligerents and neutral states during armed conflict, belligerents may temporarily suspend the right of innocent passage for the vessels of neutral States. Such suspension is permitted as long as it is essential to protect the security of the party to the conflict and must be carried out in a non-discriminatory manner.⁴¹

37 HC VIII, Art. 1 and 25, and SRM, Rule No. 15.

38 SRM, Rule No. 22.

39 SRM, Rule No. 20(b) and (c), and HC, Art. 17 and 18.

40 SRM, Rules Nos. 34 and 35.

41 UNCLOS, Art. 25(3).

4.4.3 International straits

The right of transit passage through international straits and archipelagic sea lanes is retained regardless of whether they consist of neutral waters or the waters of the parties to the conflict. This applies to the surface ships, submarines, and aircraft of both neutral States and the belligerents.⁴² The right of transit passage may not be suspended, but the laws and regulations of the coastal State regarding transit or archipelagic sea lanes passage remain applicable.⁴³

In certain International straits subjected to special treaty regulation under international law, the right of non-suspendable innocent passage may only be suspended if it is specifically provided for in the treaty that regulates the strait in question.

4.5

The conduct of hostilities – Attacks

Actors, military objectives, protected objects, and the right to conduct hostilities

As already mentioned, the general principles and rules of IHL also apply to naval warfare -- in particular, the principles of distinction and proportionality (see Chapter 4). Therefore, the rights and obligations of the various actors and the identification of military objectives at sea follow the rules set out in Chapter 5 and Chapter 8, respectively.

The right to conduct hostilities in connection with naval warfare depends on the status of the **vessel**, i.e., the category to which it belongs, not on the status of the crew on board even though these two aspects are obviously closely connected. Moreover, the character and conduct of a vessel determine whether it constitutes a military objective just as loss of protection against attack will likewise be based on the conduct of the vessel.

Hence, the rules on naval warfare are characterised by their focus on the status, rights, and obligations of the vessels involved. In this regard, the rules differ from

⁴² SRM, Rules Nos. 23, 26 and 28.

⁴³ SRM, Rule No. 27.

general IHL pursuant to which the actors of the armed conflict are individuals and the rules regulate actions vis-à-vis individuals and objects of the adversary. The focus of the rules on vessels as opposed to individuals is well-founded since it will often be impossible for the adversary to conduct an individual assessment of a vessel's crew members and their conduct.

4.5.1 Right to conduct hostilities

As far as **individuals** are concerned, only the combatants of the belligerents are entitled to take part in the hostilities. The rules on combatant status, described in Chapter 5, apply fully to naval warfare.

This means that any civilian contractors who are on board a warship are prohibited from taking an active part in the hostilities. If they nevertheless do so, their participation will be regarded as direct participation in the hostilities. This means that they will lose their protection against attack and may be prosecuted for their acts if captured by the adversary.

14.1. As regards **units**, only **warships** and **military aircraft** have a right to take part in hostilities at sea.⁴⁴ In situations where attacks on objectives at sea are conducted from land, military units on land may also participate

The presence of civilians on board a warship does not affect its status and the right of the warship to take part in the hostilities. All other vessels and aircraft are at any time prohibited from taking part in the hostilities regardless of whether they lend support to the armed forces of the State. The prohibition therefore also includes auxiliary vessels and auxiliary aircraft as well as other State-owned vessels and aircraft used, for instance, for policing and customs activities. Members of the crews of such vessels and aircraft, however, are entitled to defend themselves against attack from the adversary.

4.5.2 Military objectives at sea

Military objectives – also at sea – are limited to objects that, as a result of their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture, or damage offers a definite military

⁴⁴ SRM, Explanation, para. 13(g) and (h).

advantage. This follows from the fact that the general principles of IHL also apply to naval warfare. For more information, see Chapter 8.

Below is a non-exhaustive list of vessels and other maritime units that, according to their nature, constitute military objectives and, therefore, may be lawfully attacked:

- Belligerent warships and auxiliary vessels
- Belligerent military aircraft and auxiliary aircraft
- Military installations in the maritime environment, such as port facilities.

During armed conflict, belligerent **warships and auxiliary vessels** may be attacked at all times without prior warning and without consideration for the safety of the vessel's crew.

Furthermore, any vessel that constitutes an effective contribution to the war effort as a result of its nature, location, use, or purpose constitutes a military objective and may be attacked. However, it must be noted that a number of classes of vessels are exempt from attack which means that they enjoy special protection under the law of naval warfare (see below).

4.5.2.1 Enemy vessels exempt from attack

The San Remo Manual's formulation of the principle of distinction,⁴⁵ deviates slightly from the formulation of the principle in AP I. Thus, in addition to civilian objects the manual also mentions "exempt objects" as those that need to be distinguished from military objectives. This addition refers to the fact that certain types of vessels enjoy specific protection against attack under the rules on naval warfare by being exempt from attacks.

The term 'enemy vessels' covers all vessels of the adversary. These may be warships and auxiliary vessels as well as non-State vessels flying an enemy flag, including merchant vessels.

⁴⁵ SRM, Rule No. 39.

The following classes of **enemy vessels are exempt from attack**:⁴⁶

- hospital ships,⁴⁷
- small craft used for coastal rescue operations and other medical transports,⁴⁸
- vessels granted *safe conduct** by agreement between the parties, including *cartel vessels** engaged in the transport of prisoners of war and vessels engaged in humanitarian missions, such as transport of supplies indispensable to the survival of the civilian population,
- vessels engaged in transporting cultural property under special protection (see Chapter 6),
- passenger vessels when engaged only in carrying civilian passengers,
- vessels charged with religious, non-military scientific, or philanthropic missions,⁴⁹
- small coastal fishing vessels and small boats engaged in local coastal trade,⁵⁰
- vessels designated or adapted exclusively for responding to pollution incidents in the marine environment,
- vessels which have surrendered, and
- life rafts and life boats.

However, the listed vessels are exempt from attack only if the following conditions are met:⁵¹

- the vessel is innocently employed in its normal role;
- the vessel submits to identification and inspection when required and
- the vessel does not intentionally hamper the movement of troops and, obeys orders to stop or move out of the way when required.

4.5.2.2 Loss of exemption from attack

In the event that a vessel exempt from attack fails to meet one or more of the above conditions, it may be attacked only if diversion, capture, or other military control measures are not available and the circumstances of non-compliance are sufficiently grave that the vessel may be reasonably assumed to be a military objective as a result of its conduct and use.⁵²

46 SRM, Rule No. 47.

47 GC II, Art. 22.

48 GC II, Art. 27.

49 HC XI, Art. 4.

50 HC XI, Art. 4.

51 SRM, Rule No. 48.

52 SRM, Rule No. 52.

In all circumstances, the vessel may be attacked only if an attack can be launched in accordance with of the principle of proportionality. For more information, see Chapter 4. Aircraft enjoying special protection are addressed in Chapter 13.

Special considerations with respect to hospital ships, small craft used for coastal rescue operations, and other medical transports

Like other medical units, hospital ships are subject to extensive regulation in GC II. Thus, they enjoy full protection against attack unless they are abused to conduct military acts harmful to the enemy.⁵³ Coastal rescue craft and other vessels engaged in the transport of the sick, wounded, and shipwrecked enjoy the same protection.⁵⁴ Therefore, the specific rules on hospital ships described in the following also apply to these vessels.

The Danish hospital ship *Jutlandia* is one example of a hospital ship used in armed conflict, namely the Korean War in 1950-53.

14.2. The exemption from attack is based on the function of the hospital ship. Thus, it does not matter whether any sick, wounded, or shipwrecked are, in fact, on board the ship.⁵⁵

The marking of hospital ships is meant to facilitate the identification of these and other exempt vessels and does not in itself confer protected status to the ship.⁵⁶ Consequently, failure to comply with the methods of identification does not result in a loss of protection.

However, the protection of hospital ships extends beyond protection against attack. Hospital ships must at all times be respected and protected to the same extent as other medical units, as described in Chapter 7. This means, for instance, that they may not be captured or made the object of reprisal, that they have the right to leave a port that has fallen into the hands of the adversary, and that the adversary may not prevent them from performing their duties.⁵⁷

⁵³ GC II, Art. 22.

⁵⁴ GC II, Art. 27.

⁵⁵ SRM, Rule No. 173, Explanation.

⁵⁶ SRM, Rule No. 173.

⁵⁷ GC II, Art. 22 and 24.

In connection with other protected vessels, hospital ships will only lose their protection against attack if the conditions for loss of protection set out above in Section 4.5.2 are fulfilled.⁵⁸ In this context, it is important to point out that an attack is to be conducted only as a last resort -- that is, in situations where less radical measures, such as diversion or capture, are insufficient.

In addition to the general conditions for loss of protection, a hospital ship must have been given due **warning** prior to an attack. If circumstances allow, the warning must include a reasonable time limit for the hospital ship to discharge itself of the cause endangering its specific protection against attacks. In cases in which a hospital ship directly attacks the adversary, the setting of a time limit will often be operationally indefensible and, thus, not required.⁵⁹ Chapter 7 sets out more detailed requirements for prior warning.

The prohibition on using hospital ships for any kind of military purpose does not prevent hospital ships from having the necessary navigation and communication equipment installed, including cryptographic equipment. However, it is a condition that such equipment is not abused to collect and transmit intelligence data or in any other way to acquire any military advantage.⁶⁰

Hospital ships may also be equipped with purely deflective means of defence, such as *chaff*^{*} and *flares*^{*}, without losing their protection.⁶¹ Weapons that can be used offensively, such as anti-aircraft guns, are not permitted, however. Moreover, the individual crew members on board hospital ships are entitled to carry small arms for self-defence and maintenance of discipline and good order without this affecting the hospital ship's protection against attack.⁶²

4.5.2.3 Enemy merchant vessels

Enemy merchant vessels are merchant vessels flying the flag of the enemy. Thus, the term 'enemy' exclusively describes the formal affiliation of the merchant ship and has no implication for its acts.

⁵⁸ SRM, Rule No. 49, and GC II, Art. 34.

⁵⁹ SRM, Rule No. 49, and GC II, Art. 34.

⁶⁰ SRM, Rule No. 171.

⁶¹ SRM, Rule No. 170, Explanation.

⁶² GC II, Art. 35.

14.3. Enemy merchant vessels may only be attacked if they meet the definition of a military objective.⁶³

The following non-exhaustive list contains examples of activities that may render enemy merchant vessels military objectives, which means that they will lose the protection against attack that otherwise follows from their civilian status.⁶⁴

- Participation in hostilities on behalf of the enemy, including laying mines and mine-sweeping
- Acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishment at sea
- Participatiion or assistance with enemy *ISR operations**
- Sailing in convoy with enemy warships
- Refusing an order to stop or actively resisting visit, search, and capture
- Being armed to such an extent that a merchant vessel could inflict damage to a warship. This does not prevent the crew from carrying arms for individual self-defence or the vessel from being equipped with deflective means of defence, such as *chaff** and *flares**.

However, even though participation in these activities would render a vessel a military objective in the vast majority of cases, it must always be determined by an assessment of the specific circumstances, whether the criteria applicable to military objectives as set forth in Chapter 8 are met. Reference is made to Chapter 13 for enemy civilian aircraft.

4.5.2.4 Neutral merchant vessels

Neutral merchant vessels are generally exempt from attack. However, they will lose their protection against attack if they meet the same conditions described above in Section 4.5.2.3 with respect to enemy merchant vessels, that is, if they become military objectives as a result of their use.⁶⁵ A neutral merchant vessel will furthermore lose its protection against attack if it is believed on reasonable grounds that it is carrying contraband or breaching a blockade and, after prior warning, it intentionally and clearly refuses to stop or intentionally and clearly resists visit, search, or capture.⁶⁶

⁶³ SRM, Rule No. 59.

⁶⁴ SRM, Rule No. 60.

⁶⁵ SRM, Rule No. 67.

⁶⁶ SRM, Rule No. 67(a).

The mere fact that a neutral merchant vessel is armed does not provide a sufficient legal basis for attacking it.⁶⁷ Reference is made to Chapter 13 for information about neutral civilian aircraft.

4.5.3 Precautions in attacks

As described in Chapter 8, the parties to an armed conflict are subject to a series of requirements to take precautions to verify objectives and minimise collateral damage, derived from AP I, Art. 57, for instance.

However, the precautions listed in AP I only apply directly to naval warfare in so far as an attack is directed against objectives on land or otherwise affects civilians on land.⁶⁸

As regards attacks on objectives at sea or in the air, AP I merely states that the parties must take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.⁶⁹

In practice, this means that:⁷⁰

- Those who plan and/or decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not vessels or objects which are not military objectives are present in an area of attack. In practice, this entails a requirement to do what is feasible to compile a thorough situational analysis, particularly in coastal or other areas with heavy sea and/or air traffic. For this purpose, all available methods must be used to the extent feasible, e.g., radio, radar, and helicopter;
- in the light of the information available to them at the time of attack, those who plan and/or decide upon an attack must do everything feasible to ensure that attacks are limited to military objectives;
- furthermore, they must take all feasible precautions in the choice of methods and means in order to minimise collateral casualties or damage; and
- an attack must be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

⁶⁷ SRM, Rule No. 69.

⁶⁸ AP I, Art. 49(3).

⁶⁹ AP I, Art. 57(4).

⁷⁰ SRM, Rule No. 46.

Chapter 8 describes in more detail to whom the obligations listed above apply and what it takes to meet the requirement to “do everything feasible”.

4.6

Special means and methods of naval warfare

The parties to a conflict are subject to certain limitations in their choice of means and methods in armed conflict, as set out in Chapters 9 and 10 of the Manual.⁷¹ The general rules and principles described in these chapters also apply to naval warfare. Therefore, reference is made to these chapters for a more detailed explanation.

However, the subject of this section is the means and methods of warfare unique to the naval domain and therefore separately regulated by the rules on naval warfare.

Special issues on the protection of the natural environment

during armed conflict at sea

In addition to the general prohibition against using means and methods of warfare that cause extensive, long-term, and serious damage to the natural environment, as set forth in Section 2.15 of Chapter 10, and the prohibition against using the natural environment as a weapon, as set forth in Section 3.12 of Chapter 9, a requirement exists in armed conflict at sea to the effect that **due regard** for the natural environment must be exercised in the use of means and methods of warfare in accordance with applicable rules of international law.⁷² Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is **prohibited** in all circumstances. In practice, this means that the effect of a given tactic or weapon on the natural environment must be taken into consideration prior to the choice of tactics and weapons. A weapon or tactic anticipated to cause damage to, or destruction of, the natural environment must only be used to the extent that it is a military necessity and no reasonable and less harmful alternative exists.

This rule is particularly important when operations are undertaken in sea areas with fragile ecosystems, such as the Arctic, where, for instance, an oil or chemical spill as a result of attacks on vessels or pipelines will have particularly serious and long-term consequences for the environment.

⁷¹ AP I, Art. 35.

⁷² SRM, Rule No. 44.

4.6.1 Submarines

Submarines are bound by the same rules as surface ships.⁷³ This means, for instance, that they are subject to the same requirements for distinction, proportionality, and precautions as surface ships, including the duty to take all possible measures to search for, collect and protect shipwrecked and wounded after an attack,⁷⁴ as described in more detail in Section 4.7 below and in Chapter 7.

4.6.2 Torpedoes

In addition to the restrictions that follow from the general IHL requirement of distinction and the resulting prohibition against the use of weapons that cannot be directed against a specific military objective (see Section 2.2 of Chapter 9), the use of torpedoes which do not sink or otherwise become harmless when they have completed their run is specifically prohibited.⁷⁵ This prohibition is motivated by the risk that a torpedo that does not sink or is made harmless will lie dead in the water and thus constitute the same risk to civilian shipping and other vessels exempt from attack as free-floating mines.

4.6.3 Mines and mining

Mines have traditionally played a key role due to Denmark's geostrategic location. However, today, minesweeping is what is important to the Danish Defence since a large number of German and British mines were left in Danish waters as relics from World Wars I and II. Minesweeping is not governed by the rules on naval warfare, but the difficulties of sweeping activities clearly highlight the need for rules on effective monitoring and risk management.

Subject to certain restrictions and conditions described below, the use of mines continues to be a lawful activity in naval warfare. The general rule is that mines may only be used for legitimate military purposes, including the denial of sea areas to the enemy.⁷⁶ As a result of this, non-discriminatory mining in EEZs and the high seas directed against both civilian and military shipping would be prohibited because such practice clearly conflicts with the principle of distinction.

⁷³ SRM, Rule No. 45.

⁷⁴ GC II, Art. 18.

⁷⁵ SRM, Rule No. 79, and HC VIII, Art. 1(3).

⁷⁶ SRM, Rule No. 80.

14.4. Any form of mining is subject to the principles of effective monitoring, risk management, and notification.

The principle of **effective monitoring** entails a requirement to the effect that the parties must carefully record the locations where they have laid mines.⁷⁷ The recording of minefields is important since it is essential to both notification and the subsequent sweeping of the minefields.

The principle of **risk management** entails a general requirement that the parties must be able to manage and control the dangers to civilian shipping represented by their minefields. Specifically, the use of free-floating mines is prohibited unless they are directed against military objectives and become harmless within an hour after loss of control over them.⁷⁸ This also means that moored mines may be only used to the extent that they have been equipped with a form of deactivation mechanism that neutralises them if they are detached or control over them is otherwise lost.⁷⁹

The requirement for a deactivation mechanism also applies in relation to **remotely-controlled minefields** because such remote control is technically complex and extremely rarely infallible. Consequently, there is a need for further precautions in the form of a deactivation mechanism to ensure that the minefield can be neutralised by other means. The requirement for deactivation within one hour generally does not apply to sophisticated **bottom mines** designed exclusively to detonate, for instance, on the basis of an acoustic/magnetic signature or specific pressure changes even though such mines are not moored. The explanation is that these types of mines can be directed against special types of vessels or even individual vessels, which means that they do not represent any immediate danger to civilian shipping or other vessels protected against attack.

The principle of **notification** entails a requirement that the laying of mines and arming of pre-laid mines must be notified to international shipping.⁸⁰ This requirement will be met when notification takes place through the usual channels established for international shipping. The duty to notify international shipping of the establishment of minefields does not apply if the mines in question only detonate against vessels that constitute military objectives. In that situation, the mines will

⁷⁷ SRM, Rule No. 84.

⁷⁸ SRM, Rule No. 82, and HC VIII, Art. 1.

⁷⁹ SRM, Rule No. 81.

⁸⁰ SRM, Rule No. 83.

not endanger shipping exempt from attacks or other civilian shipping, and so no need for notification exists.

Mining of the internal waters, territorial sea, or archipelagic waters of the parties must be done in a way that allows the vessels of neutral States to exit the area.⁸¹

Geographical restrictions on the laying of mines

The rights of belligerents to lay mines are subject to certain geographical restrictions in order to maintain acceptable conditions for civilian shipping during armed conflict and to respect the territorial integrity of neutral States.

Belligerents are **prohibited** from laying mines in **neutral waters**.⁸² This prohibition is absolute and applies to all types of mines. In the event that a belligerent decides to lay mines in the EEZ or continental shelf of a neutral State, the belligerent must pay special attention to the interests of the neutral State in this area.⁸³

Belligerents may not lay mines in a manner that, in practice, prevents passage between neutral waters and the EEZ and the high seas⁸⁴ since this does not serve a legitimate military purpose.

Belligerents may lay mines in the high seas and the EEZ, provided that it is carried out in a manner that ensures that due regard to the peaceful use of these areas is exercised.⁸⁵ For instance, safe routes could be designated or a pilot or escort service could be made available to ensure safe passage through the mined area.

Mining may not impede transit passage through **international straits** or passage through **waters subject to the right of archipelagic sea lanes passage** unless a safe and convenient alternative route is provided.⁸⁶ In practice, this will often be difficult in relation to international straits, such as the Strait of Gibraltar, because alternative routes will often cause considerable inconvenience to ship traffic. In such cases, waters constituting international straits may only be mined to the extent that

⁸¹ SRM, Rule No. 85.

⁸² SRM, Rule No. 86, and HC VIII, Art. 2.

⁸³ SRM, Rule No. 35.

⁸⁴ SRM, Rule No. 87.

⁸⁵ SRM, Rule No. 88.

⁸⁶ SRM, Rule No. 89.

it allows safe passage through the strait, and the parts of the strait that represent neutral waters may never be mined.

Obligations after the cessation of the armed conflict

After the cessation of the conflict in question, the parties to the conflict must do their utmost to remove or render harmless the mines they have laid.⁸⁷ With regard to mines laid in the territorial sea of the enemy, each party must notify the enemy of their geographical position. The parties must proceed with the least possible delay to remove the mines in their territorial seas or otherwise render the territorial sea safe for navigation.⁸⁸

The parties to the conflict are furthermore obligated to participate in international cooperation aimed at removing or otherwise rendering minefields harmless.⁸⁹

4.6.4 Missiles

No special rules apply to the use of missiles in naval warfare. Therefore, the use of missiles must conform to the general rules of IHL, including the principle of distinction, in particular.⁹⁰ This imposes considerable demands on the verification of potential objectives and to precautionary measures, particularly, in the case of over-the-horizon attacks and littoral warfare.

What is essential to the lawfulness of such attacks is the missile's capability to hit the chosen objective and the quality of the information on which a potential attack is based. Reference is made to Chapter 8 of the Manual for more information about the rules on verification of military objectives.

4.6.5 Various weapons

*Flares**, *chaff**, smoke, pyrotechnic substances, ammunition, or submunition designed to produce an electric or electronic effect do not fall within the scope of the Convention on Cluster Munitions, see Section 3.6 of Chapter 9, or other weapons-specific treaties. Thus, these weapons may be used lawfully within the framework of other international law, including HRL. For more information, see Chapter 9.

⁸⁷ SRM, Rule No. 90.

⁸⁸ SRM, Rule No. 90.

⁸⁹ SRM, Rule No. 91.

⁹⁰ SRM, Rule No. 78.

4.6.6 Blockades

A blockade is a way of denying access to/departure from the enemy's coastal areas or port facilities for all types of vessels and aircraft, the primary purpose of which is to prevent the area from receiving outside supplies and to prevent exports and the carrying of troops to/from the blockaded area.

For a blockade to be lawful under the rules of naval warfare, the following conditions must be met:

- The **blockade must be notified and declared** to both belligerent and neutral States.⁹¹
- The declaration must contain information about the commencement, duration, and geographical location and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.⁹²
- The **blockade must be effective**. The question of whether a blockade is effective is a question of fact, that is whether the party to the conflict enforcing the blockade in fact⁹³ and effectively is able to prevent vessels from entering/leaving the blockaded area. If a blockade is not effective, it can no longer be lawfully enforced. This means, for instance, that neutral vessels may no longer be captured or attacked even though they are trying to breach the blockade and fail to comply with orders to stop unless they constitute military objectives.⁹⁴
- The blockade may **not bar access** to the coastal areas and port facilities of neutral States.⁹⁵
- **The blockade must be applied to all types of vessels from all States and impartially enforced.**⁹⁶
- **The blockade may not be established solely to starve the civilian population.** If the blockade means that the civilian population is inadequately provided with supplies of food and water, the blockading party must ensure free passage for the civilian population to receive supplies that are essential to their survival. This also includes medical supplies.⁹⁷ The provision of supplies essential to the survival of the civilian population, for instance, may take place via a humanitarian corridor. In any case, the blockading party has

91 SRM, Rule No. 93.

92 SRM, Rule No. 94.

93 SRM, Rule No. 95, and the Paris Declaration of 1856, Art. 4.

94 M, Rules Nos. 98 and 67(a).

95 SRM, Rule No. 99.

96 SRM, Rule No. 100.

97 SRM, Rules Nos. 103 and 104.

a right to establish the terms and conditions for access to the blockaded area. This includes the right to verify that the supplies in question are essential to the survival of the civilian population, and the right to limit the delivery of supplies.⁹⁸

• The **blockade may not be established if the damage to the civilian population is excessive** in relation to the military advantage anticipated from the blockade.⁹⁹

The physical location of the forces that are to maintain the blockade may be determined by military requirements. A significant distance to the blockaded area may in certain circumstances be required.¹⁰⁰ In this context, the extent and strength of the enemy's coastal defence play a key role. If the opposing belligerent for example has long-range missiles or if air supremacy has yet to be established, a presence at sea or in the air in the immediate vicinity of the blockaded area will often constitute an unacceptable risk to the blockading party.

The blockade may be maintained and enforced by means of a combination of lawful methods and means, provided that the other conditions for the blockade are met. Thus, the blockading party may use warships or other naval vessels, including submarines and military aircraft. This includes conventional vessels and aircraft as well as unmanned underwater and surface vessels and aircraft.¹⁰¹ The use of these types of vessels and aircraft may be supplemented with missiles and mining. However, a blockade will not be lawful if it is merely enforced by means of missiles and/or mining as this renders it impossible to comply with the requirement that certain vessels must be allowed access to the blockaded area.

Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.¹⁰²

98 SRM, Rule No. 103(a) and (b).

99 SRM, Rule No. 102(b), and the general principle of proportionality.

100 SRM, Rule No. 96.

101 The San Remo Manual does not specifically refer to unmanned vessels and aircraft, but as these are generally considered lawful under international humanitarian law, they are regarded as legitimate means for the maintenance and enforcement of blockades.

102 SRM, Rules Nos. 98 and 67.

4.6.7 Maritime exclusion and safety zones

The establishment of maritime exclusion and safety zones are today considered a lawful method rooted in customary international law. Such zones have been established in many forms and different situations in naval warfare during the past century.

These zones may only be established when justified by military necessity. The duration of a zone, its geographical location and extent, the restrictions imposed by the zone, and the means used to enforce it may not exceed what is strictly required by military necessity to the belligerent establishing the zone.¹⁰³

There is no unambiguous or generally recognised definition of maritime exclusion and safety zones. However, a zone is generally a three-dimensional area defined and established by a belligerent, to which the access of other States' vessels or aircraft is denied or restricted. Most often, the zones are established as a necessary element in a party's defence measures or to modify the geographical extent of a conflict.

Moreover, the establishment of a zone will often serve the important purpose of warning civilian ships of areas that involve a special risk of hostilities, thus protecting civilian ship traffic from the dangers of hostilities. Maritime exclusion and safety zones must not be confused with neutralised and demilitarised zones (as described in Chapter 6) in which the civilian population and other vulnerable groups may seek protection against hostilities.

14.5. The establishment of a zone does not absolve a party of its duties and rights under IHL.¹⁰⁴

The same body of law applies both inside and outside the zone.¹⁰⁵ Consequently, a party to a conflict may not bypass, disregard, or modify its obligations under international law by establishing a zone, regardless of the purpose of the zone and regardless of the designation used for it. It is particularly important to note that the zone does not change what constitutes a military objective. This means that a belligerent can under no circumstances lawfully decide that entering the zone by sea or air automatically means that the vessel or aircraft in question becomes liable to attack. The general requirements of identification of military objectives, thus, continue to apply, and vessels and aircraft exempt from attack continue to enjoy their special protection inside the zone.

¹⁰³ SRM, Rule No. 106(b).

¹⁰⁴ SRM, Rule No. 105.

¹⁰⁵ SRM, Rule No. 106(a).

When a zone is established, due regard must be given to the rights of neutral States to legitimate uses of the areas affected.¹⁰⁶ This means that neutral vessels and aircraft must be provided with safe passage in the following situations: When a zone, as a result of its geographical extent or location, significantly impedes free and safe access to the coasts and port facilities of neutral States¹⁰⁷ or when normal navigation routes are affected. However, this requirement does not apply in situations in which it is not possible to provide such passage as a result of military necessity.¹⁰⁸

It is hardly possible to establish a requirement for effective enforcement of the zone in line with the enforcement of blockades. Nevertheless, it is obvious that a party establishing a zone cannot expect the zone to be respected if it is not effectively enforced.

The establishment of a zone must be publicly declared to all belligerent and neutral States.¹⁰⁹ The notification must provide information about the commencement, duration, physical location and extent of the zone, as well as the restrictions imposed. It shall be done in such a way to ensure that the vessels and aircraft affected are given the opportunity to meet these requirements, thereby avoiding being exposed to danger or otherwise conflicting with the zone.

Moving safety zones

Moving safety zones -- for instance, known from the United Kingdom's practice during the Falklands War as "defence bubbles" -- may be established if the size of the zone, the restrictions on maritime traffic and air traffic resulting from the zone, and the applied control measures do not exceed what is strictly required by military necessity and are not disproportionate. Furthermore, the establishment of the zone must be made public. However, it cannot be required that the course of the craft that the moving safety zone protects be made public, because that would make the craft vulnerable to the enemy and, thus, spoil the primary purpose of the establishment of the zone. It suffices that the public notification contains information about the extent of the zone, indicated as the safety distance to the protected unit. In addition, the conduct that will be perceived as hostile and could potentially trigger a reaction must be specified.

No-fly zones are dealt with in Chapter 13 on air operations.

¹⁰⁶ SRM, Rule No. 106(c).

¹⁰⁷ SRM, Rule No. 106(d)(i).

¹⁰⁸ SRM, Rule No. 106(d)(ii).

¹⁰⁹ SRM, Rule No. 106(e).

4.6.8 Control over areas in the immediate vicinity of naval operations

Belligerents are entitled under customary international law to undertake control measures in areas in the immediate vicinity of hostilities¹¹⁰ in order to ensure that their operations are not compromised.

Hence, belligerents may prohibit sailing through or flying over areas in which fighting is taking place. Restrictions may also be imposed on the activities of nearby merchant vessels -- for instance, communication with other vessels to the detriment of the ongoing fighting.

4.6.9 Ruses of war and perfidy

Ruses of war are described in more detail in Section 2.2 of Chapter 10, which also describes the sometimes difficult, albeit important, distinction between ruses of war and perfidy, the latter of which is prohibited at all times.¹¹¹

Traditionally, the latitude for ruses of war has been increased in naval warfare compared to land and air operations. One example is the right to **fly a false flag**. This right is fully recognised under the law of naval warfare whereas in land and air operations the use of flags, emblems, uniforms, and the like of neutral States and, in certain circumstances, the enemy is prohibited.¹¹² In the light of technological developments -- particularly, the possibility of conducting *over-the-horizon** attacks, however, the practical relevance of the right to fly a false flag has diminished significantly. Today, the identification of other vessels is primarily undertaken by means of radar equipment and other advanced technologies, and the parties to a conflict are rarely within visual range of each other. Therefore, the flag of a vessel does not have any real importance in identification in the majority of cases, and so the right to fly a false flag loses its significance.

¹¹⁰ SRM, Rule No. 108.

¹¹¹ SRM, Rule No. 111, and AP I, Art. 37(1).

¹¹² AP I, Art. 39(3).

The right to use ruses of war in naval warfare is subject to the following restrictions:¹¹³

- Warships are prohibited from launching an attack while flying a false flag. This means that a warship may fly a false flag until the attack is launched, but the true flag must be revealed before fire is opened.
- The parties are at all times prohibited from actively simulating the status of:
 - hospital ships, small coastal rescue craft, or medical transports,
 - vessels guaranteed *safe conduct**, including *cartel** vessels, by prior agreement between the parties,
 - vessels on humanitarian missions, such as the transport of supplies indispensable to the survival of the civilian population,
 - vessels engaged in transporting cultural property under special protection (see Chapter 6),
 - passenger vessels engaged only in carrying civilian passengers,
 - vessels protected by the United Nations flag, and
 - vessels protected by the emblem of the Red Cross, Red Crystal or Red Crescent.

It is important to note that it is only the **active simulation** of one of the above categories that is prohibited.¹¹⁴ However, it is difficult to distinguish between what constitutes permitted passive simulation and what constitutes prohibited active simulation. This distinction has not become any easier with the emergence of new advanced technology. The mere transmission of an acoustic and/or electronic signature, which is often associated with merchant vessels, is not sufficient to violate the rule. However, the use of means and channels of communication as well as terminology reserved for a specific type of protected vessel will typically suffice. What constitutes active simulation must be determined on the basis of a specific assessment in each individual case.

4.7

Conduct of hostilities – measures short of attack

The measures dealt with in this section are not included in the category of ‘attack’ since they imply the use of a substantially lower degree of force. Instead, they are referred to as measures short of attack.

¹¹³ SRM, Rule No. 110.

¹¹⁴ SRM, Rule No. 110, Explanation.

These measures may only be undertaken by the warships of the belligerents since the vessels must also be competent to conduct hostilities (see Section 4.5.1. of this chapter.

A unique characteristic of the rules of naval warfare is the explicit and comprehensive right to direct military operations against the commercial interests of the enemy in order to weaken its economic foundation for warfare. This allows the belligerents to focus their operations on a group of enemy assets which are normally completely off limit since they do not constitute military objectives within the meaning of Article 52 of AP I.

The right to direct military operations against the enemy's economic assets at sea is implemented in what is traditionally referred to as prize* law, which permits belligerents to capture enemy vessels and, to some extent, neutral vessels. In the latter case, however, the objective of the rules is not to weaken the economic foundation of the enemy but to allow the parties to respond to vessels that do not respect their obligations of neutrality.

The right to capture applies to both vessels and aircraft of the enemy. For aircraft, see Section 3 of Chapter 13.

14.6. The parties may capture any enemy vessel outside neutral waters. Vessels exempt from attack as listed in section 4.2.1. are likewise exempt from capture and may thus only be captured if they cease to fulfil the conditions for exemption.¹¹⁵

The parties have a right to visit and search enemy vessels when there are reasonable grounds for suspecting that they are subject to capture.¹¹⁶

Capture of enemy vessels does not require prior visit and search if the enemy status of the vessel can otherwise be determined.

Enemy vessels do not have to constitute a military objective in order to be liable to capture. It is sufficient that the vessel is hostile, i.e., it belongs to the enemy. Vessels that constitute military objectives may be captured at any time as an alternative to attack.

In addition to the vessel, its cargo is also the object of capture unless it does not belong to the enemy. The cargo of neutral States on board enemy vessels may only be captured if it is contraband.

¹¹⁵ SRM, Rule No. 135.

¹¹⁶ SRM, Rule No. 118.

The true affiliation of a merchant vessel and, accordingly, its potential enemy status may be determined by its registry, ownership, charter, or other criteria.¹¹⁷ **The fact that a merchant vessel is flying the flag of an enemy State is conclusive evidence of its enemy character.**¹¹⁸ However, this is not the case when a merchant vessel is flying the flag of a neutral State because a neutral flag merely creates an assumption about the nationality of the vessel.¹¹⁹ This means that its neutral status may be rejected in cases in which the actual circumstances indicate that the true affiliation is not the one demonstrated by the flag.

This is the case, for instance, when the registry of the vessel proves not to comply with the rules or the registration has been transferred to a neutral State for the sole purpose of avoiding the consequences of being an enemy vessel.

14.7. When reasonable grounds exist for suspecting that a merchant vessel flying a neutral flag in fact has enemy character, its status may be established by the exercise of the right to visit and search.¹²⁰

If the circumstances do not allow visit and search at sea, the merchant vessel may be diverted to a port where it is safe to verify its status.¹²¹

Neutral merchant vessels sailing in convoy are exempt from the exercise of the right to visit and search if the following conditions are met:

- they are bound for a neutral port;
- they 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 convoy;
- the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
- the commander of the neutral warship provides, if requested, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.¹²²

117 SRM, Rule No. 117.

118 SRM, Rule No. 112.

119 SRM, Rule No. 113.

120 SRM, Rule No. 114.

121 SRM, Rule No. 121.

122 SRM, Rule No. 120.

It follows from this rule that neutral States have a right to protect their merchant vessels by forming multinational convoys, provided that the cumulative conditions of the rule have been met.

In the event that, after **visit and search have been completed**, reasonable grounds still exist for assuming that a merchant vessel has enemy character, the vessel may be captured.¹²³

Neutral merchant vessels may be captured only if, as a result of their conduct, they have lost their protection against attack or if the completion of visit and search reveals that they:

- are carrying contraband;
- are transporting individuals who are embodied in the armed forces of the enemy;
- are operating directly under enemy control, orders, charter, employment, or direction;
- present irregular or fraudulent documents, lack necessary documents, or destroy or conceal documents;
- are violating regulations established within the immediate area of naval operations; or
- are breaching or attempting to breach a blockade

Goods on board neutral merchant vessels are subject to capture only if they are contraband. Contraband is defined as goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict.¹²⁴ In order to exercise the right of capture of neutral vessels, the belligerents must have published reasonably specific contraband lists.¹²⁵

As an alternative to visit and search with a view to capture, belligerents may choose to **divert** the neutral merchant vessel in question from its declared destination to a destination designated by the capturing party.¹²⁶ This form of diversion is useful when the party has no interest in capturing the vessel in question but merely wishes to prevent it from sailing in certain areas.

¹²³ SRM, Rule No. 116

¹²⁴ SRM, Rule No. 148

¹²⁵ SRM, Rules Nos. 147 and 149.

¹²⁶ SRM, Rule No. 119.

Having captured an enemy or neutral merchant vessel, the courts (prize courts) of the captor must decide whether the title to the captured ship and cargo may be transferred to the capturing State.¹²⁷ The title to the vessel and its cargo will not be transferred to the capturing State until the moment when the courts so decide.¹²⁸

In exceptional cases, enemy and neutral merchant vessels seized with a view to capture may be destroyed instead of being captured. However, destruction may take place only when the circumstances prevent the vessel from being captured and provided that:

- the safety of the crew and passengers, if any, is provided for;
- the vessel's documents and papers relating to the prize are safeguarded; and,
- if feasible, the personal effects of the crew and passengers, if any, are saved.¹²⁹

Furthermore, as regards destruction of civilian property, all alternatives to destruction must have been exhausted; and, subsequently, the destruction shall be subject to adjudication.¹³⁰

4.7.1 Special issues regarding captured warships, military aircraft and enemy vessels which constitute military objectives by use

These rules on the capture of enemy vessels do not apply to enemy warships and military aircraft. If such ships or aircraft are captured, they become war booty of the enemy.¹³¹ This means that title is automatically transferred to the capturing party at once without submission to a court of law. The same holds true for vessels, which constitute military objectives, and are captured as an alternative to attack. Reference is made to Section 2.8 of Chapter 10 for a more detailed description of the rules on confiscation of war booty.

127 SRM, Rule No. 138.

128 SRM, Rule nr. 139 Commentary

129 SRM, Rules Nos. 139 and 151.

130 SRM, Rule No. 151.

131 SRM, Rule No. 138, Commentary.

4.8

Protection of the sick, wounded, and shipwrecked

The parties to an armed conflict are subject to a series of obligations to help and protect the sick, wounded, and shipwrecked. The contents and scope of these obligations which also apply to naval warfare are described in Chapter 7 of this Manual. This section is limited to a few comments on the obligation to come to the rescue of the sick, wounded, and shipwrecked immediately after each engagement, as applicable at sea.

14.8. After each engagement, the parties to the conflict must, without delay, take all possible measures to search for and collect the shipwrecked, wounded, and sick.¹³²

Due to the difficult conditions at sea, it is essential to the chances of survival of the sick, wounded, and shipwrecked that search and collection is commenced as soon as possible.

The obligation to act without delay is absolute. However, it is limited to what is possible in the specific circumstances. What is possible is determined on the basis of a military assessment that may take into account operational security and available facilities, etc. In practice, this means that only in exceptional cases will submarines, for instance, be required to take part in rescue operations after having been involved in attacks. The reason is that it will often present a significant security risk to a submarine if it were to surface. Moreover, the limited space on submarines rarely permits taking extra people on board.

In situations in which a vessel is unable to collect the wounded after an attack, other vessels with rescue facilities in the vicinity, such as hospital ships, should be alerted and asked to provide assistance.¹³³

4.9

Deprivation of liberty in the context of armed conflict at sea

The rules on deprivation of liberty, described in Chapter 12, apply to armed conflict at sea. These rules apply in the event deprivation of liberty takes place in connection with an attack on enemy units or measures short of attack, such as capture.

¹³² GC II, Art. 18.

¹³³ Commentary on GC II, Art. 18.

Consequently, the crew and other military units on board enemy warships and auxiliary vessels have prisoner of war status and must be treated accordingly. This also applies to any civilian employees on board warships.

5. Non-international armed conflict (NIAC)

Naval operations in NIAC will not be subjected to a comprehensive separate analysis.

There are two explanations for this. First, Denmark has no experience with participation in naval operations as part of a NIAC. Although Denmark has undertaken assignments in direct geographical proximity to a NIAC the operations Denmark has contributed to have not been part of the ongoing NIAC.

Example 14.2: Example of Danish participation in operations related to a NIAC

One example is Operation RECSYR in which Danish naval forces helped transport chemical substances out of Syria. At the time, the Syrian regime was engaged in a NIAC with OAGs in Syria, but the Danish task of removing chemical substances from Syria was not a direct part of the NIAC.

Outside a Danish context, the number of examples of naval operations that are part of a NIAC is also limited. The primary reason is that it is rarely the case that a non-State party achieves actual naval capacities.

Example 14.3: Example of a naval operation in NIAC

The Liberation Tigers of Tamil Eelam (LTTE) fought Sri Lankan rule with a maritime unit known as the Sea Tigers, which is considered to be the most effective naval terrorist platform ever. The Sri Lankan fleet is estimated to have lost about half its maritime capacity due to the Sea Tigers' attacks. Moreover, the Sea Tigers conducted hijackings and suicide attacks using *waterborne improvised explosive devices*.

Second, the special conditions applicable in naval operations are intrinsically linked to States. As seen in Section 3 above, there is a large body of rules that regulate naval warfare i.e. naval operations in IAC. The primary focus of these rules is to protect neutral shipping and ensure the continuous use of the high seas and free navigation by neutral states, while allowing for belligerent states to conduct hostilities at sea in pursuance of their national interests as required and limited by military necessity

The special rules on naval warfare, therefore, have had no significant influence on the law applicable to NIAC. This means that, if Danish naval forces become engaged in naval operations as part of NIAC, Denmark would have to comply with the general rules of international humanitarian law. Reference is made to the other chapters of this Manual.

In addition, the rules applicable to hostilities at sea, such as the rules on special means of naval warfare described in Section 4.5 above, would have to be complied with.

6. Naval operations in time of peace

6.1

Introduction

This section addresses the legal framework governing the freedom of naval forces to navigate and operate in time of peace, which is essential to the influence that may be exercised by naval forces.

During operations in time of peace, it is absolutely essential to clarify whether force may be used and, if so, to what degree and intensity.

6.2

Boarding operations (maritime interdiction operations)

The legal basis for a Danish warship to board a non-government ship on the high seas may derive from the flag State's consent and the rules of international law.

In time of peace, enforcement-related naval operations are most often referred to as maritime interdiction operations (MIO). The subjects considered in this chapter fall into two categories:

- a. MIO operations that require flag State consent prior to boarding:
 - ii. Narcotic drugs
 - iii. Terrorism
 - iv. Weapons of mass destruction
 - v. Human trafficking

- b. MIO operations that do not require flag State consent prior to boarding:
 - iii. Piracy
 - iv. Slave trade
 - v. Unauthorised broadcasting
 - vi. Vessels without nationality

In the above cases, however, the following ships may not be boarded:

- a. Warships that, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.¹³⁴
- b. Ships owned or operated by a State that are used only for governmental non-commercial service have complete immunity on the high seas from the jurisdiction of any State other than the flag State.¹³⁵

6.2.1 Flag State consent versus the consent of the master of the ship

Denmark requires the authorities of a flag State to give their consent for Danish forces to board ships flying a foreign flag. Similarly, foreign nations must obtain permission from the Danish authorities to board ships flying the Danish flag.

Some nations merely request the consent of the master of the ship prior to boarding.

When a flag State consents to boarding, the boarding cannot be assumed to take place with the consent of the master of the ship since it is unlikely the master of the ship would be interested in being boarded if involved in unlawful activities. Thus, a flag State's consent to boarding must not be confused with the classification of the type of boarding that is to be conducted. Boarding with the consent of the flag State does not necessarily constitute level I *boarding** (compliant boarding).

6.2.2 MIO operations that require flag State consent to boarding

The following topics on the high seas are considered:

- a. Narcotic drugs
- b. Terrorism
- c. Weapons of mass destruction
- d. Smuggling of migrants

¹³⁴ UNCLOS, Art. 95.

¹³⁵ UNCLOS, Art. 96.

Generally speaking, a Danish warship has neither a right to board nor other jurisdiction over ships flying foreign flags unless the flag State has consented to boarding. Domestic legal authority must also allow intervention.

14.9. Ships may sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in UNCLOS, are subject to its exclusive jurisdiction on the high seas.¹³⁶

6.2.2.1 Narcotic drugs

Article 108 of UNCLOS

Article 108 of UNCLOS addresses illicit traffic in narcotic drugs or psychotropic substances and stipulates that all States must cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions. Moreover, it stipulates that any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

UNCLOS does not in itself authorise boarding a ship suspected of smuggling narcotic drugs. However, the Convention stipulates that all States must cooperate on the suppression of illicit traffic in narcotic drugs engaged in by ships on the high seas **contrary to international conventions**. The regulations stipulated by international conventions therefore need to be addressed.

United Nations Convention against Illicit Traffic in Narcotic Drugs

and Psychotropic Substances of 20 December 1988¹³⁷

A Danish naval unit may notify the flag State if it has reasonable grounds for suspecting that a vessel exercising the right of freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another

¹³⁶ UNCLOS, Art. 92(1).

¹³⁷ By Royal Decree of 3 December 1991, Denmark has ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted on 19 December 1988 at the diplomatic conference in Vienna. The number of States Parties to the Convention was 170 on 1 September 2015.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, Art. 17(3).

party is engaged in illicit traffic, if the flag state is party to the convention. The unit may request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.¹³⁸ In connection with Denmark's ratification, a declaration was issued that the Convention does not apply to the Faroe Islands and Greenland.

If the consent of the flag State is obtained and narcotic drugs are found, they may be confiscated under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. For instance, each party must adopt such measures as may be necessary to enable confiscation of 1) proceeds derived from narcotic drugs offences defined in the Convention or property the value of which corresponds to that of such proceeds and 2) narcotic drugs and psychotropic substances, materials and equipment, or other instrumentalities used in or intended for use in any manner in offences addressed by the Convention.¹³⁹ Sections 75-77a of the Danish Criminal Code set out the Danish rules on confiscation.

A party must respond expeditiously to a request from another party to determine whether a vessel that is flying its flag is entitled to do so and to requests for authorisation to take appropriate measures.¹⁴⁰

The flag State may authorise the requesting party to, *inter alia*:

- (a) board the vessel,
- (b) search the vessel, and
- (c) if evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons, and cargo on board.¹⁴¹

The flag State may subject its authorisation to conditions mutually agreed between itself and the requesting party, including conditions relating to responsibility.¹⁴²

A party that has taken any action – succeeding flag State approval – must promptly inform the flag State concerned of the results of such action.¹⁴³ Any action must take

138 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, Art. 17(3).

139 1988 Convention on Narcotic Drugs, Art. 5.

140 1988 Convention on Narcotic Drugs, Art. 17(7).

141 1988 Convention on Narcotic Drugs, Art. 17(4).

142 1988 Convention on Narcotic Drugs, Art. 17(6).

143 1988 Convention on Narcotic Drugs, Art. 17(8).

due account of the need not to interfere with or affect the rights and obligations of coastal States. Jurisdiction must be exercised in accordance with the international law of the sea.¹⁴⁴

Boarding may only be carried out by warships or other ships clearly marked and identifiable as being on government service.¹⁴⁵

The Convention allows Denmark to approach the flag State and request authorisation to take appropriate measures with respect to the vessel when Denmark has reasonable grounds for suspecting that the vessel is engaged in illicit traffic.¹⁴⁶ So far, Denmark has not availed itself of this option.

It is also possible to enter into bilateral agreements to enhance the effectiveness of the suppression of illicit traffic in narcotic drugs at sea.¹⁴⁷ As yet, Denmark has not entered into any such agreements.

In the event that a party to a convention has reasonable grounds for suspecting that a vessel – flying its flag or not displaying a flag or mark of registry – is engaged in illicit traffic, this party may request the assistance of other parties to prevent the vessel from being used for such illicit traffic. The parties so requested must render such assistance within the means available to them.¹⁴⁸

6.2.2.2 Suppression of unlawful acts against the safety of maritime navigation

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (1988 SUA Convention) and the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 Protocol to the SUA Convention) are collectively referred to as the 2005 SUA Convention.¹⁴⁹ The 2005 SUA Convention aims at preventing terrorism and the proliferation of weapons of mass destruction. The 2005 SUA Convention is discussed before the topics of terrorism and weapons of mass destruction because

144 1988 Convention on Narcotic Drugs, Art. 17(11).

145 1988 Convention on Narcotic Drugs, Art. 17(10).

146 1988 Convention on Narcotic Drugs, Art. 17(3).

147 1988 Convention on Narcotic Drugs, Art. 17(9).

148 1988 Convention on Narcotic Drugs, Art. 17(2).

149 The 2005 SUA Convention consists of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 (2005 SUA Convention) and the related Protocol of 1 November 2005 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 SUA Protocol). Denmark ratified the 2005 SUA Convention on 23 July and 24 August 2018. By Royal Decree of 7 September 1995, Denmark has ratified the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation concluded at Rome on 10 March 1988 and the related Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

the 2005 SUA Convention addresses both terrorism and weapons of mass destruction. For instance, the 2005 SUA Convention prohibits sea transport of weapons of mass destruction and dual use items if they are used together with weapons of mass destruction

Any parties to the Convention suspecting that a vessel is carrying an illicit cargo may request the flag State for authorisation to board and search the vessel.

The consent given by a flag State to another State to board the vessels of the flag State does not entail authorisation to exercise jurisdiction. The State wishing to board must apply to the flag State for separate authorisation to exercise jurisdiction. See also Section 6.2.4 below.

Scope of application

The Convention applies if a ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.¹⁵⁰

In cases in which the Convention, does not apply (see above), it nevertheless applies if the offender or the alleged offender is found in the territory of a State Party other than the State referred to in the above paragraph.

The 2005 SUA Convention does not apply to the activities of armed forces during an armed conflict or to a State's use of military forces on official duty when such duty is regulated by other international law.¹⁵¹

Offences

Under the 2005 SUA Convention, a person commits an offence if that person unlawfully and intentionally:

- a. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation, or
- b. performs an act of violence on board a ship if that act is likely to endanger the safe navigation of that ship, or

¹⁵⁰ 2005 SUA Convention, Art. 4.

¹⁵¹ 2005 SUA Convention, Art. 2bis(2).

- c. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship, or
- d. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship, or
- e. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship, or
- f. f. communicates information which he knows to be false, thereby endangering the safe navigation of a ship.¹⁵²

A person also commits an offence if that person threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs (b), (c) or (e) above, if that threat is likely to endanger the safe navigation of the ship in question.¹⁵³

Furthermore, a person commits an offence if that person:

- a. unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in article 3, paragraph 1, article 3bis, or article 3ter, or
- b. attempts to commit an offence set forth in article 3, paragraph 1, article 3bis, paragraph 1(a)(i), (ii) or (iii) , or subparagraph (a) of this article; or
- c. participates as an accomplice in an offence set forth in article 3, article 3bis, article 3ter, or subparagraph (a) or (b) of this article; or
- d. organizes or directs others to commit an offence set forth in article 3, article 3bis, article 3ter, or subparagraph (a) or (b) of this article; or
- e. contributes to the commission of one or more offences set forth in article 3, article 3bis, article 3ter or subparagraph (a) or (b) of this article, by a group of persons acting with a common purpose, intentionally and either:
 - i. with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence set forth in article 3, 3bis or 3ter; or
 - ii. in the knowledge of the intention of the group to commit an offence set forth in article 3, 3bis or 3ter.¹⁵⁴

¹⁵² 2005 SUA Convention, Art. 3.

¹⁵³ 2005 SUA Convention, Art. 4(4).

¹⁵⁴ 2005 SUA Convention art. 3quater.

The provisions of the Convention place the parties to it under an obligation to make the offences set forth in the Convention criminal offences (penal provisions) in national law.

Responsibilities of the master of the ship, the flag State, and the receiving State

The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who the master has reasonable grounds to believe has committed an offence set forth in article 3, 3bis, 3ter, or 3quater of the Convention.¹⁵⁵

The rules on non-refoulement also apply at sea – see Section 14.2.2 of Chapter 12.

Boarding and measures¹⁵⁶

Any measures taken must be carried out by officially authorised personnel (military or law enforcement personnel) from warships or other ships clearly marked and identifiable as being on government service.¹⁵⁷

When a flag State is requested to take measures against a suspect ship, the request should contain the following information:

- a. Name of ship
- b. IMO ship identification number
- c. Port of registry
- d. Ports of origin and destination
- e. Other relevant information¹⁵⁸

The flag State must respond to the request as expeditiously as possible.¹⁵⁹

¹⁵⁵ 2005 SUA Convention, Art. 8, see Art. 3, 3bis, 3ter and 3quater.

¹⁵⁶ 2005 SUA Convention, Art. 8bis.

¹⁵⁷ 2005 SUA Convention, Art. 8bis(10)(d-e).

¹⁵⁸ 2005 SUA Convention, Art. 8bis(2)

¹⁵⁹ 2005 SUA Convention, Art. 8bis(1).

If a State requests authorisation to board a ship of another State, the requesting State must ask the flag State to:

- a. confirm the nationality of the ship in question; and
- b. if nationality is confirmed, the requesting State must ask the flag State for authorisation to board and to take appropriate measures with regard to that ship which may include stopping, boarding, and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in the Convention has been committed.¹⁶⁰

When evidence of infringement of the 2005 SUA Convention is found on board the ship, the flag State may authorise the requesting State to detain the ship, cargo, and persons on board, pending receipt of disposition instructions from the flag State. The requesting State must promptly inform the flag State of the results of the boarding.¹⁶¹

When the ship is boarded, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorised actions.¹⁶²

The 2005 SUA Convention also contains provisions regarding terrorism and weapons of mass destruction. These subjects are dealt with separately below.

6.2.2.3 Terrorism

All States must take urgent action to prevent and suppress all active and passive support to terrorism.¹⁶³ The procedures referred to in Section 6.2.2.2 above regarding the exercise of jurisdiction must be adhered to in the treatment of terrorist acts.

Offences

A person is guilty of the offence of terrorism if that person unlawfully and intentionally conducts any of the following acts which, by their nature or context, are intended to intimidate a population or to compel a government or an international organisation to do or to abstain from doing any of the following acts:

- a. “uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or

¹⁶⁰ 2005 SUA Convention, Art. 8bis(5) cf. Art. 3, 3bis, 3ter and 3quater.

¹⁶¹ 2005 SUA Convention, Art. 8bis(6).

¹⁶² 2005 SUA Convention, Art. 8bis(9). Art. 8bis(10) provides further instructions.

¹⁶³ Security Council resolution 1456 (2003), see also 1373 (2001), 1390 (2002) and 1455 (2003).

- b. discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
- c. uses a ship in a manner that causes death or serious injury or damage; or
- d. threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii);”¹⁶⁴

The above circumstances constitute an offence under the Convention, as does the transport of terrorists:

*”Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, 3bis or 3quater or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.”*¹⁶⁵

Articles 3-3quater of the 2005 SUA Convention contain penalty provisions. When an act of terrorism falls within Danish criminal jurisdiction, not only the punishable acts referred to in the Convention but also all of the provisions of terrorism in the Danish Criminal Code (sections 114-114h) may be relevant under the circumstances.

6.2.2.4 Weapons of mass destruction and their components

Security Council resolution 1540 (2004) obliges all States to take effective precautions against the proliferation of weapons of mass destruction, means of delivery and related materials. The procedures referred to in Section 6.2.2.2 above regarding the exercise of jurisdiction must be adhered to in the handling of weapons of mass destruction, etc.¹⁶⁶

Any person commits an offence if that person unlawfully and intentionally transports on board a ship:

- a. any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

¹⁶⁴ 2005 SUA Convention art. 3bis (1) (a).

¹⁶⁵ 2005 SUA Convention art. 3ter.

¹⁶⁶ UN Charter, Art. 49, see Art. 39. See also UNSCR 1673.

- b. any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or
- c. any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or
- d. any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.¹⁶⁷

The 2005 SUA Convention makes the transport of biological, chemical, and nuclear material with an intention inconsistent with the guidance documents of the International Atomic Energy Agency a criminal offence.

Proliferation Security Initiative

The Proliferation Security Initiative (PSI) aims at combating the proliferation of weapons of mass destruction and improving the ability to intervene with respect to the unlawful transport of weapons of mass destruction and their means of delivery.

The PSI is based on existing rules in international law on port State control, coastal jurisdiction, and flag State jurisdiction. States participating in the PSI are under an obligation to board ships flying their flag when reasonable grounds exist for suspecting that a ship is unlawfully transporting weapons of mass destruction.

Furthermore, under international law, ships are to be boarded in internal waters, the territorial sea, and the contiguous zone when reasonable grounds exist for suspecting that a ship is unlawfully transporting weapons of mass destruction. If the suspicion is confirmed, the cargo may be seized.¹⁶⁸

The PSI cooperation focuses on the expansion of national rules rather than global rules. The PSI cooperation supplements the 2005 SUA Convention and the Nuclear Non-Proliferation Treaty (NPT)*.¹⁶⁹ Denmark participates in the PSI cooperation.¹⁷⁰

¹⁶⁷ 2005 SUA Convention art. 3bis (1) (b).

¹⁶⁸ Proliferation Security Initiative, Statement of Interdiction principles.

¹⁶⁹ Kraska, James et al., "International maritime security law", p. 786.

¹⁷⁰ The amendments to the 2005 SUA Convention are in accordance with the Proliferation Security Initiative, see the Danish Maritime Authority's memorandum of 1 February 2007 to the Legal Affairs Committee, REU general part, Appendix 352, p. 4.

Nuclear Non-Proliferation Treaty

Article II of the Treaty imposes the following obligations on the non-nuclear States:

“Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”

Under the 2005 SUA Convention, the States Parties to the Nuclear Non-Proliferation Treaty may transport nuclear materials by sea to or from the territory of, or under the control of, a State Party to the Nuclear Non-Proliferation Treaty (NPT), provided that the following conditions are met:

- a. The transfer or receipt is not contrary to the State Party's obligations under the NPT.
- b. The item or material is not contrary to the State Party's obligations under the NPT.¹⁷¹

6.2.2.5 Smuggling of migrants and trafficking in persons

Smuggling of migrants

Denmark must cooperate to prevent and suppress the smuggling of migrants by sea to the fullest extent possible and in accordance with international law.¹⁷² See Section 6.2.3.3 below on slavery.

The Protocol against the Smuggling of Migrants by Land, Sea and Air defines the smuggling of migrants as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.¹⁷³

¹⁷¹ 2005 SUA Convention, Art. 3bis(2).

¹⁷² Danish Executive Order concerning the Protocol against the Smuggling of Migrants by Land, Sea and Air of 15 November 2000, Art. 7. Pursuant to Royal Decree of 22 November 2006, Denmark became a party to the Protocol against the Smuggling of Migrants by Land, Sea and Air adopted by the United Nations in New York on 15 November 2000, supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000. See Executive Order No. 35 of 30 October 2008.

¹⁷³ Section 3 of the above Executive Order.

*”A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned and engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.”*¹⁷⁴

Thus, a State Party may request the flag State to confirm registry if the State Party has reasonable grounds to suspect that a vessel is:

- a. exercising its right of navigation in accordance with international law,
- b. flying its flag or displaying the marks of registry of another State Party, and
- c. engaged in smuggling of migrants by sea.¹⁷⁵

If the registry is confirmed, the State Party may request authorisation from the flag State to take the necessary measures with regard to that vessel. The flag State may authorise, *inter alia*, the requesting State:

- a. to board the vessel,
- b. to search the vessel, and
- c. if evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.¹⁷⁶

A State Party that has taken any measure referred to in the paragraph above must promptly inform the flag State concerned of the results of such measures. A State Party must respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so. A request for authorisation for boarding, search, and other appropriate measures with respect to the vessel and persons and cargo on board must also be expeditiously responded to.¹⁷⁷

A flag State may, consistent with article 7 of the Protocol, subject its authorization to conditions to be agreed by the flag State and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization

¹⁷⁴ Section 3 of the above Executive Order.

¹⁷⁵ Section 8(2) of the above Executive Order.

¹⁷⁶ Section 8(2) of the above Executive Order.

¹⁷⁷ Section 8(3) and (4) of the above Executive Order.

of the flag State, except those necessary to relieve imminent danger to the lives of persons, or those which derive from relevant bilateral or multilateral agreements.¹⁷⁸

In the event a flag State does not consent to intervention, the magnitude of the offence must be compared to the nature of the intervention, including the rights of smuggled persons, if any.

Vessels without nationality

A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be compared to a vessel without nationality may board and search the vessel. If evidence confirms the suspicion, the State Party must take appropriate measures in accordance with relevant domestic and international law.¹⁷⁹

Trafficking in persons

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, defines trafficking in persons as follows:

- a. a. the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b. the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) must be irrelevant where any of the means set forth in subparagraph (a) have been used;

¹⁷⁸ Section 8(5) of the above Executive Order, see Section 7.

¹⁷⁹ Section 8(7) of the above Executive Order.

- c. the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation must be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) above.¹⁸⁰

6.2.3 MIO operations that do not require flag State consent prior to boarding

6.2.3.1 Introduction

Special grounds exist for boarding in case of the following events on the high seas:¹⁸¹

- a. Piracy
- b. Slave trade
- c. Unauthorised broadcasting
- d. Ships without nationality

Pursuant to Article 86 of UNCLOS, Part VII of UNCLOS concerning the high seas applies to all parts of the sea that are not included in the exclusive economic zone, the territorial waters or the internal waters of a State, or in the archipelagic waters of an archipelagic State.

This distinction is also demonstrated in the illustration of maritime zones in Section 3.2 above (fig. 14.1). Article 110 of UNCLOS confers a special right to visit/board in cases of piracy, slave trade, unauthorised broadcasting, or ships without nationality and is included in Part VII of UNCLOS.

Due to Article 86 of UNCLOS, therefore, Article 110 may be read as if it does not apply to the exclusive economic zone. This is not the case. UNCLOS stipulates that the justification for boarding set out in Article 110 and other relevant rules of international law applies to the exclusive economic zone insofar as it is not incompatible with Part V of UNCLOS on the exclusive economic zone.¹⁸²

180 Danish Executive Order concerning the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 15 November 2000, supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000, Art. 3. Pursuant to Royal Decree of 16 September 2003 and after the Danish Parliament, by passing Act No. 380 of 6 June 2002, gave its consent thereto, Denmark has become a party to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000 signed at Palermo on 15 November 2000, see Executive Order No. 3 of 19 February 2004 of the Royal Danish Ministry of Foreign Affairs, Danish Law Gazette C

181 UNCLOS, Art. 110.

182 UNCLOS, Art. 58(2).

UNCLOS exclusively authorises visit in connection with boarding.¹⁸³ UNCLOS does not allow jurisdiction to be exercised. Interference in connection with boarding therefore requires other legal authority. More information about legal authority for interference is provided in Sections 6.2.3.2–6.2.3.5 above, and Section 6.2.2 above provides more information about legal authority in connection with consent. As regards MIO operations that do not require flag State consent prior to boarding, interference is allowed only if also provided for in domestic law.

6.2.3.2 Piracy

Definition of piracy – Article 101 of UNCLOS

Piracy consists of any of the following acts:

- a) any **illegal acts of violence or detention, or any act of depredation**, committed for **private ends** by the crew or the passengers of a private ship or a private aircraft, and directed
 - ii) on the **high seas, against another ship** or aircraft, or against persons or property on board such ship or aircraft;
 - iii) against a ship, aircraft, persons or property in a place **outside the jurisdiction of any State**;
- b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; and
- c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹⁸⁴

The definition of piracy includes any form of illegal act of violence, detention or depredation.

If an act is committed in the territorial sea that, on the high seas, would comply with the definition of Article 101 of UNCLOS, the act would fall within the jurisdiction of the coastal State to regulate and could be punishable, depending on the circumstances. In Denmark, such acts, depending on the circumstances, are punishable pursuant to section 183a of the Danish Criminal Code on hijacking of ships, etc. (known as the piracy provision).

¹⁸³ UNCLOS, Art. 110.

¹⁸⁴ UNCLOS, Art. 101.

Boarding a pirate ship – Article 110 of UNCLOS

Unless otherwise authorised by treaty, a warship which encounters a foreign ship on the high seas may only board it if reasonable grounds exist for suspecting that it is engaged in piracy. However, ships entitled to full immunity are exempt from the rule. There is no requirement for flag State consent in connection with the boarding of a suspected pirate ship flying a foreign flag.¹⁸⁵

Seizure and piracy – Article 105 of UNCLOS

All States have universal jurisdiction to seize pirate ships or ships taken by piracy and under the control of pirates, and to arrest persons and seize property on board.¹⁸⁶ Thus, a special legal basis exists under international law for States to exercise jurisdiction on board pirate ships. However, Denmark has yet to incorporate this rule into national law, which means that universal jurisdiction does not exist under Danish law. Criminal jurisdiction exists pursuant to the relevant general rules of the Danish Criminal Code in the event of a violation of section 183a of the Danish Criminal Code on hijacking of ships, etc. (known as the piracy provision).

On the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or a ship taken by piracy and under the control of pirates. The State may also arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed. Moreover, the courts may determine the action to be taken with regard to the ships, aircraft, or property in question subject to the rights of third parties acting in good faith.¹⁸⁷

Detention of suspected pirates

It follows from section 6 of the Danish Criminal Code that acts fall within Danish criminal jurisdiction when they are committed:

185 Churchill, R.R. & A.V. Lowe, 3ed, p. 210. See also James Kraska, "Grasping 'The Influence of Law on Sea Power'", p. 123, Naval War College Review, Vol. 62, No. 3, Summer 2009.

186 UNCLOS, Art. 105.

187 UNCLOS, Art. 105.

- a. within the Danish State,
- b. on board a Danish vessel or aircraft located within the territory of another State by a person belonging to or travelling on the vessel or aircraft, or
- c. on board a Danish vessel or aircraft located outside the territory of any State.¹⁸⁸

Investigation and prosecution of criminal offences subject to Danish criminal jurisdiction are undertaken pursuant to the provisions of the Danish Administration of Justice Act. This means, for instance, that a suspected pirate must be brought before a judge within 24 hours after his or her arrest.¹⁸⁹

Arraignment may take place *in absentia*.*

When suspected pirates are detained, human rights law must be observed.¹⁹⁰ More information is available in Section 5.3 of Chapter 12.

6.2.3.3 Slave trade

Slavery is defined as follows:

- a. "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."
- b. "The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."¹⁹¹

¹⁸⁸ Section 6 of the Danish Criminal Code.

¹⁸⁹ Danish Administration of Justice Act, Section 760(2), and Danish Weekly Law Reports, 2014.1044 Ø.

¹⁹⁰ Danish Defence has developed special applicable rules and provisions in this respect.

¹⁹¹ Danish Executive Order regarding Denmark's ratification of the Slavery Convention signed at Geneva on 25 September 1926, Art. 1. By Royal Decree of 6 May 1927, Denmark has ratified the following completed international translation signed at Geneva on 25 September 1926. The Executive Order has also been promulgated as No. 15 in Denmark's Treaties, 1927.

Prohibition of the transport of slaves

14.10. Every State shall take effective measures to prevent and punish the transport of slaves in ships authorised to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.¹⁹²

Warships have the following mandate with regard to ships

engaged in the slave trade

14.11. Unless otherwise authorised by treaty, a warship which encounters a foreign ship on the high seas may board it only if reasonable grounds exist for suspecting that it is engaged in the slave trade. However, ships entitled to full immunity are exempt from this rule.¹⁹³

Reference is made to Section 6.2.2.5 above on the smuggling of migrants.

6.2.3.4 Unauthorised broadcasting

A warship may board a ship on the high seas if there are reasonable grounds for suspecting that the ship is engaged in unauthorised broadcasting and the flag State of the warship has jurisdiction.¹⁹⁴

‘Unauthorised broadcasting’ means the transmission of sound radio and television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.

A State having jurisdiction (cf. the list below) may, if permitted by domestic legal authority, arrest any person or ship and seize the broadcasting apparatus provided that the State is:¹⁹⁵

- a. the flag State of the ship,
- b. the State of registry of the installation,
- c. the State of which the person is a national,
- d. any State where the transmissions can be received, or
- e. any State where authorised radio communication is suffering interference.

¹⁹² UNCLOS, Art. 99.

¹⁹³ UNCLOS, Art. 110(1)(b).

¹⁹⁴ UNCLOS, Art. 110(1)(c).

¹⁹⁵ UNCLOS, Art. 109(3) and (4).

6.2.3.5 Ships without nationality (flag State verification)

A warship may board a ship on the high seas if there are reasonable grounds for suspecting that:

- a. the ship is without nationality;¹⁹⁶
- b. though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship;¹⁹⁷ or
- c. the ship is sailing under the flags of two or more States and uses them according to convenience. The ship may not claim any of the nationalities in question with respect to any other State and may be equated to a ship without nationality.¹⁹⁸

6.2.4 Accidental finds

If an accidental find is made in connection with visit or on the basis of another justification for boarding, the exercise of jurisdiction over vessels flying the flag of another State is subject to flag State consent. With respect to a vessel without nationality, a Danish warship will have executive jurisdiction over the vessel and its cargo with the option of destroying unlawful cargo. As a rule, there will not be executive jurisdiction* over the crew unless Danish nationals are on board. This form of intervention is subject to national legal authority.

Example 14.4: An example of the extent of a State's jurisdiction is presented in the case of the S.S. LOTUS:

"Now the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention."¹⁹⁹

196 UNCLOS, Art. 110(1)(d).

197 UNCLOS, Art. 110(1)(e).

198 UNCLOS, Art. 92(2), see Art. 110(1)(d).

199 S.S. LOTUS case, pp. 18-19. Publications of the Permanent Court of International Justice, series A. – No. 10, September 7, 1927.

6.3

Use of force at sea in time of peace

14.12. Necessary and reasonable force may be used for the purpose of making a ship heave to if reasonable grounds exist for doing so (see figure 3.3 of Chapter 3). A visual or audible signal must be given to make a ship heave to. Thereafter, warnings shots may be fired. When all other possibilities for making a ship heave to have been exhausted, force may be used. In the event that force is used, such use must be proportionate and all measures must be taken to avoid bodily injury and loss of human life.

Principles for the use of force

The use of force may be essential to the execution of an operation. Therefore the framework for the use of force is illustrated by examples below.

On account of the special characteristics of the maritime environment, the use of force at sea in time of peace must be addressed in addition to what is described in Section 7 of Chapter 3. Reference is also made to this section.

Since the use of force is not addressed directly in UNCLOS, the relevant general rules of international law apply. The following examples constitute the international law framework for the use of force at sea in time of peace.

6.3.1 Three examples to illustrate the use of force at sea in time of peace

This section illustrates some fundamental guidelines for the use of force at sea in time of peace by means of examples and extracts from protocols.

Eksempel 14.5: S/S I'M ALONE

The schooner I'M ALONE, flying the British flag and registered in Canada, participated in the smuggling of alcoholic beverages into the US by remaining outside the US territorial sea and loading alcoholic beverages onto smaller boats, which then transported them into the US. The US Coast Guard cutter WOLCOTT pursued the I'M ALONE on 22 March 1929. The I'M ALONE escaped but was caught. The US Coast Guard cutter DEXTER joined the WOLCOTT in its 200 nautical mile long pursuit of the I'M ALONE and fired shots across the bow of the I'M ALONE and through the sails and rigging. The I'M ALONE was ordered to heave to but did not obey the order. Subsequently, the DEXTER fired shots against the hull of the I'M ALONE. The I'M ALONE sank after 30 minutes.²⁰⁰

200 Kraska, James et al., "International maritime security law", p. 760 ff.

A commission was set up to investigate the matter. The commission stated as follows: [The United States] "might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention."²⁰¹

The force used in the I'M ALONE case was not considered to be proportionate.

Eksempel 14.6: M/V SAIGA²⁰²

The oil tanker M/V SAIGA, flying the flag of St. Vincent and the Grenadines, was arrested by a Guinean patrol boat outside the exclusive economic zone of Guinea on 28 October 1997. The M/V SAIGA was fully loaded with oil, had a low freeboard, had a maximum speed of 10 knots, was unarmed, and showed no sign of resistance. Nevertheless, the Guinean patrol boat fired shots at the M/V SAIGA with large-calibre automatic weapons. In this case, Guinea claimed that its patrol boat had in vain requested the M/V SAIGA over the radio to heave to.

The International Tribunal for the Law of the Sea stated as follows in its decision:

"In considering the force used by Guinea in the arrest of the SAIGA, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention [UNCLOS] does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law."²⁰³

"The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered"[.]²⁰⁴

"Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries

201 Reports of International Arbitral Awards, S.S. "I'm Alone" (Canada, United States), 30 June 1933 and 5 January 1935, Volume III, p. 1615. The convention referred to in the quote above is: Convention between the United States of America and Great Britain to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States of 23 January 1924.

202 International Tribunal for the Law of the Sea, M/V SAIGA case (no. 2), Saint Vincent and the Grenadines v. Guinea, 1 July 1999.

203 SAIGA, para. 155.

204 SAIGA, para. 156.

to two of the persons on board.”²⁰⁵

The Tribunal concludes: “[...] there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice.”²⁰⁶

“For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the Saiga, and thereby violated the rights of Saint Vincent and the Grenadines under international law.”²⁰⁷

The force used in the SAIGA case was beyond what can be considered proportionate. Furthermore, no warning was issued, and no warning shot was fired prior to direct fire.

Eksempel 14.7: Guyana versus Suriname²⁰⁸

With reference to the I’M ALONE, RED CRUSADER and SAIGA cases, the Arbitral Tribunal accepts the argument “[...] that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.”

The case of Guyana v. Suriname emphasises the legitimacy of the use of force if such use is unavoidable, reasonable, and necessary.

6.3.2 Two examples of the use of force at sea in time of peace regulated by convention

6.3.2.1 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

*“When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.”*²⁰⁹

²⁰⁵ SAIGA, para. 158.

²⁰⁶ SAIGA para. 157.

²⁰⁷ SAIGA para. 159.

²⁰⁸ Award of the Arbitral Tribunal, (Guyana, Suriname) 17. September 2007, p. 147. Arbitral Tribunal Constituted pursuant to art. 287, and in accordance with annex VII of the United Nations Convention on the Law of the Sea.

²⁰⁹ Protocol of 2005 to the Convention for the Suppression of Unlawful acts Against the Safety of Maritime Navigation art. 8bis (9).

6.3.2.2 Agreement for the implementation of the provisions of the United Nations convention on the law of the sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks

“The inspecting State shall ensure that its duly authorized inspectors: (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.”²¹⁰

6.3.3 Three examples to illustrate the use of force by Danish warships at sea in time of peace

Example 14.8: RED CRUSADER

On 29 May 1961, the Danish warship NIELS EBBESEN attempts to arrest the British trawler RED CRUSADER near the Faroe Islands.

“At 03.22 hours one round of 127 mm. gun-shot was fired astern and to the right of the trawler, at a distance estimated at 2.100 metres with the elevation 24/r25. At 03.23 hours the first stop-signals were given by steamwhistle—signal K. At 03.25 hours one round of 127 mm. gun-shot was fired ahead and to the left, at the same estimated distance with the elevation 24/1 20. At 03.26 hours the signal K was repeated by steamwhistle.

It is established that no signal by radio, steamwhistle, blank shot or otherwise was attempted earlier than 03.23 hours[.]”

On the basis of the above, the Commission of Enquiry finds as follows:

“that, in opening fire at 03.22 hours up to 03.53 hours, the Commanding Officer of the “Niels Ebbesen” exceeded legitimate use of armed force on two counts:

- (a) firing without warning of solid gun-shot;
- (b) creating danger to human life on board the “Red Crusader” without proved necessity, by the effective firing at the “Red Crusader” after 03.40 hours.²¹¹

In the RED CRUSADER case, the Commission of Enquiry criticised the use of force due to the firing of a gun-shot without prior warning signal as well as the unnecessary risk to human life resulting from the direct fire.

Example 14.9: ARIYA

210 Agreement for the implementation of the provisions of the United Nations convention on the law of the sea of 10 december 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, art. 22 (1) (f).

211 Reports of International Arbitral Awards, Investigation of certain incidents affecting the British trawler Red Crusader, (United Kingdom, Denmark), Volume XXIX, pp. 521-539, 23 March 1962, pp. 536-538.

On 12 May 2011, the Danish warship ESBERN SNARE captured the alleged pirate ship ARIYA in the Indian Ocean. In the incident, the crew of the ESBERN SNARE shot and killed four Somali pirates and wounded another 11.

"At a distance of probably not less than 300 metres, several vain attempts were made by megaphone to request the alleged pirate ship to surrender. The crew on board the Esbern Snare observed that the alleged pirate ship aimed both RPGs (rocket-propelled grenades) and AK 47s (automatic weapons) at the Esbern Snare, which, if they hit their target from the given distance, could have killed or wounded the crew on board the Esbern Snare, and a hit could also have caused substantial damage to the Esbern Snare. The crew on board the Esbern Snare also observed that the hostages on board the pirate ship were hustled to the bow of the ship.

The marksmen on board the Esbern Snare then requested permission to open fire at the pirate ship, but the request was denied twice. Shortly thereafter, one of the marksmen on board the Esbern Snare noticed that an AK 47 was aimed directly at them and so the marksman decided to fire a shot at the pirate ship. Next, it was soon established that RPGs were also aimed at the Esbern Snare, and so shots were again fired at the pirate ship. The hit of the RPG generated smoke, but it did not explode. Around 200 shots were subsequently fired at the pirate ship. The marksmen fired shots, and shots were also fired from the heavy machine guns (TMG) on board.

It is not possible to establish for certain that the pirate ship fired shots at the Esbern Snare or whether any shots were accidentally fired when shots fired from the Esbern Snare hit the weapons in question. Hence, the Esbern Snare was not hit, but its crew have explained that they heard shots from the pirate ship. So have several of the freed Iranian hostages.

The operation against the pirate ship lasted about five minutes and then the pirates surrendered. The crew on board the Esbern Snare could then free the hostages, and the wounded pirates subsequently received treatment on board the Esbern Snare."²¹²

In the ARIYA case, the Danish Military Prosecution Service found that there was no reason to believe that a criminal offence had been committed that was pursued by the authorities and that the crew acted in **self-defence** to ward off an imminent unlawful attack by the pirates.

Example 14.10: SAJJAD

On 27 February 2012, the Danish warship Absalon fired at and boarded the alleged pirate ship SAJJAD in the Indian Ocean. Sixteen hostages were freed, but one Iranian and one Pakistani hostage lost their lives. Seventeen alleged Somali pirates were captured in the operation.

²¹² Press release of 20 July 2011 from the Danish Military Prosecution Service.

“The possibility that marksmen from the Absalon during the firing at ‘Jelbut 37’ [SAJJAD] are very likely to have caused the death of the two hostages does not change the fact that no reason exists for believing that a criminal offence should have been committed as firing with a view to stopping a vessel will unavoidably involve some risk of loss of human life.

In the specific case, the military prosecution service is of the opinion that no additional use of force took place other than warranted by the situation since the only alternative to the escalating use of force would be to let the vessel controlled by pirates escape.”²¹³

It is accepted in the SAJJAD case that firing at a vessel to stop it will unavoidably involve a risk to human life even though the rules on and guidelines for escalating use of force are followed. As mentioned in the introduction, it is a prerequisite that one of the conditions listed in figure 3.3 of Chapter 3 is met. The example is justified as use of force is absolutely necessary in order to make a lawful arrest.

6.4

Duty to render assistance at sea

14.13. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- a) to render assistance to any person found at sea in danger of being lost; and
- b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him [...].²¹⁴

6.5

Embargo

Embargo operations are typically conducted under an international mandate, which also lays down the framework for the use of force, if applicable. An embargo is not an act of war; contrary to a blockade which is an act of war. See further on blockades Section 4.6.6.

213 Press release of 3 July 2012 from the Danish Military Prosecution Service.

214 UNCLOS, Art. 98. See also the Safety of Life at Sea (SOLAS) and the Danish Merchant Shipping Act.

7. Naval glossary

Archipelagic waters

The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with Article 47 of UNCLOS and described as archipelagic waters regardless of their depth or distance from the coast.

Boarding

In this context, a boarding operation is defined as an operation in which a boarding team boards a vessel for a specific purpose. The boarding operation commences with hailing the vessel in question and lasts until the last deckhand has left it. Moreover, boarding is divided into three levels:

- a. LEV I boarding (unopposed/compliant/consensual):
LEV I boarding is a boarding operation in which the master of the boarded ship complies with the boarding authority's directions and orders and the following conditions are also met:
 - No immediate passive or active means of resistance are employed.
 - There is no intelligence to indicate a threat.
- b. LEV II boarding (non-cooperative/non-compliant/non-consensual):
LEV II boarding is a boarding operation in which there is no intelligence to indicate a threat and one or more of the following conditions are met:
 - The master of the boarded vessel does not respond to hailing, does not assist in clarifying his presence in the area, and persistently refuses to agree to the implementation of the boarding.
 - Passive obstructions have been put in place to delay, hamper, complicate, and/or deter boarding of the suspect vessel, and such obstructions can be handled by means of physical countermeasures.
 - Passive means of resistance have been put in place to delay, hamper, complicate and/or deter search and capture of the suspect vessel. These can be handled by physical countermeasures

c. LEV III boarding (opposed):

A boarding operation in which one or more of the following conditions are met:

- The master of the vessel refuses actively to consent to boarding.
- Passive means of resistance have been put in place with the clear intention of causing injury to the boarding team or creating very dangerous circumstances for the operation.
- Intelligence indicates a potential threat on board the suspect vessel or the vessel is suspected of carrying terrorist-related contraband..

Merchant vessel

Merchant vessel means a vessel other than a warship, an auxiliary vessel, or a State vessel (such as a customs or fisheries inspection vessel) that is engaged in commercial service only.²¹⁵

Hospital ship

A ship built or equipped by either of the parties to a conflict specially and solely with a view to assisting the wounded, sick, and shipwrecked and ships of the same character that are employed by the Red Cross or other humanitarian organisations or private parties and which have been officially approved by a party to a conflict.²¹⁶

Contraband

Goods which are ultimately destined for territory under the control of the enemy and which may be used in armed conflict.

Warship

A ship belonging to the armed forces of a State bearing the external marks distinguishing the character and nationality of such a ship, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.²¹⁷ Merchant vessels that have been converted into warships in accordance with HC VII fall within the definition. The presence of civilian mariners and civilians under fixed-term employment on board a warship does not change the status of the ship as long as the criteria above are met and a certain proportion of the crew is under regular military command.

²¹⁵ SRM, Rule No. 13(i), and ADFPUB 007-501, paras. 1-7.

²¹⁶ SRM, Rule No. 13, and GC II, Art. 22.

²¹⁷ SRM, Rule No. 13(g), UNCLOS, Art. 29, and HC VII, Art. 3 and 4.

Auxiliary vessel

A vessel that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service -- typically, logistical support for the armed forces in the form of transport of troops or military equipment, etc. Auxiliary vessels may be manned in full or in part by military personnel or exclusively by civilian personnel.

Naval warfare

Naval warfare is a special term which, in addition to **attack**, also includes **measures short of attack** as described in Section 4.7 above.

Maritime Interdiction Operations (MIO)

Maritime enforcement of rules through boarding and inspection. The purpose is to establish whether a ship is engaged in any illegal activities. The terms maritime interdiction operations and maritime interception operations are used interchangeably. Both are abbreviated as MIO*. This chapter uses the term maritime interdiction operations.

Neutral State

Any State that is not a party to a conflict. The term neutrality covers the special status under international law enjoyed by States which are not parties to an international armed conflict. Neutral waters are the **internal waters and the territorial sea** or archipelagic waters of neutral States.

Capture

Seizure of a vessel with a view to acquisition of title.

Shipwrecked

People in distress or rendered helpless at sea.


SUA Convention

2The 2005 SUA Convention consists of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 (2005 SUA Convention) and the related Protocol of 1 November 2005 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 SUA Protocol). Denmark ratified the 2005 SUA Convention on 23 July and 24 August 2018. By Royal Decree of 7 September 1995, Denmark has ratified

the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation concluded at Rome on 10 March 1988 and the related Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

Nautical mile

One nautical mile is equivalent to 1,852 metres.



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Implementation and enforcement

Implementation and enforcement

1. Introduction

This chapter presents various initiatives and measures which the Danish Defence has already implemented and continuously monitors to ensure that Danish soldiers observe the rules of IHL and HRL in practice. The chapter also looks into the consequences for the individual soldier, the commander, and the State if the rules are not observed.

1.1

Chapter contents

The chapter contains three main sections. Section 2 on implementation describes various measures Denmark is obliged to implement both in peacetime and during armed conflict to ensure compliance with IHL and HRL.

Section 4 on enforcement addresses both prosecution and other sanctions. The section falls into five sub-sections. Section 4.1 discusses prosecution by the International Criminal Court (ICC), and Section 4.2 describes the options available in Denmark for commencing prosecution for violations of IHL. Section 4.3 introduces prosecution in Denmark for crimes against humanity and genocide. Section 4.4 introduces the military prosecution service and the military disciplinary authority and, furthermore, outlines the rules of international law governing the institution of investigations in the event of suspicious deaths. Section 4.5 describes who can be responsible for violations of international law. The section falls into three sub-sections. Section 4.5.1 provides a general outline of the international law principles of State responsibility. Section 4.5.2 points out that Danish military personnel may incur liability for violation of the always applicable rules. Section 4.5.3 describes in detail the rules of international law on the command responsibility of superiors.

1.2

Scope in relation to other chapters

As this chapter is about the consequences of failing to comply with international law obligations, the chapter naturally interacts with all other chapters of the Manual. The chapter has been written so that it may be read independently.

2. Implementation

The Geneva Conventions, the Additional Protocols, and the European Convention on Human Rights (ECHR) commit the States Parties to ensure the effective implementation of these conventions in their respective national legal systems.¹

Furthermore, the Geneva Conventions and Additional Protocol I contain a Common Article 1, which requires the States Parties to respect and ensure respect for these conventions in all circumstances. This involves, among other things, an implementation obligation and an obligation to ensure that the conventions are actually observed by one's own forces.²

1 1907 Hague Convention, Art. 1, AP I, Art. 80, and ECHR, Art. 1.

2 CA 1 to GC and AP I, Art. 1(1).

This includes, for instance, a duty to fashion domestic law in a way to provide for the effective enforcement of sanctions against persons who commit or order violations of IHL.³ It also includes a duty for the States Parties to ensure that military commanders are aware of their obligations under IHL⁴ to prevent and sanction violations of IHL. This Manual is an example of such implementation.

The implementation of the ECHR is intended to ensure that domestic law is crafted in a way that any person under Danish jurisdiction is guaranteed the rights and freedoms contained in the Convention. When Danish armed forces are deployed in military operations, therefore, Denmark shall, as a part of its obligation to implement the ECHR, ensure that persons who are under Danish jurisdiction are secured, to the extent relevant, the rights and freedoms contained in the ECHR. Therefore, it will be crucial to clarify whether a person is within or outside Danish jurisdiction for the purposes of the ECHR. For more information, see Section 4 of Chapter 3 and Chapter 12 on persons deprived of liberty.

Other implementation measures include, for instance, issuing instructions and guidelines to the armed forces to ensure observance of IHL (including instructions with respect to specially-protected cultural objects⁵ and the rules of international law on weapons),⁶ the training and education of the armed forces (for instance, in connection with the organisation of exercises), and the establishment of the military legal adviser system.⁷

Ongoing **training and exercise, issue of instructions**, etc., ensures that the knowledge of international humanitarian law acquired by military personnel in peacetime translates into the individual soldier's compliance with the rules in armed conflict.

Upon the outbreak of an armed conflict and in situations in which the diplomatic relations between the parties to the conflict have actually been suspended, the parties must designate **protecting powers**.⁸ A protecting power is one or more States, or their substitutes, that are designated to attend to the interests of the parties to the conflict in all matters between the belligerents, for instance, to assist in the conclusion of agreements and the exchange of information and to make sure that civilians

3 GC I, Art. 49, GC II, Art. 50, GC III, Art. 129, GC IV, Art. 146, AP I, Art. 85(5) and Art. 87(1).

4 AP I, Art. 87(1) and (3). See AP I, Art. 80.

5 1954 Hague Convention, Art. 7.

6 CCW, Art. 6, CCW P II (1996), Article 14(3), CCW P V, Art. 11(1), Ottawa Convention, Art. 9, and Oslo Convention, Art. 9.

7 GC I, Art. 47, GC II, Art. 48, GC III, Art. 127, GC IV, Art. 144, AP I, Art. 80, 82, 83, 87(2), AP II, Art. 19, and SCIIHL, Rules Nos. 141 and 142.

8 GC I-III, Common Art. 8-11, GC IV, Art. 9-12, and AP I, Art. 5.

are given the opportunity to contact them, including in cases of complaints about the treatment they receive under the rules of IHL, etc.⁹ If no protecting power is designated, the ICRC may offer to fill the gap in the absence of diplomatic relations between the parties to the conflict.¹⁰ States have traditionally been reluctant to use this scheme; accordingly, only a few parties to conflicts have chosen to avail themselves of the opportunity. It happened in connection with the Suez conflict in 1956, the Goa conflict in 1961, and the conflict between India and Pakistan in 1971-72. Most recently, Argentina and the United Kingdom used protecting powers (Brazil and Switzerland, respectively) during the Falklands War in 1982.

3. Three types of international crimes particularly linked to armed conflict

From an overall perspective, three types of international crime are considered to be particularly linked to armed conflict and, therefore, the most relevant to introduce briefly in this Manual. The three types are war crimes, crimes against humanity, and genocide.

War crimes

War crimes are serious violations of IHL and customary international law in the area¹¹ and, therefore, can only be committed in situations in which IHL is applicable. IHL distinguishes between two different categories of war crimes. One category is comprised of a limited number of crimes that are collectively referred to as grave breaches of the Geneva Conventions and Additional Protocol I.¹² The term ‘grave breaches’ is used consistently in the following text. The other category is comprised of all other serious violations of IHL.¹³

With respect to **grave breaches**, all States are obliged to search for and prosecute persons believed to have committed or ordered such breaches, regardless of the nationality of the alleged offender or where the crime was committed (universal jurisdiction).¹⁴

⁹ GC IV, Art. 30.

¹⁰ AP I, Art. 5.

¹¹ ICC Statute, Art. 8, ICTY Tadic IT-94-1-T 1997, para. 613, and ICTY Boris Tadic IT-94-1-AR72 1995, para. 134. See SCIHL, Rule No. 156.

¹² GC I, Art. 50, GC II, Art. 51, GC III, Art. 130, GC IV, Art. 147, AP I, Art. 11, and AP I, Art. 85.

¹³ GC I, Art. 49(3), GC II, Art. 50(3), GC III, Art. 129(3), and GC IV, Art. 146(3).

¹⁴ See SCIHL, Rules Nos. 157 and 158.

A State may also choose to extradite the alleged offender to another State that has provided sufficient evidence and submitted a request for extradition.¹⁵

A single case in Denmark was related to grave breaches of the Geneva Conventions:

Example 15.1 of prosecution in Denmark for grave breaches:

In a case from 1995, a person residing in Denmark was convicted under the Danish Criminal Code for a great many acts of violence against fellow inmates while he was an “enforcer” in a Croatian prison camp. Some of these acts were extremely grave.

The Danish Supreme Court found that, since the offences were committed under identical circumstances, all offences should be considered collectively in relation to GC III and GC IV. Therefore, the condition of grave breaches had been met, and the offences could be tried in Danish courts. The Supreme Court imposed a sentence of imprisonment for a term of eight years.¹⁶

This chapter does not contain the full catalogue of war crimes listed in the Statute of the International Criminal Court (ICC Statute).¹⁷ Instead, a number of individual war crimes have been described separately in the relevant chapters of the Manual. There, it can be seen whether a specific act or omission corresponds to a rule of the ICC Statute. More information about the ICC is provided in Section 4.1 below.

Crimes against humanity

Crimes against humanity consist of various separate acts (underlying elements of the crime) -- for instance, murder or rape -- committed as part of a **widespread or systematic attack directed against any civilian population** when the offenders know that such an attack is being executed.¹⁸ The underlying elements of the crime (for instance, murder or rape) may separately constitute war crimes. The fact they are nevertheless considered as two materially different crimes, is due to the requirement of a systematic or widespread attack, which is one of the requirements for the acts to qualify as crimes against humanity. The crime is defined, for instance, in the Statute of the International Criminal Court and may be committed **both in peacetime and during armed conflict**.

¹⁵ GC I, Art. 49(2), GC II, Art. 50(2), GC III, Art. 129(2), GC IV, Art. 146(2), and section 8(vi) of the Danish Criminal Code.

¹⁶ Danish Weekly Law Reports, 1995.838 H.

¹⁷ ICC Statute, Art. 8.

¹⁸ ICC Statute, Art. 7, and e.g. ICTY Kunarac IT-96-23-T & IT-96-23/1-T, para. 434, and ICTY Naletilić & Martinović IT-98-34-T 2003, para. 232.

Genocide

The core element of the crime of genocide is the **intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such**, for instance, by killing members of the group or causing serious bodily or mental harm to its members. The crime is defined in the Genocide Convention and reproduced, for example, in the Danish Act on Punishment of the Crime of Genocide¹⁹ and in the ICC Statute.²⁰ The crime may be committed **both in peacetime and during armed conflict**.

Examples of genocide in history include the Holocaust during World War II, the genocide in Rwanda in 1994, and the Srebrenica massacre in Bosnia in 1995.

No conviction for genocide has occurred in Denmark, but Danish courts have commented on the possibility of doing so.²¹

4. Enforcement, prosecution, and other sanctions

The obligation of enforcement should here be understood as an obligation to respond and impose sanctions -- where necessary, under criminal law. This also applies to the violation of both IHL and HRL by Danish military personnel.

4.1

International Criminal Court (ICC)

The International Criminal Court (ICC) commenced operations in 2002. The Court has a mandate to investigate and prosecute persons suspected of having committed or otherwise participated in war crimes, crimes against humanity, and genocide.

It must be considered somewhat unlikely that a Danish soldier will be prosecuted by the ICC. This is due to the fact that the Court is complementary (secondary)

¹⁹ Genocide Convention, Art. 2, and Danish Act No. 132 of 29 April 1955.

²⁰ ICC Statute, Art. 6.

²¹ Danish Weekly Law Reports 2012.2399 H.

to national criminal jurisdictions²² or courts. Therefore, as a point of departure, prosecution by the ICC for a crime covered by the ICC Statute will only occur in cases in which national courts are either unwilling or unable to commence legal proceedings themselves.²³

In this context, it should be noted that the Danish Military Penal Code and the Danish Administration of Justice Act provide assurance that criminal proceedings relating to offences that are also covered by the Statute of the ICC may be commenced in Denmark.

The Statute of the ICC has been incorporated into Danish domestic law by the Danish Act on the International Criminal Court,²⁴ which makes possible cooperation with the Court. The Act provides no actual penal sanctions for crimes covered by the Statute of the ICC. Such sanctions must be found in Danish criminal law, see Section 4.2 below.

4.2

Prosecution in Denmark for violations of IHL

Unlike the other sections of the chapter, which deal with IHL and international law from a more general perspective, this section looks into selected **aspects of Danish criminal law** which, according to circumstances, may be relevant in the context of the criminal prosecution of persons in Denmark for violations of IHL.

A Danish soldier or crew member cannot be convicted directly for violations of IHL. Any criminal liability must be established on the basis of the general penal provisions of Danish law, for instance, in the Danish Criminal Code or the Danish Military Penal Code.

The most important parts of substantive Danish criminal law in this area consists of the Danish Military Penal Code, the Danish Criminal Code, and other special statutes regulating this area (for instance, the Danish Act on Punishment of the Crime of Genocide),²⁵ whereas criminal prosecution is conducted in accordance

22 ICC Statute, e.g. preambular paragraph 10, Art. 1 and Art. 17.

23 ICC Statute, Art. 17, see Art. 13 and Art. 53.

24 Danish Act No. 342 of 16 May 2001.

25 Danish Act No. 530 of 24 June 2005 as amended by Danish Act No. 494 of 17 June 2008 (Military Penal Code), Danish Consolidation Act No. 873 of 9 July 2015 (Criminal Code), Danish Act No. 132 of 29 April 1955 (Genocide Act) and Danish Act No.

with the provisions of the Danish Administration of Justice Act and the Danish Military Administration of Justice Act.²⁶ The acts apply both in peacetime and during armed conflict.

The primary provision of the **Danish Military Penal Code** for violations of international humanitarian law is section 36, which states, for instance, that any improper use of the protective emblems and signs, perfidy, and any use of prohibited methods of warfare and weapons are criminal offences. In addition, a number of other instances could be referred to other provisions of the Code, including, for instance, **section 27 on grave dereliction of duty**.

Example 15.2 demonstrating how a prohibition in international law has been incorporated into Danish criminal law:

If a Danish soldier is charged with having used the protective emblem of the Red Cross in violation of IHL, the soldier will not be prosecuted directly pursuant to AP I or GC I, etc. Rather, the rules of Danish criminal law must be used. If a criminal offence has been committed, section 36(1) or section 27 of the Danish Military Penal Code on grave dereliction of duty, therefore, might be relevant in such a case, depending on the circumstances.

Moreover, the Danish Military Penal Code explicitly authorises sanctions during armed conflict for:

- War treason²⁷
- Espionage²⁸
- Deliberately altering ammunition in such a way that the effect is deteriorated or absent or exposes persons to danger²⁹
- Any deliberate attempt, contrary to one's duties, to evade battle or to bring about surrender³⁰
- Any deliberate disclosure of military secrets³¹
- Contacting the adversary without permission³²
- Pillage³³
- Looting of the property of the dead³⁴

395 of 12 July 1946 as amended (War Crimes Act).

26 Danish Consolidation Act No. 1308 of 9 December 2014 as amended and Danish Act No. 531 of 24 June 2005.

27 Section 28 of the Danish Military Penal Code.

28 Section 29 of the Danish Military Penal Code.

29 Section 30 of the Danish Military Penal Code.

30 Section 31 of the Danish Military Penal Code.

31 Section 32 of the Danish Military Penal Code.

32 Section 35 of the Danish Military Penal Code.

33 Section 37 of the Danish Military Penal Code.

34 Section 38 of the Danish Military Penal Code.

In addition to the provisions above, the Danish Military Penal Code and the Danish Criminal Code also contain provisions on dereliction of duty,³⁵ acts of omission,³⁶ necessity,³⁷ and self-defence.³⁸ The Danish Military Penal Code provides a legal basis for increasing sentences if violations of the Code have been committed during armed conflict or if the violation has been committed by an act of torture.³⁹

The general part of the Danish Criminal Code (parts 1 to 11) provide for the general conditions for the establishment of criminal liability.

For instance, it is a condition that:

- An act punishable under Danish law has been committed
- The act has been committed intentionally or, for certain offences, negligently⁴⁰
- No criminal defence applies
- Criminal liability has not ceased⁴¹

The general part of the Danish Criminal Code is applicable to military operations unless otherwise specified.

Criminal liability is imposed on any person who has committed or **attempted** to commit the offence and any person who has been **complicit** in the commission of the offence.⁴²

The special part of the Danish Criminal Code (parts 12 to 29) and the Danish Military Penal Code provide that certain acts or omissions are criminal offences. Provisions of particular relevance in this context, for instance, are section 237 of the Criminal Code on homicide, sections 244 to 246 on assault and battery, aggravated assault, and section 291 on malicious damage.

35 Part 2 and section 27 of the Danish Military Penal Code.

36 Section 33 of the Danish Military Penal Code.

37 Section 14 of the Danish Criminal Code.

38 Section 13 of the Danish Criminal Code.

39 Section 27 (a) of the Danish Military Penal Code, Danish Act No. 530 of 24 June 2005 as amended by Danish Act No. 494 of 17 June 2008.

40 It follows from section 19 of the Danish Criminal Code that criminal liability for offences under the Code requires intent, whereas no offences committed due to negligence may be subject to criminal sanction unless specifically provided for. As far as other offences are concerned, criminal liability requires, at a minimum, a negligent act unless otherwise specifically provided for.

41 E.g. because prosecution for the offence is time-barred.

42 Sections 21-24 of the Danish Criminal Code.

Criminal jurisdiction

Sections 6 to 12 of the Danish Criminal Code provide for Danish criminal jurisdiction, i.e., the rules specifying which offences may be tried in Danish courts. For instance, acts committed within the territory of another State by a person who is a Danish national, is a permanent resident in the State of Denmark, or otherwise resides permanently within the State of Denmark are subject to Danish criminal jurisdiction if the act is also a criminal offence under the laws of the State in which the act was committed (dual criminality) or if the act was aimed at someone with such ties to Denmark, see section 7 of the Danish Criminal Code. Danish criminal jurisdiction also applies to certain serious offences against the Danish State, committed outside the Danish State, or acts falling within the scope of international instruments obliging Denmark to have criminal jurisdiction, see section 8 of the Danish Criminal Code, as well as acts falling within the Statute of the International Criminal Court, see section 8a of the Danish Criminal Code.

As mentioned above, Danish criminal responsibility may be established only on the condition that no criminal defence applies. If, for instance, the conditions for self-defence or necessity are met, any act committed in violation of a penalty provision will not be a punishable offence.

Self-defence

It follows from section 13(1) of the Danish Criminal Code that acts will not be subject to penal sanction if they were necessary to resist or avert an unlawful attack that had begun or was imminent and did not manifestly exceed the limits of what is reasonable in view of the aggressor and the importance of the interest assaulted.

The provision describes the conditions that need to be satisfied to allow a person to resist or avert an unlawful attack without committing a punishable offence. The provision applies, for instance, to any attack causing serious harm to the life, body, liberty, or property of a person. This criminal defence requires proportionality between the attack and the response, which means that not all responses to attacks amount to a criminal defence. Therefore, the act of self-defence may not manifestly exceed reasonable limits.

It is also a condition that the act of self-defence must be aimed at the aggressors self. Therefore, the act of self-defence may never be aimed at a third person. Reference is made to Sections 7.5 and 7.6 of Chapter 3 for more information about extended self-defence.

Necessity

Section 14 of the Danish Criminal Code on necessity is applied in practice only when the provision on self-defence is not applicable. It follows from the provision that an act that would otherwise be a punishable offence will not be punished if it was necessary to avert imminent injury to a person or damage to property and the offence is deemed of relatively minor importance.

Contrary to self-defence situations, acts committed in situations of necessity may be directed at items or valuables belonging to third persons.

Duty of obedience

15.1. Military personnel at all levels have a duty to obey all **lawful superior orders**. Manifestly unlawful orders must be disobeyed. + NIAC⁴³

The duty of obedience implies a duty to obey all superior orders that are not manifestly unlawful. In the event it does not happen, steps may be taken, when and as appropriate, to institute disciplinary or criminal proceedings for disobedience or dereliction of duty. A superior order, for instance, may be an oral or written order instructing the soldier to act within certain limits. RoE, including the soldier's cards, are an example of a mission-specific framework directive that constitutes a written order. This Manual is applicable to every member of the Danish Defence. Therefore, the authorities of the Danish Ministry of Defence should consult the Manual in connection with the preparation of mission-specific directives and other orders for the purpose of ensuring compliance with the provisions of the Manual.

Examples of manifestly unlawful orders are orders to commit war crimes, crimes against humanity, or genocide. It is not a punishable offence to disobey a manifestly unlawful order. On the other hand, obeying a manifestly unlawful order may be punishable.

43 See SCIH, Rule No. 154.

4.3

Prosecution in Denmark for crimes against humanity and genocide

Crimes against humanity are not listed as separate offences in Danish domestic law, but the individual underlying elements of the crime are subject to prosecution through a combination of the provisions of the Danish Military Penal Code and the Danish Criminal Code. Genocide is punishable pursuant to the Danish Act on Punishment of the Crime of Genocide.⁴⁴ See Section 4.2 above, where this topic is briefly addressed.

4.4

Introduction to the military prosecution service and the military disciplinary authority

The military prosecution service

In Denmark, the Danish Military Prosecution Service (MPS) is responsible for investigating and prosecuting military criminal cases. MPS has authority to prosecute all military criminal cases. MPS is independent of the military command system and, therefore, cannot receive instructions therefrom. In other words, the Military Prosecution Service decides at its own discretion whether there are valid grounds for commencing a case.

During armed conflict, MPS is authorised to hear and decide cases against:

- any person serving in the Danish Defence or accompanying their units
- prisoners of war
- medical personnel and chaplains who are detained to assist prisoners of war unless otherwise provided by applicable international agreements
- any person who is guilty of violations of sections 28 to 34 and sections 36 to 38 of the Danish Military Penal Code, which deal with certain crimes against the effectiveness of the military forces and other crimes during armed conflict

Military authorities provide assistance in connection with specific criminal cases and inquiries at the request and direction of the judge advocate.⁴⁵

⁴⁴ Danish Act No. 132 of 29 April 1955.

⁴⁵ Military Prosecutor General's statement no. 2/2016, section 3.2.4

The Judge Advocate Office is subordinate to the Military Prosecutor General's Office, which acts as an appeals and supervisory body and, moreover, is responsible for the legal training and guidance of military legal advisers in the Danish Defence. The Danish Minister of Defence is superior to the Military Prosecutor General and the Judge Advocate Office and supervises them.⁴⁶

The military disciplinary commander

Military commanders with disciplinary powers are authorised to hear and decide cases pursuant to the Danish Military Disciplinary Code. The question as to which military commanders are also disciplinary commanders is addressed in more detail in a related executive order.⁴⁷ The executive order also provides that other military commanders -- typically, from the company command level and upwards -- are empowered to a certain extent to impose sanctions on subordinates for violations of military discipline.

During armed conflict, the Danish Military Disciplinary Code applies to any person serving in the Danish Defence or accompanying their units, prisoners of war, and medical personnel and chaplains who are detained to assist prisoners of war.⁴⁸

Disciplinary measures include

- 1) Reprimand
- 2) Arraignment before a superior
- 3) Work and additional exercise during a portion of free time
- 4) Additional service
- 5) Disciplinary fine⁴⁹

If a superior wants to impose disciplinary measures but does not have the authority to do so, the superior must report to his or her immediate superior. If this superior does not have the necessary competence to impose disciplinary sanctions, the case must be referred to the disciplinary commander, who is responsible for investigating and deciding the case.

⁴⁶ Section 6(3) of the Danish Military Administration of Justice Act.

⁴⁷ Danish Act No. 532 of 24 June 2005 and Executive Order No. 1196 of 8 December 2005 on Disciplinary Authority in the Danish Armed Forces.

⁴⁸ Section 3 of the Danish Military Disciplinary Code.

⁴⁹ Section 6 of the Danish Military Disciplinary Code.

Who should hear and decide the case?

The division of competence between the Danish Military Prosecution Service and the disciplinary commander entails that MPS hears and decides cases falling within the scope of the Danish Military Penal Code and that the disciplinary commander hears and decides cases falling within the scope of the Danish Military Disciplinary Code.

Therefore, the **nature of the act** determines whether the responsibility involves either criminal liability to be prosecuted by MPS or an administrative, disciplinary matter to be pursued by the immediate superior who is empowered to impose disciplinary sanctions. Grave acts committed intentionally – “on purpose” – or as a result of gross negligence on the part of the offender will be subject to prosecution as a military criminal case. Less grave or ordinarily negligent acts will, depending on the circumstances, be subject to the imposition of sanctions in military disciplinary proceedings.

If the disciplinary commander is in doubt as to whether criminal proceedings should be commenced, the disciplinary commander must submit the matter to the disciplinary chief, who, in cases of doubt, may refer the matter to the judge advocate for final decision.⁵⁰

Examples of how the Danish Military Prosecution Service has applied the Danish Military Penal Code during armed conflict

Below are a few examples illustrating the influence of IHL on Danish military criminal cases.

Example 15.3 of loss of protected status:

A **chaplain** was charged with an offence against section 36 of the Danish Military Penal Code for having misused his protected status under Article 24 of GC I, for instance, by throwing an explosive charge into an area and by participating in the preparation of hand grenades for use, and standing guard at a local defence post. Prosecution was later abandoned due to the insufficient evidence. In this connection, the judge advocate attached importance, in part, to the chaplain's statement that he was not aware of the purpose of throwing the explosive charge, which was supported by testimony, and, in part, to documentary evidence from the case.⁵¹

⁵⁰ Section 11 of the Danish Military Disciplinary Code.

⁵¹ 2012 Annual Report of the Danish Military Prosecution Service, p. 69.

Example 15.4 of possession of prohibited ammunition:

In another case, three soldiers were charged with an offence against section 36 of the Danish Military Penal Code for having been in possession of prohibited expanding bullets of the jacketed hollow-points type. The ammunition was not issued or authorised by the Danish Defence. This type of ammunition belongs to the category of **dumdum bullets** and is prohibited under the Hague Declaration (IV, 3) concerning Expanding Bullets of 1899.⁵²

The offence was subsequently changed to an offence against section 27(2) of the Danish Military Penal Code concerning dereliction of duty of a particularly grave nature. The three soldiers accepted fines for violation of this provision.⁵³

Reference is made to Section 3.8 of Chapter 9 for more information about the prohibition to use expanding bullets. See, for instance, Chapter 3, example 3.6, for a description of a situation outside armed conflict in which the prohibition is not applicable.

Section 27 of the Danish Military Penal Code has been used several times in connection with the Danish Armed Forces' participation in armed conflict.

Example 15.5 of the treatment of persons deprived of liberty:

In a case from Iraq in 2004, a captain and four sergeants were charged with dereliction of duty of a particularly grave nature, see section 15 of the then applicable Danish Military Penal Code, section 27(2) and subsection (1) of the current Military Penal Code, and with violation of Articles 27 and 31 of the Fourth Geneva Convention, in connection with **interrogations of three detainees conducted in a Danish camp**, for having instructed military police, who were guarding the detainees, to force the detainees to sit in stress-inducing positions, for having spoken to the detainees in a disparaging and defamatory manner, for having denied them access to drinking water and toilet access, and for having refused to hand out blankets to protect them against the cold at night. The captain had been tasked by her immediate superiors to question the detainees in order to determine whether they were ordinary criminals or presented a danger to the coalition and, consequently, should be transferred to a coalition partner. The Danish District court (court of first instance) acquitted the defendants on some of the charges, and the Danish High Court (court of second instance) acquitted them on all charges.⁵⁴

In rendering judgment, the High Court noted that the captain used the methods she had learned "and which no one had informed her could no longer be used. She had received no specific guidelines for the interrogations, and she was given no guidance from her superiors about enquiring about this. No one intervened during the individual interrogations. Nor did any of the detainees suffer any harm, and none of them complained."⁵⁵

52 2012 Annual Report of the Danish Military Prosecution Service, p. 69.

53 The information was received from MPS in connection with the preparation of the Manual.

54 Judgment rendered by the Copenhagen District Court on 12 January 2006 in Case No. 40.2120/2005 and Danish Weekly Law Reports, 2006.2927 Ø.

55 Danish Weekly Law Reports, 2006.2927 Ø.

Example 15.6 of improper use of a distinctive emblem:

In a case from Afghanistan from 2010, a private from the guard platoon and its platoon commander were both issued fines for gross failure to perform their military duties, see section 27(1) of the Danish Military Penal Code, in that, in violation of Article 44 of GC I and while standing guard, the private had been wearing a **cap with the distinctive emblems of the Red Cross and Red Crescent**, which his platoon commander had noticed but had failed to intervene or to draw his attention to the rules or impose a sanction.⁵⁶

Investigations in the event of suspicious deaths

International law includes treaty provisions⁵⁷ and case law⁵⁸ concerning the institution of an investigation in the event of a suspected violation of certain rules. The international human rights rules that commit Denmark to undertake investigations to ensure the effective protection of these rights in armed conflict are primarily concerned with the right to life and the right not to be subjected to torture. The duty to investigate under the ECHR depends on whether Danish jurisdiction applies. Section 4.2 of Chapter 3 provides information about situations in which Danish jurisdiction can be said to exist in the territory of a foreign State.

It can generally be said that it is a requirement under international law to commence an investigation in situations in which the death of an individual appears to be suspicious, and in situations of armed conflict in which the adversary's combatants have died in circumstances that must be regarded as suspicious, for instance, through the use of perfidy.

On the other hand, it is not in itself suspicious that combatants lose their lives in connection with their participation in hostilities or that civilians die as a result of collateral damage in connection with the conduct of lawful military operations in an armed conflict.⁵⁹ As a point of departure, these situations, therefore, are not covered by the duty to investigate.

The investigation must be effective to live up to the procedural requirements of human rights law.⁶⁰

56 2010 Annual Report of the Danish Military Prosecution Service, p. 53.

57 ECHR, Art. 1-3, and UN CAT, Art. 12. See, e.g., the non-binding communications of the UN Committee against Torture CAT/C/53/D/495/2012 and CAT/C/53/D/514/2012 on the duty to proceed to a prompt and impartial investigation under Article 12.

58 E.g. ECtHR, *Jaloud v. The Netherlands* (Appl. No. 47708/08) of 20 November 2014, and ECtHR, *Al-Skeini and Others v. The United Kingdom* (Appl. No. 55721/07) of 7 July 2011.

59 AP I, Art. 43(2) and Art. 57, and ICJ, *Legality of the threat or use of Nuclear Weapons* (Advisory Opinion) 1996, para. 25.

60 ECtHR, *Al-Skeini and Others v. The United Kingdom* (Appl. No. 55721/07) of 7 July 2011, para. 163, and ECtHR, *Jaloud v. The Netherlands* (Appl. No. 47708/08) of 20 November 2014, para. 164.

The requirement of effectiveness means in this context that the investigation must be capable of leading to a decision as to whether the use of force was justified and, when and as appropriate, to the identification and punishment of those responsible.⁶¹ The investigation should take into consideration the specific circumstances in which the use of force took place -- for instance, the planning and control of the specific operation.⁶²

The requirement of effectiveness includes a number of additional sub-elements, including a requirement that the authority conducting the investigation is independent of those who are the subject of the investigation, that the investigation is instituted straightaway, and that the investigation is transparent, for instance, by involving the family members of the deceased in the procedure to the extent necessary to safeguard their legitimate interests.⁶³

Case law recognises that investigations conducted during armed conflict may involve various practical constraints that might impede the actual investigation,⁶⁴ including, for example, the risk of delays.⁶⁵ In situations in which Danish jurisdiction cannot be exercised over a dead body, for instance, it will not be possible to conduct a full-scale investigation. The fact that the investigation takes place during an armed conflict, however, does not affect the obligation to take all reasonable steps to ensure that an effective and independent investigation is conducted into alleged breaches of the right to life.⁶⁶

In Denmark, the Danish Military Prosecution Service decides when circumstances or conditions that should be investigated exist. In connection with the operation of the Danish Defence in Afghanistan, a practice has evolved in which the judge advocate reviews and assesses reports on unintended collateral damage in connection with hostilities in which Danish forces have been involved. The purpose is to determine the sequence of events, including whether Danish forces have acted within the applicable rules on the use of force, including the rules of international humanitarian law.

61 ECtHR, *Al-Skeini and Others v. The United Kingdom* (Appl. No. 55721/07) of 7 July 2011, para. 163, and ECtHR, *Jaloud v. The Netherlands* (Appl. No. 47708/08) of 20 November 2014, para. 200.

62 ECtHR, *Al-Skeini and Others v. The United Kingdom* (Appl. No. 55721/07) of 7 July 2011, para. 163.

63 ECtHR, *Jaloud v. Netherlands* (Appl. No. 47708/08) of 20 November 2014, para. 186.

64 ECtHR, *Al-Skeini and Others v. The United Kingdom* (Appl. No. 55721/07) of 7 July 2011, para. 164, and ECtHR, *Jaloud v. The Netherlands* (Appl. No. 47708/08) of 20 November 2014, para. 186.

65 ECtHR, *Al-Skeini and Others v. The United Kingdom* (Appl. No. 55721/07) of 7 July 2011, para. 164, and ECtHR, *Jaloud v. The Netherlands* (Appl. No. 47708/08) of 20 November 2014, para. 186.

66 ECtHR, *Al-Skeini and Others v. The United Kingdom* (Appl. No. 55721/07) of 7 July 2011, para. 164.

Thus, the Danish Military Prosecution Service has investigated a number of cases of civilian deaths in connection with hostilities, notwithstanding that a direct duty to do so is not found in international law. In none of the cases were Danish soldiers ruled to have acted in breach of use-of-force directives or other rules.

For more information about the investigations of the Danish Military Prosecution Service, reference is made to the MPS website, where the annual reports are also available.⁶⁷

4.5

Who can be responsible for violations of international law?

This section addresses two of the subjects of international law, i.e., the legal entities that can be held responsible for violations of international law: the State and the individual.

It is a fundamental principle of international law that a State is responsible for all acts committed by members of its armed forces.⁶⁸ This does not mean that Denmark will automatically incur State responsibility in a situation in which a Danish soldier has committed a war crime. Conversely, it is not a given that a Danish soldier will always incur individual criminal liability in a situation in which State responsibility may prove to exist.

Responsibility for the State and the individual is determined on the basis of two different and, in terms of international law, non-comparable parameters. They may exist concurrently but are not interdependent, as already mentioned.

The category of individual responsibility includes the special form of responsibility referred to as **command responsibility** in international law. This form of responsibility is particularly relevant to **military commanders**. Command responsibility is discussed in Section 5.3 of Chapter 4.

4.5.1 States

The rules of international law on State responsibility are applicable **both in and outside armed conflict**. These rules specify, for instance, when acts contrary to

⁶⁷ www.fauk.dk. This site also contains the Military Prosecutor General's statement no. 5/2016.

⁶⁸ HC IV 1907, Art. 3, and AP I, Art. 91.

international law that are committed by State organs may be linked (attributed) to the State and what the consequences may be if the State is found responsible.

Acts contrary to international law are acts that are inconsistent with the obligations of a State under international law. An act contrary to international law could be a violation of a treaty obligation, for instance, international humanitarian law or human rights law. The terminology used here is “acts”, but the rules also include omissions.

State organs are all government authorities and persons authorised to act on behalf of the State. The Danish armed forces are State organs.

The fundamental principle behind these rules is that an act contrary to international law is linked to the State to which the soldiers belong. This means that acts contrary to international law committed by Danish armed forces in connection with military operations could be linked, depending on the circumstances, to Denmark (direct responsibility).

Modern coalition and alliance operations make it particularly relevant to take a closer look at the extent to which Denmark may be responsible under the rules on State responsibility for acts contrary to international law committed by the military units or the police of another State in cases in which the foreign units serve under the authority of a Danish military unit or military commander. Section 3.4 of Chapter 3 provides general information about the rules on State responsibility.

The rules on State responsibility are based on the principle of the unity of the State. This means that the closer to the State an act contrary to international law can be said to be, the more likely it will be that a responsibility can be linked to the State.

As far as the Danish armed forces are concerned, direct responsibility and complicity are the most relevant forms of responsibility. Complicity under the rules on State responsibility requires the act to be contrary to international law for the complicit State. Multiple States may incur responsibility at the same time.

The legal effect of a State being found responsible may be payment of compensation, depending on the circumstances.⁶⁹ Various international bodies, each within its specified framework, have been authorised under the mandates of the States Parties

69 HC IV 1907, Art. 3, AP I, Art. 91, SCIL, Rule No. 150, PCIJ, Chorzow Factory 1928, paras. 28-29, and ICJ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 2004, para. 133.

to decide and issue opinions on matters relating to State responsibility. These international bodies include, among others, the International Court of Justice, the European Court of Human Rights, and a range of UN committees such as the Human Rights Committee⁷⁰ and the Committee against Torture,⁷¹ which Denmark has recognised as competent to receive and consider communications from private individuals. The UN committees cannot order Denmark to pay compensation with binding effect.

The rules on State responsibility are constantly evolving. In cases of doubt in specific missions, the Danish Ministry of Foreign Affairs must be consulted **through the military chain of command**.

4.5.2 Individuals

Danish military personnel may incur individual responsibility in the event of a violation of IHL,⁷² which follows from the way the rules are incorporated into Danish domestic law and directives -- for instance, the soldier's cards and operational orders. More information about prosecution in Denmark for the violation of international humanitarian law is provided in Section 4.2 above.

4.5.3 The rules of international law on command responsibility

The rules of international humanitarian law on command responsibility cover two different aspects: direct command responsibility and indirect command responsibility.

The rules of international law on direct command responsibility

15.2. Direct command responsibility is an individual responsibility for one's own acts or omissions.⁷³ + NIAC⁷⁴

The responsibility associated with direct command responsibility, according to the International Criminal Court, is direct responsibility, including accomplice liability.⁷⁵

⁷⁰ Optional Protocol to CCPR 1966.

⁷¹ UN CAT, Art. 17-24.

⁷² SCJHL, Rule No. 151.

⁷³ ICTY, Čelebići IT-96-21-T 1998, para. 334. See ICC Statute, Art. 25, ICTY, Hadžihasanović & Kubura IT-01-47-T 2003, paras. 13 and 31, and ICTY, Tadić IT-94-1-A 1999, para. 21. See also CWM, Rule No. 24 a.

⁷⁴ SCJHL, Rule No. 151, and ICC Statute, Art. 25.

⁷⁵ ICTY, Čelebići IT-96-21-T 1998, para. 334. See ICC Statute, Art. 25, ICTY, Hadžihasanović & Kubura IT-01-47-T 2003, paras. 13 and 31, and ICTY, Tadić IT-94-1-A 1999, para. 21, and CWM, Rule No. 24 a.

In addition to responsibility for one's own acts, including war crimes committed pursuant to orders,⁷⁶ responsibility also includes the conduct the person concerned exhibits to his subordinates -- for instance, a failure to act, to support, or other behaviour which due to the circumstances may be perceived as if the superior accepts the act contrary to international law, whether expressly or implicitly.

Direct command responsibility may also be of significance to the person receiving a manifestly unlawful order. Orders to commit war crimes, crimes against humanity, and genocide are manifestly unlawful.⁷⁷ Every person has a duty to disobey unlawful orders,⁷⁸ and a person who has committed these crimes, therefore, claiming that orders were merely followed does not amount to a criminal defence.

Example 15.7 of an unlawful order that could involve direct responsibility:

A company commander who, while issuing orders to engage, orders that there should be no survivors.

See, for instance, Section 2.6 of Chapter 10 about the prohibition to order that no mercy be shown.

The rules of international law on indirect command responsibility

15.3. Indirect command responsibility is the responsibility resting on the superior who exercises effective control over subordinates in the **line of command**, and who is aware that they are about to commit or have committed violations of IHL and who, in spite of this knowledge, fails to take all necessary and reasonable measures within his or her power to prevent or repress their commission.⁷⁹

+ NIAC⁸⁰

Indirect command responsibility, therefore, has an independent meaning for **all military commanders with command powers**. Persons who commit violations will incur individual criminal liability, and the superior will incur indirect command responsibility in respect of violations committed by subordinates.⁸¹ The actual

⁷⁶ SCIHL, Rule No. 152.

⁷⁷ ICC Statute, Art. 33(2), GC I, Art. 49, GC II, Art. 50, GC III, Art. 129, GC IV, Art. 146, and AP I, Art. 85(1). See ICTY, Blaskić IT-95-14-A 2004, para. 42.

⁷⁸ See, e.g., Essen Lynching Case, British Military Court for the trial of war criminals, 18-22 December 1945

⁷⁹ AP I, Art. 86(2), see AP I, Art. 87(1) to (3), and, e.g., ICTY, Čelebići IT-96-21-A 2001 and others. SCIHL, Rule No. 153. See ICC Statute, Art. 28.

⁸⁰ See ICC Statute, Art. 28, ICTY Čelebići IT-96-21-T 1998, paras. 333, 343, ICTY Čelebići IT-96-21-A 2001, para. 266, and ICTY Hadžihasanović & Kubura IT-01-47-T 2003, para. 31, SCIHL, Rule No. 153. See also CWM, Rule No. 24 b..

⁸¹ E.g. ICTY, Čelebići IT-96-21-A 2001, para. 225.

violations are subject to prosecution independently of the legal proceedings that may be instituted in accordance with the rules of indirect command responsibility⁸² and, therefore, are not discussed in this section. Reference is made to Section 4.2 above on prosecution in Denmark for violations of IHL.

Case law sets out **three main conditions**, all of which must be met simultaneously for the superior's indirect command responsibility to arise. These conditions and the specific content of this responsibility are described below.

- 1) The existence of a superior-subordinate relationship must be established
- 2) The superior must be aware or have been given notice, i.e., should have known that the violations are being or were committed
- 3) The superior must have failed to take all necessary and reasonable measures to prevent or punish the violations⁸³

Superior-subordinate relationship

The first condition that needs to be satisfied to invoke indirect command responsibility is the existence of a superior-subordinate relationship between a superior and subordinate(s) who is/are about to commit or has/have committed the violation(s).⁸⁴ This means that the relevant relationship with respect to indirect command responsibility is the one concerning the **line of command**. The superior-subordinate relationship may be of a temporary⁸⁵ or permanent nature, but it must exist at the time when the violation is committed.⁸⁶

The criterion for the existence of a superior-subordinate relationship, which is necessary to invoke command responsibility, is whether the superior exercises **effective control** over subordinates.⁸⁷ Effective control means in this context that the superior exercises such a degree of control over subordinates in the line of command that the commander has actual or material ability to prevent violations or to impose sanctions on the subordinate(s) who committed the violation(s).⁸⁸

82 E.g., ICTY, Oric IT-03-68-A 2008, para. 20, and ICTY, Popović IT-05-88-T 2010, para. 2019.

83 E.g., ICTY, Čelebići IT-96-21-T 1998, para. 346.

84 E.g., ICTY, Strugar IT-01-42-T 2005, para. 359, and ICTY, Aleksovski IT-95-14/1-A 2000, para. 76.

85 E.g., ICTY, Strugar IT-01-42-T 2005, para. 362, and ICTY, Halilović IT-01-48-T 2005, para. 61.

86 E.g., ICTY, Popović IT-05-88-T 2010, para. 2021, and ICTY, Hadžihasanović & Kubura IT-01-47-AR72 2003, para. 51.

87 ICTY, Čelebići IT-96-21-T 1998, paras. 377-378, ICTY, Čelebići IT-96-21-A 2001, paras. 197, 256 and 266, and ICTY, Popović IT-05-88-T 2010, para. 2022.

88 E.g., ICTY, Čelebići IT-96-21-T 1998, para. 378, ICTY, Čelebići IT-96-21-A 2001, para. 303, ICTY, Strugar IT-01-42-A 2008, para. 254, ICTY, Popović IT-05-88-T 2010, para. 2023, ICTY, Popović IT-05-88-A 2015, para. 1857, and ICC, Bemba ICC-01/05-01/08 PTC 2009, paras. 411 and 415.

The authority relates to the relationship between the superior and a given subordinate and, therefore, is more comprehensive than the individual situation in which an order is issued, for instance.⁸⁹

In day-to-day operations, the effective control may be manifested, for instance, through the duty of obedience in the sense that the superior, exclusively by virtue of his or her military rank, is empowered to impose his or her will on the subordinates, who are obliged to obey all lawful superior orders.

The organisational distance is not decisive in assessing whether effective control exists.⁹⁰ Accordingly, the effective control may be exercised downwards through **one or more levels in the line of command** as long as the control is effective.⁹¹

Example 15.8 of indirect command responsibility for failure to prevent acts committed by subordinates two levels down in the line of command and for failure to impose sanctions on the parties involved:

The case concerned the attack on the old town of Dubrovnik, inter alia, in Croatia in 1991. The actual attack was carried out by infantry and artillery units from the third battalion of the 472nd motorised brigade (3/472 mtbr), whose activities were coordinated by Captain Kovačević. 3/472 was subordinate to the ninth maritime sector (9 VPS), which was under the command of Admiral Jokić. 9 VPS was subordinate to the second operational group (2 OG), which operated under the command of the defendant, Lieutenant General Pavle Strugar.

The ICTY found that both Strugar and Admiral Jokić were responsible under the rules on indirect command responsibility for their failure to prevent the attack on the old town and for their failure to initiate investigations of the circumstances and impose sanctions on the persons involved.⁹² Charges were brought against Captain Kovačević, but the case was handed over to Serbia, where it later had to be dropped on account of Kovačević's poor health.⁹³

Two or more superiors may be responsible at the same time.⁹⁴

It appears from case law that the assessment of whether effective control is exercised in a given situation will always have to be based on the specific conditions existing no later than the time during which the violation was committed.⁹⁵ In the assessment, due consideration must be given to factors that, in the circumstances at the time,

89 E.g. ICTY, Popović IT-05-88-A 2015, para. 2023, and ICTY, Popović IT-05-88-A 2015, para. 1857.

90 E.g. ICTY, Čelebići IT-96-21-A 2001, paras. 252 and 303, and ICTY, Popović IT-05-88-T 2010, para. 2025.

91 E.g. ICTY, Čelebići IT-96-21-A 2001, para. 198, and ICTY, Popović IT-05-88-A 2015, para. 1857.

92 E.g. ICTY, Strugar IT-01-42-T 2005, ICTY, Strugar IT-01-42-A 2008, ICTY Jokić IT-01-42/1-S 2004, and ICTY, Jokić IT-01-42/1-A 2005.

93 ICTY, Kovačević IT-01-42/2-I, Decision of 17 November 2006.

94 E.g. ICTY, Strugar IT-01-42-T 2005, para. 365, ICTY, Halilović IT-01-48-T 2005, para. 62, and ICTY, Popović IT-05-88-T 2010, paras. 2025-2026.

95 E.g., ICTY, Popović IT-05-88-A 2015, para. 1860, and ICTY, Hadžihasanović & Kubura IT-01-4747-AR72 2003, para. 51.

may be of significance for the ability of the superior to effectively prevent violations or impose sanctions on subordinates who committed violations.⁹⁶

Case law has provided examples of factors that, depending on the circumstances and the evidentiary standard applied, could **indicate** whether a superior exercises effective control.⁹⁷

- The existence of a hierarchical superior-subordinate relationship
- Does the superior possess formal authority (*de jure* powers)?⁹⁸
- The superior's official military rank
- Is the superior authorised to issue orders?
- Are the superior's orders actually followed?⁹⁹
- Does the superior possess disciplinary powers?
- Is the superior authorised to deploy armed forces to battle and to withdraw them?

Knowledge or notice

The second condition that needs to be satisfied to invoke indirect command responsibility is that the superior either has obtained **knowledge** or should have known that his subordinates are committing or have already committed violations of IHL.¹⁰⁰

Case law has defined **knowledge** in this context as awareness that the violations are about to be committed or already have been committed.¹⁰¹

The level of knowledge that is required in a **situation of notice** or a situation in which the superior **should have known** is that the superior must be in possession of alarming¹⁰² information about a risk that the subordinate is about to commit or has committed violations.¹⁰³ The alarming information does not need to contain specific details about the violations committed or about to be committed,¹⁰⁴ but must be sufficient that the mere awareness of the information indicates the need to

96 E.g., ICTY, Popović IT-05-88-A 2015, para. 1857.

97 E.g., ICTY, Halilović IT-01-48-A 2007, paras. 66, 58 and 204, and ICTY, Popović IT-05-88-A 2015, para. 1860.

98 E.g., ICTY, Oric IT-03-68-A 2008, paras. 91-92.

99 E.g., ICTY, Strugar IT-01-42-A 2008, para. 256.

100 E.g., ICTY, Čelebići IT-96-21-T 1998, para. 383, and ICTY, Čelebići IT-96-21-A 2001, para. 238.

101 ICTY, Kordić & Čerkez IT-95-14/2-T 2001, para. 427. See for instance ICC Statute, Art. 30(3).

102 E.g., ICTY, Čelebići IT-96-21-A 2001, para. 232, and ICTY, Čelebići IT-01-42-A 2008, para. 298.

103 E.g., ICTY, Čelebići IT-96-21-A 2001, paras. 238 and 241, and ICTY, Popović IT-05-88-A 2015, para. 1910.

104 E.g., ICTY, Strugar IT-01-42-A 2008, para. 298.

initiate additional investigations.¹⁰⁵

Investigations must be conducted with a view to determining whether subordinates are committing or have committed violations.¹⁰⁶

The underlying consideration is the desire to avoid a situation in which the superior evades responsibility by claiming that the information is too vague when there are actually indications, based on the information available, that unlawful acts are about to be committed.¹⁰⁷

The form of the notice is not decisive.¹⁰⁸ It may reach the superior in the form of written or oral reports, rumours, photo material, a chat in the mess line, information via social media, etc.

Example 15.9 of a situation in which the superior has been put on notice and, therefore, has a duty to initiate an investigation of the situation:

The company commander has a quiet day and, therefore, decides to use the Internet computer to check the latest updates on Facebook. Since many of the soldiers in the company are his FB friends, the first post he sees on Facebook is a photo uploaded by a soldier of the first platoon. The photo shows Danish soldiers violently kicking a person who is clearly deprived of liberty and who has his hands tied with strips behind his back, wearing a hood over his head.

If written reports have been prepared, they only need to be **available** to the superior. It is not a requirement that the superior must have actually read the reports.¹⁰⁹

A consequence of effective control is precisely that the superior can implement effective internal reporting systems and, in this manner, stay up to date.

Example 15.10 of a situation in which the superior has been put on notice and, therefore, has a duty to initiate an investigation of the situation:

For a couple of days, a battalion combat group has been carrying out a major operation to which all units have been deployed. During large parts of the operation, the battalion commander was at his advance command post but is now back in the camp. After a few hours of sleep, he is on the way to the Tactical Operations Centre (TOC) to receive the latest news. On his way to the TOC, he decides to drop in at the mess tent for a cup of coffee. On this occasion, he overhears fragments of a conversation between soldiers of the first platoon, who have been deployed to the operation. The battalion commander, who is a little pressed for time, does not pay full attention to what the soldiers are saying and leaves the mess tent to go down to the TOC.

105 E.g., ICTY, Popović IT-05-88-A 2015, para. 1910.

106 E.g., ICTY, Čelebići IT-96-21-T 1998, paras. 383 and 393, and ICTY, Popović IT-05-88-A 2015, para. 1877.

107 E.g., ICTY, Strugar IT-01-42-T 2005, para. 416.

108 E.g., ICTY, Čelebići IT-96-21-A 2001, para. 238.

109 E.g., ICTY, Čelebići IT-96-21-A 2001, para. 239.

Two hours later, after a very intense period, the battalion commander is back in his office. Here, he suddenly remembers the conversation he was overhearing in the mess tent because something has sunk into his subconscious mind: he heard the soldiers talk about firing some ammunition they had received from foreign colleagues.

A superior is not permitted to remain deliberately ignorant.¹¹⁰ Deliberate ignorance may occur, for instance, when a person fails to exercise ordinary due care by refraining from participating in staff meetings, by redirecting reports to staff officers, by refusing to obtain information or refusing to ask for information that would usually come to the knowledge of a person in a superior position, or simply by not keeping up to date within his area of responsibility.

It is not possible to draw up an exhaustive list of the different ways or situations in which a superior possesses knowledge or has been given notice. The assessment will always have to be based on the specific conditions existing no later than at the time the violation was committed.¹¹¹

Case law provides examples of circumstances that, based on an evidentiary standard, may **indicate** whether a superior possesses knowledge or may be said to be on notice ¹¹²

- Prior conduct of subordinates
- The prior conduct of the superior with respect to knowledge of violations¹¹³ (e.g., failure to punish)
- The superior's specific responsibility at the relevant time
- Information flow and communication facilities between subordinates and the superior in question at the relevant time
- The superior's ability to communicate with his or her subordinates¹¹⁴
- The number, type, or extent of violations (e.g., single or systematic offences against multiple persons)

110 E.g., ICTY, Čelebići IT-96-21-A 2001, para. 226, and ICTY, Halilović IT-01-48-T 2005, para. 69.

111 E.g., ICTY, Hadžihasanović & Kubura IT-01-4747-AR72 2003, para. 51.

112 E.g., ICTY, Čelebići IT-96-21-T 1998, para. 386, and ICTY, Strugar IT-01-42-T 2005, para. 368, and ICTY, Popović IT-05-88-T 2010, para. 2024.

113 ICTY, Strugar IT-01-42-A 2008, para. 301.

114 ICTY, Popović IT-05-88-T 2010, para. 2024.

- The period within which the violations were committed (e.g., within a couple of hours or over several months)
- The number of subordinates involved in the violations
- Tactical conditions, including the intensity of operations
- The geographical area in which the violations were committed (e.g., in a tent in the camp or in an area covering hundreds of square kilometres)
- The place where the superior was present when he or she obtained knowledge of the offence

Necessary and reasonable measures

The third condition that needs to be satisfied to invoke indirect command responsibility is that the superior has **failed** to take all **necessary and reasonable** measures to prevent future violations, to suppress¹¹⁵ ongoing violations, or to sanction subordinates who have committed violations.¹¹⁶

To avoid incurring liability, therefore, the superior needs to act. The measures include what the Danish Defence understands to be encompassed within the duty to act and report.

Necessary measures are measures which, under the circumstances at the time, show that the superior genuinely tried to prevent or punish the violations.¹¹⁷ **Reasonable** measures are those reasonably falling within the effective control of the superior.¹¹⁸

It is the content of the material powers or effective control of the superior that provides the framework for the potential measures available to the superior. In the specific situation, it will depend on the superior's military rank whether he is required to act, to report, or perhaps to do both. It might be sufficient, therefore, to report the unlawful act **through the chain of command**.

The measures must be taken or initiated **immediately**.¹¹⁹ They may, depending on the circumstances, be commenced by **delegation**.¹²⁰

115 AP I, Art. 86(2), and ICTY, Popović IT-05-88-T 2010, para. 2044.

116 AP I, Art. 86(2).

117 E.g., ICTY, Popović IT-05-88-A 2015, para. 1927.

118 AP I, Art. 87(3), see AP I, Art. 86(2), and, e.g., ICTY, Popović IT-05-88-A 2015, para. 1927.

119 E.g., ICTY, Popović IT-05-88-T 2010, para. 2051.

120 E.g., ICTY, Popović IT-05-88-A 2015, para. 2053.

These are distinct legal obligations that apply independently of one other¹²¹ and, consequently, cannot be evaded through the performance of other acts.¹²²

The superior's obligation to **prevent** his subordinates from committing violations in the future and to suppress ongoing violations arises even before the commencement of the armed conflict and, at this time, includes a requirement for the superior to ensure that members of the armed forces under his or her command are aware of their obligations under international humanitarian law.¹²³ Another element of the obligation may also require the superior, through his or her conduct, to set a good example in day-to-day operations.

The obligation to **suppress** ongoing violations arises at the time when the superior either obtains knowledge or is given notice that the violations are being committed. Compliance with the obligation may require the superior to cease fire, to prohibit an attack,¹²⁴ or to issue a prohibition against the use of a specific weapon or method. If the superior receives an order that is inconsistent with IHL, compliance with the obligation to prevent and suppress violations may require the superior to **prevent** the execution of the order.¹²⁵

Depending on the circumstances, the use of **physical force** could prevent future or suppress ongoing violations. IHL does not specifically authorise the superior who has effective control to use physical force against a subordinate to suppress ongoing violations.¹²⁶ This authority is assumed to be an implicit part of the effective control and must be regarded as derivative of the duty to act with the effect that, to the extent that a violation can be prevented by the use of physical force, the duty to act must also include the use of physical force.

IHL contains no rules on the **degree or nature of the physical force** that is to be used. Case law has established that the threshold is probably the force required to impose one's will on an opposing party to the conflict.¹²⁷ If, therefore, it is necessary to use physical force equivalent to the force that would be required against an adversary, this may indicate that the superior did not exercise effective control over the subordinate.

121 E.g., ICTY, Blaskić IT-95-14-A 2004, para. 83.

122 E.g., ICTY, Strugar IT-01-42-T 2005, para. 373, and ICTY, Hadžihasanović & Kubura IT-01-47-T 2006, para. 125.

123 AP I, Art. 87(2), and e.g., ICTY, Halilović IT-01-48-T 2005, para. 85.

124 E.g., ICTY, Strugar IT-01-42-A 2008, para. 255.

125 SCJHL, Rule No. 154, and, e.g., ICTY, Popović IT-05-88-A 2015, para. 1897.

126 E.g., ICTY, Čelebići IT-96-21-A 2001, para. 303.

127 E.g., ICTY, Hadžihasanović & Kubura IT-01-47-A 2008, para. 230.

The obligation of the superior to **punish** violations committed by subordinates arises at the time when the superior either knows or has been given notice that violations have been committed. The obligation includes the institution of an **investigation** that is capable of ascertaining the facts and identifying potential perpetrators.¹²⁸

The obligation also includes a duty to **report** suspected offences **through the military chain of command** to the immediate superior or to a competent authority with a view to initiating an investigation or imposing disciplinary or penal sanctions.¹²⁹

If the superior concerned **possesses disciplinary or penal powers**, the obligation to punish may also include a duty to apply these powers in relation to subordinates. Disciplinary and penal sanctions must reflect the gravity of the act.¹³⁰

The effective imposition of sanctions is part of the obligation to prevent future violations,¹³¹ which is why sanctions should have a preventive effect.

Example 15.11 which shows the punishment of an unlawful act that is too lenient:

Two soldiers are sitting in camp. They have heard that it is possible to modify the ammunition they have received to achieve a dum dum effect. After modification, they want to check whether the ammunition still fits in the weapon. The incident is discovered. The commander chooses to give the soldier who modified the ammunition an oral reprimand. The other soldier is let off with a scolding.

Reference is made to Section 3.8 of Chapter 9 on the prohibition against using certain bullets that flatten easily in the human body.

The obligations do not cease, but they only entail liability if the three conditions described above are satisfied. Ultimately, the determination of what constitutes necessary and reasonable measures in a given situation will always be based on specific, factual circumstances.¹³²

Case law provides examples of various circumstances which, based on an evidentiary standard, may be relevant for assessing whether a given measure was necessary and reasonable¹³³

128 E.g., ICTY, Popović IT-05-88-A 2015, paras. 1932 and 1944.

129 AP I, Art. 87(1) and (3), see AP I, Art. 86(2), and e.g. ICTY, Čelebići IT-96-21-A 2001, para. 190, ICTY, Popović IT-05-88-T 2010, para. 2053, and ICTY, Popović IT-05-88-A 2015, paras. 1932, 1936 and 1938.

130 E.g. ICTY, Popović IT-05-88-A 2015, para. 1942.

131 E.g. ICTY, Halilović IT-01-48-T 2005, para. 96.

132 E.g. ICTY, Halilović IT-01-48-T 2005, para. 74, and ICTY, Popović IT-05-88-A 2015, para. 1932.

133 E.g. ICTY, Halilović IT-01-48-T 2005, para. 74. See also ICTY, Strugar IT-01-42-T 2005, paras. 374-375.

- The superior had a specific responsibility at the relevant time¹³⁴
- The superior's ability to communicate with subordinates¹³⁵
- The physical location of the superior when he or she obtained knowledge of the offence¹³⁶
- Har den overordnede med vilje valgt ikke at gennemtvinge sin vilje i den konkrete situation?¹³⁷
- Has the superior issued specific orders to prohibit or suppress violations?
- What measures has the superior taken to ensure compliance with the orders issued?
- Has the superior taken other measures to interrupt or suppress ongoing violations?
- What measures – if any – has the superior taken after a violation has been committed with a view toward initiating an investigation and ensuring criminal prosecution of the alleged offenders?

4.5.4 Special considerations on the duty to act and report

The rules of international law on command responsibility contain a duty to report for the superior. In a similar manner, as described above, a superior has an obligation under international law to intervene if subordinates commit acts contrary to IHL. These are obligations imposed on the superior by virtue of command responsibility.

However, international law contains no clear rules on a duty to act or report for **military personnel without subordinates**.

In relation to the duty to act, IHL describes various situations in which persons are afforded special Danish protection. For instance, this will be the case in relation to the sick, wounded, or shipwrecked referred to in Chapter 7, in relation to persons deprived of liberty in the custody of Denmark, see Chapter 12, or in cases in which Danish forces form part of an occupying power, see Chapter 11. In these cases, Danish soldiers at all levels might be under a duty to act. By resolution, the UN Security Council is able to establish some special protection tasks for deployed members of a contingent which, depending on the circumstances, could place these members under a duty to intervene if civilians are subjected to human rights violations.

¹³⁴ ICTY, Popović IT-05-88-T 2010, para. 2024.

¹³⁵ ICTY, Popović IT-05-88-T 2010, para. 2024.

¹³⁶ ICTY, Popović IT-05-88-T 2010, para. 2024.

¹³⁷ Fx ICTY *Strugar* IT-01-42-A 2008 pr. 258.

The implementation of and compliance with Denmark's obligations in international military operations call for a command system that imposes on every person a duty to **report through the military chain of command** incidents the observer assesses to be contrary to IHL or HRL.

As far as Danish military personnel are concerned, their duties to act and report are imposed through the issuance of general or/and mission-specific directives.

Special considerations on the rules of international law

on command responsibility in coalition operations

In coalition operations, **direct command responsibility** will be relevant to **staff officers** who, for instance, convey orders. Unlawful orders are naturally not allowed to be issued or conveyed. In relation to orders concerning national restrictions on the staff officer, the staff officer must be attentive to the extent of the restrictions. For instance, they may appear in transfer of authority documents, use-of-force directives, and annexes thereto containing national caveats.

Example 15.12 of a national restriction on a Danish officer:

A Danish operations officer who works on an international staff and conveys an order to subordinate units that entails authority to use anti-personnel mines.

Reference is made to Section 3.5 of Chapter 9 on special considerations of coalition operations in relation to anti-personnel mines.

In coalition operations in which foreign military units or law enforcement agencies are temporarily under the command authority of a Danish military commander, the Danish military commander might also be responsible in accordance with the rules on **indirect command responsibility**, for acts by this foreign unit that are contrary to international law.

In such a situation, the same three conditions described in Section 4.5.3 above on indirect command responsibility need to be satisfied.

The scope of the responsibility will be limited by the fact that the Danish military commander has no disciplinary powers over the military units or law enforcement agencies of foreign States. The powers that ensue from the superior-subordinate relationship and relate to punishment, therefore, may be limited, depending on the circumstances, to reporting through the military chain of command and to the relevant foreign authorities.

In these cases, therefore, reports will need to be **conveyed concurrently by following two parallel tracks**: the military chain of command in the national track to Defence Command Denmark and in the mission track to the senior national representative -- typically, the commander of the alleged offender's national contingent in the mission area.¹³⁸

The conveyance of the report on two tracks is designed to ensure that the incident is followed up within the appropriate jurisdiction and that IHL is effectively complied with.

Example 15.13 of sufficient knowledge, which obliges the battalion commander to arrange for a report to be conveyed through the national chain of command and to the commander of the forces of the State of Z, possibly, the senior national representative (SNR/SDO):

A Danish battalion combat group participates in a coalition in the State Y. A few months into the operation, a coalition State Z deprives a group of persons belonging to an insurgent group of their liberty. In connection with the interrogation of these persons, it turns out that they may have knowledge of an imminent attack on the coalition. Therefore, they need to be interrogated again. The coalition partner, who has the detention facilities, calls on Denmark to provide support in the form of MPs. The Danish commander knows that his soldiers are trained in IHL and is confident that they will intervene if they observe violations. Therefore, he takes no further action. However, he also knows that the State of Z has a tarnished reputation when it comes to interrogation techniques.

The Danish commander delivers the MPs but only to stand guard outside the door of the interrogation room.

During an interrogation in which a Danish MP is standing guard outside the room, the MP hears a loud thumping noise that sounds like blows to a person's body, and he hears screaming. The MP does not intervene but draws up a report on the incident, which is sent to the Danish battalion commander.

138 Addendum 15.1.

Brief remarks on the commander's responsibility

for the conduct of his or her subordinates in UN operations

The principles behind the rules on indirect command responsibility are also applicable, for example, in UN operations. This appears from various documents, including the Memorandum of Understanding, which is the United Nations' standard contract between the troop-contributing nation and the organisation.¹³⁹ In this respect, for instance, the MoU provides that the commander of the national contingent is responsible for maintaining discipline in the contingent and that the commander is under a duty to report on this to the UN Force Commander.¹⁴⁰ The troop-contributing nation is responsible for initiating investigations in relation to disciplinary proceedings, etc., and retains criminal jurisdiction over its deployed contingents.¹⁴¹ Reference is made to Section 4.3 of Chapter 3 on UN operations and Section 6.2.1 of Chapter 3 on the application of IHL in operations under UN military command and control.

139 2007 Model Memorandum of Understanding between the United Nations and [participating state] contributing resources to [the United Nations Peace Keeping Operation] (MOU).

140 MoU, Art. 7.5 and Art. 7.6.

141 MoU, Art. 7.10 and Art. 7.22.

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Appendix

APPENDIX 1

Glossary

Defector	A person who leaves his or her country's armed forces and joins the opposing side.
Arrested person	A person detained on suspicion of having committed a criminal offence.
Artillery observer (AO)	A person specialised in requesting and directing fire support from all types of indirect fire weapons and capable of assisting the <i>Forward Air Controller (FAC)*</i> in carrying out <i>Close Air Support (CAS)*</i> . Artillery observers usually operate in teams of observers, signallers, and drivers, who may thus be deployed together or separately with the supported unit. Observation officers may also advise the supported unit commander on how to use fire support assets and conduct fire planning.
Autonomous weapons systems	The term autonomous weapons system refers to weapons capable of selecting and engaging targets automatically by means of electronic (often GPS-based) equipment. Autonomous systems are also capable of calculating their own firing data on the basis of digitally received target coordinates – perhaps, directly from the observer – and translate them into firing data. Autonomous systems are usually self-propelled systems, but towed systems with built-in navigation and positioning equipment and a digital fire control system are also available. The benefits of autonomous systems are their increased speed in connection with position advancement and ready-for-fire operations, their increased speed, and lower margin of error in calculating firing data as well as a reduced need for personnel
Battle Damage Assessment (BDA)	The practice of assessing the damage inflicted on the target of an attack as well as any undesirable collateral damage.
Biometric data	Information about the distinctive physical characteristics of individuals, such as fingerprints and iris scans, which can be used to identify persons.
Capture (at sea)	An act by which the master of a ship assumes the powers of authority over a hostile vessel -- typically, a hostile warship.
Cargo manifest	A document, typically carried by a ship or aircraft, listing the loaded cargo..

Cartel vessel (at sea)	A ship used by a parlementaire during a mission to approach the adversary. The ship enjoys the same protection as the parlementaire
Central information agency	GC III, Article 123, and GC IV, Article 140: An international central information agency responsible for collecting information on prisoners of war and protected persons and for transmitting such information where relevant. Related term: “ <i>national information bureau</i> ”.
Chaff	Strips of metal foil, wire, or metallised glass fibres which are used to reflect electromagnetic energy. Chaff is typically dropped from aircraft or expelled from shells or rockets as a radar countermeasure.
Civil-military cooperation (CIMIC)	Cooperation and coordination between the military commander/force and civilians, including the local population, local government officials, and national as well as international non-governmental organisations for the purpose of creating the best possible conditions for performing the military task.
Close Air Support (CAS)	The deployment of aircraft or helicopters in close support of combat units, which - for every deployment - requires detailed coordination of one's own forces' fire and movement to avoid friendly fire.
Collateral Damage Estimation (CDE)	A forecast of foreseeable collateral damage supporting the military commander's assessment of the lawfulness of the collateral damage (whether the collateral damage is clearly disproportionate to the concrete and direct military advantage anticipated and whether such damage is adequately minimised). In its simplest form, a number of relative risk levels are defined in the work process. To a relevant extent, appropriate account is taken of different risk outcomes, depending on factors such as the nature of the contemplated attack and possible choices of timing, means, and methods of warfare.
Command, control, communications, computers and informations system (C4IS)	Command, Control, Communications, Computers and Information System: A system integrating C2IS (a command and control information system that supports operational command and control), CIS (a generic term for a communication information system for equipment, procedures, and personnel to solve specific tasks in connection with the dissemination and processing of information), and computers.
Compound	A small enclosure consisting of one or more buildings, typically, surrounded by a fence or wall.
Computer Network Attack (CNA)	Military CNAs are network-based actions directed against IT networks, IT systems, or computers and expected to create an effect that may cause loss of human life, injury to persons, and/or substantial damage to or destruction of physical objects. This may be direct or substantial destruction or substantial destruction as a secondary effect -- for instance, when a military air traffic control system is taken out of operation and causes foreseeable loss of human life and/or substantial damage to or destruction of physical objects.
Computer Network Defence (CND)	CND should be understood in this context to mean pure defence actions. CND includes warnings, analysis, internal responses to incidents, and mitigation of consequences of security incidents as well as cooperation with corresponding authorities in other States. In Denmark, the Danish Cyber Security Centre (CSC) is an example of an authority that performs a CND function. The Danish Cyber Security Centre gathers knowledge of cyber attacks on an ongoing basis and finds the digital trails and patterns identifying

an attack. These digital footprints are stored in specially designed alarm units that are placed on Internet connections with the Centre's customers. Here, the alarm unit compares the data traffic flowing through the connections with the digital footprints.

**Computer Network
Exploitation (CNE)**

CNE is active network data collection. CNE seeks to secure access to and gather intelligence data from closed IT networks, IT systems or computers. However, CNE can also cover operations designed to counter the offensive network-based actions of other parties. For instance, this may be accomplished by blocking other parties' access to their own data temporarily. This effect has demonstrably been achieved by overloading systems containing the data in question. When CNE is carried out with a view toward countering the offensive actions of other parties, it is essential that the CNE operation is in the nature of a limited attack against a specific target, has a limited effect, and is for a limited period of time. The use of CNE is not designed to cause destruction since this would essentially be a CNA. Both an effective defence system and effective attacks are dependent on information and data. Accordingly, CNE is a prerequisite for both an effective CND and CNA, enabling the procurement of key intelligence data and access to computer networks.

**Computer Network
Operations
(CNO)**

A common term for operations conducted in cyberspace. CNO fundamentally includes three different main tracks: Computer Network Defence (CND), Computer Network Exploitation (CNE), and Computer Network Attack (CNA). All three types of operation are network-based operations and use the same type of technology and tools but serve different purposes. CND is defensive by nature, whereas CNE and CNA are offensive. CNO may be conducted as separate operations or in cooperation with traditional military capabilities.

Crowd control

Tactics, techniques, and procedures designed to facilitate, manage, and control demonstrations or other public assemblies or gatherings to prevent crowd members from committing hostile or criminal acts.

Digital infrastructure

A term used about the infrastructure connecting information and communication technologies. The term covers networks, computers, and other systems and is used synonymously with what is also known as ICT infrastructure and IT infrastructure.

Dazzler

Laser weapon using optical radiation to cause temporary visual disorientation such as blindness or a flash effect.

Depositary

A State designated to keep custody of the original text of the treaty and, if applicable, instruments of full powers to receive signatures to treaties and to receive and keep custody of any instruments, notifications, or communications relating to the treaty. Another function of the depositary is to inform the parties and the States entitled to become parties to the treaty of acts, notifications, and communications relating to the treaty. The functions may also be performed by designated organisations, such as the United Nations.

Deserter

A person who flees military service.

Design purpose

The specific purpose that a weapon has been developed and fabricated to fulfil.

Deterrence

A course of action designed to dissuade or prevent a potential or actual adversary or another target group from committing acts that pose a threat to a State's own interests.

Dissident	In the context of international humanitarian law, the term is used to describe former members of a nation's armed forces who rebel against a government and establish their own military organisation.
Exclusive Economic Zones (EEZ)	An area extending up to 200 nautical miles from the territorial sea baseline of a coastal State and over which the coastal State claims and exercises sovereign rights as provided by UNCLOS/the United Nations Convention on the Law of the Sea, including in relation to the exploitation of natural resources.
Electroshock gun	Single-shot weapon designed to incapacitate a person temporarily by the use of electrical pulses which disrupt the body's nervous system.
Extraction route	The route used for moving out of a hostile or potentially hostile territory.
Eyesafe mode	Laser mode ensuring that the laser is harmless to the eye at the distance applied.
Area target	A target comprising an area rather than a single point.
Flares	Defensive mechanisms employed to decoy infrared (heat-seeking) missiles. One or more flares, e.g., are dispersed from an aircraft to counter heat-seeking missiles.
Flashbang	A grenade used to disorient temporarily an enemy's senses. Usually by producing a loud noise and a blinding flash of light.
Forward Air Controller (FAC)	An observer qualified to direct and coordinate the deployment of <i>Close Air Support</i> (CAS). The FAC may conduct airspace control in a designated area within which the FAC is responsible for coordinating the assets that use the airspace. An FAC may operate in a <i>Tactical Air Control Party</i> , i.e., a team made up of assistants, a signaller, and a driver, whose main role is to support the FAC in deploying CAS. An FAC may also deploy as part of a unit observations team.
Ground Laser Target Designator (GLTD)	A <i>Laser Target Designator</i> * used by ground forces.
Guided Multiple Launch Rocket System (GMLRS)	A weapons system capable of launching multiple remote-controlled rockets.
Hors de Combat	Adversaries are hors de combat if <ul style="list-style-type: none"> a) they are in the power of an adverse party; b) they clearly express an intention to surrender; or c) they have been rendered unconscious or are otherwise incapacitated by wounds or sickness and, therefore, incapable of defending themselves; d) provided that, in any of these cases, they abstain from any hostile act and do not attempt to escape.
Human Intelligence (HUMINT)	Intelligence derived from information collected and provided by human sources.
Improvised explosive device (IED)	An explosive device fabricated in an improvised manner and incorporating destructive, lethal, noxious, and/or incendiary chemicals designed to destroy, harass, or distract. It may contain factory-made ammunition but is usually constructed from non-factory components.

In absentia	Without being present at the event in question.
Intercept/ interception (aircraft)	The process of establishing visual or electronic contact with another aircraft to check its identity, destination, etc., or to force the intercepted aircraft to land for an inspection or change its destination.
Interoperability	The ability of the armed forces of two or more States to conduct joint operations.
Joint targeting	The process of determining the effects necessary to achieve the commander's objectives across the range of military capabilities – i.e., the army, the navy, and the air force. The process involves identifying the acts necessary to create the desired effects with the means available, selecting and prioritising targets in a broader sense, and synchronising fire between various types of weapon. Then, the overall effect is assessed, and necessary adjustments made. Joint targeting occurs at several levels of command.
Jurisdiction	Jurisdiction in international law refers to the power of a State to exercise authority. The concept is traditionally subdivided into three main categories: a. jurisdiction to legislate, b. jurisdiction to enforce legislation, and c. jurisdiction to adjudicate. The Manual also uses the concept of jurisdiction to describe the scope of application of the European Convention on Human Rights outside Denmark. This refers to situations in which Denmark can be said to exercise jurisdiction in the territory of a foreign State within the meaning of the convention. The issue is addressed in Chapter 3, Section 4.2.
Key Leader Engagement (KLE)	Information activity describing meetings and other activities between one's own and other actors commanders for the purpose of achieving an effect in the information environment.
Continental shelf	That part of the seabed and subsoil of submarine areas that extend beyond the territorial sea of a coastal State to the outer edge of the continental margin or, at a minimum, to a distance of 200 nautical miles from the coastal baseline. More detailed requirements for determining the continental shelf are provided for in the United Nations Convention on the Law of the Sea.
Contraband	Goods that are ultimately destined for an adversary in a conflict and may benefit its war effort.
Ex gratia	Payment of compensation although no legal obligation exists.
Laser target designator	Device emitting a laser beam that is used to designate a certain place or object.
Less lethal weapons	Weapons explicitly designed and developed to incapacitate or repel people with a low probability of permanent injury or death or to disable equipment with minimal undesired damage to equipment or impact on the environment. The term covers the same weapons as the so-called "non-lethal weapons", but the term less-lethal weapons is preferred as it cannot be excluded that such weapons may also cause death under special circumstances.
Levée en masse	<i>Levée en masse</i> is French for mass uprising and is used in international law to describe the situation in which "inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war". GC III, Article 4(A)(6).

Loadmaster	An aircrew member. Responsible for the loading of cargoes and passengers.
Malware	Software -- for instance, viruses -- in a computer or computer network which the user does not know about or want.
Rendering objects temporarily inoperable	<p>Objects may be rendered temporarily inoperable by employing one or more of the following three methods:</p> <ul style="list-style-type: none"> · use of third-generation mines with a view toward denying the enemy the use of the object while keeping it intact; or · blocking the object; or · removal of vital parts of the object.
Mission and Target Approval Authority Team (MTAA-team)	The powers that derive from MTAA include, inter alia, Danish approval of military objectives in multinational operations. MTAA is typically assigned to the commander of an air force contingent -- usually, a colonel or lieutenant colonel. The commander will typically appoint a team of people to advise him in these decisions. The team will typically consist of a military legal adviser and an intelligence officer. Related term: <i>Red Card Holder</i> .
Nanotechnology	A field of applied science dealing with the engineering of structures ranging from 0.1 to 100 nanometres (equal to one billionth of a metre).
National information bureau	GC III, Article 122, and GC IV, Article 136: Each State Party is under an obligation to institute an official information bureau for prisoners of war and protected persons who are in its power. Related term: " <i>central information agency</i> ".
NATO Standardization Agreement (STANAG)	The conclusion of an agreement between multiple or all NATO member countries which specifies common provisions, concepts, processes, and procedures to ensure that the participating nations use the same or similar military equipment, etc. National subscription to NATO's standardisation publications is also considered to constitute such an agreement.
Notices to Mariners (NOTMAR)	Notices advising mariners of important matters affecting, for instance, freedom of navigation in an area.
Territorial jurisdiction	See Chapter 3, Section 4.2, under the subsection addressing territorial jurisdiction.
OPLAN	A plan for conducting one or more comprehensive military operations either simultaneously or consecutively. Most frequently, a framework directive issued by a higher authority to be implemented and executed by subordinate units.
Out of Bounds	A military out-of-bounds area is a section of road or other geographically defined area about which an order restricting or prohibiting entry has been issued, for instance, to avoid disturbing civilian activities or in the interests of personal security.
Civil airliner	According to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, a civil airliner is defined as: A civil aircraft that is clearly marked and engaged in carrying civilian passengers in scheduled or non-scheduled services along Air Traffic Service routes.
Pattern of life (PoL)	The civilian population's activities and movement patterns.

Personal jurisdiction	See Chapter 3, Section 4.2, under the subsection addressing personal jurisdiction.
Positive identification (PID)	Means that evidence has been gathered to verify that a target or target area has been identified as being hostile.
Private Military Contractor (PMC)	Private provider of services or products to military forces.
Private Military Security Company (PMSC)	PMSC is an organisation composed of PMCs that provides services of an actual military or security-related nature. These services include, in particular, the guarding (armed guard service) and armed protection of persons or objects, the maintenance of weapons systems, the handling of persons deprived of liberty as well as the provision of advice to or training of local forces and security personnel.
Prize	Hostile or neutral merchant vessels boarded and captured under the rule set forth in Article 116 of SRM.
Point target	A target which requires precision bombing.
Range-finder	Distance-measuring sensor; an instrument measuring the distance to an object.
Red card holder	The commander of an MTAA team. The Red Card Holder is the “old” scheme still used by most other nations – there is a crucial doctrinal difference between the MTAA and Red Card systems.
Customary international law	For a rule of customary international law to exist, an objective and a subjective criterion must be satisfied: <ol style="list-style-type: none"> 1) A uniform State practice must be established. 2) The States are required to follow this practice, based on the conviction of being legally bound by it.
Riot Control Agent	Non-lethal chemical agents used by law enforcement officials to suppress riots and rebellions -- for instance, tear gas and CS gas.
Rules of Engagement (RoE)	Directives issued by a competent military authority (typically, a coalition or alliance authority) that specify powers and restrictions relating to the use of force in the broad sense.
Safe-conduct	A special written authorisation issued by a competent military commander to hostile or neutral units at sea or to persons of any nationality at sea. The safe-conduct implies permission to travel to a specified place and, if necessary, to pass through a war zone without being subjected to search or discriminatory treatment. A safe-conduct must contain accurate information and may be granted on a temporary or permanent basis.
Search	1) Bodily search or security search of a person
Show of force	2) Search of a location or vehicle An operation designed to showcase a State's own forces and demonstrate its preparedness to use them.
Special Instructions (SPINS)	Contain detailed operating procedures for all missions and tasks. (Appendix to Air Tasking Order)

Special Operations	Military activities conducted by specially designated, organised, trained, and equipped forces through the employment of tactics, techniques, and procedures that are non-standard for conventional forces.
Standing Operating Procedures (SOP)	Instructions applicable to those features of operations that are suitable for a definite or standardised procedure without loss of effectiveness. The procedure applies unless otherwise provided. Frequent terms used in Danish are 'blivende bestemmelser for garnisonsforhold' (BBG) (i.e., standing orders for garrison conditions) or 'blivende bestemmelser for feltforhold' (BBF) (i.e., standing orders for field conditions).
Tactical Operations Centre (TOC)	A command post for monitoring, coordinating, and deploying units.
Target Pack	A collection of all relevant information about an intended target for the purpose of providing the basis for the operational planning of and for choosing between kinetic or non-kinetic effects on the target. A "target" and "objective" should be understood as a "military objective" in the broader sense, also encompassing the objective of measures other than attacks, including the objective of information operations.
Targeting	The process of selecting and prioritising targets for the purpose of choosing capabilities and the nature of the appropriate response to them. A "target" and "objective" should be understood as a "military objective" in the broader sense, also encompassing the objective of measures other than attacks, including the objective of information operations.
Transfer of Authority (ToA)	An action by which operational command of designated forces is transferred to another nation, coalition, or alliance.
Triage	The process of assessing and classifying the condition of sick or injured persons and determining their treatment and evacuation needs.
Tumble	A tumbling projectile rotates around its own axis after firing with increased risk of hitting the target in the longitudinal direction of the projectile.
Universal jurisdiction	A legal principle allowing a State to prosecute crimes committed by foreign nationals outside its territory, solely based on the foreign national's presence within the territory of the State concerned.
Unmanned Aerial Vehicle (UAV)	A powered, unmanned drone or aircraft. Can be remote-controlled or auto-piloted.
Walk-in	An unsolicited person who presents himself or herself to a military installation or unit to provide information, request medical treatment, etc.
Weaponeeing	The process of assessing the choice of weapons and ammunition, weapon and ammunition options, etc. in relation to available weapon and ammunition resources and the desired effect on a given target.

APPENDIX 2

Abbreviations used in the Manual

AJP	Allied Joint Publication
AMW	Harward Programme for Conflict Research Manual on Air and Missile Warfare
ANCBS	The Association of National Committees of the Blue Shield
AO	Artillery Observer
AU	Organization of African Unity
BCN-Weapon	Biological, Chemical or Nuclear weapon
BDA	Battle Damage Assessment
EOI	Danish Executive Order on International Law
CAOC	Combined Air Operations Center
CAS	Close Air Support
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBRN	Chemical, Biological, Radiological and Nuclear
CCW	United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980. Reference is made to the Protocols to the Convention, e.g. CCW PI.
CDE	Collateral Damage Estimate

CEDAW	United Nations Convention of 18 December 1979 on the Elimination of All Forms of Discrimination against Women
CERD	United Nations International Convention on the Elimination of All Forms of Racial Discrimination
CIMIC	Civil-Military Cooperation
CNA	Computer Network Attack
CND	Computer Network Defence
CNE	Computer Network Exploitation
CNO	Computer Network Operations
CoE	Council of Europe
CPA	Coalition Provisional Authority (Iraq)
CPG	Copenhagen Process: Principles and Guidelines
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
CS-Gas	Tear gas ($C_{10}H_5ClN_2$)
CWC	Chemical Weapons Convention of 1993
CWM	Tallinn Manual on the International Law Applicable to Cyber Warfare
DANCON	Danish Contingent
DARIO	United Nations Draft Articles on the Responsibility of International Organisations of 2011
PLA	Platoon
EEZ	Exclusive Economic Zone (Maritime term – see also the naval glossary in Chapter 14).
ECtHR	The European Court of Human Rights
ECHR	The European Convention on Human Rights
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
ESCR	United Nations International Covenant on Economic, Social and Cultural Rights
ETS	European Treaty System

EU	European Union
EEZ	Exclusive Economic Zone
CA	Common Article
FAC	Forward Air Controller
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
MPS	Danish Military Prosecution Service
FMLN	Farabundo Marti National Liberation Front (El-Salvador)
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council. If reference is made to Council resolutions, “RES” is added.
DHS	Danish Defence Health Service
GC	Geneva Convention
GLTD	Ground Laser Target Designator
GMLRS	Ground Multiple Launch Rocket System
SQD	Squad
HC	Hague Convention
1954 Hague Convention	Hague Convention on the Protection of Cultural Property of 1954
1907 Hague Convention IV	Annex to Hague Convention IV of 1907 (Hague Land War Regulations)
RDA	Royal Danish Army
HPCR	Harvard Programme on Humanitarian Policy and Conflict Research
HUMINT	Human Intelligence
IAC	International Armed Conflict
IAEA	International Atomic Energy Agency
IC	Internee Camp
ICBS	The International Committee of the Blue Shield

ICC	International Criminal Court
ICJ	The International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	United Nations International Criminal Tribunal for Rwanda
ICTY	United Nations International Criminal Tribunal for the Former Yugoslavia
IED	Improvised Explosive Device
IFOR	Implementation Force – NATO-led military implementation force in Bosnia-Herzegovina
IHL	International Humanitarian Law
IIHL	Institute of International Humanitarian Law, San Remo
ILC	International Law Commission
ILO	International Labour Organization
IMAS	International Mine Action Standards
IMO	United Nations International Maritime Organization
INTERPOL	International Criminal Police Organization
IO	International Organisation
ISAF	International Security Assistance Force – NATO-led peacekeeping force in Afghanistan
ITU	International Telecommunications Union
CC	Company Commander
KFOR	Kosovo Force – NATO-led military peacekeeping force in Kosovo
KLE	Key Leader Engagement
CMP	Company
ConA	Consolidation Act
LTTE	Liberation Tigers of Tamil Eelam
MC	Military Committee of NATO
MDC	Danish Military Disciplinary Code

MEZ	Maritime exclusion zone
MINURSO	United Nations Mission for the Referendum in Western Sahara
MINUSMA	United Nations Mission in Mali
MIO	Maritime Interdiction Operation
LEGAD	Military Legal Adviser
MoU	Memorandum of Understanding
MOAG	Member of a Non-State Organised Armed Group
MP	Military Police
MPC	Danish Military Penal Code
MTAA	Mission and Target Approval Authority
NATO	North Atlantic Treaty Organization
NEO	Non-Combattant Evacuation Operation
NGO	Non Governmental Organization
NIAC	Non-International Armed Conflict
NM	Nautical Miles
NOTAM	Notice to airmen
NOTMAR	Notice to mariner
NPT	Nuclear Non-Proliferation Treaty
OEF	Operation Enduing Freedom
ONUC	United Nations Operations in The Congo
OPLAN	Operational Plan
OPS-BOX	Geographical Operations Area, typically in the air
OSCE	Organization for Security and Cooperation in Europe
OVG	Non-State Organised Armed Group
PCIJ	Permanent Court of International Justice
PfP	Partnership for Peace

PG	Prisoner de Guerre
PID	Positive Identification
PMC	Private Military Contractor
PMSC	Private Military Security Company
ARINF	Armoured Infantry
PoL	Pattern of Life
PSI	Proliferation Security Initiative
PW	Prisoner of War
R2P	Responsibility to Protect
RCA	Riot Control Agent
Rec	Recommendation
RECSYR	Removal of Chemical Weapons from Syria
RoE	Rules of Engagement
SAM	Surface to Air Missile
SFOR	Stabilisation Force – NATO-led peacekeeping force in Bosnia-Herzegovina
SNR	Senior National Representative
SOF	Special Operations Forces
SOFA	Status of Forces Agreement
ADFPUB	Admiral Danish Fleet Publication
SOMA	Status of Mission Agreement
SOP	Standing Operational Procedures
SPINS	Special Instructions
SRM	San Remo Manual on International Law Applicable to Armed Conflicts at Sea
SCIHL	Study on Customary International Humanitarian Law of the ICRC
SSM	Surface to Surface Missile
STANAG	NATO’s Standardization Agreements applying to Alliance forces

SUA	Convention for the suppression of unlawful acts against the safety of maritime navigation
TA	Technical Arrangement
TEZ	Total exclusion zone
HMG	Heavy Machine Gun
ToA	Transfer of Authority
TOC	Tactical operations Center
AP	Additional Protocol
TTW	Territorial Waters
UAV	Unmanned Aerial Vehicle
UNCLOS	United Nations Convention on the Law of the Sea of 1982
UNDHR	United Nations Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNICEF	United Nations Children's Fund
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNSOM	United Nations Mission in Somalia
UNPROFOR	United Nations Protection Force (Croatia, Bosnia, Herzegovina and Macedonia)
UNSMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
UXO	Unexploded Ordnance
WHC	UNESCO's World Heritage Convention
DCD	Defence Command Denmark
DO	Duty Officer
VTC	Video Tele Conference
WFP	World Food Programme
WHO	World Health Organization
SDO	Senior Danish Officer

APPENDIX 3

List of sources of law applied in the Manual

International legal instruments

Second International Peace Conference at the Hague in 1907

Hague Convention IV respecting the Laws and Customs of War on Land of 18 October 1907 (Land Law Convention / Hague Land War Convention)	1907 Hague Convention IV
Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907	HC V
Hague Convention VI relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities of 18 October 1907	HC VI
Hague Convention VII relating to the Conversion of Merchant Ships into War-Ships of 18 October 1907	HC VII
Hague Convention VIII relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907	HC VIII
Hague Convention XI relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War of 18 October 1907	HC XI
Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War of 18 October 1907	HC XIII

Geneva Conventions and their Additional Protocols

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949	GC I
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Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949	GC II
Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949	GC III
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949	GC IV
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 18 June 1977	AP I
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 18 June 1977	AP II
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) of 8 December 2005	AP III

Weapons

Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles of 11 December 1868	Saint Petersburg Declaration
Hague Declaration concerning Asphyxiating Gases of 29 July 1899	Asphyxiating Gas Declaration
Hague Declaration concerning Expanding Bullets of 29 July 1889	Dum-Dum Declaration
Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925	Gas Protocol
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972	Biological Weapons Convention
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 18 May 1977	ENMOD
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980	CCW
Amended Article 1 to CCW	CCW art 1 (2001)
Protocol on Non-Detectable Fragments (Protocol I) of 10 October 1980 to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980	CCW P I
Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980 to the Convention on Prohibitions or	CCW P II

Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) as amended on 3 May 1996 to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980

CCW P II (1996)

Technical Annex to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) as amended on 3 May 1996

CCW P II (1996),
Technical Annex

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) of 10 October 1980 to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980

CCW P III

Protocol on Blinding Laser Weapons (Protocol IV) of 13 October 1995 to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980

CCW P IV

Protocol on Explosive Remnants of War (Protocol V) of 28 November 2003 to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980

CCW P V

Technical Annex to the Protocol on Explosive Remnants of War (Protocol V) of 28 November 2003

CCW P V, Technical
Annex

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 13 January 1993

CWC

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction of 18 December 1997

Ottawa Convention

Convention on Cluster Munitions of 30 May 2008

Oslo Convention

Cultural property

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954

1954 Hague Convention

First Protocol of 14 May 1954 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954

1954 Hague Convention
P I

Second Protocol of 26 March 1999 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954

1954 Hague Convention
P II

UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972

WHC

Airborne operations

Hague Rules of Air Warfare of 1923	Hague Rules of Air Warfare
Convention on International Civil Aviation of 7 December 1944	Chicago Convention
Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 27 January 1967	Outer Space Treaty

Naval operations

Paris Declaration Respecting Maritime Law of 16 April 1856	Paris Declaration
London Submarine Protocol of 6 November 1936	London Protocol
United Nations Convention on the Law of the Sea of 10 December 1982	UNCLOS
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	Narcotic Drugs Convention
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and its Protocol of 1 November 2005	2005 SUA Convention
United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air of 15 November 2000	Convention against Transnational Organized Crime
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks	Agreement for the Conservation and Management of Fish Stocks

Certain human rights conventions and instruments

Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948	Genocide Convention
Universal Declaration of Human Rights of 10 December 1948	UDHR
European Convention on Human Rights of 4 November 1950 and its Protocols Nos. 11 and 14	ECHR
United Nations International Covenant on Economic, Social and Cultural Rights of 16 December 1966	ESCR
United Nations International Covenant on Civil and Political Rights of 16 December 1966 and its Optional Protocol	ICCPR
United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979	CEDAW

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984	CAT
United Nations Convention on the Rights of the Child of 20 November 1989	UNCRC
Optional Protocol on the Involvement of Children in Armed Conflict of 25 May 2000 to the Convention on the Rights of the Child of 20 November 1989	OP UNCRC I
Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography of 25 May 2000 to the Convention on the Rights of the Child of 20 November 1989	OP UNCRC II
Charter of Fundamental Rights of the European Union of 18 December 2000	EU Charter of Fundamental Rights
United Nations Convention on the Rights of Persons with Disabilities of 2006	CRPD
International Convention for the Protection of all Persons from Enforced Disappearance of 20 December 2006	Convention against Enforced Disappearance
ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation of 25 June 1958	ILO 111
ILO Convention No. 138 concerning Minimum Age for Admission to Employment of 26 June 1973	ILO 138
ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999	ILO 182
Convention concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents of 1925	Convention of 1925

NATO

Agreement Between the Parties to the North Atlantic Treaty regarding the Status of Their Forces of 19 June 1951	NATO SOFA
Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of their Forces (PfP SOFA), done at Brussels on 19 June 1995	PfP SOFA
Protocol on the Status of International Military Headquarters set up Pursuant to the North Atlantic Treaty of 28 August 1952	Agreement on the Status of NATO Headquarters
Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace regarding the Status of their Forces of 19 December 1997	Agreement on the Status of Personnel Associated with NATO Headquarters and Serving in PfP Countries

Agreement of 12. September 1994 on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organization

Agreement on the Status of Representatives of NATO/PfP Countries Participating in Meeting Activities Etc. at NATO Headquarters

United Nations

United Nations Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 and Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel of 8 December 2005

UN Convention on the Safety of UN Personnel and Associated Personnel and its Optional Protocol

General Convention on the Privileges and Immunities of the United Nations, adopted by resolution of the General Assembly in plenary meeting on 13 February 1946

Convention on the Privileges and Immunities of the United Nations

United Nations Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law of 6 August 1999

UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law

United Nations Standard Minimum Rules for the Treatment of Prisoners

United Nations Standard Minimum Rules for the Treatment of Prisoners

Other international legal instruments

Paris Convention for the Protection of Industrial Property of 1883 as amended

Paris Convention on Industrial Property

Constantinople Convention Respecting the Free Navigation of the Suez Maritime Canal of 1888

Constantinople Convention of 1888

Constitution of the International Labour Organization (ILO) of 1919

ILO Constitution

Treaty Regulating the Status of Spitsbergen of 9 February 1920

Spitsbergen Treaty

Decision of the League of Nations of 1921 to prevent acts of war from taking place within the Åland Islands

League of Nations decision of 1921

Decision of the League of Nations of 1921 to prevent acts of war from taking place within the Åland Islands

Roerich Pact

Charter of the United Nations and Statute of the International Court of Justice of 26 June 1945

UN Charter

Statute of the Council of Europe of 5 May 1949	Statute of the Council of Europe
UN Flag Code and Regulations 1952	UN Flag Code
Antarctic Treaty banning military activity on the continent of Antarctica of 1959	Antarctic Treaty
Vienna Convention on Diplomatic Relations of 18 April 1961	Vienna Convention on Diplomatic Relations
Vienna Convention on the Law of Treaties of 23 May 1969	VCLT
Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 1977	Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal
Constitution and Convention of the International Telecommunication Union of 22 December 1992 and the Optional Protocol attached thereto	ITU
General Comment of the UN Human Rights Committee on the Interpretation of Article 7 of CCPR of 1992	Human Right Committee General Comment n. 20 on Article 7, 1992
Concluding Observations of the UN Committee Against Torture with respect to Finland of 1996	Committee against Torture concluding observations Finland 1996
General Comment of the UN Committee Against Torture on the Interpretation of Article 3 in the context of Article 22 of the Convention against Torture	Committee against Torture, General Comment no. 1, 1998
Concluding Observations of the UN Human Rights Committee on the report of Denmark submitted in 2000	Human Rights Committee Concluding observations on Denmark, 2000
Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules	CoE Rec(2006)2
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, and Protocol No. 22 on the Position of Denmark with regard to the Treaty of Lisbon	Treaty of Lisbon
Administrative agreement with the Council of Europe regarding the use of the European emblem by third parties (2012/C 271/04), published in the Official Journal of the European Union C 271, 2012	Official Journal of the EU
Safe School Declaration, 29 May 2015	Safe School Declaration

Danish legal instruments

Danish War Crimes Act, Act No. 395 of 12 July 1946 as amended	War Crimes Act
Constitutional Act of the Kingdom of Denmark, Act No. 169 of 5 June 1953	Constitution of the Kingdom of Denmark
The Danish Act on Punishment of the Crime of Genocide, Act No. 132 of 29 April 1955	Genocide Act
Danish Royal Decree No. 130 concerning Rules of Engagement for the Armed Forces in case of an Attack on the Country and in Time of War of 26 April 1961, which is an addition to Danish Royal Decree No. 63 concerning Rules of Engagement for the Armed Forces in case of an Attack on the Country and in Time of War	Royal Rules of Engagement
Danish Executive Order concerning the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980	EOI No. 114 of 12 December 1983
Danish Executive Order concerning the implementation of the Constitution of the International Telecommunication Union, Geneva, 1992 (see Chapter 3, page 44, note 23)	Executive Order No. 127 of 8 December 1994
Danish Executive Order concerning the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) as amended on 3 May 1996 to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980	EOI No. 50 of 17 June 1999
Danish Act on the International Criminal Court, Act No. 342 of 16 May 2001	ICC Act
Danish Consolidation Act on Police Activities, CA No. 956 of 20 August 2015	Police Act
Danish Military Penal Code, Act No. 530 of 24 June 2005 as amended by Act No. 494 of 17 June 2008	MPC
Danish Military Administration of Justice Act, Act No. 531 of 24 June 2005	MAJA
Danish Military Disciplinary Code, Act No. 532 of 24 June 2005	MDC
Danish Act on the Contiguous Zone, Act No. 589 of 24 June 2005	DACZ
Danish Criminal Code, Consolidation Act No. 873 of 9 July 2015	CC
Danish Administration of Justice Act, Consolidation Act No. 1308 of 9 December 2014 as amended	AJA
Danish Administration of Justice Act, Consolidation Act No. 1308 of 9 December 2014 as amended	Disciplinary Executive Order
Circular No. 9036 issued by the Danish Ministry of Defence of 20 January 2006 concerning Conditions of Service for Military and Civilian Personnel in the Armed Forces	Ministry of Defence Guidelines for Subordinates

Circular No. 66 of 29 September 2011 concerning the Size and Equipment of Prisoners' Day Rooms in the Facilities of the Danish Prison and Probation Service

Circular concerning Day Rooms

Circular Letter No. 9738 of 21 March 2002 on the Red Cross Emblem

Circular Letter of the Red Cross Emblem

**Overview of Computer Network
Operations (CNO*) addressed
in the Manual**

Chapter 1	Section 5 On CNO* issues addressed in the Manual
Chapter 2	Section 2.2.3 On individual or collective self-defence Section 3.5 On the geographical scope of conflicts
Chapter 3	Section 1.1 On CNO* issues addressed in the Manual Section 3.9.4 On the protection of the correspondence of diplomats Section 3.10 Introduction to the regulation of CNO* in international law Section 5.4.2 On the Tallinn Manual on the International Law Applicable to Cyber Warfare
Chapter 4	NIL
Chapter 5	Section 2.1 On combatants in CNO* Section 2.2 On the direct participation of civilians in hostilities (examples 5.8 and 5.9) Section 2.6 On cyber espionage
Chapter 6	Section 3.4 On precautions Section 3.5 On the prohibition against using CNO* in a manner to interfere with relief efforts. Section 5.3 On CNA* and plants and facilities capable of triggering dangerous forces.
Chapter 7	NIL
Chapter 8	Section 1.4.1 CNO* issues addressed in the chapter Section 2.1 On CNA* as attacks within the meaning of AP I (example 8.6) Section 2.1.1 Data do not in general constitute an object Section 2.3.1 On an effective contribution by its nature Section 2.3.1 On an effective contribution by virtue of use (example 8.18c) Section 3.4.1 On the obligation to minimise collateral damage from an attack (example 8.33) Section 4.2.2 How long and how often must verification measures be taken?
Chapter 9	Section 4.13 On cyber booby-traps Section 4.4 On cyber weapons Section 10 On weapon-screening of cyber weapons
Chapter 10	Section 2.10 On the prohibition to engage in indiscriminate CNA*(example 10.18)
Chapter 11 to 15	NIL

It has not always been found necessary to add a separate text on CNO*, which does not imply, however, that international law in that specific area does not apply to CNO*. Throughout the Manual, therefore, the footnotes contain references to rules in the Tallinn Manual on the International Law Applicable to Cyber Warfare (CWM rule XX) -- also in cases in which the main text does not address CNO*.

Principles for application of addendums in the Manual

Principles for application of addendums in the Manual

In certain carefully selected contexts, the Manual makes a **deliberate addendum** to the explicit obligations of the Danish armed forces under international law. Addendums may be made for a number of reasons, including a desire to provide increased protection to a group of people, but additions may also be based on a desire to create uniform rules across various conflicts or otherwise to facilitate the application of the rules.

Accordingly, an addendum cannot be seen as an indication that Denmark or the Danish Defence feels obliged under international law to act in this way.

In the Manual, addendums are marked with a footnote and the text “Addendum”, followed by a number which, first, specifies the chapter in which the addendum is cited and, then, the sequential number starting with 1 in each chapter. E.g., “Addendum 3.1”. It should be noted that the text boxes are also numbered sequentially, provided with a chapter number and a sequential number, e.g., 12.1. These box numbers should not be confused with numbered addendums appearing in footnotes.

An addendum is provided where the scope of a rule under international law is **deliberately** extended in the Manual in relation to the international law obligation that applies in the relevant area. This practice has been followed according to the following guidelines:

1. Extension of the scope of the application of a treaty.

Example 1 shows a case in which the addendum, here Addendum 3.4, extends the scope of the application of a treaty in relation to AP I, Art. 1(2), which presumes reciprocity:

3.1. To avoid this difficult identification of customary international law in conflicts in which one or more of the parties are not party to the treaty, Danish forces are required to comply with the provisions of the protocol in IACs whether or not the other parties to the conflict are parties to the treaty.

2. Protection is extended in relation to one or more existing provision(s).

Example 2 of an obligation that is deliberately extended in relation to the obligation enshrined in IHL, here from Addendum 3.1:

“In this context, restraint should be exercised in using schools and other educational institutions in support of Danish military operations.” (Chapter 6 under Box 6.4).

There is no specific obligation to exercise such restraint provided for by international law. A presumption of civilian status applies to schools, but the use of schools in support of military operations is based on the same assessments of military necessity as other civilian objects that do not qualify for special protection under IHL. The background to this addendum may be found in various UNSC resolutions, which draw attention to these matters.

3. Uniform rules: A protective measure applies in one type of conflict and/or in time of peace but – for instructional and/or humanitarian reasons – is extended to apply in other types of conflict and/or in peacetime operations.

Example 3a shows a case in which protection measures described for IACs are also applied in NIACs although there is no (sufficiently clear) basis in international law for such an extension of the rules. Here, the example from Addendum 7.1 is applied:

“The right to capture medical units, transports, and equipment is not regulated in NIACs. The issue, therefore, remains unresolved in international law. It seems most coherent, however, to require the same respect for the adversary’s medical units in NIACs.”

In order to create uniform rules in different scenarios of conflict and, moreover, to support the humanitarian purpose of the provision, the provision is extended to apply to NIACs although there are no valid grounds – either under treaty law or under customary law – for extending the rule to NIACs.

Example 3b differs from 3a in the sense that a NIAC rule actually exists in the area either in treaty law or customary international law (reflected in the ICRC's study in the form represented in the Manual). In order to ensure uniformity and, in certain cases, also develop the humanitarian considerations from the black letter rules of international law, the rule is described in the form it has in IACs, thereby extending the wording to apply in NIACs.

The example applied here is Addendum 7.3:

7.12. *The personal effects and military equipment of a deceased person must be collected. Military equipment, including military documents, weapons, uniform, etc., becomes State property as war booty when collected. No Danish military personnel are entitled to take and retain the deceased person's personal effects or items of military equipment.*

+NIAC

Here, the NIAC rules of AP II and SCIHL prohibit pillage. The part providing that the personal effects and military equipment of a deceased person must be collected is not covered by any rule of international law in NIACs.

4. The highest common denominator for protection is used in certain cases in which the rules governing the protection of different types of persons deprived of liberty differ.

Example 4: Reference is made to a situation described in Chapter 12 in which certain rules are compiled for different groups of protected persons to find the highest common denominator for the protection and, accordingly, a uniform rule governing different categories of protected persons (here, prisoners of war, internees, and arrested persons).

”The person deprived of liberty must not be unduly exposed to noise”.

In this case, the deliberate addendum exclusively concerns two of several categories of protected persons (internees and prisoners of war) since the rule applies as described to arrested persons, but it cannot be derived from Chapter 12's box text which group of persons the addendum concerns.

5. Specification of an existing, more loosely formulated provision.

Example 5: When the Manual specifies an existing, more loosely formulated obligation, e.g.: Persons deprived of liberty must be supplied with sufficient food and drink. These sufficiency standards are additionally specified in Chapter 12 of the Manual as follows: While in detention facilities, persons deprived of liberty must be offered three meals a day and must have access to clean drinking water (Addendum 12.8). It is clear that these standards do not follow from treaty law, customary international law, or judicial decisions but are a manifestation of the **level of treatment** which, as presented in the Manual, is assessed to be well within the limits of international law. Other States might find that less rigorous standards could be adopted without necessarily being “at odds” with the rules of international law. Given these circumstances, it is an addendum in the Manual.

Overview of addendums in the Manual

Sequential number	Concerning	Background indication
CHAPTER 3		
3.1	The addition concerns the requirement to exercise actual restraint with respect to the military use of children's institutions, including day-care facilities, schools, and residential children's homes. This also applies in situations in which the basis of international law, including SOFAs, allows for the possibility of evacuating such institutions for use by international military forces.	2
3.2	In operations in which none of the three conditions for jurisdiction is met, Danish armed forces must respect the aspects of the right to life that are linked to their own use of force.	1
3.3	In cases in which extraterritorial jurisdiction is not established, the United Nations Convention on the Rights of Persons with Disabilities must also be respected by the Danish armed forces in so far as possible and appropriate in the context of the tasks assigned to the force on the individual mission.	1
3.4	To avoid a difficult identification of customary international law in conflicts in which one or more of the parties are not parties to the treaty, Danish forces are required to comply with the provisions of AP I in IACs whether or not the other parties to the conflict are parties to the treaty.	1
CHAPTER 5		
5.1	It appears in Box 5.6 that, also in NIACs, the Danish armed forces must contribute to making this distinction possible by the wearing of uniforms.	2 and 3
CHAPTER 6		
6.1	Danish forces should consider the possibilities of separating or protecting the civilian part of the objective as best possible from the effects of attacks. This applies particularly in situations in which the civilian proportion is considerable or of material civilian importance.	2
6.2	Restraint should be exercised in using schools and other educational institutions in support of Danish military operations.	2 and 3

Sq.nr.	Concerning	Background indication
6.3	The parties to the conflict must allow and facilitate agreements on relief supplies and ensure the free and unimpeded passage of relief shipments, distribution equipment, and personnel for the benefit of the distressed civilian population, and the parties are required to protect such supplies and support the rapid distribution of relief consignments.	3
6.4	Transports of cultural property must be respected.	3
6.5	It appears in Box 6.23 that it is prohibited to cause widespread, long-term, and severe damage to the natural environment and, thereby, prejudice the health or survival of the population. This is an addition as far as NIACs are concerned.	3

CHAPTER 7

7.1	The right to capture medical units, transports, and equipment is not regulated in NIACs. The issue, therefore, remains unresolved in international law. It seems most coherent, however, to require the same respect for the adversary's medical units in NIACs.	3
7.2	Matters relating to the capture of medical equipment.	3
7.3	The personal effects and military equipment of a deceased person must be collected. Military equipment, including military documents, weapons, uniform, etc., becomes State property when collected as war booty. No Danish military personnel are entitled to take and retain the deceased person's personal effects or items of military equipment. The addition concerns the application of the rules in NIACs	3
7.4	The dead must be buried or cremated, carried out individually as far as circumstances permit. If possible, burial must be conducted according to the rites of the religion to which the deceased belonged. The addition concerns the application of the rules in NIACs	3

CHAPTER 8

8.1	Obligations addressed in this chapter apply to any operation that, regardless of whether it is carried out from land, sea, or air, is directed against objectives on land or affects protected persons or protected objects on land. The addition concerns protected persons.	1
8.2	If parts of a military objective are also of material civilian importance, the Danish armed forces should also limit the harmful effects to that part of the objective that is of military interest when this is safe for Denmark's own forces..	2

Sq.nr.	Concerning	Background indication
8.3	When the loss of – or damage to – such data is foreseeable, Danish forces are required to recognise this as collateral damage. Data cannot be deemed to be objects under international humanitarian law.	2 and 5
8.4	Danish forces are required to recognise damage to the non-military “share” of a dual-use object as collateral damage in cases in which the non-military share is of particular and direct importance to protected persons.	2
8.5	In case of doubt as to whether a person is entitled to receive protection as a civilian , Danish personnel must give such a person the benefit of the doubt. This addition extends the presumption of civilian status to a presumption of a need for protection under the relevant rules of international humanitarian law.	2
8.6	In case of doubt as to whether an object makes an effective contribution to the adversary’s military action, Danish personnel must ensure that objects normally dedicated to civilian purposes are given the benefit of the doubt.	2
8.7	All personnel have a derivative obligation to inform the commander if it becomes apparent to them that an imminent attack will be unlawful.	5

CHAPTER 9

9.1	The endeavours of States to implement restrictions on the use of anti-tank mines at national level. The Danish armed forces must act in accordance with the declaration.	2
9.2	White phosphorus may not be used to direct attacks against combatants.	2 and 5

CHAPTER 10

10.1	All emblems, including the Star of David, must be respected and must not be misused.	2 and 3
10.2	Prohibitions against any misuse of the adversary’s flag, uniforms, and emblems with a view to favouring one’s own or impeding the adversary’s military operations in NIACs.	3

Sq.nr.	Concerning	Background indication
CHAPTER 11		
11.1	Denmark has not yet acceded to the Second Protocol to the Convention on the Protection of Cultural Property, but the protocol provides for a substantial extension of the responsibility of occupying powers and must in future be followed by the Danish armed forces.	2
CHAPTER 12		
12.1	As far as Danish soldiers are concerned, the prohibition applies to all forms of acts and omissions that aggravate the suffering of persons deprived of liberty beyond what is an inevitable part of the deprivation of liberty.	2
12.2	Any use of physical force or any other form of intervention that serves no legitimate purpose will be a violation of the prohibition.	2
12.3	The use of physical restraint in the form of handcuffs or plastic restraints or forcing persons deprived of liberty to take a special position is lawful in cases of operational necessity and when the discomfort following from their use is not disproportionate to the purpose. Such physical restraint must not be used as a disciplinary punishment.	2
12.4	Sensory deprivation engenders a particularly strong feeling of discomfort for persons deprived of liberty. Therefore, it may be used only if the purpose of such sensory deprivation cannot be achieved, for instance, by concealing sensitive material or choosing another route for transporting the person concerned.	2
12.5	If a curtailment of vision is necessary, this must be done in a way that causes minimum discomfort to the person deprived of liberty.	4
12.6	The person deprived of liberty must not be unduly exposed to noise.	4
12.7	As a result of operational conditions, access to and the quality of food and water may vary and, for short periods of time, be limited. Under such conditions, persons deprived of liberty must be supplied with food and water in line with the Danish forces.	5
12.8	While in detention facilities, persons deprived of liberty must be offered three meals a day and must have access to clean drinking water.	4 and 5
12.9	When released or transferred to another State, unit, or facility, persons deprived of liberty must be asked whether they have any complaints relating to the time they were under Danish responsibility.	2

Sq.nr.	Concerning	Background indication
12.10	Prisoners of war and internees must have opportunities for pursuing sports or taking other physical exercise for at least two hours a day. For other persons deprived of liberty, the minimum standard is one hour. In that connection, they must have opportunities for being outdoors unless the weather conditions are of such a nature that they are considered a health hazard.	4
12.11	With regard to civilians deprived of liberty and children, in particular, it is necessary to take all practical measures to ensure that they are able to continue or begin their studies.	4
12.12	If persons deprived of liberty undertake work, they must do so under reasonable and appropriate conditions. This applies both in relation to health and safety at work but also in relation to the right to receive working pay. Work must not be used as a disciplinary punishment.	4
12.13	When transporting persons deprived of liberty, all possible precautions must be taken to ensure their safety. To the widest possible extent, persons deprived of liberty should not be transferred to camps that impede family contact .	5
12.14	The provisions regulating the exact size of the cells are a national matter. It appears in Danish national legislation that detainees must be accommodated in rooms with a floor area of no less than six square metres for single cells and no less than eight square metres for double cells. These rules are not directly applicable to Danish forces operating abroad but must be respected, if possible.	5
12.15	Persons deprived of liberty must be provided with sufficient soap and water for their daily personal toilet and for washing their personal laundry. The installations and facilities necessary for that purpose must be made available.	4
12.16	An interrogation must be conducted within a reasonable period of time to ensure that no method of interrogation is employed that impairs the detainee's capacity for decision-making or judgement.	4
12.17	Any prohibition of communication with the outside world for military or political reasons may only be temporary, and its duration must be as short as possible.	4
12.18	In NIACs, internees may not be transferred to States that do not have the willingness and ability to comply with CA 3 or AP II.	2

Sq.nr.	Concerning	Background indication
CHAPTER 15		

15.1	In these cases, therefore, reports will need to be conveyed concurrently by following two parallel tracks: the chain of command in the national track to Defence Command Denmark and in the mission track to the senior national representative -- typically, the commander of the alleged offender's national contingent in the mission area.	1 and 2
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