

Chapter 1

General Background and Basic Principles of the Law of Armed Conflict

Certain basic principles are foundational to a full understanding of LOAC, rules of engagement, and Army and Marine Corps doctrine. This chapter examines the law governing the resort to the use of armed force (*jus ad bellum*), the purpose and applicability of LOAC in armed conflict and its relationship with other law. After examining the basic LOAC principles, this chapter discusses the classes of persons distinguished within LOAC along with their basic rights, responsibilities, and liabilities. This chapter concludes with a discussion of the tools for implementation of LOAC, such as the role of protecting powers and humanitarian organizations within LOAC, when LOAC no longer applies, and the relationship with human rights law.

INTERNATIONAL LAW AND USE OF FORCE IN INTERNATIONAL RELATIONS

1-1. International law principally governs the relations between States both in peacetime and during armed conflict. ***Jus ad bellum* is that part of international law that regulates the circumstances in which States may resort to the use of force in international relations. *Jus in bello* is that part of international law relating to the conduct of hostilities and the protection of war victims, from combatants who are wounded and out of combat, to prisoners of war and civilians.**

1-2. Article 2(4) of the United Nations (UN) Charter provides that States are required to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. There are circumstances in which the resort to force will not violate this prohibition, which include when the use of force is authorized by the UN Security Council, when it is undertaken with the consent of the territorial State, and when it is undertaken in the lawful exercise of the inherent right of self-defense (See DOD Law of War Manual, 1.11.4). For example, the United States has used armed force pursuant to an authorization in a UN Security Council Resolution and pursuant to its inherent right of individual or collective self-defense against an armed attack.

1-3. The decision to resort to the use of force in international relations is one that is decided at the national level. Because this publication is intended for Soldiers and Marines operating at lower echelons, it will focus on the *jus in bello* principle, that is, the international law relating to the conduct of hostilities and the protection of war victims, which as discussed in paragraph 1-4 below, is known as LOAC.

LEX SPECIALIS—THE LAW OF ARMED CONFLICT

1-4. LOAC, also referred to as the law of war, is that part of international law that regulates the conduct of hostilities and the protection of war victims both in international and non-international armed conflict; belligerent occupation; and the relationship between belligerent, neutral, and non-belligerent States (see DOD Law of War Manual, 1.3; JP 3-84). The legal maxim *lex specialis derogat legi generali*, also known as the principle of specialty, provides that as a rule, the special law overrides the general law. This means if an action is regulated by both a general provision and a specific one, the latter applies, as it is more specifically directed toward the action. LOAC is the *lex specialis* of armed conflict; it is the controlling body of law and provides the legal standards that apply to the conduct of hostilities and the protection of war victims.

1-5. Although LOAC is part of international law, it is important to understand that different States may have different LOAC obligations. Understanding where these differences may arise is often important in dealing with an enemy; it becomes critical when working with allies and other foreign partners. Partner States are often bound by treaties to which the United States is not a party (for example, Additional Protocol I). Partner States may also have different interpretations of LOAC obligations even where the same treaty provision is at issue. Consequently, those partners often adopt conditions or “caveats” during multinational operations that express those States’ interpretations or their differences on issues of national policy.

1-6. DOD policy is that “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” (DODD 2311.01E, para. 4.1). Soldiers and Marines must comply with LOAC in all military operations (as well as with any further restrictions imposed by the rules of engagement). Although reciprocity may play an important role in encouraging LOAC compliance, DOD policy is to comply with LOAC even when enemy forces are engaged in violations of their LOAC obligations (see DOD Law of War Manual, 3.6).

PURPOSES OF THE LAW OF ARMED CONFLICT

Purposes of the Law of Armed Conflict

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

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

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

As Francis Lieber put the matter in his 1863 Army regulations: “Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.” [Lieber Code, art. 15]

Telford Taylor
Nuremberg Prosecutor

1-7. The main purposes of LOAC are:

- Protecting combatants, noncombatants, and civilians from unnecessary suffering;
- Providing certain fundamental protections for persons who fall into the hands of the enemy, particularly prisoners of war, military wounded and sick, and civilians;
- Facilitating the restoration of peace;
- Assisting the commander in ensuring the disciplined, ethical, and effective use of military force;
- Preserving the professionalism and humanity of combatants; and
- Preventing the degeneration of warfare into savagery or brutality.

WHEN THE LAW OF ARMED CONFLICT APPLIES

1-8. Commanders must be prepared to comply with LOAC whenever there is the possibility of military operations or hostile actions. Different LOAC rules can apply to an armed conflict against another State versus an armed conflict against a non-State armed group, such as a terrorist or insurgent group. Guidance

will come from higher authority regarding which rule set may apply; but, if no such guidance is forthcoming, commanders must adhere to the LOAC rules for State-on-State conflict described in paragraph 1-14 below.

1-9. War may be described as the existence of armed hostility between States, between States and non-State armed groups, or between non-State armed groups, although the specific legal definition of “war” may depend on the legal purpose at issue (see DOD Law of War Manual, 1.5). For example, under the U.S. Constitution, Congress has the power to declare war, which it last did formally in World War II. Of course, the United States has often engaged in armed conflict or “war,” under international law, since that time, often with congressional support or authorization. Even if parties involved in hostilities do not refer to such actions as “war” or “armed conflict,” LOAC applies to the hostilities at issue. For this reason, and because the terms “war” and “armed conflict” often are used interchangeably, this manual uses them as synonyms.

1-10. Whether a LOAC rule applies may depend on whether a war exists. *Jus in bello* treaties often provide that they apply to cases of “declared war or of any other armed conflict,” even if a state of war is not recognized by the parties (see Common Article 2, the Geneva Conventions of 1949). This standard has also been understood to result in the application of the customary law of war. A case of “declared war or any other armed conflict” for the purpose of determining whether parties must comply with *jus in bello* rules may be understood as arising in two ways: (1) when a party intends to conduct hostilities; or (2) when parties are actually conducting hostilities. What specific parts of LOAC apply as a matter of law to a given war may depend on whether the war is characterized as an international armed conflict (IAC) or a non-international armed conflict (NIAC).

EXISTENCE OF A WAR FOR PURPOSES OF APPLYING THE LAW OF ARMED CONFLICT

1-11. Whether an armed conflict exists for the purpose of applying LOAC may be an intent-based analysis. If States or non-State armed groups seek to engage in armed conflict, they are bound by LOAC with respect to the conduct of hostilities and the protection of war victims (see DOD Law of War Manual, 3.4.1). As such, LOAC obligations must be taken into account even before the fighting actually begins, such as in the planning of military operations.

1-12. Whether an armed conflict exists may also be a conduct-based analysis. Armed conflict may exist absent a declaration of war or without the participating States acknowledging they are engaged in armed conflict. The factual existence of an armed conflict is sufficient to trigger LOAC obligations for the conduct of hostilities and the protection of war victims.

1-13. A helpful rule of thumb may be that where parties are, in fact, engaged in activities that LOAC contemplates (including detention of enemy military personnel without criminal charge, or bombardment of military objectives), those activities are subject to LOAC.

INTERNATIONAL ARMED CONFLICT

1-14. An *international armed conflict (IAC)* refers to any declared war between States, or to any other armed conflict between States, even if the state of war is not recognized by one of them. The Geneva Conventions apply to all cases of international armed conflict and all cases of partial or total occupation of a territory, even if the occupation meets no armed resistance (Common Article 2 to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [GWS], Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea [GWS Sea], Geneva Convention Relative to the Treatment of Prisoners of War [GPW], and Geneva Convention Relative to the Protection of Civilian Persons in Time of War [GC]). Other law of war treaties also generally apply to international armed conflict and occupation (such as Hague Convention (IV) Respecting the Laws and Customs of War on Land [Hague IV], and its Annex: Regulation Concerning the Laws and Customs of War on Land (The Hague, October 18, 1907) [HR]). The United States has interpreted “armed conflict” in Common Article 2 of the 1949 Geneva Conventions to include any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity, or scope of the fighting (see DOD Law of War Manual, 3.4.2).

NON-INTERNATIONAL ARMED CONFLICT

1-15. A *non-international armed conflict* (NIAC) is an armed conflict not between States, such as a conflict between a State and a non-State armed group or a conflict between two non-State armed groups (Common Article 3 to GWS, GWS Sea, GPW, and GC). In assessing whether a NIAC exists, thus triggering the applicable LOAC rules, situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature do not amount to armed conflict (see DOD Law of War Manual, 3.4.2.2).

1-16. “Armed conflict not of an international character” for the purpose of applying the obligations in Common Article 3 of the 1949 Geneva Conventions was not specifically defined in those conventions. There is a range of views on what constitutes an “armed conflict not of an international character” for this purpose. The intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between a NIAC and “internal disturbances and tensions.” A variety of factors have been considered in assessing these criteria and in seeking to distinguish between armed conflict and internal disturbances and tensions.

1-17. The minimum (baseline) legal standard for humane treatment in armed conflict, regardless of the characterization of the conflict, is reflected in Common Article 3, as set forth in Figure 1-1 on page 1-5. As such, the Department of Defense applies the standards articulated in Common Article 3 in the treatment of all detainees (see, Department of Defense Directive [DODD] 2310.01E, *Department of Defense Detainee Program*). Additional humane treatment protections and fundamental guarantees may also apply to persons in the hands of opposing forces depending on the context, particularly in international armed conflicts—for example, the United States applies out of a sense of legal obligation the principles set forth in Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (“Additional Protocol I”)(June 8, 1977) [AP I], to any individual it detains in an international armed conflict.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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

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

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

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

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

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

Figure 1-1. Common Article 3

PRINCIPLES OF THE LAW OF ARMED CONFLICT

1-18. When no specific rule applies, the principles of LOAC form the general guide for conduct during war (see DOD Law of War Manual, 2.1.2.2). States acknowledged this idea in treaty law in the Preamble to Hague IV, a provision commonly known as the “Martens Clause,” set forth in Figure 1-2 on page 1-6, for its association with Russian representative Fyodor Martens, who first proposed the clause in the preamble to the 1899 Hague Convention II on the Laws and Customs of War on Land). (For other treaties using some form of the Martens Clause, see also GWS art. 63; GWS Sea art. 62; GPW Art. 142; GC art. 158; 1980 United Nations Convention on Conventional Weapons [CCW] preamble; AP I art. 1(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Additional Protocol II”) (June 8, 1977) [AP II] preamble.).

Martens Clause

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Figure 1-2. Martens Clause

OVERVIEW

1-19. Three interdependent principles—military necessity, humanity, and honor—provide the foundation for other derivative LOAC principles—most importantly, distinction and proportionality—as well as most of the treaty and customary rules of LOAC. Paragraphs 1-23 through 1-48 explain the principles of military necessity, humanity, honor, distinction, and proportionality. See table 1-1.

Table 1-1. Application of basic LOAC principles

<i>Principle</i>	<i>Alternate Names</i>	<i>Paragraphs</i>	<i>Summary</i>
Military Necessity		1-23 to 1-27	Justifies the use of all measures required to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of armed conflict.
Humanity	Humanitarian Principle; Unnecessary Suffering; Superfluous Injury	1-28 to 1-30	Basis of protection for civilians; forbids inflicting suffering, injury, damage, or destruction unnecessary to accomplish a legitimate military purpose.
Honor	Chivalry	1-31 to 1-33	Demands a certain amount of fairness and a certain mutual respect between opposing forces.
Distinction	Discrimination	1-34 to 1-43	Distinguishing between combatants and military objectives on the one hand and civilians and civilian objects on the other in offense and defense.
Proportionality		1-44 to 1-48	Requires commanders to refrain from attacks in which the expected loss or injury to civilians and damage to civilian objects incidental to such attacks would be excessive in relation to the concrete and direct military advantage expected to be gained. It also underlies the requirement to take feasible precautions to reduce the risk of harm to civilians, other protected persons and civilian objects.

1-20. LOAC principles provide the foundation for the specific LOAC rules. These principles, however, are not as specific as rules, and thus interpretations of how principles apply to a given situation may vary. Nonetheless, understanding LOAC principles helps legal practitioners (1) interpret specific treaty or customary rules, (2) apply these rules to novel or complex situations, and (3) understand how LOAC operates as a coherent system to regulate the conduct of hostilities. This section therefore illustrates the operation of the general principles by briefly discussing some specific rules. For information about applying the specific rules, the reader should look to pertinent sections in later chapters that discuss those rules.

1-21. LOAC principles work as interdependent and reinforcing parts of a coherent system. Military necessity justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC. Conversely, humanity forbids certain actions unnecessary to achieve that object. Distinction underpins the parties' responsibility to comport their behavior with military necessity, humanity, and proportionality by requiring parties to a conflict to recognize and respect certain legal categories: principally, the distinctions between combatants and civilians, and between military objectives and civilian objects. Proportionality requires that even when actions may be justified by military necessity, such actions cannot result in excessive civilian loss. Lastly, honor supports the entire system and gives parties confidence in it, and provides legitimacy to the entire endeavor.

1-22. LOAC principles are consistent with military doctrine that are the basis for effective combat operations, and the ethical standards of the military profession. Commanders can use LOAC principles to guide them in making difficult decisions and judgments in military operations. For example, a commander might consider whether there is a legitimate military purpose for an action; the proposed course of action is unreasonable or excessive; or, are there precautions that can be taken to avoid unnecessary suffering.

MILITARY NECESSITY

Military Necessity

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.

List Case, World War II

1-23. **Military necessity is the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC** (see DOD Law of War Manual, 2.2; see Lieber Code, articles 15 and 16 for historical reference).

Military Necessity as Justification

1-24. Military necessity justifies actions, such as seizing persons and destroying property. Thus, military necessity underlies LOAC concepts that explain when persons and property may be the object of attack, such as the concepts of "direct participation in hostilities" (see paragraphs 2-11 to 2-21) and "military objective" (see paragraphs 2-29 to 2-57). Military necessity may justify not only violence and destruction, but also alternative means of subduing the enemy. Military necessity also permits certain incidental harms that inevitably result from the actions it justifies. Military necessity may justify the use of overwhelming force to defeat enemy forces because the object of war is not simply to prevail, but to prevail as quickly and efficiently as possible. Military necessity does not require commanders to use the minimum force necessary in a given situation; such an interpretation of military necessity would prolong the fighting and increase suffering.

Military Necessity and the Law of Armed Conflict Rules

1-25. Military necessity does not justify actions that are prohibited by LOAC. In particular, military necessity cannot justify departures from LOAC because States have crafted LOAC specifically with war's exigencies in mind. Prohibitions in LOAC may be understood to reflect States' determinations that those prohibited acts are always militarily unnecessary or otherwise inappropriate or unlawful.

1-26. Although military necessity cannot justify actions that have been prohibited by LOAC (see, for example, GC art. 49 (prohibiting forcible population transfers from occupied territory)), some LOAC rules expressly incorporate military necessity. For example, certain LOAC rules specify that departures from what would otherwise be the rule are permissible when absolutely or imperatively necessary (see, for example, GWS art. 8 (restricting activities of protecting power representatives); GC art. 42 (interning protected persons), and art. 53 (destruction of property during occupation); HR art. 23(g) (seizing enemy property)). In such cases, military necessity must not be conflated with military convenience. As another example, certain LOAC rules may direct that persons comply with an obligation, but only to the extent feasible or consistent with military necessity (see, for example, GWS art. 30 (repatriating retained personnel); GC art. 108 (limiting relief shipments)).

Evaluating Military Necessity

1-27. LOAC seeks to ameliorate any difficulties in applying military necessity in three ways. First, in evaluating military necessity, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and not be restricted to considering only the demands of the specific situation. Second, LOAC recognizes that certain types of actions are militarily necessary *per se*. For example, an attack on enemy combatants is generally lawful. Third, in what is commonly called the Rendulic Rule, LOAC recognizes that commanders must assess the military necessity of an action based on the information available to them at the relevant time; they cannot be judged based on information that subsequently comes to light.

HUMANITY

1-28. **Humanity is the LOAC principle that forbids inflicting suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.** Humanity is sometimes referred to as the principle of avoiding unnecessary suffering or the principle of avoiding superfluous injury. Commanders should exercise leadership to ensure that Soldiers and Marines under their command know that cruelty and the infliction of unnecessary suffering will not be tolerated.

Humanity and Military Necessity

1-29. Humanity is related to military necessity, and these principles logically complement one another. Although military necessity justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC, military necessity cannot justify actions that are not necessary to achieve this purpose, such as cruelty or wanton violence. Moreover, once a military purpose has been achieved, inflicting more suffering is unnecessary and must be avoided. Thus, for example, if an enemy has been incapacitated (rendered *hors de combat*) by being severely wounded or captured, no military purpose is served by continuing to attack that incapacitated enemy. Enemies who are *hors de combat* may not be made the object of attack and must be treated humanely (see generally Common Article 3). Similarly, humanity is the source of the immunity from attack that the civilian population and civilian objects receive because they make no contribution to military action.

Humanity and the Law of Armed Conflict Rules

1-30. Humanity animates LOAC rules focused on humanitarian concerns, including: fundamental safeguards for persons who fall into the hands of the enemy; protections for civilians and civilian objects (see GC section II, art. 53; consider AP I, parts II and III); protections for military medical personnel, units, and transports (see GWS art. 36-40; consider AP I art. 12, 15, 21-30); protection for enemy wounded and sick, as well as respect for the dead (see GWS); restrictions on weapons that may cause superfluous injury or unnecessary suffering to combatants (see HR art. 23(e); consider AP I art. 35); and, prohibitions on weapons that are indiscriminate by nature, or restrictions on weapons that are indiscriminate in their effects on civilians and civilian objects, without special precautions (see CCW; consider AP I art. 51). Humanity is given further effect with the development of the derivative principles of distinction and proportionality.

HONOR

1-31. Honor is a core Army and Marine Corps value. **Honor, also called chivalry, demands a certain amount of fairness in offense and defense, and a certain mutual respect between opposing forces.** While the word “chivalry” is often associated with a specific historical context—a code of ethics or conduct for knights in Europe during the Middle Ages—honor draws from warriors’ codes from a variety of cultures and time periods (see DOD Law of War Manual, 2.6.1). Honor is a matter of carrying out, acting, and living out other core values, such as respect, duty, loyalty, selfless service, integrity, and personal courage, in everything Soldiers and Marines do. It has been vital to the development of LOAC and continues to give LOAC vitality today. Honor also requires adherence to LOAC regardless of the enemy’s level of compliance.

Certain Amount of Fairness

1-32. Honor requires a certain amount of fairness in offense and defense. Honor forbids resorting to means, expedients, or conduct that would constitute a breach of trust. Honor reflects the idea that parties to a conflict

must accept that certain limits exist on their ability to conduct hostilities (HR art. 22). The principle of honor does not address what those limits are, as much as require that parties accept that certain legal limits exist. Thus, honor gives rise to rules that help enforce and give effect to LOAC. Honor requires persons to make good faith efforts to comply with LOAC. In addition to shaping the rules that require parties to a conflict to make efforts to comply with LOAC, honor also underlies rules that require parties to refrain from taking advantage of their opponent's adherence to the law by falsely claiming the law's protections. For example, enemies must deal with one another in good faith in their non-hostile relations. Additionally, even in the conduct of hostilities, parties may not engage in treacherous or perfidious killing or wounding of enemy persons. As another example, misuse of a flag of truce is prohibited. If parties could take advantage of their opponent's adherence to LOAC, this would discourage parties from complying with LOAC. Honor, however, does not forbid parties from using ruses and other lawful deceptions against which the enemy ought to take measures to protect itself.

Certain Mutual Respect

1-33. Honor demands a certain mutual respect between opposing military forces. Opposing military forces should respect one another outside of the fighting because they share a profession and they fight one another on behalf of their respective parties and not out of a personal hostility. Honor thus underlies rules that relate to prisoners of war (POWs). For example, POWs and their captors should treat one another with respect. In addition, honor helps establish the requirements for entitlement to POW status or other privileges afforded lawful combatants. For example, an armed group must, among other things, be organized under a responsible command and conduct its operations in accordance with LOAC in order for its members to receive POW status upon capture during international armed conflict.

DISTINCTION

1-34. ***Distinction, sometimes called discrimination, is the LOAC principle that obliges parties to a conflict to distinguish between combatants and the civilian population and to distinguish between military objectives and protected property and places.*** Distinction is a principle that is derivative of both military necessity and humanity.

1-35. Distinction developed over time as States increasingly departed from the practice of war between entire peoples, and instead treated war as a contention between their professional military forces. Distinction requires parties to a conflict to recognize and respect a framework of legal categories for persons and objects, each category with different rights, duties, and liabilities. Principally, distinction separates those taking part in hostilities (whom military necessity justifies as permissible to attack), such as the armed forces, and those taking no active part in hostilities (whom military necessity and humanity protect as unnecessary to attack), such as the civilian population. By requiring parties to recognize and respect different legal categories that derive from military necessity and humanity, distinction seeks to confine the fighting between opposing armed forces and thereby spare the civilian population as much as possible. Distinction also helps parties comport with proportionality and thereby reduces incidental harm.

1-36. Distinction encompasses two interdependent sets of duties. Parties must recognize and respect categories by discriminating in the use of force against the enemy, and by distinguishing a party's own persons and objects (See DOD Law of War Manual, 2.5).

Discrimination in Conducting Attacks Against the Enemy

1-37. Distinction requires parties to a conflict to discriminate in their use of force against the enemy. On the one hand, consistent with military necessity, parties may attack enemy combatants and other military objectives. On the other hand, consistent with military necessity and humanity, parties may not make civilians, civilian objects, and other protected persons and objects the object of an attack. Moreover, persons using force must exercise reasonable care in discriminating between legitimate and illegitimate objects of attack (see DOD Law of War Manual, 2.5.2).

Distinguishing a Party's Own Persons and Objects

1-38. Distinction gives rise to three different types of rules that obligate a party to assist its opponent in discriminating between protected and unprotected persons and objects, principally between a party's armed forces and the civilian population. Parties to a conflict must take certain measures, in offense or defense: (1) to ensure military forces are identifiable from civilians and civilian objects; (2) to separate, as feasible, their military objectives from civilians and civilian objects; and, (3) to refrain from misusing civilians and civilian objects to shield military forces or military objectives (see DOD Law of War Manual, 2.5.3; consider AP I art. 58).

1-39. To ensure military forces are identifiable from civilians and civilian objects, parties must not disguise their armed forces as civilians or as other protected categories in order to kill or wound opposing forces (see DOD Law of War Manual, 2.5.3.1; consider AP I, art. 37). Further, some rules obligate parties to mark protected persons and objects, such as marking hospitals with a red cross, to help them receive the protections of that status (consider AP I art. 18). Additionally, medical personnel should identify (or distinguish) themselves as noncombatants to ensure they receive protection from direct attack to which they are entitled. Conversely, certain rules incentivize parties to a conflict to identify certain persons and objects as unprotected. For example, members of organized resistance movements must, among other requirements, wear fixed, distinctive signs visible at a distance and carry arms openly to distinguish themselves from the civilian population in order for their group to receive POW status upon capture (GPW art. 4A(2)).

1-40. Distinction also creates obligations for parties to a conflict to take feasible measures to separate civilians and civilian objects from military objectives in order to reduce the risk that the opposing party to a conflict will incidentally harm the civilian population and other protected persons and objects. Accordingly, military commanders must take reasonable steps to separate their military units from the civilian population and civilian objects, as far as military requirements permit, such as by evacuating civilians from danger areas. Thus, distinction seeks not only to reduce the risk that civilians will be erroneously attacked, but also to reduce the risk of other incidental harm to civilians, regardless of the attacker's subjective intent.

1-41. Although the duty to separate depends largely on what is feasible, parties to a conflict in all cases must not use protected persons or objects as a shield to protect military objectives, whether by hiding a military objective or by exploiting an adversary's adherence to proportionality considerations.

Misconceptions about Distinction

1-42. Distinction seeks to ensure that protected and unprotected categories are distinct from one another, not distinct in the abstract. For example, using camouflage is consistent with distinction because foliage is not a protected category and because civilians generally do not wear camouflage. Similarly, U.S. forces have worn nonstandard uniforms to blend with local forces while remaining distinct from the civilian population. Furthermore, distinction addresses the different rights, duties, and liabilities of different categories; it does not mandate that a particular person or object must fall within a particular category. For example, a combatant generally may take a civilian object and use it for military purposes, thereby turning it into a military objective, consistent with distinction. Similarly, persons with medical training or who provide medical care on the battlefield are not necessarily noncombatants and need not be identified as such. Rather, a State may reserve the ability to use these persons as combatants (who are liable to attack) by refraining from designating them as protected medical personnel (see DOD Law of War Manual, 2.5.4).

Reinforcing Duties

1-43. Discriminating in conducting attacks against the enemy and distinguishing one's own persons and objects reinforce one another. A party is not relieved of its obligations to discriminate in conducting attacks by the failures of its adversary to distinguish the adversary's military objectives from protected persons and objects. Nonetheless, the practical ability of a party to discriminate in conducting attacks often depends on the degree to which its enemy has distinguished its military objectives from protected persons and objects. For example, if enemy forces intermingle with civilians, an opposing party may be less able to avoid incidentally harming the civilian population. Similarly, if enemy forces do not respect the Red Cross or other distinctive emblem, but instead specifically attack persons wearing it, the party receiving these attacks is less likely to distinguish its medical personnel and transports (see DOD Law of War Manual, 2.5.5).

PROPORTIONALITY

1-44. **Proportionality is the LOAC principle requiring combatants to refrain from attacks in which the expected loss or injury to civilians and damage to civilian objects incidental to such attacks would be excessive in relation to the concrete and direct military advantage expected to be gained.** It also underlies the requirement to take feasible precautions to reduce the risk of harm to civilians, other protected persons and civilian objects. In other words, even when a party to the conflict is justified in targeting a particular military objective, that party must not cause incidental harm to civilians or to civilian objects excessive in relation to the concrete and direct military advantage expected to be gained from targeting the military objective. The principle of proportionality complements the principle of distinction and, like distinction, derives from and applies both military necessity and humanity.

1-45. Proportionality most often refers to the *jus in bello* (the law related to the conduct of hostilities) requirement to avoid excessive harm to civilians incidental to attacks, often referred to as “collateral damage.” It is this *jus in bello* proportionality principle, which underlies the requirement to take feasible precautions, that is discussed here and addressed in this publication. It is a different standard from the proportionality principle in the *jus ad bellum* (the law related to the use of force) principle of proportionality (see para. 1-2), which is beyond the scope of this publication.

1-46. In war, incidental harm to the civilian population and civilian objects is unfortunate, but inevitable. Thus, the proportionality standard does not require that no incidental harm results from attacks. Rather, the combatants must determine whether, in engaging in offensive or defensive operations, his or her actions 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 to be gained (consider AP I art. 51(5)(b), 57(2)(b)). Under LOAC, judgments of proportionality often involve difficult and subjective comparisons. Recognizing these difficulties, States have declined to use the term proportionality in LOAC treaties because it could incorrectly imply that equilibrium or a precise comparison between considerations is possible (see DOD Law of War Manual, 2.4.1.2).

Justification in Acting

1-47. Proportionality is implicated in cases in which one is justified in acting. For example, an attack on a military objective that incidentally damages civilian property would raise proportionality considerations. On the other hand, where there is no justification for acting, such as an unlawful attack directed against the civilian population, a proportionality analysis would not be necessary to reach the conclusion that the attack was unlawful (see DOD Law of War Manual, 2.4.1.1).

Excessive Harm

1-48. Proportionality generally weighs the justification for acting against the expected harms to determine whether the latter is excessive compared with the former. In war, incidental harm to the civilian population and civilian objects is unfortunate and tragic, but inevitable. Thus, the proportionality standard does not require that no incidental harm results from attacks. Rather, combatants must refrain from attacks in which the expected harm of loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would be excessive in relation to the concrete and direct military advantage anticipated to be gained (see DOD Law of War Manual, 2.4.1.2; consider AP I art. 51(5)(b), 57(2)(b)). Under LOAC, judgments of proportionality often involve difficult and subjective comparisons. Often an equilibrium or a precise comparison between considerations is not possible.

CLASSES OF PERSONS

1-49. This section addresses different classes of persons under LOAC. In the past, a citizen or national of a State at war, as one of the constituents of a State that is engaged in hostilities, could be subjected to the hardships of war by an enemy State (see “Lieber Code” arts. 21-24). As civilization has advanced and certainly today, however, consistent with the principles of military necessity and humanity, military operations generally may not be directed against civilians (see DOD Law of War Manual, 5.2.2). Thus, under

the principle of distinction, LOAC recognizes that the population of a State that is a party to a conflict is generally divided into two classes—combatants and civilians, which correspond generally to the armed forces and the civilian population. Both classes have distinct rights, duties, and liabilities. No person can exercise the distinct rights afforded both classes at the same time. For example, a person cannot exercise the combatant’s right to attack enemy forces while also claiming the civilian’s right not to be made the object of attack.

1-50. Thus, in order to help protect the civilian population from the effects of armed conflict, LOAC distinguishes between combatants and civilians, as well as persons directly participating in hostilities and persons taking no part in hostilities. The line between these classes is not always clear, and certain categories of persons are not easily characterized as falling within one of these categories. Nonetheless, the principle of distinction continues to be of the utmost importance in LOAC and underlies many of the rules discussed in this section. This section discusses the identification as well as the rights, duties, and liabilities of various classes of people under LOAC—primarily combatants and civilians, but also certain subcomponents within each of these classes that are subject to rules different from the general treatment of each primary class, such as certain humanitarian personnel, certain civilian supporters of the armed forces, two categories of “unlawful” or “unprivileged” belligerents, and military attachés and diplomatic representatives of neutral States.

LAWFUL COMBATANTS

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

- Members of the armed forces of a State party to a conflict, including members of the regular armed forces of a de facto government or authority not formally recognized by the opposing power, aside from certain categories of medical and religious personnel (GPW art. 4A(1) and 4A(3));
- Members of militia or volunteer corps that are not part of the armed forces of a State but belong to a State party to the conflict, and that meet the following four requirements: commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying their arms openly; and conducting their operations in accordance with LOAC (GPW 4A(2)); and
- Inhabitants of an area who participate in a kind of popular uprising to defend against foreign invaders, known as a *levée en masse* (GPW 4A(6)).

The United States does not accept the Additional Protocol I definition of lawful combatants. A principle U.S. objection to the Additional Protocol I definition is the extent to which it would grant combatant status to individuals who fail to comply with the requirements of GPW for status as a member of a militia or volunteer corps that belong to a State (GPW art. 4A(2)) and thereby undermine the protection of the civilian population. Many U.S. partners that are States Parties to Additional Protocol I, however, are bound by this definition of lawful combatants (as defined in AP I art. 43-44), to the extent they have not taken a reservation, declaration, or understanding limiting the application of this definition.

Rights, Duties, and Liabilities of Lawful Combatants

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

Nationality and Combatant Status

1-53. Members of enemy armed forces may include nationals of neutral or non-belligerent States. Nationals of a neutral or non-belligerent State who are members of the armed forces of a belligerent State should be treated like other members of that State’s armed forces. However, the special privileges international law affords lawful combatants do not apply between nationals and their own State. For example, provisions of the GPW recognize that nationals of the detaining power are not POWs (GPW art. 87). Thus, international

law does not prevent a State from punishing its nationals whom it may capture among the ranks of enemy forces. For example, under U.S. law, not only may U.S. nationals who join enemy forces be subject to attack or detention by U.S. forces, they may also be tried for treason (18 U.S.C. § 2381).

CIVILIANS

1-54. In general, a civilian is a member of the civilian population—that is an individual who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities. For example, any person who belongs to any of the combatant categories referred to in GPW Article 4(A)(1), (2), and (3) (these categories are discussed in paragraphs 3-16 to 3-25), are not civilians. For most purposes, the term “civilian” does not include unprivileged belligerents.

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

Civilians and the Conduct of Hostilities

1-56. Civilians who take a direct part in hostilities forfeit their protection from being made the object of attack (see DOD Law of War Manual, 5.8; consider AP I art. 51(3); AP II, art. 13(3)). Civilians might be killed incidentally in military operations; however, the principle of proportionality requires that the expected incidental harm to civilians may not be excessive in relation to the concrete and direct military advantage anticipated from an attack, and underlies the requirement that feasible precautions must be taken to avoid harming civilians during military operations. Private persons who join a non-State armed group or otherwise engage in hostilities forfeit the corresponding protections of civilian status and may be liable to treatment in one or more respects as unprivileged belligerents.

Civilians and Detention

1-57. In general, civilians may be subject to non-violent measures of control and security that are justified by military necessity, such as searches or temporary detention. Belligerents or Occupying Powers may take necessary security measures in relation to civilians, including internment or assigned residence for imperative reasons of security (GC arts. 42, 78). Civilians who are interned or confined to assigned residences during international armed conflict or occupation generally are classified as protected persons under the GC and receive a variety of protections. Chapter 5 addresses, in detail, the treatment of civilian internees during international armed conflict and occupation. In all circumstances, detained civilians must be treated humanely.

Civilians’ Liability Under an Enemy State’s Domestic Law

1-58. Unlike combatants, civilians generally lack any special immunity from the domestic law of the enemy State. Private persons who engage in hostilities or provide support to the enemy may be punished by an opposing State for their conduct pursuant to a conviction following a fair trial. Moreover, a State that is an Occupying Power has additional authority over enemy civilians that extend beyond the ability to punish their unauthorized participation in hostilities. Note, however, the special cases of diplomats, persons authorized to accompany the armed forces, members of the merchant marine, crews of civil aircraft, and participants in a *levée en masse*, who might have certain immunities from foreign domestic law.

MIXED CASES

1-59. Certain classes of persons do not fit neatly within the dichotomy of the armed forces and the peaceful civilian population, that is, combatants and civilians. These classes may be classified into three groups: certain humanitarian personnel; certain civilian supporters of the armed forces; and, unprivileged belligerents. Each of these classes has some attributes of combatant status and some attributes of civilian

status; in certain respects these classes are treated like combatants, but in other respects they are treated like civilians.

CERTAIN HUMANITARIAN PERSONNEL

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

- Military medical and religious personnel (GWS art. 24, 33);
- Authorized staff of voluntary aid societies (GWS art. 26);
- Staff of a recognized aid society of a neutral country (GWS art. 27); and
- Auxiliary medical personnel (GWS art. 25).

CERTAIN CIVILIAN SUPPORTERS OF THE ARMED FORCES

1-61. Certain categories of persons are not members of the armed forces and do not have combatant immunity, but are nonetheless authorized to support the armed forces in the fighting (see, for example, Department of Defense Instruction [DODI] 3020.41 [discussing contractors authorized to accompany the force]) and are entitled to POW status if captured during an international armed conflict:

- Persons authorized to accompany the armed forces but who are not members thereof (GPW art. 4A(4)); and
- Members of the crews of merchant marine vessels or civil aircraft (GPW art. 4A(5)).

UNPRIVILEGED BELLIGERENTS

1-62. In addition to distinguishing between combatants and the civilian population, LOAC distinguishes between privileged and unprivileged belligerents. Persons who are not members of the armed forces as described in GPW (art. 4) but who engage in hostilities deprive themselves of many of the privileges attaching to the members of the civilian population. As the U.S. Supreme Court stated in *Ex Parte Quirin*, “Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” (317 U.S. 1 [1942]) ***Unprivileged belligerents are persons who, by engaging in hostilities, have incurred the corresponding liabilities of combatant status (for example, being subject to attack or detention), but who are not entitled to the distinct privileges of combatant status (for example, combatant immunity and POW status upon capture).***

Unprivileged Belligerents as a Category in Treaty Law

1-63. Although States have defined categories of lawful combatants in treaties (HR art. 1; GWS art. 13; GPW art. 4), States have seldom explicitly recognized in treaties, much less affirmatively defined, legal categories of unprivileged belligerents (see HR art. 29-31; GC art. 5; consider AP I art. 46). States have generally refrained from doing so because LOAC treaties have been understood to reflect restrictions on the conduct of hostilities by States, and States have been reluctant to agree to restrictions on their ability to respond to unprivileged enemy belligerents, or to afford such persons the distinct privileges afforded civilians or lawful combatants. Thus, the concept of unprivileged belligerency has primarily been understood in opposition to the rights, duties, and liabilities of lawful combatants and civilians, and as a necessary implication of creating these two latter legal categories (see, for example, 10 U.S.C. § 948a). Unprivileged belligerents have been viewed either as combatants who have forfeited the privileges of combatant status by engaging in spying or sabotage, or as civilians who have forfeited certain protections of civilian status by joining armed groups that fail to qualify as lawful combatants or by otherwise engaging in acts of hostility against the opposing armed forces.

Cases of Doubt With Respect to POW Status

1-64. During an international armed conflict, should there be any doubt as to whether persons suspected of committing a belligerent act and having fallen into the hands of the enemy are entitled to POW status, such persons shall be treated as POWs pending the determination of their status by a competent tribunal (GPW art. 5).

Types of Unprivileged Belligerents

1-65. As set forth in the following paragraphs (1-65 through 1-71), unprivileged belligerents assume the liabilities of both combatant and civilian status. They may generally be classified into two categories:

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

1-66. Persons engaging in spying, sabotage, and other secretive, hostile acts behind enemy lines are persons who may have initially qualified as combatants (that is, by falling into one of the three categories in paragraph 1-50) but who have acted so as to forfeit the privileges of combatant status by engaging in spying or sabotage while acting clandestinely or on false pretenses (HR art. 29). Private persons engaging in acts of hostility are persons who never qualified as combatants, but who, by engaging in hostilities, have forfeited some of the protections of civilian status (see sections 1-85 through 1-92 below for further discussion of when engaged in hostilities may result in an individual being liable for treatment in one or more respects and as an unprivileged belligerent). For example, persons who join armed groups that fail to qualify as combatants are not entitled to the privileges of combatant status, but have incurred the corresponding liabilities of combatant status by virtue of their membership in such groups.

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

Rights, Duties, and Liabilities of Unprivileged Belligerents

1-68. Unprivileged belligerents have certain rights, duties, and liabilities. In general, unprivileged belligerents lack the distinct privileges afforded to lawful combatants and civilians, and receive the liabilities of both classes. Unprivileged belligerents may be made the object of attack by enemy combatants. They, however, must be afforded fundamental guarantees of humane treatment if *hors de combat*. Unprivileged belligerents may be punished by enemy States for their engagement in hostilities if they are convicted after a fair trial.

Treatment of Unprivileged Belligerents

1-69. Although unprivileged belligerents have not been recognized and protected in treaty law to the same extent as civilians and lawful combatants, basic guarantees of humane treatment protect even unprivileged belligerents (Common Article 3; consider AP I art. 75; consider AP II art. 4-6). Moreover, some treaty protections apply to certain unprivileged belligerents (see, for example, Common Article 3; GC art. 5). In some cases, U.S. practice has, as a matter of domestic law or policy, afforded unprivileged belligerents more favorable treatment than they would be entitled to receive under international law (see paragraph 5-3). Nonetheless, U.S. practice has also recognized that unprivileged belligerents should not be afforded the distinct privileges afforded lawful combatants, nor should they receive all of the protections afforded civilians under LOAC.

Unprivileged Belligerents and the Conduct of Hostilities

1-70. Although unprivileged belligerents lack the right to engage in hostilities, they must observe the same duties as lawful combatants during their conduct of hostilities. In addition, unprivileged belligerents are subject to the same liabilities that combatants have in the conduct of hostilities—that is, they may be made

the object of attack by combatants of opposing armed forces. Nevertheless, unprivileged belligerents who are *hors de combat* may not be made the object of attack and must be treated humanely.

Unprivileged Belligerents and Detention

1-71. Unprivileged belligerents generally may be detained for engaging in hostilities or for other imperative reasons of security. The DOD practice has been to review periodically the detention of all persons not afforded POW status or treatment. Unprivileged belligerents who are detained in order to prevent their further participation in hostilities generally should be released when hostilities have ended. In some cases, continued detention in connection with criminal proceedings may be appropriate.

Necessary Security Measures

1-72. An offended State may take necessary security measures with regard to unprivileged belligerents. Since they have engaged in hostilities, unprivileged belligerents (or persons suspected of being unprivileged belligerents) may be denied certain privileges to which they might otherwise be entitled under LOAC. For example, the rights of unprivileged belligerents who are entitled to protected person status under the GC would be subject to derogation for security reasons (see GC art. 5). Belligerents may take necessary security measures, such as measures to ensure that captured spies do not collect or pass along information. Unprivileged belligerents who are protected by the GC should be afforded its full protections when feasible.

Unprivileged Belligerents' Liability for Participation in Hostilities

1-73. Although international law affords lawful combatants a certain privilege or immunity from prosecution, unprivileged belligerents lack any such protection. Unprivileged belligerents are thus exposed fully to the consequences of engaging in hostilities against a State. A State may punish unprivileged enemy belligerents provided it meets applicable requirements, such as a fair trial (HR art. 30).

Unprivileged Belligerency—as a War Crime

1-74. In contemporary parlance, spying and other forms of unprivileged belligerency generally are not referred to as “LOAC violations” or “war crimes.” For example, since spying is permissible under LOAC in the sense that belligerents are not prohibited from employing spies, these activities are punishable by domestic law, but not prohibited under international law. This usage of terminology generally prevails. In some cases, however, offenses of unprivileged belligerency have been characterized as violations of LOAC (see, for example, *Ex Parte Quirin*, referenced in paragraph 1-62). For example, spying and other acts of unprivileged belligerency have been called offenses against the law of nations or LOAC because the punishment of these offenders is a recognized incident or exercise of a belligerent’s war powers under LOAC. The difference in these characterizations may be traced to different definitions of war crime that have been used over time and different definitions of LOAC. If one views LOAC as only containing prohibitions, the punishment of unprivileged belligerents, like all exercises of the war powers, emanates from the domestic law of the belligerent State. On the other hand, if one views LOAC as also including sources of authority, the punishment of unprivileged belligerents is also grounded in the international LOAC. Although the relationship between unprivileged belligerency and LOAC has been characterized in different ways, it is well-accepted that States may punish unprivileged enemy belligerents under their domestic law.

SPIES, SABOTEURS, AND OTHER PERSONS ENGAGING IN SECRETIVE, HOSTILE ACTS BEHIND ENEMY LINES

1-75. Spying, committing sabotage, and engaging in other secretive, hostile acts behind enemy lines have a dual character under LOAC; commanders are permitted to employ persons who engage in these activities, but these activities are punishable by the enemy State. Commanders may employ spies and saboteurs consistent with LOAC. However, any person, including individuals who would otherwise receive the privileges of lawful combatants, who engages in spying, sabotage, or other secretive, hostile acts behind enemy lines (for example, spying while disguised as a civilian or member of the enemy force without properly identifying themselves as members of a hostile force) is regarded as an unprivileged belligerent while doing

so. While engaging in these activities, these persons forfeit entitlement to the privileges of combatant status and may be punished after a fair trial if captured (see DOD Law of War Manual, 4.17).

Spies

1-76. A person may be considered a spy when, (1) acting clandestinely or under false pretenses, (2) in the zone of operations of a belligerent, (3) he or she obtains, or endeavors to obtain, information, (4) with the intention of communicating it to a hostile party (HR art. 29; see also Uniform Code of Military Justice [UCMJ] art. 106). During war, any person—military or civilian—whose actions meet all of these elements may be considered a spy under LOAC. The following discussion elaborates upon the elements of spying.

Acting Clandestinely or Under False Pretenses

1-77. Acting clandestinely or under false pretenses means deliberately concealing or misrepresenting one's identity and conduct (see DOD Law of War Manual, 4.17.2.1; consider AP I art. 46(3)). For example, members of the armed forces may meet this element when they wear disguises, such as civilian clothes or enemy uniforms in an attempt to conceal their true identities as members of the opposing armed forces. Soldiers and Marines who act openly, such as by wearing the uniform of the armed forces to which they belong, do not meet this element (consider AP I art. 46(2)). For example, a ground reconnaissance team or couriers who wear their normal military uniforms would not meet this element. In addition, observers on military reconnaissance aircraft are not regarded as acting clandestinely or under false pretenses.

In the Zone of Operations of a Belligerent

1-78. A person must engage in acts of espionage in the zone of operations controlled by a belligerent to be considered a spy. "Zone of operations" has been construed broadly to include areas supporting the war effort. A person, however, who engages in surveillance or information gathering from outside territory controlled by a hostile party would not meet this element and would not be considered a spy.

Obtains, or Endeavors to Obtain, Information

1-79. A person may be punished as a spy regardless of whether he or she succeeds in obtaining information or in transmitting it to the enemy. Nevertheless, a person must obtain or attempt to obtain information to be considered a spy. For example, airmen who parachute into enemy territory after their aircraft has been disabled and disguise themselves in civilian clothing simply to avoid capture would not be spies.

With the Intention of Communicating It to the Hostile Party

1-80. A person must act with the intention of communicating the sought-after information to a hostile party to the conflict to be considered a spy within the meaning of this rule. Nevertheless, people who seek to send information to a State not involved in the conflict may still commit acts punishable by the offended State and their conduct may fall within the broader category of secretive, hostile acts behind enemy lines.

Saboteurs and Other Persons Engaging in Secretive, Hostile Acts Behind Enemy Lines

1-81. In addition to spies, other persons acting clandestinely or under false pretenses (for example, wearing a disguise) with a hostile purpose behind enemy lines are treated like spies under LOAC. They, too, lose the privileges of combatant status while engaged in those activities behind enemy lines. For example, saboteurs acting clandestinely or under false pretenses in the zone of operations of a belligerent are treated as spies. Activities besides sabotage that are helpful to one side's war effort done behind the other side's lines may be punished as well, often under the rubric of war treason, secretly entering the lines, or activities hostile to the security of the State. These kinds of activities almost necessarily take on the character of spying because the person who conducts these activities would also take that opportunity to collect intelligence. Indeed, these actions are often reported as spying even though the actual purpose of these activities may not be to gain or transmit intelligence but to take other sorts of actions that would further the conflict. Thus, a belligerent's presence with a hostile purpose on territory controlled by an opposing State, while operating clandestinely or under false pretenses, suffices to make that person liable to treatment as a spy under LOAC (see DOD Law of War Manual, 4.17.3).

1-82. Under LOAC, belligerents may employ spies and saboteurs. Spying and sabotage are not prohibited by LOAC. For example, spying and sabotage are not prohibited by the 1949 Geneva Conventions, nor defined as a grave breach of those conventions. Similarly, spying and sabotage are not war crimes punishable under the statutes of international criminal tribunals. In addition, LOAC treaties that regulate, but do not prohibit, spying recognize implicitly that belligerents may use these methods of warfare (see HR art. 24, 29-31; consider AP I, art. 46). Although spying and sabotage are not prohibited by LOAC, acting clandestinely or under false pretenses (out of uniform) could, in some circumstances, constitute “feigning a protected status” (such as that of a civilian), one of the elements of perfidy. Persons engaged in these activities and commanders who employ them should take special care not to commit perfidy (*i.e.*, wounding or killing the enemy while engaged in “feigning a protected status.”).

Spying and Sabotage – Forfeiture of the Privileges of Combatant Status

1-83. Although LOAC allows belligerents to employ spies, saboteurs, and other persons engaged in secretive hostile activities behind enemy lines, LOAC also permits belligerents to take additional measures to defend against these persons. These individuals, by acting clandestinely or under false pretenses, fail to distinguish themselves as combatants generally must do. Thus, persons entitled to privileges of combatant status, including POW status, forfeit their entitlement to those privileges while engaged in spying, sabotage, or other hostile, secretive activities behind enemy lines. Although not explicitly reflected in the GPW, this understanding was the general understanding at the 1949 Diplomatic Conference of Geneva and is reflected in other treaties (HR art. 31; consider AP I art. 46(1)), cases, military manuals, and scholarly works.

Liability for Previous Acts of Espionage

1-84. Persons who qualify for the privileges of combatant status, engage in spying, and then return to friendly lines incur no responsibility or liability for previous acts of espionage (HR art. 31). Persons who have never qualified for the privileges of combatant status would not benefit from this rule because they cannot regain a status that they never held.

PRIVATE PERSONS WHO ENGAGE IN ACTS OF HOSTILITY

1-85. Like it treats spying and sabotage, international law does not generally prohibit private acts of hostility, but does recognize that opposing States may punish persons who commit these acts. Nonetheless, private persons engaging in hostilities have been described in some contexts as having committed a war crime, a violation of international law, or a violation of LOAC. In more recent times, private persons committing acts of hostility are often punished as committing acts of terrorism. The unauthorized use of violence by private persons to achieve political ends is contrary to the principles of democratic States. Moreover, States have obligations under international law to repress terrorism, especially when conducted on their territory against other States.

1-86. In general, private persons who engage in acts of hostility forfeit many of the protections to which members of the civilian population are entitled and may be liable to treatment as unprivileged belligerents.

Loss of Protections Afforded Civilians

1-87. Taking military action (such as detention) to address the threat posed by civilians engaged in hostilities can be justified by military necessity. The forfeiture of many of the protections of civilian status is also reflected in the principle that a person cannot exercise the distinct rights of both a civilian and a combatant at the same time.

Denial of Combatant Status

1-88. Private persons who engage in hostilities are not entitled to the privileges of combatant status and may be punished, after a fair trial. LOAC does not condone the unprivileged belligerent, for example, a farmer by day and guerilla by night. The denial of the privileges of combatant status to private persons engaging in hostilities is justified principally on the basis that such persons lack the principal qualification for entitlement to the privileges of combatant status—State authorization to engage in hostilities. Denying private persons who engage in hostilities the privileges of combatant status is also justified on humanitarian grounds. Private

persons who engage in hostilities risk undermining the protections afforded to civilians. Further, private persons who engage in hostilities generally have not been trained in LOAC and are not subject to the same disciplinary regime as members of the armed forces.

Engaging in Hostilities or Direct Part in Hostilities

1-89. A number of different formulations may be used to describe when a person has engaged in hostilities so as to deprive that person of a protection that they might otherwise be afforded by LOAC. For example, Common Article 3 of the 1949 Geneva Conventions requires humane treatment for persons no longer taking an “active part in the hostilities.” The GPW contemplates interim POW protections for persons “having committed a belligerent act” (GPW art. 5). The GWS explains that the protection afforded medical units “shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy” (GWS art. 21). Additional Protocol I, which is not binding on the United States, provides that civilians forfeit their protection from being made the object of attack “for such time as they take a direct part in hostilities” (consider AP I art. 51(3)). Although these terms often refer to the same conduct, the context in which each term is applied is important, and the scope of each term may depend on the particular legal rule in question. In general, this publication uses the phrase engaging in hostilities to describe those actions that deprive a person of many of the protections of civilian status under LOAC and reserves the use of the phrase “direct part in hostilities” specifically for activity with which civilians forfeit their protection from being made the object of attack, in contrast to other protections (see paragraph 2-13, et. seq).

Activities That Constitute Engaging in Hostilities by Private Persons

1-90. Certain activities, when done by private persons, constitute engaging in hostilities, and may make those who engage in them liable to treatment by the enemy State as unprivileged belligerents.

Being Part of a Non-State Armed Group

1-91. Joining a Non-State armed group is a form of engaging in hostilities that makes private persons liable to treatment in one or more respects as unprivileged belligerents. Such armed groups may be described as insurgents, or terrorist groups. Non-State armed groups exist in both international and non-international armed conflicts; in either case they are generally unprivileged belligerents, but in an international armed conflict, they might qualify as lawful combatants if they fall into one of the categories discussed above in paragraph 1-51.

1-92. Whether a person has joined a Non-State armed group can be a difficult factual question. Non-State armed groups may not use formal indicia of membership (for example, uniforms or identity cards) or members of these groups may seek to conceal their affiliation. Circumstantial or functional information may be appropriate to use to assess whether a person has joined a private armed group. In addition, these armed groups may rely on individuals who are not formally members of the groups but are functionally part of those organizations (for more information on insurgents see FM 3-24, *Insurgencies and Countering Insurgencies* (2014)). These individuals may be regarded as part of the group constructively, even if not members in fact.

Other Hostile Acts

1-93. In addition to joining Non-State armed groups, other hostile acts can make a person liable to treatment in one or more respects as an unprivileged belligerent under LOAC. For example, private persons who bear arms against enemy personnel or who attempt to kill or injure enemy personnel may become liable to being made the object of attack. Spying, sabotage, and other hostile activities behind enemy lines, may also make private persons who perform them liable to prosecution for such conduct.

MILITARY ATTACHÉS AND DIPLOMATIC REPRESENTATIVES OF NEUTRAL STATES

1-94. Military attachés and diplomatic representatives of neutral States who establish their identity as such and are accompanying an army in the field, whether within the territory of the enemy or in territory occupied by it, are generally not detained provided that they take no part in hostilities or provided that temporary detention is not necessary for security reasons or for their own protection. They may be ordered out of the theater of military operations and, if necessary, transferred to the custody of representatives of their respective

countries. Only if such personnel refuse to quit the theater of military operations may they be interned. Commanders should work through command channels to ensure consultation with the Department of State regarding the appropriate disposition of such persons.

SOURCES OF THE LAW OF ARMED CONFLICT

1-95. LOAC is derived from two principal sources:

- Treaties (or Conventions), such as the Hague and Geneva Conventions. (See Appendix for a non-exhaustive list of treaties binding on the United States, and other treaties not binding on the United States.)
- Customary International Law. Some of LOAC is not created through a treaty. Customary international law results from a general and consistent practice of States followed from a sense of legal obligation, which is known as *opinio juris*.

TREATIES

1-96. A treaty is generally defined as an international agreement concluded between States in written form and governed by international law. Treaties often go by different terms, such as Conventions or Protocols, but regardless of how titled, all treaties in force are legally binding on States Parties as a matter of international law. The Department of State publishes an annual listing of treaties that are in force for the United States.

1-97. States sometimes need to enact domestic legislation to implement treaty provisions. Although such implementing legislation is not international law, it may help interpret treaty provisions or reflect a State's interpretation of those provisions. A State's domestic law, however, cannot excuse that State's noncompliance with a treaty obligation as a matter of international law.

1-98. If there is doubt as to the applicability of a specific U.S. treaty obligation, the commander should seek legal advice from a judge advocate. Judge advocates should refer specific questions through their operational chain of command for resolution to ensure that there are common understandings of the applicability of treaty obligations during military operations. See table 1-2 for a non-exhaustive list of treaties.

Table 1-2. Treaties

Law of armed conflict treaties to which the United States is a party	
Treaty Name	Reference/Citation
Washington Convention Regarding the Rights of Neutrals at Sea of October 31, 1854	10 Stat. 1105, TS 300, 11 Bevans 1214
Hague Convention for the Exemption of Hospital Ships in Time of War, from the Payment of all Dues and Taxes Imposed for the Benefit of the State of December 21, 1904	35 Stat. 1854, TS 459, 1 Bevans 430
Hague Convention III of October 18, 1907, Relative to the Opening of Hostilities	36 Stat. 2259, TS 538
Hague Convention IV of October 18, 1907, Respecting the Laws and Customs of War on Land (Hague IV), and the Annex thereto, entitled Regulations Respecting the Laws and Customs of War on Land (HR).	36 Stat. 2277, TS 539, 36 Stat. 2295, TS 539
Hague Convention V of October 18, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V).	36 Stat. 2310, TS 540
Hague Convention VIII of October 18, 1907, Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII).	36 Stat. 2322, TS 541, 1 Bevans 669
Hague Convention IX of October 18, 1907, Concerning Bombardment by Naval Forces in Time of War (Hague IX).	36 Stat. 2351, TS 542
Hague Convention XI of October 18, 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI).	36 Stat. 2396, TS 544, 1 Bevans 711
Hague Convention XIII of October 18, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII).	36 Stat. 2415, TS 545, 1 Bevans 723