

**Unofficial
United States Guide to the
First Additional Protocol
to the
Geneva Conventions
of 12 August 1949**



COL THEODORE T. RICHARD, USAF

AIR UNIVERSITY



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THEODORE RICHARD
Colonel, USAF

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Curtis E. LeMay Center for Doctrine Development and Education
Maxwell Air Force Base, Alabama

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Project Editor
Donna Budjenska

Cover Design
L. Susan Fair

Composition and Prepress Production
Thomasa Huffstutler
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Dedicated to Ankie

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Foreword

I am pleased to provide this foreword at the request of the Air University Press upon its publication of the outstanding work by Col Theodore Richard, a fellow member of the Air Force Judge Advocate General's Corps.

For many American observers and practitioners alike, the practical legal impact of the First Protocol Additional (Additional Protocol I, or AP I) to the Geneva Conventions of 12 August 1949 presents a challenge. Of course, the United States is not a party to AP I, but various provisions of AP I are nonetheless considered to be customary international law. The resulting legal landscape has, over a period of many years, provided the opportunity for various entities within the US government to express their official views regarding specific provisions of AP I. Taken together, these expressions not only can provide remarkable clarity but also can simultaneously prompt a need for additional study and academic comment.

Richard's work lies in the midst of this environment, systematically stepping through the text of AP I to identify, consolidate, and comment upon the United States' precise stated positions regarding AP I's constituent provisions. On its own, the Unofficial United States Guide to the First Additional Protocol to the Geneva Conventions of 12 August 1949 is not intended to provide an official expression of United States positions on AP I. Even so, this guide is quite remarkable in its reach and depth—as well as in its practical contribution to future scholarship within the international legal community. Without Colonel Richard's work, individual practitioners would be left to their own devices to independently frame AP I's historical context.

Now, with Colonel Richard's guide in hand, these same practitioners can conveniently and quickly trace the origins of AP I's American legal history and turn their attention to even more productive pursuits of legal scholarship in the important field of international humanitarian law, which directly affects so many lives around the world. Indeed, the author's act of providing such a thoroughly researched, highly useful guide in this area is to be commended. I congratulate him on his excellent contribution to legal scholarship, and I am very pleased to recommend his work to practitioners.

BRYAN D. WATSON, Colonel, USAF
Commandant, Air Force Judge Advocate General's School

About the Author

Col Theodore Richard is a native of Madison, Wisconsin. Prior to graduating from the University of Wisconsin Law School, Richard was a private detective in Wisconsin and Illinois. While in law school, he completed internships with the Brown County Wisconsin District Attorney's Office and Wisconsin Supreme Court Justice Jon Wilcox. He has a master of law degree from George Washington University where he graduated with highest honors and received the Patricia A. Tobin Award for Excellence in Government Procurement Law. He has served in several positions in the Air Force, including as a deployed staff judge advocate, chief of operations law and deputy staff judge advocate for United States Strategic Command, and as an operations law attorney for United States Air Forces Europe and Air Forces Africa. He was awarded the U.S. Army's combat action badge while serving with the Combined Joint Task Force-101 in Afghanistan.

Introduction

The First Additional Protocol to the Geneva Conventions (“AP I”) is central to the modern law of war, widely referred to as international humanitarian law outside the United States. It updates the Geneva Conventions for protection of war victims and combines them with new or updated rules governing hostilities and the use of weapons found in the Hague Regulations Respecting the Laws and Customs of War. Due to its comprehensive nature and adoption by a majority of States, AP I is frequently cited as the source for law of war rules by attorneys and others interested in protecting humanitarian interests. The challenge for United States attorneys, however, is that their country is not a party to AP I and has been a persistent objector to many of its new rules.

While the United States signed the First Additional Protocol to the Geneva Conventions in 1977, it determined, after 10 years of analysis, that it would not ratify the protocol. President Reagan called AP I “fundamentally and irreconcilably flawed.”¹ Yet, as will be detailed throughout this guide, United States officials have declared that aspects of AP I are customary international law. Forty years after signing AP I, and 30 years after rejecting it, the United States has never presented a comprehensive, systematic, official position on the protocol. Officials from the United States Departments of Defense and State have taken positions on particular portions of it. This guide attempts to bring those sources together in one location.

Recently, the Department of Defense issued its *Law of War Manual*,² which is tremendously helpful in understanding the United States military approach to issues. Its layout, however, is not always conducive to engaging with those versed in AP I. In addition, the size of the manual (exceeding 1,200 pages) discourages its use as a quick reference. This guide treats the manual as “current guidance” on

¹ Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 29 January 1987 [hereinafter Reagan’s Message to the Senate].

² U.S. DEP’T OF DEF., DOD LAW OF WAR MANUAL (December 2016) [hereinafter LAW OF WAR MANUAL].

individual rules, but readers should understand that the manual itself merely reflects the current legal views of the Department of Defense and “does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.”

To the extent possible, this guide also includes other “official” statements from United States officials (as opposed to individual commentaries frequently written by officials in their personal capacities). In this way, readers can see how the *Law of War Manual*’s text conforms to or departs from prior United States positions.

For example, the manual states, “Under customary international law, no legal presumption of civilian status exists for persons or objects.”³ This is contrary to articles 50(1) and 52(3) in AP I. The manual itself cites two secondary sources to support its position.⁴ As this guide points out, the Joint Chiefs of Staff were very concerned about the workability of such a presumption and asked for a reservation to these rules if the United States did ratify AP I.⁵ Although this may not satisfy those who take issue with the Department of Defense position, it demonstrates that it is based on longstanding concerns and a realistic approach to the fog and friction inherent in war.

On the other hand, this guide also shows contradictions between the manual and previous statements. One instance of this can be found in the treatment of the rule on perfidy. AP I says, “It is prohibited to kill, injure or capture an adversary by resort to perfidy.”⁶ The manual

³ *Id.* ¶ 5.4.3.2.

⁴ *Id.* at n. 89 (citing Christopher Greenwood, *Customary international law and the First Geneva Protocol of 1977 in the Gulf conflict*, in PETER ROWE, *THE GULF WAR 1990–91 IN INTERNATIONAL AND ENGLISH LAW* 63, 75 (1993); MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, 327 (2013)).

⁵ *See infra* notes 94 and 109.

⁶ *LAW OF WAR MANUAL*, *supra* note 2, ¶ 5.22.2. The Hague Regulations previously addressed wounding and killing by treachery, thus adding “capture” is arguably a new AP I rule. *See* Sean Watts, *Law-of-War*

explains that the “Department of Defense has not interpreted customary international law to prohibit U.S. forces from seeking to capture by resort to perfidy.” Nothing is cited to support this provision in the manual. Prior statements by the State Department Legal Adviser and the Joint Chiefs of Staff appear to contradict the Department of Defense position.⁷

In many cases, the United States’ position on a provision of AP I is simply unclear. This may be due to the lack of an authoritative comment or because the comments do not explain how the United States would treat the rule. For instance, the United States has critiqued the protecting power system in AP I, article 5, as being insufficient, but such critiques do not amount to an endorsement or rejection of a rule.⁸ Similarly, the guide does not treat comments from the Joint Chiefs of Staff, standing alone, as establishing an official position on a provision of AP I since their comments were made as recommendations within the government as opposed to policy statements.

What follows in the guide is the text of AP I with modifications to assist readers in understanding the United States’ position on various rules. The modifications follow a basic format:

- Language in regular text appears to reflect an understanding of the law followed by the United States.
- Language to which the United States has objected is ~~lined out~~.
- Language in **red** has either (1) no clear guidance as to whether the United States objects in principle or simply does not believe it reflects a customary international law obligation or (2) not been commented upon by United States officials, other than internal correspondence.

Perfidy, 219 MILITARY L. REV. 106, 144 (2014).

⁷ See *infra* note 68.

⁸ See *infra* note 68.

- Where necessary, clarifying language appears in **bold** and set in **[brackets]**.

After compiling this guide, I am left with the overall impression that the United States, as a nation that is regularly engaged in armed conflicts, made difficult but appropriate choices in rejecting API while embracing key provisions to minimize the hardships of war on civilians where possible. The United States needed to resist overly restrictive rules that would have made modern war fighting impossible. As Hays Parks emphasized, aspects of AP I were the result of “perennial efforts by moralist and idealists who, realizing the futility of any attempt to outlaw war, endeavored to interject language into the Protocols that could be interpreted as making the law governing combat operations so restrictive as to make the waging of war impossible.”⁹ The path chosen by the United States leaves intact rules and standards that can be and are followed. Respect for the law would not be enhanced by setting near impossible standards that are acknowledged only in the breach.

THEODORE T. RICHARD
Colonel, USAF

⁹ W. Hays Parks, *The 1977 Protocols to the Geneva Conventions of 1949*, 68 INT’L L. STUDIES 467, 476 (1995).

Preamble

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,¹⁰

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,¹¹

¹⁰ *Current Guidance:* The LAW OF WAR MANUAL ¶ 3.5.2.2, says to “consider” this provision of the preamble to understand the independent obligations of *jus in bello* and *jus ad bellum*.

¹¹ *Current Guidance:*

States fighting against one another must adhere to rules relating to the conduct of hostilities (*jus in bello*), regardless of whether a State may be considered the aggressor or whether the initial resort to force was lawful under *jus ad bellum*. For example, the 1949 Geneva Conventions require States to undertake to respect and to ensure respect for the conventions in all circumstances.

Have agreed on the following:

The phrase “in all circumstances” has been interpreted to mean that a Party’s obligations to respect and to ensure respect for the 1949 Geneva Conventions applies regardless of whether a Party to the Convention is the aggressor or lawfully using force in self-defense.

LAW OF WAR MANUAL, *supra* note 2, ¶ 3.5.2.1.

PART I

GENERAL PROVISIONS

Article 1 – General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.¹²

¹² *Current Guidance*: “AP I . . . does not apply to the use of nuclear weapons.” LAW OF WAR MANUAL, *supra* note 2, ¶ 19.20.1.

Parties to AP I have expressed the understanding that the rules relating to the use of weapons introduced by AP I were intended to apply exclusively to conventional weapons. Thus, Parties to AP I have understood AP I provisions not to regulate or prohibit the use of nuclear weapons. Although the United States is not a Party to AP I, the United States participated in the diplomatic conference that negotiated AP I based upon this understanding.

Id. ¶ 6.18.3.

Background: When the International Committee of the Red Cross introduced the draft Additional Protocols, it explained:

Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems. It should be borne in mind that the Red Cross as a whole, at several International Red Cross Conferences, has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for the banning of their use.

International Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 590 (Yves Sandoz et al, eds., 1987).

The United States delegation expressed the following understanding of AP I upon its consensus approval:

From the outset of the conference, it has been our understanding that the rules to be developed have been designed with a view to conventional weapons. During

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.¹³
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
4. ~~The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Prin-~~

the course of the conference we did not discuss the use of nuclear weapons in warfare. We recognize that nuclear weapons are the subject of separate negotiations and agreements, and further that their use in warfare is governed by the present principles of international law. It is the understanding of the United States that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. We further believe that the problem of regulation of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements.

BOTHE ET AL., *supra* note 4, at 219.

DOD Review Documents: The Joint Chiefs of Staff [hereinafter JCS] recognized that AP I did not expressly exclude chemical and nuclear weapons from its purview and an understanding was necessary to “make it clear that the rules related to use of weapons in the Protocol do not have any effect on the use of nuclear or chemical weapons.” Appendix to John W. Vessey Jr., chairman of the JCS [hereinafter CJCS], Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, 3 May 1985 [hereinafter JCS Review of AP I], at 91.

¹³ The MANUAL notes that this is similar to the Martens Clause found in the preamble to the 1899 Hague II. LAW OF WAR MANUAL, *supra* note 2, ¶ 19.8.3.

~~ciples of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁴~~

¹⁴ *Current Guidance*: “The United States has strongly objected to this provision as making the applicability of the rules of international armed conflict turn on subjective and politicized criteria that would eliminate the distinction between international and non-international conflicts.” LAW OF WAR MANUAL, *supra* note 2, ¶ 3.3.4.

AP I changed, for its Parties, the conditions under which armed groups that are not part of a State’s armed forces may qualify for combatant status. The United States has objected to the way these changes relaxed the requirements for obtaining the privileges of combatant status, and did not ratify AP I, in large part, because of them. A chief concern has been the extent to which these changes would undermine the protection of the civilian population. The United States has expressed the view that it would not be appropriate to treat this provision of AP I as customary international law.

Id. ¶ 4.6.1.2; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on national liberation movements). The United States reserved Article 7(4)(b) of 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, 10 October 1980, 1342 UNTS 137 (CCW) consistent with its objection to AP I art 1(4). *Id.* ¶ 19.21.1.2.

Presidential Statements: President Reagan stated:

One of [AP I’s unacceptable] provisions, for example, would automatically treat as an international conflict any so-called “war of national liberation.” Whether such wars are international or non-international should turn exclusively on objective reality, not on one’s view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war’s alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to “wars of national liberation,” an ill-defined concept expressed in vague, subjective, politicized terminology. . . . These problems are so fundamental in character that they cannot be remedied

through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view.

Reagan's Message to the Senate, *supra* note 1.

State Department Legal Adviser Statements: "It probably goes without saying that we likewise do not favor the provision of article 1(4) of Protocol I concerning wars of national liberation and do not accept it as customary law." Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 425 (1987); Judge Abraham Sofaer explained:

In key respects, Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law. Protocol I also elevates the international legal status of self-described "national liberation" groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions and the resources to fulfill their obligations.

Abraham D. Sofaer, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 463 (1987) [hereinafter *Remarks on the United States Position*]. He elaborated:

The Conference adopted in committee during its first session what is now article 1(4) of Protocol I. This article makes the laws of international armed conflict applicable to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination." Never before has the applicability of the laws of war been made to turn on the purported aims of a conflict. Moreover, this provision obliterated the traditional distinction between international and non-international armed conflicts. Any group within a national boundary, claiming to be fighting against colonial

domination, alien occupation, or a racist regime, can now argue that it is protected by the laws of war, and that its members are entitled to POW status for their otherwise criminal acts. Members of radical groups in the United States have already done so in our own federal courts.

The ICRC and most Western nations expressed no admiration for article 1(4). Some contend, however, that as a result of the new rule, humanitarian law now governs the actions of national liberation groups. While the PLO and other “freedom fighters” may now claim the benefits of the laws of war, they thereby become bound to obey these rules. This, in some eyes, is seen as an advance for humanitarian law.

In fact, radical groups rarely have the resources and facilities to provide the protections for prisoners of war required by the laws of war. Even if they had the resources, no reason exists to believe they have the inclination to provide them, or to abide by the law’s limitations on the actions they may take, particularly against civilians. In fact, no doubt recognizing that the PLO and other “freedom fighters” have concentrated their guns, bombs, and rockets on civilian noncombatants, the supporters of article 1(4) obtained at the Conference an additional protection for these groups.

Id. at 464–65. A year later, Judge Sofaer wrote:

One result of this provision, if actually applied, would be that those fighting for such causes would theoretically obtain prisoner-of-war status if captured, and thus immunity from prosecution for belligerent acts. On the other hand, those fighting for less-favored political causes (at least from a Third World perspective) would be treated under the rules of internal conflicts, and would not receive POW status or immunity from prosecution for warlike acts. If one is dealing with a group like the PLO, elements of which often use terrorist tactics, this distinction becomes very important. Treating these terrorists as soldiers also enhances their stature, to the detriment of the civilized world community.

Abraham D. Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont’d) The*

Article 2 – Definitions

For the purposes of this Protocol:

- (a) “First Convention”, “Second Convention”, “Third Convention” and “Fourth Convention” mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; “the Conventions” means the four Geneva Conventions of 12 August 1949 for the protection of war victims;
- (b) “rules of international law applicable in armed conflict” means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;
- (c) “Protecting Power” means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;
- (d) “substitute” means an organization acting in place of a Protecting Power in accordance with Article 5.

Rationale for the United States Decision, 82 AM. J. INT’L. L. 784, 785–86 (1988) [hereinafter *Rationale for the United States Decision*].

DOD Review Documents: In 1985, the Chairman of the Joint Chiefs of Staff (hereinafter CJCS) wrote that one of the “more serious problems created by” AP I was that “it would inject political criteria into the administration and application of humanitarian law. . .” CJCS Cover letter to JCS Review of AP I, *supra* note 12. (citing AP I, art. 1(4)).

*Article 3 – Beginning and end of application*¹⁵

Without prejudice to the provisions which are applicable at all times:

- (a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;
- (b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the gen-

¹⁵ *Current Guidance:*

In the home territory of parties to the conflict, the application of the GC shall cease on the general close of military operations.

In the case of occupied territory, the application of the GC shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such State exercises the functions of government in such territory. . . .

The one-year time limit for the cessation of the application of the GC (apart from the provisions that continue to apply to the extent that the Occupying Power exercises the functions of government in occupied territory) was proposed to account for situations like those of Germany and Japan after World War II. AP I provides that the 1949 Geneva Conventions and AP I shall cease to apply, in the case of occupied territories, on the termination of the occupation; coalition partners that are Occupying Powers and Parties to AP I would be bound by this rule.

In any case, individuals entitled to GC protection who remain in the custody of the Occupying Power following the end of occupation retain that protection until their release, repatriation, or re-establishment. In addition, it may be appropriate following the end of occupation to continue to apply by analogy certain rules from the law of belligerent occupation, even if such rules do not apply as a matter of law.

eral close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment.

Article 4 – Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Article 5 – Appointment of Protecting Powers and of their substitute¹⁶

¹⁶ *State Department Legal Adviser Statements*: “[W]e strongly support the principle that Protecting Powers be designated and accepted without delay from the beginning of any conflict. This principle is contained in article 5, but with the important difference that as stated in that article, it is not unequivocal and is still subject, in the last instance, to refusal by the state in question.” Matheson, *supra* note 14, at 428–29. Judge Sofaer explained:

[T]he United States sought to strengthen the institution of the “protecting power.” Under this concept, a neutral state assumes the responsibility for protecting a country’s citizens who are in the custody or control of a particular enemy power, whether as prisoners of war, civilian internees, or inhabitants of occupied territory. This practice has only rarely worked since 1945, largely because of the refusal of communist governments to allow a neutral power to inspect either their prisoner of war or internment camps.

The Eastern Bloc countries likewise strongly resisted all efforts at the Diplomatic Conference to require third-party supervision of compliance with Protocol I and the Geneva Conventions. The results of the effort to strengthen the compliance mechanisms of the Conventions were,

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

therefore, meager. Article 5 of Protocol I describes in detail the procedures to be used in appointing a neutral protecting power. It does not, however, expressly require that a state holding enemy prisoners of war or civilians accept such a power. On the contrary, it expressly refers to the requirement that a protecting power be accepted by the detaining power. There is no reason to believe that these provisions will be more successful than comparable provisions in the 1949 Geneva Conventions.

Sofaer, *Remarks on the United States Position*, *supra* note 14, at 469–70.

DOD Review Documents: The JCS did not believe AP I, art. 5 would be effective. JCS Review of AP I, *supra* note 12, at 81.

Article 5 of the Protocol describes in detail the procedures to be used in appointing a neutral protecting power. It does not, however, expressly require that a state holding enemy prisoners of war or civilians accept such a power. On the contrary, it expressly refers to the requirement that a protecting power be accepted by the detaining power. In a sense, this is a step backward from the 1949 Conventions, which do not mention the requirement that the detaining power “accept” the protecting power (though the need for this consent was recognized in custom). Article 5 of the Protocol does state that the detaining power “shall accept” the services of the International Committee of the Red Cross (or a similar organization) if a protecting power is not agreed upon. The same language already appears in the 1949 conventions, but this has not prevented Communist governments, and others, from refusing to allow the Red Cross to function as an alternative to a protecting power.

Id. at 81–82.

2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.
3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, *inter alia* ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.
4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute.¹⁷ The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.

¹⁷ See *supra* note 16.

5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.
6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.
7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

*Article 6 – Qualified persons*¹⁸

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.
2. The recruitment and training of such personnel are within domestic jurisdiction.
3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.
4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

¹⁸ *DOD Review Documents*: The JCS characterized AP I, art. 6 as a measure to encourage compliance. JCS Review of AP I, *supra* note 12, at 86.

*Article 7 – Meetings*¹⁹

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

¹⁹ *DOD Review Documents*: The JCS characterized AP I, art. 7 as a promising compliance mechanism introduced by AP I. JCS Review of AP I, *supra* note 12, at 86–87.

PART II

WOUNDED, SICK AND SHIPWRECKED

SECTION I: GENERAL PROTECTION

*Article 8 – Terminology*²⁰

For the purposes of this Protocol:

- (a) “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,**

²⁰ *Current Guidance:*

For the purpose of applying AP I, Article 8 of AP I defines “wounded” and “sick” to include persons “whether military or civilian” and “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.” On the other hand, in the 1949 Geneva Conventions, the protections for civilians who are wounded and sick are addressed in the GC, and the protections for combatants who are wounded and sick are addressed in the GWS, GWS-Sea, and GPW.

LAW OF WAR MANUAL, *supra* note 2, ¶ 7.20.1.

State Department Legal Adviser Statements: “Let me start with the protection of the wounded, sick, and shipwrecked, an area in which the Protocol does contain some useful codifications or improvements of existing rules.” Matheson, *supra* note 14, at 423 (citing AP I, art. 8, in n.15).

DOD Review Documents: The Joint Chiefs of Staff (JCS) determined that AP I, art. 8 was militarily acceptable. JCS Review of AP I, *supra* note 12, at 5–7.

such as the infirm or expectant mothers, and who refrain from any act of hostility;

- (b) “shipwrecked” means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;
- (c) “medical personnel” means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under subparagraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:
 - (i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
 - (ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
 - (iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2.
- (d) “religious personnel” means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:
 - (i) to the armed forces of a Party to the conflict;

- (ii) to medical units or medical transports of a Party to the conflict;
- (iii) to medical units or medical transports described in Article 9, paragraph 2; or
- (iv) to civil defence organizations of a Party to the conflict.

The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under subparagraph (k) apply to them;²¹

- (e) “medical units” means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment — including first-aid treatment — of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;
- (f) “medical transportation” means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;
- (g) “medical transports” 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 the conflict;

²¹ *Current Guidance*: “Chaplains attached to the armed forces include any cleric, regardless of faith, who is attached to the armed forces of a belligerent and assigned duties exclusively of a religious or spiritual nature.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 4.9.1.3 (citing AP I, art. 8 & BOTHE ET AL., *supra* note 4, at 99).

- (h) “medical vehicles” means any medical transports by land;
- (i) “medical ships and craft” means any medical transports by water;
- (j) “medical aircraft” means any medical transports by air;
- (k) “permanent medical personnel”, “permanent medical units” and “permanent medical transports” mean those assigned exclusively to medical purposes for an indeterminate period. “Temporary medical personnel”, “temporary medical units” and “temporary medical transports” mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms “medical personnel”, “medical units” and “medical transports” cover both permanent and temporary categories;
- (l) “distinctive emblem” means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;
- (m) “distinctive signal” means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

Article 9 – Field of application

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.
2. The relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Conven-

tion applies) and their personnel made available to a Party to the conflict for humanitarian purposes:

- (a) by a neutral or other State which is not a Party to that conflict;
- (b) by a recognized and authorized aid society of such a State;
- (c) by an impartial international humanitarian organization.

*Article 10 – Protection and care*²²

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

²² *Current Guidance*: “The wounded, sick, and shipwrecked must be respected and protected at all times. This means that they should not be knowingly attacked, fired upon, or unnecessarily interfered with.” LAW OF WAR MANUAL, *supra* note 2, ¶ 7.3.3. “The respect and protection due to the wounded, sick, and shipwrecked do not prohibit incidental damage or casualties due to their proximity to military objectives or to a justifiable mistake.” *Id.* ¶ 7.3.3.1.

State Department Legal Adviser Statements:

We support the principle that all the wounded, sick, and shipwrecked be respected and protected, and not be made the object of attacks or reprisals, regardless of the party to the conflict to which they belong, as well as the principle that when such persons are given medical treatment, no distinction among them be based on any grounds other than medical ones. These principles are contained in article 10 of Protocol I.

Matheson, *supra* note 14, at 423.

DOD Review Documents: The JCS determined that AP I, art. 10, was militarily acceptable. JCS Review of AP I, *supra* note 12, at 5–7. DOD attorneys viewed AP I, art. 10, as “already part of customary international law[.]” 1977 Protocols Additional to the Geneva Conventions: Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Secretary of Defense, Customary International Law Implication (9 May 1986) [hereinafter McNeill Memorandum] *reprinted in* The Judge Advocate General’s Legal Center & School, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234 (2012).

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

*Article 11 – Protection of persons*²³

²³ *Current Guidance:*

The wounded, sick, and shipwrecked, and other POWs, may be ordered to receive medical treatment or care that is warranted by their medical condition.

Because POWs are subject to the laws, regulations, and orders in force in the armed forces of the Detaining Power, POWs may be ordered to receive medical treatment just as Detaining Power military personnel may be ordered to do so. However, the wounded, sick, and shipwrecked, and other POWs, may not be subjected to medical or biological experiments, even if Detaining Power military personnel could be ordered to be subjected to such procedures.

The Detaining Power’s authority to order POWs to receive medical treatment also derives from the Detaining Power’s duty to ensure the well-being of POWs. For example, the Detaining Power’s duty to take all sanitary measures necessary to prevent epidemics in the POW camp may require the Detaining Power to order POWs to receive certain measures, such as vaccinations.

LAW OF WAR MANUAL, *supra* note 2, ¶ 7.5.2.4. “Wounded and sick detainees shall be cared for. They should receive the medical care and attention required by their condition. Medical or biological experiments on detainees are prohibited.” *Id.* ¶ 8.8. “Detainees may voluntarily consent to give blood for transfusion or skin for grafting for therapeutic purposes; such procedures should take place under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.” *Id.* ¶ 8.8.2 (noting to “*Consider AP I*, art. 11”); *see also* ¶ 9.5.2.4 (“POWs may voluntarily consent to give blood for transfusion or skin for grafting for therapeutic purposes; such procedures should take place under conditions consistent with generally accepted medical standards and controls designed for the benefit of both

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article 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 to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
2. It is, in particular, prohibited to carry out on such persons, even with their consent:
 - (a) physical mutilations;
 - (b) medical or scientific experiments;
 - (c) removal of tissue or organs for transplantation,

except where these acts are justified in conformity with the conditions provided for in paragraph 1.

the donor and the recipient.”)

State Department Legal Adviser Statements: Mr. Matheson stated:

We support the principle reflected in article 11 that the physical or mental health and integrity of persons under the control of a party to the conflict not be endangered by any unjustified act or omission and not be subjected 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. This principle is reflected in article 11.

Matheson, *supra* note 14, at 423.

DOD Review Documents: The JCS determined that AP I, art. 11, was militarily acceptable but wanted a reservation to art. 11(5). JCS Review of AP I, *supra* note 12. *See infra* note 24.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.
5. ~~The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.~~²⁴

²⁴ *Current Guidance*: “AP I, Article 11, paragraph 5 provides for a ‘right to refuse any surgical operation.’ However, this rule could operate in an inhumane manner in some circumstances, and the United States has not accepted it.” LAW OF WAR MANUAL, *supra* note 2, ¶ 7.5.2.4.

Medical care should, wherever possible, be undertaken with the consent of the wounded or sick detainee. However, medical actions to preserve the health of the detainee may be justified even where the detainee refuses to provide consent. For example, it is not prohibited to administer vaccinations to detainees in order to preserve their health and to prevent epidemics. Similarly, it is not prohibited to order detainees to be fed, if they undertake a hunger strike.

Id. ¶ 8.8.1.

DOD Review Documents: The JCS determined that AP I, art. 11, was militarily acceptable but wanted a reservation to art. 11(5) to allow non-consensual life-saving surgeries for prisoners refusing treatment to make a political point, or because of ignorance or mental incompetence. JCS Review of AP I, *supra* note 12, at 7–8 and Annex to JCS Review of AP I, *supra* note 12, at 1.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

*Article 12 – Protection of medical units*²⁵

1. Medical units shall be respected and protected at all times and shall not be the object of attack.²⁶

²⁵ *State Department Legal Adviser Statements*: Mr. Matheson stated:

We also support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks or reprisals, as well as the principle that civilian medical and religious personnel likewise be respected and protected. These principles can be found, of course with considerable elaboration, in articles 12 through 20 of the Protocol.

Matheson, *supra* note 14, at 423.

DOD Review Documents: The JCS determined that AP I, art. 12, was militarily acceptable. JCS Review of AP I, *supra* note 12, at 5–7.

²⁶ *Current Guidance*: “Fixed establishments and mobile medical units of the Medical Service (*i.e.*, military medical units and facilities) may in no circumstances be attacked, but shall at all times be respected and protected by the parties to the conflict.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 7.10. “The respect and protection accorded by the GWS to military medical units and facilities mean that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions.” *Id.* ¶ 7.10.1.

DOD Review Documents: DOD attorneys viewed AP I, art. 12(1), as “already part of customary international law” as it applies to military medical activities and “supportable for inclusion in customary law through state practice” as applicable to civilian medical activities. McNeil Memorandum, *supra* note 22, at 234.

2. Paragraph 1 shall apply to civilian medical units, provided that they:
 - (a) belong to one of the Parties to the conflict;
 - (b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
 - (c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.²⁷
3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.²⁸
4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.²⁹

*Article 13 – Discontinuance of protection of civilian medical units*³⁰

²⁷ *DOD Review Documents*: DOD attorneys viewed AP I, art. 12(2), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

²⁸ *DOD Review Documents*: DOD attorneys viewed AP I, art. 12(3), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

²⁹ *Current Guidance*: “In no case may a military medical unit or facility be used for the purpose of shielding military objectives from attack.” LAW OF WAR MANUAL, *supra* note 2, ¶ 7.10.2.

DOD Review Documents: DOD attorneys viewed AP I, art. 12(4), as “already part of customary international law[.]” McNeil Memorandum, *supra* note 22, at 234.

³⁰ *State Department Legal Adviser Statements*: Mr. Matheson explained that the United States supported the principle that medical units and personnel, as well as authorized civilian medical units and personnel, be “respected and protected at all times and not be the object of attacks

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.
2. The following shall not be considered as acts harmful to the enemy:
 - (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
 - (b) that the unit is guarded by a picket or by sentries or by an escort;
 - (c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
 - (d) that members of the armed forces or other combatants are in the unit for medical reasons.

*Article 14 – Limitations on requisition of civilian medical units*³¹

or reprisals.” Matheson, *supra* note 14, at 423 (*see* note 25 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 13, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, art. 13, was militarily acceptable. JCS Review of AP I, *supra* note 12, at 5–7.

³¹ *Current Guidance*: “The Occupying Power may not requisition foodstuffs, articles, or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account.” The Geneva Convention Relative to the Protection of Civilian Persons (GC), art. 49 (*quoted in* LAW OF WAR MANUAL, *supra* note 2, ¶ 11.14.2, which notes to “Consider AP art. 14”).

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.
2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their *matériel* or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment.
3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:
 - (a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;
 - (b) that the requisition continues only while such necessity exists; and
 - (c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

*Article 15 – Protection of civilian medical and religious personnel*³²

State Department Legal Adviser Statements: Mr. Matheson explained that the United States supported the principle that medical units and personnel, as well as authorized civilian medical units and personnel, be “respected and protected at all times and not be the object of attacks or reprisals.” Matheson, *supra* note 14, at 423 (see note 25 for the full quotation).

DOD Review Documents: The JCS determined that AP I, art. 13, was militarily acceptable. JCS Review of AP I, *supra* note 12, at 5–7. DOD attorneys viewed AP I, art. 14, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

³² *State Department Legal Adviser Statements:* Mr. Matheson explained

1. Civilian medical personnel shall be respected and protected.³³
2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.
3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.
5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.³⁴

that the United States supported the principle that medical units and personnel, as well as authorized civilian medical units and personnel, be “respected and protected at all times and not be the object of attacks or reprisals.” Matheson, *supra* note 14, at 423 (*see* note 25 for the full quotation).

DOD Review Documents: The JCS determined that AP I, art. 15, wrote, “The substance of Article 14 is already implicit in existing international law, and the article is therefore militarily acceptable.” JCS Review of AP I, *supra* note 12, at 9.

³³ *DOD Review Documents*: DOD attorneys viewed AP I, art. 15(1), as “already part of customary international law[.]” McNeil Memorandum, *supra* note 22, at 234.

³⁴ *DOD Review Documents*: DOD attorneys viewed AP I, art. 15(5), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

*Article 16 – General protection of medical duties*³⁵

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.
3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

*Article 17 – Role of the civilian population and of aid societies*³⁶

³⁵ *State Department Legal Adviser Statements*: Mr. Matheson explained that the United States supported the principle that medical units and personnel, as well as authorized civilian medical units and personnel, be “respected and protected at all times and not be the object of attacks or reprisals.” Matheson, *supra* note 14, at 423 (*see* note 25 for the full quotation).

DOD Review Documents: The JCS determined that AP I, art. 16, was militarily unacceptable to the extent it added new limitations on the right of governments and military forces to stipulate the conditions under which medical care is to be provided to enemy combatants. JCS Review of AP I, *supra* note 12, at 9–11. A key concern was that the conditions under which care can be provided to the sick and wounded would be used to deny adequate medical care. *Id.* at 11. Another concern was that art. 16(2) would create a new defense for medical providers facing courts-martial. *Id.* at 12–13 and Annex to JCS Review of AP I, *supra* note 12, at 1.

³⁶ *State Department Legal Adviser Statements*: Mr. Matheson explained

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.
2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for so long as they are needed.

*Article 18 – Identification*³⁷

that the United States supported the principle that medical units and personnel, as well as authorized civilian medical units and personnel, be “respected and protected at all times and not be the object of attacks or reprisals.” Matheson, *supra* note 14, at 423 (*see* note 25 for the full quotation); *see also infra* note 150.

DOD Review Documents: The JCS said a reservation was needed to say, “To the extent permitted under existing international law, the United States reserves the right to stipulate the conditions under which medical care is to be provided to individuals committing belligerent acts against the United States or its allies and cobelligerents.” Annex to JCS Review of API, *supra* note 12, at 1–2.

³⁷ *Current Guidance:*

The GWS and GWS-Sea contemplate that the distinctive emblem, usually a red cross on a white background, will be used to facilitate the identification of the persons and objects protected by the GWS and GWS-Sea. It helps identify protected persons and objects (*e.g.*, medical and religious personnel, medical transports, and medical facilities), but does not itself confer on them, or by its absence deprive them of, legal protection. The use of the

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.³⁸
2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.³⁹

distinctive emblem to facilitate protection is to take place under the direction of the competent military authority. The misuse of the distinctive emblem is prohibited.

LAW OF WAR MANUAL, *supra* note 2, ¶ 7.15.

State Department Legal Adviser Statements: Mr. Matheson explained that the United States supported the principle that medical units and personnel, as well as authorized civilian medical units and personnel, be “respected and protected at all times and not be the object of attacks or reprisals.” Matheson, *supra* note 14, at 423 (*see* note 25 for the full quotation).

Matheson also stated,

Further, we support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized medical vehicles, hospital ships, and other medical ships and craft, regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23.

Id.

³⁸ *DOD Review Documents*: DOD attorneys viewed AP I, art. 18(1), as “already part of customary international law[.]” as it applies to military medical activities. McNeil Memorandum, *supra* note 22, at 234. They explained “adding identification guidelines for civilian medical activities is acceptable. . . .” *Id.*

³⁹ *DOD Review Documents*: DOD attorneys viewed AP I, art. 18(2), as “already part of customary international law” as it applies to military medical activities. McNeil Memorandum, *supra* note 22, at 234. They explained “adding identification guidelines for civilian medical activities is acceptable. . . .” *Id.* They further stated, “We do not believe any reference to ‘signals’ represents customary international law” and did not support its inclusion. *Id.*

3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.⁴⁰
4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.⁴¹
5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.
6. The application of the provisions of paragraphs 1 to 5 of this Article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter.
7. This Article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.⁴²

⁴⁰ *DOD Review Documents*: DOD attorneys viewed AP I, art. 18(3), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

⁴¹ *DOD Review Documents*: DOD attorneys viewed AP I, art. 18(4), as “already part of customary international law” as it applies to military medical activities. McNeil Memorandum, *supra* note 22, at 234.

⁴² *DOD Review Documents*: DOD attorneys viewed AP I, art. 18(7), as “already part of customary international law” as it applies to military medical activities. McNeil Memorandum, *supra* note 22, at 234. They explained “adding identification guidelines for civilian medical activities is acceptable. . . .” *Id.*

8. The provisions of the Conventions and of this Protocol relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals.⁴³

*Article 19 – Neutral and other States not Parties to the conflict*⁴⁴

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

*Article 20 – Prohibition of reprisals*⁴⁵

Reprisals against the persons and objects protected by this Part are prohibited.

⁴³ *DOD Review Documents*: DOD attorneys commented on AP I, art. 18, writing, “We do not believe any reference to ‘signals’ represents customary international law” and did not support its inclusion. McNeil Memorandum, *supra* note 22, at 234.

⁴⁴ *State Department Legal Adviser Statements*: Mr. Matheson explained that the United States supported the principle that medical units and personnel, as well as authorized civilian medical units and personnel, be “respected and protected at all times and not be the object of attacks or reprisals.” Matheson, *supra* note 14, at 423 (*see* note 25 for the full quotation).

⁴⁵ *State Department Legal Adviser Statements*: “We also support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks or reprisals. . . .” Matheson, *supra* note 14, at 423.

DOD Review Documents: DOD attorneys viewed AP I, art. 20, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, art. 20, was militarily acceptable. JCS Review of AP I, *supra* note 12, at 5–7.

SECTION II: MEDICAL TRANSPORTATION

*Article 21 – Medical vehicles*⁴⁶

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

*Article 22 – Hospital ships and coastal rescue craft*⁴⁷

⁴⁶ *Current Guidance*: “Ground transports of wounded and sick, or of medical equipment, shall be respected and protected in the same way as mobile medical units.” LAW OF WAR MANUAL, *supra* note 2, at ¶ 7.11. “As with medical units, these ground transports must refrain from all interference, direct or indirect, in military operations in order to retain protection. For example, these ground transports must not be used to transport able-bodied combatants or to carry ammunition to combat forces.” *Id.* ¶ 7.11.1.

State Department Legal Adviser Statements:

[W]e support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized medical vehicles . . . regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23.

Matheson, *supra* note 14, at 423.

DOD Review Documents: DOD attorneys viewed AP I, art. 21, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, art. 21, was acceptable. JCS Review of AP I, *supra* note 12, at 13.

⁴⁷ *Current Guidance*:

Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick, and shipwrecked, to treating them, and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected on condition that their names and descriptions have been notified to the parties to the conflict ten days before those ships are employed.

LAW OF WAR MANUAL, *supra* note 2, ¶ 7.12.1.1. “Civilian hospital ships

1. The provisions of the Conventions relating to:
 - (a) vessels described in Articles 22, 24, 25 and 27 of the Second Convention,
 - (b) their lifeboats and small craft,
 - (c) their personnel and crews, and
 - (d) the wounded, sick and shipwrecked on board,

may also be sent from neutral countries.” *Id.* ¶ 7.12.1.3.

Hospital ships utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries shall have the same protection as military hospital ships and shall be exempt from capture, on condition that they have placed themselves under the control of one of the parties to the conflict, with the previous consent of their own governments and with the authorization of the party to the conflict concerned, in so far as the provisions of Article 22 of the GWS-Sea concerning notification have been complied with.

Id. “Under the same conditions as those provided for in Articles 22 and 24 of the GWS-Sea, small craft employed by the State, or by the officially recognized lifeboat institutions for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit.” *Id.* ¶ 7.12.1.5. “[T]he protection of small craft described in Article 27 of the GWS-Sea is afforded, even if the notification envisaged by that Article has not been made.” *Id.* ¶ 7.20.1.

State Department Legal Adviser Statements:

[W]e support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized . . . hospital ships, and other medical ships and craft, regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23.

Matheson, *supra* note 14, at 423.

DOD Review Documents: The JCS determined that AP I, art. 22, was militarily acceptable. JCS Review of AP I, *supra* note 12, at 15.

shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.

2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:

- (a) by a neutral or other State which is not a Party to that conflict; or

- (b) by an impartial international humanitarian organization,

provided that, in either case, the requirements set out in that Article are complied with.

3. Small craft described in Article 27 of the Second Convention shall be protected even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

*Article 23 – Other medical ships and craft*⁴⁸

⁴⁸ *State Department Legal Adviser Statements:*

[W]e support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized medical vehicles, hospital ships, and other medical ships and craft, regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23.

Matheson, *supra* note 14, at 423.

DOD Review Documents: The JCS determined that AP I, art. 23, was militarily acceptable. JCS Review of AP I, *supra* note 12, at 15.

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.
2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.
3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.
4. A Party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse Party shall acknowledge receipt of such information.
5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.
6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and

craft. Wounded, sick and shipwrecked civilians who do not belong to any of the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

*Article 24 – Protection of medical aircraft*⁴⁹

⁴⁹ *Current Guidance:*

Medical aircraft — that is to say, aircraft exclusively employed for the removal of the wounded, sick, and shipwrecked, and for the transport of medical personnel and equipment — shall not be attacked, but shall be respected by the belligerents, while flying at heights and times, and on routes, specifically agreed upon by the belligerents concerned.

LAW OF WAR MANUAL, *supra* note 2, ¶ 7.14.

State Department Legal Adviser Statements:

We support the principle that known medical aircraft be respected and protected when performing their humanitarian functions. That is a rather general statement of what is reflected in many, but not all, aspects of the detailed rules in articles 24 through 31, which include some of the more useful innovations in the Protocol.

Matheson, *supra* note 14, at 423–24.

We recognize that certain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft . . . are useful changes in current law, even though by themselves they will not solve the problems demonstrated in recent conflicts. We want to preserve these new developments and encourage their universal acceptance and observance in time.

Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471.

DOD Review Documents: DOD attorneys viewed AP I, art. 24, as “already part of customary international law . . . except reference to ‘this Part.’”

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

*Article 25 – Medical aircraft in areas not controlled by an adverse Party*⁵⁰

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater

McNeil Memorandum, *supra* note 22, at 234.

⁵⁰ *Current Guidance*:

The use of protected medical aircraft generally depends on an agreement between the belligerents.

However, known medical aircraft, when performing their humanitarian functions, must be respected and protected. Such aircraft does not constitute a military objective that is liable to being made the object of attack. Thus, even if not flying pursuant to an agreement, such aircraft shall not be deliberately attacked or fired upon, if identified as protected medical aircraft.

LAW OF WAR MANUAL, *supra* note 2, ¶ 7.14.1. Note the MANUAL later restates AP I, art. 25, without elaboration. *Id.* ¶ 7.20.2.

State Department Legal Adviser Statements: Mr. Matheson explained that the United States supported the principle that “known medical aircraft be respected and protected when performing their humanitarian functions.” Matheson, *supra* note 14, at 423–24 (*see* note 49 for the full quotation). Judge Sofaer stated, “[C]ertain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft . . . are useful changes in current law. . . .” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (*see* note 49 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 25, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, arts. 24–31, were militarily acceptable, but noted, “As a practical matter . . . medical aircraft may rarely be able to claim the new protection provided by the Protocol.” JCS Review of AP I, *supra* note 12, at 15–19.

safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

*Article 26 – Medical aircraft in contact or similar zones*⁵¹

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.
2. “Contact zone” means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

*Article 27 – Medical aircraft in areas controlled by an adverse Party*⁵²

⁵¹ *State Department Legal Adviser Statements*: Mr. Matheson explained that the United States supported the principle that “known medical aircraft be respected and protected when performing their humanitarian functions.” Matheson, *supra* note 14, at 423–24 (*see* note 49 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 26, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. Furthermore, DOD attorneys explained that support under AP I, art. 26, “is conditioned on the requirement for an agreement between the parties to the conflict concerned.” *Id.* The JCS determined that AP I, arts. 24–31, were militarily acceptable, but noted, “As a practical matter . . . medical aircraft may rarely be able to claim the new protection provided by the Protocol.” JCS Review of AP I, *supra* note 12, at 15–19.

⁵² *Current Guidance*: “Unless otherwise agreed, flights over enemy or enemy-occupied territory are prohibited. If flying pursuant to an agreement, however, medical aircraft are to receive protection when flying over enemy or enemy-occupied territory.” LAW OF WAR MANUAL, *supra*

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.
2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse

note 2, ¶ 7.14.4.

State Department Legal Adviser Statements: Mr. Matheson explained that the United States supported the principle that “known medical aircraft be respected and protected when performing their humanitarian functions.” Matheson, *supra* note 14, at 423–24 (*see* note 49 for the full quotation). Judge Sofaer stated, “[C]ertain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft . . . are useful changes in current law. . . .” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (*see* note 49 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 27, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. DOD attorneys added,

Support for the provisions pertaining to aircraft is also subject to the general conditions that the duties of aircraft shall depend on control of airspace rather than control of the surface overflown, and that a summons to land need not be respected unless there is a reasonable basis to believe that a party ordering the landing will respect the Geneva Convention and Articles 30 and 31 of the Protocol.

Id. Furthermore, DOD attorneys explained that support under AP I, art. 27, “is conditioned on the requirement for an agreement between the parties to the conflict concerned.” *Id.* The JCS determined that AP I, arts. 24–31, were militarily acceptable, but noted, “As a practical matter . . . medical aircraft may rarely be able to claim the new protection provided by the Protocol.” JCS Review of AP I, *supra* note 12, at 15–19.

Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

*Article 28 – Restrictions on operations of medical aircraft*⁵³

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.⁵⁴
2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8, sub-paragraph (f). The carrying on board of the personal effects of the occupants or of

⁵³ *State Department Legal Adviser Statements*: Mr. Matheson explained that the United States supported the principle that “known medical aircraft be respected and protected when performing their humanitarian functions.” Matheson, *supra* note 14, at 423–24 (see note 49 for the full quotation). Judge Sofaer stated, “[C]ertain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft . . . are useful changes in current law. . . .” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (see note 49 for the full quotation).

DOD Review Documents: The JCS determined that AP I, arts. 24–31, were militarily acceptable, but noted, “As a practical matter . . . medical aircraft may rarely be able to claim the new protection provided by the Protocol.” JCS Review of AP I, *supra* note 12, at 15–19.

⁵⁴ *DOD Review Documents*: DOD attorneys viewed AP I, art. 28(1), as “already part of customary international law[.]” McNeil Memorandum, *supra* note 22, at 234.

equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited.⁵⁵

3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.⁵⁶
4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked.⁵⁷

*Article 29 – Notifications and agreements concerning medical aircraft*⁵⁸

⁵⁵ DOD Review Documents:

The JCS believed an understanding was required to clarify that the prohibition on medical aircraft carrying equipment used to collect or transmit intelligence data does not preclude the presence of communications equipment and encryption materials, or their use solely to facilitate navigation, identification, and communication in support of medical operations.

Annex to JCS Review of AP I, *supra* note 12, at 2. DOD attorneys viewed AP I, art. 28(2), as “supportable for inclusion in customary law through state practice” except for the first sentence of the paragraph. McNeil Memorandum, *supra* note 22, at 234.

⁵⁶ *DOD Review Documents*: DOD attorneys viewed AP I, art. 28(3), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

⁵⁷ DOD attorneys viewed AP I, art. 28(4), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

⁵⁸ *State Department Legal Adviser Statements*: Mr. Matheson explained that the United States supported the principle that “known medical aircraft be respected and protected when performing their humanitarian functions.” Matheson, *supra* note 14, at 423–24 (see note 49 for the full quotation). Judge Sofaer stated, “[C]ertain provisions of Protocol I

1. Notifications under Article 25, or requests for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.
2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification.
3. A Party which receives a request for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall, as rapidly as possible, notify the requesting Party:
 - (a) that the request is agreed to;
 - (b) that the request is denied; or
 - (c) of reasonable alternative proposals to the request. It may also propose a prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.
4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.
5. The Parties shall also take the necessary measures to disseminate rapidly the substance of any such notifications and agreements to

reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft . . . are useful changes in current law. . . .” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (see note 49 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 29, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, arts. 24–31, were militarily acceptable, but noted, “As a practical matter . . . medical aircraft may rarely be able to claim the new protection provided by the Protocol.” JCS Review of AP I, *supra* note 12, at 15–19.

the military units concerned and shall instruct those units regarding the means of identification that will be used by the medical aircraft in question.

*Article 30 – Landing and inspection of medical aircraft*⁵⁹

⁵⁹ *Current Guidance*: “Medical aircraft shall obey every summons to land (including water landings if the aircraft is equipped for them). In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 7.14.5.

In the event of an involuntary landing in enemy or enemy-occupied territory (including a water landing), the wounded and sick, as well as the crew of the aircraft, shall be POWs. The medical personnel shall be treated according to Article 24 and the Articles following of the GWS, and Articles 36 and 37 of the GWS-Sea.

Id. ¶ 7.14.5.1.

State Department Legal Adviser Statements: Mr. Matheson explained that the United States supported the principle that “known medical aircraft be respected and protected when performing their humanitarian functions.” Matheson, *supra* note 14, at 423–24 (*see* note 49 for the full quotation). Judge Sofaer stated, “[C]ertain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft . . . are useful changes in current law. . . .” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (*see* note 49 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 30, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. DOD attorneys added,

Support for the provisions pertaining to aircraft is also subject to the general conditions that the duties of aircraft shall depend on control of airspace rather than control of the surface overflown, and that a summons to land need not be respected unless there is a reasonable basis to believe that a party ordering the landing will respect the Geneva Convention and Articles 30 and 31 of the Protocol.

Id. The JCS determined that AP I, arts. 24–31, were militarily acceptable,

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.
2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.
3. If the inspection discloses that the aircraft:
 - (a) is a medical aircraft within the meaning of Article 8, subparagraph (j)
 - (b) is not in violation of the conditions prescribed in Article 28, and
 - (c) has not flown without or in breach of a prior agreement where such agreement is required,the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.
4. If the inspection discloses that the aircraft:
 - (a) is not a medical aircraft within the meaning of Article 8, subparagraph (j)

but noted, “As a practical matter . . . medical aircraft may rarely be able to claim the new protection provided by the Protocol.” JCS Review of AP I, *supra* note 12, at 15–19.

- (b) is in violation of the conditions prescribed in Article 28, or
- (c) has flown without or in breach of a prior agreement where such agreement is required,

the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

*Article 31 – Neutral or other States not Parties to the conflict*⁶⁰

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.

⁶⁰ *State Department Legal Adviser Statements*: Mr. Matheson explained that the United States supported the principle that “known medical aircraft be respected and protected when performing their humanitarian functions.” Matheson, *supra* note 14, at 423–24 (see note 49 for the full quotation). Judge Sofaer stated, “[C]ertain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions on the protection of medical aircraft . . . are useful changes in current law. . . .” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (see note 49 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 31, as “already part of customary international law . . . subject to there being a reasonable basis for assuming that the party ordering a landing will respect the Geneva Conventions and Articles 30 and 31 of the Protocol.” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, arts. 24–31, were militarily acceptable, but noted, “As a practical matter . . . medical aircraft may rarely be able to claim the new protection provided by the Protocol.” JCS Review of AP I, *supra* note 12, at 15–19.

2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is recognized, that State shall make all reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.
3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal. If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.
4. The wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the

hostilities. The cost of hospital treatment and internment shall be borne by the State to which those persons belong.

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

SECTION III: MISSING AND DEAD PERSONS

*Article 32 – General principle*⁶¹

⁶¹ *Current Guidance*: Note the MANUAL restates AP I, art. 32, without elaboration. *Id.* ¶ 7.20.3.

State Department Legal Adviser Statements:

Next, let me turn to the treatment of the missing and remains of the dead. Again, this is an area in which the Protocol includes some useful innovations. We support the principles that families have a right to know the fate of their relatives and that each party to a conflict should search areas under its control for persons reported missing, when circumstances permit, and at the latest from the end of active hostilities. These useful principles are reflected in articles 32 and 33 of the Protocol.

Matheson, *supra* note 14, at 424.

We recognize that certain provisions of Protocol I reflect customary international law, and others appear to be positive, new developments. For example, the Protocol provisions . . . on the missing and the dead are useful changes in current law, even though by themselves they will not solve the problems demonstrated in recent conflicts. We want to preserve these new developments and encourage their universal acceptance and observance in time.

Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471.

DOD Review Documents: DOD attorneys viewed AP I, art. 32, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

*Article 33 – Missing persons*⁶²

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

AP I, arts. 32–34 were militarily acceptable. JCS Review of AP I, *supra* note 12, at 21–22.

⁶² *State Department Legal Adviser Statements*: Mr. Matheson stated, “We support the principles that families have a right to know the fate of their relatives and that each party to a conflict should search areas under its control for persons reported missing, when circumstances permit, and at the latest from the end of active hostilities.” Matheson, *supra* note 14, at 424 (*see* note 61 for the full quotation). Judge Sofaer stated, “[T]he Protocol provisions . . . on the missing and the dead are useful changes in current law, even though by themselves they will not solve the problems demonstrated in recent conflicts. We want to preserve these new developments and encourage their universal acceptance and observance in time.” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (*see* note 61 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 33, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, arts. 32–34, were militarily acceptable. JCS Review of AP I, *supra* note 12, at 21–22.

- (a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
 - (b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.
3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.
 4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

*Article 34 – Remains of deceased*⁶³

⁶³ *Current Guidance*: Note the MANUAL restates AP I, art. 32, without elaboration. *Id.* ¶ 7.20.3.

State Department Legal Adviser Statements:

We likewise support the principles that each party to a conflict permit teams to search for, identify, and recover the dead from battlefield areas, and that the remains of the dead be respected, maintained, and marked. We support the principle that as soon as circumstances permit,

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.
2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
 - (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
 - (b) to protect and maintain such gravesites permanently;

arrangements be made to facilitate access to grave sites by relatives, to protect and maintain such sites permanently, and to facilitate the return of the remains when requested. These principles can be found in article 34.

Matheson, *supra* note 14, at 424. Judge Sofaer stated, “[T]he Protocol provisions . . . on the missing and the dead are useful changes in current law, even though by themselves they will not solve the problems demonstrated in recent conflicts. We want to preserve these new developments and encourage their universal acceptance and observance in time.” Sofaer, *Remarks on the United States Position*, *supra* note 14, at 471 (see note 61 for the full quotation).

DOD Review Documents: DOD attorneys viewed AP I, art. 34, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234. The JCS determined that AP I, arts. 32–34, were militarily acceptable. JCS Review of AP I, *supra* note 12, at 21–22.

- (c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.
3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.
 4. A High Contracting Party in whose territory the gravesites referred to in this Article are situated shall be permitted to exhume the remains only:
 - (a) in accordance with paragraphs 2 (c) and 3, or
 - (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.

PART III

METHODS AND MEANS OF WARFARE COMBATANT AND PRISONER-OF-WAR STATUS

SECTION I: METHODS AND MEANS OF WARFARE

*Article 35 – Basic rules*⁶⁴

⁶⁴ *Current Guidance*: “It is especially forbidden to use weapons that are calculated to cause superfluous injury.” LAW OF WAR MANUAL, *supra* note 2, ¶ 6.6. “The superfluous injury rule is an application of the principle of humanity in the context of weapons. The superfluous injury rule prohibits weapons that are designed to increase the injury or suffering of the persons attacked beyond that justified by military necessity.” *Id.* ¶ 6.6.2. “[W]eapons that are regarded as lawful in peacetime or that apply only the minimum force necessary in order to avoid death or injury to civilians would not be prohibited under the superfluous injury rule.” *Id.*

The test for whether a weapon is prohibited by the superfluous injury rule is whether the suffering caused by the weapon provides no military advantage or is otherwise clearly disproportionate to the military advantage reasonably expected from the use of the weapon. Thus, the suffering must be assessed in relation to the military utility of the weapon. Weapons that may cause great injury or suffering or inevitable death are not prohibited, if the weapon’s effects that cause such injury are necessary to enable users to accomplish their military missions.

Id. ¶ 6.6.3.

A weapon is only prohibited by the superfluous injury rule if the suffering it inflicts is clearly disproportionate to its military utility. This excessiveness should be assessed in light of the State practice and *opinio juris* and the principle of humanity.

Because of the difficulty of comparing the military necessity for the weapon and the suffering it is likely to cause, a weapon is only prohibited if the suffering is clearly or manifestly disproportionate to the military

necessity. The suffering likely to result from the use of the weapon and its military effectiveness are likely to be difficult to assess, much less to compare to one another.

Id. ¶ 6.6.3.3. The MANUAL quotes BOTHE ET AL.:

In applying para. 2 of Art. 35, the suffering or injury caused by a weapon must be judged in relation to the military utility of the weapon. The test is whether the suffering is needless, superfluous, or manifestly disproportionate to the military advantage reasonably expected from the use of the weapon. On the humanitarian side of the equation against which military advantage is to be balanced are such factors as the painfulness or severity of wounds, mortality rates, and the incidence of permanent damage or disfigurement and the feasibility of treatment under field conditions. Neither element of the equation can be taken in isolation. All such comparative judgments logically lead to an inquiry into how much suffering various weapons cause and whether available alternate weapons can achieve the same military advantage effectively but cause less suffering. The comparison of, and balancing between, suffering and military effectiveness is difficult in practice because neither side of the equation is easy to quantify. Inevitably, the assessment will be subjective even when sufficient agreed factual data are available on wound effects and military effectiveness.

Id. ¶ 6.6.3.3 n.140 (*quoting* BOTHE ET AL., *supra* note 4, at 196).

See supra notes 99 and 100 for guidance on indiscriminate weapons.

State Department Legal Adviser Statements:

With respect to methods and means of warfare, we support the principle that the permissible means of injuring the enemy are not unlimited and that parties to a conflict not use weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. These principles are contained in article 35.

Matheson, *supra* note 14, at 424.

DOD Review Documents: DOD attorneys viewed AP I, art. 35(1) and (2), as “already part of customary international law.” McNeil Memorandum, *supra* note 22, at 234. The LAW OF WAR MANUAL says “consider” art. 35(1)

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. ~~It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.~~⁶⁵

for the principle that parties to the conflict must accept that the right of belligerents to adopt means of injuring the enemy is not unlimited.” LAW OF WAR MANUAL, *supra* note 2, ¶ 2.6.2.1.

⁶⁵ *Current Guidance*: The United States has not accepted AP I, arts. 35(3) or 55. LAW OF WAR MANUAL, *supra* note 2, ¶ 6.10.3.1. It “has repeatedly expressed the view that these provisions are “overly broad and ambiguous and ‘not a part of customary law.’” *Id.*

State Department Legal Adviser Statements:

We, however, consider that another principle in article 35, which also appears later in the Protocol, namely that the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment, is too broad and ambiguous and is not a part of customary law.

Matheson, *supra* note 14, at 424. Bellinger and Haynes wrote, “France and the United States repeatedly have declared that Articles 35(3) and 55 of AP I . . . do not reflect customary international law.” John Bellinger, III and William J. Haynes II, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT’L REV. OF THE RED CROSS 443, 455-56 (June 2007). They clarified, “[U]nder the principle of discrimination that parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity.” *Id.* at 455.

DOD Review Documents: The JCS determined that AP I, art. 35(5), would have “considerable impact on naval warfare” and would need to reserve the words “of may be expected” from art. 35(3). JCS Review of AP I, *supra* note 12, at 25.

*Article 36 – New weapons*⁶⁶

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

*Article 37 – Prohibition of perfidy*⁶⁷

⁶⁶ *Current Guidance*: “The DoD policy and practice of conducting legal reviews of weapons preceded this AP I provision.” LAW OF WAR MANUAL, *supra* note 2, ¶ 6.2.3. This is an example of an AP provision that is consistent with longstanding U.S. practice. LAW OF WAR MANUAL, *supra* note 2, ¶ 19.20.1.2.

DOD Review Documents: The JCS determined that AP I, art. 36, would cause no problems for the United States because these legal reviews were already being conducted. JCS Review of AP I, *supra* note 12, at 26.

⁶⁷ *Current Guidance*: “[C]ombatants may not kill or wound by resort to perfidy.” LAW OF WAR MANUAL, *supra* note 2, ¶¶ 5.4.8, 5.21 (“Good faith prohibits . . . killing or wounding enemy persons by resort to perfidy”), 5.22 (“During international armed conflict, it is prohibited to kill or wound the enemy by resort to perfidy.”). “Breaches of good faith, principally perfidious conduct, may undermine the protections afforded by the law of war to civilians, persons who are *hors de combat*, or certain other classes of persons and objects.” *Id.* a¶ 5.21.1.

“Acts of *perfidy* are acts that invite the confidence of enemy persons to lead them to believe that they are entitled to, or are obliged to accord, protection under the law of war, with intent to betray that confidence.” *Id.* ¶ 5.22.1 (noting to “*Consider* AP I art 37(1)”).

“[I]n AP I, “perfidy” is used to refer to a certain type of deception, which might not, by itself, be prohibited (*e.g.*, feigning death would not be prohibited in order to facilitate escape).” *Id.* ¶ 5.22.1.1

It may not be prohibited to invite the confidence of the adversary that he or she is obligated to accord protection under the law of war, for certain purposes (*e.g.*, to facilitate spying, sabotage, capturing enemy personnel, or evading enemy forces). However, such deception may not rely on certain signs and symbols.

Id. ¶ 5.22.2.

1. It is prohibited to kill, injure ~~or capture~~⁶⁸ an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
 - (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;⁶⁹
 - (b) the feigning of an incapacitation by wounds or sickness;⁷⁰
 - (c) the feigning of civilian, non-combatant status; and⁷¹

⁶⁸ *Current Guidance*: “In addition to killing or wounding, Article 37 of AP I prohibits ‘capture’ by resort to perfidy. The Department of Defense has not interpreted customary international law to prohibit U.S. forces from seeking to capture by resort to perfidy.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.22.2.1 (citing nothing). *But see* . . .

State Department Legal Adviser Statements: “We support the principle that individual combatants not kill, injure, **or capture** enemy personnel by resort to perfidy. . . .” Matheson, *supra* note 14, at 425 (emphasis added).

DOD Review Documents: “The clarification of existing law in Article 37 is both **accurate** and helpful from a military standpoint.” JCS Review of AP I, *supra* note 12, at 27 (emphasis added).

⁶⁹ *Current Guidance*: “Examples of killing or wounding by resort to perfidy include . . . feigning an intent to negotiate under a flag of truce and then attacking, which takes advantage of the rule that flags of truce may not be used to shield military operations.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.22.3.

⁷⁰ *Current Guidance*: “Examples of killing or wounding by resort to perfidy include . . . feigning of death or incapacitation by wounds or sickness and then attacking, which takes advantage of the respect afforded the dead or the protection afforded those who are *hors de combat*.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.22.3.

⁷¹ *Current Guidance*: “Examples of killing or wounding by resort to perfidy include . . . feigning civilian status and then attacking.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.22.3.

- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.⁷²

*Article 38 – Recognized emblems*⁷³

⁷² *Current Guidance*: “Ruses of war are considered permissible. In general, a belligerent may resort to those measures for mystifying or misleading the enemy against which the enemy ought to take measures to protect itself.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.25. Ruses of war are acts that are intended to mislead an adversary or to induce him to act recklessly, but that do not infringe upon any rule of international law applicable in armed conflict and that are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. *Id.* ¶ 5.25.1 (noting to “*Consider AP I art. 37(2)*”). The MANUAL also notes to consider the examples of ruses listed in art. 37(2). *Id.* ¶ 5.25.2 n.794.

“It is a legitimate ruse to use enemy flags, insignia, and military uniforms outside of combat.” *Id.* ¶ 5.22.1.3.

⁷³ *Current Guidance*:

Certain signs, symbols, or signals reflect a status that receives special protection under the law of war, and thus these signs may not be improperly used. They may not be used: (1) while engaging in attacks; (2) in order to shield, favor, or protect one’s own military operations; or (3) to impede enemy military operations. Thus, their use may be improper even when that use does not involve killing or wounding, and they may not be used to facilitate espionage (except for signs, emblems, or uniforms of a neutral or non-belligerent State).

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.24. These include distinctive emblems of the Geneva Conventions (e.g., Red Cross). *Id.* ¶ 5.24.2. “The

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

*Article 39 – Emblems of nationality*⁷⁴

improper use of a flag of truce is strictly prohibited” *Id.* ¶ 5.24.7; *see also* ¶ 12.4.2.1 (“It is especially forbidden to make improper use of a flag of truce. It would be improper to use a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention.”).

“During armed conflict, the use of the distinctive emblem for cultural property in any other cases than those mentioned in the 1954 Hague Cultural Property Convention, and the use for any purpose whatsoever of a sign resembling the distinctive emblem, is forbidden.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 5.18.7.4 (noting to “Consider AP I art. 38(1)(a)”).

State Department Legal Adviser Statements: “We support the principle that . . . internationally recognized protective emblems, such as the red cross, not be improperly used.” Matheson, *supra* note 14, at 425.

DOD Review Documents: “There is no military problem with Article 38.” JCS Review of AP I, *supra* note 12, at 28.

⁷⁴ *Current Guidance*: “Combatants may not fight in the enemy’s uniform.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 5.4.8. “During international armed conflict, improper use of enemy flags, military emblems, insignia, or uniforms, is prohibited.” *Id.* ¶ 5.23. “In general, the use of enemy flags, insignia, and military uniforms is prohibited during combat, but is permissible outside of combat.” *Id.* ¶ 5.23.1.

Military personnel, such as aircrew downed behind enemy lines, may use enemy uniforms to evade capture. Similarly, escaping prisoners of war may use enemy military uniforms to facilitate their escape from a POW camp to return to friendly lines.

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.⁷⁵

However, those using enemy uniforms to evade capture or escape must not engage in combat while in the enemy's uniform, and, if they are not escaping POWs, they may be liable to treatment as spies and saboteurs if caught behind enemy lines.

Id. ¶ 5.23.1.4. “Military personnel not in uniform may resist an attack, so long as they are not wearing the enemy’s uniform and do not kill or wound treacherously.” *Id.* ¶ 5.4.8.1.

In addition to prohibiting the use of enemy uniforms while engaging in attacks, AP I also prohibits the use of flags, military emblems, insignia, or uniforms of an enemy in order to shield, favor, protect, or impede military operations. . . .

This provision of AP I is unclear as to what uses would be permissible and what uses would be prohibited. However, because the United States is not a Party to AP I and because the rule is not part of customary international law, U.S. military personnel are not subject to this more restrictive rule.

Id. ¶ 5.23.3; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on prohibition of the use of enemy flags, insignia, or uniforms to shield, favor, protect, or impede military operations).

State Department Legal Adviser Statements: “[W]e do not support the prohibition in article 39 of the use of enemy emblems and uniforms during military operations.” Matheson, *supra* note 14, at 425.

DOD Review Documents: The JCS determined AP I, art. 39(1) and (3) were acceptable. JCS Review of AP I, *supra* note 12, at 29. The JCS, however, expressed concerns with art. 39(2) because it would prohibit infiltrations and exfiltrations of special operations personnel, and possibly escape and evasion. *Id.* at 28. Superiors would also be potentially liable for war crimes. *Id.*

⁷⁵ *Current Guidance*: “During international armed conflict, the use of signs, emblems, or uniforms of a neutral or other nation not a party to the conflict is prohibited.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.24.1 (noting to “Consider AP I art. 39(1)”).

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks ~~or in order to shield, favour, protect or impede military operations.~~
3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

*Article 40 – Quarter*⁷⁶

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

*Article 41 – Safeguard of an enemy “hors de combat”*⁷⁷

⁷⁶ *Current Guidance*: “It is forbidden to declare that no quarter will be given.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.4.7 (noting to “Consider AP I art. 40”).

State Department Legal Adviser Statements: “We support the principle that no order be given that there shall be no survivors nor an adversary be threatened with such an order or hostilities be conducted on that basis. This is contained in article 40.” Matheson, *supra* note 14, at 425.

DOD Review Documents: DOD attorneys viewed AP I, art. 40, as “already part of customary international law.” The JCS determined AP I, art. 40, was acceptable as a restatement of law. JCS Review of AP I, *supra* note 12, at 29.

⁷⁷ *Current Guidance*: LAW OF WAR MANUAL, *supra* note 2, ¶ 4.4.1 (“[C]ombatants placed *hors de combat* must not be made the object of attack.”) and ¶ 5.9:

Persons, including combatants, placed *hors de combat* may not be made the object of attack. Persons placed *hors de combat* include the following categories of persons, provided they abstain from any hostile act and do not attempt to escape:

- persons in the power of an adverse party;
- persons not yet in custody, who have surrendered;
- persons who have been rendered unconscious or

1. A person who is recognized or who, in the circumstances should be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
 - (a) he is in the power of an adverse Party;
 - (b) he clearly expresses an intention to surrender; or
 - (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.⁷⁸

otherwise incapacitated by wounds, sickness, or shipwreck; and

- persons parachuting from aircraft in distress.

DOD Review Documents: The JCS determined AP I, art. 41, was acceptable as a restatement of law. JCS Review of AP I, *supra* note 12, at 30.

⁷⁸ *Current Guidance*:

When persons entitled to protection as POWs have fallen into the power of an adverse party under unusual conditions of combat that prevent their evacuation as provided for in Part III, Section I, of the GPW, they may be released, provided that feasible precautions are taken to ensure their safety. . . . Release in such circumstances is permissible, but is not required.

LAW OF WAR MANUAL, *supra* note 2, ¶ 9.9.3 (noting to “*Consider AP I, art. 41(3)*”).

*Article 42 – Occupants of aircraft*⁷⁹

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.

DOD Review Documents: The JCS requested an understanding to clarify that there is no obligation “to release prisoners of war simply because these individuals cannot be immediately evacuated from a combat zone.” Annex to JCS Review of AP I, *supra* note 12, at 3.

⁷⁹ *Current Guidance:*

In general, persons, such as aircrew or embarked passengers, parachuting from an aircraft in distress are treated as though they are *hors de combat*, *i.e.*, they must not be made the object of attack. . . . This protection is provided because a person descending by parachute is temporarily *hors de combat* just like someone who is shipwrecked or unconscious.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.9.5 (noting to “Consider AP I, art. 42.”).

State Department Legal Adviser Statements: “We also support the principle that persons, other than airborne troops, parachuting from an aircraft in distress, not be made the object of attack. This is, of course, contained in article 42.” Matheson, *supra* note 14, at 425.

DOD Review Documents: DOD attorneys viewed AP I, art. 42, as “already part of customary international law.” The JCS determined AP I, art. 42, was acceptable. JCS Review of AP I, *supra* note 12, at 31.

SECTION II: COMBATANT AND PRISONER-OF-WAR STATUS

*Article 43 – Armed forces*⁸⁰

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and 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 recognized by an adverse Party. Such armed forces shall be [(a) **‘commanded by a person responsible for his subordinates’**; (b) **‘have a fixed distinctive sign recognizable at a distance’**; (c) **‘carry arms openly’**; and (d) **‘conduct their operations in accordance with the laws and customs of war’ meaning that they are**] subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.⁸¹

⁸⁰ *DOD Review Documents*: The JCS determined that the intent of AP I, art. 43, was to include both regular armed forces and guerrilla units in the definition. JCS Review of AP I, *supra* note 12, at 32. The objectionable language is in art. 44. *Id.* Due to the interlocking nature of the provisions, the JCS wanted to reserve art. 43(1). Annex to JCS Review of AP I, *supra* note 12, at 4.

⁸¹ *Current Guidance*: Additional language for AP I, art. 43, is required to bring it into compliance with the United States’ understanding of international legal obligations. The inadequate definition of combatant in AP I was a primary reason for the United States rejecting AP I. LAW OF WAR MANUAL, *supra* note 2, ¶ 4.6.1.2. Members of the armed forces, to be afforded prisoner-of-war status, must satisfy the four conditions as agreed in the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences. *Id.* at ¶ 4.6.1.3 (citing Jay S. Bybee, Assistant Attorney General, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, 7 February 2002, 26 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 1, 4 and BOTHE ET AL., *supra* note 4, at 234–35). “[T]he law of war requires that combatants wear uniforms, insignia, or other clearly identifiable markings.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013 at A-4. “Combatants have certain obligations to distinguish themselves that include, but are not limited to, those times when they conduct attacks. For example, militia and volunteer corps must wear fixed, distinctive insignia, including when they are conducting attacks.” LAW OF

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.⁸²
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.⁸³

*Article 44 – Combatants and prisoners of war*⁸⁴

WAR MANUAL, *supra* note 2, at ¶ 5.4.8; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s criteria for lawful combatant status and obligation of combatants to distinguish themselves).

⁸² *Current Guidance*: “‘Combatant’ and ‘belligerent,’ when used without modification (such as ‘lawful’ or ‘unlawful,’ or ‘privileged’ or ‘unprivileged’), have often referred implicitly to lawful or privileged combatants.” LAW OF WAR MANUAL, *supra* note 2, ¶ 4.3.2.3 (citing AP I, art. 43(2)); *see also* ¶ 4.4.3 (considering art. 43(2) for the principle that “combatants . . . have the right to participate directly in hostilities.”).

⁸³ *Current Guidance*:

Some States use police forces in a paramilitary capacity or use military forces in a police role. Members of the armed forces engaged in police roles are combatants.

The extent to which police officers are treated as combatants largely depends on whether the State decides to use them in that capacity. States may decide to make law enforcement agencies part of their armed forces. Members of these law enforcement agencies, like other members of those armed forces, receive combatant status by virtue of their membership in the armed forces. In addition, States may authorize members of the law enforcement agencies to accompany their armed forces without incorporating them into their armed forces. These persons have the legal status of persons authorized to accompany the armed forces.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.23.2.

⁸⁴ *Current Guidance*: The inadequate definition of combatant and the attempt to legalize guerilla fighters was a primary reason for the United States rejecting AP I. LAW OF WAR MANUAL, *supra* note 2, ¶ 4.6.1.2.

“The law of war does not condone the ‘farmer by day and guerilla by night.’” *Id.* ¶ 4.18.3. “Combatants have certain obligations to distinguish themselves that include, but are not limited to, those times when they conduct attacks. For example, militia and volunteer corps must wear fixed, distinctive insignia, including when they are conducting attacks.” *Id.* ¶ 5.4.8.

The API provision only partially describes the obligation under customary international law of combatants to distinguish themselves from the civilian population. Under customary international law, the obligation of combatants to distinguish themselves is a general obligation that the armed forces have as a group and is not limited to times when they are engaged in an attack or in a military operation preparatory to an attack. Moreover, measures such as wearing insignia or other distinctive emblems may be of less practical significance during an attack. During an attack, combatants are likely to be distinguishable based on their activities more than any insignia or devices they are wearing.

Id. ¶ 5.4.8.2; *see also* ¶ 19.20.1.5 (repeating the objection to API’s obligations for combatants to distinguish themselves).

Presidential Statement: President Reagan stated,

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . [One] provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . .

Reagan’s Message to the Senate, *supra* note 1.

State Department Legal Adviser Statements: Mr. Matheson elaborated:

[W]ith respect to combatant and prisoner-of-war status, we support the principle that persons entitled to combatant status be treated as prisoners of war in accordance with the 1949 Geneva Conventions, as well as the principle

that combatant personnel distinguish themselves from the civilian populations while engaged in military operations. These statements are, of course, related to but different from the content of articles 44 and 45, which relax the requirements of the Fourth Geneva Convention concerning prisoner-of-war treatment for irregulars, and, in particular, include a special dispensation allowing individuals who are said to be unable to observe this rule in some circumstances to retain combatant status, if they carry their arms openly during engagements and deployments preceding the launching of attacks. As Judge Sofaer will explain, the executive branch regards this provision as highly undesirable and potentially dangerous to the civilian population and of course does not recognize it as customary law or deserving of such status.

Matheson, *supra* note 14, at 425; Judge Sofaer continued:

[T]roubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to ‘national liberation’ movements in general, but in particular to the inhumane tactics of many of them. Article 44(3) grants combatant status to armed irregulars, even in cases where they do not distinguish themselves from noncombatants, with the result that there will be increased risk to the civilian population within which such irregulars often attempt to hide.

Sofaer, *Remarks on the United States Position, supra* note 14, at 463.

Article 44(2) provides that once a group qualifies as a national liberation movement protected by article 1(4), no conduct by members of the group can lead to the loss of its status as a protected organization. The rationale for this rule is that individuals can be punished separately for their conduct. The effect is to preserve the right of such organizations to be treated as combatants, even though they are almost exclusively engaged in terrorizing civilians.”)

The Conference went even further in accommodating the needs of terrorist groups at the expense of the civilian population that humanitarian law is intended to protect.

A fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying their weapons openly. Thus, under the 1949 Geneva Conventions, irregular forces achieve combatant (and, if captured, POW) status, when they (1) are commanded by a person responsible for subordinates; (2) wear a fixed, distinctive insignia recognizable from a distance; (3) carry weapons openly; and (4) conduct their operations in accordance with the laws and customs of war. Fighters who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy.

The terrorist groups that attended the Conference had no intention to modify their conduct to satisfy these traditional rules of engagement. Terrorists are not soldiers. They do not wear uniforms. They hide among civilians, and after striking, they try to escape once again into civilian groups. Instead of modifying their conduct, they succeeded in modifying the law. Article 44(3) of Protocol I recognizes that “to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.” But the provision goes on to state “that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself.” In such situations, “he shall retain his status as a combatant, provided . . . he carries his arms openly: (a) during each military engagement, and (b) during each time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” Furthermore, the section provides that “acts which comply with the requirements of this paragraph shall not be considered as perfidious.”

These changes undermine the notion that the Protocol has

1. Any combatant, ~~as defined in Article 43~~, who falls into the power of an adverse Party shall be a prisoner of war.
2. ~~While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.~~

secured an advantage for humanitarian law by granting terrorist groups protection as combatants. Under the Geneva Conventions, a terrorist could not hide among civilians until just before an attack. Under Protocol I, he may do so; he need only carry his arms openly while he is visibly engaged in a deployment or while he is in an actual engagement.

The significance of Protocol I to terrorist organizations is not a matter of hypothetical speculation. They were at the Conference and lobbied hard for these provisions. The degree of their success is not in doubt.

Id. at 465–67. Judge Sofaer repeated these concerns a year later, and added,

This provision would make it easier for irregulars to operate, and it would substantially increase the risks to the civilian population. Inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their POW status if captured. Innocent civilians would therefore be made more vulnerable by application of the Protocol. This is no advance for humanitarian law.

Sofaer, *Rationale for the United States Decision*, *supra* note 14, at 786.

DOD Review Documents: In 1985, CJCS wrote that one of the “more serious problems created by” AP I was that “In many situations, it would grant guerrillas a superior legal status to members of the regular armed forces.” CJCS Cover letter to JCS Review of AP I, *supra* note 12. The JCS determined AP I, art. 44, would give advantages to guerrillas while giving very little military advantage to the United States. JCS Review of AP I, *supra* note 12, at 32–37. JCS recommend reserving art. 44. Annex to JCS Review of AP I, *supra* note 12, at 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
 - (a) during each military engagement, and
 - (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c):

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.⁸⁵
5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

⁸⁵ *Current Guidance*: The LAW OF WAR MANUAL advises consideration of this paragraph when dealing with espionage under art. 46. LAW OF WAR MANUAL, *supra* note 2, ¶ 4.17.5 n. 362.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

*Article 45 – Protection of persons who have taken part in hostilities*⁸⁶

⁸⁶ *Current Guidance:*

Capturing personnel may be unable to establish a detainee's status, including whether that person is entitled to POW status under the [Geneva Conventions Concerning Prisoners of War] GPW. For example, a detainee might have lost his or her identity card or the detainee might be a deserter who does not wish to admit that he or she is a member of enemy armed forces.

During international armed conflict, should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 of the GPW, such persons shall enjoy the protection of the GPW until such time as their status has been determined by a competent tribunal

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.27.2.

State Department Legal Adviser Statements:

[W]e do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offence arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Those principles are found in article 45.

Matheson, *supra* note 14, at 425–26.

DOD Review Documents: The JCS determined AP I, art. 45, “is consistent with existing United States law and policies.” JCS Review of AP I, *supra* note 12, at 41. DOD attorneys viewed the first sentence of AP I, art. 45(3), as “already part of customary international law” and the remainder of the article as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Article 46 – Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.⁸⁷
2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered

⁸⁷ *Current Guidance:*

Although the law of war allows belligerents to employ spies, saboteurs, and other persons engaged in secretive hostile activities behind enemy lines, the law of war 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 otherwise 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.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.17.5. “[P]ersons engaging in spying or sabotage risk additional penalties under the domestic law of enemy States.” *Id.* ¶ 5.4.8.

DOD Review Documents: The JCS determined AP I, art. 46(1), preserved and restated existing law. JCS Review of AP I, *supra* note 12, at 37.

as engaging in espionage if, while so acting, he is in the uniform of his armed forces.⁸⁸

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.⁸⁹

⁸⁸ *Current Guidance*: “Persons who act openly, such as by wearing the uniform of the armed forces to which they belong, do not meet” this necessary element of spying. LAW OF WAR MANUAL, *supra* note 2, ¶ 4.17.2.1 (noting “*Consider* AP I, art. 46(2)”).

DOD Review Documents: The JCS determined AP I, art. 46(2), preserved and restated existing law. JCS Review of AP I, *supra* note 12, at 37.

⁸⁹ *Current Guidance*: According to the LAW OF WAR MANUAL:

A person may only 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 the hostile party. During war, any person—military or civilian—whose actions meet all of these elements may be considered a spy under the law of war.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.17.2 (noting “*Consider* AP I, art. 46(3)”). The MANUAL also “considers” this paragraph along with art. 46(4) as “referring to persons who “engage in espionage in [the] territory” of a hostile party, and noting that a person ‘may not be treated as a spy unless he is captured while engaging in espionage.’” *Id.* ¶ 4.17.5.1 n.366.

DOD Review Documents: The JCS determined AP I, art. 46(3), was objectionable:

[The paragraph] attempts to create parallel rules for guerrillas in occupied territory. Under that paragraph, such guerrillas can be convicted of espionage only if, while gathering information, they engage in some act

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.⁹⁰

*Article 47—Mercenaries*⁹¹

of false pretense, beyond merely wearing civilian attire, such as using a concealed camera. Also, the guerrilla cannot be convicted of spying in occupied territory unless captured while actually engaging in espionage. Again, this improved status for guerrilla spies may be quite important to nations planning to defend their national territory by such means.

JCS Review of AP I, *supra* note 12, at 37–38. JCS asked for a reservation to art. 46(3). Annex to JCS Review of AP I, *supra* note 12, at 4.

⁹⁰ *Current Guidance*: Generally, “law of war treaties that regulate, but do not prohibit, spying, recognize implicitly that belligerents may use this method of warfare.” LAW OF WAR MANUAL, *supra* note 2, ¶ 4.17.2.1 (noting “Consider AP I, art. 46”).

DOD Review Documents: The JCS determined AP I, art. 46(4), preserved and restated existing law. JCS Review of AP I, *supra* note 12, at 37.

⁹¹ *Current Guidance*: “A number of treaty provisions are intended to repress mercenary activities. The United States has not accepted any such provision because these efforts are not consistent with fundamental principles of the law of war.” LAW OF WAR MANUAL, *supra* note 2, ¶ 4.21.1; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on mercenaries).

State Department Legal Adviser Statements: “We do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law.” Matheson, *supra* note 14, at 426. Judge Sofaer elaborated:

[A]rticle 47 of Protocol I provides that “a mercenary shall not have the right to be a combatant or a prisoner of war.” This article was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is

1. ~~A mercenary shall not have the right to be a combatant or a prisoner of war.~~
2. ~~A mercenary is any person who:~~
 - (a) ~~is specially recruited locally or abroad in order to fight in an armed conflict;~~
 - (b) ~~does, in fact, take a direct part in the hostilities;~~
 - (c) ~~is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;~~
 - (d) ~~is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;~~
 - (e) ~~is not a member of the armed forces of a Party to the conflict; and~~
 - (f) ~~has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.~~

unwelcome. In doing so, this article disregards one of the fundamental principles of international humanitarian law by defining the right to combatant status, at least in part, on the basis of the personal or political motivations of the individual in question. This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself.

Sofaer, *Remarks on the United States Position*, *supra* note 14, at 469.

DOD Review Documents: In 1985, CJCS wrote that one of the “more serious problems created by” AP I was that “[i]t would inject political criteria into the administration and application of humanitarian law. . . .” CJCS Cover letter to JCS Review of AP I, *supra* note 12 (citing AP I, art. 47). JCS asked for a reservation to art. 47. Annex to JCS Review of AP I, *supra* note 12, at 4.

PART IV
CIVILIAN POPULATION

SECTION I: GENERAL PROTECTION AGAINST EFFECTS
OF HOSTILITIES

CHAPTER I – BASIC RULE AND FIELD OF APPLICATION

Article 48 – Basic rule

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.⁹²

⁹² *Current Guidance*: “In general, military operations must not be directed against enemy civilians. In particular . . . Civilians must not be made the object of attack[.]” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.2 (citing art. 48).

It is necessary to distinguish between military targets and civilian/protected objects regardless of the legal status of the territory on or over which combat occurs. Purely civilian/protected objects or locations may not be intentionally targeted. However, due consideration under the principle of proportionality must be taken where such objects or locations are colocated with or are in close proximity to military targets. Further, the adversary’s use of a civilian/protected object or location for military or combat purposes may result in the loss of protected status, rendering it subject to attack.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-2. The MANUAL says “consider” API, art. 48, for the obligation of “parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects.” LAW OF WAR MANUAL, *supra* note 2, ¶ 2.5.1. It also says:

The party controlling civilians and civilian objects has

*Article 49 – Definition of attacks and scope of application*⁹³

1. “Attacks” means acts of violence against the adversary, whether in offence or in defence.
2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.
3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
4. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

the primary responsibility for the protection of civilians and civilian objects. The party controlling the civilian population generally has the greater opportunity to minimize risk to civilians. Civilians also may share in the responsibility to take precautions for their own protection. For example, civilians may decide to take measures for their own protection upon receiving a warning to stay away from military objectives.

Id. ¶ 5.2.1.

DOD Review Documents: The JCS determined AP I, art. 48, is acceptable. JCS Review of AP I, *supra* note 12, at 45.

⁹³ *DOD Review Documents*: The JCS determined AP I, art. 49, is acceptable. JCS Review of AP I, *supra* note 12, at 46.

CHAPTER II – CIVILIANS AND CIVILIAN POPULATION

Article 50 – Definition of civilians and civilian population

1. ~~A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A) 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.~~⁹⁴

⁹⁴ *Current Guidance*: As to the first sentence, “AP I defines ‘civilian’ in opposition to ‘combatant’; under AP I, anyone who is not a ‘combatant’ is, by definition, a ‘civilian.’ The United States has objected to AP I’s definition of combatant.” LAW OF WAR MANUAL, *supra* note 2, ¶ 4.8.1.4. As to the second sentence:

Under customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases. Attacks, however, may not be directed against civilians or civilian objects based on merely hypothetical or speculative considerations regarding their possible current status as a military objective. In assessing whether a person or object that normally does not have any military purpose or use is a military objective, commanders and other decision-makers must make the decision in good faith based on the information available to them in light of the circumstances ruling at the time.

A legal presumption of civilian status in cases of doubt may demand a degree of certainty that would not account for the realities of war. Affording such a presumption could also encourage a defender to ignore its obligation to separate military objectives from civilians and civilian objects. For example, unprivileged belligerents may seek to take advantage of a legal presumption of civilian status. Thus, there is concern that affording such a presumption likely would increase the risk of harm to the civilian population and tend to undermine respect for the law of war.

In applying AP I rules on “doubt,” some Parties to AP I

2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Article 51 – Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.⁹⁵

have interpreted these rules in a more limited way (e.g., applying a “substantial doubt” standard) than AP I’s text would suggest.

Id. ¶ 5.4.3.2; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on presumptions in favor of civilian status in conducting attacks).

DOD Review Documents: CJCS wrote that one of the “more serious problems created by” AP I was that “[i]ts presumption that, in case of doubt, objects and persons be considered civilian would be unworkable in practice.” CJCS Cover letter to JCS Review of AP I, *supra* note 12. The JCS said that this was the only controversial provision in AP I, art. 50. JCS Review of AP I, *supra* note 12, at 46. The JCS asked for a reservation to the second sentence of art. 50(1). Annex to JCS Review of AP I, *supra* note 12, at 4.

⁹⁵ State Department Legal Adviser Statements:

We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them, and that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. These fundamental principles can be found in article 51.

Matheson, *supra* note 14, at 426.

DOD Review Documents: JCS determined that AP I, art. 51(1), was

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁹⁶
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.⁹⁷

acceptable. JCS Review of AP I, *supra* note 12, at 50.

⁹⁶ *Current Guidance*: “Under the principle of distinction, combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.5. “In general, military operations must not be directed against enemy civilians. In particular . . . Civilians must not be made the object of attack[.]” *Id.* ¶ 5.2.2. “Measures of intimidation or terrorism against the civilian population are prohibited, including acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.” *Id.*; *see also* ¶ 10.5.3.2 (Regarding protected persons: “Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”).

State Department Legal Adviser Statements: “We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them. . . .” Matheson, *supra* note 14, at 426.

DOD Review Documents: DOD attorneys viewed the first sentence of AP I, art. 51(2), as “already part of customary international law[.]” McNeil Memorandum, *supra* note 22, at 234; Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-2 (“Civilian populations and civilian/protected objects may not be intentionally targeted, although there are exceptions to this rule. . . . Acts of violence solely intended to spread fear among the civilian population are prohibited.”). JCS determined that AP I, art. 51(2), was acceptable. JCS Review of AP I, *supra* note 12, at 50.

⁹⁷ *Current Guidance*: “The law of war gives civilians protection from attack during armed conflict. Civilians may lose this protection based upon specific warlike acts. Once civilians take a direct part in hostilities, they become lawful targets for such time as they directly participate in the hostilities.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-2.

“The United States has expressed support for the customary principle on which Article 51(3) of AP I is based, but has noted that Article 51(3)

of AP I, as drafted, does not reflect customary international law.” LAW OF WAR MANUAL, *supra* note 2, ¶ 1.8.1; *see also* ¶ 5.8.1.2 (“Although, as drafted, Article 51(3) of AP I does not reflect customary international law, the United States supports the customary principle on which Article 51(3) is based.”) and ¶ 19.20.1.4 (noting the same). “Private persons who engage in hostilities forfeit many of the protections afforded civilians under the law of war.” *Id.* ¶ 4.18.2. “[T]he United States has not accepted the ICRC’s study on customary international humanitarian law nor its ‘interpretive guidance’ on direct participation in hostilities.” *Id.* ¶ 4.26.3.

As to direct participation:

At a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy. Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations. However, taking a direct part in hostilities does not encompass the general support that members of the civilian population provide to their State’s war effort, such as by buying war bonds.

Id. ¶ 5.8.3. The MANUAL elaborates as to factors for assessing whether an act by a civilian constitutes taking a direct part in hostilities, such as: the degree to which the act causes harm to the opposing party’s persons or objects; the degree to which the act is connected to the hostilities; the specific purpose underlying the act; the military significance of the activity to the party’s war effort; and the degree to which the activity is viewed inherently or traditionally as a military one. *Id.*

As to direct participation in hostilities and voluntary human shields:

In cases where civilians voluntarily act as human shields, those civilians may be taking a direct part in hostilities and lose protection from attack. Such civilians need not be taken into account when assessing collateral damage under the law, though there may be diplomatic or strategic concerns that affect targeting decisions.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-2.

As to persons in non-State armed groups:

The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups

as “civilians” to whom this rule would apply. The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.8.2.1. API States may “characterize the act of joining and remaining a member of an armed group that is engaged in hostilities as a form of taking a direct part in hostilities that continuously deprives these individuals of their protection from being made the object of attack.” *Id.*

As to duration of liability for attack:

In the U.S. approach, civilians who have taken a direct part in hostilities must not be made the object of attack after they have permanently ceased their participation because there would be no military necessity for attacking them. Persons who take a direct part in hostilities, however, do not benefit from a “revolving door” of protection. There may be difficult cases not clearly falling into either of these categories, and in such situations a case-by-case analysis of the specific facts would be needed.

Id. ¶ 5.8.4.

As to persons accompanying the armed forces:

Unlike combatants, persons authorized to accompany the armed forces receive no general license to participate in hostilities. However, international law contemplates that persons authorized to accompany the armed forces may lawfully support armed forces in the conduct of hostilities. Such persons should not be liable under an enemy State’s domestic law for providing authorized support services. For example, they should not be prosecuted for offenses of aiding the enemy. Persons authorized to accompany the armed forces may not be punished by an enemy State for authorized support activities or for defending themselves against unlawful attacks. This protection would not apply with respect to acts by persons authorized to accompany the armed forces that are prohibited by the law of war.

Persons authorized to accompany the armed forces should not engage in unauthorized participation in hostilities. Such activity would be treated like engagement in private

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- ⁹⁸

acts of hostility, and such persons would be in the position of unprivileged belligerents in relation to those activities.

There may be additional considerations in determining which prosecution forum is appropriate because persons authorized to accompany the armed forces are not themselves members of the armed forces.

Commanders who use persons authorized to accompany the armed forces could, under certain circumstances, be prosecuted for war crimes committed by such personnel under theories of command responsibility or other theories of individual liability.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.15.4 (citing BOTHE ET AL., *supra* note 4, at 304).

State Department Legal Adviser Statements: “We also support the principle . . . that immunity not be extended to civilians who are taking part in hostilities.” Matheson, *supra* note 14, at 426; JCS determined that AP I, art. 51(3), was acceptable. JCS Review of AP I, *supra* note 12, at 50.

⁹⁸ *Current Guidance*:

Harassing fires against enemy combatants are not prohibited. (Such action is clearly distinguishable from attacks to terrorize or otherwise harm the civilian population, which are, of course, prohibited.) Harassing fires are delivered on enemy locations for the purpose of disturbing enemy forces’ rest, curtailing their movement, or lowering their morale.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.4.6.3.

DOD Review Documents: JCS commented on AP I, art. 51(4):

Paragraph 4 prohibits indiscriminate attacks and defines that term. Questions have been raised as to whether certain effective methods of warfare; e.g., harassing fires and interdiction fires, common in past armed conflict, would meet the test of this prohibition against indiscriminate attacks. Harassing fires are delivered on enemy locations for the purpose of disturbing the rest, curtailing the movement, or lowering the morale of troops. Interdiction

- (b) those which employ a method or means of combat which cannot be directed at a specific military objective;⁹⁹ or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;¹⁰⁰

fires are delivered, at random intervals, on selected terrain for the purpose of denying the enemy the unrestricted use of these areas. Neither of these types of attacks should be considered indiscriminate. . . .

JCS Review of AP I, *supra* note 12, at 47.

⁹⁹ *Current Guidance*:

Inherently indiscriminate weapons, *i.e.*, weapons that are incapable of being used in accordance with the principles of distinction and proportionality, are prohibited. Such weapons include weapons that are specifically designed to conduct attacks against the civilian population as well as weapons that, when used, would necessarily cause incidental harm that is excessive compared the military advantage expected to be gained from their use.

LAW OF WAR MANUAL, *supra* note 2, ¶ 6.7. The test for whether a weapon is inherently indiscriminate is whether its use necessarily violates the principles of distinction and proportionality, *i.e.*, whether its use is expected to be illegal in all circumstances. *Id.* ¶ 6.7.2.

Inherently indiscriminate weapons include those that are specifically designed to be used to conduct attacks against the civilian population, including attacks to terrorize the civilian population. For example, Japanese bombs attached to free-floating, long-range balloons used during World War II were unlawful for this reason. Also, German long-range rockets without guidance systems used during World War II were similarly illegal.

Id. ¶ 6.7.3.

¹⁰⁰ *Current Guidance*:

Indiscriminate weapons also include weapons whose anticipated incidental effects are necessarily excessive compared to the military advantages expected to be gained from using the weapon. To be clear, the principle of proportionality does not prohibit the use of weapons

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:¹⁰¹
 - (a) an attack by bombardment by any methods or means which 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;¹⁰² and

whose destructive force cannot be limited to a specific military objective. Such weapons may be used when their use is required against a target of sufficient military importance to outweigh the incidental harm that is expected to result.

...

Weapons that necessarily cause excessive incidental harm include “blind” or essentially random weapons that are incapable of being controlled, and thus, cannot, with any degree of certainty, be directed against a military objective. The expected incidental harm from the use of such weapons outweighs the little, if any, military utility of such weapons.

Weapons that necessarily cause excessive incidental harm also include weapons whose uncontrollable nature is such that, even when directed against military objectives, they otherwise are expected invariably to cause excessive incidental harm. For example, using communicable diseases such as the plague as weapons has been prohibited, in part because such use would almost inevitably cause excessive incidental harm among the civilian population compared to the military advantages from their use.

LAW OF WAR MANUAL, *supra* note 2, ¶ 6.7.4.

¹⁰¹ *DOD Review Documents*: JCS determined that AP I, art. 51(4), was acceptable. JCS Review of AP I, *supra* note 12, at 50.

¹⁰² *DOD Review Documents*: JCS determined that AP I, art. 51(5), was acceptable but asked for the declaration of the following understanding:

- (b) 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.¹⁰³

It is the understanding of the United States that whether targets are “clearly separated and distinct military objectives” will be judged on the basis of the viewpoint of the attacking force taking into account all factors either within or beyond the control of the attacking force which might affect its ability to separate and identify military targets.

JCS Review of AP I, *supra* note 12, at 51; Annex to JCS Review of AP I, *supra* note 12, at 3 (the annex identified the problematic article as 51(5)(b), but the language at issue was in art. 51(5)(a)). The JCS wanted to clarify that “if enemy camouflage makes it impossible to distinguish the military objectives from the surrounding civilian population, then this rule would not prevent an attack on the entire area where the target is believed to be.” JCS Review of AP I, *supra* note 12, at 49.

¹⁰³ *Current Guidance*: “Military objectives may not be attacked when the expected incidental loss of civilian life, injury to civilians, and damage to civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained[.]” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.2; *see also* ¶¶ 5.10 & 5.12 (“Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.”).

See infra notes 122 to 124 for additional commentary on proportionality.

The obligation to take feasible precautions is fundamentally connected to the prohibition on attacks expected to cause excessive incidental harm, and the two obligations are mutually reinforcing. Thus, although the obligation to take feasible precautions applies even if an attack is expected not to cause excessive incidental harm, incidental harm expected to result from strikes in which additional precautions are feasible, but have not been taken, would be more likely to be considered excessive.

Id. ¶ 5.12.3.2.

State Department Legal Adviser Statements: “We support the principle

6. ~~Attacks against the civilian population or civilians by way of reprisals are prohibited.~~¹⁰⁴

that . . . attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage.” Matheson, *supra* note 14, at 426.

DOD Review Documents:

Many legal experts believe that this rule is already binding on the United States as part of customary international law. Even if this rule is not already legally binding, considerations of proportionality have always been a major factor underlying political and practical restraints on military operations of the United States.

JCS Review of AP I, *supra* note 12, at 48.

¹⁰⁴ *Current Guidance*: “The United States has expressed the view that AP I’s provisions on reprisal are counter-productive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 18.18.3.4 (specifying AP I, art. 51(6)); *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on reprisals).

State Department Legal Adviser Statements: “[W]e do not support the prohibition on reprisals in article 51 and subsequent articles.” Matheson, *supra* note 14, at 426. Judge Sofaer explained:

Article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy’s own violations of the law and are intended to deter future violations. Historically, reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.

Sofaer, *Remarks on the United States Position*, *supra* note 14, at 469. A year later, Judge Sofaer repeated, “The total elimination of the right of reprisal . . . would hamper the ability of the United States to respond to an enemy’s intentional disregard of the limitations established in the Geneva Conventions of 1949 or Protocol I, for the purpose of deterring such disregard.” Sofaer, *Rationale for the United States Decision*, *supra* note 14, at 786.

DOD Review Documents: In 1985, CJCS wrote that one of the “more serious problems created by” AP I was that “[i]t would virtually eliminate reprisals as a deterrent against violations of the law of armed conflict.” CJCS Cover letter to JCS Review of AP I, *supra* note 12. JCS explained their concerns with virtually identical language:

Historically, reciprocity has been the major sanction underlying the law of war. If paragraphs 6 and 8 of Article 51 come into force, this sanction would be removed, at least insofar as the civilian population is concerned. Thus the enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. Similarly, if an adversary used the civilian population as a shield for military objectives; e.g., by hiding a guerrilla headquarters in the center of a town or refugee camp, an attack on such objectives would be forbidden if “excessive” civilian casualties might result. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.

JCS Review of AP I, *supra* note 12, at 50. At the end of their report on AP I, the JCS reemphasized the need to protect reprisals as a legal option:

While its compliance articles are acceptable, the Protocol has not significantly improved the international machinery for ensuring compliance with international humanitarian law in armed conflict. The United States did not, therefore, achieve its most important negotiating objective in participating in the Protocol negotiations. This conclusion lends greater importance to the earlier recommendation

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.¹⁰⁵

that the limits on reprisals in Articles 51–56 be reserved. If the United States cannot rely on neutral supervision to ensure compliance with humanitarian law, then the threat of unilateral retaliation retains its importance as a deterrent sanction to ensure at least a minimum level of humane behavior by US adversaries.

Id. at 87–88.

¹⁰⁵ *Current Guidance:*

Parties to a conflict may not use the presence or movement of protected persons or objects: (1) to attempt to make certain points or areas immune from seizure or attack; (2) to shield military objectives from attack; or (3) otherwise to shield or favor one’s own military operations or to impede the adversary’s military operations.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.16. The civilian population is classified as “protected persons.” *Id.* ¶ 5.16.1. There is an “absolute duty to refrain from purposeful misconduct” by “endangering protected persons or objects for the purpose of deterring enemy military operations.” *Id.* ¶ 5.16.2.

A party that is subject to attack might fail to take feasible precautions to reduce the risk of harm to civilians, such as by separating the civilian population from military objectives. Moreover, in some cases, a party to a conflict might attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack.

When enemy persons engage in such behavior, commanders should continue to seek to discriminate in conducting attacks and to take feasible precautions to reduce the risk of harm to the civilian population and civilian objects. However, the ability to discriminate and

8. ~~Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.~~¹⁰⁶

to reduce the risk of harm to the civilian population likely will be diminished by such enemy conduct. In addition, such conduct by the adversary does not increase the legal obligations of the attacking party to discriminate in conducting attacks against the enemy. Violations by the defending party are not a basis for that party to assert additional legal rights against the attacking party.

Id. ¶ 5.4.4. “When an adversary places military objectives in or near a populated area, this failure will weaken effective protection of their nearby civilian population and constitutes a violation of the law of war.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-4.

“[A] party [is not prohibited] from using what would otherwise be a civilian object for military purposes and thereby converting it to a military objective that is not protected by the law of war.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.16.1. It also does not prohibit persons who would otherwise be civilians from participating in hostilities or assuming risks inherent in supporting military operations. *Id.*

“[T]his rule would not prohibit restricting the [movement of civilians in order to conduct military operations without their interference. In addition, it would also not prohibit the evacuation of civilians for their own security or for imperative military reasons.” *Id.* ¶ 5.16.2.

State Department Legal Adviser Statements: “We also support the principle that the civilian population not be used to shield military objectives or operations from attack, and that immunity not be extended to civilians who are taking part in hostilities.” Matheson, *supra* note 14, at 426.

DOD Review Documents: “This rule should be militarily advantageous to the United States, since it expressly outlaws a practice used by US adversaries both during and since World War II. Use of civilians as a screen has also been a common practice among guerrilla and terrorist groups.” JCS Review of AP I, *supra* note 12, at 51.

¹⁰⁶ The objection to this paragraph is linked to AP I’s new prohibitions on reprisals. *See supra* note 104.

DOD Review Documents: “There is . . . a problem with the last paragraph of Article 51, which provides that any violation of Article 51 by one side

CHAPTER III – CIVILIAN OBJECTS

Article 52 – General protection of civilian objects

1. Civilian objects shall not be the object of attack ~~or of reprisals~~. Civilian objects are all objects which are not military objectives as defined in paragraph 2.¹⁰⁷
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹⁰⁸

will not release the other side from fully complying with its provisions.” JCS Review of AP I, *supra* note 12, at 49.

¹⁰⁷ *Current Guidance*: “Civilian objects consist of all civilian property and activities other than those used to support or sustain warfighting capability.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-2. “Under the principle of distinction, combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.5.

“The United States has expressed the view that AP I’s provisions on reprisal are counter-productive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict.” *Id.* ¶ 18.18.3.4 (specifying AP I, art 52(1)); *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on reprisals).

State Department Legal Adviser Statements: “[W]e do not support the prohibition on reprisals in article 51 and subsequent articles.”); *see supra* note 104 for the rationale for rejecting reprisals.” Matheson, *supra* note 14, at 426.

DOD Review Documents: DOD attorneys viewed AP I, art. 52(1), as “already part of customary international law” except for its provisions on reprisals. McNeil Memorandum, *supra* note 22, at 234.

¹⁰⁸ *Current Guidance*: “[T]his article has been understood to comprise only an obligation not to direct attacks against civilian objects and not to address the question of incidental harm resulting from attacks directed against military objectives.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.4.1.

AP I, art. 52(2)'s definition of military objective is an example of an AP I provision incorporated into other treaties that the United States has accepted. *Id.* ¶ 19.20.1.1. It "is substantially similar to the definition in Article 2(6) of CCW Amended Mines Protocol and Article 1(3) of CCW Protocol III on Incendiary Weapons." *Id.*

Military objectives refers to persons and objects that may be made the object of attack. Certain classes of persons and objects are categorically recognized as military objectives. Apart from these classes that are categorically military objectives, other objects are assessed as to whether they meet the definition of "military objective."

Id. ¶ 5.6.

The following combines guidance from Joint Publication 3-60 and the MANUAL while attempting to avoid redundancies:

Military attacks will be directed only at military objectives. In the law of war, military objective is a treaty term: "those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, under the circumstances ruling at that time, offers a definite military advantage."

(1) If the objective is not enemy military forces and equipment, the second part of the definition (that is, that the destruction of a target offers a definite military advantage) limits the first part (that is, it contributes to military action). Both parts must apply before an object that is normally a civilian object can be considered a military objective. In addition, the definition deals only with intentional attack and not with damage to civilian objects incidental to the lawful attack of military objectives.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-2-3.

A Two-Part Test. The definition of military objective insofar as objects are concerned may be divided into two parts, both of which must be met for the object to be considered a military objective: (1) that the object somehow makes an effective contribution to military action; and (2) attacking, capturing, or neutralizing the object, in the circumstances, offers a definite military

3. ~~In case of doubt whether an object which is normally dedicated~~

advantage

Generally, the reason why the object meets the first part of the definition also satisfies the second part of the definition. In other words, attacking the object in the circumstances will offer a definite military advantage because it seeks to preclude the object from effectively contributing to the enemy's military action. Moreover, the two parts are not necessarily connected because the concept of definite military advantage is broader than simply denying the adversary the benefit of an object's effective contribution to its military operations. These broader aspects of "military advantage" may also be relevant in evaluating whether an attack is expected to be excessive under the principle of proportionality.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.5.

(2) **Nature.** Nature refers to the type of object, for example, equipment used as military transports, and facilities used as C2 centers or communication stations.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-3.

"Nature" refers to the type of object and may be understood to refer to objects that are *per se* military objectives. For example, military equipment and facilities, by their nature, make an effective contribution to military action. On the other hand, "nature" can also be understood to refer to objects that may be used for military purposes as discussed below.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.6.1.

(3) **Location.** Location includes areas that are militarily important because they must be captured from or denied to an enemy, or because the enemy must be made to retreat from them. An area of land, such as a mountain pass, or a like route through or around a natural or man-made obstacle, may be a military objective. A town, village, or city may become a military objective, even if it does not contain military objectives, if its seizure is necessary (e.g., to protect a vital line of communications) or for other legitimate military reasons.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-3.

The location of an object may provide an effective contribution to military action. For example, during military operations in urban areas, a house or other structure that would ordinarily be a civilian object may be located such that it provides cover to enemy forces or would provide a vantage point from which attacks could be launched or directed. The word “location” also helps clarify that an area of land can be militarily important and therefore a military objective.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.6.1.

(4) **Purpose or Use.** Purpose means the future intended or possible use, while use refers to its present function.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-3.

“Use” refers to the object’s present function. For example, using an otherwise civilian building to billet combatant forces makes the building a military objective. Similarly, using equipment and facilities for military purposes, such as using them as a command and control center or a communications station, would result in such objects providing an effective contribution to the enemy’s military action.

“Purpose” means the intended or possible use in the future. For example, runways at a civilian airport could qualify as military objectives because they may be subject to immediate military use in the event that runways at military air bases have been rendered unserviceable or inoperable. Similarly, the possibility that bridges or tunnels would be used to assist in the adversary’s military operations in the future could result in such objects providing an effective contribution to the enemy’s military action, even though they are not being used at that moment for such purposes.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.6.1.

The potential dual use of a civilian object, such as a civilian airport, also may make it a military objective because of its future intended or potential military use. The connection of some objects to an enemy’s war-fighting, war-supporting, or war-sustaining effort may be direct, indirect, or even discrete. A decision as to

classification of an object as a military objective and allocation of resources for its attack is dependent upon its value to an enemy states [sic] war-supporting or war-sustaining effort (including its ability to be converted to a more direct connection), and is not solely reliant on its overt or present connection or use.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-3.

Sometimes, “dual-use” is used to describe objects that are used by both the armed forces and the civilian population, such as power stations or communications facilities. However, from the legal perspective, such objects are either military objectives or they are not; there is no intermediate legal category. If an object is a military objective, it is not a civilian object and may be made the object of attack. However, it will be appropriate to consider in applying the principle of proportionality the harm to the civilian population that is expected to result from the attack on such a military objective.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.1.2.

(5) **Nature, Location, Purpose, or Use.** The words nature, location, purpose, or use allow wide discretion, but are subject to qualifications stated later in the definition of effective contribution to military action and the offering of a definite military advantage through its seizure or destruction. There does not have to be a geographical connection between effective contribution and military advantage. Attacks on military objectives in the enemy rear, or diversionary attacks, away from the area of military operations as such (the contact zone), are lawful.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-3.

The object must make or be intended to make an effective contribution to military action; however, this contribution need not be “direct” or “proximate.” For example, an object might make an effective, but remote, contribution to the enemy’s military action and nonetheless meet this aspect of the definition. Similarly, an object might be geographically distant from most of the fighting and nonetheless satisfy this element.

Military action has a broad meaning and is understood to mean the general prosecution of the war. It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as "war-fighting," "war-supporting," and "war-sustaining" are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.6.2.

(6) **Military Action.** Military action is used in the ordinary sense of the words, and is not intended to encompass a limited or specific military operation.

(7) **Circumstances Ruling at the Time.** The phrase in the circumstances ruling at the time is essential. If, for example, enemy military forces have taken up position in a building that otherwise would be regarded as a civilian object, such as a school, retail store, or museum, the building has become a military objective. The circumstances ruling at the time that is, the military use of the building permits its attack, if attacking the building would offer a definite military advantage. If enemy military forces abandon the building, however, the change of circumstances may preclude its treatment as a military objective.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-3.

The attack of the object must, "in the circumstances ruling at the time," offer a definite military advantage for the object to be considered a military objective.

Nonetheless, the purpose (*i.e.*, future use) of the object can be considered in whether an object provides an effective contribution to the adversary's military action. In addition, the definite military advantage offered by the attack need not be immediate, but may be assessed in the full context of the war strategy.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.6.2.

(8) **Definite.** Definite means a concrete and perceptible military advantage, rather than one that is merely hypothetical or speculative. A military commander may regard this requirement as met in seeking to seize or destroy objects with a common purpose in order to deny their use to the enemy. An example is the attack of all bridges on lines of communication the enemy is using, or may use as alternate lines of communication, in order to reinforce or resupply his or her forces.

(9) **Military Advantage.** Military advantage refers to the advantage anticipated from an attack when considered as a whole, and not only from its isolated or particular parts. The advantage need not be immediate. For example, the military advantage in the attack of an individual bridge may not be seen immediately (particularly if, at the time of the attack, there is no military traffic in the area), but can be established by the overall effort against bridges in order to isolate enemy military forces on the battlefield. Similarly, military advantage is not restricted to tactical gains, but is linked to the full context of war strategy. It may involve a variety of considerations, including the security of the attacking force.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-3–4; these definitions are virtually the same as those found at LAW OF WAR MANUAL, *supra* note 2, ¶ 5.6.7.3.

Wanton destruction is prohibited:

[D]evastation or destruction may not be pursued as an end in itself. The measure of permissible seizure or destruction of enemy property is found in the strict necessities of war. There must be some reasonable connection between the seizure or destruction of the enemy property and the overcoming of enemy forces.

Id. ¶ 5.17.2 (citing *United States v. List, et al. (The Hostage Case)*, XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1253-54 (“There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.”)). “[I]f sufficient military necessity exists to justify attacking an object as reflected by that object meeting the definition of military objective, then imperative military necessity would also exist to justify seizing or destroying that object by measures short of attack.” *Id.* ¶ 5.17.2.1.

to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.¹⁰⁹

“It may be imperatively demanded by the necessities of war to seize or destroy enemy property in order to diminish the enemy’s ability to conduct or sustain operations, such as railways, lines of communication, and other war fighting and war sustaining infrastructure.” *Id.* ¶ 5.17.2.3.

State Department Legal Adviser Statements: Bellinger and Haynes, *supra* note 65, at 455 (“[U]nder the principle of discrimination that parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity.”).

DOD Review Documents: DOD attorneys viewed AP I, art. 52(2), as “already part of customary international law[.]” The JCS said, “This definition, which is consistent with customary international law, is broad enough to meet military requirements.” JCS Review of AP I, *supra* note 12, at 51.

¹⁰⁹ *Current Guidance*:

Under customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases. Attacks, however, may not be directed against civilians or civilian objects based on merely hypothetical or speculative considerations regarding their possible current status as a military objective. In assessing whether a person or object that normally does not have any military purpose or use is a military objective, commanders and other decision-makers must make the decision in good faith based on the information available to them in light of the circumstances ruling at the time.

A legal presumption of civilian status in cases of doubt may demand a degree of certainty that would not account for the realities of war. Affording such a presumption could also encourage a defender to ignore its obligation to separate military objectives from civilians and civilian objects. For example, unprivileged belligerents may seek to take advantage of a legal presumption of civilian status.

Thus, there is concern that affording such a presumption likely would increase the risk of harm to the civilian population and tend to undermine respect for the law of war.

In applying AP I rules on “doubt,” some Parties to AP I have interpreted these rules in a more limited way (e.g., applying a “substantial doubt” standard) than AP I’s text would suggest.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.4.3.2; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on presumptions in favor of civilian status in conducting attacks).

Commanders and other decision-makers must make decisions in good faith and based on the information available to them at the time. Even when information is imperfect or lacking (as will frequently be the case during armed conflict), commanders and other decision-makers may direct and conduct military operations, so long as they make a good faith assessment of the information that is available to them at that time.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.3.

State Department Legal Adviser Statements: “We also support the principle that the civilian population not be used to shield military objectives or operations from attack, and that immunity not be extended to civilians who are taking part in hostilities. This corresponds to provisions in articles 51 and 52.” Matheson, *supra* note 14, at 426. Matheson did not comment on DOD concerns over art. 52(3).

DOD Review Documents: CJCS wrote that one of the “more serious problems created by” AP I was that “[i]ts presumption that, in case of doubt, objects and persons be considered civilian would be unworkable in practice.” CJCS Cover letter to JCS Review of AP I, *supra* note 12. The JCS said,

The problem with Article 52 is paragraph 3, which provides that “in case of doubt” as to whether an object “normally dedicated to civilian purposes” is a military objective, “it shall be presumed not to be” a military objective. This rule would apply to almost any object except for weapons and similar things that are military in the narrowest sense. Railroads, telecommunications facilities, and electrical power plants are all “normally dedicated to civilian

*Article 53 – Protection of cultural objects and of places of worship*¹¹⁰

purposes.” This rule, together with the comparable rule in Article 50 that “in case of doubt” whether a person is a civilian, he or she “shall be considered to be a civilian,” is unrealistic. Commanders and other military personnel who make decisions in the fog of war must do so in good faith and on the basis of whatever information they have available at the time. Such decisions will almost never be free of “doubt,” either subjective or objective.

. . . The presumption of civilian status established by Articles 50 and 52 of the Protocol could adversely impact on American military operations and personnel in many ways. “War crimes” accusations have been a principal means used to deny prisoner of war status to Americans in both Korea and Southeast Asia; the existence of a rule that everyone and everything is civilian in case of “doubt” could be used to prove such charges in the future, or at least lend credence to them for propaganda purposes. A requirement that there be no “doubt” that the persons and objects attacked were military could also be used to place American prisoners of war on the psychological defensive during interrogation. This presumption also provides an additional protection for guerrillas and other irregulars who may find it advantageous to be presumed a civilian rather than a combatant. Finally, such a presumption would make it more difficult to defend the legality of military operations in domestic and international public opinion.

JCS Review of AP I, *supra* note 12, at 51–53. The JCS asked for a reservation to art. 52(3). Annex to JCS Review of AP I, *supra* note 12, at 4.

¹¹⁰ *Current Guidance*: The MANUAL notes that the definition of protected property in AP I, art. 53, is different from other treaties. LAW OF WAR MANUAL, *supra* note 2, ¶ 5.18.1.1. “[B]ased on the statements of national delegations, including the U.S. delegation, during the negotiations of this provision, it appears that objects that qualify for special protection under Article 53 of AP I are substantially those that qualify for special protection” under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter 1954 Hague Cultural Property Convention). *Id.* ¶ 5.18.10.

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;¹¹¹

Property must be “of great importance to the cultural heritage of every people” to qualify as cultural property. Ordinary property (such as churches or works of art) that are not of great importance to the cultural heritage of every people would not qualify as cultural property, although such property may benefit from other protections, such as those afforded civilian objects or enemy property.

Id. ¶ 5.18.1.2.

DOD Review Documents: The JCS reported that general protections of cultural property already existed in international law. JCS Review of AP I, *supra* note 12, at 53–54. The JCS wanted art. 53 clarified to explain,

[I]f cultural property is used for military purposes, it loses its protection. Second, the protection of the article must be limited to a relatively few highly important cultural monuments and objects. This was the position of the United States and most of its allies at the diplomatic conference. However, a few states regarded Article 53 as protecting all temples, chapels, mosques, and other places of worship, an extension that would make the article impractical in operation.

Id. at 54.

¹¹¹ *Current Guidance:* “In general, acts of hostility may not be directed against cultural property, its immediate surroundings, or appliances in use for its protection. Acts of hostility may, however, be directed against cultural property, its immediate surroundings, or appliances in use for its protection, when military necessity imperatively requires such acts.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.18.5. Note the US understanding to the 1954 Hague Cultural Property Convention says, “customary international law . . . prohibits the use of any cultural property to shield any legitimate military targets from attack and . . . allows all property to be attacked using any lawful and proportionate means, if required by military necessity and

- (b) to use such objects in support of the military effort;¹¹²
- (c) to make such objects the object of reprisals.¹¹³

notwithstanding possible collateral damage to such property.” 1954 Hague Cultural Property Convention, 2575 UNTS 7 (13 March 2009).

¹¹² *Current Guidance:*

In general, no use should be made of cultural property, its immediate surroundings, or appliances in use for its protection, for purposes that are likely to expose it to destruction or damage in the event of armed conflict. However, such use is permissible when military necessity imperatively requires such use.

Uses that would be likely to expose cultural property to destruction or damage in the event of armed conflict would include: (1) using the cultural property for military purposes; (2) placing military objectives near cultural property; or (3) using the cultural property in such a way that an adversary would likely regard it as a military objective. For example, such uses would include billeting military personnel in buildings that constitute cultural property, or emplacing artillery, mortars, or anti-air systems on the grounds of cultural property.

In addition, it is prohibited to use deliberately the threat of potential harm to cultural property to shield military objectives from attack, or otherwise to shield, favor, or impede military operations. There is no waiver of this obligation in cases of imperative military necessity.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.18.1.3. “The primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.” 1954 Hague Cultural Property Convention, 2575 UNTS 7 (13 March 2009).

¹¹³ According to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Cultural Property Convention), art. 4(4), the State Parties “shall refrain from any act directed by way of reprisals against cultural property.” 1954 Hague Cultural Property Convention.

State Department Legal Adviser Statements: Mr. Matheson made a broad statement as to the non-applicability of AP I’s new restrictions on

*Article 54 – Protection of objects indispensable to the survival of the civilian population*¹¹⁴

reprisals: “[W]e do not support the prohibition on reprisals in article 51 and subsequent articles.” Matheson, *supra* note 14, at 426.

¹¹⁴ *Current Guidance*: “Starvation specifically directed against the enemy civilian population . . . is prohibited. For example, it would be prohibited to destroy food or water supplies for the purpose of denying sustenance to the civilian population.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.20.1. Starvation of enemy forces is permitted. *Id.* “Military action intended to starve enemy forces, however, must not be taken where it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage anticipated to be gained.” *Id.* ¶ 5.20.2.

The MANUAL says AP I, art. 51(3),

[W]ould not apply to attacks that are carried out for specific purposes other than to deny sustenance. For example, this rule would not prohibit destroying a field of crops to prevent it from being used as concealment by the enemy or destroying a supply route that is used to move military supplies but is also used to supply the civilian population with food.

Similarly, this AP I prohibition does not apply to objects that would otherwise be covered by it if those objects are used by an adverse party “as sustenance solely for the members of its armed forces” or “if not as sustenance, then in direct support of military action.” Actions against this latter category of objects forfeiting protection, however, may not be taken if they “may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.”

Further exception is made for a State to engage in a “scorched earth” defense of a party’s own territory.

When adopted, this AP I prohibition was novel and the product of extensive diplomatic negotiation. Given the intricacy of this provision of AP I, it would be difficult to conclude that all of its particulars reflect customary international law. Nonetheless, the United States has supported the underlying principle that starvation of civilians may not be used as a method of warfare. . . .

Id. at ¶ 5.20.4; *see also* ¶ 19.20.1.4, explaining that

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - (a) as sustenance solely for the members of its armed forces; or
 - (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these

[T]he intricacy of the provisions of AP I on objects indispensable to the survival of the civilian population make it doubtful that such provisions could be characterized as customary international law, although the United States has supported the principle that the starvation of civilians not be used as a method of warfare.

Id.

State Department Legal Adviser Statements:

We support the principle that starvation of civilians not be used as a method of warfare, and subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged. These principles can be found, though in a somewhat different form, in articles 54 and 70.

Matheson, *supra* note 14, at 426.

DOD Review Documents: JCS determined that AP I, art. 54, was a new rule but was militarily acceptable because “there is little military need for a modern armed force to retain the option of starving the enemy’s civilian population into submission.” JCS Review of AP I, *supra* note 12, at 54.

objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. ~~These objects shall not be made the object of reprisals.~~¹¹⁵
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

*Article 55—Protection of the natural environment*¹¹⁶

¹¹⁵ *Current Guidance*: “The United States has expressed the view that AP I’s provisions on reprisal are counter-productive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict.” LAW OF WAR MANUAL, *supra* note 2, ¶ 18.18.3.4 (specifying AP I art 54(4)); *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on reprisals).

State Department Legal Adviser Statements: “[W]e do not support the prohibition on reprisals in article 51 and subsequent articles.” Matheson, *supra* note 14, at 426.

¹¹⁶ *Current Guidance*: The United States has not accepted AP I, arts. 35(3) or 55. LAW OF WAR MANUAL, *supra* note 2, ¶ 6.10.3.1. It “has repeatedly expressed the view that these provisions are “overly broad and ambiguous and ‘not a part of customary law.’” *Id.*; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on environmental protection).

State Department Legal Adviser Statements:

We, however, consider that another principle in article 35, which also appears later in the Protocol, namely that the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment, is too broad and ambiguous and is not a part of customary law.

Matheson, *supra* note 14, at 426.

“France and the United States repeatedly have declared that Articles 35(3) and 55 of AP I . . . do not reflect customary international law.” Bellinger and Haynes, *supra* note 65, at 455. They also clarified, “[U]nder the

1. ~~Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.~~
2. ~~Attacks against the natural environment by way of reprisals are prohibited.~~¹¹⁷

*Article 56—Protection of works and installations containing dangerous forces*¹¹⁸

principle of discrimination that parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity.” *Id.*

DOD Review Documents: JCS determined that AP I, art. 55, was militarily acceptable so long as the words “or may be expected” were reserved. JCS Review of AP I, *supra* note 12, at 57.

¹¹⁷ *Current Guidance:* “The United States has expressed the view that AP I’s provisions on reprisal are counter-productive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 18.18.3.4 (specifying AP I art 55(2)); *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on reprisals).

State Department Legal Adviser Statements: “[W]e do not support the prohibition on reprisals in article 51 and subsequent articles.” Matheson, *supra* note 14, at 426.

¹¹⁸ *Current Guidance:*

The United States has objected to this article of AP I. . . . Insofar as Article 56 of AP I deviates from the regular application of the principles of distinction and proportionality, the U.S. view has been that it does not reflect customary international law applicable in international . . . armed conflicts.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.13.1.

Attack of facilities, works, or installations containing dangerous forces, such as dams, nuclear power plants,

or facilities producing weapons of mass destruction, is permissible so long as it is conducted in accordance with other applicable rules, including the rules of discrimination and proportionality. In light of the increased potential magnitude of incidental harm, additional precautions, such as weaponeering or timing the attack such that weather conditions would minimize dispersion of dangerous materials, may be appropriate to reduce the risk that the release of these dangerous forces may pose to the civilian population.

Id. ¶ 5.13; *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on protection of works and installations containing dangerous forces).

State Department Legal Adviser Statements: “[W]e do not support the provisions of article 56, concerning dams, dykes, and nuclear power stations, for reasons that again Judge Sofaer will discuss, nor do we consider them to be customary law.” Matheson, *supra* note 14, at 426. Judge Sofaer explained:

Article 56 of Protocol I is designed to protect dams, dikes, and nuclear power plants against attacks that could result in “severe” civilian losses. As its negotiating history indicates, this article would protect objects that would be considered legitimate military objectives under customary international law.

Attacks on such military objectives would be prohibited if “severe” civilian casualties might result from flooding or release of radiation. The negotiating history throws little light on what level of civilian losses would be “severe.” It is clear, however, that under this article, civilian losses are not to be balanced against the military value of the target. If severe losses would result, then the attack is forbidden, no matter how important the target. It also appears that article 56 forbids any attack that raises the possibility of severe civilian losses, even though considerable care is taken to avoid them.

Paragraph 2 of article 56 provides for termination of protection, but only in limited circumstances. If it is once conceded that a particular dam, dike, or nuclear power station is entitled to protection under article 56, that protection can only end if it is used “in regular, significant, and direct support of military operations.” In the case of

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall 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. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided by paragraph 1 shall cease:
 - (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of mili-

a nuclear power plant, this support must be in the form of “electric power.” The negotiating history refers to electric power for “production of arms, ammunition, and military equipment” as removing a power plant’s protection, but not “production of civilian goods which may also be used by the armed forces.” The Diplomatic Conference thus neglected the nature of modern integrated power grids, where it is impossible to say that electricity from a particular plant goes to a particular customer. It is also unreasonable for article 56 to terminate the protection of nuclear power plants only on the basis of the use of their electric power. Under this provision, a nuclear power plant that is being used to produce plutonium for nuclear weapons purposes would not lose its protection.

Sofaer, *Remarks on the United States Position*, *supra* note 14, at 468–69.

DOD Review Documents: CJCS wrote that one of the “more serious problems created by” AP I was that “[i]t would unreasonably restrict attacks against certain dams, dikes, and nuclear power stations.” CJCS Cover letter to JCS Review of AP I, *supra* note 12. JCS stated, “Article 56 has so many defects, both in concept and in drafting, that it should not be considered militarily acceptable.” JCS Review of AP I, *supra* note 12, at 57. The JCS asked for a reservation to art. 56. Annex to JCS Review of AP I, *supra* note 12, at 4.

- tary operations and if such attack is the only feasible way to terminate such support;
- (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
- (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.
4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.¹¹⁹
5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations

¹¹⁹ *Current Guidance*: “The United States has expressed the view that AP I’s provisions on reprisal are counter-productive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 18.18.3.4 (specifying AP I art 56); *see also* ¶ 19.20.1.5 (repeating the objection to AP I’s provisions on reprisals).

State Department Legal Adviser Statements: Matheson, *supra* note 14, at 426 (“[W]e do not support the prohibition on reprisals in article 51 and subsequent articles.” Footnote 33 specifically references art. 56, “in particular the protections of works and installations containing dangerous forces[.]”).

from attack are permissible and shall not themselves be made the object of attack, provided that they 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.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.
7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

CHAPTER IV – PRECAUTIONARY MEASURES

*Article 57 – Precautions in attack*¹²⁰

¹²⁰ State Department Legal Adviser Statements: Mr. Matheson explained:

We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit. We also support the principle that attacks not be made against appropriately declared or agreed non-defended localities or agreed demilitarized zones. These various principles are reflected in articles 57 through 60.

Matheson, *supra* note 14, at 426–27.

DOD Review Documents: JCS determined that Article 57 was militarily acceptable, except for art. 57(2)(b). JCS Review of AP I, *supra* note 12, at 63.

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.¹²¹
2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) 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 within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;¹²²

¹²¹ *Current Guidance*: “Parties to a conflict must take feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.3. “Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.” *Id.* ¶ 5.2.3.2. The duty to take “constant care” should be understood as consistent with AP I, art. 57, in its entirety. *Id.* ¶ 5.2.3.5.

DOD Review Documents: DOD attorneys viewed AP I, art. 57(1), as “already part of customary international law[.]”

¹²² *Current Guidance*: “Planners should ensure that military objectives, and not civilian objects, are prosecuted. Sound target intelligence enhances military effectiveness and target validity.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-5. “Feasible precautions to reduce the risk of harm to civilians and civilian objects must be taken when planning and conducting attacks.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.3. “The standard for what precautions must be taken is one of due regard or diligence, not an absolute requirement to do everything possible. A wanton disregard for civilian casualties or harm to other protected persons and objects is clearly prohibited.” *Id.* ¶ 5.2.3.2. Commanders and other decision-makers must make decisions in good faith and based on the information available to them at the time. *Id.* ¶ 5.3. “The commander’s decisions on proportionality must be reasonable. For example, the commander must be able to explain the expected military importance of the target and why the anticipated civilian collateral injury or damage is not expected to be excessive.” *Id.* ¶ 5.10.2.2.

- (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;¹²³

¹²³ *Current Guidance*: “It is specifically provided that feasible precautions must be taken in connection with certain types of weapons.” *LAW OF WAR MANUAL*, *supra* note 2, ¶ 5.2.3; *see also* ¶ 5.10 (“Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack”).

When conducting military operations, positive steps and precautions must be taken to avoid excessive incidental civilian casualties and damage to civilian property. The extent of danger to the civilian population varies with the type of military target attacked, terrain, weapons used, weather, and civilian proximity. . . . Threats to civilians depend on engagement techniques, weapons used, nature of conflict, commingling of civilian and military objects, and armed resistance encountered.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-4.

“Required precautionary measures are reinforced by traditional tenets of military doctrine, such as surprise, economy of force, and concentration of effort.” *Id.* at A-5.

Presidential Statements: Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack. Executive Order 13732, *United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force*, 81 FEDERAL REGISTER 44485, 44485-86 (§2) (1 July 2016).

State Department Legal Adviser Statements:

[T]he U.S. reservation to [AP III] is consistent with article 57(2)(ii) and article 57(4) of the 1977 Additional Protocol I to the Geneva Conventions. Article 57(4) provides that governments shall “take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.” Although the United States is not a party to Additional Protocol I, we believe these provisions are an accurate statement of the fundamental law of war

- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated,¹²⁴

principle of discrimination.

Harold Koh, Legal Adviser, Department of State, Letter to Paul Seger, Legal Adviser of Switzerland regarding Switzerland's Position on the U.S. Reservation to Protocol III of the Convention on Certain Conventional Weapons, 30 December 2009.

¹²⁴ *Current Guidance*: “Military objectives may not be attacked when the expected incidental loss of civilian life, injury to civilians, and damage to civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained[.]” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.2. “Feasible precautions should be taken to mitigate the burden on civilians when seizing or destroying enemy property.” *Id.* ¶ 5.2.3; *see also* ¶¶ 5.10 & 5.12 (“Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.”).

As to expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack:

In light of the humanitarian objectives of the law of war, the expected loss of civilian life and injury to civilians should be given greater consideration than the expected damage to civilian objects. Similarly, the expected damage to civilian objects (such as schools, hospitals, and religious facilities) should be given greater consideration when such damage is expected to involve the risk of harming civilians present inside such objects.

In light of the great importance of cultural property, expected damage to cultural property should be afforded greater consideration than expected damage to ordinary property.

Id. ¶ 5.12.1.1.

Minimization of Civilian Casualties. Unless otherwise prohibited by ROE, attacks are not prohibited against military targets even if they might cause incidental injury or damage to civilians or civilian objects. In spite

of precautions, such incidental casualties are inevitable during armed conflict.

(a) Collateral damage to civilian objects or persons must not be excessive in relation to the concrete and direct military advantage expected to be gained. If the attack is directed against dual-use objects that are legitimate military targets but also serve a legitimate civilian need (e.g., electrical power or telecommunications), then this factor must be carefully balanced against the military benefits when making a proportionality determination.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-5.

Expected loss of civilian life, injury to civilians, and damage to civilian objects must be considered. Mere inconveniences or temporary disruptions to civilian life need not be considered in applying this rule.

For example, although the actual damage to a civilian marketplace from an attack on a nearby military objective would be considered, the temporary disruption to commerce from the closure of the marketplace due to the nearby attack would not need to be considered.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.12.1.2.

The expected loss of civilian life, injury to civilians, and damage to civilian objects is generally understood to mean such immediate or direct harms foreseeably resulting from the attack. Remote harms that could result from the attack do not need to be considered in applying this prohibition. The exclusion of remote harms is based on the difficulty in accurately predicting the myriad of remote harms from the attack (including the possibility of unrelated or intervening actions that might prevent or exacerbate such harms) as well as the primary responsibility of the party controlling the civilian population to take measures to ensure that population's protection.

For example, if the destruction of a power plant would be expected to cause the loss of civilian life or injury to civilians very soon after the attack due to the loss of power at a connected hospital, then such harm should be considered in assessing whether an attack is expected to

cause excessive harm. On the other hand, the attacker would not be required to consider the economic harm that the death of an enemy combatant would cause to his or her family, or the loss of jobs due to the destruction of a tank factory. Similarly, in determining the expected loss of civilian life, injury to civilians, and damage to civilian objects, the attacker would not be required to consider the possibility that a munition might not detonate as intended and might injure civilians much later after the attack. This is due to the difficulty in assessing such risks and the responsibility of the party controlling the territory and the civilian population to take steps with regard to the protection of the civilian population from unexploded ordnance.

Id. ¶ 5.12.1.3. When determining whether a planned attack would be excessive, planners must consider taking feasible precautions to reduce harm to civilian workers at and around legitimate military objectives (i.e., munitions factories, airfields, warships). *Id.* ¶ 5.12.3.3. “Those making such determinations may consider all relevant facts and circumstances.” *Id.* The expected harm to such civilian workers does not render these objectives immune from attack. *Id.* These workers assume risk of collateral injury. *Id.*

As to concrete and direct military advantage expected to be gained:

The considerations in assessing a “definite military advantage” in the definition of “military objective” are also relevant in assessing the “concrete and direct military advantage expected to be gained.” For example, the military advantage may not be merely hypothetical or speculative, although there is no requirement that the military advantage be “immediate.”

There must be a good faith expectation that the attack will make a relevant and proportional contribution to the goal of the military attack involved. Such goals may include: (1) denying the enemy the ability to benefit from the object’s effective contribution to its military action (e.g., using this object in its military operations); (2) improving the security of the attacking force; and (3) diverting enemy forces’ resources and attention.

. . . The military advantage expected from an attack is intended to refer to the advantage gained from the attack

considered as a whole, rather than only from isolated or particular parts of an attack. Similarly, “military advantage” is not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy. The military importance of a target often turns on its relationship to other targets within an operational system, and the effect that disabling the target will have on the functions that comprise the adversary’s ability to wage war. For example, an attack against a communications relay that was a military objective might be expected to yield a much greater military advantage when the attack was part of a strategy of coordinated attacks to disable the adversary’s command and control network than as an isolated attack.

Consideration of the military advantage of the entire attack in its operational and strategic context ensures the proper consideration and allocation of responsibility to the appropriate levels within the military hierarchy. Lower-level personnel may not be competent to evaluate the broader strategic and operational implications of the entire attack.

Id. ¶ 5.12.2.

As to “excessive”:

Determining whether the expected incidental harm is excessive does not necessarily lend itself to quantitative analysis because the comparison is often between unlike quantities and values. The evaluation of expected incidental harm in relation to expected military advantage intrinsically involves both professional military judgments as well as moral and ethical judgments evaluating the risks to human life (*e.g.*, civilians at risk from the attack, friendly forces or civilians at risk if the attack is not taken).

Id. ¶ 5.12.3.

Again, the rub lies in determining what counts as “excessive.” Any number of intangibles must be [c]onsidered: How important is the military objective sought to be achieved? What are the pros and cons of each option available to achieve that objective? For each option, what

- (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to

is the probability of success? What are the costs of failure? What are the risks of civilian casualties involved in each option? What are the risks of military casualties involved in each option? How are casualties of either kind to be weighed against the benefits of the operation? In short, questions of proportionality are highly open-ended, and the answers to them tend to be subjective and imprecise.

Id. at n.404 (quoting *Statement of Interest of the United States of America, Matar v. Dichter*, 05 Civ. 10270 (WHP) (S.D.N.Y. Nov. 17, 2006), 2006 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 465, 471–72).

As to “Human Shields”:

Joint force targeting . . . is driven by the principle of proportionality, so that otherwise lawful targets involuntarily shielded with protected civilians may be attacked, and the protected civilians may be considered as collateral damage, provided that the collateral damage is not excessive compared to the concrete and direct military advantage anticipated by the attack.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-2.

If civilians are being used as human shields, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive, and feasible precautions must be taken to reduce the risk of harm to them. However, the enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack. Based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.12.3.4. “The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, although the attacker may share this responsibility if it fails to take feasible precautions.” *Id.* ¶ 5.16.5.

See supra note 103 for State Department and DOD Review remarks about AP I, art. 51’s rule of proportionality in attack.

special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;¹²⁵

¹²⁵ *Current Guidance*: “**Cancellation or Suspension of Attacks.** Target intelligence may be found to be faulty before an attack is started or completed. If it becomes apparent that a target is no longer a lawful military objective, the attack must be cancelled or suspended.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-5. “Commanders may decide to cancel or suspend attacks based on new information of expected civilian casualties or authorize subordinates to do so, in order to reduce the risk of harm to civilians and civilian objects.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.11.4.

In the absence of specific direction to the contrary, subordinate commanders or engagement authorities have the authority to make the corresponding decisions required by the law of war, such as the decision to cancel or suspend an attack in light of new information, in order to effectuate the commander’s intent.

Id. ¶ 5.10.2.1.

The MANUAL acknowledges that the duty to refuse clearly illegal orders to commit law of war violations would apply to an attack that is expected to result in civilian casualties that the commander himself or herself acknowledges would be excessive, but cautions that

this duty must be understood in light of application of the principle that law of war obligations are implemented by those with responsibility to make the decisions and judgments required by the law of war, and in particular the point that subordinates might not be competent to evaluate whether the requirements of proportionality had been met.

Id. ¶ 5.10.2.4. Subordinates may normally presume that the order to attack is lawful. *Id.*

The MANUAL also states, “The decision to cancel or suspend an attack based on new information raising concerns of expected civilian casualties does not necessarily mean that the attack would have been unlawful, such as by violating the prohibition against attacks expected to cause excessive incidental harm.” *Id.* It then notes, “API art. 57(2) is framed

- (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.¹²⁶

differently and provides for the cancellation or suspension of attacks as a precaution. . . .” *Id.* at n.358.

DOD Review Documents: JCS wanted an understanding that Article 57(b) only applied to commanders with authority to terminate attacks. JCS Review of AP I, *supra* note 12, at 65. They explained:

This provision might provide a defense to military personnel accused of disobedience or misbehavior before the enemy as a result of refusal to participate in a particular combat operation. Under military law, members of the armed forces may, and should, refuse to obey an order to commit a crime, such as the shooting of prisoners of war or unarmed civilians. Article 57, however, goes considerably beyond this, in allowing each individual combatant to call off an “attack” (or at least his participation in it) if it appears to him that collateral damage “may” be excessive to whatever military advantage he is aware of. In order to overcome this defense in a trial by court-martial, the prosecution would have to prove, beyond a reasonable doubt, that the possible collateral damage would not be excessive to the military advantage gained. To do this would often require the declassification of information known to the accused’s superiors and its discussion in a public trial. Finally, the accused might be able to prevail on this issue simply by demonstrating a reasonable mistake of fact on his part—a reasonable belief, perhaps formed in part on the basis of propaganda reports in the public media, that collateral damage was excessive to any expected military advantage.

Id.

¹²⁶ *Current Guidance*: “Warnings must be given when circumstances permit (e.g., any degradation in attack effectiveness is outweighed by the reduction in collateral damage because advanced warning allowed the adversary to get civilians out of the target area).” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-5.

“Unless circumstances do not permit, effective advance warning must be given of an attack that may affect the civilian population.” LAW OF WAR

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.¹²⁷

MANUAL, *supra* note 2, ¶ 5.11.5.

“Circumstances not permitting the giving of advance warning include where giving a warning would be incompatible with legitimate military requirements, such as exploiting the element of surprise in order to provide for mission accomplishment and preserving the security of the attacking force.” *Id.* ¶ 5.11.5.4.

The purpose of a warning is to facilitate the protection of the civilian population so that civilians and the authorities in control of the civilian population can take measures to reduce the risk that civilians will be harmed by military operations. Although there is no set form for warnings, a warning should be designed to accomplish this purpose to the extent feasible.

Warnings may be communicated to the authorities in control of the civilian population, such as the national leadership of the enemy State. Warnings may also be delivered directly to the civilian population through military information support operations (*e.g.*, broadcasts, leaflets) advising the civilian population of risk of harm if they are near military objectives. Low passes of aircraft or warning shots may also be appropriate in certain circumstances.

The warnings may be general in nature; giving the specific time and place of an attack is not required.

Id. ¶ 5.11.5.2.

“[W]arning requirements exist before certain medical units, vessels, or facilities forfeit their protection from being made the object of attack[.]”

Id. ¶ 5.11.5.1.

DOD Review Documents: DOD attorneys viewed AP I, art. 57(2)(c), as “already part of customary international law[.]”

¹²⁷ *Current Guidance*:

In particular, when attempting to achieve a particular military advantage through an attack, a commander may confront a choice among several military objectives for

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.¹²⁸

achieving that advantage. When facing such a choice, provided that all other factors are equal, the object to be selected for attack shall be the object the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. For example, in seeking to deny an adversary the ability to use a railroad network, it may be possible to disable the railroad network just as effectively by striking the railroad lines away from inhabited areas as by striking the railroad station located near civilians.

...

When the choice of military objectives involves different risks and benefits potentially yielding different military advantages, this rule does not require that the object that may be expected to cause the least danger to civilian lives and to civilian objects be chosen for attack. For example, a commander could decide to attack a military objective involving higher risks of civilian casualties because the attack on that objective affords a greater likelihood of achieving the military advantage.

5.11.7.1 . . . The United States has expressed the view that this language is not a part of customary international law. Whether this AP I provision is consistent with customary international law would depend on how AP I Parties interpret it. If this AP I provision is interpreted as described in § 5.11.7 (Selecting Military Objectives), then this provision could be understood to be consistent with customary international law.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.11.7.

¹²⁸ *Current Guidance*: “Feasible precautions to reduce the risk of harm to civilians must also be taken by the party subject to attack.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.3.

State Department Legal Adviser Statements:

[T]he U.S. reservation to [AP III] is consistent with article 57(2)(ii) and article 57(4) of the 1977 Additional Protocol

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

*Article 58 – Precautions against the effects of attacks*¹²⁹

I to the Geneva Conventions. Article 57(4) provides that governments shall “take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.” Although the United States is not a party to Additional Protocol I, we believe these provisions are an accurate statement of the fundamental law of war principle of discrimination.

Harold Koh, Legal Adviser, Department of State, Letter to Paul Seger, Legal Adviser of Switzerland regarding Switzerland’s Position on the U.S. Reservation to Protocol III of the Convention on Certain Conventional Weapons, 30 December 2009.

DOD Review Documents: DOD attorneys viewed AP I, art. 57(4), as “already part of customary international law[.]”

¹²⁹ *Current Guidance*: “Feasible precautions to reduce the risk of harm to civilians must also be taken by the party subject to attack.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.2.3.

[P]arties to a conflict should also take feasible precautions to reduce the risk of harm to protected persons and objects from the effects of enemy attacks. In particular, military commanders and other officials responsible for the safety of the civilian population must take reasonable steps to separate the civilian population from military objectives and to protect the civilian population from the effects of combat.

Id. ¶ 5.14. “The parties to a conflict are obligated to remove their own civilian population, individual civilians, and civilian objects from areas or locations where military objects are located.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-4. *Cf.* “It may be appropriate to remove civilians and civilian objects from the vicinity of military objectives.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.14.2. “To the maximum extent feasible, the law of war requires combatants to locate their military facilities away from protected civilian objects, such as hospitals and schools.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-4. “[C]ivilian hospitals should be situated as far as possible from military objectives.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.14.2. “. . . Result of Failure to Separate Military Activities. When an adversary places military objectives

in or near a populated area, this failure will weaken effective protection of their nearby civilian population and constitutes a violation of the law of war.” Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-4 (emphasis in original).

It may be appropriate to avoid placing military objectives, such as the armed forces, in urban or other densely populated areas, in order to reduce the risk of incidental harm to the civilian population.

However, it often may not be feasible to refrain from placing military objectives in densely populated areas. Legitimate military reasons often require locating or billeting military forces in urban areas or other areas where civilians are present. For example, forces may be housed in populated areas to take advantage of existing facilities, such as facilities for shelter, health and sanitation, communications, or power. In some cases, especially during counterinsurgency operations or in non-international armed conflict generally, the protection of the civilian population may be increased by placing military forces in densely populated areas to protect the civilian population from enemy attack and influence.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.14.1.

State Department Legal Adviser Statements: Mr. Matheson explained that art. 58 contained supportable principles:

We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.

Matheson, *supra* note 14, at 427.

DOD Review Documents: The JCS found AP I, art. 58, to be militarily acceptable but was concerned about reasonable interpretations.

The term “feasible” refers to what is practical or practically possible, and allows for the consideration of reasonableness and military necessity in applying the Article. It would thus be impractical to move major headquarters and other permanent military installations

The Parties to the conflict shall, to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

CHAPTER V – LOCALITIES AND ZONES UNDER SPECIAL PROTECTION

*Article 59 – Non-defended localities*¹³⁰

completely away from urban areas, since such installations require utilities, transportation services and a civilian work force that can only be obtained in an urban environment. What the Article requires, rather, is that the parties to the Protocol take civilian danger into account as one factor among many in their defense planning. However, several countries have voiced concerns about the possible impact of Article 58 on their national defense, especially in densely populated areas such as Europe.

JCS Review of AP I, *supra* note 12, at 66. The JCS asked for an understanding to declare that art. 58 “does not prohibit the use of urban terrain for military purposes when military necessity dictates such use and further, that potential danger to the civilian populace is only one factor to be considered in formulating overall defense planning.” Annex to JCS Review of AP I, *supra* note 12, at 5.

¹³⁰ *Current Guidance*: “Attack, by whatever means, of a village, town, or city that is undefended is prohibited. Undefended villages, towns, or cities may, however, be captured.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15. AP I, art. 59, “uses the term non-defended” rather than “undefended,” but uses essentially the same criteria as “undefended” places within

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:
 - (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated,¹³¹

the meaning of Article 25 of the Hague IV Regulations. *Id.* ¶ 5.15.1.1. The undefended/non-defended/open area in question “must be open for immediate physical occupation by opposing military ground forces. Thus, a city in rear areas behind enemy lines cannot be ‘undefended.’” *Id.* ¶ 5.15.3.1.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-4, states

Under the law of war, safety zones or demilitarized zones may be created by or between the warring parties. While the creation of such zones rarely occurs, if created, they must only be used for their intended purposes. Examples are open cities, civilians, prisoner of war (POW) camps, hospitals, etc.

Id.

State Department Legal Adviser Statements: Mr. Matheson explained that art. 59 contained supportable principles, explaining, “We also support the principle that attacks not be made against appropriately declared or agreed non-defended localities or agreed demilitarized zones.” Matheson, *supra* note 14, at 427.

DOD Review Documents: The JCS found AP I, art. 59, to be in keeping with customary international law and militarily acceptable. JCS Review of AP I, *supra* note 12, at 66–67. DOD attorneys viewed AP I, art. 59, as “already part of customary international law[.]”

¹³¹ *Current Guidance:* “All combatants, as well as their mobile weapons and mobile military equipment, must have been evacuated.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15.4.1 (Noting to “*Consider* AP I art. 59(2).”).

- (b) no hostile use shall be made of fixed military installations or establishments;¹³²
 - (c) no acts of hostility shall be committed by the authorities or by the population; and¹³³
 - (d) no activities in support of military operations shall be undertaken.¹³⁴
3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.¹³⁵
 4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2

¹³² *Current Guidance*: “No hostile use shall be made of fixed military installations or establishments within the city.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15.4.2 (Noting to “*Consider* AP I art. 59(2).”).

¹³³ *Current Guidance*: “Hostile acts may not be committed by the local civilian authorities or the civilian population against the occupying military force.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15.4.3 (Noting to “*Consider* AP I art. 59(2).”).

¹³⁴ *Current Guidance*: “No activities in support of military operations may be undertaken. For example, factories in the city should not be used to manufacture munitions, and ports or railroads should not be used to transport military supplies.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15.4.3 (Noting to “*Consider* AP I art. 59(2).”).

¹³⁵ *Current Guidance*: “[T]he presence of military medical personnel, the wounded and sick, and civilian police forces for the purpose of maintaining local law and order would not cause a city designated as undefended to lose that status.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15.4.3 (Noting to “*Consider* AP I art. 59(3).”).

are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.¹³⁶

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.¹³⁷
6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may

¹³⁶ *Current Guidance:*

Belligerents may refuse to recognize a declaration that a city is undefended if they assess that it does not satisfy all of the necessary conditions, although they should notify the opposing belligerent of that decision. Absent or until recognition, military objectives in a city unilaterally designated as undefended remain subject to attack.

LAW OF WAR MANUAL, *supra* note 2, at ¶ 5.15.3.3 (Noting to “*Consider* AP I art. 59(4).”).

¹³⁷ *Current Guidance:*

Even if the conditions described above are not met, parties to a conflict may agree between themselves to treat an area as an undefended city. The agreement should be in writing and should define and describe, as precisely as possible, the limits of the undefended city (such as the exact geographic limits of the locality, when the location is to begin to receive protection as undefended, and the duration of undefended status). If necessary, methods of supervision to ensure that the city continues to fulfill the conditions should be specified. It may also be appropriate for agreements to specify: (1) rules on marking the city and agreed signs; (2) persons authorized to enter the city; and (3) whether and under what conditions the city may be occupied by enemy forces.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15.3.5 (Noting to “*Consider* AP I art. 59(5).”).

be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.¹³⁸

*Article 60 – Demilitarized zones*¹³⁹

¹³⁸ *Current Guidance:*

Once a party to a conflict has validly declared a city to be undefended, the city must also satisfy certain conditions. If the city fails to satisfy these conditions, it would not be entitled to undefended status, or, if previously granted, it would lose that status. Persons and objects within that city, however, may still receive other protections for civilians and civilian objects.

LAW OF WAR MANUAL, *supra* note 2, ¶ 5.15.4. Noting to “*Consider API art. 59(7)*.”

¹³⁹ *Current Guidance:*

Under the law of war, safety zones or demilitarized zones may be created by or between the warring parties. While the creation of such zones rarely occurs, if created, they must only be used for their intended purposes. Examples are open cities, civilians, prisoner of war (POW) camps, hospitals, etc.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at A-4. “Certain zones or localities may be established through the agreement of parties to a conflict to shelter civilians or wounded and sick combatants from the effects of attacks.” LAW OF WAR MANUAL, *supra* note 2, ¶ 5.14.3. “Attacks . . . may not be conducted in special zones established by agreement between the belligerents, such as hospital, safety, or neutralized zones.” *Id.* ¶ 5.4.5.

State Department Legal Adviser Statements: Mr. Matheson explained that art. 60 contained supportable principles, explaining, “We also support the

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.
2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.
3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:
 - (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
 - (b) no hostile use shall be made of fixed military installations or establishments;
 - (c) no acts of hostility shall be committed by the authorities or by the population; and
 - (d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in sub-paragraph (d) and upon persons

principle that attacks not be made against appropriately declared or agreed non-defended localities or agreed demilitarized zones.” Matheson, *supra* note 14, at 427.

DOD Review Documents: The JCS found AP I, art. 60, to be in keeping with customary international law and militarily acceptable. JCS Review of AP I, *supra* note 12, at 66–67. DOD attorneys viewed AP I, art. 60, as “already part of customary international law[.]”

to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.
5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.
6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.
7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

CHAPTER VI – CIVIL DEFENCE

*Article 61 – Definitions and scope*¹⁴⁰

¹⁴⁰ *Current Guidance:*

The United States has supported the principle that civilian civil defense organizations and their personnel be respected and protected as civilians and be permitted to perform their civil defense tasks except in cases of imperative military necessity. However, a number of military operational problems have been identified with respect to the system of protection for civil defense

For the purpose of this Protocol:

- (a) “civil defence” means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:

established by AP I, and these provisions of AP I may be understood not to preclude an attack on an otherwise lawful military objective.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.22. Although the United States supports the principle that civilian civil defense organizations and their personnel be respected and protected as civilians, the provision may not be customary international law or militarily acceptable. *Id.* ¶ 19.20.1.4.

DOD Review Documents: The JCS found the civil defense provisions in AP I, arts. 61–67, to be “well meaning” but with practical problems caused by ambiguous definitions in art. 61. JCS Review of AP I, *supra* note 12, at 69–70.

[A] civil defense organization will be entitled to special protection when it warns the civilian population of an impending attack, but not when it warns enemy military organizations. To the extent that such activities substantially lessen the military impact of surprise, they should be considered to be legitimate objects of attack. Obviously, there will be considerable overlap among these situations, and in practice it will often be unclear whether a particular activity is a legitimate civil defense function or not. This ambiguity could encourage misuse of the orange and blue civil defense identification sign in an attempt to shield otherwise lawful targets from attack. An attacking force will often have difficulty deciding whether to respect the sign in a particular case. To lessen the risk of misuse of this sign and avoid placing an unacceptable burden on proof of an attacking force, an understanding is proposed that makes it clear that Articles 61–67 do not preclude an attack on an otherwise lawful military objective.

Id. at 70–71.

- (i) warning;
 - (ii) evacuation;
 - (iii) management of shelters;
 - (iv) management of blackout measures;
 - (v) rescue;
 - (vi) medical services, including first aid, and religious assistance;
 - (vii) fire-fighting;
 - (viii) detection and marking of danger areas;
 - (ix) decontamination and similar protective measures;
 - (x) provision of emergency accommodation and supplies;
 - (xi) emergency assistance in the restoration and maintenance of order in distressed areas;
 - (xii) emergency repair of indispensable public utilities;
 - (xiii) emergency disposal of the dead;
 - (xiv) assistance in the preservation of objects essential for survival;
 - (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;
- (b) “civil defence organizations” means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks

mentioned under sub-paragraph (a), and which are assigned and devoted exclusively to such tasks;

- (c) “personnel” of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned sub-paragraph (a), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;
- (d) “*matériel*” of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned sub-paragraph (a).

*Article 62 – General protection*¹⁴¹

¹⁴¹ *Current Guidance:*

In general, members of law enforcement agencies have civilian status. Furthermore, routine domestic law enforcement is part of the general protection of the civilian population and does not constitute “taking a direct part in hostilities” that would deprive police officers of their protection from being made the object of attack.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.23.1 (citing *United States v. Shakur*, 690 F. Supp. 1291 (S.D.N.Y. 1988)), III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-88 3436, 3450 (“Members of the civilian police force are not deemed to be legitimate objects of attack during international wars unless they are incorporated into the armed forces. The ‘status of police is generally that of civilians’ for purposes of the law of war.”).

State Department Legal Adviser Statements:

[W]e support the principle that civilian civil defense organizations and their personnel be respected and protected as civilians and be permitted to perform their civil defense tasks except in cases of imperative military necessity. . . . These principles reflect, in general terms, many of the detailed provisions in [article] 62. . . .

Matheson, *supra* note 14, at 427; LAW OF WAR MANUAL, *supra* note 2, ¶ 4.22.

DOD Review Documents: The JCS proposed an understanding to clarify

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.
2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.
3. Buildings and *matériel* used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong.

*Article 63 – Civil defence in occupied territories*¹⁴²

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no circumstances shall their personnel be compelled to perform activities which would interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of

“that Articles 61–67 do not preclude an attack on an otherwise lawful military objective.” JCS Review of AP I, *supra* note 12, at 71; LAW OF WAR MANUAL, *supra* note 2, ¶ 4.22.

¹⁴² *State Department Legal Adviser Statements*: “We also support the principle that in occupied territories, civilians receive from the appropriate authorities, as practicable, the facilities necessary for the performance of their tasks. These principles reflect, in general terms, many of the detailed provisions in [article] . . . 63.” Matheson, *supra* note 14, at 427.

DOD Review Documents: The JCS proposed an understanding to clarify “that Articles 61–67 do not preclude an attack on an otherwise lawful military objective.” JCS Review of AP I, *supra* note 12, at 71.

their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.

2. The Occupying Power shall not compel, coerce or induce civilian civil defence organizations to perform their tasks in any manner prejudicial to the interests of the civilian population.
3. The Occupying Power may disarm civil defence personnel for reasons of security.
4. The Occupying Power shall neither divert from their proper use nor requisition buildings or *matériel* belonging to or used by civil defence organizations if such diversion or requisition would be harmful to the civilian population.
5. Provided that the general rule in paragraph 4 continues to be observed, the Occupying Power may requisition or divert these resources, subject to the following particular conditions:
 - (a) that the buildings or *matériel* are necessary for other needs of the civilian population; and
 - (b) that the requisition or diversion continues only while such necessity exists.
6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

*Article 64 – Civilian civil defence organizations of neutral or other States not Parties to the conflict and international coordinating organizations*¹⁴³

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and *matériel* of civilian civil defence organizations of neutral or other

¹⁴³ *DOD Review Documents*: The JCS proposed an understanding to clarify “that Articles 61–67 do not preclude an attack on an otherwise lawful military objective.” JCS Review of AP I, *supra* note 12, at 71.

States not Parties to the conflict which perform civil defence tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.

2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.
3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

*Article 65 – Cessation of protection*¹⁴⁴

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and *matériel* are entitled shall not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.
2. The following shall not be considered as acts harmful to the enemy:

¹⁴⁴ *DOD Review Documents*: The JCS proposed an understanding to clarify “that Articles 61–67 do not preclude an attack on an otherwise lawful military objective.” JCS Review of AP I, *supra* note 12, at 71.

- (a) that civil defence tasks are carried out under the direction or control of military authorities;
 - (b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;
 - (c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are *hors de combat*.
3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.
 4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

*Article 66 – Identification*¹⁴⁵

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and *matériel*, are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.

¹⁴⁵ *DOD Review Documents*: The JCS proposed an understanding to clarify “that Articles 61–67 do not preclude an attack on an otherwise lawful military objective.” JCS Review of AP I, *supra* note 12, at 71.

2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and *matériel* on which the international distinctive sign of civil defence is displayed.
3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status.
4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and *matériel* and for civilian shelters.
5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of distinctive signals for civil defence identification purposes.
6. The application of the provisions of paragraphs 1 to 4 is governed by Chapter V of Annex I to this Protocol.
7. In time of peace, the sign described in paragraph 4 may, with the consent of the competent national authorities, be used for civil defence identification purposes.
8. The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.
9. The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

*Article 67 – Members of the armed forces and military units assigned to civil defence organizations*¹⁴⁶

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:
 - (a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;
 - (b) if so assigned, such personnel do not perform any other military duties during the conflict;
 - (c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;
 - (d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;
 - (e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party;
 - (f) such personnel and such units perform their civil defence tasks only within the national territory of their Party.

¹⁴⁶ *DOD Review Documents*: The JCS proposed an understanding to clarify “that Articles 61–67 do not preclude an attack on an otherwise lawful military objective.” JCS Review of AP I, *supra* note 12, at 71.

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.

2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.
3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.
4. The *matériel* and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

SECTION II: RELIEF IN FAVOUR OF THE CIVILIAN POPULATION

*Article 68 – Field of application*¹⁴⁷

¹⁴⁷ *DOD Review Documents*: The JCS determined that Articles 68–71 were acceptable, subject to an understanding that relief supplies could be refused due to “imperative considerations of military necessity.” This interpretation would also make the Protocol compatible with United States law [50 U.S.C. § 1702(b)], which allows the president to cut off relief supplies “subject to the jurisdiction of the United States” to any areas of the world if such supplies would “endanger the Armed Forces of the United States which are engaged in hostilities.” JCS Review of AP I, *supra*

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

*Article 69 – Basic needs in occupied territories*¹⁴⁸

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.
2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

*Article 70 – Relief actions*¹⁴⁹

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted

note 12, at 72–73.

¹⁴⁸ See *supra* note 147.

¹⁴⁹ *State Department Legal Adviser Statements*:

We support the principle that starvation of civilians not be used as a method of warfare, and subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged. These principles can be found, though in a somewhat different form, in articles 54 and 70.

Matheson, *supra* note 14, at 426.

DOD Review Documents: See *supra* note 147.

without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
 - (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
 - (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
 - (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.
5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international coordination of the relief actions referred to in paragraph 1.

*Article 71 – Personnel participating in relief actions*¹⁵⁰

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
2. Such personnel shall be respected and protected.
3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in

¹⁵⁰ *State Department Legal Adviser Statements*: In 2007, the US State Department Legal Adviser responded to an ICRC report on Customary International Law, which found many rules in existence, including “Rule 31” which was “Humanitarian relief personnel must be respected and protected.” Bellinger and Haynes, *supra* note 65, at 449. They did not expressly comment on whether the United States adopts article 71, but did state:

Treaty provisions on the treatment of humanitarian relief personnel guide the current practice of many States, and clearly articulate limits to the obligation asserted by Rule 31:

- Article 71(1) of Additional Protocol I (“AP I”) requires that humanitarian relief personnel obtain the consent of the State in which they intend to operate. Article 71(4) prohibits humanitarian relief personnel from exceeding the “terms of their mission” and permits a State to terminate their mission if they do so. Even Article 17(2) of API, which the Study cites in support of a State’s obligation to protect aid societies, describes a situation in which consent almost certainly would be present, since a State that appeals to an aid society for assistance effectively is providing advance consent for that society to enter its territory.

Id.

DOD Review Documents: See *supra* note 147.

paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

SECTION III: TREATMENT OF PERSONS IN THE POWER OF A PARTY TO THE CONFLICT

CHAPTER I – FIELD OF APPLICATION AND PROTECTION OF PERSONS AND OBJECTS

*Article 72 – Field of application*¹⁵¹

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

*Article 73 – Refugees and stateless persons*¹⁵²

¹⁵¹ *DOD Review Documents*: The JCS determined, “Articles 72–79 are militarily acceptable.” JCS Review of AP I, *supra* note 12, at 75.

¹⁵² *State Department Legal Adviser Statements*: “[W]e support the principle that persons who were considered as refugees or stateless persons before the beginning of hostilities nonetheless be treated as protected persons under the Fourth Geneva Convention[.]” Matheson, *supra* note 14, at 427. The rule is found in article 73. *Id.*

DOD Review Documents: DOD attorneys viewed AP I, art. 52(2), as “a correct and authoritative interpretation of Article 4 of the Fourth Geneva Convention of 1949.” McNeil Memorandum, *supra* note 22, at 234.

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

*Article 74 – Reunion of dispersed families*¹⁵³

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations.

*Article 75 – Fundamental guarantees*¹⁵⁴

¹⁵³ *State Department Legal Adviser Statements*: “[W]e support the principle . . . that states facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and encourage, in particular, the work of humanitarian organizations engaged in this task.” Matheson, *supra* note 14, at 427. The rule is found in article 74. *Id.*

DOD Review Documents: The JCS determined, “Articles 72–79 are militarily acceptable.” JCS Review of AP I, *supra* note 12, at 75. DOD attorneys viewed AP I, art. 74, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

¹⁵⁴ *Current Guidance*: “[T]he United States has supported adherence to the guarantees in Article 75 of AP I during international armed conflict.” LAW OF WAR MANUAL, *supra* note 2, ¶ 3.1.1.2. “[T]he United States has explicitly supported, out of a sense of legal obligation, the fundamental guarantees reflected in Article 75 of AP I as minimum standards for the humane treatment of all persons detained during international armed conflict.” *Id.* ¶ 4.19.3.1.

Article 75 of AP I reflects fundamental guarantees for the treatment of persons detained during international armed conflict. Although not a Party to AP I, the United States has stated that the U.S. Government will choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it

detains in an international armed conflict, and expects all other nations to adhere to these principles as well. This statement was intended to contribute to the crystallization of the principles contained in Article 75 as rules of customary international law applicable in international armed conflict.

Id. ¶ 8.1.4.2; *see also* ¶ 19.20.1.2 (citing art. 75 as an example of a provision of AP I supported by the United States).

Presidential Statements:

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported. Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

The White House, Office of the Press Secretary, *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, 7 March 2011.

State Department Legal Adviser Statements:

As a matter of international law, the administration's statement is likely to be received as a statement of the U.S. Government's *opinio juris* as well as a reaffirmation of U.S. practice in this area. The statement is therefore also likely to be received as a significant contribution to the crystallization of the principles contained in Article 75 as rules of customary international law applicable in international armed conflict. . . . The U.S. statement, coupled with a sufficient density of State practice and *opinio juris*, would contribute to creation of the principles reflected in Article 75 as rules of customary international

law, which all States would be obligated to apply in international armed conflict.

Harold Koh, Legal Adviser, Department of State, Responses to Questions Submitted by Senator Richard G. Lugar, Libya and War Powers: Hearing Before the Committee on Foreign Relations, U.S. Senate, 112th Congress, First Session, 53, 57 (28 June 2011).

We support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria.

We support the principle that these persons not be subjected to violence to life, health, or physical or mental well-being, outrages upon personal dignity, the taking of hostages, or collective punishments, and that no sentence be passed and no penalty executed except pursuant to conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.

Likewise, we support the principle that women and children be the object of special respect and protection, [and] that women be protected against rape and indecent assault. . . .

Matheson, *supra* note 14, at 427–28; DOD attorneys viewed API, art. 75, as “already part of customary international law[.]” In 2014, the US State Department Deputy Legal Adviser said:

Although the United States continues to have significant concerns with many aspects of Additional Protocol I, Article 75 of that Protocol sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. The U.S. Government has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and we expect all other nations to adhere to these principles as well. Indeed, in

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.¹⁵⁵

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
 - (a) violence to the life, health, or physical or mental well-being of persons, in particular:¹⁵⁶

the recently updated Department of Defense Directive on its Detainee Program, specific reference is made to the principles in Article 75 of Additional Protocol I.

Remarks by Stephen Townley at the 69th United Nations General Assembly, Sixth Committee (Legal) Session on Agenda Item 79: Status of the Protocols Additional to the Geneva Conventions of 1949, New York, NY, 21 October 2014, <http://usun.state.gov/briefing/statements/234022.htm>.

DOD Review Documents: The JCS determined, “Articles 72–79 are militarily acceptable.” JCS Review of AP I, *supra* note 12, at 75.

¹⁵⁵ *Current Guidance*: “Detainees shall be treated humanely without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, national or social origin, political or other opinion, or any other similar criteria.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.2.6 (noting to “Consider AP 75(1)”); *see also* ¶ 8.11 (“Detainees shall be granted free exercise of religion, consistent with the requirements of detention. Detainees’ religious practices shall be respected.” (noting to “Consider AP 75(1)”).

¹⁵⁶ *Current Guidance*: “Detainees must be protected against violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, torture, and any form of corporal punishment.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.2.1 (noting to “Consider AP 75(2)(a)”).

- (i) murder;
 - (ii) torture of all kinds, whether physical or mental;
 - (iii) corporal punishment; and
 - (iv) mutilation;
- (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;¹⁵⁷
- (c) the taking of hostages;
- (d) collective punishments; and¹⁵⁸
- (e) threats to commit any of the foregoing acts.¹⁵⁹
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.¹⁶⁰

¹⁵⁷ *Current Guidance*: “Detainees must be protected against rape, forced prostitution, and other indecent assault.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.2.1 (noting to “Consider AP 75(2)(b)”).

¹⁵⁸ *Current Guidance*: “Collective punishments are prohibited.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.2.1.

¹⁵⁹ *Current Guidance*: “Threats to commit the unlawful acts described above (*i.e.*, violence against detainees, or humiliating or degrading treatment, or biological or medical experiments) are also prohibited.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.2.4 (noting to “Consider AP 75(2)(e)”).

¹⁶⁰ *Current Guidance*: “Detainees shall be informed promptly of the reasons for their detention in a language that they understand.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.14.1 (noting to “Consider AP 75(3)”).

For persons who have participated in hostilities or belong

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:¹⁶¹
- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;¹⁶²
 - (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;¹⁶³
 - (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to

to armed groups that are engaged in hostilities, the circumstance that justifies their continued detention is the continuation of hostilities. Thus, release of such persons is generally only required after the conflict has ceased. As a matter of policy, release of lawfully detained persons often occurs before the conclusion of hostilities.

Id. ¶ 8.14.3.1 (noting to “*Consider AP 75(3)*”).

¹⁶¹ *Current Guidance*: “The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees that are recognized as indispensable by civilized peoples are prohibited.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16 (noting to “*Consider AP 75(4)*”).

¹⁶² *Current Guidance*: “The [trial] procedure shall provide for an accused to be informed without delay of the particulars of the notice alleged against him or her and shall afford the accused before and during his or her trial all necessary rights and means of defense.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.3 (noting to “*Consider AP 75(4)(a)*”).

¹⁶³ *Current Guidance*: “No one shall be convicted of an offense except on the basis of individual penal responsibility. . . . Collective punishments are prohibited.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.2.1 (noting to “*Consider AP 75(4)(a)*”).

which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;¹⁶⁴

- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;¹⁶⁵
- (e) anyone charged with an offence shall have the right to be tried in his presence;¹⁶⁶
- (f) no one shall be compelled to testify against himself or to confess guilt;¹⁶⁷

¹⁶⁴ *Current Guidance:*

No one shall be accused or convicted of a criminal offense on account of any act or omission that did not constitute a criminal offense under the national or international law to which he or she was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offense was committed; if, after the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.2.2 (noting to “*Consider* AP 75(4)(c)”).

¹⁶⁵ *Current Guidance:* “Anyone charged with an offense is presumed innocent until proved guilty according to law.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.3.1 (noting to “*Consider* AP 75(4)(d)”).

¹⁶⁶ *Current Guidance:* “Anyone charged with an offense shall have the right to be tried in his or her presence.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.3.2 (noting to “*Consider* AP 75(4)(e)”).

¹⁶⁷ *Current Guidance:* “No one shall be compelled to testify against himself or herself or to confess guilt.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.3.3 (noting to “*Consider* AP 75(4)(f)”).

- (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;¹⁶⁸
 - (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;¹⁶⁹
 - (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and¹⁷⁰
 - (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.¹⁷¹
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or

¹⁶⁸ *Current Guidance*: “Anyone charged with an offense shall have the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.3.4 (noting to “Consider AP 75(4)(g)”).

¹⁶⁹ *Current Guidance*: “No one shall be prosecuted or punished by the same party for an offense in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.2.3 (noting to “Consider AP 75(4)(h)”).

¹⁷⁰ *Current Guidance*: “Anyone prosecuted for an offense shall have the right to have the judgment pronounced publicly.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.3.5 (noting to “Consider AP 75(4)(i)”).

¹⁷¹ *Current Guidance*: “A convicted person shall be advised on conviction of his or her judicial and other remedies, and of the time-limits within which they may be exercised.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.16.3.6 (noting to “Consider AP 75(4)(j)”).

interned, they shall, whenever possible, be held in the same place and accommodated as family units.¹⁷²

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
 - (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
 - (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

¹⁷² *Current Guidance*: “Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women.” LAW OF WAR MANUAL, *supra* note 2, ¶ 8.7.1 (noting to “*Consider AP 75(5)*”).

CHAPTER II – MEASURES IN FAVOUR OF WOMEN AND CHILDREN

*Article 76 – Protection of women*¹⁷³

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.¹⁷⁴
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.¹⁷⁵
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.¹⁷⁶

¹⁷³ *State Department Legal Adviser Statements*: “We support the principle that women and children be the object of special respect and protection, that women be protected against rape and indecent assault. . . . These principles are contained in [article] 76. . . .” Matheson, *supra* note 14, at 428.

DOD Review Documents: The JCS determined, “Articles 72–79 are militarily acceptable.” JCS Review of AP I, *supra* note 12, at 75. The JCS explained that the special protections for women only apply to noncombatants. *Id.* at 75–76.

¹⁷⁴ *DOD Review Documents*: DOD attorneys viewed AP I, art. 76(1), as “already part of customary international law[.]”

¹⁷⁵ *DOD Review Documents*: DOD attorneys viewed AP I, art. 76(2), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

¹⁷⁶ *DOD Review Documents*: DOD attorneys viewed AP I, art. 76(3), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

*Article 77 – Protection of children*¹⁷⁷

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.¹⁷⁸
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.¹⁷⁹

¹⁷⁷ *State Department Legal Adviser Statements*: Matheson, *supra* note 14, at 428. Matheson stated:

We support the principle that women and children be the object of special respect and protection. . . . and that all feasible measures be taken in order that children under the age of fifteen do not take a direct part in hostilities. . . . These principles are contained in . . . [article 77].

Id.

DOD Review Documents: The JCS determined, “Articles 72–79 are militarily acceptable.” JCS Review of AP I, *supra* note 12, at 75. The JCS explained that the special protections for children only apply to noncombatants. *Id.* at 75–76.

¹⁷⁸ *DOD Review Documents*: DOD attorneys viewed AP I, art. 77(1), as “already part of customary international law[.]”

¹⁷⁹ *Current Guidance*: AP I, art. 77(2), prohibition of child soldiers is an example of an AP I provision incorporated into another treaty that the United States has accepted: the Child Soldiers Protocol. *Id.* ¶ 19.20.1.1.

U.S. law makes it a crime, under certain circumstances, to recruit, enlist, or conscript a person to serve in an armed force or group, while such person is under 15 years of age. U.S. law also makes it a crime to use a person under 15 years of age to participate actively in hostilities. These restrictions in U.S. law are similar to provisions in treaties to which the United States is not

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.¹⁸⁰
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.¹⁸¹
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.¹⁸²

*Article 78 – Evacuation of children*¹⁸³

a Party.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.20.5.1 (citing 18 U.S.C. § 2442(a), and noting to “*Consider AP I, art. 77(2)*”).

DOD Review Documents: DOD attorneys viewed AP I, art. 77(2), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

¹⁸⁰ *DOD Review Documents*: DOD attorneys viewed AP I, art. 77(3), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

¹⁸¹ *DOD Review Documents*: DOD attorneys viewed AP I, art. 77(4), as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

¹⁸² Although not specifically addressing AP I, the United States Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18.

¹⁸³ *Current Guidance*: GC, art. 49, governs deportation, transfers and evacuations. It says,

[T]he Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or

protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Id. GC, art. 50, governs additional protections for children, but does not specifically address evacuation of children. The MANUAL repeats GC 49 in separate paragraphs with footnotes saying to “*Consider* AP I art 78[.]” LAW OF WAR MANUAL, *supra* note 2, ¶¶ 11.12.3.3 & 11.12.4 with n.247 & n. 249 respectively.

State Department Legal Adviser Statements: “We support the principle that no state arrange for the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or their safety, except in occupied territory, so require. These principles are contained in . . . [article 78].” Matheson, *supra* note 14, at 428.

DOD Review Documents: DOD attorneys viewed AP I, art. 78, as “supportable for inclusion in customary law through state practice . . . subject to the right of asylum and compliance with the United Nations Protocol on Refugees.”). McNeil Memorandum, *supra* note 22, at 234.

medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.
3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:
 - (a) surname(s) of the child;
 - (b) the child's first name(s);
 - (c) the child's sex;
 - (d) the place and date of birth (or, if that date is not known, the approximate age);
 - (e) the father's full name;
 - (f) the mother's full name and her maiden name;

- (g) the child's next-of-kin;
- (h) the child's nationality;
- (i) the child's native language, and any other languages he speaks;
- (j) the address of the child's family;
- (k) any identification number for the child;
- (l) the child's state of health;
- (m) the child's blood group;
- (n) any distinguishing features;
- (o) the date on which and the place where the child was found;
- (p) the date on which and the place from which the child left the country;
- (q) the child's religion, if any;
- (r) the child's present address in the receiving country;
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.

CHAPTER III – JOURNALISTS

*Article 79 – Measures of protection for journalists*¹⁸⁴

¹⁸⁴ *Current Guidance*: The United States has supported the principle recognized in AP I that journalism is generally to be regarded as a civilian activity, but notes the provision may not be customary international law or militarily acceptable. LAW OF WAR MANUAL, *supra* note 2, ¶ 19.20.1.4.

In general, journalists are protected as civilians; *i.e.*, engaging in journalism does not constitute taking a

direct part in hostilities such that such a person would be deprived of protection from being made the object of attack.

Journalists do not form a distinct class of persons under the law of war, but instead receive protection through the general protections afforded civilians. Thus, in general, the rights, duties, and liabilities applicable to civilians also apply to journalists.

Although journalism is regarded as a civilian activity, the fact that a person performs such work does not preclude that person from otherwise acquiring a different status under the law of war, such as the status of persons authorized to accompany the armed forces or of combatants.

Id. ¶ 4.24.1 (citing AP I, art. 79, and *Hedges v. Obama*, No. 12-3644, *Reply Brief for Defendant-Appellant*, 11 (2d Cir. Dec. 20, 2012)). That brief stated:

As an initial matter, it is an established law of war norm, which is reflected in Article 79 of Additional Protocol I to the Geneva Conventions, that “journalists” are generally to be protected as “civilians.” Although the United States is not a party to Additional Protocol I, it supports and respects this important principle.

Id.

In addition, civilian journalists and journalists authorized to accompany the armed forces should not take any action adversely affecting their status as civilians if they wish to retain protection as a civilian. For example, relaying target coordinates with the specific purpose of directing an artillery strike against opposing forces would constitute taking a direct part in hostilities that would forfeit protection from being made the object of attack.

LAW OF WAR MANUAL, *supra* note 2, ¶ 4.24.2.1.

State Department Legal Adviser Statements: “We also support the principle that journalists be protected as civilians under the Conventions, provided they take no action adversely affecting such status. This principle can be found in article 79.” Matheson, *supra* note 14, at 428.

DOD Review Documents: The JCS determined, “Articles 72–79 are

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 (A) (4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

militarily acceptable.” JCS Review of AP I, *supra* note 12, at 75. DOD attorneys viewed AP I, art. 79, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

PART V

**EXECUTION OF THE CONVENTIONS AND OF
THIS PROTOCOL**

SECTION I: GENERAL PROVISIONS

*Article 80 – Measures for execution*¹⁸⁵

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.
2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

*Article 81 – Activities of the Red Cross and other humanitarian organizations*¹⁸⁶

¹⁸⁵ *State Department Legal Adviser Statements*: “The final part of Protocol I deals with the implementation of the Conventions and the Protocol. Although many of these provisions are procedural in character, certain of the principles contained in this part also merit acceptance as customary law. We support the principle that all necessary measures for the implementation of the rules of humanitarian law be taken without delay. . . .” Matheson, *supra* note 14, at 428. This principle is found in article 80. *Id.*

¹⁸⁶ *State Department Legal Adviser Statements*: “We support the principle . . . that the ICRC and the relevant Red Cross or Red Crescent organizations be granted all necessary facilities and access to enable them to carry out their humanitarian functions.” Matheson, *supra* note 14, at 428. This principle is found in article 81. *Id.*

DOD Review Documents: The JCS did not believe AP I, art. 81, would be effective. JCS Review of AP I, *supra* note 12, at 81. DOD attorneys viewed AP I, art. 81, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.
2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

*Article 82 – Legal advisers in armed forces*¹⁸⁷

¹⁸⁷ *Current Guidance*: This is an example of an AP provision that is consistent with longstanding U.S. practice. LAW OF WAR MANUAL, *supra* note 2, ¶ 19.20.1.2. The United States has provided for legal advisers to advise military commanders on the law of war. For example, DOD

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

policy has required that each head of a DOD component make qualified legal advisers available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations. *Id.* ¶ 18.5.1.

The [Staff Judge Advocate (SJA)] advises the [Joint Force Commander] and other staff members on applicable international and domestic laws, legal custom and practice, multilateral and bilateral agreements with host nations, law of war issues, compliance and interpretation of the [Rules of Engagement], and other pertinent issues involved in joint target recommendations and decisions. SJA also reviews target selection and force assignment for legal compliance. The SJA also highlights potential associated issues, such as harmful environmental impacts or other consequences that should be considered in the targeting process.

Joint Publication 3-60, *Joint Targeting*, 31 January 2013, at III-12. “Due to the complexity and extent of international law considerations involved in the joint targeting cycle, the SJA or their representative must be immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations.” *Id.* at A-7.

State Department Legal Adviser Statements: “[W]e support the principle that legal advisors be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles, and that their study be included in programs of military instruction.” Matheson, *supra* note 14, at 428. This principle is found in article 82. *Id.*

DOD Review Documents: The JCS characterized AP I, art. 82, as a measure to encourage compliance. JCS Review of AP I, *supra* note 12, at 86; DOD attorneys viewed AP I, art. 82, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

*Article 83 – Dissemination*¹⁸⁸

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

*Article 84 – Rules of application*¹⁸⁹

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

¹⁸⁸ *DOD Review Documents*: The JCS characterized AP I, art. 83, as a measure to encourage compliance. JCS Review of AP I, *supra* note 12, at 86; DOD attorneys viewed AP I, art. 83, as “supportable for inclusion in customary law through state practice[.]” McNeil Memorandum, *supra* note 22, at 234.

¹⁸⁹ *State Department Legal Adviser Statements*: “The final part of Protocol I deals with the implementation of the Conventions and the Protocol. Although many of these provisions are procedural in character, certain of the principles contained in this part also merit acceptance as customary law. . . . These principles are found in articles 80 through 85.” Matheson, *supra* note 14, at 428.

DOD Review Documents: The JCS characterized AP I, art. 84, as a measure to encourage compliance. JCS Review of AP I, *supra* note 12, at 86.

SECTION II: REPRESSION OF BREACHES OF THE CONVENTIONS AND OF THIS PROTOCOL

*Article 85 – Repression of breaches of this Protocol*¹⁹⁰

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.
2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.
3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

¹⁹⁰ *State Department Legal Adviser Statements*: Mr. Matheson stated:

We support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have wilfully committed such acts, and make good faith efforts to cooperate with one another in this regard. These principles are contained, though of course in more detailed form, in articles 85 through 89.

Matheson, *supra* note 14, at 428.

DOD Review Documents: JCS reviewed articles 85–88 and stated, “In general, the Protocol provisions on grave breaches are acceptable.” JCS Review of AP I, *supra* note 12, at 85. The JCS objected to art. 85(3)(c) and (4)(c).

- (a) making the civilian population or individual civilians the object of attack;
 - (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
 - (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);¹⁹¹
 - (d) making non-defended localities and demilitarized zones the object of attack;
 - (e) making a person the object of attack in the knowledge that he is *hors de combat*;
 - (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
- (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied

¹⁹¹ *DOD Review Documents*: The JCS believed a reservation to AP I, art. 85(3)(c), was necessary because the paragraph implemented AP I, art. 56, which was also objectionable. JCS Review of AP I, *supra* note 12, at 85 and Annex to JCS Review of AP I, *supra* note 12, at 4. Basically, the paragraph failed to address military advantage.

- territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
 - (c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;¹⁹²
 - (d) making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
 - (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.
5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

*Article 86 – Failure to act*¹⁹³

¹⁹² *DOD Review Documents*: In 1985, CJCS wrote that one of the “more serious problems created by” AP I was that “[i]t would inject political criteria into the administration and application of humanitarian law. . . .” CJCS Cover letter to JCS Review of AP I, *supra* note 12 (citing AP I, art. 85(4)(c)). The JCS believed AP I, art. 85(4)(c), was a political statement and that it was unclear as to what exactly it forbids. JCS Review of AP I, *supra* note 12, at 85–86.

¹⁹³ *Current Guidance*:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

*Article 87 – Duty of commanders*¹⁹⁴

Commanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war. Failures by commanders of their duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war can result in criminal responsibility.

LAW OF WAR MANUAL, *supra* note 2, ¶ 18.23.3 (noting to “Consider AP I art 86(2)”).

State Department Legal Adviser Statements: “We support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have willfully committed such acts, and make good faith efforts to cooperate with one another. . . .” Matheson, *supra* note 14, at 428 (*see* note 190 for the full quotation).

DOD Review Documents: JCS stated, “The obligations created by Articles 86 and 87 are well within the precedents for war crimes liability established by American tribunals after World War II. To fully integrate them into military law would probably require the adoption of punitive regulations by the Services.” JCS Review of AP I, *supra* note 12, at 85.

¹⁹⁴ *Current Guidance*:

The law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates. One of the requirements for armed forces to receive the privileges of combatant status is that they

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

operate under a responsible command.

LAW OF WAR MANUAL, *supra* note 2, ¶ 18.4.1 (citing *In re Yamashita*, 327 U.S. 1, 15 (1946); noting to “*Consider AP I art 87(1)*”). “In carrying out their duties to implement and enforce the law of war, commanders may use disciplinary or penal measures.” LAW OF WAR MANUAL, *supra* note 2, ¶ 18.4.2.

Apart from disciplinary measures, a variety of other measures may be appropriate to prevent or address violations of the law of war by subordinates. For example, commanders should ensure that members of the armed forces under their command are, commensurate with their duties, aware of their duties under the law of war.

Id. ¶ 18.4.4.

State Department Legal Adviser Statements: “We support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have willfully committed such acts, and make good faith efforts to cooperate with one another. . . .” Matheson, *supra* note 14, at 428 (*see* note 190 for the full quotation).

DOD Review Documents: JCS stated, “The obligations created by Articles 86 and 87 are well within the precedents for war crimes liability established by American tribunals after World War II. To fully integrate them into military law would probably require the adoption of punitive regulations by the Services.” JCS Review of AP I, *supra* note 12, at 85.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

*Article 88 – Mutual assistance in criminal matters*¹⁹⁵

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

¹⁹⁵ *State Department Legal Adviser Statements*: “We support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have willfully committed such acts, and make good faith efforts to cooperate with one another. . . .” Matheson, *supra* note 14, at 428 (see note 190 for the full quotation).

DOD Review Documents: JCS reviewed articles 85–88 and stated, “In general, the Protocol provisions on grave breaches are acceptable.” JCS Review of AP I, *supra* note 12, at 85. The JCS objected to art. 85(3)(c) and (4)(c).

*Article 89 – Co-operation*¹⁹⁶

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

*Article 90 – International Fact-Finding Commission*¹⁹⁷

¹⁹⁶ *State Department Legal Adviser Statements*: “We support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have willfully committed such acts, and make good faith efforts to cooperate with one another. . . .” Matheson, *supra* note 14, at 428 (*see* note 190 for the full quotation).

DOD Review Documents: The JCS did not believe AP I, art. 89, would be effective. JCS Review of AP I, *supra* note 12, at 81.

¹⁹⁷ *Current Guidance*: At the request of a party to the conflict, an inquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the 1949 Geneva Conventions. LAW OF WAR MANUAL, *supra* note 2, ¶ 18.14.1. “AP I provides for the establishment of an international fact-finding commission.” *Id.* ¶ 18.14.1.1.

The commission operates on the basis of mutual consent. Any party to a conflict may ask the commission to conduct an inquiry; but, unless the States involved previously declared that they recognize *ipso facto* and without special agreement, in relation to any other Party to AP I accepting the same obligation, the competence of the Commission, the Commission will only investigate with the consent of the States involved.

Id. The United States has not recognized the competence of the international fact-finding commission. *Id.*

State Department Legal Adviser Statements: Judge Sofaer stated:

[O]ne major innovation of Protocol I is the creation of a permanent fifteen-member international fact-finding commission to investigate alleged serious violations of the Protocols and the Geneva Conventions and to facilitate resumption of compliance through the use of its good offices. However, the Commission cannot act

1. (a) An International Fact-Finding Commission (hereinafter referred to as “the Commission”) consisting of 15 members of high moral standing and acknowledged impartiality shall be established.
- (b) When not less than twenty High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.
- (c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting.

without the consent of the parties to the dispute, which can be given either on a permanent one-time basis or an *ad hoc* basis for a particular dispute. Given the persistence of Soviet refusal to allow third-party supervision of the Geneva Conventions, it is extremely unlikely that either the Soviet Union or any of its allies or clients would consent to the activities of the Commission.

Sofaer, *Remarks on the United States Position*, *supra* note 14, at 470.

DOD Review Documents: The JCS also recognized the innovation codified in art. 90 and did not object, writing, “Historically, the United States has consented to the jurisdiction of such bodies on a permanent basis (e.g., the World Court in The Hague), and the US Government would presumably do so again if it ratifies the Protocol.” JCS Review of API, *supra* note 12, at 83.

Author’s note: The United States withdrew its permanent consent to the World Court in The Hague. US DEPT OF STATE, LETTER AND STATEMENT CONCERNING TERMINATION OF ACCEPTANCE OF ICJ COMPULSORY JURISDICTION, 24 I.L.M. 1742 (1985).

- (d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.
 - (e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding subparagraphs.
 - (f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.
2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to inquire into allegations by such other Party, as authorized by this Article.
- (b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.
 - (c) The Commission shall be competent to:
 - (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
 - (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.
 - (d) In other situations, the Commission shall institute an inquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.

- (e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.
3. (a) Unless otherwise agreed by the Parties concerned, all inquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:
- (i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;
 - (ii) two *ad hoc* members, not nationals of any Party to the conflict, one to be appointed by each side.
- (b) Upon receipt of the request for an inquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any *ad hoc* member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.
4. (a) The Chamber set up under paragraph 3 to undertake an inquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation *in loco*.
- (b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.
- (c) Each Party shall have the right to challenge such evidence.

5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate.
 - (b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.
 - (c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.
6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an inquiry, they are exercised by a person who is not a national of a Party to the conflict.
 7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an inquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of fifty per cent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance fifty per cent of the necessary funds.

*Article 91 – Responsibility*¹⁹⁸

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

¹⁹⁸ *Current Guidance:*

A State may be responsible for violations of the law of war committed by persons forming part of its armed forces. In particular, States are responsible for the treatment accorded protected persons under the GC by their agents. State responsibility for violations of the law of war committed by its armed forces or other agents results from principles of State responsibility in international law that are not specific to the law of war.

LAW OF WAR MANUAL, *supra* note 2, ¶ 18.9.1 (citing HAGUE IV art. 3 (“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”); and noting to “*Consider AP I art. 91*”).

PART VI

FINAL PROVISIONS

Article 92 – Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 93 – Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Article 94 – Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Article 95 – Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.
2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Article 96 – Treaty relations upon entry into force of this Protocol

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol

in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
 - (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
 - (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
 - (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Article 97 – Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.
2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Article 98 – Revision of Annex I

1. Not later than four years after the entry into force of this Protocol and thereafter at intervals of not less than four years, the International Committee of the Red Cross shall consult the High

Contracting Parties concerning Annex I to this Protocol and, if it considers it necessary, may propose a meeting of technical experts to review Annex I and to propose such amendments to it as may appear to be desirable. Unless, within six months of the communication of a proposal for such a meeting to the High Contracting Parties, one third of them object, the International Committee of the Red Cross shall convene the meeting, inviting also observers of appropriate international organizations. Such a meeting shall also be convened by the International Committee of the Red Cross at any time at the request of one third of the High Contracting Parties.

2. The depositary shall convene a conference of the High Contracting Parties and the Parties to the Conventions to consider amendments proposed by the meeting of technical experts if, after that meeting, the International Committee of the Red Cross or one third of the High Contracting Parties so request.
3. Amendments to Annex I may be adopted at such a conference by a two-thirds majority of the High Contracting Parties present and voting.
4. The depositary shall communicate any amendment so adopted to the High Contracting Parties and to the Parties to the Conventions. The amendment shall be considered to have been accepted at the end of a period of one year after it has been so communicated, unless within that period a declaration of non-acceptance of the amendment has been communicated to the depositary by not less than one third of the High Contracting Parties.
5. An amendment considered to have been accepted in accordance with paragraph 4 shall enter into force three months after its acceptance for all High Contracting Parties other than those which have made a declaration of non-acceptance in accordance with that paragraph. Any Party making such a declaration may at any time withdraw it and the amendment shall then enter into force for that Party three months thereafter.

6. The depositary shall notify the High Contracting Parties and the Parties to the Conventions of the entry into force of any amendment, of the Parties bound thereby, of the date of its entry into force in relation to each Party, of declarations of non-acceptance made in accordance with paragraph 4, and of withdrawals of such declarations.

Article 99 – Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article I, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Convention or this Protocol have been terminated.
2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.
3. The denunciation shall have effect only in respect of the denouncing Party.
4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

Article 100 – Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

- (a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;

- (b) the date of entry into force of this Protocol under Article 95;
- (c) communications and declarations received under Articles 84, 90 and 97;
- (d) declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and
- (e) denunciations under Article 99.

Article 101 – Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.
2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

Article 102 – Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

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