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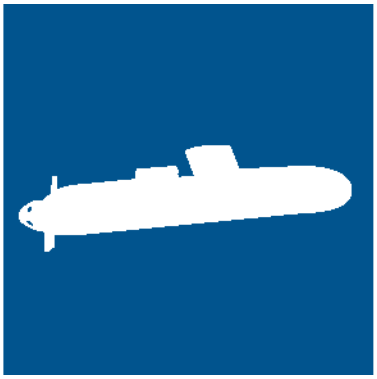
MANUAL OF THE LAW OF MILITARY OPERATIONS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SGA
Secrétariat général pour l'administration

Legal Affairs Directorate
Joint Defence Staff

MANUAL OF THE LAW OF MILITARY OPERATIONS

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Translation

Jonathan Gautier

"*The blood of our enemies is still the blood of men.*
True glory lies in sparing it."

—King Louis XV to his son, the Dauphin, on the evening of the Battle of Fontenoy, 11 May 1745.
Les Pensées des rois de France (The Thoughts of the Kings of France)
Gabriel Boissy, Albin Michel, 1949.

"*The law of nations is naturally founded on this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudicing their real interests*."

—Montesquieu, *De l'esprit des lois* (The Spirit of Laws[1]), Vol. II, Chapter 3, 1748

[1] As translated by Thomas Nugent, 1750.

FOREWORD

As a permanent member of the Security Council of the United Nations, whose founding Charter proclaims the faith of the peoples of the United Nations in fundamental human rights and their commitment to unite their strength to maintain international peace and security, "*the French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people*"[2].

France has always ensured that the actions of its armed forces, which have been consistently engaged in foreign operations since the end of the Cold War, are carried out in accordance with international law, be it the *jus ad bellum* or, in the field, the *jus in bello*, also known as international humanitarian law.

International humanitarian law is much more than a body of complex rules which must be applied. Humanitarian law, and more broadly the law applicable to French operations, is the armour of our soldiers. This armour is inherently tied to military status, as under Article L4122-1 of the French Defence Code, no soldier may "*be ordered to accomplish acts that are contrary to laws, to customs of war or to international conventions*". It is also an ethical armour, drawing on military virtues in line with those of the Nation, including the control of violence, a sense of honour, and belief in universal human dignity. Lastly, it is an armour that is inseparable from the success of operations, for respect for law and for others is one of the cardinal conditions for the legitimacy of any intervention, particularly in the eyes of civilian populations.

This Military Operations Law Manual presents, in a single volume, the main rules governing the use of force by the French armed forces, whether it be abroad in situations of armed conflict or in executing operational agreements, or in national territory for interventions outside war situations. It focuses on the concrete operational responses and associated legal aspects.

Like the unsightly Sileni to which Alcibiades compares Socrates, this handbook, although under a perhaps austere exterior, holds treasures[3]. It contains essential, valuable and comprehensive information, and therefore belongs, whether in printed or digital form, in the basic gear of each member of military personnel involved in operations, regardless of their rank or role, and in particular operational legal advisors, in order to "*bring justice and force together, and, for this end, make what is just strong, or what is strong just*"[4].

Army General Thierry Burkhard
Chief of the Defence Staff

Claire Legras
Legal Affairs Director

[2] Preamble to the Constitution of 27 October 1946, §14. The Preamble to the 1946 Constitution of the 4th Republic is part of the 'block of constitutionality' under the current Constitution of the French Republic.
[3] In Plato's Symposium, Alcibiades compares Socrates to Silenus, saying that the former reminds him of "*one of those Silenus figures that you can find in sculptors' workshops […] if you crack them open, you can find little figurines of the gods inside*".
[4] Blaise Pascal, *Pensées* (Thoughts), original posth., Paris: G. Desprez, 1669, item 298.

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INTRODUCTION

The purpose of this Manual of the Law of Military Operations is twofold:

- Provide officers tasked with advising command in military operations with a single handbook containing a body of rules and practical illustrations which they can use in performing their duties, in a concise, clear, and structured format.
- Present to a broader audience France's interpretation of the legal rules applicable to the French armed forces during operations conducted in national territory or abroad, whether in peacetime or in armed conflict situations.

Despite the French armed forces being consistently deployed both in foreign operations and in national territory, France paradoxically remained for quite a long time one of the few States lacking a reference manual on the legal rules applicable to the conduct of operations. The last public document in this regard was essentially a glossary, which was first published in 1993 and reviewed in 2012. Such a situation presented several disadvantages regarding both the accessibility of legal rules and norms and France's legal outreach or ability to defend certain legal positions before domestic or international courts.

This Manual addresses those needs by focussing on the application of international humanitarian law to military operations conducted by France abroad. It also examines situations where the French armed forces might be called upon to use armed force in national territory. The manual draws upon several bodies of international and domestic law, including international humanitarian law, international human rights law, the law of the sea, space law, and criminal law, among others.

The content of this Manual is based both on reference works and publications and internal material from State services involved in those fields of expertise. However, it does not replace official documents (notes, opinions, joint doctrines and procedures, etc.) that represent France's official positions on the subjects discussed, although every effort has been made to ensure these positions are accurately reflected.

I.1. International humanitarian law relies on a balance between military necessity and the principle of humanity

International humanitarian law (IHL), or the law of armed conflict (LOAC), less commonly referred to as the law of war, is a branch of public international law. In this work, these three terms are considered synonymous. The term 'international humanitarian law' has become, as noted by Jean Pictet[5], "*quasi-official*" since the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held from 1974 to 1977 in Geneva.

IHL encompasses all rules of international law applicable in armed conflict[6] that aim at protecting both persons and objects that are extraneous to the conflict, but may be affected by its consequences. It is a full-fledged body of law, the non-compliance with which can be punished by national and international courts.

IHL is therefore the law applicable to the conduct of hostilities (*jus in bello*). It is not concerned with the reasons why force was used in the first place or with whether it was lawful or not; those considerations are governed by a separate branch of international law, namely the *jus ad bellum*, whose cornerstone is the Charter of the United Nations. The legality of the use of force by either party to an armed conflict does not affect the applicability of IHL, which protects all victims, whether civilian or military.

IHL is based upon a balance between recognized military necessities and legitimate humanitarian concerns.

[5] Jean Pictet, *Development and Principles of International Humanitarian Law*, 1985.

[6] Armed confrontation between the armed forces or equivalent entities of at least two States (international armed conflict), or between the armed forces of a State and one or more non-State armed groups, or between such groups themselves (non-international armed conflict).

IHL recognizes that the conduct of hostilities by parties to an armed conflict involves killing, injuring, and causing destruction to their enemies, as well as to impose stricter security measures than those permissible in peacetime. However, military necessity means that parties to an armed conflict may only use such means as are necessary to achieve defined military objectives, and other humanitarian imperatives impose restrictions on the means and methods of warfare. For example, IHL requires that persons who fall into enemy hands be treated humanely in all circumstances.

This body of law applies mainly in situations of armed conflict, whether it is an international or non-international armed conflict. The legal classification of a conflict situation is a crucial step as it determines the legal framework applicable to it. The adoption of the four Geneva Conventions on 12 August 1949, which all expressly provide that they "*shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*", marked a turning point in the classification of armed confrontations under IHL. Non-international armed conflicts must be distinguished from 'internal disturbances and tensions', riots, and other similar acts or situations of violence, which do not meet the threshold of armed conflict under IHL.

Modern IHL encompasses three categories of specific legal rules:

Law of The Hague: This first category of IHL rules applicable to combat and the conduct of belligerents aims to protect combatants from the most harmful effects of war. Hague law includes all rules governing the conduct of hostilities and methods of warfare, such as the prohibition on perfidy and on ordering or threatening that no quarter will be given. The first of the two Protocols additional to the Geneva Conventions adopted in 1977 provides for further rules governing the conduct of hostilities in international armed conflict, supplementing the Hague Conventions of 18 October 1907 and 14 May 1954.

Law of Geneva: This body of law aims to protect persons and objects from the effects of war and to provide for rules governing how persons who fall into enemy hands must be handled. Geneva law was primarily developed with the aim of alleviating the suffering of the wounded and of protecting medical personnel. This protection is not limited to military personnel: The 1949 Geneva Conventions, relating respectively to the wounded and sick in armed forces in the field (1st Convention), the wounded, sick and shipwrecked of armed forces at sea (2nd Convention), prisoners of war (3rd Convention), and civilians (4th Convention), aim to protect both combatants who have been placed *hors de combat* (out of action) and civilians who are affected by the harmful effects of conflicts. Article 3 common to the Geneva Conventions provides for basic guarantees of protection and humane treatment applicable specifically in non-international armed conflicts; those rules have been supplemented by the 1977 Second Additional Protocol.

Arms control law: In any armed conflict, the right of the parties to choose methods or means of warfare is not unlimited. Accordingly, it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, and 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. Certain international conventions impose restrictions on military capabilities and technologies to limit their use or reduce their harmfulness, or even completely ban certain categories of weapons or munitions.

Despite the broad scope and sometimes complexity of IHL, it should not be viewed as a matter for specialists only. All military personnel in the Army, Navy, Air and Space Force, National Gendarmerie, and joint bodies and services must apply the rules of IHL[7].

[7] These rules are presented in the "*bulletin officiel des armées édition méthodique*" (BOEM 101-2.1.) of the French Ministry of Defence.

I.2. While the origins of IHL date far back in time, modern IHL was developed in the latter part of the 19th century

Over the centuries, States have faced the inhuman and deadly nature of warfare and have come to believe that rules applicable in conflicts must be established to mitigate their most harmful effects. Law has early on appeared as an important factor in regulating armed conflicts.

The development of IHL is the result of a historical process dating back to ancient times. From the prohibition under anathema of the "*murderous art*" of crossbowmen and archers in 1139[8] to the current debates on lethal autonomous weapon systems (LAWS), the imperative to protect persons has continually guided efforts to regulate the use of force in conflicts. This long-standing requirement is faithfully reflected in the address given by Friedrich von Martens at the 1899 Hague Conference: protection derives from the application of the principles of international law, "*as they result from the usages established between civilized nations, from the laws of humanity, and from the dictates of public conscience*".

Before the international codification of universal IHL as we know it today, there were first customary rules regulating armed conflicts. Gradually, more or less elaborate bilateral agreements (cartels, covenants, etc.) emerged, sometimes ratified by belligerents after battles. This body of law was progressively supplemented by regulations issued by States for their troops. The law then applicable in armed conflicts was thus limited in time and space, applying only to a specific battle or conflict. These rules also varied depending on the period, the place, and on the civilizations and their respective understanding of ethics.

The law of war is as old as war itself[9]: "*Even in ancient times, there existed interesting – though primitive – customs and agreements containing 'humanitarian' elements, and almost everywhere in the world and in most cultures*[10]*, these customs had very similar patterns and objectives. This global phenomenon proves the existence of two things: a common understanding of the need for regulations of some kind even during wars; [and] the feeling that, in certain circumstances, human beings, friend or foe, deserve some protection*"[11].

Modern IHL norms thus derive to a large extent from customary rules and practices.

The process of developing written, internationally-recognized legal standards began in the second half of the 19th century, under the impetus of figures such as Henri Dunant, who witnessed the bloody battle of Solferino and inspired the first Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field, and Francis Lieber, who drafted the Instructions for the Government of Armies of the United States in the Field (Lieber Code) promulgated in 1863 by President Lincoln during the American Civil War, which is considered the first attempt to codify the laws of war. At the dawn of the 20th century, these developments were enshrined in positive law by States through multilateral conventions on the protection of military victims (Geneva Convention of 1906) and rules governing the actions of combatants (Hague Conventions of 1899 and 1907). The two world wars highlighted the shortcomings of these bodies of law. New treaties were negotiated to fill these gaps, extending protection to civilian victims. The four Geneva Conventions of 12 August 1949 were adopted in the wake of the Nuremberg and Tokyo trials, in which war criminals were convicted for the first time by international courts. Today, these four Conventions

[8] 1139 Second Lateran Council, Canon 29.
[9] ICRC, International Humanitarian Law – Answers to Your Questions, 2015: "*It would be a mistake to think of the founding of the Red Cross in 1863, or the adoption of the original Geneva Convention in 1864, as the starting point of IHL as we know it today. Just as there is no society of any sort that does not have its own set of rules, so there has virtually never been a war that did not have rules, vague or precise, covering the conduct of hostilities, their outbreak and their end*".
[10] ICRC, *How Does Law Protect in War? Volume I – Outline of International Humanitarian Law*, Third Edition. Chapter 3, "Historical Development of International Humanitarian Law", pp. 50-51: "*The existence of such customs, which can be found in cultures, regions and civilizations as diverse as Asia, Africa, pre-Columbian America and Europe, is of fundamental importance. This should always be kept in mind when studying the modern rules of IHL, for it demonstrates that although most of the modern rules are not universal by birth – they have until recently been drafted and adopted mainly by European powers – they are universal by nature, since the principles they codify can be found in most non-European systems of thought*".
[11] *Ibid*., p. 50.

are the bedrock of IHL.

In a global, international society governed by the United Nations Charter, the law of armed conflict has evolved to become both more ambitious and more effective, and its scope has been expanded to include new issues such as the protection of cultural property, the preservation of the environment, the participation of children and mercenaries in armed conflicts, and the prohibition of certain weapons the use of which causes excessive injury or indiscriminate damage.

I.3. IHL must be applied in conjunction with other legal norms

I.3.1. IHL is still relevant today

At a time when the international system is increasingly being challenged and armed conflicts are marked by massive violations of IHL, the application of and respect for the law remain paramount for the French armed forces.

France's 2013 White Paper on Defence and National Security[12] as well as the 2017 Strategic Review[13] recall that respect for international law is a cardinal condition for the legitimacy of France's actions both nationally and internationally.

Compliance with IHL is a strategic and political necessity for three reasons: it determines France's credibility with its allies and partners; it guarantees the effectiveness of its operations; and it ensures legal security in criminal matters, which is an inherent risk in all foreign operations, through individual and collective control of that risk[14].

In armed conflict situations, IHL provides essential protection for both armed forces and civilian populations. It enables military operations while limiting the harmful consequences of war, provides a framework for the actions of the armed forces, and contributes to France's legitimacy in its external interventions.

Overall, adherence to IHL is a guarantee of effective mission accomplishment. It allows combatants to behave virtuously, while reinforcing their sense of discipline. It facilitates the management of crisis recovery and the return to peace, at a time when these issues are becoming vital in any intervention abroad.

I.3.2. The interplay between IHL and international human rights law (IHRL)

The interaction between IHL and IHRL has been debated for many years, but its practical implications have been considerably expanded by the judicialization of the battlefield, the recognition of the right of individual application to the European Court of Human Rights (ECtHR), and the development of the Court's case law on the concept of 'jurisdiction' under Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR). In the light of the jurisprudence of international courts, such as the International Court of Justice (ICJ)[15], and European courts (ECtHR) [16], IHL cannot be viewed as the only body of law applicable in armed conflicts; indeed, IHRL does not cease to apply in times of armed conflict, so that in certain circumstances, as defined by case

[12] Chapter 2, "The foundations of the strategy for defence and national security", Subsection B, "Ensuring the legitimacy of our actions both nationally and internationally", pp. 22-25.
[13] 2017 Defence and National Security Strategic Review, §§204-208.
[14] *Les opérations extérieures de la France*, dir: Julian Fernandez & Jean-Baptiste Jeangène Vilmer, p. 100 (in French only).
[15] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, §106.
[16] ECtHR, *Hassan v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 29750/09, 16 September 2014, §104.

law, both bodies of law may apply simultaneously.[17].

This recognition of the concurrent applicability of IHRL and IHL in armed conflict raises the question of the interplay between these two branches of international law. It also means that the courts which monitor States' compliance with human rights conventions may be called upon to rule on certain aspects of the conduct of military operations.

I.4. As a State governed by the rule of law, France ensures that its armed forces respect and implement IHL and, more broadly, applicable international law

France ensures that its armed forces respect and implement its international obligations in armed conflicts. Instructions and directives issued by military authorities comply with both IHL and IHRL, as must be the case in any State governed by the rule of law.

I.4.1. France's commitment to upholding international law is enshrined in its Constitution

France is bound by many international commitments. For instance, France is party to the 1945 United Nations Charter, which prohibits, except in exceptional cases, the threat or use of force in international relations.

France's interventions are consistently warranted under international law. Moreover, since the revision of the Constitution on 28 July 2008, its Article 35 provides for greater parliamentary oversight of foreign operations.

France has also signed and ratified the vast majority of IHL treaties and conventions.

Under Article 55 of the Constitution, duly ratified and published international treaties and agreements "*shall prevail*" over domestic law. Therefore, IHL and IHRL take pride of place in the domestic hierarchy of norms. Moreover, IHL and IHRL are fully implemented in the national legal system. Accordingly, Book IV bis of the Penal Code includes felonies and misdemeanours for violations of IHL and human rights within the meaning and for the application of the Geneva Conventions and their Additional Protocols, and defines offences in line with the Rome Statute of the International Criminal Court (ICC).

I.4.2. France is committed to respecting and ensuring respect for IHL

In accordance with Common Article 1 of the Geneva Conventions, "*the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances*".

This commitment to respecting and ensuring respect for IHL requires, *inter alia*, the implementation of training and dissemination actions, which are essential. France devotes considerable effort to disseminating IHL within its armed forces, including at all career stages, at all ranks, in specialization courses, before and during operational deployment[18].

Both bilaterally and multilaterally, France is committed to strengthening respect for and development of IHL. To this end, France regularly makes new commitments, for example at the International Conferences of the Red Cross and Red Crescent Movement.

In addition, France ensures compliance with IHL through the presence of legal advisors at all levels of command, entrusted with operational missions – this Manual is particularly intended for them.

[17] See Part 3, Chapter 2, Subsection 2.1 which addresses the necessary conciliation between IHL and IHRL in situations of armed conflict.

[18] All officers, non-commissioned officers and soldiers receive initial IHL training, supplemented by an advanced module in case of deployment on foreign operations or at certain stages of their careers (exams or public competitions).

PART 1

THE LEGAL FRAMEWORK FOR THE INTERVENTION OF THE ARMED FORCES IN NATIONAL TERRITORY

CHAPTER 1: THE GENERAL LEGAL FRAMEWORK FOR THE USE OF THE ARMED FORCES[19] IN NATIONAL TERRITORY

While defence can be considered the State's primary mission[20], the State also has the duty to guarantee security by ensuring, throughout the entire national territory, the safeguard of institutions and national interests, compliance with the laws, maintenance of public peace and order, and the protection of persons and property[21].

In times of peace, crisis or war, the armed forces contribute to the implementation of the national security strategy[22] by intervening in national territory under different legal frameworks as part of permanent or non-permanent missions.

In peacetime, there are three distinct operational frameworks provided for under the Defence Code within which the armed forces may intervene in national territory: Military Defence, the Action of the State at Sea, and Non-Military Defence.

In the event of a crisis or armed conflict, the intervention of the armed forces may also coincide with the implementation of exceptional legal regimes by the executive power. While some of these regimes may lead to temporary changes in the powers assigned to the armed forces, none of them affect the law governing the use of force in national territory.

1.1. The three specific operational frameworks for the use of the armed forces in national territory

1.1.1. Military Defence

Under French law, 'Military Defence' means the intervention of the armed forces to prevent or respond to an aggression or attack where a situation of armed conflit occurs in national territory. It encompasses actions taken in times of peace, crisis and war. Military Defence is implemented without the need for a legal requisition by the civil authority and within defined plans and a specific framework for the use of force.

In peacetime, Military Defence includes the nuclear deterrence policy, including planning, implementation and governmental review[23], the permanent component of the Operational Defence of the Territory (*défense opérationnelle du territoire, DOT*), the Maritime Defence of the Territory (*défense maritime du territoire, DMT*)[24] and the Air Defence (*défense aérienne, DA*) of the territory[25].

In situations of crisis or war in national territory, the peacetime measures taken under Military Defence can be supplemented by specific Military Defence measures, including within the framework of DOT, the deployment of the armed forces in national territory to respond to aggression or attack and the implementation of nuclear forces.

The nuclear deterrence policy encompasses the engagement of nuclear forces, the protection of nuclear

[19] Under Art. L3211-1 of the Defence Code, "*the Armed Forces include: (1) the Army, the Navy and the Air and Space Force, which constitute the Armies within the meaning of this Code; (2) the National Gendarmerie; (3) support services and joint organisations. […]*". For the purposes of this Part, the term "*armed forces*" means the armed forces referred to in (1) and (3) of Art. L3211-1.
[20] Under Art. L1111-1§3 of the Defence Code, "*the defence policy aims to ensure the integrity of the territory and the protection of the population from armed attack. It contributes to the fight against other threats likely to endanger national security*".
[21] See Internal Security Code, Art. L111-1.
[22] Under Art. L1111-1§1 of the Defence Code, "*the national security strategy aims to identify all threats and risks that may affect the life of the Nation, including in respect of the protection of the population, the integrity of the territory and the continuity of the institutions of the Republic, and to determine how public authorities must respond to them*".
[23] Defence Code, Arts. L1411-1 to L1411-10 and Arts. R*1411-1 to R*1411-18.
[24] *Ibid*., Arts. D*1431-1 to D*1432-5.
[25] *Ibid*., Arts. D*1441-1 to D*1443-4.

installations, the governmental review of the integrity of the nuclear deterrence means used for the transport by non-military means of nuclear material assigned to the means necessary to the implementation of the nuclear deterrence policy, as well as the inspection of nuclear arms.

In conjunction with the other types of Military Defence and with Civil Defence, DOT contributes to maintaining the freedom and continuity of Government action and to preserving the bodies essential to the defence of the Nation. DOT encompasses a permanent component which includes the protection of military infrastructures, especially strategic nuclear force infrastructures, as well as a special component which is triggered by the presence of an external threat recognized by the Defence and National Security Council[26] or in case of aggression or attack, and aims to ensure the general ground defence of the national territory and to resist enemy actions within that territory, in accordance with Article R1422-2 of the Defence Code. In the event of an invasion, the military authorities responsible for the implementation of DOT are tasked with "*conducting military resistance operations, which […] express the national will to reject the law imposed by the enemy and to eliminate it*"[27].

DOT's permanent component includes the Protection of Military Installations (*protection des installations militaires, PIM*) which covers the different military areas or zones (military areas, temporary military zones, safety zones, highly sensitive defence areas), Navy facilities outside military ports, military aircraft outside air bases, and land convoys. PIM is governed by a specific framework for the use of force under Articles L2338-3(3) and L4123-12(I) of the Defence Code[28]. In accordance with Article L4123-12(I)§2, "*a highly sensitive defence area is an area defined by regulation within which military objects are located or stationed the loss or destruction of which may cause very serious damage to the population or jeopardize the vital interests of national defence*". The conditions under which highly sensitive defence areas are established, as well as the conditions for entry authorizations and for the protection of such areas, are set out in a decree of the Council of State (Conseil d'Etat, France's highest administrative body), which also specifies the rules applicable to warnings within that area[29].

The Maritime Defence of the Territory (DMT) participates in ensuring the security of the territory, including the protection of priority defence installations. It supplements Civil Defence, DOT and Air Defence. DMT is permanent and aims at: (i) monitoring maritime approaches of the national territory on coastlines; and identifying and assessing potential threats at sea and in the sea; (ii) providing civil and military authorities with information about suspicious or hostile activities at sea and sea threats within their area of responsibility, and (iii) resisting sea actions against the national territory and any acts harmful to national interests within maritime approaches of that territory, in particular to any national activities in coastal and sea areas where France has a right of exploitation[30]. DMT is implemented under the responsibility of Maritime Area Commanders (*commandants de zones maritimes, CZM*) in the three maritime prefectures of mainland France, and of Senior Forces Commanders (*commandants supérieurs de forces, COMSUP*) in overseas territories, under the authority of the Chief of the Defence Staff, within the framework of defence plans and of the

[26] Under Art. 15§2 of the Constitution, the French President "*shall preside over the higher national defence councils and committees*". As part of this prerogative, the President chairs the meetings of the Defence and National Security Council. Under Art. R*1122-1 of the Defence Code, the Council "*shall set out the guidelines for military planning; deterrence; the conduct of foreign operations; planning responses to major crises; intelligence; economic and energy security; planning internal security contributing to national security; and the fight against terrorism. The Council shall establish the priorities in each area*".

[27] Defence Code, Art. R*1421-1.

[28] Under Art. L2338-3 of the Defence Code, "*military personnel tasked with the protection of military installations located in national territory may use their firearms in the conditions provided for under Article L435-1(1) to (4) of the Internal Security Code in case of absolute necessity and in a strictly proportionate manner. They may also use appropriate technical means, in accordance with technical standards established by order of the Minister of Defence, to immobilize vehicles under the conditions set out in Article L214-2 of that Code*". Art. L4123-12(I)§1 of the Defence Code provides for an exemption from prosecution and a framework for the use of force specific to the protection of highly sensitive defence areas: "*Outside cases of self-defence, military personnel shall not be held criminally responsible for using, after giving warnings, armed force which is absolutely necessary to prevent or halt any entry into a highly sensitive defence area and to arrest the intruder*".

[29] Defence Code, Art. L4123-12(I)§3.

[30] *Ibid*., Art. D*1431-1.

Standing Maritime Safeguard Posture (*Posture permanente de sauvegarde maritime, PPS-M*)[31].

Lastly, the Air Defence of the territory (DA) contributes to ensuring the security of the territory, including the protection of priority defence installations, in conjunction with Civil Defence and the other types of Military Defence. DA is permanent and aims at: (i) monitoring space, air approaches of the national territory, and the national airspace, and identifying and assessing potential threats; (ii) providing governmental authorities and military commanders with air and space information for decision-making within their area of responsibility; (iii) ensuring at all times national sovereignty in the French airspace; (iv) resisting any use of the national airspace by an attacker; and (v) participating to the dissemination of warnings to the population in case of unforeseen air or space threat[32].

1.1.2. Action of the State at Sea

France's maritime space is one of the largest in the world, with an Exclusive Economic Zone covering 10.7 million square kilometres, 19,000 kilometres of coastline and a strong presence in all the world's oceans.

The Action of the State at Sea (*action de l'État en mer, AEM*) encompasses all State missions at sea, excluding national defence. AEM includes administration and management missions, police missions and operational missions in ten different fields: sovereignty and protection of national interests; maritime security; customs, tax and economic law enforcement at sea; fight against unlawful sea activities; protection of human life and property; maritime safety; management of protected areas; environmental protection; monitoring of sanitary and working conditions at sea; and management of the marine heritage and public resources.

The capabilities of the French Navy are used within the framework of AEM (cf. Part 4, Chapter 1 below).

1.1.3. Non-Military Defence

In peacetime, the armed forces may also be used in national territory for the benefit of civil authorities within the framework of the Non-Military Defence, which encompasses Civil Defence and Economic Defence.

Civil Defence means the participation of the armed forces in Civil Security and Internal Security. Civil Security refers to disaster relief and rescue missions, whereas Internal Security covers the participation in the protection of persons, the defence of institutions and the maintenance of public order. Unlike Military Defence, the use of the armed forces in national territory as part of Civil Defence is subject to a Legal Requisition or Request for Support (see Part 1, Chapter 2 below) where civil means are insufficient, unavailable, inadequate or not existent. Needs are defined based on a dialogue between the civil and military authorities[33].

In accordance with Article L112-1 of the Internal Security Code, Civil Security refers "*to the prevention of risks of all types, to public information and warning as well as to the protection of persons, property and the environment against hazards, accidents and disasters*". Under Article L721-2 of the Internal Security Code, "*civil security missions are primarily carried out by professional and volunteer firefighters from the fire and rescue services, as well as by personnel from State services and military units that are permanently assigned to these duties. The performance of civil security missions also relies on military personnel from the armed forces and the national gendarmerie, personnel from the national police, and agents of the State, local authorities and public or private institutions and organizations tasked with activities related to the protection of the population or the maintenance of national life, members of associations pursuing civil security*

[31] See Part 4, Chapter 1, Subsection 1.3.1.2. below.
[32] Defence Code, Art. D*1441-1.
[33] See Part 1, Chapter 2 below.

purposes, and civil security reservists".

Under Article L111-1§2 of the Internal Security Code, Internal Security is defined as the "*defence of institutions and national interests, compliance with laws, maintenance of public peace and order, and the protection of persons and property*".

The armed forces have long been participating in Internal Security operations, as illustrated by their almost continuous involvement in the Government's anti-terrorism plan *Vigipirate* since 1991. Similarly, as part of Operation *Sentinelle* launched in the wake of the attacks on the French population in January 2015, more than 10,000 soldiers from the three branches of the armed forces have been deployed in national territory to support internal security forces.

Economic defence is provided for in Articles L1331-1 to L1336-1 of the Defence Code. It refers to actions and initiatives taken by the public authorities to protect and defend the economy and businesses from various threats and to meet the needs of national defence[34]. Economic defence is organized by the Minister for the Economy, under the authority of the Prime Minister and with the assistance of the Secretary-General for Defence and National Security. It is carried out using the resources of this minister and those of other competent ministers. It covers two areas of the State's action pertaining first to its sovereign mission of ensuring the general functioning of the economy and secondly to its capacity as strategic partner to guarantee economic defence, security and intelligence for companies.

The General Commander of the defence and security area assists the Prefect of that defence and security area in implementing non-military defence measures for the purposes of economic defence. The armed forces may thus be called upon to participate in the protection of vital operators.

Beyond these three operational frameworks provided for under the Defence Code, the participation of the armed forces may also occasionally be provided for in other codes. For example, as regards the health service of the armed forces (*service de santé des armées, SSA*), Article R6147-112 of the Public Health Code specifies that "*subject to the priority it must always give to meeting the needs of the armed forces and considering the specificity of its missions, the health service of the armed forces shall contribute to the public health policy in accordance with the provisions of this part, which also determines the conditions under which other health actors contribute to the armed forces' health support mission*".

1.1.4. The use of the French armed forces in national territory can also be presented as permanent interventions and non-permanent interventions

The 'permanent intervention' of the armed forces refers to the missions in which the armed forces participate in national territory at all times (peace, crisis or war), within the framework of a specific posture in terms of means and use of force depending on the situation.

These missions are carried out within the framework of specific plans developed and validated by the Joint Defence Staff or, as regards the Action of the State at Sea (AEM), by the maritime prefects in conjunction with the Joint Defence Staff. Within the scope of their permanent interventions, the armed forces operate without the need for a legal requisition or a request from the civil authority, and without their deployment being decided by decree.

The scope of permanent interventions includes:

- The nuclear deterrence policy;
- The Protection of Military Installations (PIM, under DOT's permanent component);

[34] See the circular from the Minister for the Economy, Finance and Industry of 14 February 2002 relating to economic defence (https://www.legifrance.gouv.fr/eli/circulaire/2002/2/14/ECOZ0200005C/jo/texte). Ordinance No. 59-147 of 7 January 1959 concerning the general organization of defence, which is implemented through this circular, was repealed, but the definition of the concept of economic defence provided thereunder remains relevant.

- The Maritime Defence of the Territory (DMT);
- The Air Defence of the territory (DA)
- The Action of the State at Sea (AEM);
- The contribution of the health service of armed forces to the public health policy.

The 'non-permanent intervention' of the armed forces refers to the missions carried out in times of peace, crisis or war which require either a legal requisition or a request from the civil authority (military participation in civil defence and security and requests for support to the armed forces) or an engagement of the armed forces by decree to respond to a specific situation, such as an attack, an invasion or an external threat (which pertains to DOT) or an "*imminent peril resulting from a foreign war or an armed insurrection*" (state of siege).

The scope of non-permanent interventions includes:
- DOT;
- military participation in civil defence and security;
- requests for assistance to the armed forces;
- the state of siege;
- armed conflict in national territory.

1.2. The intervention of the armed forces in case of crisis or armed conflict may coincide with the implementation of exceptional legal regimes under French law

Under French law, France's political authorities (Government and Parliament) can implement exceptional legal regimes for the intervention of the armed forces in crisis situations.

In accordance with the Defence Code, there are six different exceptional legal regimes which are designed to provide specific frameworks for situations of major crises or armed conflict[35]:
- War (Defence Code, Arts. L2112-1 to L2113-2 and Art. R2112-1)[36];
- State of siege (*ibid*., Arts. L2121-1 to L2121-8);
- State of emergency (*ibid*., Art. L2131-1);
- General mobilization and '*mise en garde*', i.e. partial mobilization (*ibid*., Arts. L2141-1 to L2142-1 and Art. R2141-1);
- National security service (*ibid*., Arts. L2151-1 to L2551-5 and Arts. R2151-1 to R2151-7);
- National security reserve mechanism (*ibid*., Arts. L2171-1 to L2171-7 and Arts. R2171-1 to R2171-4).

In addition to those exceptional legal regimes decided by the executive branch, Article 16 of the 1958 French Constitution provides for a special regime of 'emergency powers' ('*pouvoirs exceptionnels*') for the French president (see Subsection 1.2.2. below).

[35] The Defence Code (Articles L2161-1 to L2161-3 and Articles R2161-1 and following) also provides for the exceptional legal regime relating to requisitions resulting from manoeuvres and exercises, under which "*the military authority has the right to either temporarily use or prohibit access to private properties*" for the purposes of troop training, including firing exercises, marches, manoeuvres and general operations. This regime can be implemented in peacetime for the training of troops.

[36] International humanitarian law (IHL), which is also referred to as the law of war or law of armed conflict (LOAC), is the body of international law applicable in armed conflict (see Subsection 1.2.3. below). War-related provisions under French law specify, *inter alia*, the Parliament's competence regarding declarations of war (Art. 35(1) of the Constitution) or adapt certain rules governing institutions in wartime. This includes Arts. L2112-1 and R2112-1 of the Defence Code, which pertain to municipalities in wartime and refer to the relevant provisions of the General Local Authorities Code, and Arts. L2113-1 and L2113-2, derived from Arts. 18 and 19 of the Law of 11 July 1938 on the general organization of the nation in wartime, which address the engagement of certain individuals for the duration of hostilities.

1.2.1. Exceptional legal regimes for situations of major crisis have no bearing on the powers of the military authority, nor on the law governing the use of force in national territory

The state of emergency, which is governed by the Law No. 55-385 of 3 April 1955 regarding the state of emergency, is established solely for the benefit of the civil authority. It does not grant any special powers to the military authority.

The state of emergency can be declared over all or part of the French metropolitan territory, overseas regions and departments (Art. 73 of the Constitution), overseas territorial communities (Art. 74 of the Constitution) and New Caledonia, either in the event of imminent danger resulting from serious threats to public order or in cases of events that, by their nature and severity, constitute a public emergency ('*calamité publique*').

The state of emergency is declared by a decree of the Council of Ministers specifying the territories concerned. Within these territories, the areas where the state of emergency applies are defined by decree. The extension of the state of emergency beyond twelve days can only be authorized by law[37].

The law relating to the state of emergency grants the civil authority exceptional police powers that are limited in time and scope. These powers mainly aim to restrict freedom of movement in certain places or for certain individuals and allow for administrative searches.

The state of emergency and the state of siege are mutually exclusive. On the same territory, it is not possible to simultaneously apply provisions related to the state of emergency and those related to the state of siege[38].

Building on France's 2008 White Paper on Defence and National Security, which aimed at improving France's ability to respond to major crises[39], the Law No. 2011-892 of 28 July 2011 for facilitating the use of military and civilian reserves in the event of a major crisis adapted the legal regime of 'defence service' which could previously only be activated in cases of mobilization or '*mise en garde*' (full or partial mobilization, see above). It was replaced by the 'national security service' which is designed to ensure the continuity of the actions of the State, local authorities, and the organizations associated with them, as well as companies and institutions contributing to national security. This service applies to personnel covered by a continuity or recovery plan of a public or private operator or establishment designated by the administrative authority, in accordance with Articles L. 1332-1 and L. 1332-2 of the Defence Code. It is used under the circumstances specified in Articles L1111-2 (mobilization or '*mise en garde*') and L2171-1 of the Defence Code (national security reserve mechanism) or Article 1 of the Law No. 55-385 of 3 April 1955[40].

Established by the Law No. 2011-892 of 28 July 2011, the 'national security reserve mechanism'[41] is a special regime adapted to the exceptional circumstances of a major crisis[42]. This system aims to enhance the capabilities of State services, local authorities, or any other public or private entity participating in a public service mission in the event of a major crisis occurring over all or part of the national territory, the scale of which jeopardizes the continuity of State action, the security of the population, or the Nation's ability to survive. This mechanism is implemented by a decree of the Prime Minister and consists of reservists from the military operational reserve, the national police civilian reserve, the health reserve, the penitentiary civilian reserve, and the civil security reserves.

[37] See Arts. 1 and 2 of Amended Law No. 55-385 of 3 April 1955 regarding the state of emergency.
[38] Defence Code, Art. L2131-1(2).
[39] See the Report No. 343 (2010-2011) by Josselin de Rohan, then President of the Foreign Affairs, Defence and Armed Forces Committee of the French Senate, 9 March 2011.
[40] Defence Code, Arts. L2151-1 to L2151-5.
[41] *Ibid*., Art. L2171-1.
[42] French Senate Report, op. cit., p. 9: "*Purely military scenarios: a regional conflict involving massive deployment and implications for internal security, but also scenarios involving major terrorist acts, such as the 9/11 attacks, or a pandemic or natural disaster that disrupts the continuity of public services, like the devastating disaster that recently struck Japan* [2011 tsunami]".

1.2.2. Exceptional legal regimes for situations of major internal tensions or armed conflict can give the armed forces special missions without changing the rules governing the use of force applicable in national territory

Article 16 of the French Constitution provides that "*where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council*". The implementation of that article leads to a temporary reorganization of the executive, legislative and judicial powers for the benefit of the French President who can then exercise 'emergency powers' ('*pouvoirs exceptionnels*'), including taking measures which normally fall within the purview of the Parliament, enacting regulations without the countersignature of the Prime Minister or concerned Ministers, or, where deemed required by the circumstances, entrusting the armed forces with special missions[43].

The state of siege provided for under Article 36 of the Constitution and Articles L2121-1 to L2121-8 of the Defence Code can only be declared by decree of the Council of Ministers in the event of imminent peril resulting from a foreign war or an armed insurrection[44]. An extension of the state of siege beyond twelve days is only possible upon authorization by Parliament. For the duration of the state of siege, which may apply to all or part of the territory, the powers vested in the civil authority for maintaining public order and law enforcement are transferred to the military authority. The civil authority continues to exercise its other functions[45]. Where there is a state of siege, a decree taken by the Council of Ministers may set up territorial military courts under the conditions provided for by the Military Justice Code[46]. In practice, where the state of siege is declared, the military authority may[47]:

- Conduct house searches by day or by night (where ordinary law provisions for law enforcement allows them only between 6 a.m. and 9 p.m.);
- Expel any person who has been definitively convicted of a felony or misdemeanour;
- Expel any individual who does not reside in the place(s) under the state of siege;
- Order the handing over of, and conduct searches and seizure of, arms and ammunition;
- Prohibit all publications and gatherings deemed as threatening public order.

The regime of general mobilization involves the implementation of "*all pre-prepared defence measures*"[48], while that of '*mise en garde*' (partial mobilization) involves the implementation of "*certain measures to ensure the Government's freedom of action, reduce the vulnerability of populations or key equipment, and ensure the security of mobilization or military force deployment operations*"[49]. The *mise en garde* is decided by decree taken by the Council of Ministers or, "*in the event of communication breakdown with the Government due to internal or external attack*", by the senior civilian official in each defence and security

[43] The emergency powers of the French President under Art. 16 of the Constitution are considerable, but not unlimited, as "*the measures shall be designed to provide the constitutional public authorities, as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures*" and its opinions are not published. The President cannot dissolve the National Assembly or prevent the Parliament from sitting. He also cannot initiate or continue a revision of the Constitution (Constitutional Council, decision No. 92-312 DC of 2 September 1992, "Treaty on the European Union").

[44] Defence Code, Art. L2121-1(1).

[45] *Ibid*., Arts. L2121-1(2) and L 2121-2.

[46] Code of Criminal Procedure, Art. 700. The jurisdiction of such courts derives from the provisions of the Military Justice Code for times of war and of the special provisions of the laws governing the state of siege.

[47] Defence Code, Art. L2121-7. Furthermore, under Art. L2121-3, military courts also have jurisdiction to rule on cases punishable under Art. L332-3 of the Military Justice Code (which provides that "*engaging in commercial or financial relations, either directly or through another entity, with nationals or agents of a power at war with France is punishable by fifteen years of criminal imprisonment and a fine of €7,500,000*"); cases of incitement, by any means, to disobedience by military personnel of commanders' orders for the execution of military laws and regulations; cases of incitement, by any means, to assassination, murder, arson, pillage, destruction of buildings or military installations; cases of misdemeanours committed by suppliers concerning supplies intended for the armed forces and associated formations, as provided for under Book IV, Title V, of the Consumer Code and related special laws; cases of forgery detrimental to the armed forces and, more generally, any felonies or misdemeanours adversely affecting national defence.

[48] Defence Code, Arts. L2141-1 to L2142-1.

[49] *Ibid*., Art. L2141-1(2).

area[50] as provided for in Article L1311-1 of the Defence Code, i.e., in practice, by the Prefect of that defence and security area. Under the conditions and penalties provided for by the Defence Code provisions relating to requisitions, a *mise en garde* confers on the Government:

1. The right to requisition persons, property and services;
2. The right to control and allocate energy resources, raw materials, industrial products, and essential supplies, and to impose necessary constraints on individuals and legal entities for this purpose[51].

Lastly, Article L1321-2(2) of the Defence Code allows, under certain conditions, for the responsibility of public order and the coordination of civil defence measures to be entrusted to the military authority. It provides that "*in areas where military operations are developing and by decision of the Government, the designated military command shall become responsible for public order and coordinate civil defence measures with military operations*". Similarly, Article L1321-2(3) provides that "*in the event of a threat to one or more priority defence installations, the designated military command may be entrusted, by decree of the Council of Ministers, with the responsibility for public order and the coordination of civil defence measures with military defence measures within the security sectors delineated around these installations by the President of the Republic in a meeting of the Defence and National Security Council*". However, the Government has never used these provisions.

1.2.3. The legal regime of 'war', which does not include all situations of armed conflict in which France may participate, does not determine the law governing the use of force in national territory

Under the Preamble to the Constitution of 1946, which is part of the 'block of constitutionality' under the current Constitution, France "*shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people*". Accordingly, war may not be offensive but must instead fall within the defensive framework provided for under Article 51 of the United Nations Charter, which recognizes "*the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations*".

France's involvement in armed conflict at the request of another State or pursuant to a UN Security Council resolution under Chapter VII of the Charter is not considered as 'war' within the meaning and for the purposes of Article 35§1 of the Constitution, which has never been implemented since the Constitution of 5 October 1958 came into force and which reiterates an old principle of the law of war[52]; rather, it must be construed as an intervention of the armed forces abroad within the meaning and for the purposes of Article 35§§2-4 of the Constitution.

Therefore, the exceptional legal regime of 'war', which refers to inter-State armed conflicts, cannot alone govern cases in which the armed forces use force in situations of armed conflict.

In the case of a war occurring in national territory, the concept of 'war' in itself is irrelevant; instead, it is the classification of armed conflict that confers on the armed forces the right to use minimum force, including deadly force, to neutralize the enemy.

In the event of a war resulting from an armed attack against France, regardless of whether the Parliament authorized a declaration of war as per the Constitution, the classification as 'international armed conflict'

[50] *Ibid*., Art. L2141-2.

[51] *Ibid*., Art. L2141-3. Additionally, Art. R2211-1 provides that, in the cases provided for in Art. L1111-2, including partial mobilization ('*mise en garde*'), the requisition of persons, property or services for the needs of the nation is carried out under the conditions specified by Arts. R2211-2 and following. Arts. R2211-3 and R2211-4 specify which authorities have the right to requisition property and services, including the "*general officers exercising territorial command*" for the satisfaction of their respective needs. Arts. R2211-5 and R2211-6 specify which military authorities can receive delegation from the authorities mentioned in Arts. R2211-3 and R2211-4.

[52] 1907 Hague Convention (III) relative to the Opening of Hostilities, Art. 1: "*The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war*".

would *ipso facto* authorize the armed forces to use minimum force, including deadly force, to neutralize enemy combatants, civilians taking a direct part in hostilities, and, where appropriate, members of organized armed groups acting against the French armed forces, in compliance with the rules governing the conduct of hostilities under international humanitarian law. The same applies to a confrontation between the French armed forces and one or more non-State organized armed groups operating in national territory that reaches the threshold of a non-international armed conflict.

Irrespective of the implementation of any exceptional legal regimes under French law, the operational framework for the intervention of the armed forces in national territory falls within the scope of Military Defence and Civil Defence[53].

In case of armed attack, the intervention of the armed forces falls within Military Defence. The armed forces may be used without the need for a legal requisition and implement specific Military Defence measures, such as Operational Defence of the Territory (DOT) or the use of strategic armed forces.

Conversely, where the armed forces participate in maintaining public order and internal security, the intervention of the armed forces falls within the framework of Civil Defence. Permanent Military Defence measures, such as airspace surveillance or maritime surveillance, continue to be implemented.

[53] Except regarding the Action of the State at Sea (AEM) referred to in Part 4, Chapter 1, of this Manual.

CHAPTER 2: THE SPECIFIC FRAMEWORK FOR THE PARTICIPATION OF THE ARMED FORCES IN CIVIL DEFENCE AND SECURITY AND FOR THEIR CONTRIBUTION TO ACTIVITIES OUTSIDE THE SCOPE OF DEFENCE

In peacetime, the armed forces are regularly used in national territory to support the civil authority within the framework of civil defence and security[54].

They may also support third parties (government departments, public or private legal entities) by contributing to activities outside the scope of civil defence and security where such activities pursue a goal of general interest.

The participation of the armed forces in these activities is governed by two distinct legal frameworks:

- 'Legal Requisition'. The requisition is an order given to the military authority by the civil or judicial authority to provide resources or capabilities, and with which the military authority must comply.

  The armed forces must be legally requisitioned in order to participate in Internal Security missions that may require the use of force or coercion. In crisis situations, a requisition of the armed forces may also be considered as a last resort to support other State services in performing missions other than Internal Security.

  Within the framework of Internal Security, the armed forces may carry out patrol missions, such as in Operation *Sentinelle*, as well as protection missions for certain locations (e.g. operations *Sentinelle* or *Résilience* for the protection of mask storage sites, G7 summit, etc.), support missions to internal security forces (e.g. *Harpie* in French Guiana, combating illegal gold mining alongside internal security forces) and law enforcement missions.

  In times of crisis, the armed forces can also be requisitioned in support of Civil Security[55] to participate in disaster relief and rescue missions, protection missions (fight against pollution, medical evacuations), etc.

- 'Request for Support' (*demande de concours*). This legal framework governs the participation of the armed forces in Civil Security missions outside crisis situations, as well as in public service actions or activities involving training, cooperation, etc., which may or may not fall within the scope of civil defence and security, depending on the circumstances.

  The missions covered by Requests for Support thus pertain to non-specific missions that involve the participation of the armed forces in missions falling under other government departments and State services, or requested by public authorities[56], as well as services provided by the Ministry of Defence at the request of individuals or entities other than the State, as governed by Decree No. 2018-1073 of 3 December 2018 relating to payments for services provided by the Ministry of

[54] Interventions of the armed forces in national territory are referred to as internal or inland operations, defined as "*engagements of the armed forces in national territory under the operational command of the Chief of the Defence Staff, in support of, conjunction with or complement to the State's civilian actions in the land, sea and air domains*". Cf. French Joint Doctrine (*doctrine interarmées*) relative to the Legal Framework for the Use of the Armed Forces in National Territory, DIA-5.60.2_CJEA-TN(2017) N°199/ARM/CICDE/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 27 December 2017 (as amended on 15 November 2018).

[55] In accordance with Article L112-1 of the Internal Security Code, "*civil security refers to the prevention of risks of all types, to public information and warning as well as to the protection of persons, property and the environment against hazards, accidents and disasters through the preparation and implementation of appropriate measures and capabilities at the level of the State, local authorities and other public or private entities. It contributes to the general protection of the population, in connection with public security and civil defence*".

[56] Cf. Interministerial Directive of 18 January 1984 relating to the participation of the armed forces in missions falling under other government departments.

Defence and by the National Gendarmerie musical groups[57].

Regardless of the mission, the intervention of the armed forces in support of civil defence and security must be based on a request from the civil authority, which can either take the form of a 'Legal Requisition' or a 'Request for Support' depending on the situation.

2.1. Within the framework of Internal Security, the participation of the armed forces is subsidiary to the actions of internal security forces and subject to a legal requisition by the civil authority

In accordance with Article L1321-1 of the Defence Code, the use of the armed forces – excluding the National Gendarmerie – in national territory is based on the principle of legal requisition by the civil authority[58], as well as on the provision of capabilities by the Minister of Defence to the Minister of the Interior[59].

Where the armed forces are duly requisitioned (i.e. "*legally required*" to participate in the maintenance of public order, Art. D1321-3 Defence Code), they are assimilated with internal security forces and become part of the 'public force'.

The use of armed forces in national territory, for example within the framework of Operation *Sentinelle*, is thus based on a legal requisition by the Prefect of a defence and security area, by which they request the general officer of that same area to contribute to reinforcing the security of persons and property and to provide the military forces and capabilities necessary for the maintenance of public order.

2.1.1. Pre-eminence of the civil authority

The Minister of the Interior is solely responsible for the conduct of crisis management operations in national territory.

Unlike the current legal frameworks for the protection of maritime approaches by the French Navy and the protection of airspace by the Air and Space Force, the intervention of the armed forces on the ground in national territory is, in principle, carried out in a 'put at disposal' approach, i.e. the armed forces are subsidiary to the capabilities of the civil authority. Accordingly, they are ranked third in the three-tier graduated classification of forces that may intervene for the purposes of maintaining public order[60]:

- 1st category forces: units of the Departmental Gendarmerie and the Republican Guard;
- 2nd category forces: units of the Mobile Gendarmerie;
- 3rd category forces: units of the land, sea and air forces, support services and joint organisations, as well as gendarmerie units set up by mobilization or by ministerial decision[61].

3rd catefory forces are primarily assigned to "*missions aimed at reinforcing the first and second category units as well as police forces*"; "*protection missions*"; and, as a last resort, they can be requisitioned for operations "*which require exceptional security measures*"[62].

In accordance with Articles L1142-2 of the Defence Code and D211-10 of the Internal Security Code, the Minister of the Interior is solely responsible for the maintenance of public order in the event of an unlawful

[57] Cf. Directive No. 1606/ARM/SGA/DAJ/D2P/CM of 16 June 2020 relating to payments for services provided by the Ministry of Defence to third parties.
[58] See also Defence Code, Art. D1321-3.
[59] Defence Code, Art. L1321-2. See also Interministerial Directive No. 10100/SGDSN/PSE/PSN/NP of 14 November 2017 relating to the engagement of the armed forces in national territory on the basis of a legal requisition by the civil authority.
[60] Defence Code, Art. D1321-6.
[61] Exceptional legal regime of general mobilization or partial mobilization ('*mise en garde*') under Arts. L1111-2, Arts. L2141-1 to L2142-1 and Art. R2141-1 of the Defence Code.
[62] Defence Code, Art. D1321-9.

assembly, i.e. any gathering of persons on the public highway or in any place open to the public where it is liable to breach public order.

2.1.2. Necessity of a legal requisition by the civil authority

The armed forces may carry out internal or inland operations only under a legal requisition (Art. L1321-1 Defence Code), the legal framework for which is provided for under Articles R1321-1 and D1321-3 to D1321-10 of the Defence Code, and Interministerial Directive No. 10100/SGDSN/PSE/PSN/NP of 14 November 2017 relating to the engagement of the armed forces in national territory on the basis of a legal requisition by the civil authority.

Requisitions, which are also referred to as 'legal requisitions' or 'administrative requisitions', are issued by the Prefect of a defence and security area, by the representative of the State in a *département* (Departmental Prefects[63], the police prefects in the case of the *départements* Paris and Bouches-du-Rhône, representatives of the State in overseas territorial communities), or by the 'Representative of the State at Sea' (Maritime Prefect for mainland France and Government's Delegate for overseas territories) to the general officer of the defence and security area (*officier general de zone de défense et de sécurité, OGZDS*) and for naval capabilities to the Maritime Area Commander (*commandant de zone maritime, CZM*). Overseas, they are addressed to the Senior Forces Commander (*commandants supérieurs de forces, COMSUP*) or to the military commander[64].

A failure by the military commander to comply with such a requisition constitutes a military offence punishable by two years of imprisonment and/or dismissal[65].

2.1.3. Principles governing the use of the armed forces upon requisition by the civil authority

The use of the armed forces in national territory is intended to enhance the public authorities' ability to address and resolve a crisis, or to replace those authorities where they are unable to deal with the crisis.

Conditions for requisitioning

In general, the armed forces can be requisitioned in national territory for internal security and civil security missions only when the resources of the civil authority, including those of the National Gendarmerie, are insufficient, unavailable, inadequate or not existent[66].

Distribution of responsibilities

The requisitioned military units operate under the responsibility of the civil authority and under military command, in coordination with the internal security forces.

The civil authority can only formulate its request in terms of the "*effect to be achieved by the armed forces*"[67] and can in no case determine the means to be implemented for this purpose. The engagement of the armed forces in national territory is carried out under the operational command of the Chief of the Defence Staff,

[63] Defence Code, Art. R1321-35: "*[…] 3. The Prefect may request the support of or requisition the armed forces to contribute to the accomplishment of their non-military defence responsibilities*".
[64] Interministerial Directive No. 10100/SGDSN/PSE/PSN/NP of 14 November 2017 relating to the engagement of the armed forces in national territory on the basis of a legal requisition by the civil authority, Art. 25.
[65] Code of Military Justice, Art. L323-17: "*Any military commander who fails or refrains from complying with a legal requisition properly made by the civil authority shall be liable to dismissal and two years of imprisonment, or only to one of those penalties*".
[66] Interministerial Directive No. 10100/SGDSN/PSE/PSN/NP of 14 November 2017 relating to the engagement of the armed forces in national territory on the basis of a legal requisition by the civil authority, Art. 18.
[67] *Ibid*., Art. 16.

who is responsible for executing requisitions.

The requisition must be made in writing according to the model request provided for in Article D1321-4 of the Defence Code, and must be dated and signed. It must clearly and precisely indicate the purpose of the requisition and the extent of the area in which it applies[68]. As specified in Article 26 of Interministerial Directive No. 10100/SGDSN/PSE/PSN/NP of 14 November 2017, "*the requisitioning authority specifies its requirements and provides the information necessary to determine the nature and number of capabilities to be used, as well as its own opinion on the measures to be taken*".

In order to ensure coordinated action, a permanent civil-military dialogue is established, facilitated by corresponding civil and military chains of command organized on three levels: national, regional and departmental.

Even though the civil and military authorities have a similar territorial organization, their subdivisions are specific and independent from each other.

The civil chain is based on the Prefectures, with the Prime Minister and each minister (national level) exercising authority over the Prefects of defence and security areas (regional level) [69] and, finally, Departmental Prefects.

In parallel, the military chain is based on the joint defence territorial organization (*organisation territoriale interarmées de défense, OTIAD*) under the responsibility of the Chief of the Defence Staff at national level, acting mostly through the MoD's Centre for Planning and Conduct of Operations (*centre de planification et de conduite des operations, CPCO*). Their representative at regional level is the OGZDS, who, as the military advisor of the Prefect of the relevant defence and security area, receives on their behalf the requisitions submitted and the associated objectives. The representative of the OGZDS at departmental level is the Departmental Military Delegate (DMD), who is the military advisor of the Departmental Prefect.

2.1.4. Military personnel may also be requisitioned by the judicial authority

2.1.4.1. Military personnel, like any individual, may be requisitioned by the judicial authority to perform a specific act

The judicial authority can requisition any individual, private or public entities as part of a judicial investigation, a preliminary enquiry or an expedited investigation in cases of *flagrance*[70]. In this context, the judicial authority may order the transmission of information and documents from any person. Failure to comply with such a requisition is punishable by a fine.

- As part of a judicial investigation ('*information judiciaire*'[71]): Under Article 99-3 of the Code of Criminal Procedure, "*the investigating judge or any judicial police officer empowered by them may, by any means, order any person, any private or public entity or organization or any public administration that may hold documents relevant to the investigation, including those from a computer system or a personal data processing system, to hand over such documents, including in*

[68] Defence Code, Art. D1321-4.
[69] *Ibid*., Arts. R1311-3 et seq.; Internal Security Code, Art. R122-2 et seq. on the powers of the Prefect of a defence and security area.
[70] Under French law, cases of '*flagrance*' (flagrant offences punishable by imprisonment) warrant the conduct of expedited investigations due to the urgent character of the situation. *Flagrance* has a more restrictive scope than the notion of '*flagrante delicto*' because it only covers felonies and misdemeanours that are punishable by at least a penalty of imprisonment.
[71] Within the French judicial system, '*information judiciaire*' refers to the judicial investigation into the most serious and complex offences, conducted by a specialized judge known as the '*juge d'instruction*' (investigating judge). This investigation is initiated following a referral by the Public Prosecutor ('*Procureur de la République*') or by a victim filing a civil claim for damages within criminal proceedings. The role of the *juge d'instruction* is to gather all evidence that may incriminate or exonerate the accused, based on which they may decide to refer the case for trial. However, they are not part of the trial panel and thus do not adjudicate, i.e. determine the person's guilt or innocence.

digital form, and may in doing so override any invocation of the obligation of professional secrecy made without legitimate reason".

- As part of a preliminary enquiry (following a complaint): Article 77-1-1 of the Code of Criminal Procedure also provides that "*the public prosecutor or, with their authorization, any judicial police officer or agent may, by any means, order any person, any private or public entity or organization or any public administration that may hold documents relevant to the investigation [...]*".

- Lastly, as part of expedited investigations ('*enquêtes de flagrance*'[72]): Article 60-1 of the Code of Criminal Procedure provides that "*the public prosecutor, the judicial police officer, or, under the control of the latter, the judicial police agent may, by any means, order any person, any private or public entity or organization or any public administration that may hold documents relevant to the investigation [...]*".

2.1.4.2. Certain judicial requisitions are specific to military personnel

In military criminal cases[73], judicial police officers can requisition military personnel on duty. Under Article 698-4 of the Code of Criminal Procedure, "*hierarchical superiors must comply with the requests of judicial police officers to make available a member of military personnel on duty when either the necessities of the investigation or the execution of a rogatory commission or judicial warrant require such a measure*".

Military personnel can also be requisitioned for the purposes of maintaining public order.

Article 17 of the Code of Criminal Procedure grants any judicial police officer the right to directly requisition 'public force':

- Military personnel as agents of the 'public force'

Under Article D1321-3 of the Defence Code, armed forces legally requisitioned to participate in maintaining public order in national territory become part of the 'public force', which has two consequences.

Firstly, as specified in Article L2338-3 of the Defence Code, such armed forces may, under a legal requisition, use their firearms under the same conditions as any other public force agent (internal security forces from the National Police or National Gendarmerie), in accordance with Article L435-1 of the Internal Security Code[74]. The use of weapons is also authorized under Articles R211-14 and R211-15 of the Internal Security Code for armed forces legally requisitioned for the maintenance of public order in the event of an unlawful assembly.

Secondly, criminal courts may confer upon requisitioned armed forces the status of a 'person holding public authority' (*personne dépositaire de l'autorité publique*)[75], i.e. a person who holds decision-making and coercive power over individuals and things for the performance of their functions, whether permanent or temporary, by delegation of powers of public authority.

Consequently, armed forces deployed in national territory for the purpose of the maintenance of public order enjoy enhanced protection under criminal law. This protection increases the penalties for certain offences committed against persons holding public authority, but also implies that such persons are held to the highest standards of conduct, with certain offences committed by persons holding public authority also being

[72] See definition of '*flagrance*' above; '*enquête de flagrance*' refers to the expedited investigation initiated in cases of *flagrance* which grants extended powers to judicial police officers.
[73] In France, military criminal cases (*affaires pénales militaires, APM*) specifically concern the offences provided for under Arts. 697-1 et seq. of the Code of Criminal Procedure.
[74] Version of Article L2338-3(2) of the Defence Code adopted by the Law No. 2021-646 of 25 May 2021 for comprehensive security preserving freedoms.
[75] Grenoble Correctional Court, 13 October 2016.

punished more severely[76].

- The '*prêt de main forte*' (direct assistance requisition)

Judicial police officers[77], public prosecutors and investigating judges[78] may "*directly requisition the assistance of the public force for the performance of their mission*".

This power, known as the '*prêt de main forte*' (literally the 'lending of a helping hand'), allows them to directly requisition military personnel who are on the ground, including verbally, and associate them with judicial police operations. However, judicial police officers can only requisition the assistance of military personnel if the latter are under a legal requisition allowing them to operate in national territory, because in want of such legal requisition, armed forces are not part of the 'public force'.

However, military personnel requisitioned under the '*prêt de main forte*' mechanism are not granted the status of judicial police officers; persons who are given the status of judicial police officer or agent are exhaustively listed under the Code of Criminal Procedure[79]. Therefore, judicial police powers and tasks that can only be performed by the judicial police cannot be delegated to armed forces.

2.2. Request for Support: The legal framework for non-specific missions of the Armed Forces and for their use for Civil Security

Requests for Support ('*demandes de concours*') provide the framework for the provision of services and of military units, equipment, military grounds or facilities by the French armed forces.

The purpose of this procedure is to request the armed forces' contribution to missions that do not involve the use of force or the use of firearms, including:

- the provision of military units or constituted detachments, without military equipment;
- the provision of military equipment, without military personnel (the receiving party is responsible for operating the equipment);
- services performed by military units or detachments with their own equipment (e.g. logistical or medical transport in Operation *Résilience* in 2020).

Unlike legal or judicial requisitions, the armed forces are not under the obligation to comply with a Request for Support; whether the request will be accepted depends on the unavailability of the civil capabilities, the public nature of the request, and the interest it may have for the armed forces.

2.2.1. Requests for Support from other government departments

Requests made by other government departments for the occasional participation of the armed forces in general interest activities, to support or replace competent State services, are governed by the Interministerial Directive of 18 January 1984 relating to the participation of the armed forces in missions falling under the responsibility of other government departments.

There is no document that precisely describes the procedure for Requests for Support from other government departments[80]. However, a number of documents[81] highlight the key role played by the joint defence

[76] For example, acts of violence resulting in a temporary work incapacitation of no more than eight days, punishable by a €1500 fine when committed against or by a regular individual, will be punishable by 3 years of imprisonment and a €45,000 fine when committed against or by a person holding public authority.
[77] Code of Criminal Procedure, Art. 17(3).
[78] *Ibid*., Arts. 42 and 51.
[79] *Ibid*., Arts. 16 to 21-2 and 28.
[80] Central administration, national competency services and decentralized services.
[81] Interministerial Directive of 18 January 1984 relating to the participation of the armed forces in missions falling under the responsibility of other government departments; French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées*

territorial organization (*organisation territoriale interarmées de défense, OTIAD*) in dealing with such requests (including in assessing whether the conditions of non-existence, insufficiency, inadequacy, or unavailability of the civil means are met) as well as the advising role of the MoD's Centre for Planning and Conduct of Operations (*centre de planification et de conduite des operations, CPCO*) and other directorates, where applicable.

The costs incurred by the armed forces in responding to Requests for Support from other government departments or State services can usually be refunded. The Interministerial Directive of 18 January 1984 provides that the Ministry of Defence can request reimbursement from the recipient services or ministries. Article 6 of the Directive specifies that "*the implementation of military resources, regardless of the location of the mission, is subject to reimbursement. This reimbursement covers only additional expenses, that is, those that result directly from the nature of the activity or service provided*". Nevertheless, the Ministry of Defence may decide to provide support free of charge.

Focus: The Procedure for Requests for Support From Other Government Departments

This procedure can be described as follows[82]:

- A Request for Support from other government departments must be addressed directly to the Ministry of Defence or to any military authority (such as a commanding officer or defence base commander) for the provision of a service or of a movable or immovable asset, in exchange for payment.

- The Request for Support must be in writing, substantiated, specific about the nature and scope of the support requested, and indicate the expected duration of that support.

- The military authority receiving the request then submits it for an opinion to the local military authority with territorial jurisdiction, particularly regarding the conditions for the provision of the service. The request may also be forwarded directly to the Prefect of a defence and security area (regional level) or to the Departmental Prefect, who is the point of entry for Requests for Support or Requisitions at the level of *départements*. The Departmental Prefect then seeks the advice and opinion of the Departmental Military Delegate (DMD) on the request. It should be noted that the Departmental Prefect does not have the power to directly request the support of the armed forces. The DMD is also not competent to approve or reject a Request for Support. Only the Prefect of a defence and security area and the General Officer of that area (OGZDS) are competent to respectively request the support of the armed forces and validate the request. Therefore, a Request for Support addressed to the Departmental Prefect must be forwarded by the latter to the Prefect of the corresponding defence and security area. Simultaneously, the DMD forwards the request to the OGZDS together with an initial opinion on the conditions for the provision of the service (feasibility) and on whether the conditions of non-existence, insufficiency, inadequacy, or unavailability of the civil means are met.

- The OGZDS forwards the request to the relevant service directorates for assets within their competence: the Armed Forces Commissariat for movable assets (via the defence base support group) or the Defence Infrastructure Service (*service d'infrastructure de la défense, SID*), via the relevant Defence Infrastructure Support Unit or *établissement du service d'infrastructure de la défense* (ESID).

- The OGZDS must inform the MoD's Centre for Planning and Conduct of Operations (CPCO) about the request if the deployment of resources is likely to have an impact on operations or compromise the fulfilment of specific operational requirements. The rule for the engagement of the armed forces in national territory is the centralized management of capabilities and resources (cf. the CICDE Joint Publication relating to the Joint Defence Territorial Organization cited above).

de concepts, de doctrines et d'expérimentations, CICDE), Joint Publication (*publication interarmées*) relating to the Joint Defence Territorial Organization, PIA-3.60.2.3(B)_OTIAD(2020) N° D-20-005269/ARM/EMA/EMP.3/NP, 6 October 2020, and Joint Doctrine (*doctrine interarmées*) relative to the Legal Framework for the Use of the Armed Forces in National Territory, DIA-5.60.2_CJEA-TN(2017) N°199/ARM/CICDE/NP, 27 December 2017 (as amended on 15 November 2018).

[82] CICDE, Joint Doctrine relative to the Legal Framework for the Use of the Armed Forces in National Territory, cited above, §§241-246.

- The OGZDS approves the Request for Support and drafts a protocol, unless the CPCO, directorates or services raise any objection.

- Before any service is provided and except in cases of urgency, a protocol must be drafted. However, even in urgent situations, the civil authorities or the government departments must commit in writing to reimburse the armed forces for the costs incurred by their intervention.

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This procedure has two exceptions:

- In the event of a crisis in national territory restricted to a certain geographical area, in an emergency situation, the OGZDS and the senior commanders of overseas forces (COMSUP) have permanent delegation from the Chief of the Defence Staff to authorize, within their area of responsibility and for a period of no more than three days, the deployment of military capabilities (up to 130 personnel) and supporting resources, excluding specialized capabilities (helicopters, CBRN defence, military engineering, etc.). Where further capabilities are needed, the CPCO must authorize the deployment.

- Where the armed forces must replace public services, for example in case of strikes, the support of the armed forces is granted by the Minister of Defence on the order of the Prime Minister.

2.2.2. Requests for Support from entities other than the State

Requests for Support from entities other than the State are governed by Decree No. 2018-1073 of 3 December 2018 relating to payments for services provided by the Ministry of Defence and by the National Gendarmerie musical groups, as well as by Directive No. 1606/ARM/SGA/DAJ/D2P/CM of 16 June 2020 relating to payments for services provided by the Ministry of Defence to third parties, which details the implementation of this decree.

The procedure for processing a Request for Support from entities other than the State is outlined in the aforementioned Directive.

Unlike requests made by the State, such requests are not assessed based on whether the conditions of non-existence, insufficiency, inadequacy, or unavailability of the civil means are met. Instead, they are assessed in terms of public interest (such as financial interest, contributions to military-civilian relations, or public relations value), in accordance with the principle of freedom of commerce and industry.

Focus: The Procedure for Requests for Support From Entities Other Than the State

The procedure for assessing and deciding on such requests is as follows:

- The authority to which the Request for Support is addressed issues a written opinion on the advisability of the request, particularly regarding the conditions for the provision of the service. Where the authority from whom support has been requested does not have the power to authorize it itself, the request is forwarded, along with the opinion on advisability, to the authority empowered to make the decision.

- The following authorities are competent to decide on the request:
    - Authorities holding a full delegation of the power of signature from the Minister of Defence, and which are competent in respect of the nature of the service. These authorities are empowered to sign the agreements provided for in Article 7 of Decree No. 2018-1073 of 3 December 2018 relating to payments for services provided by the Ministry of Defence and by the National Gendarmerie musical groups;
    - Authorities holding a partial delegation of the power of signature, and which are designated under the Order of 21 October 2019 delegating powers from the Minister of Defence to certain authorities for the participation of the staffs, directorates and divisions of the Ministry of Defence, or any bodies attached to them, to services provided

to third parties. These authorities are empowered to sign such agreements where the capabilities requested are under their responsibility, except for agreements involving total or partial gratuity, the signature of which is reserved for the authorities holding a full delegation of the power of signature from the Minister of Defence.

Any service provided to a third party must be made official through an agreement (a model is provided in the Directive No. 1606/ARM/SGA/DAJ/D2P/CM of 16 June 2020 cited above). If the services provided involve multiple entities not under the same authority, a coordinating body is designated to sign a single, unified agreement.

Requests for Support from entities other than the State must be remunerated.

Under Article 1 of Decree No. 2018-1073 of 3 December 2018 relating to payments for services provided by the Ministry of Defence and by the National Gendarmerie musical groups, "*Services of any kind provided upon request to any legal entity other than the State or to any individual by the staffs, directorates or divisions of the Ministry of Defence, or by any bodies attached to them, including the provision of personnel with or without equipment, shall be remunerated*".

The remuneration must cover all costs incurred in providing the service. Article 3 of the Decree specifies that "*the remuneration provided for in Articles 1 and 2 is determined based on all the direct and indirect costs incurred for planning and executing the service and may take into account any advantages provided to the recipient*".

In exceptional cases, services may be provided free of charge or for a reduced fee if they serve the common interest, particularly when they contribute to government policy, international cooperation, military outreach, or strengthening the relationship between the military and the nation, in accordance with Article 6 of the Decree.

Directive No. 1606/ARM/SGA/DAJ/D2P/CM of 16 June 2020 cited above provides that, apart from the Minister of Defence, only the authorities holding a full delegation of the power of signature from the Minister of Defence[83], or agents of the central administration holding a delegation from them, can grant full or partial gratuity for a service.

In practice, as regards international relations and operations, the authorities who can approve such requests are:

- For the Joint Defence Staff: the Chief of the Defence Staff, the Major General of the Armed Forces (Deputy Chief of the Defence Staff)[84], the Assistant Chief of the Defence Staff for Operations, the General Officer in charge of international military relations and their two deputies, and the Head of the Centre for Planning and Conduct of Operations (CPCO)[85];
- For the operational staffs: the Chiefs of Staff of the Army, Navy, and Air and Space Force, as well as the General Officers responsible for international relations and operations within their respective staffs.

The full or partial gratuity is granted only if it serves the common interest and if the services provided do not adversely affect the operational capacity of the armed forces or the overall activities of the Ministry.

Where the authority signing the agreement decides that the criteria for granting free services are met, they

[83] Decree No. 2005-850 of 27 July 2005 relating to the delegation of the power of signature from members of the Government.

[84] Art. D3121-19 of the Defence Code, which provides that "*the Chief of the Defence Staff: I. Has a Deputy Chief of the Defence Staff, the Major General of the Armed Forces, who shall assist them and act as a substitute in exercising their duties*".

[85] Art. D3121-14(11°) of the Defence Code, which provides that the Chief of the Defence Staff "*negotiates, with the support of the Secretary-General for Administration, and signs, in their areas of competence and on behalf of the Minister of Defence, operational military agreements and instruments establishing limited administrative cooperation in the military field*". It follows that the Chief of the Defence Staff may, in accordance with the conditions set by Decree No. 2005-850 of 27 July 2005, decide to delegate the Minister's power of signature to the general officers under their authority for operational military agreements, technical arrangements, and letters of intent in the field of international military relations within the limits of their responsibilities.

must submit a file to their central administration authority, which includes:

- A presentation of the request and the potential recipient, including any history of relations with the Ministry of Defence;
- A justification for not applying the basic principle of remuneration for the provision of personnel with or without the provision of equipment or other services;
- An assessment of the proposed gratuity's impact on the freedom of commerce and industry;
- A financial statement detailing the total cost, as per Subsection 2.2.1.;
- The consequences on the capabilities of the Ministry of Defence;
- A draft agreement based on the template provided for in Annex 1 of the Directive No. 1606/ARM/SGA/DAJ/D2P/CM of 16 June 2020 cited above.

For requests involving total or partial gratuity of €5,000 or less, a simplified form summarizing the main conditions for the provision of the service can be filled out, as per the template in Annex 2 of the Directive. This form must be sent together with the draft agreement and the financial statement mentioned above.

Requests for Support from entities other than the State do not include the following:

- The provision of State-owned immovable assets, which falls under temporary occupancy authorizations and agreements, in accordance with Article L2125-1 of the General Public Property Code. Such requests must be addressed to the Defence Infrastructure Service (SID);
- Military air transport and the provision of airport platforms, which are subject to specific provisions and decision-making processes outlined in:
  - Article R351-2 of the Civil Aviation Code;
  - Amended Order of 29 October 2012 relating to air transport by military means for individuals or public services not under the responsibility of the Ministry of Defence[86];
  - Directive No. 120/ARM/EMA/PERF/BPSO of 3 December 2018 relating to air transport by military means for individuals or public services not under the responsibility of the Ministry of Defence and to boarding on military aircraft[87];
- Requests where the conditions for the provision of the service are governed by an intergovernmental agreement, in favour of a State (e.g. a logistical support agreement) or an international organization (NATO, EU, UN).

[86] Légifrance, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000026952115/?isSuggest=true.
[87] *Ibid*., https://www.legifrance.gouv.fr/download/pdf/circ?id=44392.

CHAPTER 3: FRAMEWORK FOR THE USE OF FORCE AND FIREARMS IN NATIONAL TERRITORY

French criminal law provides for certain ordinary law mechanisms and causes of non-responsibility to which military personnel may be entitled when exercising their duties. Furthermore, French law, in particular under the Penal Code, Defence Code and Internal Security Code, provides for different legal frameworks governing the use of armed force in specific situations.

3.1. Ordinary law mechanisms applicable to military personnel

3.1.1. Citizen's arrest

Under Article 73 of the Code of Criminal Procedure, "*in the event of a flagrant felony or of a flagrant misdemeanour punished by a penalty of imprisonment, any person is entitled to arrest the perpetrator and to bring them before the nearest judicial police officer. Where such person is brought before the judicial police officer, that person shall not necessarily be taken into custody, even though the conditions for taking such measure provided for under this Code may be met, if they are not required to remain at the disposal of the investigators and they have been informed that they may leave the police or gendarmerie premises at any time. However, this paragraph does not apply where that person has been coercively brought by the public force before the judicial police officer*".

In cases of *flagrance*[88], any citizen may therefore arrest a person who is committing, or has just committed, a felony or a misdemeanour.

Citizen's arrest is only permitted in case of flagrant felony or flagrant misdemeanour where there are evident signs of an offence being committed, whereby plausible signs are enough to warrant such measure. Furthermore, the nature of the offence is assessed at the time of the arrest; it may ultimately be classified as a less serious offence.

Nevertheless, this power to arrest is subject to restrictions in terms of:

- duration: the 'arrest' may last only for such time as is necessary to bring the person to the nearest judicial police officer, as it may otherwise amount to arbitrary detention. In practice, the citizen only calls the law enforcement services so that they can come and transfer the offender to the station. Although no time limit is specified, a citizen's arrest must be carried out as quickly as possible;
- means: the citizen may only carry out the arrest and deprivation of liberty of the offender; they may not conduct any other judicial police action such as interrogation or identity control. However, even though body searches are prohibited, the Court of Cassation (France's highest judicial authority) has recognized that citizens may carry out a pat-down where the circumstances so require for the sole purposes of detecting any concealed weapons or dangerous objects that may pose a security risk, which then must be handed over to the judicial police officer who has the exclusive power of legally seizing them, or of disclosing objective evidence for the classification of the offence as flagrant.

Consequently, military personnel may, like any other citizen, arrest a flagrant offender by using force in a strictly necessary and proportional manner. In such case, the criminal responsibility of the member of military personnel may not be entailed for using force against the person while arresting them. However, if that person is injured during the arrest, they may initiate liability proceedings against the State. In any event, military personnel must comply with all applicable rules governing the use of force.

[88] Under French law, '*flagrance*' has a more restrictive scope than the notion of '*flagrante delicto*' because it only covers felonies and misdemeanours that are punishable by at least a penalty of imprisonment. Cases of *flagrance* warrant the conduct of expedited investigations by the judicial authority due to the urgent character of the situation (see Chapter 2, Subsection 2.1.4.1. above).

Lastly, it should be noted that the 'citizen's arrest' provided for under Article 73 of the Code of Criminal Procedure is only a possibility authorized by law; it does not carry with it any specific obligation or sanction (except for the failure to prevent the commission of a felony or misdemeanour, and the failure to provide assistance).

3.1.2. Objective causes of criminal non-responsibility ('justifying facts')

3.1.2.1. Self-defence and state of necessity

Self-defence and necessity are 'objective causes of criminal non-responsibility', also known as 'justifying facts', that can erase the punishable nature of an offence, provided that the relevant criteria are met. Consequently, a person shall not be held criminally responsible for acts committed based on those grounds, whether they are the perpetrator or co-perpetrator of, or accomplice to, the offence. By contrast, only self-defence is a cause of civil non-responsibility because, unlike the victim of an act committed in self-defence, who provoked the self-defensive behaviour and may thus be personally at fault, the victim of an act committed under a state of necessity is extraneous to the situation and therefore cannot be at fault.

3.1.2.1.1. Self-defence

In French law, self-defence is governed by Article 122-5 of the Penal Code, which provides as follows: "*A person who is confronted with an unjustified attack upon themselves or upon another person shall not be held criminally responsible for performing at the same moment an act compelled by the necessity of the legitimate defence of oneself or another person, unless the means used for defence are not proportional to the seriousness of the attack.*

A person shall not be held criminally responsible for performing an act of defence other than wilful murder to interrupt the commission of a felony or a misdemeanour against property, where that act is strictly necessary for the intended objective and the means used are proportional to the gravity of the offence".

Self-defence is subject to strict applicability conditions relating both to the attack and the ensuing defence.

- The attack must be unjustified, ongoing and real.

Firstly, the attack must be unjustified, i.e. illegitimate: the act against which a person responds in self-defence must be unlawful.

Where the attack is directed against a person, self-defence is permissible irrespective of whether that attack amounts to a felony, a misdemeanour or a less serious offence, whether it targets or actually threatens the person's physical or mental integrity, physical freedom or honour. Self-defence includes responses to attacks directed against the person responding in self-defence or against another person, regardless of the connection between those persons.

Where the attack is directed against property, self-defence is only permitted where the attack amounts to a felony or a misdemeanour.

Secondly, the attack must be ongoing, i.e. the act against which a person responds in self-defence must be currently occurring or imminent. If the attack has already ceased (the attacker has been subdued or has escaped), a response would amount to an act of vengeance. Conversely, if the attack has not yet begun, a "response" would be viewed as excessive anticipation.

Finally, the attack must be real and certain, i.e. the act against which a person responds in self-defence must constitute a real and indisputable danger. At the very least, there must be objective reason to believe that the attack is probable and apparent, i.e. the person must reasonably be able to believe that the attack is imminent;

mere fear of an attack is therefore insufficient. Judges assess this criterion based on the objective circumstances of the attack and their own personal convictions. They must not, and cannot, seek to determine the defendants' actual thoughts or personal perception of the situation at the time of the attack.

- The defence must be immediate, necessary, proportional and intentional.

The response in self-defence must be immediate in relation to the attack. The means used for defence must be proportional to the seriousness of the attack and the only way to repel that attack.

The response in self-defence must be an intentional act and therefore cannot constitute an unintentional offence such as the misdemeanour of 'unintentional injuries'[89].

The person invoking self-defence has the onus of proof, i.e. they must produce the evidence to support their claim. However, Article 122-6 of the Penal Code provides for two exceptions where there is a rebuttable presumption of self-defence (reverse onus clauses): "*A person shall be presumed to have acted in a state of self-defence if they perform an action 1° to repulse at night an entry to an inhabited place committed by breaking in, violence or deception; 2° to defend themselves against the perpetrators of theft or pillage carried out with violence*".

Where the criteria of self-defence are not fulfilled, it is possible to invoke the objective cause of criminal non-responsibility (justifying fact) of the state of necessity, including where the facts resulting from the response amount to an unintentional offence.

3.1.2.1.2. The state of necessity

French law provides for a 'state of necessity' under Article 122-7 of the Penal Code: "*A person who is confronted with a present or imminent danger threatening themselves, another person or property shall not be held criminally responsible for performing an act necessary to ensure their safety or that of the other person or property, unless the means used are not proportional to the seriousness of the threat*".

Necessity is different than self-defence in that the person does not respond to defend themselves against an attacker, but against a danger which does not necessarily result from a person's conduct. The state of necessity is subject to strict applicability conditions relating both to the danger and the response adopted.

- The danger must be serious and real, ongoing and unavoidable.

Firstly, the danger must be serious and real, objectively established, and pose a threat to the person responding, other persons or property. The threat may concern the life or physical or psychological integrity.

Secondly, the danger must be ongoing (current or imminent), i.e. the person must be responding to a present or extremely close danger; a mere possibility that a danger exists is not sufficient.

Thirdly, the danger must also be unavoidable and unforeseeable, and it must therefore not have been caused by a prior fault of the person, who find themselves in a dangerous situation as a result of this fault.

Finally, the danger must be unfair or illegitimate. This requirement is not provided for under Article 122-7 of the Penal Code, but it is dictated by logic and stems from case law[90]. Indeed, where a danger results from a situation which is lawful, then that danger is considered legitimate.

[89] Court of Cassation (Criminal Division), ruling No. 66-92.071, 16 February 1967: The fact justifying self-defence is not compatible with the intentional character of the offence. Therefore, it cannot amount to the offence of unintentional injuries.
[90] Court of Cassation (Criminal Division), Bulletin of criminal rulings No. 57, 31 January 1996; Court of Cassation (Criminal Division), ruling No. 02-80.788, 19 November 2002.

- The response must be necessary and proportional.

The response must be necessary and essential to ensure the safety of the person or property and must be the only way to repel the danger.

The response must be proportional to the seriousness of the threat. Accordingly, the social value thereby preserved must outweigh the social value sacrificed by committing an offence in response to the danger.

Besides, it is irrelevant whether the response amounts to an intentional or unintentional offence.

3.1.2.2. 'Order by the law' and 'command by a lawful authority'

Article 122-4(§§1 and 2) of the Penal Code provides for two other objective causes of criminal non-responsibility: "*A person shall not be held criminally responsible for performing an act prescribed or authorized by legislative or regulatory provisions*" ('order by the law') and "*a person shall not be held criminally responsible for performing an act commanded by a lawful authority, unless such act is manifestly unlawful*" ('command by a lawful authority').

Accordingly, neither the criminal responsibility nor the civil liability of a public agent may be involved before courts for the commission of an offence which was required or authorized by statute or regulation (i.e. ordered by the law), or commanded by a lawful authority. However, certain situations may entail the State's responsibility or liability[91].

Furthermore, both those objective causes of criminal non-responsibility affect all participants in the offence (perpetrator, co-perpetrator and accomplice).

3.1.2.2.1. Order by the law (requirement or authorization by statute or regulation)

Under French law, the 'order by the law' clause is a justifying fact (objective cause of criminal non-responsibility) erasing the punishable nature of the offence, whether intentional or unintentional, which is provided for under Article 122-4§1 of the Penal Code. It is subject to a number of applicability conditions:

- There must be a formal statute or regulation that requires or authorizes a specific conduct by the agent which may involve the commission of an offence.

Statute law encompasses all laws, statutes or acts adopted by the Parliament as well as the ordinances of the Government which have been ratified by the Parliament, whether codified or not, whether relating to criminal law or not. Regulatory law includes all regulations taken by administrative authorities of the executive branch (mostly decrees and orders). Regulations therefore do not include internal rules of procedure or bylaws, nor circulars, directives or instructions.

It is irrelevant whether the offence committed amounts to a felony, a misdemeanour or a less serious offence.

- The statute or regulation must be in force, and thus be binding and enforceable in French territory.

The statute or regulation must be a rule of French domestic law, international law or the law of the European Union which is binding and enforceable in France. Therefore, it does not include foreign statutes or regulations. In this regard, Article L311-14 of the Code of Military Justice provides that "*the laws, decrees or regulations enacted by enemy authorities, or orders or authorizations given by enemy authorities, or by authorities that are or were subordinate to them, cannot be invoked as a cause of non-responsibility pursuant*

[91] Court of Cassation (Criminal Division), ruling No. 04-82.208, 14 June 2005: "*where the harm results from the use of firearms, the State is liable for the harm suffered by persons targeted by judicial police operations due to the fault of one of its agents, regardless of whether this fault constitutes gross fault*".

to Article 122-4 of the Penal Code. However, courts shall take this circumstance into account when determining the penalty and the amount thereof'.

- The statute or regulation must explicitly or implicitly require ('*prescrire*') or authorize a conduct that may involve an offence.

Where relevant, agents must also comply with the conditions prescribed by the statute or regulation authorizing the unlawful conduct. Accordingly, agents may only act in a strictly necessary manner[92].

The 'order by the law' cause of criminal non-responsibility may also be invoked to warrant the use by members of the National Police, National Gendarmerie and military personnel of their firearms, provided that the conditions prescribed by Article L435-1 of the Internal Security Code are respected (see below).

Conversely, the 'order by the law' clause may under no circumstances be invoked by a member of the National Police or National Gendarmerie who used their firearm while not on duty and not wearing their uniform. In such cases, only the objective causes of self-defence or necessity can erase the agent's criminal responsibility.

The Penal Code expressly excludes certain offences from the scope of the 'order by the law' clause (for example crimes against humanity under Article 213-4).

3.1.2.2.2. Command by a lawful authority

An agent may commit an offence as part of an order ('command') received from an authority. Where the conditions of the 'command by a lawful authority' cause of criminal non-responsibility are not fulfilled, the agent who received the order will be considered as the perpetrator of the offence, and the authority (the 'commander') as the accomplice. Conversely, where the conditions are met, the criminal responsibility of both of them will be erased as this cause affects all participants in the offence.

The 'command by a lawful authority' clause is subject to several applicability conditions relating both to the status of the 'lawful authority' and to the nature of the order ('command').

- The order ('command') must be given by a 'lawful authority'.

Only a public authority, whether civil or military, may be considered lawful where it is vested with powers of public authority (officers, whether commissioned or not, commanding troops; members of the National Police or National Gendarmerie giving an order to a subordinate or a citizen; judges; prefects; mayors, etc.). This public authority must be of French nationality and must have been legally established (see Art. L311-14 of the Code of Military Justice above).

Lastly, for the 'command by a lawful authority' clause not to be ruled out in court, the authority must have the competence to order the act that may involve the commission of an offence[93].

- The act ordered must not be manifestly unlawful.

Where a lawful authority (the 'commander') orders the performance of an act which is manifestly unlawful, the duty to obey does not warrant the commission of that act and the criminal responsibility of the agent may be entailed for the offence committed. On the contrary, military personnel have the duty to disobey an order

[92] Court of Cassation (Criminal Division), ruling No. 05-81.706, 28 March 2006: The Court of Cassation requires trial judges to determine whether the act constituting an offence was absolutely necessary in the circumstances ruling at the time.
[93] Court of Cassation (Criminal Division), ruling No. 07-82.249, 30 September 2008: In the *Élysée telephone tapping* case, in which senior civil servants were prosecuted for invasion of privacy, the 'command by a lawful authority' clause was ruled out on the grounds that the authority that ordered the tapping had exceeded the scope of its mandate.

given by their superior where it involves the commission of a manifestly unlawful act. This duty to disobey is provided for under Article D4122-3(3) of the Defence Code, which specifies that military personnel, as subordinates, "*must not execute an order to accomplish an act which is manifestly unlawful or contrary to the rules of international law applicable in armed conflicts or to international conventions in force*".

In principle, this 'manifestly unlawful' criterion must be assessed *in abstracto*, i.e. every citizen must be able to determine whether the order given is unlawful or not. In practice, however, courts also take into account the subordinate's skills and knowledge, experience, rank, hierarchical position, etc.

Certain offences are by nature manifestly unlawful. For example, Article 213-4 of the Penal Code precludes both the 'order by the law' and 'command by a lawful authority' justifications for the commission of crimes against humanity. Under Article 2(3) of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was signed and ratified by France[94], "*an order from a superior officer or a public authority may not be invoked as a justification of torture*".

3.2. Legal framework for the use of force and firearms by legally requisitioned military personnel

French law provides for specific rules governing the use of firearms by internal security forces and legally requisitioned military personnel, including rules governing individual and collective equipment and weapons.

3.2.1. Conditions for the use of force and firearms

The use of force and firearms is governed by two basic principles: absolute necessity and strict proportionality.

The requirement of absolute necessity is established under Article 2 enshrining the "*right to life*" of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR)[95]. However, that Article 2(2) provides for three exceptions to this principle in cases where death "*results from the use of force which is no more than absolutely necessary*:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection".

Both the Court of Cassation (France's highest judicial authority) and the European Court of Human Rights (ECtHR) strictly apply this principle and require a systematic examination of whether the use of force which resulted in death was absolutely necessary considering the circumstances[96].

Any use of armed force must also be strictly proportional with regard to the circumstances ruling at the time, the legitimate aims pursued, and the severity of the threat or harm involved[97].

In accordance with these fundamental principles, French law provides for a specific framework for the use of force and firearms by internal security forces.

[94] Law No. 85-1173 of 12 November 1985 authorizing the ratification of the convention against torture and other cruel, inhuman or degrading treatment or punishment adopted in New York on 10 December 1984; Decree No. 87-917 of 9 November 1987.
[95] ECHR, Art. 2(1): "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*".
[96] Court of Cassation (Criminal Division), ruling No. 07-88.470, 27 February 2008; ECtHR, *Celniku v. Greece*, Judgment, Application No. 21449/04, 5 July 2007.
[97] ECtHR, *Wasilewska and Kałucka v. Poland*, Judgment, Application Nos. 28975/04 and 33406/04, 23 February 2010; Court of Cassation (Criminal Division), ruling No. 04-83.939, 13 April 2005.

Pursuant to Article L2338-3(2) of the Defence Code[98], military personnel deployed in national territory under a legal requisition also fall within the scope of this framework, which is provided for under Article L435-1 of the Internal Security Code. It states an exhaustive list of five situations which are the conditions for the use of firearms. Accordingly, the use of firearms, where absolutely necessary and strictly proportional, is permitted only:

1. When acts that threaten their life or physical integrity, or those of others, are committed, or when armed individuals threaten their life or physical integrity, or those of others;
2. When, after two verbal warnings, they cannot defend by any other means the location they are occupying or the people entrusted to them;
3. When, immediately after two verbal warnings, they cannot stop individuals, by any means other than the use of firearms, who are attempting to escape from their custody or investigations and are likely to commit, in their escape, acts that threaten their life or physical integrity, or those of others;
4. When they cannot immobilize, by any means other than the use of firearms, vehicles, boats, or other means of transport whose drivers do not comply with the order to stop and whose occupants are likely to commit, in their escape, acts that threaten their life or physical integrity, or those of others;
5. For the exclusive purpose of preventing the recurrence, within a short period of time, of one or more murders or attempted murders that have just been committed, where they have real and objective reasons to believe that such recurrence is probable based on the information available to them at the time they use their firearms.

These five cases of legitimate firearm use must, in addition to their specific characteristics, meet common requirements: absolute necessity and strict proportionality, but also the requirement for the service member to be currently on duty. Article L435-1 of the Internal Security Code specifies that they must be wearing their uniform or visible and identifiable insignia of their status.

3.2.2. Rules relating to equipment and weapons

Under Article D1321-3§4 of the Defence Code, "*the responsibility for executing the requisition lies with the requisitioned military authority, which decides the means to be used*".

3.2.2.1. Individual equipment and weapons

Under Article 35 of Interministerial Directive No. 10100/SGDSN/PSE/PSN/NP of 14 November 2017 relating to the engagement of the armed forces in national territory on the basis of a legal requisition by the civil authority, "*when deployed in national territory to support internal security forces, military personnel are equipped with their individual service equipment and weapons*".

It is important to note that military personnel are under no circumstances allowed to part with their weapons, even at the request of a representative of the internal security forces. Military personnel may not lend their weapons to internal security forces within the scope of the 'assistance of the public force' under Article 17(3) of the Code of Criminal Procedure, as this could be viewed as falling within the scope of the 'provision of equipment or resources', which cannot be lawfully requested in the field by a judicial police officer from military personnel. Therefore, military personnel deployed in national territory cannot be requisitioned to put their weapons at the disposal of internal security forces. Besides, this would also be inconsistent with rules of engagement and would deprive the armed forces of their operational capacity[99].

[98] Version of Article L2338-3(2) of the Defence Code adopted by the Law No. 2021-646 of 25 May 2021 for comprehensive security preserving freedoms: "*Military personnel deployed in national territory under the requisitions provided for in Article L1321-1 of this Code may use their firearms under the conditions set out in Article L435-1 of the Internal Security Code. They may also use appropriate materiel, in accordance with technical standards established by joint order of the Minister of the Interior and Minister of Defence, to immobilize vehicles under the conditions set out in Article L214-2 of that Code*".

[99] National Assembly, Parliamentary committee of inquiry relating to the means implemented by the State to fight terrorism since 7 January 2015, Report No. 32, p. 26 (in French only). Jean-Yves Le Drian, then Minister of Defence, reiterates a basic principle according to which military personnel must not lend their firearms, because it is contrary to all the rules governing the deployment of

3.2.2.2. Collective equipment and weapons

Article 35(2) of the Interministerial Directive referred to above provides that "*the deployment, upon requisition, of military collective weapons and armoured vehicles is subject to authorization by the Prime Minister or the authority to whom they have delegated this power*".

Under Article L214-1 of the Internal Security Code[100], the use of the specific military capabilities of the National Gendarmerie (armoured vehicles) is contingent upon the necessity of maintaining or restoring public order. These capabilities thus can be deployed or engaged only if there is a severely deteriorated situation, and only for the purpose of restoring order. Only the Prime Minister and Prefects of defence and security areas[101] are competent to authorize their use. The provisions of Article 35 of Interministerial Directive 10100 appear to transpose to the armed forces the obligations imposed on the National Gendarmerie, making the use of armoured vehicles contingent upon the existence of serious disturbances to public order or the risk of such disturbances, and upon authorization by the Prime Minister.

3.3. Dispersal of unlawful assemblies

The power for the 'public force' to disperse unlawful assemblies is provided for under Article 431-3 of the Penal Code[102]. Its use must be decided by the competent authority, based on an assessment of whether it is appropriate to use the 'public force' and therefore to requisition the armed forces for this purpose.

Article L211-9 of the Internal Security Code provides for a list of civil authorities with territorial jurisdiction which have the power to decide the dispersal of an unlawful assembly by using the 'public force' after two warnings have remained unheeded[103]. To exercise this power, they must comply with the formal procedures imposed by law and regulatory provisions, including the obligation for civil authorities to wear their service insignia in law enforcement operations and to issue prior warnings.

The civil authority may request assistance from the military authority in maintaining or restoring public order where they deem reinforcement by the armed forces necessary[104]. For this purpose, they must submit a formal requisition of the armed forces to the competent military authority, as well as a special written requisition for the use of firearms[105] in addition to the general requisition, which is issued by the authorities referred to under Article R211-21 of the Internal Security Code[106].

In any case, the use of force is only permissible in circumstances in which "*it is absolutely necessary for the maintenance of public order*", and "*the force deployed must be proportional to the disturbance to be*

forces in operations and it would undermine the military value of soldiers. Furthermore, he stresses that automatic weapons, designed to neutralize an adversary, are not easy to handle – even for a law enforcement professional – unless they have received specific training.

[100] Internal Security Code, Art. L214-1: "*Where the maintenance of public order requires the use of the specific military capabilities of the National Gendarmerie, such use is subject to authorization under conditions laid down by decree of the Council of State*".

[101] *Ibid*., Arts. R214-1 and R214-2.

[102] Penal Code, Art. 431-3: "*An unlawful assembly is any gathering of persons on the public highway or in any place open to the public where it is liable to breach public order*". Defence Code, Art. D1321-3§3: "*The requisition of the armed forces shall be submitted by the civil authority with territorial jurisdiction to the competent military commander*". Internal Security Code, Arts. L211-9, R211-10 and following.

[103] The designated authorities are: the Departmental Prefect, or the Prefect of Police in the case of Paris; the mayor or one of their deputies (excluding Paris, where it is the Prefect of Police); or any judicial police officer in charge of public security or any other judicial police officer (police commissioner).

[104] Interministerial Directive No. 10100/SGDSN/PSE/PSN/NP of 14 November 2017 relating to the engagement of the armed forces in national territory on the basis of a legal requisition by the civil authority, Art. 23.

[105] Internal Security Code, Arts. R211-14 and R211-15.

[106] The representative of the State in the *département* or another member of the prefect's corps, or the director of cabinet services, the mayor or one of their deputies, the director of the territorial police service in charge of public order or their deputy, the commander of a departmental gendarmerie unit or their second-in-command, or, mandated by the prefectural authority, a police commissioner or officer in charge of a division placed under the authority of the director of the territorial police service in charge of public order, or a departmental gendarmerie company commander or second-in-command (Decree No. 2021-556 of 5 May 2021).

stopped", in compliance with Article R211-13 of the Internal Security Code.

3.4. Legal framework for the protection of military installations

There are many different areas and zones which are under the responsibility of the military authority, along with different legal frameworks for their protection and rules for the use of weapons. Under the general legal framework which concerns different types of areas or zones, military personnel may be entitled to the ordinary law causes of criminal non-responsibility, whereas the specific legal framework of highly sensitive defence areas (*zones de défense hautement sensibles, ZDHS*) provides for an enhanced protection regime.

3.4.1. General legal framework

Areas and zones assigned to, or placed under the control of, the military authority, whether permanently or temporarily, include all property necessary for military activities. Such areas and zones enjoy legal protection which applies both to movable and immovable property. Protected property must either bear a distinctive mark identifying it as being assigned to, or placed under the control of, the military authority, or, in lack thereof, its boundaries must be clearly marked out with signs indicating that entry is prohibited.

The legal protection regime relating to such areas and zones is provided for under Article 413-5 (misdemeanour for fraudulent access) and Article R644-1 (infraction of the 4th group for access without fraudulent intent) of the Penal Code. These provisions do not impose that a fence be placed around the property.

Furthermore, in the event of an intrusion into a military installation in national territory, Article L2338-3(3) of the Defence Code authorizes military personnel in charge of its protection to "*use their firearms under the conditions set out in Article L435-1(1) to (4) of the Internal Security Code in case of absolute necessity and in a strictly proportional manner*".

There are several types of areas which enjoy such general protection:

- protected military area (*zone protégée, ZP*).

Protected military areas (ZP) [107] are established by ministerial order and must have clearly visible boundaries[108]. They include premises and land that are owned or managed by public or private services, institutions or companies, and are either of interest to national defence, or are intended to protect the nation's scientific or technical assets. In such cases, the aim is to protect essential elements of scientific or technical potential, which do not fall within the scope of highly sensitive defence areas, from being exploited in such a way as to weaken defence capabilities, undermine national security or harm other fundamental interests, or from being misused for terrorist purposes, to increase the proliferation of weapons of mass destruction and their means of delivery, or to contribute to the expansion of military arsenals.

ZPs come under a legal protection regime provided for under Article 413-7 of the Penal Code, which specifies that the protection covers installations as well as equipment and the confidentiality of any research, study or production. Unlike that of military land or ports, this regime provides that relevant premises or land must be fenced off, that free movement is prohibited and that access or entry must be granted.

Unauthorized intrusion into a protected military area (in the strict sense) or restricted area (areas intended to

[107] Defence Code, Art. R2362-1.

[108] Penal Code, Art. R413-4: "*The order establishing a protected military area shall be notified to the head of the service, institution or company, who shall take all necessary measures, under the control of the authority which determined the need for such protection, to make clearly visible the boundaries of that area as well as the restrictions applicable to it. A copy of the order shall be forwarded to the Minister of the Interior and Prefects with territorial jurisdiction to provide them with information and, where applicable, for the purposes of implementing provisions under their competence*".

protect scientific or technical assets[109]) is punishable by a penalty of six months' imprisonment and a €7,500 fine.

- restricted nuclear area (*zone nucléaire à accès réglementé, ZNAR*).

Restricted nuclear areas (ZNAR) are facilities and installations assigned to, or placed under the control of, the military authority that contain nuclear materials, the possession of which is subject to a specific authorization provided for under Article L1333-2 of the Defence Code. ZNAR must be enclosed and their boundaries must be clearly marked out with signs indicating that the area is a restricted nuclear area, that access without authorization is prohibited and that trespassing is punishable by one year' imprisonment and a €15,000 fine under Article L1333-13-12 of the Defence Code.

ZNAR are established by order of the Minister of Defence for ZNAR under their authority, by order of the Minister in charge of Energy for ZNAR within their sole competence, and by joint order of both Ministers where the ZNAR falls within both their remits.

Unlike ZDHS, ZNAR and ZP are not always strictly military areas.

3.4.2. Legal framework for ZDHS

Highly sensitive defence area (*zone de défense hautement sensible, ZDHS*)[110] is defined as an area "*within which military property is located or stationed, the loss or destruction of which would be likely to cause very serious damage or harm to the population, or would compromise the vital interests of national defence*".

The perimeter of a ZDHS[111] is established by order of the Minister of Defence, which determines the land, air and sea boundaries of the protected area as well as the authority responsible for its safety. This authority sets up a protection plan which must be adopted by the Minister.

No one may have access to a ZDHS unless they have an express authorization from the authority responsible for its safety, whether permanent or temporary, indicating the conditions for movement within the area. Such authorization may be withdrawn at any time[112].

As any other military land, ZDHS fall within the scope of the legal protection provided for under Articles 413-5 and R644-1 of the Penal Code.

Military personnel may, after giving warnings, use armed force which is absolutely necessary to prevent or stop any intrusion into a ZDHS and to arrest the intruder[113]. Accordingly, the land and sea boundaries of a ZDHS must be clearly marked out by any appropriate means and specific signs designed to indicate unequivocally that access to the area is subject to strict control[114].

As regards air boundaries, the conditions for prohibiting flights into a ZDHS are determined by joint order of the Minister of Defence and Minister in charge of Civil Aviation[115].

3.4.2.1. ZDHS: land boundaries

In accordance with Article L1142-1 of the Defence Code, military personnel of the armed forces may operate

[109] Penal Code, Art. R413-5§1.
[110] Defence Code, Art. L4123-12(I)§2.
[111] *Ibid*., Art. R2363-1.
[112] *Ibid*., Art. R2363-2.
[113] *Ibid*., Art. L4123-12(I)§1.
[114] *Ibid*., Art. R2363-3.
[115] *Ibid*., Art. R2363-4.

in national territory without the need for a legal requisition from the civil authority, under the responsibility of the Minister of Defence, to ensure the protection of military compounds, facilities, activities and personnel. For this purpose, they may use their firearms to prevent or stop any intrusion, or attempted intrusion, into a ZDHS and to arrest the intruder, in compliance with Article L4123-12(I) of the Defence Code. Under Article R2363-5 of that Code, they must first give two verbal warnings before using armed force.

3.4.2.2. ZDHS: sea boundaries

In the maritime domain, the perimeter of a ZHDS must also be clearly marked out with specific signs[116] indicating that any entry into the area is prohibited.

Likewise, the criminal immunity under Article L4123-12(I) of the Defence Code applies to military personnel who must use their firearms to prevent or stop any intrusion into the sea part of a ZDHS after two verbal warnings have remained unheeded, in compliance with Article R2363-6 of that Code. Those warnings must be adapted to the maritime domain (e.g. visual warnings for surface intrusion and acoustic warnings for underwater intrusion).

3.4.2.3. ZDHS: air boundaries

In accordance with the French Transport Code, "*any aircraft may fly over French territory unrestrictedly*"[117] except in certain areas or zones which may be subject to a flight ban "*for military or public security reasons*"[118], including ZDHS.

Where measures taken pursuant to the Transport Code for preventing flights into a ZDHS[119] are not sufficient, military personnel may, as a last resort, use armed force to stop such flights. The warning procedure in case of intrusion, or attempted intrusion, into a ZDHS by air is adapted to the air domain under Article R2363-7 of the Defence Code, which authorizes the use of armed force after one single warning shot has remained unheeded. The same procedure applies in case of intrusion by parachute.

[116] *Ibid*., Art. R2363-3.
[117] Transport Code, Art. L6211-1.
[118] *Ibid*., Art. L6211-4§1.
[119] *Ibid*., Arts. L6211-4 and L6211-5.

PART 2

THE LEGAL FRAMEWORK FOR THE INTERVENTION OF THE ARMED FORCES OUTSIDE FRENCH NATIONAL TERRITORY

CHAPTER 1: INTERVENTIONS ABROAD

According to Article 2(4) of the United Nations Charter, "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*".

Article 2(7) provides that "*nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII*".

In its resolution 36/103 of 9 December 1981, the United Nations General Assembly recalled that the principle of non-intervention in a State's internal affairs is corollary to the fundamental principles of sovereignty and sovereign equality enshrined in the UN Charter.

Interventions are lawful under international law when they are carried out under Chapters VI, VII or VIII of the UN Charter or explicitly asked for and approved by the State on whose territory the intervention takes place. Consequently, armed or non-armed interventions, whether individual or collective, can be conducted under the authority of an international or regional organization or as part of an interstate cooperation.

1.1. Peace operations

Peace operations, in particular peace support, peacekeeping or peace enforcement operations, are not explicitly provided for in the UN Charter, nor are they specifically defined under public international law. For the purposes of this subsection, "peace operations" mean UN-led peace support, peacekeeping or peace enforcement operations based on a UN Security Council resolution adopted under Chapter VI, VII or VIII of the UN Charter.

The law applicable to such operations mainly derives from their corresponding UN Security Council or General Assembly resolutions, relevant agreements with the host State as well as field practices in line with relevant instructions from the United Nations Secretary-General.

1.1.1. Expansion of the range of tasks assigned to peace operations

When they were created in 1948, peace operations primarily aimed at ensuring supervision of cease-fires and helping States to stabilize their domestic situation. Over time, their missions have become increasingly complex and diverse in response to crises, international armed conflicts (IACs), non-international armed conflicts (NIACs), the involvement of armed groups, etc.

Beyond the mere security scope of peacekeeping operations, their mandates now often include peacebuilding activities, even after the conflict in question has ended, such as maintaining security, supporting political processes, cooperating with local authorities, ensuring civilian protection, strengthening the rule of law, preserving human rights, providing humanitarian assistance, supporting disarmament, demobilization and reintegration programmes or reforming the local security sector.

Regional organizations, operating under Chapter VIII of the UN Charter, are often involved when UN-mandated peace operations are deployed, mainly following three different patterns:

On various occasions, the deployment of military or police forces as part of a peace operation carried out by a regional organization was followed by the establishment of a United Nations peace operation.

An example for such a situation is the transfer of authority on 1 July 2013 from the African-led International Support Mission in Mali (AFISMA), which was led by the Economic Community of West African States

(ECOWAS), to the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) established pursuant to UNSC resolution 2100 (2013).

In other cases, peace operations consisting solely of civilian and/or police personnel were deployed in addition to forces already engaged by a regional organization, as was the case with the EU-led EUFOR mission which was established in support of the United Nations Mission in the Central African Republic and Chad (MINURCAT) pursuant to resolution 1778 (2007).

Lastly, the UN Security Council occasionally set up hybrid peace operations in which forces stemming both from the UN and regional organizations were deployed under a joint leadership. Such a situation happened when the Council established the African Union-United Nations Hybrid Operation in Darfur (UNAMID) pursuant to its resolution 1769 (2007) in order to secure peace in this region of western Sudan. That joint mission was led concurrently by the UN and the African Union, which has its own chain of command and rules of engagement independently from those of the UN.

1.1.2. The threefold regulatory framework for peace operations

A peace operation is a subsidiary organ of the UN body that establishes it (see Articles 22 and 29 of the UN Charter[120]). That body decides to establish a peace operation in principle with the approval of the State(s) on whose territory it is supposed to take place, and sets out its mandate. Peace operations end when the competent body decides it or when the State on whose territory the operation takes place demands it in the case of peace operations set up by the UN General Assembly or Security Council (excluding operations under Chapter VII).

The main instruments governing peace operations are: their mandate given by the General Assembly or, most frequently, by the Security Council; relevant agreement(s) between the UN and the State on whose territory the operation takes place; the relevant status-of-forces agreement[121] (which pertains to deployed forces, also called "contingent"); the rules laid down by the UN Secretary-General; the rules of engagement (ROE) for the military component and directives on the use of force (DUF) for the police component.

1.1.2.1. The Charter of the United Nations

In recent practice, peace operations have been established by the United Nations Security Council (UNSC), which is in charge of maintaining international peace and security. They may be established pursuant to Chapters VI, VII and VIII of the United Nations Charter.

Although they constitute a form of "*action*" within the meaning of Chapter VII of the UN Charter, peace operations have traditionally been associated with Chapter VI. However, on many occasions, the UNSC deemed appropriate to invoke Chapter VII of the Charter when authorizing the deployment of peace operations into volatile post-conflict settings where the State had been unable to maintain security and public order. That legal basis for its action can be seen as a statement of firm political resolve and a means of reminding the parties to a conflict and the wider UN membership of their obligation to give effect to Security Council decisions[122].

The tasks assigned to a peace operation are set out in detail in its mandate, which varies depending on the situation, the nature of the conflict and the specific challenges at hand. It may also differ based on the nature

[120] See article 15 of the model status-of-force agreement prepared by the UN Secretary-General at the request of the General Assembly, according to which "*the United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations*". United Nations General Assembly, Model status-of-force agreement for peace-keeping operations, UN Doc. A/45/594 (1990), §15.

[121] For more details about status-of-forces agreements, see Part 3, Chapters 2 and 7.

[122] The use of force authorized in operations under Chapter VII can go beyond the scope of self-defence. This is the case when certain operations are authorized to use force if they witness an imminent threat of serious violations of international humanitarian law against civilians.

and content of agreements between the parties on the implementation of a cease-fire or a more comprehensive peace agreement, which are supported by peace operations. Although each peace operation is singular, there is a considerable degree of consistency in the thematic priorities assigned to them by the Council, as shown by its resolution 1325 (2000) on women, peace and security; its resolutions 1379 (2001), 1460 (2003) and 1612 (2005) on children and armed conflict; and its resolutions 1265 (1999) and 1894 (2009) on the protection of civilians in armed conflict.

1.1.2.2. International Humanitarian Law

Many peace operations are deployed in the context of a pre-existing conflict where hostilities are ongoing or might resume. Those situations are often characterized by the involvement of combatants and/or members of organized armed groups and vulnerable civilian populations, to which the Geneva Conventions and their Additional Protocols apply.

Depending on the circumstances, relevant provisions of International Humanitarian Law (IHL) may apply to a peace operation regardless of its mandate and of whether it was established under Chapter VI or VII of the UN Charter. Situations of conflicts are characterized as international or non-international by matching the context to the criteria of Common Articles 2 (IAC) and 3 (NIAC) of the Geneva Conventions and, where applicable, Article 1 of Additional Protocol II. If an operation's multinational forces become actively involved in hostilities, either on their own initiative[123] or in response to attacks, they may become parties to an armed conflict, in the same way as the present State forces or armed groups[124]. Therefore, if the military personnel of a peacekeeping operation (PKO) multiply acts of self-defence, it can imply, depending on the circumstances, that the intensity threshold for the conflict to qualify as a NIAC has been reached and that a PKO has become a party to that NIAC as a result. In the Secretary-General's Bulletin of 6 August 1999 entitled *Observance by United Nations forces of international humanitarian law*[125], which has been analysed by the ICRC[126], the United Nations Organization sets out its doctrine with regard to the fundamental principles and rules of IHL that apply to peace operations.

1.1.2.3. International Human Rights Law

Respect for human rights is an essential part of the regulatory framework for peace operations, whose mandate aims, *inter alia*, at advancing their enforcement. All peace operation personnel must observe human rights in their dealings with local populations as well as in their public and private life, and act appropriately in case of human rights violations while keeping in line with their mandate.

Despite the fact that IHL constitutes the *lex specialis* in armed conflicts, at least regarding the conduct of hostilities, international human rights law (IHRL) continues to apply even in such armed conflicts, which is particularly relevant for individuals captured in the course of a NIAC[127].

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[123] For instance, the mandate of the MONUSCO includes the following: "*in support of the authorities of the DRC, carry out targeted offensive operations in the DRC to neutralise armed groups and contribute to the objective of reducing the threat posed by armed groups to state authority and civilian security in the DRC*".

[124] Under such circumstances, the members of the military component do not enjoy the protection of civilians under IHL anymore. The members of the civilian component continue to enjoy it unless they commit acts that may be qualified as direct participation in hostilities (DPH). The exercise of individual self-defence by the peace operation's personnel does not amount to DPH.

[125] UNSG, Observance by United Nations forces of international humanitarian law, Secretary-General's Bulletin, ST/SGB/1999/13 (6 August 1999).

[126] Anne Ryniker, "Observance by United Nations Forces of International Humanitarian Law: Comments on the Secretary General's Bulletin of 6 August 1999", *International Review of the Red Cross*, Vol. 81, No.°836, 1999. See also Tristan Ferraro, "The Applicability and Application of International Humanitarian Law to Multinational Forces", *International Review of the Red Cross*, Vol. 95, No. 891/892, 2013, pp. 561-612.

[127] ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, 19 December 2005, I.C.J. Reports 2005, p. 168, §216: "*As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law*".

1.1.3. The three basic principles of peace operations

1.1.3.1. Consent of the parties and impartiality

With the approval of the main parties (given that it is *per se* difficult to obtain consent of organized armed groups), a peace operation can have the necessary freedom of action, both political and physical, to carry out its mandated tasks. In the absence of such consent, a peace operation risks becoming a party to the conflict and being drawn away from its fundamental role of keeping the peace.

The fact that the main parties have given their consent at the strategic level does not necessarily imply or guarantee that there will also be consent at the local or tactical level, particularly if the main parties are internally divided or have weak command and control systems.

Impartiality is crucial to maintaining the consent and cooperation of the main parties.

1.1.3.2. Non-use of force except in self-defence or defence of the mandate

The principle of non-use of force except in self-defence was introduced when armed Blue Helmets were first deployed in 1956. Thereafter, this principle was extended to include resistance to attempts by forceful means to prevent a peace operation from carrying out its mandate[128].

Peace operations are not a peace enforcement tool. However, it is widely recognized that peace operation personnel may, when the Security Council (strategic level) authorizes it under Chapter VII of the UN Charter, use armed force and coercion in order to carry out its mandate, protect populations or fight organized armed groups.

Peace operations must remain sensitive to the need to quickly reduce the level of violence and return to using non-violent means of persuasion. Once every other methods of persuasion have been exhausted, force may be used as a last resort, in a precise, proportional, appropriate and reversible manner, in accordance with the principle of minimum force necessary to reach the intended outcome, while maintaining consent for the mission and its mandate.

Several UN peace operations, deployed in contexts where hostile armed forces and/or organized armed groups are involved, received a so-called "robust" mandate from the Security Council pursuant to which they are "*authorized to use all necessary means*" to deter any attempts to disrupt the peace process, to protect civilians under imminent threat of physical attack or to help national authorities to maintain public order[129].

Although they may sometimes appear similar, robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the United Nations Charter. Robust peacekeeping involves the use of force at the tactical level with the authorization of the Security Council and consent of the host government and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force, which is prohibited under Article 2(4) of the UN Charter except when authorized by the Security Council.

Since situations in which recent peace operations have been deployed are volatile and perilous, the relevant rules of engagement are sufficiently robust to both preserve the mission's credibility and maintain the freedom of action required to carry out its mandate. The rules of engagement for the peace operation's military component and the directives on the use of force for its police component determine the level of

[128] See, in that regard, operative §18 of the UNSC resolution 2100 (2013) that established MINUSMA.

[129] See for example the UNSC resolution 2098 (2013) in which the Council decided to deploy, for a period of one year and under command of MONUSCO, an Intervention Brigade, which was authorized to "*neutralize*" and "*disarm*" Congolese rebel groups that took over the city of Goma.

force that may be employed in different situations and the related authorizations by the appropriate level of command.

1.1.4. Command and control

The authority over peace operations derives from Chapter XV of the UN Charter which provides that the Secretary-General, as Senior Official of the Organization, shall perform all functions entrusted to him by the Security Council. UN staffs responsible for peacekeeping both at the Headquarters and in field operations are appointed by the Secretary-General according to the rules laid down by the UN General Assembly. Within the UN Secretariat, the Department of Peace Operations (DPO) defines internal policies and directives and provides peace operations with strategic guidelines, while the Department of Operational Support (DOS) offers them logistical and administrative support.

The Head of the DPO, acting on behalf of the Secretary-General, defines the peace operation's mission concept, instructions, plans, orders and rules of engagement.

The Special Representative of the Secretary-General (SRSG), Head of Mission (HOM) on the ground, is responsible for the strategic conduct of operations. The SRSG is assisted in their tasks by a Deputy SRSG and a Deputy Head of Mission as well as the Force Commander who commands the troops and military observers[130].

In the field, the HOM exercises operational authority over the UN peace operation's activities, including military, police and civilian resources. The United Nations exercises operational and effective control over the activities that the military personnel provided by Member States carry out, while observing the troop-contributing States' restrictions on force employment ('national caveats') as well as their retained competence over certain criminal or disciplinary matters and regarding the unilateral withdrawal of their troops.

It has been the long-established position of the United Nations that "*forces placed at the disposal of the United Nations are 'transformed' into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, 'effective'*"[131]. Furthermore, the European Court of Human Rights (ECtHR) also held "*that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, 'attributable' to the UN in the same sense*"[132] and not such as to entail the responsibility of troop-contributing States. The same applies to all UN peace operations where the Security Council retains "*ultimate authority and control*"[133], including when the operational command is delegated to another body such as NATO[134].

By contrast, multinational operations authorized by the Security Council do not entail the responsibility of the UN Organization when authorized forces stay under 'effective command and control' of States or international organizations such as NATO, as was the case with the International Security Assistance Force in Afghanistan that was authorized under Chapter VII in UNSC resolution 1386 (2001)[135].

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[130] United Nations Department of Peacekeeping Operations, Department of Field Support, *Authority, Command and Control in United Nations Peacekeeping Operations*, UN DPKO/DFS (2008), 2008 reviewed 2009.
[131] International Law Commission, *Responsibility of international organizations*, Sixty-third session (2011), A/CN.4/637/Add.1, p. 13.
[132] ECtHR, Grand Chamber Decision as to the admissibility of Application No. 71412/01 by Agim BEHRAMI and Bekir BEHRAMI against France and Application No. 78166/01 by Ruzhdi SARAMATI against France, Germany and Norway, §143.
[133] *Ibid.*, §134.
[134] *Ibid.*, §134 et seq.: in the case of the KFOR mission established by the UNSC in its resolution 1244 of 10 June 1999, the Council retains "*ultimate authority and control*" because 1) Chapter VII allows the power delegation; 2) "*the relevant power was a delegable power*"; 3) the relevant resolution explicitly provided for the delegation; 4) "*the Resolution put sufficiently defined limits on the delegation*"; and 5) "*the leadership of the military presence was required by the Resolution to report to the UNSC"*.
[135] For more information about the respective responsibility of troop-contributing States and the UNO, which goes beyond the scope of this Manual, see the ECtHR case law (in particular the case of *Al-Jedda v. the United Kingdom*, Application No. 27021/08, Grand

1.1.5. French support for peace operations

France is the only permanent member of the UN Security Council that deploys its armed forces to support peace operations. Examples in recent years are the Operation *Artemis* where France assumed the role of Lead nation in the EU-led Interim Emergency Multinational Force in the Democratic Republic of the Congo which was authorized by the Council in its resolution 1484 (2003), the Operation *Licorne* in which France was given authorization to "*use all necessary means*" to support the UN operation ONUCI in Côte d'Ivoire[136], or the Operation *Sangaris* in support of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA)[137].

In the context of Operation *Barkhane* in Mali, the Security Council authorized "*French forces, within the limits of their capacities and areas of deployment, to use all necessary means until the end of MINUSMA's mandate as authorized in this resolution, to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General*"[138].

1.2. Requests for material assistance

1.2.1. The principle of express and revocable consent

The notion of assistance, whether bilateral or multilateral, is not specifically defined under international law. Assistance may cover a variety of fields such as technical, financial, electoral, humanitarian or military assistance, and so on.

The implementation of mutual assistance or collective defence agreements as well as responses to corresponding requests are referred to in Part 2, Chapter 2, Subsection 2.2.

Assistance is a fundamental corollary of State sovereignty[139] and therefore all steps taken for assistance purposes must comply with the rule of non-intervention in a State's internal affairs. Assistance must be explicitly requested and approved by the beneficiary Government or bodies under its control, and translated into a formal international instrument. The beneficiary State may terminate it at any time.

1.2.2. Request for assistance in case of natural disaster

In the European Union, Article 222 of the Treaty on the Functioning of the European Union (TFEU) specifies the principles and mechanisms that apply when the political authorities of an EU Member State which is the victim of a natural or man-made disaster in its territory[140] make a request for assistance.

According to Declaration (No 37) on Article 222 of the TFEU, a Member State may "*choose the most appropriate means to comply with its own solidarity obligation towards [another] Member State*". Member States coordinate between themselves in the Council in order to comply with their own obligations. In its Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause[141], the Council specifies the terms of Article 222(3) TFEU by indicating that "*Arrangements for coordination in the Council should rely on the EU Integrated Political Crisis Response (IPCR) Arrangements*", which

Chamber Judgment, 7 July 2011, §84) and the Draft articles on the responsibility of international organizations, International Law Commission, A/66/10, §87, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two).

[136] UNSC resolution 1528 of 27 February 2004, operative §16.

[137] UNSC resolution 2149 of 10 April 2017.

[138] UNSC resolution 2531 of 29 June 2020, operative §41.

[139] UN Charter, Art. 2(1).

[140] The territorial scope of the TFEU includes the Member States' land area, internal waters, territorial sea or infrastructures (such as off-shore oil and gas installations) situated in their territorial waters, exclusive economic zone or continental shelf, and airspace. The Outermost Regions (Art. 349 TFEU), namely Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands are an integral part of the EU.

[141] Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, 2014/415/UE.

may translate into three different types of responses: exceptional measures not foreseen by existing instruments; requests for military capabilities going beyond the existing arrangements on civil protection; or measures in support of a swift response by Member States.

Bilateral assistance in case of natural disaster must be expressly requested by the beneficiary State and framed into a formal agreement specifying, *inter alia*, the intervention's time frame, geographical scope and material arrangements, the criminal and disciplinary regime applicable to French forces and the authorization for them to carry weapons and wear uniform, the conditions for the use of force (self-defence) and the arrangements for the settlement of claims.

Terms for interventions on French national territory fall within the military planning law No. 2018-607 for 2019-2025 of 13 July 2018 which contains several defence-related provisions. Its Article 50 specifies that the provisions of the Agreement between the Parties to the North Atlantic Treaty (NATO) regarding the Status of their Forces of 19 June 1951 apply to civil security and crisis management cooperation activities taking place on French metropolitan and overseas territories. Those provisions concern, *inter alia*, entry and stationing, the arrangements for carrying weapons and wearing uniform, disciplinary rules, medical care, custom duties, the primary right to exercise jurisdiction and claim settlement.

Said article may also apply when France's NATO or PfP (Partnership for Peace) partners are called upon to organize emergency rescue missions from French territory for other States in the event of natural disasters, hurricanes or storms.

1.3. The Responsibility to Protect (R2P) principle

On 16 September 2005, the UN General Assembly convened the 2005 World Summit, which coincided with the sixtieth anniversary of the Organization, and devoted one chapter of its resolution A/RES/60/1 to the "*Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*".

In that resolution, the General Assembly enshrined two different types of Responsibility to Protect: a primary responsibility for "*each individual State […] to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity*", as appropriate with the help of the international community (§138); and a subsidiary responsibility for "*the international community […] to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*" (§139). The UN further expressed that "*in this context, [they] are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity*" (§139)[142].

The resolution specifically states four crimes – genocide, war crime, ethnic cleansing and crime against humanity – that constitute the threshold for implementing the Responsibility to Protect. The notion of 'ethnic cleansing' is not defined under international law or in the Statute of the International Criminal Court (Rome Statute). Ethnic cleansing can be seen as a form of genocide, which is referred to in Article 6(b) of the Rome Statute, or crime against humanity (Article 7(h) Rome Statute).

The UN may act under the framework of the Responsibility to Protect, but it is not an obligation. The R2P is a subsidiary and gradual responsibility, and does not call into question the principle of State sovereignty or the conditions for the use of force as laid down in the UN Charter.

[142] 2005 World Summit Outcome, *Resolution adopted by the General Assembly on 16 September 2005*, A/RES/60/1. See also the Report of the Secretary-General of 12 January 2009 on *Implementing the responsibility to protect*, A/63/677.

In 2006, the Security Council reaffirmed its commitment to the R2P principle in its resolution 1674 on the protection of civilians in armed conflict (§4), then in resolution 1706 (§9) authorizing the deployment of 17.300 Blue Helmets in Darfur – a mission that was rejected by the Sudanese authorities. In its resolutions 1970 and 1973 (2011), the Council invoked the R2P in order to protect the civilian population in Libya.

In said resolution 1970 (2011), the Council recalled "*the Libyan authorities' responsibility to protect its population*" and demanded "*an immediate end to the violence*". Then, in resolution 1973 (2011), it considered "*that the widespread and systematic attacks […] against the civilian population may amount to crimes against humanity*" and, acting under Chapter VII of the Charter, authorized "*Member States […] to take all necessary measures […] to protect civilians and civilian populated areas under threat of attack […], while excluding a foreign occupation force of any form on any part of Libyan territory*" (§4). In doing so, the Council authorized a military operation consisting of a coalition led by the USA, France and the United Kingdom under NATO command to use force against Libyan armed forces. Other measures taken included the establishment of a ban on all flights (§6), a reinforcement of the embargo (§13) and of the individual and financial sanctions (§19).

In spite of criticisms against this UN intervention, in doing so, the Security Council could preventively and gradually implement diplomatic, humanitarian, economic and coercive measures in coordination with the whole UN system and relevant regional organizations.

While the implementation of the R2P does not breach the basic principles of international law, it is nonetheless subject to political, strategic and military considerations.

CHAPTER 2: LEGAL GROUNDS FOR THE USE OF ARMED FORCE BY STATES IN INTERNATIONAL RELATIONS

The prohibition of the use of force is enshrined in Article 2(4) of the United Nations Charter: "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*".

However, there are exceptions to that prohibition. In accordance with the basic principles of sovereign equality and respect for territorial integrity, a State may lawfully use force against another State only in three situations:

- The armed intervention was consented to by the State with territorial jurisdiction.
- The armed intervention was authorized by the UN Security Council through a resolution under Chapter VII of the Charter.
- The former State is resorting to individual or collective self-defence in response to an armed attack from the latter State, as provided for in Article 51 of the Charter and until the Security Council has taken action.

There have been long-standing debates on the conditions under which the use of armed force may be lawful, and States have different interpretations and practices in that respect.

According to the International Court of Justice (ICJ), however, there are different thresholds for the use of armed force[143]. The use of force or the support for an armed intervention on the territory of another State does not necessarily constitute an act of aggression. Those wrongful acts may amount to a violation of the principle of non-use of force and to an intervention in another State's internal affairs, which are unlawful conducts of lesser gravity than an armed attack.

In the event of an attack below the threshold of armed attack, countermeasures may be lawfully taken if they comply with the four relevant conditions laid down by the ICJ[144].

Focus: The Constitutional Requirements for France's Involvement in Armed Conflicts

The respective functions of the French Parliament and the French Government regarding warfare[145] and interventions of the armed forces abroad are laid down in the Constitution of 4 October 1958.

According to its Article 35(1), "*A declaration of war shall be authorized by Parliament*". That provision, which refers to inter-state armed conflicts, has never been enforced, although France has been involved in such conflicts, for instance in Afghanistan at the beginning of the conflict (2001) and in Libya (2011).

Post-World War II international law no longer requires States to declare war[146], and such declarations have become very rare. For example, French interventions abroad were carried out on the grounds of the different exceptions to the prohibition of the threat or use of armed force, as envisaged by the UN Charter (see subsection 2.1. below). France's compliance with international law is enshrined in the Preamble to the Constitution of 1946, which is part of the 'block of constitutionality' under

[143] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 101, §191.
[144] *Ibid*., p. 127, §249; Also ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, pp. 55-56, §§83-85.
[145] The French constitutional tradition has seen two different ways to distribute powers relating to declarations of war between the executive and legislative branches: under the Constitutions of 1791, 1795 and 1799, a declaration of war was decided by the legislature on the exclusive initiative of the executive, whereas the Constitutions of 1848, 1875, 1946 and 1958 conferred that power on the executive which may declare war upon consent of the legislature.
[146] According to Art. 1 of the 1907 Hague Convention (III) relative to the Opening of Hostilities, "*the contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war*".

the current Constitution. It provides that "*the French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people*" (§14).

Prior to the constitutional reform of 23 July 2008, the Parliament exercised control over armed interventions outside the national territory – most frequently in non-international armed conflicts (NIACs) – in political, legislative (including authorizing ratification of defence-related international agreements) and budgetary matters. Following the 2008 review of the Constitution, its Article 35 was enlarged by three paragraphs[147], striking a balance between democratic requirements and the strategic responsiveness expected from a permanent member of the UN Security Council.

The Parliament's action in that field, in particular its authorization powers, concerns 'interventions of armed forces abroad'. Given that the term 'intervention' is not specifically defined in the Constitution, the legislators intended to establish a twofold criterion in quantitative and political terms by using that expression in order to focus the Parliament's control on operations abroad where forces are projected into crisis contexts in detachments set up for operational purposes, with the political objective of maintaining or restoring peace. It may include national, multinational (such as NATO or EU) and international (UN) interventions. Therefore, such interventions are not limited to involvements within NIACs. However, they do not cover exchanges of troops, military exercises, pre-positioning under international agreements, moving military vessels and aircraft into international spaces, ships stopovers and intelligence or special forces operations.

Under the Constitution, the Parliament must be informed of interventions abroad at the latest three days after the beginning of said intervention. Therefore, the Parliament may be informed only after the troops have been engaged. The Constitution does not specify the starting point of that three-day period; however, according to the parliamentary debates that took place during the reform process[148], that period runs from the deployment of the forces. The terms for that information duty are set out by the Prime Minister, who, under Article 21 of the Constitution, shall direct the actions of the Government and be responsible for national defence. Over time, that information duty took the form of a declaration from the Government in a public session, followed by a debate in both chambers of Parliament, or of a notification to the relevant parliamentary committees only.

However, when the intervention exceeds four months, the Government must obtain the Parliament's authorization.

Even when the Government is not required to inform the Parliament within the meaning of, and in compliance with, Article 35(2) of the Constitution, it may provide the Parliament with any useful information. In that case however, the executive does not have to organize a vote to authorize a later extension (Article 35(3)) of an operation's duration if the intervention exceeds four months.

2.1. The prohibition of the threat or use of armed force under the United Nations Charter

The ICJ recalled "*that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations*"[149].

According to Article 2(4) of the United Nations Charter, "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*".

[147] French Constitution of 4 October 1958, Art. 35(2-4): "*The Government shall inform Parliament of its decision to have the armed forces intervene abroad, at the latest three days after the beginning of said intervention. It shall detail the objectives of the said intervention. This information may give rise to a debate, which shall not be followed by a vote." / "Where the said intervention shall exceed four months, the Government shall submit the extension to Parliament for authorization. It may ask the National Assembly [the lower house of Parliament] to make the final decision." / "If Parliament is not sitting at the end of the four-month period, it shall express its decision at the opening of the following session"*.

[148] French Senate, meeting of 19 June 2008 on the modernization of the 5th Republic's institutions – resumption of debates on a constitutional amendment bill.

[149] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 97, §181.

Although the expression 'use of force' is not explicitly defined in the Charter, its prohibition under Article 2(4) is not specifically limited to the direct use of armed force by States. Indeed, the States also inferred from the principle of the prohibition of the use of force that "e*very State has the duty to refrain from organizing or encouraging the organization of irregular forces […] for incursion into the territory of another State*" and "*from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts*"[150].

It should be noted that the prohibition on the use of armed force, as a corollary of the sovereign equality of States, applies only to interstate relations. Thus, the use of force falling within the domestic jurisdiction of States, such as the maintenance of public order or, more generally, police activities, including the boarding of ships in territorial seas, are not covered by Article 2(4) of the UN Charter.

2.2. The three situations where a State may lawfully use armed force

As previously stated, in accordance with the basic principles of sovereign equality and respect for territorial integrity, as well as with the prohibition of the use of force under Article 2(4) of the UN Charter, the use of armed force by a State on the territory of another State is lawful only in three situations:

- Exercise of individual or collective self-defence.
- Intervention authorized by the UN Security Council acting under Chapter VII of the Charter.
- Intervention consented to by the State on whose territory it takes place.

2.2.1. The exercise of individual or collective self-defence

The ICJ has acknowledged the customary nature of the right of self-defence, which is supplemented by the relevant provisions of the UN Charter[151].

Article 51 of the Charter provides that "*nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*".

In the English version of the Charter, the concepts of 'attack' and 'aggression', which are both conveyed using the word "*agression*" in the French version, are not specifically defined.

On 14 December 1974, the UN General Assembly adopted its resolution 3314 (XXIX) whereby the international community reached a consensus on the definition of aggression, determining that "*aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter*"[152]. In its Article 3, it drew up a non-exhaustive list of acts that may qualify as acts of aggression, which includes "*the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another*". Although said resolution is not binding in itself, its content reflects customary law[153]. However, the Security Council remains free to refer to it in exercising its prerogatives (Article 39 of the Charter). Therefore, the Security Council has discretion in determining whether a given situation qualifies as an

[150] UNGA resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United States.
[151] *Ibid*., p. 94, §176; Also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 263, §96.
[152] UNGA resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression, A/RES/3314(XXIX), Art. 1.
[153] Cf. ICJ, Military and Paramilitary Activities in und against Nicaragua (§195): The ICJ construes resolution 3314 as customary law.

aggression "*in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity*"[154].

Four cumulative requirements must be satisfied in order to invoke self-defence.

The first requirement is the existence of an armed attack by a State, as stated in the ICJ case law[155], or by armed groups acting on the instructions of, or under the direction or control of, a State[156], or over which a State has effective control[157]; moreover, such an armed attack must reach a certain gravity threshold[158]. Consequently, not all violations of the principle of non-use of force will necessarily qualify as an armed attack[159]. Each State remains free in determining the gravity threshold for and the legal qualification of an armed attack depending on the factual circumstances and its foreign and defence policies.

For the second requirement to be met, the State victim of an attack must characterize the acts as an armed attack. Following such classification, third States may assist the victim State on the grounds of collective self-defence, provided that the victim State's competent authorities have expressly requested it. It is not necessary to have previously entered into a bilateral or multilateral agreement in order to invoke collective self-defence. A victim State may submit a request for assistance at the time of the attack or thereafter.

The third requirement consists in the obligation to immediately report any measures taken in self-defence to the Security Council. The freedom of action of States acting in self-defence is time-limited because the Security Council may "*take at any time such action as it deems necessary*" (Art. 51 UN Charter).

The fourth and last requirement is the strict compliance of the response with the principles of necessity and proportionality. That requirement may prove difficult to apply when the attacker State is acting in an indirect manner by supporting or exercising effective control over organized armed groups[160]. In any case, the response in self-defence shall be temporary, until the Security Council has intervened or the parties involved have peacefully settled their dispute, and shall under no circumstances give rise to final measures such as annexing or permanently changing the status of a territory.

[154] UNGA resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression, A/RES/3314(XXIX), Art. 2.
[155] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 103, §195; See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 194, §139: "*Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State*".
[156] Draft articles on Responsibility of States for internationally wrongful acts, Article 8, Report of the International Law Commission, A/56/10, *Yearbook of the International Law Commission* 2001, §76, p. 45.
[157] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 65, §115.
[158] *Ibid*., p. 127, §248. Certain States hold the view that the right of self-defence may be invoked in response to any illegal use of armed force, which might be connected to the construction put on the term "*armed attack*" used in English in Art. 51 of the Charter as a condition for exercising self-defence. France, however, like other States and in line with the ICJ case law, has established several gravity thresholds in the use of force and considers that only the most serious one, that of an "*agression armée*" (armed attack), may give rise to the right of self-defence.
[159] *Ibid*., p. 119, §230.
[160] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 103, §194; p. 122, §237.

Focus: Article 5 of the North Atlantic Treaty of 4 April 1949

In accordance with Article 5 of the North Atlantic Treaty, "*the Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area*.

"*Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security*".

Its Article 7 provides that "*this Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security*". In compliance with Article 103 of the United Nations Charter[161], the provisions of the North Atlantic Treaty fall strictly within the Charter, whose primacy is acknowledged by Article 7. Measures taken within the institutional framework of NATO do not necessarily include the use of force.

The NATO Allies invoked Article 5 only once, on the evening of 12 September 2001, less than 24 hours after the 9/11 attacks. NATO Secretary-General Lord Robertson then informed the UN Secretary-General of the Alliance's decision.

Subsequently, the North Atlantic Council, NATO's principal political decision-making body, agreed that if it determined that the attack was directed from abroad against the United States, it would be regarded as an action covered by Article 5. On 2 October, once the Council had been briefed on the results of investigations into the 9/11 attacks, it determined that they were regarded as an action covered by Article 5 (at the time, Al-Qaeda was supported and hosted by the Taliban regime).

On 4 October 2001, NATO agreed on a package of eight measures[162] to support the United States. On the request of the United States, it launched its first ever anti-terror operation – *Eagle Assist* – from mid-October 2001 to mid-May 2002. It consisted in seven NATO AWACS radar aircraft that patrolled the American airspace. This was the first time that NATO military assets were deployed in support of an Article 5 operation.

[161] UN Charter, Art. 103: "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*".

[162] The eight measures to support the United States, as agreed by NATO were: to enhance intelligence-sharing and cooperation, both bilaterally and in appropriate NATO bodies, relating to the threats posed by terrorism; to provide assistance to Allies and other countries which are or may be subject to increased terrorist threats; to take necessary measures to provide increased security for facilities of the United States and other Allies on their territory; to backfill selected Allied assets in NATO's area of responsibility that are required to directly support operations against terrorism; to provide blanket overflight clearances for the United States and other Allies' aircraft, for military flights related to operations against terrorism; to provide access for the United States and other Allies to ports and airfields on the territory of NATO member countries for operations against terrorism, including for refuelling; that the Alliance is ready to deploy elements of its Standing Naval Forces to the Eastern Mediterranean in order to provide a NATO presence and demonstrate resolve; that the Alliance is similarly ready to deploy elements of its NATO Airborne Early Warning Force to support operations against terrorism.

Focus: Article 42(7) of the Treaty on European Union

On 26 October 2001, the Alliance launched its second counter-terrorism operation in response to the attacks on the United States, Operation *Active Endeavour*. Elements of NATO's Standing Naval Forces were sent to patrol the Eastern Mediterranean and monitor shipping to detect and deter terrorist activity, including illegal trafficking. In March 2004, the operation was expanded to include the entire Mediterranean.

Article 42(7) of the Treaty on European Union provides that "*if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States*".

That solidarity clause is legally binding and enables each Member State to provide military or civilian assistance according to its own capabilities and defence policy. Contrary to the collective self-defence mechanism within NATO, which is based on an institutionalized and operational framework, here, consultation procedures are more flexible and do not involve the Union's institutions. In that regard, Article 42(8) provides that "*commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation*".

Following the November 2015 Paris attacks, France invoked that solidarity clause on 17 November 2015 and invited each EU Member State to join its military intervention against ISIS in the Middle East and to support its action in sub-Saharan African theatres of operation.

2.2.2. The use of force authorized by the Security Council in a resolution adopted under Chapter VII of the Charter

According to Article 24(1) of the Charter of the United Nations, "*its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf*". Since those concepts are not specifically defined in the Charter, the Security Council has the capacity to determine, on a case-by-case basis, the situations that may pose a threat to international peace and security.

In accordance with Chapter VII, the Security Council may make recommendations and decisions by which all Member States must abide under Article 25[163].

Under Article 39 of the Charter, the Security Council has the power to legally characterize a situation and "*determine the existence of any threat to the peace, breach of the peace, or act of aggression*"[164]. Upon doing so, it may, as appropriate, make recommendations to the States concerned or take action under the following articles of Chapter VII. The Council is not bound to implement increasing severity when imposing sanctions[165].

The Security Council may take provisional measures under Article 40, decide coercive measures not involving the use of armed force under Article 41 and take coercive action by air, sea or land forces under Article 42. To date, Articles 43 and following, relating to arrangements under which military may be made available to the Council, have never been implemented.

[163] Under Article 25 of the Charter, ***all*** decisions of the UNSC are binding, regardless of whether they address recommendations for the pacific settlement of a dispute (Chapter VI) or economic or military coercive measures provided for in Chapter VII to face any "*threat to the peace*" or "*breach of the peace*".
[164] Such characterization is made in the preambular paragraphs of a UNSC resolution prior to the statement according to which the Council is "*acting under Chapter VII of the Charter of the United Nations*".
[165] See, in that regard, ICTY, Appeals Chamber, *Tadic*, Judgement, IT-94-1-A, 2 October 1995, §28 et seq.

In a resolution adopted under Chapter VII of the Charter, the Security Council may authorize the use of force by using the following statement: "*authorizes the States [or a specific State, or the forces of a specific State] to use all necessary means [or] to take all necessary means to …*". Such phrasing allows the Council to determine the goals of the authorized use of force, as well as its time frame and geographical scope where appropriate[166].

2.2.3. The consent of the State on whose territory the intervention takes place

An armed intervention on the territory of another State is lawful only if that State gives its express consent and within the confines *ratione temporis*, *ratione loci*, *ratione materiae* and *ratione personae* of that consent[167]. Such consent must be "*valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers*"[168]. It is considered as "*attributable to the State*" only if it was given by an agent or person who "*was authorized to do so on behalf of the State*"[169].

Such consent may come in different forms, e.g. a letter, or the conclusion of an intergovernmental agreement. For instance, France's intervention in Mali in January 2013 followed on from the Malian authorities' express request for assistance. Besides, it was carried out in accordance with the UN Charter and the UNSC resolutions 2056, 2071 and 2085 (2012)[170].

2.3. Evacuating nationals and rescuing hostages

Two alternative legal grounds are generally used to conduct an operation to protect and evacuate its nationals: when the Security Council authorizes it in a resolution under Chapter VII, as was the case with resolution 1975 (2011) that authorized France to protect its nationals in Côte d'Ivoire, or when the host State with territorial jurisdiction gives its express consent.

These principles also apply to hostage release operations.

2.4. The conditions under which countermeasures are lawful in case of attack below the threshold of armed attack

When a State commits internationally unlawful acts against another State that do not reach the threshold of armed attack within the meaning of Article 51 of the Charter, the victim State may take countermeasures to end such infringement and to obtain reparation.

Two categories of measures can be adopted in response to such violations.

First and foremost, retaliatory measures, which are intrinsically lawful under international law but considered unfriendly, may be implemented. For example, a State may decide to break diplomatic relations,

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[166] See, for instance, resolution 678 (1990) of 29 November 1990 on Iraq and Kuwait, operative §2; resolution 1973 (2011) of 17 March 2011 on Libya, operative §4; or resolution 2531 (2020) of 29June 2020 on Mali, operative §41.

[167] ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, pp. 196-199, §§42-54.

[168] International Law Commission, Commentary on Art. 29 "Consent" of the Draft articles on State responsibility for internationally wrongful acts, A/CN.4/SER.A/1979/Add.l (Part 2), *Yearbook of the International Law Commission*, 1979, Vol. II (2), Article 29, §11, p. 112.

[169] International Law Commission, Commentary on Art. 20 "Consent" of the Draft articles on responsibility of States for internationally wrongful acts, A/56/10, *Yearbook of the International Law Commission*, 2001, Vol. II (2), Article 20, §4, p. 174.

[170] France's intervention was notified to the UN Security Council (S/2013/17) and General Assembly on 11 January 2013: "*France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr. Dioncounda Traoré. Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of its population. I therefore wish to inform you that the French armed forces, in response to that request and in coordination with our partners, particularly those in the region, are supporting Malian units in combating those terrorist elements*".

implementing provisions of relevant conventions for the suspension of agreements or treaties, interrupting cooperation programmes, etc.

Secondly, there are countermeasures, which are measures that are normally unlawful but whose unlawfulness is exceptionally ruled out when they are taken in response to a prior internationally wrongful act.

The four conditions under which countermeasures are lawful have been set out by the ICJ in the cases concerning *Military and Paramilitary Activities in und against Nicaragua*[171] and *Gabčíkovo-Nagymaros Project*[172], and by the International Law Commission in its Draft Articles on State Responsibility (2001).

Firstly, countermeasures taken by the injured State must aim at ensuring cessation of and appropriate reparation for the internationally wrongful act by the responsible State or, where appropriate, offering guarantees of non-repetition. Such countermeasures must be reversible, and terminated as soon as the responsible State has complied with its obligations. Secondly, the use of armed force is prohibited, as are any breaches of non-reciprocal basic obligations, such as respect for international humanitarian and human rights law and the inviolability of diplomatic or consular agents, premises, archives and documents. Thirdly, "*countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question*" (Art. 51). Lastly, before taking countermeasures, an injured State shall call upon the responsible State to fulfil its obligations and offer to negotiate with that State.

[171] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 127, §249.
[172] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, pp. 55-56, §§83-85.

PART 3

THE USE OF FORCE IN ARMED CONFLICTS

CHAPTER 1: ARMED CONFLICT CLASSIFICATION – A PREREQUISITE TO DETERMINING THE APPLICABLE LEGAL FRAMEWORK

Conflict classification is the first essential step to determine the legal framework that applies to a situation in which the French armed forces are involved. It is the reasoning that consists in matching the facts *in situ* to a legal category, which gives rise to the application of the relevant legal regime[173]. In practice, the classification of an armed conflict involves two steps: first, one must determine whether a given situation may qualify as an armed conflict by matching the facts to the relevant legal criteria under international humanitarian law (IHL); then, once the existence of an armed conflict has been established, one must determine whether the situation qualifies as an international armed conflict (IAC) or a non-international armed conflict (NIAC).

The legal classification step is determinative in terms of which body of law shall apply to the conflict situation at issue. Accordingly, once it has been determined that the situation qualifies as an 'armed conflict', IHL applies, and depending on the nature of the conflict – IAC or NIAC – the respective relevant rules apply. IACs are governed by a large range of rules and instruments, including the four Geneva Conventions (GC) of 1949 and the first Additional Protocol (AP I) of 1977. A more restricted set of rules applies to NIACs. Those rules originate mainly in Common Article 3 of the four Geneva Conventions and Additional Protocol II, but also in numerous customary norms and particular conventions.

Consequently, the legal classification process is critical for legal advisors in a theatre of operations or back at the headquarters of the Ministry of Defence, because their capacity to advise accurately the heads of command on the applicable rules depends on it.

For a long time, the classification of armed confrontation was left at the discretion of belligerent States. Nowadays, political considerations by the latter play a much less important role in the legal classification of armed conflicts because this process is confined by the many criteria that international courts developed in their case law based on relevant provisions of IHL. Prior to the adoption of the four GC on 12 August 1949, 'war' was the term used in IHL instruments to identify a situation of armed confrontation. Yet, the existence of a war required the issuance of a formal act – the declaration of war – by at least one of the belligerent States. In turn, it meant that the *legal* existence of armed confrontations, and *a fortiori* the application of IHL, were dependent on the States formally recognizing a state of war[174].

Article 2(1) common to the four GC explicitly provides that the Conventions shall apply "*to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*". That provision marked a turning point in the legal classification of armed confrontations under IHL. The introduction of the notion of 'armed conflict' by the drafters of the Geneva Conventions and, at a later stage, their Additional Protocols also denotes their clear intention to objectify the classification process. Therefore, the existence of an armed conflict within the meaning of IHL instruments relies solely on objective and factual criteria, and not on the formal recognition by States of a state of war[175].

Furthermore, this classification process unfolds irrespective of whether either party considers the use of force lawful or the defended cause rightful. In fact, the determination of the lawfulness of the use of force is the concern of another branch of international law, the *jus ad bellum* (see Part 2, Chapter 2 above). The rules pertaining to that body of law do not affect the applicability of *jus in bello* norms, and vice versa[176]. So, regardless of how an armed conflict was triggered, whether following an unlawful military intervention or

[173] This step, called '*qualification (juridique)*' in French, is of particular importance in legal practice. It is defined (in French) in Jean Salmon (dir.), *Dictionnaire de Droit International Public*, Bruylant, 2001, p. 915.
[174] See, in that respect, the 1907 Hague Convention (III) relative to the Opening of Hostilities as well as the concept of 'declared war' referred to in Art. 2(1) common to the four GC.
[175] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 2.
[176] French Ministry of Defence, Manual of the Law of Armed Conflict, 2012, p. 7.

in full compliance with the United Nations Charter, it has no bearing whatsoever on the classification of the situation and, if applicable, the ensuing identification of applicable IHL rules.

There is no single international authority in charge of the classification of armed conflicts; rather, several institutions may play a role in that matter and, to that end, each consider different factors.

The United Nations Charter confers on the Security Council the role of determining whether a given situation constitutes a "*threat to the peace*", a "*breach of the peace*" or an "*act of aggression*" (Art. 39). As part of that responsibility, the Council may explicitly or implicitly determine that a situation qualifies as an international or non-international armed conflict.

The International Court of Justice (ICJ) may also have to determine the classification of an armed conflict at the request of a State party to a dispute on which the Court has to rule. Such a situation happened for instance in the case concerning *Military and Paramilitary Activities in und against Nicaragua*[177], where an internal conflict became internationalized.

The ICJ is not the only international jurisdiction that plays a part in armed conflict classification. Indeed, since the notion of 'war crime' is intrinsically linked to the existence of an armed conflict, the International Criminal Court (ICC) must first necessarily rule on the existence of such a conflict before it can determine that an act qualifies as a war crime. In addition, because of the differentiation between 'war crime' during an IAC and 'war crime' during a NIAC under its Statute[178], the ICC must also determine what type of conflict is at hand before making a decision.

Lastly, the International Committee of the Red Cross (ICRC) may also undertake the classification of a conflict situation in order to engage a confidential dialogue with the (State) parties to that conflict about the law applicable to armed conflicts and the rules that might apply in other situations of violence.

However, every State reserves the right to proceed to its own classification of the situations where its armed forces are involved, although the fact that a State fails to regard a situation as an armed conflict does not prejudice the *de facto* existence of such a conflict, nor, ultimately, the body of law that should apply to it.

In close coordination with the Ministry of Foreign Affairs, the Ministry of Defence is required to determine the classification of situations where the French armed forces are involved outside national territory. To that end, their legal departments base their analysis on factual and objective elements (at times provided by intelligence services) relating to the situation, and undertake to match them to legal categories under relevant IHL provisions, such as Articles 2 and 3 common to the GC, while taking into account the relevant case law and doctrine.

1.1. International armed conflicts still exist

Originally, IHL was developed in order to create a regulatory framework for IAC – i.e. conflicts opposing the armed forces of two or more States. In the second half of the 19th century, Henri Dunant, a Swiss humanitarian, endeavoured to tackle that task based on the experience he had when he witnessed the aftermath of the Battle of Solferino on 24 June 1859, where the allied Sardinian forces and French troops under Napoléon III fought against the Austrian Army under Emperor Franz Joseph I. Dunant's efforts led to the establishment of the International Committee for Relief to the Wounded (which soon became the International Committee of the Red Cross) and the adoption of the first Geneva Convention on 22 August 1864[179]. Yet, many States remained deeply reluctant to admit that IHL may *interfere* in their

[177] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.
[178] Rome Statute of the ICC, done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544.
[179] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, done at Geneva on 22 August 1864.

internal affairs. So, partly for that reason, the first IHL provision regulating the NIACs came about only on 12 August 1949 with the adoption of Article 3 common to the four GC. Therefore, the IAC has long been the yardstick in IHL, as can be seen in the successive amendments to IHL norms following large-scale IACs such as the Second World War.

Since the end of World War II, the number of IACs has been decreasing, whereas the number of NIACs significantly increased, as was shown in the *Uppsala Conflict Data Program* (UCDP)[180]. Nevertheless, although the world has not known any IAC as extensive as World War II since 1945, that type of conflict has not disappeared; the number thereof has even been increasing in recent years. Consequently, it remains essential to further study the IAC classification criteria under IHL.

1.1.1. The rather broad definition of international armed conflict

The definition of IAC is not specifically laid down in Article 2 common to the four GC; rather, Article 2(1) only provides that the GC "*shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*". The 1977 AP I, which supplements the GC on IACs, does not give any more detail about the constitutive elements of IACs but the new developments on wars of national liberation (see below). It is generally recognized in case law, particularly from international criminal tribunals[181], and by legal scholars that an IAC exists whenever there is a use of armed force between two or more States, including when one State occupies with military means the territory of another State.

Territory is considered occupied "*when it is actually placed under the authority of the hostile army*"[182], "*even when the occupation is not resisted*"[183]. Occupation requires the exercise of "*effective control*"[184] by hostile troops over the territory concerned[185]. The exercised control is 'effective' when the following three conditions are cumulatively fulfilled: "*the armed forces of a State are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion[186]; the effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces' unconsented-to presence; the foreign forces are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local*

[180] Therese Petterson, Stina Hogbladh & Magnus Oberg, "Organized violence, 1989-2018 and Peace Agreements", *Journal of Peace Research*, 2019, pp. 589-603.
[181] ICTY, Appeals Chamber, *Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-AR72, 2 October 1995, §70.
[182] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Art. 42.
[183] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 2, §286.
[184] There is no consensus amongst jurisdictions on the degree of control required for a situation to qualify as occupation. The European Court of Human Rights (ECtHR) held that 'overall control' was sufficient to set off the application of the Convention (see, in that regard, the Judgment of 8 July 2004 in the Case of Ilaşcu and Others v. Moldova and Russia, Application No. 48787/99). In its ruling on the issue of jurisdiction, the Court found that the Convention was in fact applicable, thus implying that a state of occupation requires a mere 'overall control' by foreign forces. By contrast, the International Court of Justice held that the effective control requirement was necessary for a situation to qualify as occupation (see, in that respect, the Judgment of 19 December 2005 in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*). Therefore, the threshold for qualification as occupation is higher for the ICJ than for the ECtHR.
[185] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 2, §301.
[186] That condition is a topic of debates amongst legal scholars. According to some interpretations, a situation could qualify as occupation where hostile forces exercise a certain authority or control over foreign territory even if they are not physically present (e.g. a land and/or sea blockade through which a State maintains its authority over a foreign territory), or even if the occupation regime is not stable yet (e.g. troops advancing into foreign territory that could be considered bound by the law of occupation from the outset of the invasion). See, in that regard, ICRC, *Commentary on the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, Art. 6, §1.

government"[187]. Occupation can also be indirect when a State exercises control over local *de facto* authorities or other local organized groups that exercise effective control over said occupied territory[188].

The definition of IAC is rather broad because, contrary to NIAC (see below), there is no specific threshold of duration or intensity of the confrontation; however, there must be a "*belligerent intent*"[189]. Consequently, IAC does not include unintentional causation of harm, such as merely erroneous or accidental cross-border firings, or acts by a State agent who oversteps their instructions (*ultra vires* acts) without the later endorsement or acquiescence of the State to which they belong[190].

So-called 'wars of national liberation' are somewhat of an outlier in the category of IAC, which includes in principle conflicts of a strictly inter-State character. They are defined in Article 1(4) of Additional Protocol I as "*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 Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*". In such situation, the authority representing the non-State party to the armed conflict may undertake to apply the GC and AP I by means of a unilateral declaration addressed to the Swiss Federal Council, the depositary of the GC (Article 96(3) AP I). Once deposited, such declaration shall result in the non-State party having the same obligation as the State party to comply with the provisions of the GC and AP I.

Upon its accession to AP I on 11 April 2001, France made two interpretative declarations on that specific provision applicable to conflicts of national liberation. Firstly, for the Government of the French Republic, the expression "*armed conflicts*" employed in Article 1(4) "*refers to a situation of a type that does not include committing ordinary crimes – including terrorist acts – irrespective of whether those crimes are collective or individual*". Secondly, regarding the procedural obligation under Article 96(3) of AP I, the Government of the French Republic deems itself bound by a declaration made in application of that article only if "*it has explicitly acknowledged that the declaration was made by an authoritative body that truly represents a people engaged in an armed conflict as defined in Article 1(4)*"[191].

Besides conflicts opposing the armed forces of two or more States and conflicts of national liberation referred to in Article 1(4) of AP I, some conflicts that are initially non-international may become internationalized because of a third State's intervention in favour of one of the warring parties (see subsection 1.3. below).

1.1.2. International armed conflicts are governed by a large set of detailed rules

International armed conflicts are governed by a large set of rules originating mainly in the four Geneva Conventions and Additional Protocol I as well as in customary international humanitarian law. Those specific rules will be addressed further in the next two Chapters.

1.1.3. The 2011 French operation *Harmattan* in Libya

On 17 March 2011, the Security Council, acting under Chapter VII of the United Nations Charter and invoking the Responsibility to Protect principle, adopted its resolution 1973 in which it determined that the situation in Libya constituted "*a threat to international peace and security*". In that resolution, the Council

[187] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 2, §304.
[188] *Ibid*., §329. See also ICTY, Trial Chamber, *Tadic*, Judgment, IT-94-1-T, 7 May 1997, §584: "*the relationship of de facto organs or agents to the foreign Power includes those circumstances in which the foreign Power 'occupies' or operates in certain territory solely through the acts of local de facto organs or agents"*.
[189] Nils Melzer, *International Humanitarian Law – A Comprehensive Introduction*, ICRC, 2022, p. 67.
[190] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 2, §241.
[191] Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts.*

authorized Member States to take all necessary – including military – measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, while excluding a foreign occupation force of any form on any part of Libyan territory. It decided, *inter alia*, to implement a no-fly zone, a ban on flights of any Libyan aircraft and an arms embargo.

Based on that resolution, the French air and sea forces intervened under the name *Harmattan* against Libyan armed forces as part of the NATO-led Operation *Unified Protector* (OUP), which was carried out from 19 March 2011 to 31 October 2011. According to the aforementioned GC criteria, the conflict opposing the French armed forces to the Libyan forces could qualify as an IAC insofar as one State in fact resorted to armed force against another State. Moreover, and in compliance with the objective assessment principle, the fact that the French political authorities declared at the time of the intervention that France was not at war with Libya does not change that conclusion because the factual situation on the ground matched the characteristics of an IAC anyway.

1.2. The number of non-international armed conflicts is increasing since the end of WWII

Nowadays, the most widely prevalent type of armed conflict is the non-international armed conflict (NIAC). That term may refer to very different situations, but under IHL, there are two types of NIAC that are governed by distinct bodies of law: low-intensity NIACs [192] (1.2.1.) and high-intensity NIACs (1.2.2.). That classification of NIACs is binding for France since its accession to Additional Protocol II on 24 February 1984. Each type of NIACs and, briefly, the corresponding legal frameworks will be addressed further in two different sections and illustrated through actual cases of operations by French armed forces.

Focus: Internal Disturbances and Tensions

In accordance with Article 1(2) AP II, the law of armed conflict does not apply to "*situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature*".

'Internal disturbances and tensions' are situations of instability within society which may lead to an armed conflict but are not governed by the law of armed conflict. According to the ICRC, 'internal disturbances' are situations in which there exists a confrontation, which is characterized by a certain seriousness or duration, assuming various forms such as riots or other acts of revolt and opposing more or less organized groups to the authorities in power. In these situations, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order[193].

As regards 'internal tensions', while they may involve torture or other kinds of ill-treatment, enforced disappearances and/or the suspension of fundamental judicial guarantees, that term refers to circumstances of violence of lesser intensity than internal disturbances[194]. If such confrontation persists or if its intensity increases, it can lead to a NIAC.

The primary purpose of the notions of internal disturbances and tensions is to determine the threshold for application of IHL. Consequently, such situations are expressly excluded from the field of application of IHL (Article 1(2) AP II) and are governed only by international human rights law (IHRL) and the domestic law of the State on whose territory they are occurring.

[192] That classification does have its limitations, because even though the intensity of confrontations is high in certain NIACs, AP II may still not apply. That is for example the case when involved armed groups do not exercise control over part of the territory concerned or when the State on whose territory the NIAC takes place is not a party to AP II.
[193] ICRC, *Commentary on the 1977 Second Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts*, 1987, Art. 1(2), §4475.
[194] *Ibid*., §§4476, 4477.

1.2.1. Low-intensity non-international armed conflict

Conflict situations must be closely analysed on a case-by-case basis, taking into account a great number of indicative factors, in order to determine whether the criteria for qualification as low-intensity or high-intensity NIAC are met.

1.2.1.1. The low-intensity NIAC criteria have been laid down by international criminal tribunals in their precedents

Following the Second World War, as the Geneva Conventions were being negotiated, the drafters decided to include Article 3 as a Common Article into all four Conventions. In that article, they laid down a minimum set of rules applying to situations of NIAC. In pursuance thereof, that provision shall apply "*in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*". However, it does not provide for a specific definition of NIAC; rather, it opposes it to the notion of IAC.

As part of its ruling on whether it had jurisdiction *ratione materiae*, The International Criminal Tribunal for the former Yugoslavia (ICTY) had to examine the notion of armed conflict. It found "*that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*"[195] (emphasis added), thereby giving NIAC a proper definition. In light of that definition, there are, in particular, two conditions that must be cumulatively fulfilled in order to determine the existence of a NIAC within the meaning of Common Article 3. First, the armed confrontation must reach a minimum level of intensity. Second, the non-State parties involved in the conflict must show a minimum of organization.

The level of intensity of the violence is assessed based on a set of 'indicative factors' developed in international case law by *ad hoc* international criminal tribunals[196]: the number and duration of the armed clashes, the types of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, the number of civilians fleeing combat zones, etc. Furthermore, the involvement of the UN Security Council may also be a reflection of the intensity of a conflict, without it being a prerequisite for the existence of the conflict.

Regarding the level of organization of the armed group, the ICTY also retained a number of indicators to determine the existence of a NIAC: the presence of a command structure, the enforcement of disciplinary rules and the existence of disciplinary authorities as well as headquarters; the effective control over a part of the territory; the capacity to procure weapons and other military equipment; the ability to recruit new members and to provide military training; the ability to plan, coordinate and carry out military operations, in particular to deploy troops and provide logistical support; the ability to determine a unified military strategy and to employ military tactics; or the ability to speak with one voice and to negotiate and conclude agreements such as cease-fires or peace agreements.

Where both conditions are cumulatively fulfilled, the situation qualifies as a non-international armed conflict within the meaning of Common Article 3, i.e. as a low-intensity NIAC.

[195] ICTY, Appeals Chamber, *Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-AR72, 2 October 1995, §70.
[196] See, in particular, ICTY, Trial Chamber, *Boskoski & Tarculovski*, Judgment, IT-04-82-T, 10 July 2008, §177; ICTY, Trial Chamber, *Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, §625; ICTY, Trial Chamber, *Haradinaj et al*., IT-04-84-T, Judgment, 3 April 2008, §§49, 60.

1.2.1.2. Rules applying to low-intensity NIACs

The existence of a NIAC entails compliance with obligations under Common Article 3 as well as the application of customary law provisions, including the basic principles governing the conduct of hostilities (see Chapter 3 below). Particular conventions, for instance on the use of certain weapons or the protection of cultural property, also apply during such armed conflicts. Moreover, States that are party to a low-intensity NIAC always have the possibility to willingly apply more restrictive rules than those prescribed in Common Article 3, for example the rules provided for in AP II.

1.2.1.3. The operation *Sangaris* in the Central African Republic (2013-2016)

On 5 December 2013, the French President decided to launch Operation *Sangaris* in the Central African Republic, aiming, *inter alia*, at restoring a minimum degree of security in that country by putting an end to acts of violence and allowing non-governmental organizations to resume their activities, and at preparing the field for the intervention of the international community (in particular the African-led International Support Mission to the Central African Republic – MISCA). Operation *Sangaris* was carried out in response to the President of the Central African Republic's request on 27 November 2013 and pursuant to UN Security Council resolution 2127 of 5 December 2013. It ended on 31 October 2016.

In that time, the confrontations in the Central African Republic opposing armed groups to the Central African armed forces and armed groups between themselves were considered a low-intensity NIAC. That qualification meant that only Article 3 common to the Geneva Conventions was in principle applicable to the situation. However, the French armed forces chose to comply with the provisions of AP II which ensure enhanced protection of civilians.

1.2.2. High-intensity non-international armed conflict

The very existence of a high-intensity NIAC classification is due the wording of Article 1(1) of AP II. Several criteria must be cumulatively met in order for a conflict situation to qualify as high-intensity NIAC, which will give rise to the application of a specific body of law. For example, the 2013 conflict in Mali, where the French armed forces intervened as part of Operation *Serval*, qualified as a high-intensity NIAC.

1.2.2.1. The high-intensity NIAC criteria are laid down in Article 1(1) AP II

Article 1(1) of AP II specifies the material field of application of the Protocol, and that field of application under IHL is more restrictive than that of Article 3 common to the Geneva Conventions. In accordance therewith, AP II "*shall apply to all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*". That provision underlines the following three main elements:

Firstly, contrary to Common Article 3, AP II is not applicable to conflicts that only pits armed groups between themselves because its material field of application is explicitly limited to conflicts between the armed forces of a State and dissident armed forces or organized armed groups.

Secondly, the field of application of AP II requires that the armed group concerned be "*under responsible command*".

Lastly, the armed group(s) under AP II must "*exercise such control over a part of [the State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*". Those three closely interrelated conditions must be in fact cumulatively fulfilled in order to trigger the application of AP II.

1.2.2.2. High-intensity NIACs are governed by Common Article 3 and AP II

Common Article 3 of the Geneva Conventions is also applicable to high-intensity non-international armed conflicts since it provides for a minimum set of rules that must be observed under any circumstances. In addition, high-intensity NIACS are governed by AP II, which develops and supplements the basic safeguards prescribed in Common Article 3. AP II thus foresees specific provisions for certain categories of civilians, such as children under Article 4(3), and imposes more obligations on parties towards "*persons deprived of their liberty*" who shall, *inter alia*, "*be allowed to receive individual or collective relief*"; "*be allowed to practise their religion*"; and "*have the benefit of medical examinations*" (Article 5). Customary IHL rules, including the basic principles governing the conduct of hostilities, also apply to high-intensity NIACs.

1.2.2.3. The Operation *Serval* in Mali (2013-2014)

On 11 January 2013, the French armed forces intervened in Mali under the operation name *Serval* in order to put a halt to the southward offensive by several armed groups, and to restore the State's sovereignty over its territory. That operation was launched in response to a request by the President of the Republic of Mali and in compliance with UNSC resolution 2085. The 2013 conflict in Mali qualified as a high-intensity NIAC since organized armed groups were exercising such control over a part of the Malian territory as to enable them to carry out sustained and concerted military operations within the meaning of Article 1(1) of AP II. Operation *Serval* ended in July 2014.

1.3. Evolution and juxtaposition of armed conflicts

Some conflict situations are very complex because of the involvement of many State and/or non-State actors. Thus, multiple types of confrontations can take place simultaneously in the same conflict area: clashes between the armed forces of two or more States, clashes opposing armed groups between themselves, or clashes confronting armed groups and the armed forces of a State. Under such circumstances, a conflict situation can correspond to different conflict classifications depending on what is in fact occurring on the ground. Sometimes, a NIAC may expand beyond the borders of a single State, which raises the issue of the classification of such particular situations and of determining the applicable body of law.

1.3.1. A NIAC may become internationalized because of another State's intervention

Conflict classification may become particularly tricky when one or more foreign States intervene in a situation of NIAC. Because of such foreign intervention, the NIAC may become internationalized.

When a State deploys its armed forces to support another State involved in a NIAC, it does not change the classification of that conflict which will remain non-international in nature. By contrast, an armed conflict taking place in the territory of a single State may become internationalized when another State's armed forces intervene to support organized armed groups fighting against the former State's armed forces. Such situation, known as 'internationalized NIAC', is not specifically provided for under IHL; however, it has been mentioned in international case law and studied by legal scholars, including the ICRC[197].

Nevertheless, a conflict does not necessarily become internationalized when another State intervenes to support an armed group party to a NIAC. There are two different approaches in international case law regarding such internationalization and the threshold of involvement by foreign States. Firstly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICJ held that a conflict becomes internationalized whenever the intervening State has effective control over the organized armed group involved. That approach requires a high degree of exercised control since the organized armed groups involved must be found to be under the control of the intervening State "*in all fields*", in such a way that they

[197] Tristan Ferraro, "The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict", *International Review of the Red Cross*, Vol. 97, No. 900, 2015, pp. 1227-1252.

may be regarded as acting on its behalf[198]. The Court held that a State's participation in a conflict could be established in particular when that State is supporting non-State players acting by proxy on its behalf. By contrast, some jurisdictions considered a lower threshold for the exercised control in more recent judicial precedents by referring to the notion of 'overall control'. Following this more flexible approach, the internationalization of a conflict may be recognized as soon as a foreign State provides an armed group with equipment and/or funds and coordinates, or participates in the overall planning of, its military operations. Accordingly, that approach does not require to prove that the State is directly involved in each of the armed group's military activities. In 2012, the International Criminal Court (ICC) followed that approach in the case of *The Prosecutor v. Thomas Lubanga Dyilo*[199], while the ICJ ruled in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* based on a two-pronged approach: it held that 'overall control' is a relevant element for armed conflict classification, but it retained the criteria of 'effective control' to rule on the responsibility of the State concerned.

Therefore, in order to implement the appropriate body of law, it is necessary to differentiate confrontations between States, which are governed by IAC rules, from hostilities opposing armed groups or between armed groups and the armed forces of a State, which are governed by the law applicable to NIAC[200].

1.3.2. Exportation of a NIAC beyond the limits of the original conflict

The field of application of the Geneva Conventions and Additional Protocol II is determined respectively in Common Article 3 and Article 1(1), both of which specifying that those instruments shall apply to conflicts occurring in the territory of one of the State parties. However, it does not necessarily mean that only such conflicts taking place within the borders of one State may qualify as NIAC under said instruments[201].

Indeed, in practice, some conflicts between government forces and one or more armed groups take place in the territory of two or more States. Armed forces that are party to a NIAC may continue their fighting on the territory of one or more foreign States with their consent. Such a situation is referred to as an 'exported NIAC': The armed forces of one State fight against the armed groups that are party to the NIAC in the territory of one or more neighbouring States where the armed group(s) are operating. Such classification is subject to two conditions. First, the States concerned must have given their express consent. For want of such consent, the trespassing by armed forces into another State's territory may well constitute a violation of that State's territorial sovereignty, which could lead to an IAC. Second, the intervention on the other State's territory must form part of an 'operational continuum' and be connected to the military action carried out on the territory of the State where the original NIAC broke out. Consequently, in an exported NIAC, only the armed groups that are party to the original NIAC may be targeted on the territory of the neighbouring State(s).

The IHL rules applicable to the exported NIAC are the same as those applying to the original NIAC. However, those rules only govern situations of armed conflict, so their application will end as soon as the fighting is over, in particular after the armed group responsible for the conflict exportation has been neutralized.

The Operation *Barkhane* by the French armed forces in the Sahel-Sahara region (Mauritania, Mali, Burkina Faso, Niger, Chad), which was launched in 2014 following the end of Operation *Serval*, was taking

[198] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, §§109, 115.
[199] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Judgment, ICC-01/04-01/06-2842, 14 March 2012, §541.
[200] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, §219; ICTY, Appeals Chamber, *Kordić & Čerkez*, Judgement, IT-95-14/2-A, 17 December 2004, §320-321.
[201] It seems that the reference to the "*territory*" of a "*High Contracting Party*" in Common Article 3 of the GC and Art. 1(1) AP II was intended as a mere reminder that the provisions of those instruments apply only to those States that ratified them; in the case of the Geneva Conventions, all States did so. See also Andreas Paulus & Mindia Vashakmadze, "Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization", *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 95; Marco Sassoli, "Transnational Armed Groups and International Humanitarian Law", *Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series*, No. 6, 2006, p. 8.

place in the context of an exported NIAC: the armed groups facing the *Serval* force in Mali continued their military activities beyond the borders of Mali, for example by setting up rear bases in neighbouring States and maintaining logistics flows through the borders of States in the region. The *Barkhane* intervention in the territory of neighbouring States of Mali did not cause the conflict to become internationalized since it did not oppose the armed forces of States between themselves. Besides, the States concerned explicitly consented to the French forces' intervention. That theatre of operation was governed by Article 3 common to the Geneva Conventions, AP II and customary IHL rules.

Focus: A Cross-Border Global Armed Conflict?

Because of the restrictive conditions governing the notion of 'exported NIAC', the French armed forces cannot fight – in compliance with IHL – organized armed groups wherever they are. For this reason, that notion is different from that of 'cross-border armed conflict' where the armed forces of a State enter into conflict with an organized armed group located in the territory of another State, without any spillover or exportation of a pre-existing conflict.

A minority amongst legal scholars as well as some States have taken the view that a cross-border NIAC may acquire a global dimension, for example in the fight against terrorist groups such as Al-Qaeda. In that case, it could be possible to take military action against such armed groups wherever they are without the need of an operational and territorial continuum with the State where the original NIAC broke out. IHL would thus be applicable to all territories where the members of such groups would seek refuge[202].

That interpretation of IHL is dismissed by a majority of legal scholars and does not correspond to the position of France, which systematically disregarded the notion of global non-international armed conflict.

1.4. The end of an armed conflict must be objectively assessed

1.4.1. Most of IHL rules cease to apply as soon as the armed conflict ends

In terms of the applicability of IHL, it is equally essential to determine the end of an armed conflict as it is to determine the beginning of its existence. That process, called 'declassification' of a conflict, entails many legal consequences since most of IHL provisions cease to apply when the armed conflict comes to a close (for the exception, see below). Like the classification process, such declassification must be based on factual and objective criteria. Here too, the nature of the analysis depends on the nature of the conflict – IAC or NIAC.

- IAC:

The Geneva Conventions and Additional Protocol I contain several provisions relating to the temporal scope of application of IHL in situations of IAC. For instance, Article 6 of GC IV specifies that the Convention shall cease to apply in the territory of parties to the conflict on the general close of military operations. Likewise, Article 3(b) AP I also refers to the "*general close of military operations*" as the juncture when the Conventions and Protocol shall cease to apply. The notion of 'military operations' in that reference is not specifically defined under those instruments; however, according to the ICRC, it means "*the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat*"[203]. The determination of such a situation is based on factual criteria upon which the definitive end of hostilities can be confirmed with sufficient certainty. For that purpose and in order to determine whether IHL no longer applies, the analysis must take account of declarations by warring parties as well as potential cease-fire or peace agreements; most of all, the end of hostilities must be confirmed through an objective assessment of

[202] Supreme Court of the United States, *Hamdan v. Rumsfeld*, 29 June 2006: In that case, the Supreme Court of the United States held that Common Article 3 of the Geneva Conventions is applicable to the members of Al-Qaeda in the context of the "*war against terrorism*".
[203] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 3, §152.

the facts *in situ* (cessation of fighting, withdrawal of troops, etc.). Furthermore, the temporary suspension of military operations is not a sufficient condition to conclude definitely that the armed conflict has ended and that IHL thus ceases to apply. In sum, it is possible to conclude that an IAC has ended when the suspension of hostilities forms part of a long-term perspective, or, in other words, when there is "*no real likelihood of a resumption in hostilities*"[204], e.g. after having determined the end of "*military movements of a bellicose nature, including those that reform, reorganize, or reconstitute*"[205].

- NIAC:

Contrary to IACs, IHL instruments governing NIACs give no specific information about the moment when a NIAC really ends. Accordingly, neither Common Article 3 nor AP II specify when IHL shall cease to apply to relevant situations. Since most of IHL rules apply as soon as there exists an armed conflict, it seems reasonable to take the view that IHL no longer applies when the conflict situation falls below the qualification threshold under IHL. Consequently, when the specific features of a NIAC no longer exist, e.g. when the fighting has stopped, the armed groups are no longer organized, peace agreements have been negotiated and implemented, etc., then the situation of NIAC may become "*declassified*" and IHL shall cease to apply. Like with IACs, the declassification of a NIAC requires a certain duration or continuity of the end of hostilities. Therefore, the classification of a conflict situation may not go back and forth between 'internal disturbances and tensions' and 'armed conflict' depending solely on the intensity of the confrontation; rather, declassification requires a long-term return below the threshold of armed conflict.

1.4.2. Some IHL rules continue to apply after the conflict has ended

As an exception to the above, some IHL provisions continue to apply after the armed conflict has ended. For instance, according to its Article 5(1), the provisions of GC III shall apply "*to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation*", even though it is possible that such "*final release and repatriation*" of prisoners of war take place only after the definitive end of hostilities. Article 5 of GC I also provides for a similar rule for the "*protected persons*" (wounded, sick) "*who have fallen into the hands of the enemy*". It is fairly easy to explain that particular exception for protected persons whose liberty has been restricted: indeed, it would be absurd, and contrary to the spirit of IHL, to deprive them of safeguards under IHL as soon as the conflict has ended since they are still in the power of the (former) enemy. That solution, albeit very logical, was nonetheless specified under Article 3(b) AP I: "*the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general 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*".

Similarly, concerning situations of NIAC, Article 2(2) AP II provides that "*at the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty*".

It is therefore important to differentiate between IHL norms that immediately cease to apply once the armed conflict has ended and those that must continue to be enforced beyond the definitive end of hostilities. Beside provisions for persons who have been deprived of their liberty, that category also includes obligations

[204] Marko Milanovic, "The End of Application of International Humanitarian Law", *International Review of the Red Cross*, Vol. 96, No. 893, 2014, pp. 163-188; ICRC, 32nd International Conference of the Red Cross and the Red Croissant, Report on "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", 32IC/15/11, Geneva, October 2015, pp. 9 ff.
[205] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 2, §278.

pertaining to investigations on and legal proceedings against those who gravely violated IHL during an IAC[206].

[206] Under Art. 50 GC I; Art. 51 GC II; Art. 130 GC III; Art. 147 GC IV.

CHAPTER 2: THE INTERPLAY BETWEEN THE DIFFERENT LEGAL REGIMES THAT APPLY DURING ARMED CONFLICTS

According to the International Court of Justice[207] (ICJ) and most international legal instruments, international humanitarian law (IHL) is the *lex specialis* in armed conflict, prevailing over international human rights law (IHRL), at least with respect to the conduct of hostilities.

Further, in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory as well as in its Judgment in the case concerning *Armed Activities on the Territory of the Congo* of 19 December 2005, the ICJ held that "*as regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law*"[208].

This Chapter deals with the two main issues resulting from the interplay between both of those bodies of international law. The first issue concerns the extraterritorial application of IHRL in foreign operations; the second relates to such interplay, in situations of armed conflict, between IHL, which constitutes the *lex specialis*, and IHRL.

Both issues have very concrete consequences on the conduct of operations abroad, as can be seen in the topical cases of the respect for the right to life and the detention and transfer conditions of captured persons.

2.1. The necessary conciliation between IHL and IHRL in situations of armed conflict

Even though IHL and IHRL both strive for the same purpose of protecting individuals, they form two different branches of public international law.

International humanitarian law is the body of international law that applies in times of armed conflict and occupation. It aims at minimizing the adverse impacts of armed conflicts by protecting individuals who do not, or no longer, participate in hostilities and by regulating means and methods of warfare. However, it does not prohibit the incidental loss and damage caused to civilian population or objects that would not be excessive in relation to the concrete and direct military advantage anticipated.

On the other hand, IHRL aims at ensuring universal protection of fundamental rights and freedoms from arbitrary deprivation. Several international treaties are specifically dedicated to human rights at the global level, such as the International Covenant on Civil and Political Rights[209] (ICCPR), and at the regional level, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights[210] (ECHR).

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[207] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 240, §25: "*The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable* lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*".

[208] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 178, §106; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, pp. 242-243, §§216, 217.

[209] The International Covenant on Civil and Political Rights entered into force on 23 March 1976. France acceded to it on 4 November 1980.

[210] The Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 3 September 1953 and was ratified by France on 3 Mai 1974.

Focus: Soft Law[211]

Historically, the law of armed conflict has always been regulated by international treaties that are legally binding. However, the number of relevant soft law instruments has also been increasing in the last twenty years.

There is no consensus on the definition of 'soft law' since the documents that may fall within that category can vary greatly in terms of drafting body or authority, content and binding force.

Soft law refers to the different initiatives taken by States, international institutions and non-State actors that undertake to define majority-based standards of conduct, which are therefore norms of non-binding character. Such initiatives may be unilateral or multilateral, which can lead to a more or less broad consensus with respect to how they are drafted or perceived. Thus, contrary to 'hard law' which is based on rules developed and adopted with the participation and explicit consent of States or other actors likely to be bound by such rules, soft law is not established by international conventions.

Soft law rules are statements of principles or recommendations pertaining to a specific matter, most of the time with the objective of filling the gaps left under hard law. Those detailed rules, while they are legally non-binding, primarily aim at providing guidance to and orient the actions of the parties to the conflict.

Documents synthetizing the position of experts groups or stating a legal opinion on the interpretation or implementation of the law do not necessarily fall within the scope of soft law. However, they can sometimes be considered a source of law, as provided for in Article 38 of the Statute of the International Court of Justice: "*The Court […] shall apply […] the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*". Such documents are, for example, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and the Tallinn Manual 2.0 on the International Law Applicable to Cyberoperations.

Reference texts of operational character – i.e. which are intended to apply in armed conflicts – that are agreed upon by international organizations such as the UN or NATO are legally binding as subsidiary law of international organizations.

Here are some examples of soft law documents pertaining to the law of armed conflicts: the resolutions of the UN General Assembly, the Montreux Document on Private Military and Security Companies, the International Code of Conduct for Private Security Service Providers – to which France has not yet acceded – as well as the codes of conduct and security standards relating to the conduct of operations adopted by military companies, the Paris Principles and Commitments on Children Associated with Armed Forces or Armed Groups, the International Code of Conduct against Ballistic Missile Proliferation, and certain ICRC publications such as the Guide to the Legal Review of New Weapons, Means and Methods of Warfare and the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.

It appears that finding the clear delineation of soft law remains difficult, especially as some documents may both be non-binding in nature and partially rely on pre-existing binding norms.

2.1.1. IHRL does not cease to apply in times of armed conflict

For a long time, the interaction between IHL and IHRL did not raise any issue because their respective scopes of application were regarded as distinct from one another: IHRL was considered the body of international law that would apply in peacetime while IHL would be applicable to situations of armed conflict.

Over time, that clear distinction between both legal regimes became somewhat blurred, which was in part due to the influence of the United Nations General Assembly (UNGA) and of the International Court of Justice (ICJ). For instance, on 19 December 1968, the UNGA affirmed that the provisions of resolution XXIII on human rights in armed conflicts needed to be implemented effectively as soon as

[211] In its 2013 annual study report on the topic of soft law, the Council of State (France's highest administrative body) endorsed the use of the notion of 'soft law' in French law. In that document, 'soft law' is defined as a set of legal instruments that fulfill three cumulative conditions: 1) they aim at influencing or orienting the behaviour and actions of their addressees by trying, as far as possible, to reach a consensus; 2) they do not create, by themselves, any rights or obligations for their addressees; 3) because of their content and/or drafting procedure, they reach such level in terms of form and structure that they come close to effective rules of law.

possible[212].

More recently, as several States were opposing the applicability of the ICCPR in times of armed conflict, the ICJ observed "*that the protection of the International Covenant on Civil and Political Rights does not cease in times of war […]*"[213]. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ added that "*more generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict*"[214] and that IHRL and IHL apply concurrently in specific situations during armed conflicts.

The question whether the ECHR applies in times of armed conflict was already raised at the negotiation stage prior to its adoption. It was then agreed upon that the Convention would continue to apply during armed conflicts, while it would be possible to derogate from certain Convention rights that are particularly difficult to secure in such situations.

2.1.2. Some provisions under human rights treaties may be derogated from in times of armed conflict

Article 15(1) of the ECHR affords to the States parties the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights under the Convention in time of "*war or other public emergency threatening the life of the nation*". However, Article 15(2) prohibits any derogation from Article 2 on the right to life, except in the context of lawful acts of war, from Articles 3 and 4(1) on, respectively, the prohibition of torture and the prohibition of slavery, and from Article 7 on the principle of legality of penalties (criminal convictions are unlawful unless a legal instrument already in force explicitly prohibits the offence charged at the time it was committed). Similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime), Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) and Article 4 of Protocol No. 7 (the right not to be tried or punished twice) to the Convention.

The implementation of Article 15 is subject to both formal and substantial conditions. The States parties may derogate from their obligations under the ECHR only "*in time of war or other public emergency threatening the life of the nation*" (the ECtHR construes that element restrictively as "*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*"[215]), "*to the extent strictly required by the exigencies of the situation*" and "*provided that such measures are not inconsistent with its other obligations under international law*" (Article 15(1)). As regards procedural obligations, the derogating State must inform the Secretary-General of the Council of Europe of the derogation, the measures it has taken on that ground and the reasons therefor as well as of the moment when those measures will cease to operate (Article 15(3)).

In practice, the States parties to the ECHR have rarely exercised their right to derogate in times when they were confronted with armed conflicts on their territory.

Similar derogation clauses are provided for in other IHRL conventions. For instance, Article 4(1) of the ICCPR provides that "*in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation,*

[212] UNGA resolution 2444 (XXIII) of 19 December 1968 on Respect for human rights in armed conflicts.
[213] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 240, §25.
[214] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 178, §106. In this Advisory Opinion, the ICJ indicates that "*as regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law*". See also ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 242-243, §216.
[215] ECtHR, *Lawless v. Ireland (No. 3)*, Judgment, Application No 332/57, 1 July 1961, §28.

provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

As is the case with the ECHR, certain rights and obligations under the ICCPR may not be derogated from, such as the right to life (Art. 6), the prohibition of torture and cruel, inhuman or degrading treatment or punishment (Art. 7), the prohibition of slavery (Art. 8), the general principles of legality in and non-retroactivity of criminal law (Art. 15), and the right to freedom of thought, conscience and religion (Art. 18).

Those fundamental rights constitute the "hard core" of IHRL and are enshrined in IHL under various forms.

2.1.3. Outside their territorial boundaries, States must ensure respect for human rights in territories and of individuals under their control

The application of human rights conventions in foreign operations is a matter of utmost importance for the French armed forces, which are regularly deployed abroad.

The key notion in that regard is the 'jurisdiction' or 'competence' of States involved. These notions are used in most IHRL treaties to determine their geographical scope of application.

For instance, Article 2(1) of the ICCPR provides that "*each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*", while under the Convention against Torture "*each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction*"[216].

As regards the ECHR, in compliance with its Article 1, "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms*" under the Convention. Thus, the exercise by a State of its jurisdiction over an individual is is a necessary condition for that State to be able to be held responsible for an alleged violation of the Convention.

Although this jurisdiction criterion imposes the obligation on any State to respect and uphold human rights in its territory (land, sea, as well as aboard aircraft registered in that State and ships flying its flag), the European Court of Human Rights (ECtHR) held that the notion of jurisdiction of a State party, as envisaged in Article 1 of the Convention, was not limited to the national territory of that State party[217].

Consequently, the responsibility of States can be involved because of acts of their authorities producing effects outside their own territory[218], including within the territory of States not party to the ECHR during operation abroad. Two exceptions to the territorial jurisdiction principle were recognized by the Court in its precedents.

Firstly, the responsibility of a State party to the Convention can be involved because of acts committed in a foreign territory over which it actually exercises effective control. According to the Court's ruling, the criterion of "*effective control*" is satisfied wherever that State exercises "*overall control*" over a foreign territory; it is therefore not necessary for the Court to determine whether that State exercised "*detailed*

[216] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, Art. 2(1). The Convention, to which France acceded on 18 February 1986, entered into force on 26 June 1987.
[217] See, in that respect, ECtHR, *Medvedyev and Others v. France*, Judgment of the Court (Grand Chamber), Application No. 3394/03, 29 March 2010, §67; ECtHR, *Al-Jedda v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 27021/08, 7 July 2011, §86; and ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 55721/07, 7 July 2011, §150.
[218] See, in that regard, ECtHR, *Drozd and Janousek v. France and Spain*, Judgment, Application No. 12747/87, 26 June 1992, §91.

control" over the policies and actions of the local authorities[219].

Secondly, the Court held that a State party to the Convention exercises extraterritorial jurisdiction over individuals under the control and authority of its agents[220], which is for example the case in capture and detention operations by members of its armed forces[221].

The ECtHR considers that the Convention cannot be reasonably interpreted so as to allow a State party, through its agents, to perpetrate violations of the Convention outside its territory[222].

When the armed forces carry out military operations in foreign theatres, they must therefore comply with their obligations under international and regional human rights treaties where they exercise effective control over individuals or part of a territory.

Further, specific questions about the applicability of the ECHR are raised by the deployment of the armed forces of a State party when it is carried out as part of the action of an international organization, such as a UN-mandated operation authorized by the Security Council under Chapter VII of the UN Charter.

For instance, on some occasions, the Court decided that it could not rule on the merits of cases of acts committed by States parties to the Convention on the account of the UN Organization under Chapter VII of the Charter[223].

In the case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the Court sitting as a Grand Chamber held that the impugned actions[224] were attributable to the UN, an "*organisation of universal jurisdiction fulfilling its imperative collective security objective*", and not to France, because the UN retained ultimate authority and control over the acts and omissions by members of the international security presence in Kosovo (KFOR), which was authorized by the UN Security Council in its resolution 1244 of 10 June 1999.

Thus, the Court considers that it has no jurisdiction to rule on the merits of alleged violations of the Convention that are attributable to the UN, which has a legal personality separate from that of its Member States and is not a Contracting Party to the Convention.

In sum, the simultaneous application of IHRL and IHL in times of armed conflict gives rise to issues relating to the interplay between both of those bodies of international law. Moreover, it implies that human rights courts may have to rule on the lawfulness of military operations.

2.1.4. IHL is the regulatory framework for the conduct of hostilities

Although IHRL provisions do not necessarily cease to apply during armed conflicts, IHL is and remains the regulatory framework for the conduct of hostilities. IHL was specifically designed to regulate the conduct of warring parties to an armed conflict and thus to minimize the suffering and destruction caused by the conflict. IHL, which is pragmatic in nature, relies on a balance between military necessity and the principle of

[219] See, in that respect, ECtHR, *Loizidou v. Turkey*, Judgment of the Court (Grand Chamber), Application No. 15318/89, 18 December 1996, §56.
[220] ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 55721/07, 7 July 2011, §137.
[221] ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Judgment, Application No. 61498/08, 2 March 2010.
[222] ECtHR, *Issa and Others v. Turkey*, Judgment, Application No. 31821/96, 16 November 2004, §71.
[223] See, *inter alia*, ECtHR, *Behrami and Behrami v. France*, Decision of the Court (Grand Chamber) as to the admissibility of Application No. 71412/01, 2 Mai 2007.
[224] In the case of *Behrami and Behrami v. France*, one of the applicant's children died and another was severely wounded following the explosion of an undetonated cluster bomb unit (CBU) which had been dropped in the Kosovan region of Mitrovica during the bombardment by NATO in 1999. On the grounds of Article 2 (right to life) of the ECHR, the applicants submitted that the incident took place because of the failure of French KFOR troops to mark and/or defuse the undetonated CBUs which those troops knew to be present on that site.

humanity.

As such, IHL constitutes the *lex specialis* in armed conflict. That being so, in situations of armed conflict or occupation, IHRL norms must be construed in light of relevant IHL norms, in particular when there is a patent incompatibility between an IHL norm and an IHRL norm or standard of reference. In its Advisory Opinion on Nuclear Weapons, the ICJ recognized this principle when ruling on the application in situations of armed conflict of Article 6 of the ICCPR, which prohibits unlawful deprivation of life: "*In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable* lex specialis, *namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities*"[225].

IHRL and IHL have many rules in common, such as the prohibition of torture in all circumstances, which is both an IHRL norm (Art. 3 ECHR; Arts. 1 and 2 of the Convention against Torture) and an IHL norm (*inter alia*, Common Article 3 of the four Geneva Conventions).

2.1.5. Because IHRL applies in armed conflicts, the French armed forces adapt their practice in operations

The application of IHRL in foreign theatres of operation concerns a range of different matters such as the right to life, the prohibition of torture and cruel, inhuman or degrading treatment or the restriction of individual liberty.

2.1.5.1. The necessary conciliation in foreign theatres of operation between obligations under Article 2 ECHR on the right to life and relevant IHL rules

The right of individuals to life is enshrined in Article 2 of the ECHR. It imposes on States parties the obligation to refrain from depriving anyone of their life, but also the positive obligation to protect individuals within their jurisdiction from such deprivation.

Apart from those substantive obligations, the ECtHR also identified, based on Article 2, procedural obligations under which States parties must conduct effective and independent investigations in case of alleged breaches of the right to life, i.e. when an individual within their jurisdiction dies or disappears. Such procedural obligation also applies in foreign theatres of operation[226].

Under IHL, i.e. the body of international law that applies specifically to situations of armed conflict, States have the obligation to investigate into any alleged war crimes that may come to their attention[227]. However, IHL does not require them to investigate into lawful deprivations of life that occurred in the conduct of hostilities.

In accordance with IHL rules relating to sanctions for infractions that occurred in the conduct of hostilities, States must investigate into any allegations of intentional use of force against civilian population or individuals; any alleged intentional indiscriminate attack that caused harm to civilian population or damage to civilian objects; or any alleged disproportionate attack that was "*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*"[228].

However, not any deprivation of an individual's life entails the obligation under IHL for the States concerned

[225] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 240, §25.
[226] ECtHR, *Behrami and Behrami v. France*, Decision of the Court (Grand Chamber) as to the admissibility of Application No. 71412/01, 2 Mai 2007; ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 55721/07, 7 July 2011, §§163, 164.
[227] See GC I, Arts. 49, 50; GC II, Arts. 51, 52; GC III, Arts. 129, 130; GC IV, Arts. 146, 147; AP I, Arts. 11, 85, 86.
[228] Additional Protocol I, Art. 57.

to investigate. In armed conflict, it is lawful to target combatants and civilians who take a direct part in hostilities under certain conditions. Therefore, deprivation of life in such cases is not unlawful provided that the principles of precaution and proportionality, *inter alia*, have been observed. Under IHL, some deprivations of life form an integral part of the conduct of hostilities[229].

According to State practice, the 'lawful acts of war' provided for in Article 15 of the ECHR are regarded as a derogation *per se* from Article 2, even when such derogation was not notified in advance.

The Court implicitly recognized that such acts intrinsically constitute a derogation from Article 2 even in lack of a formal derogation when it held that "*Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities*"[230], from which it can be inferred that combatants do not enjoy the same protection as civilians.

As regards the independence requirement, according to the ECtHR case law, "*for an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence*"[231].

However, on some occasions, the Court also recognized that "*there are important differences of context and purpose*" between certain measures depending on whether they were "*carried out during peacetime*" or "*in the course of an armed conflict*"[232].

This is especially relevant because there can be important differences between ordinary investigative bodies on the territory of a sovereign State in peacetime, investigative bodies of a State that intervenes in a foreign occupation and investigative bodies of a State involved, on another State's territory, in an armed conflict that does not fall within the scope of occupation law.

In the latter case, in particular, the military investigative bodies of such intervening State actually always retain some hierarchical or institutional connection to the military leadership in charge of the operation because of security concerns arising from the ongoing armed conflict, and with respect to the provision of the means necessary to the investigation.

In that case however, investigation capacities might also be provided by the competent authorities of the sovereign State on whose territory the armed conflict takes place.

Lastly, with regard to the effectiveness requirement, the Court held, in the case of *Jaloud v. the Netherlands*, that an investigation is deemed effective where "*it is capable of leading to the identification and, if necessary, punishment of those responsible*"[233] and that "*any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this [effectiveness] standard*"[234].

In that regard, French authorities have already stated that some deficiencies might be justified by the particularly difficult conditions surrounding an ongoing armed conflict at the time Article 2 breaches are committed. In the case of *Al-Skeini and Others v. the United Kingdom* (cited above), the Court made

[229] See, in particular, ICRC, *Expert meeting – the use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, 2013, p. 491.
[230] See ECtHR, *Varnava and Others v. Turkey*, Judgment of the Court (Grand Chamber), Application Nos. 16064/90 and others, 18 September 2009, §185; See also ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment, Application Nos. 57947/00 and others, 24 February 2005, §181.
[231] See, *inter alia*, ECtHR, *Jaloud v. the Netherlands*, Judgment of the Court (Grand Chamber), Application No. 47708/08, 20 November 2014, §186.
[232] See, *inter alia*, ECtHR, *Hassan v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 29750/09, 16 September 2014, §97.
[233] ECtHR, *Jaloud v. the Netherlands*, Judgment of the Court (Grand Chamber), Application No. 47708/08, 20 November 2014, §200.
[234] *Ibid*., §186.

reference to the report of 8 March 2006 on extrajudicial, summary or arbitrary executions of the United Nations Special Rapporteur Philip Alston, according to which "*it is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilise less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality*"[235].

2.1.5.2. The implementation of Article 5 ECHR on the right to liberty and security in capture and detention operations

Article 5 of the ECHR provides for many safeguards regarding pre-trial detention. That article was designed for an application in peacetime, so it does not explicitly provide for the administrative detention of individuals for security reasons in times of armed conflict; conversely, IHL does provide for such detention.

Under IHL, there are three types of detention in situations of international armed conflict (IAC): detention of prisoners of war (POWs), administrative detention and judicial detention. On the other hand, in situations of non-international armed conflict (NIAC), IHL only provides for administrative and judicial detention because the status of POW is not applicable in a NIAC.

Administrative detention[236] is a normal and expected measure in situations of armed conflict which often allows for a reduction of violence and harm towards civilians. Thus, the armed forces regard it as a tool that may, and is likely to, be used in the course of a military operation. Administrative detention is different from judicial detention in that it is solely justified by imperative reasons of security arising from the ongoing armed conflict. It is a preventive administrative measure and not a sentence sanctioned by court order which translates into a deprivation of liberty that must end as soon as possible, and at the latest when the security reasons justifying the measure have ceased to exist. In IAC, administrative detention is governed by the Fourth Geneva Convention and the First Additional Protocol, whereas in NIAC, there are fewer and less detailed rules applicable to detention, mainly to be found in Common Article 3 and, when applicable, Article 5 of the Second Additional Protocol.

The ECtHR first held that administrative detention of civilians during IACs with no intention to bring criminal charges was not included in the exhaustive list, contained in Article 5 of the Convention, of permissible grounds on which persons may be deprived of their liberty[237]. However, the Court then recognized that this type of detention was permissible so long as procedural safeguards are in place[238]. Indeed, in the case of *Hassan v. the United Kingdom*, which concerns the administrative detention by the British armed forces of a civilian in Iraq, the Court examined whether there existed a legal basis under IHL for detention in a situation of IAC. It held that a State party to the Convention may, under certain conditions, detain individuals for security reasons in situations of IAC without breaching its obligations under Article 5

[235] ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 55721/07, 7 July 2011, §93.

[236] 'Internment', 'detention' and 'retention' can be synonymous terms depending on the context. They all mean a non-criminal, administrative deprivation of liberty justified by imperative reasons of security and implemented in order to protect personnel members or the local civilian population. Under the third Geneva Convention however, 'internment' consists in imposing on a combatant that has been recognized as *hors de combat* the obligation of not leaving a determined place (generally a camp), as opposed to 'detention', which is implemented in order to retain such person in a cell or a room. The French armed forces use the term '*rétention*' to refer to the notion of administrative detention in situations of armed conflict in order to differentiate it from criminal detention which is implemented in peacetime. For the purposes of this Manual, the expressions "detention", "internment", "administrative detention" and "security detention" shall be used interchangeably to refer to detention for security reasons.

[237] ECtHR, *Al-Jedda v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 27021/08, 7 July 2011.

[238] ECtHR, *Hassan v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 29750/09, 16 September 2014.

of the Convention when such detention was based on the Third or Fourth Geneva Conventions (regarding respectively POWs and civilians), thus enlarging said article to include another form of deprivation of liberty. In doing so, the Court recognized that relevant IAC provisions of IHL, as the *lex specialis* in armed conflicts, could justify a measure of detention that is not provided for in Article 5 of the ECHR because procedural safeguards regulating detention are foreseen under the Geneva Conventions[239].

The Ministry of Defence regulates operational practices regarding capture and detention operations so that they are in conformity with France's international commitments. Accordingly, under the operational directives of the French armed forces, the detention of captured persons by the armed forces must be justified solely by the fact that those persons represent a threat to the security of forces and/or civilian populations which results directly from the ongoing situation of armed conflict.

As regards duration, detention must be transient, i.e. as short as possible and limited to the time required for that threat to cease and/or, where applicable, for the captured individual to be transferred to the competent local authorities. As previously stated, detention must end as soon as the security reasons justifying the measure have ceased to exist. Decisions whether a detention measure should be extended because the threat has not ceased to exist must be substantiated and made on a case-by-case basis.

Furthermore, safeguards must be provided to the detained person, who should be informed, in a comprehensible language, of the reasons for the detention as well as of a potential future transfer or release. Moreover, that person must be given the opportunity to establish contact with a designated person to inform them of their detention. Captured persons who are injured must be medically treated and handled with particular care, and must not be subjected to interrogation during their hospital stay. Lastly, captured persons must not be detained in compounds located outside the territory where they were captured[240].

2.1.5.3. The implications of Article 3 ECHR on the prohibition of torture and cruel, inhuman and degrading treatment in operations of transfer of captured persons

The principle of *non-refoulement* is derived from Article 3 of the ECHR as interpreted by the Court. Accordingly, the Court held that the extradition, expulsion or deportation by a State of an individual under its jurisdiction to the territory of another State may engage the former State's responsibility where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to treatment contrary to Article 3.

That reasoning, which the Court originally developed with respect to measures of extradition to a State that is not party to the Convention, has been extended to transfers of individuals within a single territory in the context of an armed conflict[241].

On the ground, that principle entails practical requirements that apply when the French armed forces decide to transfer individuals whom they captured or were detaining to the host State's authorities which will then, in turn, decide whether to prosecute or release said individuals. In such context, safeguards are required from the State authorities to which the captured persons are being transferred in order to mitigate the risks they may face. Such safeguards may for instance be included in relevant status-of-forces agreements (SOFA) between France and the States concerned (see subsections 6.3.5.2 and 6.3.5.3 below).

As an example, the SOFA concluded between France and Mali in March 2013 for Operation *Serval*, which later also served as the legal framework for subsequent Operation *Barkhane*, ensured that any transfer of captured persons was subject to Mali's complying with the same legal obligations as France under its treaty commitments and constitutional requirements, including the non-enforcement of the death penalty or any

[239] GC IV, Arts. 43, 78.
[240] That rule does not, in principle, prohibit extradition measures or any other form of mutual assistance in criminal matters after the captured person has been transferred to the competent authorities with territorial jurisdiction.
[241] See, *inter alia*, ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Judgment, Application No. 61498/08, 2 March 2010.

cruel, inhuman or degrading treatment and other IHL and IHRL obligations. Accordingly, Article 10 of the SOFA provided, *inter alia*, the following:

"*[…]*

In keeping with the French Party's treaty commitments and constitutional requirements, the Malian Party shall ensure that, in case the death penalty or a punishment amounting to cruel, inhuman or degrading treatment is incurred by a transferred person, such penalty or punishment shall neither be sought against nor imposed on such person, and that, in the event such penalty or punishment has indeed been imposed, it shall not be enforced.

No person handed over to the Malian authorities pursuant to this Article shall be transferred to a third party without the prior approval of the French authorities.

[…]

The representatives of the French Party [Operational Legal Advisors] shall have permission to go to all places where transferred persons may be; […] the duration and frequency of these visits shall not be restricted. […]

The Malian Party shall keep a record of all the personal details of each transferred person (identity, date of the transfer, place of detention, state of health); such record may be consulted by the French authorities.

The International Committee of the Red Cross (ICRC) shall be expressly associated to the follow-up on transferred persons (right to access[242], right to visit[243], record consultation)."

2.2. Status-of-forces agreements, French domestic law and the law of the host State

2.2.1. Where there is no relevant SOFA, the host State's domestic law applies to the foreign armed forces deployed on its territory

2.2.1.1. The principle of the territorial jurisdiction of the host State may prove inconsistent with the objectives of military cooperation

As a corollary to the principle of territorial sovereignty, States have exclusive jurisdiction within their borders. Thus, the host State's domestic law applies to French military personnel deployed on its territory, who must therefore comply with it.

On a number of points, however, the host State's domestic law may prove incompatible with the practical and legal requirements of France's international military relations. On the one hand, operational requirements may not be compatible with the application of the host State's domestic law. This is the case, for example, of standard procedures for granting visas that do not match the urgency or duration of a deployment, or of laws prohibiting the practice of medicine by a doctor who is a national of a third State. Legislation on the carrying of weapons, which is very strict in most States, is also an obstacle to operational deployments. Furthermore, the respective legal systems of the sending and host States are not necessarily reconcilable, which may subject deployed personnel to competing laws and jurisdictions. This could potentially expose them to significant risks, particularly when local criminal law authorizes the death penalty.

When France decides to send its military personnel to another State, it must take all necessary measures, in

[242] The right to access is understood as the right to access to detainees at all stages of the detention as well as to premises used by and for the detainees.
[243] The right to visit is understood more broadly as including, beside the right to access, the right to speak with, register and renew the visits of detainees.

coordination with the local authorities, to protect such personnel and ensure that their mission runs smoothly. This means systematically seeking enhanced legal protection, which is the aim of SOFAs.

2.2.1.2. SOFAs: international agreements which allow some degree of derogation from the host State's territorial jurisdiction

In accordance with Article 55 of the French Constitution, international agreements have a supra-legislative value: "*Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party*". It is therefore possible to derogate from the laws of a State by means of an international agreement. SOFAs fall into the category of international agreements. In fact, French practice distinguishes between agreements in solemn form ("*traité*" – treaty), signed by or on behalf of heads of State, and agreements in simplified form (known as "*accord intergouvernemental*" or "*AIG*" – "intergovernmental agreement"), concluded between governments, both of which have equal legal value. Following the hierarchy of norms, the sending and host States can agree, by entering into a SOFA, on legal matters requiring an *ad hoc* legal regime, derogating from the host State's domestic law.

For France, the procedure for concluding SOFAs follows a number of strict rules. In accordance with the hierarchy of norms, international agreements must be consistent with the French Constitution and France's other international commitments, in particular those made in the context of the European Union and under the ECHR. However, the implications differ greatly depending on whether the SOFA is reciprocal, i.e., its scope of application *ratione loci* covers activities taking place both in France and in the territory of the partner State, or non-reciprocal, i.e., the SOFA applies only in the territory of the partner State. In the first case, legal constraints are greater because the respective personal and territorial jurisdictions must be divided between both States. In the second case, since France's territorial jurisdiction is excluded, the margin for action appears, in principle, to be wider, and the Parliament is generally not required to give prior authorization for the SOFA to be approved.

In both cases, SOFAs are the result of complex negotiations, leading to compromise solutions aimed at obtaining the best possible level of protection for personnel members, in accordance with France's treaty commitments and constitutional requirements, while taking into account the legal specificities and political priorities of its partners.

Focus: Defence-Related International Legal Instruments

In the context of international military relations, various types of defence-related international instruments may be concluded:

1. Treaty or intergovernmental agreement ("*accord intergouvernemental*", "*AIG*"). Such international agreements, which may concern the remit of several ministries, have supra-legislative value and are signed by or on behalf of heads of State or Government. In accordance with the French Constitution, it is necessary to adopt this form of international instrument in two cases: when the intended provisions exceed the area of competence of a single minister, and/or when they fall within the scope of Article 53 of the Constitution, in particular when they affect the domains governed by statute law as defined in its Article 34. The Ministry of Defence is involved in the conclusion of several types of agreement: cooperation agreements, status-of-forces agreements, logistical support agreements, security agreements relating to the sharing and protection of classified information, and international agreements relating to support for exports of military equipment.

2. Technical arrangement (TA). Such international instruments are concluded between ministers. They have infra-legislative and infra-regulatory value, and cannot exceed the remit of the signing minister. Although technical arrangements are not an actual category of instruments under international law (according to the French Prime Minister's circular of 30 May 1997 on the drafting and conclusion of international agreements), they are accepted in international practice. Technical arrangements are binding on the French State within the remit of the Minister of Defence.

3. Standard Operating Procedure ("*document conjoint de procedure*", "*DCP*"). This document sets out the practical and organizational details of an international cooperation activity carried out under an intergovernmental agreement or a technical arrangement. Similarly, Letters of Intent (LoI) and Declarations of Intent (DoI) are declarative instruments of a political nature that are not legally binding.

4. Memorandum of Understanding (MoU). Within French law, they have an uncertain legal value because this category of instruments is not specifically provided for. Most often, they are not regarded as international agreements, but rather as good faith or gentlemen's agreements that are not legally binding on the signatories or participants. France is reluctant to enter into this type of agreement, and assesses its legal value on a case-by-case basis.

2.2.2. SOFAs are the legal instrument usually employed for military deployments in the territory of a partner State

2.2.2.1. The SOFA sets out the legal regime applicable to detachments (personnel and materiel) deployed by a State in the territory of another State

The objective of SOFAs is twofold. First, they aim at ensuring the legal protection of personnel members deployed abroad by a State by defining their rights and obligations. They also aim at simplifying the execution of activities and the material aspects of their mission.

International law[244] does not impose formal requirements in that it leaves "*complete freedom to the parties as to the name given to their legal instruments*"[245]. SOFAs can therefore take different forms. They will mainly be agreements with a standard structure, or agreements by exchange of letters. Two essential criteria must nevertheless be fulfilled: the signing authority must have the power to sign on behalf of its government (cf. below) and the drafting must comply with certain rules (in particular, France's Constitution requires that the French version of the instrument be equally authentic, and the rules for the drafting of international agreements must be respected).

Since the SOFA is a stand-alone legal instrument, its material scope of application is specifically defined in a dedicated article. Particular care must therefore be taken with the scope of application of a SOFA. A distinction must be made between *cooperation* SOFAs, which are technical military cooperation tools designed to provide a framework for instruction, training or exercise activities as part of a defence partnership, and *operational* SOFAs, which are deployment tools designed to provide a framework for the conduct of an operation abroad. Although both follow the same drafting procedure and contain similar provisions, they should not be confused, as their fields of application *ratione materiae* are different.

Focus: The NATO and EU SOFAs

France is bound by approximately 80 bilateral SOFAs, and new ones are regularly negotiated. However, there are two multilateral SOFAs that constitute a reference legal framework in that area:

1. The Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed in London on 19 June 1951, also known as the 'NATO SOFA', which governs the status of the forces of an Allied State deployed on the territory of another Allied State. It was supplemented by the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, signed on 19 June 1995. Although the NATO SOFA may seem somewhat outdated, particularly regarding the phrasing of some of its provisions (for instance Article VIII on claims for damage), most of France's NATO partners systematically refer to it in cooperation

[244] In his circular of 30 May 1997 on the drafting and conclusion of international agreements, the French Prime Minister recalled that the law of treaties is standardized in the Vienna Convention of 23 May 1969. Although France is not a party to that Convention, it complies with those of its provisions that pertain to standardizing international custom or general principles of international law.
[245] French Prime Minister's circular of 30 May 1997 on the drafting and conclusion of international agreements.

agreements, which demonstrates their will to apply it in bilateral relations. In France, the military planning law No. 2018-607 for 2019-2025 of 13 July 2018 provides that the NATO SOFA applies to all cooperation activities carried out with France's NATO and Partnership for Peace (PfP) partners on French national territory.

2. The Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), signed in Brussels on 17 November 2003, which was enacted in France by decree No. 2019-477 of 20 Mai 2019 and entered into force on 1 April 2019.

As part of the Common Foreign and Security Policy (CFSP), the Council of the European Union adopted its Decision No. 2001/496/CFSP of 25 June 2001 on the rules applicable to national military staff on secondment to the General Secretariat in order to form the EU Military Staff. It entered in its minutes the Member States' intention to agree rapidly among themselves on the functional immunities to be granted to the staff of the EU Military Staff, as well as on the functional immunities and other facilities to be granted to the headquarters and forces which they could place at the disposal of the European Union in the context of the preparation and execution of the tasks referred to in former Article 17(2) of the Treaty on European Union, which are now incorporated in Articles 42 and 43 TEU. To that effect, the Council took as a model the provisions that are otherwise in force in similar cases, for instance the NATO SOFA of 19 June 1951.

On 17 November 2003, the Governments of the EU Member States, gathered in Brussels for a meeting of the Council and in the margins of the General Affairs Council, signed the Agreement on the status of forces in charge of carrying out the "Petersberg tasks", which, under Article 43 TEU, include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. Part I governs provisions common to all military and civilian personnel. Part II covers the provisions applicable to military or civilian personnel seconded to EU institutions, and in particular to the EU Military Staff. Part III concerns provisions applicable to headquarters.

Its Article 19, which contains the final provisions, deals with the question of the application of instruments competing with the EU SOFA (§6). Accordingly, the EU SOFA applies only where headquarters and forces, together with their personnel, are placed at the disposal of the EU in the context of the preparation and execution of the tasks referred to in Article 43 TEU, and where their status is not covered by another agreement. Article 19(7) provides for the application – subject to agreements or arrangements to that effect – of the EU SOFA to third States participating in military operations or exercises carried out under EU authority in the context of the preparation and execution of the tasks referred to in Article 43 TEU.

Certain provisions of the Agreement (Part I) may be applied and extended, by mutual agreement between EU States through an *ad hoc* international agreement, to other situations, for example to compensate for the absence of a bilateral SOFA.

2.2.2.2. The main provisions of reciprocal SOFAs

As mentioned above, cooperation SOFAs and operational SOFAs are similar in terms of the provisions they contain. The differences in content can be explained, on the one hand, by the operational needs that call for specific, reinforced guarantees and, on the other hand, by the fact that operational SOFAs are, in principle, non-reciprocal. This subsection outlines the usual provisions of reciprocal SOFAs; the provisions that are specific to non-reciprocal operational SOFAs are dealt with in a separate section. Cooperation SOFAs organizing long-term cooperation, which sometimes includes long-term missions, must cover not only the personnel of the sending State, but also their dependents.

The cornerstone provision of a SOFA is usually the 'jurisdiction clause', which sets out the rules for sharing jurisdiction and the procedural guarantees applicable in the event of an offence committed by personnel members or their dependents. The principle of territoriality requires that an offence committed within the territory of a State be subject to the jurisdiction of its own courts. At the same time, the principle of personal jurisdiction enables a court of the sending State to rule on offences committed by its own nationals on foreign

territory. For the purpose of protecting personnel members, in reciprocal SOFAs, the sending State is usually granted the primary right to exercise jurisdiction for certain offences likely to be committed by its personnel while on duty.

Further, in principle, the host party has the primary right to exercise jurisdiction, subject to certain exceptions. Thus, in the event of an offence resulting from any act or omission of a personnel member in the performance of their official duties, as well as in cases where the offence is solely against the security or property of, or the person or property of another personnel member of, the sending party, the competent authorities of the sending party shall have the primary right to exercise jurisdiction.

When the host party has the primary right to exercise jurisdiction, i.e. in all other cases, reinforced guarantees must be provided to protect personnel members and dependents against the death penalty and inhuman and degrading treatment within the meaning of Article 3 of the ECHR and in compliance with the French Constitution, which prohibits them. Should the partner State's domestic law provide for such penalties, a reciprocal commitment is to be made to ensure that they shall neither be sought nor imposed, and that in the event they have indeed been imposed, they shall not be enforced. This applies both to French personnel members and their dependents under the jurisdiction of the partner State, and to the partner State's personnel members and their dependents under French jurisdiction who are to be handed over to the partner State for the purpose of exercising its jurisdiction under its primary right to do so.

Reciprocal SOFAs include other key provisions that aim primarily at:

- specifying the conditions of entry, stay and movement of personnel members and their dependents in the territory of the host party. Since France does not grant any exemption from visa requirements, bilateral SOFAs generally stipulate that personnel members and their dependents shall be authorized to enter and exit the host State's territory provided that they hold a valid passport and visa;
- specifying that the driving licences of the personnel members of either State shall be recognized on the territory of the other;
- authorizing military personnel of the sending party to wear their military uniform and insignia, and possess, carry and use a service weapon, in the territory of the host party in accordance with its domestic law, unless the competent authorities of the host party agree to implement the same rules that apply in the sending party. That last part of the clause enables France, as a sending State, to ensure more restrictive rules for using weapons in the territory of the host State;
- ensuring that personnel members and their dependents can maintain their tax residence in the State of the sending party and import, free of custom duties or under temporary admission procedure, the equipment they need to perform their tasks, and specifying the administrative modalities to that end;
- laying down the terms for the settlement of claims for harm caused by personnel members.

The remaining elements of a SOFA are considered secondary because they are likely to be further specified in subsequent implementing agreements between governments, such as technical arrangements. In general, such provisions are nonetheless incorporated in the SOFA and aim primarily at:

- determining that the sending party's authorities shall have exclusive competence over its personnel members regarding disciplinary matters.
- laying down the applicable rules in case of death of a personnel member (except the rules relating to autopsy which must be provided for by intergovernmental agreement) as well as the terms for access to the medical services of the host party, in particular regarding medical costs and expenses. In principle, each party is responsible for its medical support and medical evacuations and repatriations, and, by way of derogation, urgent medical acts and emergency evacuations shall be performed free of charge.
- setting out the terms for sharing costs of participation in the cooperation activities.

In principle, a SOFA is not intended to provide for rules relating to the exchange of classified information, because such rules must be laid down in a specific agreement known as a 'security agreement'. Security agreements aim at ensuring protection of classified information or material shared, and/or jointly produced

where appropriate, with a foreign State. Strictly speaking, the purpose of security agreements is therefore different from that of a SOFA.

2.2.2.3. Reciprocal SOFAs follow a specific drafting procedure

SOFAs are characterized by two main features: because they are interministerial, they bind the governments of the contracting parties; and because they contain provisions that may affect domains governed by statute law, they require parliamentary authorization for approval.

There are two reasons for interministerial cooperation when drawing up a SOFA. Firstly, international agreements are concluded under the authority of the Ministry of Foreign Affairs. So, while the departments of the Ministry of Defence lead the negotiations, the Ministry of Foreign Affairs remains involved at every stage in the drafting of the agreement. In particular, it is responsible for endorsing the final version of the negotiated text. In addition, the diversity of fields covered by SOFAs calls for interministerial cooperation whenever the SOFA is reciprocal and applies on French territory[246]. Thus, the ministries concerned by the content and implementation of the draft agreement are formally consulted for their opinion on the relevant provisions of the draft agreement. For example, the Ministry of Finance is consulted on all matters relating to taxation and customs duties, the Ministry of Justice on those relating to the primary right to exercise jurisdiction, and the Ministry of the Interior on those relating to the conditions of entry to and exit from national territory, the carrying of weapons in France or the recognition of driving licences.

The interministerial nature of SOFAs entails that they must mandatorily be signed by or on behalf of the governments of the contracting parties. In France, only three officials are empowered to sign SOFAs without having to receive *ad hoc* signing authority: The President of the Republic, the Prime Minister and the Minister of Foreign Affairs. Any other official charged with signing an international agreement must have been endowed with signing powers, which are either granted by the President of the Republic in the case of treaties (full powers), or by the Minister of Foreign Affairs in the case of intergovernmental agreements ("simple powers" – "*pouvoirs simples*").

In France, whenever SOFAs are designed to organize reciprocal cooperation, which pertains to the preserve of French statute law, they fall within the purview of the Parliament. In order to be formally approved or ratified, SOFAs must therefore be submitted to the Parliament for its authorization for approval, in compliance with Article 53(1) of the French Constitution, according to which "*Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament*". The French Constitutional Council (Conseil constitutionnel) held that any commitments pertaining to the preserve of French statute law fall within the scope of Article 53 of the Constitution. Therefore, the entry into force of a reciprocal SOFA is subject to the adoption of an Act of Parliament authorizing its approval or ratification.

In accordance with the Vienna Convention on the law of treaties of 23 Mai 1969, the final provisions of a SOFA must specify the terms for its entry into force and termination. As with many other types of intergovernmental agreements, especially those requiring the Parliament's authorization for approval, the entry into force of a SOFA is conditional on the deposit of an instrument of ratification or approbation which usually takes the form of a notification that relevant internal constitutional procedures have been completed. Furthermore, in France, SOFAs must, in principle, be published in the government gazette ("*Journal Officiel*"), failing which they shall not be enforceable within France's domestic legal system. SOFAs are concluded for a given period of time and are renewable by tacit or express agreement. Moreover, SOFAs systematically provide for the procedure following which either party may denunciate and/or withdraw from

[246] As with any other international agreements, non-reciprocal SOFAs must nonetheless be submitted to the Ministry of Foreign Affairs for its opinion.

the SOFA.

CHAPTER 3: THE PRINCIPLES GOVERNING THE CONDUCT OF HOSTILITIES

International humanitarian law (IHL) is based on a set of basic principles: the principles of distinction, proportionality, precaution and the prohibition of superfluous injury and unnecessary suffering. Together, they constitute the "*fabric*"[247] of IHL that governs the conduct of hostilities. Their application reveals that IHL depends on a fine balance between considerations of military necessity and the principle of humanity.

These principles have been applied on numerous occasions by international courts[248] and have served as the basis for the adoption of treaties regulating or prohibiting certain weapons[249].

3.1. The balance between military necessity and humanity

IHL depends on a balance between considerations of military necessity, on the one hand, and the principle of humanity, on the other. This balance aims at minimizing the effects of armed conflict and protecting civilians and other persons who are not, or no longer, taking part in it. From a military point of view, in the context of an armed conflict, it may indeed be necessary not only to kill, wound and cause destruction to the enemy, but also to impose more stringent security measures than would be permissible in peacetime. However, IHL makes it clear that military necessity does not give belligerents free rein to wage war without constraint. Rather, military necessity means that the parties to an armed conflict may use, in compliance with the other rules of IHL, the means necessary to achieve specific military objectives. The principle of humanity creates obligations to set limits on the means and methods of warfare, and requires that those who fall into enemy hands must be treated humanely in all circumstances. This balance between military necessity and the principle of humanity is expressed more specifically in the fundamental principles governing the conduct of hostilities, aimed at protecting the civilian population from their effects[250].

3.2. The principle of distinction

IHL imposes on parties to an armed conflict a dual obligation according to which they "*shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives*"[251].

Moreover, the civilian population and civilian objects must never be the object of attack or reprisals[252], and military necessity cannot justify attacks on civilians or civilian objects[253]. In addition, "*acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*"[254].

3.2.1. The protection of persons who are not, or no longer, taking part in hostilities

Under IHL, all individuals who are not, or no longer, actively engaged in the conflict shall be protected:

[247] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 257, §78. In this Advisory Opinion, the Court considered in particular the principles of distinction and the prohibition of unnecessary suffering.
[248] See the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR). See also, *inter alia*, ICTY, Trial Chamber, *Martic*, Decision, IT-95-11, 8 March 1996, Review of the Indictment; ICTY, Trial Chamber, *Kupreskic*, Judgement, IT-95-16-T, 14 January 2000; ICTY, Trial Chamber, *Blaskic*, Judgement, IT-95-14-T, 3 March 2000.
[249] See, *inter alia*, the 1868 St. Petersburg Declaration (principle of prohibition of superfluous injury); 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 (1980); the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (principle of distinction); the 2008 Convention on Cluster Munitions (principles of distinction and proportionality). For further information, see Chapter 5 below.
[250] AP I, Art. 35 and Part IV, Section I (Civilian population – General protection against effects of hostilities); AP II, Art. 13(1).
[251] AP I, Art. 48.
[252] *Ibid*., Arts. 51(2) and 52(1).
[253] ICTY, Appeals Chamber, *Galic*, Judgement, IT-98-29-A, 30 November 2006, §130.
[254] AP I, Art. 51(2).

combatants who expressed an intention to surrender[255]; wounded or sick combatants; shipwrecked combatants; medical and religious personnel[256]; personnel of aid societies[257] and civil defence organizations[258]; prisoners of war (POWs)[259] and civilians deprived of their liberty[260]; war correspondents[261]; parlementaires[262]; and, in general, all civilian populations located on the territory of parties to the conflict and in occupied territories. Lastly, within civilian population, women and children enjoy special protection[263].

In particular, belligerents must respect and protect all the wounded, sick[264] and shipwrecked[265], and, in compliance with that obligation, refrain from any acts against the life or integrity of wounded; "*in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created*"[266]. To this end, all possible measures must be taken "*to search for and collect*" them[267] and to provide them with the medical assistance or care they need[268]. In fulfilling those duties, the parties to the conflict must treat such individuals equally, "*without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria*". Only medical exigencies may justify a distinction in such treatment[269].

3.2.2. Distinction between combatant and non-combatant

For the purposes of the principle of distinction, any non-combatant is considered a civilian. By contrast, the term 'combatant'[270] covers both members of State armed forces[271] and members of the armed wing (organized armed group) of a non-State party to the conflict. Members of the political wing of a non-State party to the conflict are considered civilians (see the Focus on propaganda below). The notion of 'organized armed group' used in the Second Protocol Additional to the Geneva Conventions (GC) is not specifically defined. For France, an 'organized armed group' is a group that shows a minimum of organization and resorts to armed struggle – amongst other methods – in the context of a non-international armed conflict (NIAC). Whether an individual belongs to such group is determined based on facts and reasonably reliable information showing that said individual is actually a member of a group and taking part in hostilities. This

[255] See, *inter alia*, Art. 3 common to the GC; AP I, Art. 41; AP II, Art. 4.
[256] See, *inter alia*, GC I, Art. 24; GC II, Art. 36; AP I, Art. 15; AP II, Art. 9.
[257] See, *inter alia*, GC I, Art. 26; AP I, Arts. 17 and 71; As regards NIAC, cf. AP II, Art. 4.
[258] AP I, Art. 62; As regards NIAC, cf. AP II, Art. 4.
[259] See, *inter alia*, GC III, Art. 13.
[260] See, *inter alia*, GC IV, Art. 79 et seq. As regards NIAC, cf. AP II, Art. 4.
[261] War correspondents who accompany the armed forces without actually being members thereof are protected against hostilities as civilians, but they are also entitled to POW status if they are captured by hostile forces (GC III, Art. 4). As regards NIAC, cf. AP II, Art. 4.
[262] The term 'parlementaire' means a person who enters into communication with the enemy in order to negotiate. Their protection is guaranteed under an old IHL rule (see, *inter alia*, Art. 32 of the 1907 Regulations of The Hague concerning the Laws and Customs of War on Land).
[263] AP I, Arts. 76 and 77; AP II, Art. 4
[264] AP I, Art. 10(1); See also Art. 3 common to the GC; AP II, Art. 7(1). Under Art. 8(a) of AP I, "*'wounded' and 'sick' mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility*".
[265] GC II, Art. 12; AP II, Art. 7.
[266] GC I, Art. 12(2); for the comparable prohibition concerning shipwrecked, see GC II, Art. 12. For the relevant protection guaranteed in situations of NIAC, see Art. 3 common to the GC and AP II, Art. 4.
[267] GC I, Art. 15(1); for the comparable obligation concerning shipwrecked, see GC II, Art. 18. As regards NIAC, see Art. 3 common to the GC.
[268] Gregor Novak, "*Wounded, Sick and Shipwrecked*", Max Planck Encyclopedia of Public International Law, Oxford Univ. Press. Available online at http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e448?prd=EPIL.
[269] GC I, Art. 12(3); GC II, Art. 12; AP I, Art. 9(1) and 10(2); AP II, Art. 7(2).
[270] Strictly speaking, IHL provides for the status of 'combatant' in international armed conflict only. Therefore, individuals who take part in hostilities in the context of a non-international armed conflict do not enjoy combatant status, nor the related privilege. However, for the purposes of this Manual, the term 'combatant' also includes members of organized armed groups and members of State armed forces in situations of NIAC.
[271] GC III, Art. 4(A); AP I, Arts. 43 and 44.

means engaging in activities that actually and directly harm the enemy, or are likely to do so, and which therefore go beyond the scope of the war effort.

While combatants may be targeted at all times as long as they are not *hors de combat*, civilians are entitled to protection against direct attack, unless and for such time as they take a direct part in hostilities[272].

As soon as civilians no longer take a direct part in hostilities, they regain full protection against direct attack. However, they may later be prosecuted by domestic courts for having taken a direct part in hostilities, as opposed to members of State armed forces who, in the context of an international armed conflict (IAC), enjoy combatant privilege[273], namely the right to participate directly in hostilities with immunity from domestic prosecution for lawful acts of war. Under French law, military personnel involved in foreign operations enjoy a specific exemption from criminal prosecution, provided that they comply with international law applicable to the theatre of operation (outside national territory) where they are deployed[274].

Combatants may no longer be made the object of attack where they are *hors de combat*, i.e. where they are not engaged in hostilities because of sickness or wounds, because they surrendered or because they were captured[275].

In case of doubt on the status of a person in armed conflict, "*that person shall be considered to be a civilian*"[276] and thus be entitled to protection against attacks and the effects of attacks.

Focus: Foreign Fighters

While the presence of foreign fighters is not a recent phenomenon, it reached an unprecedented scale on Syrian and Iraqi territory as ISIS endeavoured to establish a caliphate.

Although the term 'foreign fighters' is not specifically defined under IHL, it means any individuals who have left their home country to fight alongside a party to a conflict, whether it be an IAC or a NIAC. Thus, the actions of such foreign fighters are governed by IHL, which is the law applicable in armed conflict. As members of an organized armed group or as civilians taking a direct part in hostilities, they may therefore be targeted by a party to the conflict, regardless of their nationality.

In the context of IAC, while nationality is irrelevant in determining combatant status under GC III, it may play a role in conferring POW status in cases where a combatant who joined the opposing party's armed forces was captured by the State of which they are a national. In such cases, and even if not expressly provided for under IHL, some States have developed the practice of denying POW status to their captured nationals because they committed belligerent acts against them. Such persons would lose the combatant privilege[277] and could therefore be prosecuted for having taken part in hostilities. In such circumstances, France does not rule out the possibility of denying POW status to French nationals captured in the course of an IAC.

In the context of NIAC, the nationality of an individual captured for belonging to an organized armed group is irrelevant in determining their status, since they are not entitled to combatant privilege anyway, which is the right to take part in hostilities with immunity from prosecution under domestic law for lawful acts of war. Consequently, foreign fighters can be prosecuted by States with territorial jurisdiction. For example, under the French criminal policy, French foreign fighters or fighters residing in France who have fought as members of a terrorist group or entity in the Middle East are systematically charged with criminal

[272] AP I, Art. 51(3); AP II, Art. 13(3).
[273] AP I, Art. 43(2).
[274] French Defence Code, Art. L4123-12(II): "*Military personnel involved in any operation using military capabilities outside French territory or territorial waters, whatever its purpose, duration or scale, including digital actions, hostage rescue, evacuation of nationals or policing the high seas, shall not be held criminally responsible for taking coercive measures or using armed force, or for giving the order to do so, where such acts are necessary to perform their mission, provided that they comply with the rules of international law*".
[275] GC I, Arts. 3 and 13; GC II, Arts. 3 and 12; GC III, Arts. 3 and 13; GC IC, Arts. 3 and 16; AP I, Arts. 10, 41 and 75; AP II, Arts. 4 and 7.
[276] AP I, Art. 50(1).
[277] AP I, Art. 43(2).

offences (punishable by up to 30 years' imprisonment) as soon as they return to French territory. Such criminal charges are intended to be brought against all individuals for whom evidence can be provided of their involvement in military-type training, armed patrols, recruitment or propaganda activities, Islamic police activities or combat.

Focus: Direct Participation in Hostilities (DPH)

The boundaries of battlefields have changed considerably over the course of the 20th century. Implementing the principle of distinction between civilians and combatants represents a real challenge in today's armed conflicts, in which participation in combat is no longer restricted to actual soldiers. Some members of organized armed groups seek to blend in with the civilian population, while civilian individuals sometimes take part in hostilities on a sporadic basis. Although civilian direct participation in hostilities (DPH) is mentioned in Art. 51(3) of AP I and Art. 13(3) of AP II, it is not specifically defined under the Geneva Conventions and their Additional Protocols. It is therefore necessary to delineate its scope and specify its consequences.

1. Civilians who take a direct part in hostilities temporarily lose their protection under IHL

In its 2010 *Interpretive Guidance*, the ICRC developed a definition of DPH which, as stated, draws on a variety of sources, including in particular IHL, international jurisprudence and military manuals. However, the positions outlined therein are those of the ICRC alone. Based on international case law and following a thorough validation process conducted in close consultation with the armed forces, the following definition has been adopted by the French authorities:

Direct participation in hostilities (DPH) means taking part in acts of war, or activities related to acts of war, that, because of their nature and/or purpose, aim at causing actual harm to military targets or to the armed forces of a party to the conflict, and/or taking part in acts benefitting a party to the conflict that aim at causing harm to individuals or property which enjoy protection against direct attack.

Examples of DPH acts include: taking up, carrying or using weapons in connection to combat operations[278]; participating in attacks against the personnel, property or equipment of a party to the conflict; transporting weapons into the immediate vicinity of combat operations; transmitting military information for the immediate use of a belligerent; serving as guards, intelligence agents, lookouts or observers on behalf of military forces; carrying out a cyberoperation to penetrate a military system of a party to the conflict in order to provide an opposing party with tactical intelligence for attack purposes (e.g. disabling a digital military warning system prior to an air attack); causing serious harm (homicide, sexual violence, deportation, etc.) to persons under protection for the benefit of a party to the conflict, etc.

As a result, civilians lose their protection against attack under IHL when and for such time as they take a direct part in hostilities. Consequently, they may be lawfully targeted in compliance with the rules of IHL.

On the other hand, support by a civilian for the war effort does not amount to DPH. For example, the following acts do not constitute DPH: demonstrating support for enemy forces; supplying food or medicine to military forces; transporting weapons or ammunition away from combat zones; providing general strategic analysis or intelligence; spreading propaganda for or providing financial support to a party to the conflict, and so on. Such acts constitute indirect participation in the conflict, and civilians who engage in such activities do not lose their protection against attacks under IHL.

2. The loss of protection only applies for such time as DPH lasts

Attacks on civilians taking a direct part in hostilities are permissible only in the time during which such individuals are engaged in a DPH act. Accordingly, civilians may be targeted during the preparation and execution of a DPH act, as well as during the disengagement phase, for example when leaving the site of an ambush in which they have just taken part. Thus, this concept

[278] Direct participation in hostilities does not include carrying weapons for the purposes of activities without connection to combat operations, e.g. fighting back against criminal acts, hunting, traditional/cultural activities, etc.

only enables armed forces in the presence of a civilian taking a direct part in hostilities to react lawfully within a short period of time in the event of a threat from that civilian, without necessarily needing to be in a situation of self-defence.

However, DPH cannot justify the planning of lethal attacks against civilians who previously committed an act of war, because they regain their protection under IHL immediately upon terminating their DPH act. Civilians who have taken part in hostilities may, nonetheless, be prosecuted by domestic jurisdictions at a later stage for such participation.

Lastly, and for the avoidance of doubt, it is necessary to distinguish between direct participation in hostilities and membership in an organized armed group. Any individual who joins an organized armed group for the purpose of taking part in hostilities, which refers in particular to participation in the armed wing of such entity, loses the protection afforded to civilians under IHL. Such individuals may therefore be targeted even when they are not engaging in DPH acts, for as long as they remain members of the organized armed group.

3. Forces engaged in a theater of operation must therefore objectively determine, on a case-by-case basis, whether or not civilians have lost their protection as a result of their direct participation in hostilities, based on a range of indicators (behaviour, equipment and any other available information)

Such an approach is materialized in the Rules of Engagement (ROE), which specify the actions that may be taken depending on the situation. The operational consequences of a DPH act and of the response to that act are set out in the ROE, which are classified information.

3.2.3. Distinction between military objectives and civilian objects

Attacks may only be directed against military objectives[279].

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 […] offers a definite military advantage*"[280]. An object is considered to be a legitimate military objective only when both parts of that definition are cumulatively fulfilled[281].

'Military objective by nature' means any objects which, because of their specific features, make an effective contribution to military action, such as weapons, equipment, transports, fortifications, military depots, buildings occupied by armed forces or organized armed groups, staff headquarters, communications centres, etc.[282] Police weapons as well as civilian equipment, transports or depots are not military objectives by nature.

'Military objective by location' means such zones or structures that are not military by nature, but are situated so that they make an effective contribution to the enemy's military action. This may be, for example, a bridge or a site, the destruction or neutralization of which offers, in the circumstances ruling at thte time, a definite military advantage, for instance preventing the enemy from seizing it or forcing the enemy to retreat from it[283].

'Military objective by use' means any object which, because of their present function, is useful to enemy forces in such a way that it falls within the scope of military objectives. For instance, if a civilian object such as a school or a hotel is used to accommodate troops or as a command post or staff headquarters, it becomes

[279] AP I, Art. 48.
[280] *Ibid*., Art. 52(2).
[281] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 52, §2018.
[282] *Ibid*., §2020.
[283] *Ibid*., §2021.

a military objective[284].

'Military objective by purpose' means any object whose future use, i.e., the use intended by the enemy, is known for a fact, and not just hypothetically determined, by the attacker[285].

Lastly, some objects have a dual-use function because they are used simultaneously for both civilian and military purposes. For example, a firing position may be located on the roof of a civilian house, or an apartment in a multi-storey building may be used as a command post. Similarly, a power station can supply electricity to both military barracks and the rest of the city. If the use of a civilian object, or a separable part of it, for military purposes makes it a military objective, the object – or separable part of it – may become a lawful target. However, the principles of proportionality and precaution are still applicable, not only as regards incidental damage to other civilian objects, but also in terms of the consequences for civilians of hindering the civilian use of that object (see below)[286].

Consequently, while attacks must not be directed against civilian objects, an object which is not necessarily military by nature may become a military objective by virtue of its use, location or purpose.

The destruction, capture or neutralization of the object must offer, in the circumstances ruling at the time and place in question, a definite military advantage. It is contrary to IHL to launch an attack which only offers potential or indeterminate advantages[287].

In case of doubt, any object normally dedicated to civilian purposes should be presumed not to be used for the purpose of making an effective contribution to military action[288]. Therefore, it cannot be the object of attack and enjoys protection against the effects of attack.

The prohibition of indiscriminate attacks is corollary to the principle of distinction[289]. There are three types of indiscriminate attack: attacks "*which are not directed at a specific military objective*", such as a soldier firing in all directions without aiming at a specific target; attacks "*which employ a method or means of combat which cannot be directed at a specific military objective*", such as long-range missiles which cannot be precisely aimed at their target; and attacks "*which employ a method or means of combat the effects of which cannot be limited*", such as destroying a building in a densely populated urban area using a bomb of such destructive power that its (collateral) effects would be excessive in relation to the concrete and direct military advantage anticipated (see Chapter 5, Subsection 5.1.2, below). Whether an attack is indiscriminate must be analysed with regard to the circumstances ruling at the time and place in which it is carried out. Means or methods of combat that can be used legitimately in certain situations may, in other circumstances, reach the threshold of an indiscriminate attack[290].

Focus: Targeting Oil Wells Used by Organized Armed Groups for Their Military Operations
Oil is one of the main sources of income for some organized armed groups. They extract it from areas under their full military control, and used it directly after refining to provide fuel for their vehicles. Under applicable IAC law and NIAC customary international law, military objectives, as far as objects are concerned, are those which, by their nature, location, purpose or use, make an effective contribution to military action, and whose total or partial destruction, capture or neutralization offers a definite military advantage in the circumstances ruling at the time.

[284] *Ibid*., §2022.
[285] *Ibid*.
[286] *Ibid*., §2023.
[287] *Ibid*., §2024.
[288] AP I, Art. 52(3).
[289] *Ibid*., Art. 51(4).
[290] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 51(4), §1963.

According to this definition, oil infrastructures (whether fixed or mobile) can become military objectives if a direct link can be established between the fuel resources obtained from operating the wells and the combat actions carried out by the enemy. This is the case, for example, if the oil extracted is used as fuel for the armed group's vehicles to carry out military operations.

On the other hand, such infrastructures cannot be considered military objectives simply because of their financial contribution – however significant – to the armed group. This type of contribution is part of the war effort. In such cases, the link between the economic or financial contribution and the group's military action is too weak to meet the threshold of a military objective.

The control of such infrastructures by members of the organized armed group and their effective contribution to the group's military action must be established and confirmed by intelligence before each engagement.

Focus: Objects Used in Propaganda Production and Dissemination, and the Status of Persons Inside Buildings Used for Such Activities

Organized armed groups often use propaganda to recruit new members, but also to incite international crimes (war crimes, crimes against humanity, even genocide).

Places of propaganda as military objectives

Propaganda is a war-sustaining activity which also contributes to the general war effort, and is considered to be outside the scope of the conduct of hostilities[291]. Indeed, while the Committee created by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) on 14 May 1999 following the NATO bombings reported that: "*if the media is used to incite crimes, as in Rwanda, then it is a legitimate target*"[292], that assertion has not yet been confirmed in case law, in particular the judgments of the International Criminal Tribunal for Rwanda (ICTR) in cases involving defendants linked to the Rwandan National *Radio Television Libre des Mille Collines*.

Although that assertion is backed by some legal scholars[293], many others strongly criticize it[294] as being inconsistent with the definition of a military objective, according to which the object concerned must make an effective contribution to military action[295].

[291] See, in that regard, Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2010, p. 55; High Court of Justice of Israel, *Public Committee Against Torture in Israel v. Government of Israel (Targeted Killings)*, HCJ/769/02, 2005, §35.

[292] ICTY, *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign*, https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal, §47.

[293] See, in that regard, Natalino Ronzitti, "Is the *Non Liquet* of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?", *International Review of the Red Cross*, Vol. 82, No. 840, 2000, p. 1017 ff.; W.J. Fenrick, "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia", *European Journal of International Law* 12, 2001, p. 496; W.J. Fenrick, "Attacking the Enemy Civilian as a Punishable Offense", *Duke Journal of Comparative and International Law* 7, 1997, p. 544.

[294] Andreas Laursen, "NATO, the War over Kosovo, and the ICTY Investigation", *American University International Law Review* 17, 2002, pp. 785-786; Marco Sassoli & Lindsey Cameron, "The Protection of Civilian Objects – Current State of the Law and Issues de Lege Ferenda", in Natalino Ronzitti & Gabriella Venturini, *Current Issues in the International Humanitarian Law of Air Warfare*, Utrecht, 2006, pp. 56-57, note 83; University Centre for International Humanitarian Law, "Expert Meeting: Targeting Military Objectives", Geneva, 12 Mai 2005, p. 10; Marco Sassoli, "Legitimate Targets of Attacks under International Humanitarian Law", Background Paper, International Humanitarian Law Research Initiative, 2003; Hans-Joachim Heintze & Pierre Thielborger, *From Cold War to Cyber War: The Evolution of the International Law of Peace and Armed Conflict over the Last 25 Years*, Bochum: Springer, 2016, pp. 118-119.

[295] Hans-Joachim Heintze & Pierre Thielborger, *From Cold War to Cyber War: The Evolution of the International Law of Peace and Armed Conflict over the last 25 Years*, 2016, Bochum: Springer, pp. 118-119: "*Overall, there are currently too few elements in State practice in order to accept a customary evolution of the criteria of article 52(2) towards a more relaxed standard of targeting, notably in order to prevent or punish the commission of international crimes. Even assuming that NATO-close States would accept such a position (which is all but proven), a rule of universal customary international law would need to be based on the assent of a significant number of States of the different regional groupings of the world. There is no evidence for such a development. It is even highly improbable that most States (especially in the Group of 77) would accept such a construction of the military objective*".

Propaganda as direct participation in hostilities

As propaganda falls outside the scope of the conduct of hostilities, it is not considered a DPH act either[296]. Although some legal scholars argue that a propagandist who incites international crimes can be considered to be taking a direct part in hostilities[297], others argue that incitement alone cannot constitute DPH if it does not involve the coordination of specific acts of war, as the link with hostilities would then be too indirect[298]. In fact, incitement to international crimes in armed conflicts would not appear to fall within the French definition of DPH (see Focus on DPH above), as it is not in itself such as to cause actual and serious harm to persons or objects under protection from direct attack. However, such incitement remains prohibited[299], and may entail the international criminal responsibility of the individuals involved[300].

Rules for targeting objects and persons involved in propaganda activities

In view of the foregoing, a propaganda centre may only constitute a military objective insofar as it can be established that it makes an effective contribution to the enemy's military action, in particular if it enables the dissemination of instructions or orders directly and explicitly relating to the conduct of hostilities, aimed for example at facilitating or coordinating military operations[301].

Similarly, civilians who take part in the propaganda activities of an organized armed group (i.e. civilians who do not belong to the armed wing of such entity) cannot be considered to be taking a direct part in hostilities for this reason alone, unless it can be established that through this propaganda effort they are facilitating or coordinating specific military operations. If such is the case, they may be lawfully targeted only for such time as their DPH act lasts and within a limited period of time before and during such participation.

When not taking a direct part in hostilities, individuals in the vicinity of or inside propaganda centres (which have become military objectives under the above-mentioned conditions) must be taken into account as civilians under protection in the proportionality test and for the purposes of the principle of precaution.

3.3. The principle of proportionality

The principle of proportionality must be observed when launching an attack against a combatant or a military objective. It is therefore prohibited to launch "*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*"[302].

France considers that the expression 'military advantage' used in Articles 51(5)(b), 52(2) and 57(2)(a)(iii) of AP I means "*the advantage anticipated from the attack as a whole and not from isolated or specific parts of the attack*"[303].

Only concrete and direct military advantages can be taken into account in the proportionality test. The

[296] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2010, p. 55; High Court of Justice of Israel, *Public Committee Against Torture in Israel v. Government of Israel (Targeted Killings)*, HCJ/769/02, 2005, §35.
[297] In particular, it is the position of most of the experts who were invited by NATO as part of the drafting of the Tallinn Manual on Cyber Warfare. See Michael N. Schmitt (dir.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge, 2013, p. 222.
[298] See, *inter alia*, Stuart Casey-Maslen, *The War Report 2012*, Oxford University Press, 2013, p. 363.
[299] Article 1 common to the Geneva Conventions; AP I, Art. 1(1).
[300] Rome Statute, Art. 25(3)(b) and (e).
[301] Such was the case with the Rwandan National Radio *des Mille Collines*, which transmitted precise information about the location of Tutsi people and provided them with false information to persuade them to regroup in supposedly protected areas. That radio was thus used to facilitate and coordinate Hutu attacks. See Stuart Casey-Maslen, *The War Report 2012*, Oxford University Press, 2013, p. 362.
[302] AP I, Art. 51(5)(b).
[303] Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, §10.

military criterion is satisfied in particular if the attack allows the occupation of the ground, or the neutralization or weakening of the enemy's armed forces. On the other hand, advantages of a purely political, psychological, economic, financial, social or moral nature may not be considered. The advantage must also be substantial, and relatively immediate. Vague, hypothetical, indirect or long-term advantages are therefore excluded.

The principle of proportionality is concerned with the incidental effects of attacks on civilians and civilian objects. These incidental (collateral) effects depend on a wide range of factors: distance from a military objective, accuracy of the weapons used, nature of the targeted military objective, etc. All these factors must be considered prior to each attack[304]. Accordingly, collateral effects on civilians must be taken into account, whether direct or indirect (or cascading), provided they are reasonably foreseeable. So, for example, if it is foreseeable that an attack will damage an electrical transformer (whether this is a dual-use object (see above), or a transformer located near a military target), the risk of cutting off the water supply to a hospital or an entire neighbourhood must be considered.

Lastly, if an attack is likely to cause collateral damage to civilian persons and objects which is excessive in relation to the military advantage anticipated, it must not be launched in the first place[305] or, if it has already been launched, it must be cancelled or suspended, in accordance with the principle of precaution[306].

The proportionality of an attack is assessed on a case-by-case basis, by comparing the foreseeable damage of the attack with the concrete and direct military advantage anticipated from it, based on the information available at the time of the decision. The International Criminal Tribunal for the former Yugoslavia held that, in order to determine whether an attack was proportionate, it is necessary to examine whether the perpetrator was reasonably well-informed of the circumstances and made reasonable use of the information available at the time of the attack, so that they could have expected excessive civilian casualties[307].

It follows that there is no predetermined threshold under IHL beyond which an attack may automatically be considered excessive in terms of incidental harm to civilian persons or objects. Therefore, under the current IHL framework, the disproportionate character of an attack cannot be presumed.

3.4. The principle of precaution

The principle of precaution applies when a military operation has to be continued in the face of risks to civilians, but also when one party is defending itself against enemy attacks. It must be implemented based on reasonably available information from all existing sources in the circumstances of the attack, as best as possible, whether at the time of the attack or against the effects of the attack. The principle of precaution entails an obligation the compliance with which is assessed on the basis of the means implemented and the precautions taken, not on the basis of the effects produced.

3.4.1. The principle of precautions in attack

Under the principle of precautions in attack, "*in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects*"[308], i.e. in "*any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat*"[309].

More specifically, the following precautions must be taken before launching and while carrying out an attack:

[304] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 57(2), §§2212-2213.
[305] AP I, Art. 57(2)(a)(iii).
[306] AP I, Art. 57(2)(b).
[307] ICTY, Appeals Chamber, *Galic*, Judgement, IT-98-29-T, 5 December 2003, §58.
[308] AP I, Art. 57(1).
[309] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 57(1), §2191. The concept of 'military operation' is thus broader than that of 'attack'.

- The warring parties must "*do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives*"[310]. In that vein, those who plan or decide upon such an attack must "*take the necessary identification measures in good time in order to spare the population as far as possible*"[311].
- In view of the prevailing circumstances at the time, the parties must "*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*"[312].
- The parties must "*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*"[313].
- Lastly, "*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*"[314].

In addition, "*effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit*"[315] – in particular "*when the element of surprise in the attack is a condition of its success*"[316]. Such warnings are particularly necessary in populated areas such as cities. The warning must reach as many civilians as possible, be as precise and comprehensible as possible, and give them time to leave, find shelter or take other measures to protect themselves. A variety of means can be used, including oral warnings, pamphlets, radio messages or other signals, telephone calls or messages, or the transmission of warnings to local authorities.

Lastly, the principle of precaution imposes on parties the obligation to cancel a planned attack or suspend an ongoing attack if it becomes apparent that such attack would breach the rules governing the conduct of hostilities; such would be for instance the case with attacks against civilians, civilian objects or individuals or objects enjoying special protection, or such attacks with disproportionate collateral damage[317]. This obligation applies to any person who carries out the attack or otherwise exercises effective control over it, including someone other than the person who decided upon the attack. France considers that this obligation only concerns the means implemented and "*calls only for normal measures to be taken to cancel or suspend that attack, on the basis of information available to the party deciding to launch the attack*"[318].

3.4.2. The principle of precautions against the effects of attacks

Under IHL, a State party to a conflict that defends itself against enemy attacks[319] on its territory or a territory under its control must also[320]:

- "*endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives*";
- "*avoid locating military objectives within or near densely populated areas*" (for example, placing barracks in the middle of a residential area, a stockpile of weapons near a school, etc.);

[310] AP I, Art. 57(2)(a)(i).
[311] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 57(2), §2198.
[312] AP I, Art. 57(2)(a)(ii).
[313] *Ibid*., Art. 57(2)(a)(iii).
[314] *Ibid*., Art. 57(3)
[315] *Ibid*., Art. 57(2)(c).
[316] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 57(2)(c), §§2223-2225.
[317] AP I, Art. 57(2)(b).
[318] Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, §16.
[319] AP I, Art. 58.
[320] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 58, §2239.

- "*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*" by keeping them away from combat zones, for instance by trying to push enemy forces back into isolated areas as France endeavoured to do in Operation *Serval*[321].

3.5. The principle of prohibition of superfluous injury and unnecessary suffering

Under this principle, it is prohibited to cause unnecessary damage and suffering to achieve strictly military purposes. More specifically, it means that "*the right of the Parties to the conflict to choose methods or means of warfare is not unlimited*"[322]. As opposed to the above-mentioned principles, the principle of prohibition of superfluous injury and unnecessary suffering aims primarily at protecting combatants.

Accordingly, "*it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering*"[323], whether physical or mental, the nature or intensity of which exceeds what is necessary to achieve the military aim sought and to weaken the opposing forces.

Means and methods of warfare that, by their very nature, cause such effects are therefore prohibited. In particular, the use of explosive projectiles under 400 grammes weight, weapons primarily injuring by fragments non-detectable by X-rays, poison or poisoned weapons or blinding laser weapons is expressly prohibited (see Part 3, Chapter 5, Subsections 5.1 et seq.).

[321] Nathalie Durhin, "Protecting Civilians in Urban Areas: A Military Perspective on the Application of International Humanitarian Law", *International Review of the Red Cross*, Vol. 98, No. 1, 2016, pp. 177-199.
[322] AP I, Art. 35(1).
[323] *Ibid*., Art. 35(2).

CHAPTER 4: CERTAIN CIVILIAN OBJECTS ARE AFFORDED SPECIAL PROTECTION

Under the principle of distinction, civilian objects enjoy a general protection against attacks and the effects of hostilities. Further, due to their specific characteristics, certain objects – medical units and transports, cultural property, objects indispensable to the survival of the civilian population, the natural environment, works and installations containing dangerous forces – are entitled to an enhanced protection against the effects of hostilities. This enhanced protection is justified by the fact that such objects are either essential to human survival, or necessary to mitigate the effects of hostilities (medical units), or are of inestimable value to a people or even all humanity, making any attack on them irreversible (cultural property), or risk, in the event of attack, causing disproportionate harm to the civilian population (works and installations containing dangerous forces).

4.1. The protection of medical units and transports

Under international humanitarian law (IHL), medical units and transports enjoy special protection. As early as 1864, the first Geneva Convention (GC) required belligerents to respect and protect ambulances and military hospitals, hospital and ambulance personnel, and the medical, administrative and transport services for the wounded[324].

The reasons behind this special protection for medical units and transports are easy to understand. Without it, it would be particularly difficult, if not impossible, to provide practical assistance to the wounded and sick[325] in times of armed conflict.

In accordance with Article 8(e) of the First Additional Protocol (AP I) to the GC, "*'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*".

In order to qualify as a 'medical unit', the unit must be assigned exclusively to medical purposes[326], whether for a temporary period of time, or for an unlimited duration.

This requirement of exclusivity of assignment is also reflected in the notion of 'medical transports' which is defined in AP I as "*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*"[327]. Medical transportation can take place by land (medical vehicle), by water (medical ships and craft), or by air (medical aircraft).

These definitions are also relevant in situations of non-international armed conflict (NIAC). Indeed, although they are not reproduced *verbatim* in AP II, the corresponding part was negotiated on the basis of the definitions used in AP I, and the terminology used to refer to medical units and transports is identical[328].

[324] ICRC, *Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field*, Arts. 1 and 2.
[325] For the legal regime applicable to the wounded and sick, see Part 3, Chapter 3, Subsection 3.2.1. above.
[326] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 8, §371.
[327] AP I, Art. 8(g).
[328] ICRC, *Commentary on the 1977 Second Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts*, 1987, Part III, §4631.

4.1.1. Medical units and transports must be respected and protected

4.1.1.1. Medical units must be respected and protected

The protective regime for medical units is based on both the obligation *to respect* and the obligation *to protect*. Thus, under the Geneva Conventions (Art. 19 GC I) and AP I (Art. 12), medical units shall be respected and protected by the parties to the conflict.

The obligation *to respect* medical units is a negative obligation, according to which belligerents must not attack such units. For the French army, this obligation means that, before launching any strike, medical installations and vehicles must be systematically identified to ensure that they are protected against targeting operations. Medical units lose their protection if they are involved in, or used for, acts harmful to the enemy which are outside their humanitarian function, such as sheltering healthy combatants, storing weapons or ammunition, being used as military observation posts, collecting or transmitting military intelligence (see below), etc.

For the French armed forces, this obligation also means not illegitimately interfering with the work of medical units, so that continuity of care for the wounded and sick can be ensured.

The obligation *to protect* medical units, on the other hand, imposes a positive obligation on the parties to the conflict to take measures to help medical units carry out their mission, such as "*coming to their help in case of need*" or making "*sure that they are not jeopardized by third parties (looting, etc.)*"[329].

The French armed forces comply with their obligation to protect medical units and transports as early as in the operation planning phase by listing members of non-governmental organizations (NGOs) in a category known as 'Persons with Designated Special Status' (PDSS). Because the French armed forces consider such persons essential to the proper fulfilment of their mission, that list is incorporated directly into the operation plan and rules of engagement (ROE). The status thus conferred by the French armed forces on these individuals and, more broadly, on the places in which they work, makes it possible, if necessary, to use graduated force, up to and including the use of deadly force, to protect them from hostile intents and acts, over and above the resort to self-defence (provided for by Article 122-5 of the French Penal Code).

Furthermore, Article 12(4) AP I provides that "*under no circumstances shall medical units be used in an attempt to shield military objectives from attack*" and that "*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*". The second part of that provision entails an obligation of conduct ("*the Parties shall ensure that…*") which relates more generally to the principle of precautions against the effects of attacks provided for in Article 58 of AP I.

Medical units must also be respected and protected in NIAC. This protection derives from the obligation to collect and care for the wounded and sick[330] set forth in Article 3 common to the GC, as well as from Article 11(1) of AP II, which expressly provides for it.

In addition to these specific obligations, medical units and transports remain covered by the IHL principles governing the conduct of hostilities. Accordingly, they must be considered in the proportionality test and when determining the precautions to be taken in the event of an attack likely to cause incidental damage to such units (Arts. 51(5) and 57 AP I). Moreover, any attack must be cancelled or suspended if it becomes apparent that it is directed against a medical unit or transport (Art. 57(2)(b) AP I).

[329] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 12, §518.
[330] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 3, §769.

In order to facilitate the identification of medical units and transports, and thus more effectively ensure that all parties to an armed conflict respect their special protection, IHL provides for the use of distinctive emblems: the Red Cross, the Red Crescent, the Red Lion and Sun[331], as well as the Red Crystal (introduced by AP III[332]). Under Article 44 of the GC I, the use of these emblems is strictly limited to the identification and protection of "*the medical units and establishments, the personnel and material protected by the present Convention*"; the National Red Cross and Red Crescent Societies may "*make use of the name and emblem of the Red Cross for their other activities*".

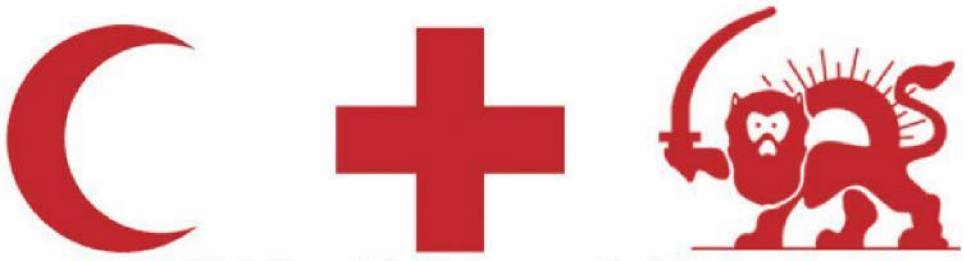


Fig. 2: Distinctive emblems in red on a white ground

Medical units and transports can also use distinctive light, radio or electronic signals, the specifications of which are listed in Annex I to AP I. In principle, the use of such signals supplements that of distinctive emblems. However, by way of exception, Article 6(4) of Annex I to AP I allows temporary medical aircraft to use only such distinctive signals if they cannot be marked with distinctive emblems, either for lack of time or because of the aircraft's specific characteristics.

The use of distinctive emblems, including the Red Crystal, by medical units and transports is also provided for in NIAC. It must be respected and not be used improperly (Art. 12 AP II).

Medical units and transports which do not display distinctive emblems, or use distinctive signals, do not lose the special protection afforded by IHL. In other words, the use of such emblems is not a prerequisite for benefitting from the protection conferred by IHL. Thus, an attacker who, when preparing an attack, identifies the presence of a medical unit or transport which is not using a distinctive emblem must always ensure that the attack complies with IHL obligations[333]. On the ground, failing to display distinctive emblems makes it more difficult to identify medical units and transports.

[331] The emblem of the red lion and sun on a white ground was employed by the Imperial State of Iran until 1980, when the Islamic Republic of Iran abandoned its use.
[332] Third Protocol additional to the 1949 Geneva Conventions and relating to the Adoption of an Additional Distinctive Emblem, adopted on 8 December 2005. France acceded to it on 17 July 2009.
[333] See, in that regard, PP4 of the Preamble of AP III: "*Recalling that the obligation to respect persons and objects protected by the Geneva Conventions and the Protocols additional thereto derives from their protected status under international law and is not dependent on use of the distinctive emblems, signs or signals*".

4.1.1.2. Medical transports must be respected and protected

Like medical units, medical transports of any sort must be respected and protected during armed conflicts (Art. 35(1) CG I; Arts. 21 and 24 AP I; Art. 11 AP II). The rationale behind this protective regime is readily understandable, as the protection of the wounded and sick would be ineffective if medical transports were unable to travel in safety. Beyond the similarities between the respective protections of medical units and medical transports, IHL provides for a number of specific rules applicable to medical aircraft in situations of international armed conflict (IAC).

In that regard, the terms for granting protection vary depending on the nature of the area overflown by the medical aircraft. In areas not controlled by an adverse party, the parties to the conflict may notify the adverse party of any medical flights planned in that area; however, the respect and protection of medical aircraft in such situations is not dependent on any agreement between the parties (Art. 25 AP I).

In 'contact zones', which are "*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*" (Art. 26(2) AP I), it is necessary under IHL to conclude an agreement before medical aircraft may operate. Without it, their protection cannot be fully effective. However, even in the absence of such an agreement, the armed forces of any party must respect medical aircraft after they have been recognized as such.

Lastly, for medical aircraft of a party overflying areas controlled by an adverse party, the former party must obtain prior agreement from that adverse party (Art. 27(1) AP I). Nevertheless, in want of such agreement, the adverse party must "*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*" (Art. 27(2) AP I).

4.1.2. If medical units and transports are used to commit acts harmful to the enemy, they lose their special protection

Notwithstanding the above, the protection afforded to medical units and transports is not absolute: it ceases wherever such units and transports are used to commit, outside their humanitarian function, "*acts harmful to the enemy*" (Art. 21 GC I; Art. 13 AP I). Art. 11(2) of AP II uses "*hostile acts*" to refer to that criterion; however, "*there is no difference of substance between these two terms*"[334]. Although neither terms are specifically defined under IHL, the GC and AP provide for some examples of acts that do not fall within that scope¸ thus limiting the risks of belligerents interpreting the notion too broadly.

Under Art. 22 of GC I, Art. 35 of GC II, Art. 19 of GC IV and Art. 13(2) of AP I, the following are not considered acts harmful to the enemy: "*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; that the unit is guarded by a picket or by sentries or by an escort; that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units; that members of the armed forces or other combatants are in the unit for medical reasons*"; that list is not exhaustive.

As regards the use of medical aircraft more specifically, Article 28 of AP I provides for restrictions on their operations to prevent that they are used improperly outside their medical purpose, which would compromise their special protection. Accordingly, medical aircraft may not be used "*to attempt to acquire any military advantage over an adverse Party*" (§1), and they "*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*" (§3). Furthermore, medical aircraft "*shall not be used to collect or transmit intelligence data and shall not carry any equipment intended*

[334] ICRC, *Commentary on the 1977 Second Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts*, 1987, Art. 11, §4720.

for such purposes" (§2). Upon acceding to AP I, France made an interpretative declaration concerning that last provision, according to which France "*does not interpret Article 28(2) as ruling out the presence on board of communication equipment and encoding material or the use of such equipment or material solely in order to facilitate navigation, identification or communication for the benefit of a medical transport mission, as defined in Article 8*"[335]. This declaration was made in view of the practical need, in certain circumstances, to use, for medical evacuation operations, military aircraft which are normally not dedicated to such missions.

Any medical unit or transport used to commit an act harmful to the enemy loses its special protection under IHL. However, the decision to attack such a unit or transport remains subject to a specific regime according to which the protection may "*cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded*" (Art. 21 GC I; Art. 13(1) AP I; Art. 11(2) AP II). This obligation to formally demand that the medical unit or transport cease the harmful act, failing which it risks being attacked, offers additional protection. IHL does not specify what a 'reasonable' time-limit is; it must therefore be determined on a case-by-case basis[336].

4.1.3. Intentional attacks against medical units or transports constitute war crimes

Intentional attacks against medical units or transports using the distinctive emblems of the Geneva Conventions in conformity with international law are serious violations of IHL and constitute war crimes in IAC and in NIAC, respectively under Art. 8(2)(b)(xxiv) and Art. 8(2)(e)(ii) of the Rome Statute of the International Criminal Court. This crime is also referred to in Article 461-12 of the French Penal Code.

4.2. The protection of cultural property

4.2.1. In armed conflicts, cultural property enjoys a specific protection against the effects of hostilities

Cultural property is protected by a principle of immunity enshrined in the 1954 Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict, under which the States parties must abide by a range of obligations aimed at the safeguarding of and respect for such property. In accordance with that Convention, the States parties "*undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict*"[337]. In situations of armed conflict, they must respect any cultural property, including within the territory of other States, in particular "*by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage*" and "*by refraining from any act of hostility directed against such property*"[338].

This protection of cultural property under the Hague Convention and Protocol is complemented by the 1977 Protocols additional to the Geneva Conventions through a number of provisions identifying such property as civilian objects entitled to special protection. Those provisions, which are viewed as a reflection of customary international law and are therefore binding on all belligerents, are set out in Articles 53 and 16 of AP I and AP II respectively. Cultural property is also covered by the general protection afforded to civilian objects under IHL, as well as by the rules of customary international law.

The Second Protocol to the Hague Cultural Property Convention, adopted on 26 March 1999, strengthens the existing legal protective regime, including by providing for enhanced protection for cultural property of

[335] Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, §5.
[336] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 13, §556.
[337] 1954 Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict, Art. 3.
[338] *Ibid*., Art. 4(1).

the greatest importance for humanity.

4.2.2. This specific protection covers any movable or immovable property of importance to the cultural heritage of every people, and any associated buildings

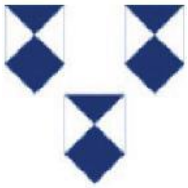
Under Article 1 of the Hague Cultural Property Convention, the term 'cultural property' covers the following:

- movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, religious buildings, cemeteries, sacred or forbidden sites and areas, groups of buildings which are of historical or artistic interest, archaeological sites, works of art, books and other objects of artistic, historical or archaeological interest;
- buildings whose main and effective purpose is to contain movable cultural property such as museums, large libraries, depositories of archives, and refuges intended to shelter movable cultural property in the event of armed conflict;
- centres containing monuments, i.e. centres containing a large amount of cultural property.

Such property may qualify as cultural property irrespective of origin or ownership. A few sites are inscribed on UNESCO's World Heritage List, a register of cultural property of outstanding universal value.

To increase recognition of and respect for cultural property in situations of armed conflict, a distinctive emblem in the form of a shield may be placed on such property as an indication of its protection. Such a distinctive emblem can take one of three forms, depending on the level of protection of the cultural property concerned:

Blue shield: distinctive emblem for cultural property protected under the Hague Cultural Property Convention



Three blue shields: distinctive emblem for cultural property under special protection

Blue shield outlined by a red band: distinctive emblem for cultural property under enhanced protection, protected under the Second Protocol to the Hague Cultural Property Convention

However, failing to display such distinctive emblems does not imply the absence of protection.

4.2.3. Depending on its status, cultural property is entitled to different levels of protection which correspond to incrementally strict conditions regarding withdrawal of immunity

4.2.3.1. Cultural property is, as a minimum, covered by a general protection whereby any use or attack is subject to the existence of an imperative military necessity

Cultural property or objects are civilian objects. As such, they must not be the target of attack or reprisal. Cultural property forms a specific category of civilian objects, and as such enjoys protection against any act

of hostility directed against it; it must also not be used to support the military effort. This general protection is the minimum level of protection based on the obligation to safeguard and respect cultural property[339].

The safeguarding of cultural property encompasses all the measures to be taken in peacetime to ensure its material protection[340]. Such measures include, as appropriate, the preparation of inventories, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property[341].

As regards the respect for cultural property, the armed forces must[342]:

- refrain from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict;
- refrain from any act of hostility directed against such property;
- prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of hostility or vandalism directed against, cultural property;
- refrain from requisitioning movable cultural property situated in the territory of another State;
- refrain from any act directed by way of reprisals against cultural property.

The obligation to respect cultural property may be waived only on the basis of imperative military necessity. Such waiver may be invoked[343]:

- to use cultural property for purposes which are likely to expose it to destruction or damage only when and for as long as there is no other feasible alternative available to obtain a similar military advantage;
- to attack cultural property only when and for as long as that cultural property has, by its function, been made into a military objective[344] and there is no other feasible alternative available to obtain a similar military advantage.

The decision to invoke imperative military necessity must be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise. If an attack is decided in such case, an effective advance warning must be given whenever circumstances permit.

The obligations to safeguard and respect cultural property must also be observed in situations of occupation. Accordingly, any State party in occupation of the territory of another State must support the competent national authorities of the occupied country in safeguarding and preserving its cultural property, and must, in close cooperation with the national authorities, take urgent measures to preserve cultural property damaged by military operations in that territory[345]. Consequently, the occupying State party must prohibit and prevent:

- any illicit export, other removal or transfer of ownership of cultural property;
- any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;
- any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.

Any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory must, unless circumstances do not permit, be carried out in close cooperation with the competent national

[339] *Ibid*., Art. 2.
[340] *Ibid*., Art. 3.
[341] 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Art. 5.
[342] 1954 Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict, Art. 4.
[343] 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Art. 6.
[344] *Ibid*., Art. 1(f).
[345] 1954 Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict, Art. 5.

authorities of the occupied territory[346].

4.2.3.2. Cultural property under special protection enjoys a higher level of protection

Article 8 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict provides for a 'special protection' regime granting immunity to cultural property inscribed in the International Register of Cultural Property under Special Protection[347] from any act of hostility and from any use of such property or its surroundings for military purposes[348]. Such protection covers primarily refuges intended to shelter movable cultural property, centres containing monuments and other immovable cultural property of very great importance.

In order to be granted special protection, cultural property must be situated at an adequate distance from any important military objective constituting a vulnerable point or from any large industrial centre, and must not be used for military purposes[349]. There are other situations where cultural property may be granted special protection.

Furthermore, under this regime, the conditions under which immunity may be withdrawn are tightened[350]. A party to the conflict is released from its obligation to respect the immunity of the property under special protection only when and for as long as the adverse party uses that property or its surroundings for military purposes. Apart from that case, immunity may be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such unavoidable necessity can be established only by the officer commanding a force the equivalent of a division in size or larger[351].

Because that protection system has proven ineffective, another regime of 'enhanced protection' was added to the existing special protection by the 1999 Second Protocol. Where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection apply[352].

4.2.3.3. Cultural property of the greatest importance for humanity may be granted enhanced protection, an immunity regime to which no exception can be made to obtain a military advantage

Cultural property may be placed under 'enhanced protection' by the Committee for the protection of cultural property in the event of armed conflict, provided that it meets the following three conditions[353]:

- it is cultural heritage of the greatest importance for humanity;
- it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection;
- it is not used for military purposes or to shield military sites, and a declaration has been made by the party which has control over the cultural property, confirming that it will not be so used.

In complying with such enhanced protection regime, the parties to the conflict must[354]:

- refrain from any use of the property or its immediate surroundings in support of military action. There are no exceptions to this obligation, unlike in the special protection regime;

[346] 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Art. 9.
[347] 1954 Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict, Art. 8.
[348] *Ibid*., Art. 9.
[349] *Ibid*., Art. 8.
[350] *Ibid*., Art. 11.
[351] *Ibid*., Art. 11(2).
[352] 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Art. 4.
[353] *Ibid*., Art. 10.
[354] *Ibid*., Art. 12.

- refrain from attacking cultural property under enhanced protection.

Cultural property under enhanced protection may lose such protection and then be the object of attack only if[355]:

- the property has, by its use, become a military objective and the purpose of the attack is solely to terminate the use of the property for military purposes;
- the attack is the only feasible means of terminating such use;
- all feasible precautions are taken to avoid, or in any event minimize, damage to the cultural property;
- the attack is ordered at the highest operational level of command, effective advance warning is issued to the opposing forces requiring the termination of the use of such property, and reasonable time is given to the opposing forces to redress the situation, unless circumstances do not permit, due to requirements of immediate self-defence.

Cultural property which is granted such protection is inscribed on the List of cultural property under enhanced protection.

4.2.3.4. The armed forces must comply with the norms pertaining to the protection of cultural property in targeting processes

The French armed forces attach great importance to the protection of cultural property during their operations.

Accordingly, armed forces personnel are trained in IHL to ensure compliance with the provisions of the GC and their AP applicable or relating to cultural property, and with the Hague Cultural Property Convention and its Additional Protocols. Training modules on the protection of cultural property during armed conflict are therefore provided not only prior to operational deployment, but also in refresher courses throughout the deployment. In addition, the French Ministry of Defence has issued a *Memento on the protection of cultural property in the event of armed conflict* as a reference document for French operation personnel.

Moreover, the protection of cultural property is considered a key factor at every stage in the planning and conduct of operations. Each strike is planned on the basis of a target folder, which includes a description of the objective (nature, function, geographical coordinates, etc.).

Cultural property is systematically catalogued by the Military Intelligence Directorate (DRM, *direction du renseignement militaire*) of the Ministry of Defence, using intelligence, the UNESCO World Heritage List, the International Register of Cultural Property under Special Protection and the List of Cultural Property under Enhanced Protection, as well as open sources.

Once listed, cultural property is placed on the No Strike List, and therefore may not be attacked, unless it is removed from that list during the operation, in accordance with its protection status and the corresponding conditions for the withdrawal of its immunity by a senior commanding officer.

When the targeting process takes place during a combat action (dynamic targeting, as opposed to deliberate targeting), the responsible personnel consults the DRM list of cultural property in order to check whether there is any which must be respected in the area concerned.

However, even if cultural property is not identified and included in the No Strike List, it does not affect the validity of its protection under IHL. In case of doubt, should the armed forces identify movable or immovable property of historical, artistic or archaeological interest, it must be presumed that such property is of great importance to the cultural heritage of every people, and that it is as such entitled to protection.

[355] *Ibid.*, Art. 13.

4.2.4. Violating the protection of cultural property amounts to a war crime or even a crime against humanity under the Rome Statute

Under the Rome Statute, whether in IAC or NIAC, it is a war crime to intentionally direct attacks against civilian objects and, more specifically, to intentionally direct attacks against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, provided they are not military objectives[356].

The extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, also constitute war crimes[357]. Other harmful acts against cultural property may amount to war crimes, such as intentionally launching an attack in the knowledge that such attack will cause incidental damage to civilian objects (in IAC)[358], seizing or destroying the enemy's property when there is no military necessity[359], or pillaging towns or places[360].

According to the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), certain harmful acts cultural property associated with a specific community, including those identifiable on racial, ethnic, cultural or religious grounds, committed as part of a widespread or systematic attack may also constitute a crime against humanity for persecution. In the cases of *The Prosecutor v. Timohir Blaškić*[361] and *The Prosecutor v. Dario Kordić and Mario Čerkez*[362], the ICTY thus characterized the willful destruction of institutions dedicated to religion or education associated with an ethnic community as persecution, which "*may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind*"[363]. Such destruction, including during armed conflict, has thus been defined as a crime against humanity, for "*all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects*"[364]. Under the Rome Statute of the International Criminal Court, in order to qualify as crime against humanity, persecution must be committed in connection with other acts punishable under the Statute[365].

4.3. The protection of objects indispensable to the survival of the civilian population

4.3.1. The rules governing the protection of objects indispensable to the survival of the civilian population in armed conflict

4.3.1.1. As a general rule, attacks against objects indispensable to the survival of the civilian population are prohibited

Both in IAC and NIAC, starvation of civilians as a method of warfare is prohibited[366] as it aims to create a general food shortage so that the civilian population suffers and dies of hunger. Its use is contrary to the principle of distinction[367].

It is also prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population because of their sustenance value, for the specific purpose of denying them to the civilian population. Such objects include foodstuffs and agricultural areas, crops, livestock, drinking water

[356] Rome Statute, Arts. 8(2)(b)(ix) and 8(2)(e)(iv).
[357] *Ibid*., Art. 8(2)(a)(iv).
[358] *Ibid*., Art. 8(2)(b)(iv).
[359] *Ibid*., Arts. 8(2)(b)(xiii) and 8(2)(e)(xii).
[360] *Ibid*., Arts. 8(2)(b)(xvi) and 8(2)(e)(v).
[361] ICTY, Trial Chamber, *Blaskic*, Judgement, IT-95-14-T, 3 March 2000, §227.
[362] ICTY, Trial Chamber, *Kordic and Cerkez*, Judgement, IT-95-14/2-T, 26 February 2001, §§206-207.
[363] ICTY, Trial Chamber, *Blaskic*, Judgement, IT-95-14-T, 3 March 2000, §227.
[364] ICTY, Trial Chamber, *Kordic and Cerkez*, Judgement, IT-95-14/2-T, 26 February 2001, §207.
[365] Rome Statute, Art. 7(1)(h).
[366] AP I, Art. 54(1); AP II, Art. 14.
[367] AP I, Art. 51; AP II, Art. 13.

installations and supplies and irrigation works.

This protection against attack applies irrespective of the motive for such action[368] and complements the general protection of civilian objects against reprisals[369].

4.3.1.2. In exceptional circumstances, attacks against objects indispensable to the survival of the civilian population may be allowed

There are some exceptions in the protection regime of objects indispensable to the survival of the civilian population. The armed forces may attack such objects when they are used for the purpose of sustaining enemy military personnel, or for other purposes where such use is in direct support of military action, unless attacking, destructing, removing or rendering useless the object results in the population being reduced to starvation or compelled to move away[370]. In any event, such attacks remain governed by the general rules relating to the protection of the civilian population against the effects of hostilities[371].

Furthermore, in the event of invasion by foreign armed forces which would compel the invaded party's armed forces to retreat, the latter are authorized to destroy such objects in order to defend their territory and impede enemy progress. This is known as the 'scorched earth policy', and must be "*required by imperative military necessity*"[372]. However, such destruction is limited to the national territory over which the retreating party exercises its authority. It is therefore prohibited to destroy objects indispensable to the survival of the civilian population located in that part of its own territory which is under enemy control, or in enemy territory. Conversely, under no circumstances may an occupying power carry out such destruction in the territory it occupies.

4.3.2. Criminalization of harmful acts against objects indispensable to the survival of the civilian population

Under the Rome Statute, in IAC, "*intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions*"[373] constitutes a war crime.

In its 18th session of 2-7 December 2019, the Assembly of States Parties of the ICC adopted an amendment to Art. 8(2)(e) of the Rome Statute, adding Paragraph (xix) which makes it a war crime in NIAC to intentionally use starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies[374]. Under Article 121(5) of the Rome Statute, "*any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance*". To date, only three States have deposited their instrument of ratification of that amendment (Andorra, New-Zealand, the Netherlands).

4.4. The protection of the natural environment

The natural environment is entitled to the general protection against the effects of hostilities afforded to civilian objects, but also enjoys a special protection against "*widespread, long-term and severe damage*"

[368] AP I, Art. 54(2).
[369] *Ibid*., Art. 54(4).
[370] *Ibid*., Art. 54(3).
[371] For example, the prohibition of disproportionate attacks if the incidental effects on civilians are excessive, even without starving the population or compelling it to move, or the application of the principle of precaution in the choice of methods and means of warfare, as well as in the selection of targets.
[372] AP I, Art. 54(5).
[373] Rome Statute, Art. 8(2)(b)(xxv).
[374] Assembly of States Parties to the Rome Statute, 18th session, Report of the Working Group on Amendments, ICC-ASP/18/32, 3 December 2019.

under Article 55 of AP I. Moreover, the conclusion of international agreements on the control of means and methods of warfare made it possible to enforce measures contributing to the preservation of the natural environment.

While IHL is the *lex specialis* in armed conflict[375], international instruments protecting the environment in peacetime may continue to apply in such situations[376].

Unless otherwise specified, the obligations of the French forces set out below are applicable during both IAC and NIAC.

In any event, no provision of AP I referred to below prevents France from exercising its inherent right of self-defence, in accordance with Article 51 of the United Nations Charter. For France, these provisions relate to conventional weapons only and they do not regulate or prohibit recourse to nuclear weapons[377].

4.4.1. Definition of the natural environment

The natural environment is defined in contradistinction to the human environment. It includes all elements that exist or occur naturally[378], i.e. the biotic and abiotic components of air, water, land, natural resources, flora, fauna and the system of interrelations between living organisms and their inanimate environment. The natural environment also includes natural elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water and livestock[379].

4.4.2. As a civilian object, the natural environment enjoys a general protection against attacks

The natural environment is a civilian object and enjoys as such the same protection under IHL. More specifically, each part or element of the natural environment is a civilian object, unless it is transformed into a military objective. Their protection includes the following elements.

4.4.2.1. Protection against direct attacks

The French armed forces comply with their obligation under IHL to attack only military objectives[380]. It is prohibited to direct an attack against a civilian object, including part of the natural environment, unless it has become a military objective the total or partial destruction of which offers, in the circumstances ruling at the time, a definite military advantage. The protection of civilian objects against direct attacks also applies at sea and in airspace[381].

Accordingly, it is for example prohibited to attack a part of a forest as such, unless it contains elements of

[375] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 240; §25.
[376] The applicability of international agreements on environmental protection is determined on a case-by-case basis, depending on their specific provisions and the intentions of their drafters.
[377] Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, §§1, 2 and 11.
[378] See, generally, ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35, §1444.
[379] *Ibid*., Art. 55, §2126.
[380] AP I, Art. 52; in NIAC, the prohibition on directing attacks against civilian objects is inferred from Art. 13 of AP II which prohibits direct attacks against the civilian population. See also the French Defence Code, Art. D4122-10, according to which such prohibition applies both in IAC and NIAC.
[381] See the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, §§39 and 44, and the 2009 HPCR Manual on International Law Applicable to Air and Missile Warfare, §11. Although those manuals were not adopted with a view to applying specifically to non-international conflicts, it is recognized that some of the rules they contain apply to NIAC, in particular the basic principles of IHL. As regards outer space, see the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Art. IV: Outer space enjoys a similar kind of protection, given that States parties are bound to use the Moon and other celestial bodies solely for peaceful purposes.

the opposing armed forces (military objective by use) and its total or partial destruction is necessary to neutralize the contingent (definite military advantage).

The prohibition of direct attacks on civilian objects implies that such objects may not be destroyed unless it is required by imperative military necessity[382]. The destruction of any part of the natural environment is thus prohibited, unless required by imperative military necessity[383]. Similarly, arbitrary destruction of the natural environment that is not justified by military necessity is prohibited in sea and air operations[384]. As regards the interplay between those rules, it should be noted that 'imperative military necessity' may not be invoked to warrant the destruction of parts of the natural environment in cases where such destruction or damage are prohibited by other IHL rules.

The destruction of an element of the natural environment can occur in a variety of ways. For example, it can be set on fire or severely damaged by other means. Indeed, the purpose of destruction is to annihilate the object, or to cause such damage to it that its normal use becomes impossible, or, as far as the environment is concerned, to deprive it of its ability to sustain life. Consequently, the prohibition of destruction of the natural environment aims at protecting entire ecosystems from annihilation. As depicted in the *Commentary* on the Manual on International Law Applicable to Air and Missile Warfare, the destruction of an entire ecosystem, like the Amazon River Basin or the Black Forest, would violate that prohibition[385].

Direct attacks against civilian objects which have not lost their protection under IHL, and their destruction, constitute war crimes[386].

4.4.2.2. The protection against attacks causing incidental damage that would be excessive in relation to the concrete and direct military advantage anticipated

The French army must refrain from any attack that may cause incidental damage to civilian objects which would be excessive in relation to the military advantage anticipated[387]. Incidental damage to the natural environment is assessed objectively based on the information available at the time of deciding upon the attack.

As an example, in an operation against an opponent's convoy (military objective), the damage caused by the land pollution due to fuel spillage and combustion (damage to the natural environment caused incidentally by the attack) must not outweigh the direct and concrete military advantage anticipated. It would therefore be probably lawful to attack a convoy of a few dozen vehicles, as the resulting pollution would not be of

[382] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Art. 23(g). See also the French Defence Code, Art. D4122-10, according to which this prohibition applies both to IAC and NIAC. That article of French statute law on general military discipline refers to "*military necessity*" only and not to '*imperative* military necessity', which does not reflect France's international obligations. However, under Art. D4122-7 of the French Defence Code, "*Military personnel in combat are bound by the obligations under international law applicable to armed conflicts, in particular the laws and customs of war and the four Geneva Conventions published by Decree No. 52-253 of 28 February 1952, and their two Additional Protocols published respectively by Decree No. 84-727 of 17 July 1984 and Decree No. 2001-565 of 29 June 2001*"; the laws and customs of war include the 1907 Hague Regulations.

[383] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, 2006, "Rule 43.B". See also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, 2020, Rule 13.

[384] 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, §44; 2009 HPCR Manual on International Law Applicable to Air and Missile Warfare, §§21 and 88. The protection of the environment against destruction is one of the rules that can also apply in NIAC, in the event that an organized armed group has access to naval and aviation technologies enabling it to carry out such operations.

[385] Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2010, §88, p. 206.

[386] As regards attacks against civilian objects, see the Rome Statute, Art. 8(2)(b)(ii) applicable to IAC; the French Penal Code, Art. 461-14 applicable both to IAC and NIAC. As regards destruction of civilian objects, see the Rome Statute, Arts. 8(2)(b)(xiii) applicable to IAC and 8(2)(e)(xii) applicable to NIAC; the French Penal Code, Art. 461-16 applicable both to IAC and NIAC.

[387] AP I, Art. 51(5)(b). The principle of proportionality is part of customary law and therefore also applies to NIAC. See, in that regard, the prohibition of indiscriminate attack recalled by the ICTY, Appeals Chamber, *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, §§100-127. In that decision, the Appeals Chamber stressed that customary rules relating to the conduct of hostilities also apply to situations of NIAC. See also Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, 2006, "Rule 14", p. 62 ff.

such gravity as to require the operation to be cancelled.

As regards sea operations, in order to protect fragile elements of the environment, parties to an armed conflict are encouraged to conduct hostile actions outside marine areas of high environmental value, i.e. areas containing rare or fragile ecosystems, or the habitats of depleted, threatened or endangered species[388]. Similarly, in land operations, warring parties are encouraged to conduct hostilities outside areas of high environmental value[389].

Lastly, in IAC, deciding upon an attack that causes incidental damage to civilian objects which is excessive in relation to the military advantage anticipated is a war crime[390].

4.4.2.3. The obligation to take all feasible precautions in attack

Those who plan or decide upon an attack must take all feasible precautions to avoid, and in any event to minimize, foreseeable losses of civilian life and damage to civilian objects[391]. Accordingly, the command staff must assess the attack's potential incidental damage to the environment objectively based on the information available at the time of deciding upon the attack. Such assessment under the obligation to take all feasible precautions cannot be based on information beyond what can be reasonably expected from the command staff.

Consequently, the military authority deciding upon the attack is not liable for incidental damage to the environment that was practically impossible to foresee, both in terms of the scientific knowledge that could reasonably be expected from that authority and of the resources reasonably available to them at the time of the decision. Lastly, the lack of scientific certainty as to an operation's effects on the environment is one of the factors to be considered before and during the attack.

The command staff must take all feasible precautions in the choice of means and methods of warfare in order to minimize incidental damage to civilian objects.

4.4.2.4. Prohibition of attacks against the natural environment by way of reprisals

Under Article 55 of AP I applicable to IAC, the natural environment is entitled to the same protection as civilian objects against any response to a wrongful act previously committed by the opposing party which would be inconsistent with the law of armed conflict.

In addition, France made reservations and interpretative declarations upon acceding to that Protocol in 2001. France considers that the prohibition of attacks against the natural environment by way of reprisals under Article 55 does not prevent it from using, in accordance with international law, any means it considers necessary for exercising its inherent right of self-defence under Article 51 of the United Nations Charter or protecting its civilian population against serious, blatant and intentional violations of the Geneva Conventions and Protocol I by the enemy.

4.4.2.5. The protection of the natural environment in occupied territory

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupying power must respect the occupied territory and make reasonable use of its resources, in accordance

[388] 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, §11.
[389] ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, 2020, Rule 9, §§144-145.
[390] Rome Statute, Art. 8(2)(b)(iv) applicable to IAC; French Penal Code, Art. 461-28 applicable to IAC.
[391] AP I, Art. 57. The principle of precaution is part of customary law and therefore also applies to NIAC. See, in that regard, ICTY, Appeals Chamber, *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, §§100-127. In that decision, the Appeals Chamber stressed that customary rules relating to the conduct of hostilities also apply to situations of NIAC. See also Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, 2006, "Rule 15", p. 69 ff.

with the rule of usufruct. *A fortiori*, all destruction and seizure not justified by imperative military necessity is prohibited. Thus, extending the notion of enemy property to include elements of the natural environment (in particular natural resources) offers some degree of protection to the environment from seizure and destruction during occupation[392].

4.4.3. The specific protection of the natural environment against widespread, long-term and severe damage

At the time of drafting AP I, the environment enjoyed growing attention on the international stage, and was consequently afforded specific protection under that instrument. Accordingly, the French armed forces comply with their obligation to refrain from conducting any attack that may incidentally cause widespread, long-term and severe damage to the natural environment[393]. The use of means and methods of warfare which are intended, or may be expected, to cause such damage is thus prohibited. For France, this rule applies both to IAC and NIAC in accordance with the French Defence Code[394].

The 'widespread, long-term and severe damage' related to that prohibition must not be confused with "*acts of warfare which cause short-term damage to the natural environment, such as artillery bombardment*"[395], which are not intended to be prohibited by Article 35 of AP I. Indeed, the former category refers to damage sufficiently substantial to cause "*serious disruption of the natural equilibrium permitting life and the development of man and all living organisms*"[396]. This kind of damage may affect a wide geographical area or a large part of the population ("*widespread*"), have effects on the ecosystem lasting for decades ("*long-term*"[397]), the severity of which must be assessed in qualitative and quantitative terms ("*severe*"). In other words, that kind of damage is sufficiently widespread, long-term and severe to compromise the health or survival of the population or the development of an ecosystem[398].

This prohibition under IHL is absolute. Under the Rome Statute of the ICC, "*intentionally launching an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*" is a war crime[399].

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[392] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Arts. 53-56; GC IV, Art. 53.

[393] AP I, Art. 35(3). See also the French Defence Code, Art. D4122-10. Under that article of French statute law on general military discipline, the prohibition to conduct such an attack only applies if the incidental damage is not "*excessive in relation to the military advantage anticipated*", which does not fully reflect France's international obligations. However, under Art. D4122-7 of the French Defence Code, "*Military personnel in combat are bound by the obligations under international law applicable to armed conflicts, in particular the laws and customs of war and the four Geneva Conventions published by Decree No. 52-253 of 28 February 1952, and their two Additional Protocols published respectively by Decree No. 84-727 of 17 July 1984 and Decree No. 2001-565 of 29 June 2001*".

[394] French Defence Code, Art. D4122-10.

[395] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35, §1454.

[396] *Ibid*., §1462.

[397] As regards the definition of "*long-term*" in the context of AP I, see ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35, §1451. Regarding the words "*widespread*" and "*severe*", the ICRC refers to the definitions agreed upon by the States parties to the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD Convention). See, in that regard, ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35, §1453, referring to the Report of the Conference of the Committee on Disarmament, Vol. I, United Nations General Assembly, 31st session, Supplement No. 27 (A/31/27), p. 91. It is worth recalling that France is not party to the ENMOD Convention.

[398] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35, §1451.

[399] Rome Statute, Art. 8(2)(b)(iv).

Focus: The Obligations of the French Army Regarding the Protection of the Environment

For the purpose of protecting the environment, the French armed forces must comply with:

- the prohibition on conducting any direct attack against the environment where it is not a military objective;
- the prohibition on conducting any attack that may cause damage to the environment which would be excessive in relation to the military advantage anticipated;
- the obligation to take all feasible precautions in attack with a view to avoiding, and in any event to minimizing, incidental damage to the environment;
- the prohibition of any attack against the environment by way of reprisals in IAC;
- the protection of the natural environment as enemy property in occupied territory;
- the prohibition on conducting any attack that may incidentally cause widespread, long-term and severe damage to the natural environment.

In accordance with international law, those prohibitions do not prevent France from using any means it considers necessary for exercising its inherent right of self-defence under Article 51 of the United Nations Charter or for protecting its civilian population against serious, blatant and intentional violations of the Geneva Conventions and Protocol I by the enemy, including the use of nuclear weapons in extreme circumstances of self-defence where France's very survival is in jeopardy[400].

4.4.4. Some provisions of treaties on control of means and methods of warfare contribute to the preservation of the natural environment

4.4.4.1. The protection of the environment resulting from the prohibition of certain methods of warfare

The destruction of objects indispensable to the survival of the civilian population is prohibited unless it is required by imperative military necessity on the territory of a State facing invasion (IAC)[401]. Further, starvation of civilians in IAC constitutes a war crime[402]. Thus, certain elements of the environment, such as agricultural areas, rivers or any area where hunting and fishing resources are found, are protected from attacks aimed at depriving the civilian population of resources.

Directing an attack against works and installations containing dangerous forces, or at or in their vicinity, is prohibited where such attack may cause the release of dangerous forces, thus protecting the natural environment from certain risks, such as radioactive pollution or flooding[403].

Lastly, the prohibition of pillage[404]also contributes to preserving the opposing party's natural resources; pillage is also a war crime[405].

[400] Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, §§1, 2 and 11.
[401] AP I, Art. 54 and AP II, Art. 14 (contrary to AP I, that article of AP II does not provide for anything related to the scorched earth policy).
[402] Rome Statute, Art. 8(2)(b)(xxv) and French Penal Code, Art. 461-25.
[403] AP I, Art. 56 and AP II, Art. 15.
[404] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Arts. 28 and 47, and AP II, Art. 4(2)(g).
[405] Rome Statute, Arts. 8(2)(b)(xvi) applicable to IAC and 8(2)(e)(v) applicable to NIAC; French Penal Code, Art. 461-15 applicable both to IAC and NIAC.

4.4.4.2. The protection of the environment resulting from treaties on prohibitions or restrictions on certain weapons or means of warfare

By prohibiting poison or poisoned weapons[406], bacteriological weapons[407], chemical weapons[408], anti-personnel mines[409] and cluster munitions[410], and by regulating the use on land of mines, booby-traps and other devices[411], States have made it possible to minimize or even end the incidental damage of such weapons on the environment (deforestation, land erosion and pollution, damage to plants and animals, etc.). The positive impact of these bans and regulations is further increased by the removal and destruction programmes for the weapons systems concerned[412]. Similar obligations apply to explosive remnants of war[413].

4.4.5. The applicability of international environmental law in armed conflict

IHL is the *lex specialis*[414] for the conduct of hostilities: it is the body of law governing armed conflict in particular. Where other bodies of law apply during an armed conflict, they must be compatible with and, if necessary, construed consistently with IHL.

More specifically, France considers that instruments of international environmental law are not applicable in situations of armed conflict, unless they have been negotiated with this purpose in mind or contain specific provisions concerning the conduct of military operations.

Accordingly, the principle of precaution in IHL should not be interpreted in the same way as the precautionary principle in international environmental law[415]. The lack of scientific certainty as to the effects of certain military operations on the environment does not release the parties to a conflict from their obligation to take all feasible precautions in attack.

4.4.6. The customary nature of the prohibition on indiscriminate attacks against the environment

The principles of distinction, proportionality and precaution, as well as the prohibition on the destruction of civilian objects not justified by military necessity, are among the principles of customary IHL which applies to all armed conflicts. France does not consider that the prohibition of widespread, long-term and severe damage under Articles 35(3) and 55 of AP I corresponds to a customary norm[416].

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[406] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Art. 23(a). This norm is also a rule under customary international law.

[407] 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. The use of such weapons in IAC is a war crime under Art. 8(2)(b)(xviii) of the Rome Statute and Art. 461-28 of the French Penal Code.

[408] 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The use of such weapons is punishable under criminal law (French Defence Code, Art. L2342-57).

[409] 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. The use of such weapons is punishable under criminal law (French Defence Code, Art. L2343-2).

[410] 2008 Convention on Cluster Munitions. The use of such weapons is punishable under criminal law (French Defence Code, Art. L2344-2).

[411] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Amended Protocol II) of the Convention on Certain Conventional Weapons (CCW).

[412] *Ibid*., Art. 10; 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Art. 1(2); 2008 Convention on Cluster Munitions, Arts. 3 and 4.

[413] Protocol on Explosive Remnants of War (Protocol V) of the CCW, Arts. 3 and 9.

[414] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 240, §25.

[415] 1992 Rio Declaration on Environment and Development, Principle 15.

[416] See France's Reservations and interpretative statements concerning its accession to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980. For a contradictory opinion, see Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, 2006, "Rule 45", p. 201 ff.

Focus: The Protection of the Natural Environment in Operations under NATO Command

Since 2003, NATO's approach to the protection of the natural environment is regulated in the NATO Military Principles and Policies for Environmental Protection (MC 469/1, as amended in 2011). Pursuant thereto, the command staff of a NATO operation must comply with a number of measures aimed at protecting the environment during the planning and conduct of operations.

As part of drafting this reference document, NATO adopted 6 standardization agreements (STANAG) on environmental protection (AJEPP[417]). Accordingly, the French armed forces engaged in a NATO-led operation must comply with the following regulations:

- STANAG 2582, *environmental protection best practices and standards for military camps in NATO operations* (AJEPP-2)
- STANAG 2583, *environmental management system in NATO operations* (AJEPP-3)
- STANAG 7141, *joint NATO doctrine for environmental protection during NATO-led military activities* (AJEPP-4)
- STANAG 2510, *joint NATO waste management requirements during NATO-led military activities* (AJEPP-5)
- STANAG 6500, *NATO camp environmental file during NATO-led operations* (AJEPP-6)
- STANAG 2594, *best environmental protection practices for sustainability of military training areas* (AJEPP-7)

4.5. The protection of works and installations containing dangerous forces

In addition to the general prohibition on attacking works or installations containing dangerous forces as civilian objects, specific rules apply where these objects are military objectives, given that an attack against them may pose significant risks to the civilian population. This prohibition applies to dams, dykes, nuclear electrical generating stations and other military objectives located at or in the vicinity of these works or installations.

4.5.1. The rules governing the protection of works and installations containing dangerous forces

4.5.1.1. The prohibition of attacks on works and installations containing dangerous forces if such attack may cause severe losses among the civilian population

Even where works or installations containing dangerous forces are military objectives, they must not be made the object of attack if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population[418]. The expression 'severe losses' refers to important or heavy losses that must be estimated in good faith on the basis of objective elements such as the proximity of inhabited areas, the density of population, the lie of the land, and so on [419].

However, it is permissible to attack works and installations containing dangerous forces which are military objectives provided that such attack is not expected to cause severe losses to the civilian population, even if it does result in the release of dangerous forces. Nevertheless, and in any event, whether such attack is appropriate must still be assessed against the fundamental principles governing the conduct of hostilities.

This rule also applies to attacks directed at military objectives located at or in the vicinity of these works or installations.

In IAC, under that special protection, it is possible to attack such objects only if they are used for other than their normal function, in regular, significant and direct support of military operations, and if such attack is

[417] Allied Joint Environmental Protection Publication.
[418] AP I, Art. 56(1); AP II, Art. 15.
[419] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 56, §2154.

the only feasible way to terminate such support[420].

Lastly, like objects indispensable to the survival of the civilian population, under no circumstances may works and installations containing dangerous forces be made the object of reprisals[421].

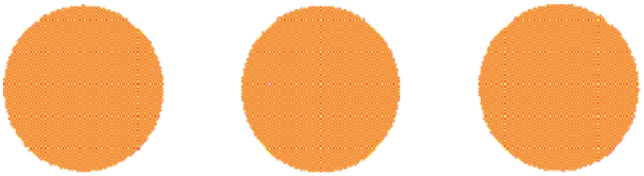
4.5.1.2. The warring parties must keep the works and installations containing dangerous forces away from military objectives

States must endeavour to avoid locating any military objectives in the vicinity of works or installations containing dangerous forces. This is an obligation of conduct.

Nevertheless, an exception may be made for installations erected for the sole purpose of defending the protected works or installations from attack provided that their armament and participation in hostilities aim only at repelling hostile action against the protected works or installations[422].

4.5.2. Protected works and installations containing dangerous forces may be marked with an international special sign

States may display an international special sign on works and installations containing dangerous forces, composed of a group of three bright orange circles of equal size placed on the same axis[423], as follows:



However, treaty-based IHL only provides for this possibility in IAC and not in NIAC. Since such marking is not mandatory, the special protection remains unaffected even if it is not displayed.

4.5.3. Criminalization of attacks against works and installations containing dangerous forces

Under the Rome Statute of the ICC, there is no specific crime for the failure to comply with the special protection of works and installations containing dangerous forces.

However, in IAC, "*intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects […] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*" is a war crime[424].

Therefore, as regards IAC, it is possible to sanction non-compliance with the special protection of works and installations containing dangerous forces by prosecuting disproportionate attacks; however, there is no equivalent alternative in NIAC.

[420] AP I, Art. 56(2).
[421] *Ibid*., Art. 56(4).
[422] *Ibid*., Art. 56(5).
[423] Annex I to AP I, Art. 17.
[424] AP I, Art. 85(3)(c); Rome Statute, Art. 8(2)(b)(iv).

CHAPTER 5: THE RESTRICTIONS ON WEAPONS, MEANS AND METHODS OF WARFARE

Under IHL, the right of the parties to the conflict to choose methods or means of warfare is not unlimited[425]. Based on that fundamental rule, IHL also provides for a framework for how weapons are to be used as well as restrictions or even prohibitions on the use of certain weapons. This is also the result of other IHL norms such as the prohibition of superfluous injury[426] and of indiscriminate attacks[427], i.e. attacks which employ a method or means of combat which cannot be directed at a specific military objective[428] or the effects of which cannot be limited as required by IHL[429].

This Chapter deals with the rules governing the choice and use of certain weapons and means of warfare according to their characteristics and effects, which is mainly provided for in Articles 35 and 51 of Protocol I additional to the Geneva Conventions (AP I). Because of their specific characteristics, the use of these weapons and means is either absolutely prohibited or partially restricted under IHL.

In line with the 1899 and 1907 Hague Regulations and Declarations as well as AP I, additional treaty-based arrangements were adopted over the years to identify specifically the weapons and means of warfare that are of a nature to cause superfluous injury and have indiscriminate effects. Key examples for such arrangements are the 1980 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 (Convention on Certain Conventional Weapons, CCW) and its five Protocols; the 1997 Anti-Personnel Mine Ban Convention; and the 2008 Convention on Cluster Munitions.

Under those different conventions, certain weapons and means of warfare are absolutely prohibited, such as poison, chemical weapons, biological and bacteriological weapons, blinding laser weapons, weapons primarily injuring by fragments non-detectable by X-rays, anti-personnel mines, cluster munitions, etc. Yet other weapons and means of warfare are only partially restricted in cases where their use in certain circumstances would not enable control over their effects as required by IHL. Examples include incendiary weapons, booby-traps and mines other than anti-personnel mines (MOTAPM).

Most of these instruments restrict or prohibit the use of specific weapons and means of warfare in armed conflict. By contrast, Protocol V to the CCW on Explosive Remnants of War (ERW) is unique in that it regulates the residual effects of a means of warfare after it was used in armed conflict. The Protocol imposes reporting and clearance obligations on States parties, in accordance with the requirement to limit the effects of a weapon in space and time[430].

It should be noted that these limitations and prohibitions only concern the main and intended effects of weapons, i.e. those for which it was designed or which can be expected under normal use, and not incidental or accidental effects. However, such incidental and accidental effects remain subject to the general principles governing the conduct of hostilities.

This Chapter also addresses the rules governing the use of certain methods of warfare, i.e. the tactics and strategies employed by the parties to an armed conflict, as well as the concepts and doctrines for the use of means of warfare, i.e. the way in which weapons are used[431]. Like weapons and means of warfare, the choice

[425] AP I, Art. 35(1).
[426] *Ibid*., Art. 35(2).
[427] *Ibid*., Art. 51(4).
[428] *Ibid*., Art. 51(4)(b).
[429] *Ibid*., Art. 51(4)(c).
[430] *Ibid*.
[431] 'Strategy' means "*the art and science of developing and employing instruments of national power in a synchronized and integrated fashion to achieve theatre, national and/or multinational objectives*", NATO Glossary AAP-39. 'Tactics' is defined as "*the art and method of combining, during engagement, the effects of military capabilities to fulfil the missions and tasks set for achieving the objectives under the operational strategy*", French Joint Glossary of Operational Terminology (*glossaire interarmées de terminologie*

of methods of warfare is not unlimited.

5.1. The basic tenets of the restrictions on weapons, means and methods of warfare

5.1.1. The prohibition of superfluous injury

The prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury[432] is corollary to the general principle under which the right of the parties to the conflict to choose methods or means of warfare is not unlimited[433]. Whereas most IHL provisions are intended to protect those who do not, or no longer, take part in hostilities, the prohibition of superfluous injury provides protection mainly for combatants.

This prohibition of superfluous injury is explicitly provided for in Article 23(e) of the 1907 Hague Regulations concerning the Laws and Customs of War on Land, as well as in Article 35(2) of AP I. On the basis of this rule, a number of particular conventions provide for the partial or absolute illegality of certain weapons[434].

Though a fundamental norm of IHL, the prohibition on the use of means and methods of warfare causing superfluous injury or unnecessary suffering is intricate, as the notions of 'superfluous' and 'unnecessary' are not specifically defined. They must be considered on a case-by-case basis according to military necessity.

In practice, this principle does not prohibit the use of means and methods of warfare that cause suffering to combatants – which is an inevitable consequence of war – unless the nature or intensity of that suffering exceeds what is necessary to achieve the military advantage intended or expected[435]. Therefore, this principle requires an assessment of the weapon, means or method of warfare based on its nature (its purpose, characteristics, expected and foreseeable effects) and in normal circumstances of use[436].

There are no strictly established, comprehensive criteria to determine whether a weapon, means or method of warfare causes superfluous injury. However, several objective criteria can be used. Firstly, such assessment does not depend on the combatant's personal perception of pain. Secondly, certain medical and health criteria, in particular in terms of trauma, appear to be essential, if not decisive, in determining whether a means inflicts unnecessary suffering. This involves considering the nature of the potential injuries and suffering inflicted, and assessing their specificity relative to those caused by conventional means (irreversible maiming, whether a specific mutilation or a permanent disability, such as disfigurement or amputation, is systematically inflicted, etc.). For example, anti-personnel mines cause specific injury compared to shells, bombs or grenades, given the higher rate of severe or permanent disabilities and amputations inflicted. They also require greater medical care (repeated and invasive surgery, more blood transfusions, etc.). The lack of existing medical treatment is also an important factor in determining whether a weapon causes unnecessary suffering (weapons that inevitably lead to death, weapons targeting biochemical, physiological or anatomical

opérationnelle, GIATO), DC-004(A)_GIATO(2024) N° 37/DEF/CICDE/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 12 February 2024. See also ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35(1), §1402.

[432] AP I, Art. 35(2).

[433] *Ibid*., Art. 35(1).

[434] In the preamble of the 1868 St. Petersburg Declaration, the use of "*arms which uselessly aggravate the sufferings of disabled men*" is prohibited; under Art. 23(e) of the 1907 Hague Regulations concerning the Laws and Customs of War on Land, it is forbidden to "*employ arms, projectiles, or material calculated to cause unnecessary suffering*"; in their preamble, the CCW Convention and the Anti-Personnel Mine Ban Convention both recall the prohibition of "*weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering*"; under Art. 8(2)(b)(xx) of the Rome Statute, it is a war crime to employ "*weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering*".

[435] See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 257, §78: the ICJ defines 'unnecessary suffering' as "*a harm greater than that unavoidable to achieve legitimate military objectives*".

[436] States are not required to foresee all possible misuses of a weapon in determining, based on its specific characteristics, the potential harm it may cause under normal use. See ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 36, §1469.

functions, weapons inflicting injuries for which there is no medical treatment, etc.).

Numerous prohibition treaties have been adopted pursuant to this principle[437]. Moreover, under the Rome Statute, it is a war crime to employ "*weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering […] in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition*"[438].

5.1.2. The prohibition of attacks which employ weapons, means or methods of warfare that have indiscriminate effects

The use of means and methods of warfare must also be assessed in relation to the principle of the prohibition on the use of indiscriminate weapons[439].

Under that principle of IHL, it is prohibited to employ indiscriminate methods and means of warfare[440], i.e. those which cannot be directed at a specific military objective[441] or the effects of which cannot be limited as required by IHL[442] and which, consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction.

In this respect, certain *ad hoc* conventions prohibit the use of specific weapons, such as biological or chemical weapons, or anti-personnel mines[443], even though such weapons are already prohibited under the general principles set forth in the Protocols additional to the Geneva Conventions[444] due to their effects or because they are by nature indiscriminate.

However, the fact that a weapon is not subject to an absolute or partial prohibition does not mean that its use will automatically be consistent with the prohibition of means of warfare which cannot be directed at a specific military objective or the effects of which cannot be limited. The legality of a means or method of warfare which is not specifically prohibited must be determined based on the prevailing circumstances, depending on its characteristics and effects, as well as the manner and environment in which it is employed.

In complying with their obligation to conduct military operations with constant care to spare the civilian population, civilians and civilian objects[445], the parties to an armed conflict must ensure that they only use weapons the effects of which can be directed precisely and reliably at the opposing party's military capabilities. Consequently, not only must weapons be used discriminately, but the parties must also employ the most appropriate means with a view to avoiding, and in any event to minimizing, collateral damage, *inter alia* depending on the targeted objective, the potential impact area and the circumstances of use. Furthermore, the weapons made available to the armed forces in a conflict situation must be adapted to the environment in which hostilities take place (for example, in a complex city environment, weapons must be more precise, i.e. have a greater discrimination capacity as that required in an open environment).

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[437] As regards France's position on the particular case of nuclear weapons, cf. the written proceedings of the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 20 June 1995 from the Minister of Foreign Affairs of the French Republic, together with Written Statement of the Government of the French Republic, in particular §§21 and 28.
[438] Rome Statute, Art. 8(2)(b)(xx).
[439] AP I, Art. 51(4)(c).
[440] *Ibid*., Art. 51(4).
[441] *Ibid*., Art. 51(4)(b).
[442] *Ibid*., Art. 51(4)(c).
[443] As regards France's position on the particular case of nuclear weapons, cf. the written proceedings of the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 20 June 1995 from the Minister of Foreign Affairs of the French Republic, together with Written Statement of the Government of the French Republic, in particular §§21 and 28.
[444] As regards France's position on the scope of application of AP I, please refer to the 2001 Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts.*
[445] AP I, Art. 57(1).

5.1.2.1. The prohibition of attacks which employ a method or means of combat which cannot be directed at a specific military objective

In compliance with the prohibition of indiscriminate attacks, the parties to the conflict must employ means of warfare which, considering their characteristics and effects, can be directed at a specific military objective[446]. Thus, a party would violate its obligation under the principle of distinction if it would use weapons that cannot be directed at a specific military objective, for example because of their inaccuracy, dispersion or delivery error. In that regard, cluster munitions are specifically prohibited, in particular because of their dispersion effects.

Under the same principle, it is prohibited to conduct any attack by bombardment 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[447].

In the case of the *Prosecutor v. Milan Martic*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that the M-87 Orkan, a multiple rocket launcher used by the Serbian forces, was incapable of hitting specific targets by virtue of its characteristics (non-guided rockets each containing a cluster warhead with bomblets) and the firing range in that specific instance[448]. It also found that using such a weapon in a densely populated civilian areas such as Zagreb was tantamount to using an indiscriminate weapon, and that the presence or otherwise of military targets in Zagreb was thus irrelevant[449]. It held that "*a direct attack against civilians can be inferred from the indiscriminate character of the weapon used*"[450].

5.1.2.2. The prohibition of attacks which employ a method or means of combat the effects of which cannot be limited

It is prohibited to employ a method or means of combat the effects of which cannot be limited[451]. Accordingly, the armed forces must keep effective control over the weapons employed, not only upon striking, but also regarding the extent of their effects in time and space. Therefore, a weapon or means of warfare can be considered indiscriminate whenever there is a disproportion between its effects and the complexity of a given environment (for instance, a disproportion between the nature and scale of the target and the ordnance employed, or between the operational environment and the impact area). Before using a weapon, the armed forces must therefore systematically consider certain characteristics such as the weapon's impact and dispersion radius, blast and fragmentation effects and area effects.

Even if the weapon is directed at a military objective at the time it is fired, its use may be illegal under IHL if the using party does not possess the means to control its destructive effects. Accordingly, chemical and biological weapons can be considered as uncontrollable weapons because of their high dispersion capacity. The same applies to incendiary weapons, the effects of which can stay confined to a military objective in a restricted environment, but can also escape from the control of the using party in other circumstances. For this reason, it is prohibited to use air-launched incendiary weapons against a military objective located within a civilian area. Similarly, the use of a cyber means of warfare which may have various and unforeseeable consequences depending on the system under attack, or replicate itself indefinitely with no prospect of reversibility, is contrary to the obligation to control the effects of a weapon.

[446] *Ibid*., Art. 51(4)(b).
[447] *Ibid*., Art. 51(5)(a).
[448] ICTY, Trial Chamber, *Martic*, Judgement, IT-95-11-T, 12 June 2007, §§462-463.
[449] *Ibid*., §461.
[450] *Ibid*., §69.
[451] AP I, Art. 51(4)(c).

5.1.3. The prohibition 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

Refer to Chapter 4, Subsection 4.4.4. entitled “The protection of the natural environment”.

5.2. The prohibition on specific weapons and means of warfare

Certain weapons and means of warfare are of a nature to cause superfluous injury or unnecessary suffering, and/or have indiscriminate effects. They are therefore specifically prohibited or restricted under *ad hoc* conventions, in accordance with the relevant basic principles of IHL.

5.2.1. Poison and poisoned weapons

It is prohibited to use poison and poisoned weapons in armed conflict[452]. The terms have been understood in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate[453].

This prohibition does not concern weapons, means or methods of warfare which would have such effects incidentally or accidentally, but solely those which are designed to intentionally kill or hurt by using the specific characteristics or effects of poison. For example, it applies to projectiles coated with poison or to the act of poisoning the vital resources of the adverse party.

5.2.2. Biological and chemical weapons

It is prohibited to use bacteriological means of warfare, i.e. microbial or other biological agents, or toxins[454] in all circumstances because they are by nature indiscriminate.

Similarly, it is prohibited to use chemical weapons as they are also indiscriminate by nature[455]. This prohibition concerns the use of any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals[456], for example hemotoxic or neurotoxic agents.

Due to their high dispersion capacity, the armed forces cannot direct such weapons at a specific military objective, nor can they limit their effects as required by IHL. In compliance with that prohibition, the armed forces may under no circumstances engage in any military preparations to use chemical weapons[457].

The use of riot control agents, i.e. chemicals which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure, is also prohibited as a method of warfare in armed conflict[458]. However, it is not prohibited to use it for law enforcement purposes, in particular in crowd control operations, including in non-international armed conflict (NIAC) on a third State’s territory or for law enforcement purposes in occupied territory. Such use

[452] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Art. 23(a). This norm is also a rule under customary international law.
[453] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 248, §55.
[454] 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. This norm is also a rule under customary international law.
[455] 1899 Hague Declaration concerning Asphyxiating Gases; 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; 1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC). This norm is also a rule under customary international law.
[456] CWC, Art. II(2).
[457] *Ibid*., Art. I(1)(c).
[458] *Ibid*., Art. I(5).

must be consistent with the rules and standards under relevant international law, i.e. within a regulated legal framework, in a manner proportionate to the aims pursued and to the extent strictly required by the exigencies of the situation.

Certain toxic chemicals and their precursors may be used by the armed forces for purposes not prohibited under the Chemical Weapons Convention (CWC), as long as the types and quantities are consistent with such purposes. This includes protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons[459] and military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare[460].

Focus: White Phosphorus Weapons

White phosphorus is a solid, explosive compound derived from phosphorus, which ignites when interacting with oxygen. It is highly toxic when inhaled, ingested or absorbed through the skin and can cause severe deep burns upon exposure. Burning phosphorus produces irritating smoke and its effects can include cardiovascular effects and collapse. Death may occur upon exposure to an acutely toxic dose. Owing to its rapid oxidation, it can be used for military purposes in a variety of firing systems to generate a smokescreen, to mark military targets or conceal sensitive positions, or to illuminate battlefields. Due to its properties, white phosphorus can also be used as incendiary or fragmentation shells.

Under the CWC, chemical weapons are toxic chemicals[461] which through their chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals[462].

White phosphorus is not listed in the schedules annexed to the CWC which are intended to identify toxic chemicals and their precursors. According to the CWC Annex on Chemicals, these schedules identify chemicals for the application of verification measures and do not constitute a definition of chemical weapons within the meaning of Article II(1)(a). Given its toxic properties, white phosphorus, in that it causes permanent harm to humans, could qualify as toxic chemical, and white phosphorus munitions could therefore be considered as chemical weapons[463]. If white phosphorus is intentionally used because of its toxic properties to cause harm or death, it falls within the definition of a chemical weapon under the CWC and such use is therefore prohibited.

However, the use of toxic chemicals is not prohibited under Article II(1)(a) of the CWC where they are used for purposes not prohibited under the Convention. In accordance with that provision, the use of white phosphorus is not prohibited where it is not used because of its toxic properties[464], even if such use cause toxic side-effects. This includes white phosphorus munitions where they are used because of the pyrophoric properties of the chemical (e.g. to produce smoke or light) and not because of its toxic properties to cause harm or death[465]. In this case, such use is regulated by the basic rules of IHL like any other means or method of warfare.

The use of white phosphorus munitions as incendiary weapon, i.e. to set fire to objects or to cause burn injury to persons, is subject to the relevant prohibitions and restrictions provided for under IHL, including the Protocol on Prohibitions or

[459] *Ibid*., Art. II(9)(b).
[460] *Ibid*., Art. II(9)(c).
[461] *Ibid*., Art. II(1)(a): "*except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes*".
[462] *Ibid*., Art. II(2).
[463] White phosphorus is not listed in the CWC schedules because it is widely available within the chemical industry.
[464] CWC, Art. II(9).
[465] In 2005, when asked if white phosphorus was covered under the CWC, the spokesperson of the Organisation for the Prohibition of Chemical Weapons, Peter Kaiser, stated: "*No, it is not forbidden by the CWC if it is used within the context of a military application which does not require or does not intend to use the toxic properties of white phosphorus. White phosphorus is normally used to produce smoke, to camouflage movement. If that is the purpose for which the white phosphorus is used, then that is considered under the Convention legitimate use. If on the other hand the toxic properties of white phosphorus, the caustic properties, are specifically intended to be used as a weapon, that of course is prohibited, because of the way the Convention is structured or the way it is in fact applied, any chemicals used against humans or animals that cause harm or death through the toxic properties of the chemical are considered chemical weapons*".

Restrictions on the Use of Incendiary Weapons (Protocol III) to the CCW and relevant rules of customary IHL applicable to incendiary weapons (see, in general, Subsection 5.3.3. below).

5.2.3. Weapons primarily injuring by fragments non-detectable by X-rays

In accordance with the prohibition of superfluous injury, "*it is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays*"[466]. Indeed, the use of a weapon or projectile whose intended effect is to cause wounds such that no medical care can be provided is not justified by any military necessity.

5.2.4. Blinding laser weapons

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness (irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery[467]) to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices[468] (prescription glasses or contact lenses). As a general rule, it is forbidden to use deliberate blinding as a method of warfare both in IAC and in NIAC.

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by that prohibition[469]. Armed forces may use laser systems which are not specifically designed for anti-personnel purposes, such as laser systems for range acquisition, target designation and marking or munition guidance.

Where the use of laser systems is authorized, the parties to the conflict must take every precaution to avoid causing permanent blindness to unenhanced vision.

Nevertheless, where there is a risk of incidental or accidental impairment of vision as a result of using such systems, for both combatants and civilians, the parties to the conflict must do everything feasible to avoid such consequences. The fact that using such systems against optical equipment[470] is legal does not mean that it is permitted to deliberately blind persons using binoculars or any other direct optics.

5.2.5. Exploding bullets and expanding munitions

The use of certain projectiles or munitions is prohibited in armed conflict wherever their characteristics do not comply with the principle of prohibition of superfluous injury and unnecessary suffering[471].

In compliance with the 1868 St. Petersburg Declaration[472] prohibiting the use of "*any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances*", the French armed forces may not employ bullets that explode inside the human body for anti-personnel purposes. That prohibition applies to projectiles designed to explode on contact with a soft substance (such as the human body), and it applies both in IAC and in NIAC, because the prohibition of superfluous injury is a rule under customary IHL.

Furthermore, in compliance with the 1899 Hague Declaration concerning Expanding Bullets, the French armed forces may not use expanding bullets, i.e. bullets which expand or flatten easily in the human body,

[466] 1980 CCW Protocol (I) on Non-Detectable Fragments.
[467] 1995 CCW Protocol (IV) on Blinding Laser Weapons, Art. 4.
[468] *Ibid*., Art. 1.
[469] *Ibid*., Art. 3.
[470] *Ibid*.
[471] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Art. 23(e).
[472] 1868 St. Petersburg Declaration relating to Explosive Projectiles.

in IAC[473]. Such use also constitutes a war crime under the Rome Statute and French criminal law[474].

The prohibition under the Hague Declaration covers munitions specifically designed to expand – i.e. increase in diameter – rapidly on contact with the human body, primarily by mushrooming, fragmentation or explosion. This can produce larger wounds and cause lethal shock waves resulting in extensive tissue damage. The prohibition thus applies to projectiles that are considered to uselessly aggravate the suffering of targeted combatants (increased caliber attrition tunnel, greater cavitation with increased risk of non-reversibility and damage to vital organs).

This prohibition also covers certain frangible munitions, i.e. munitions which explode or fragment on impact[475], including ultra-frangible projectiles which disintegrate on contact with a human body, causing a fragmentation effect in tissues[476]. On the other hand, frangible munitions designed to disintegrate only on contact with a hard material, and which cause an effect similar to that of full metal jacket (FMJ) bullets in the human body, are not prohibited[477].

The 1899 Hague Declaration concerning Expanding Bullets "*is only binding for the Contracting Powers in the case of a war between two or more of them*". There is no international convention prohibiting the use in NIAC of bullets which expand or flatten easily in the human body, nor does it seem that there is any general State practice which would tend to prohibit the use of expanding munitions in NIAC[478]. To date, no international court has recognized the existence of customary norms in that sense.

In view of the foregoing, the use of bullets which expand or flatten easily in the human body constitutes a serious violation of the laws and customs applicable to armed conflicts not of an international character only once the intentional element (*mens rea*) has been established, that is to say the fact of employing the bullets in question "*to uselessly aggravate suffering or the wounding effect upon the target of such bullets*"[479]. In other words, the decision to use such munitions, where consistent with the relevant doctrine of use, is not prohibited in NIAC if there is no intention of uselessly aggravating suffering or the wounding effect, for example when the aim is to take advantage of the characteristics of controlled-expansion munitions[480] in order to minimize incidental damage, particularly in a confined environment, and thus protect the lives of civilians or hostages.

Lastly, this prohibition does not cover the use of expanding projectiles outside armed conflict, e.g. for the purposes of law enforcement, hostage rescue, evacuating nationals or policing the high seas.

5.2.6. Anti-personnel mines

Under the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (also known as Anti-Personnel Mine Ban Convention), the use of

[473] The 1899 Hague Declaration concerning Expanding Bullets "*is only binding for the Contracting Powers in the case of a war between two or more of them*".
[474] Rome Statute, Art. 8(2)(b)(xix); French Penal Code, Art. 461-23.
[475] Such bullets are made by compression of powdered metals to produce a high-density material intended to disintegrate upon impact.
[476] These munitions damage not only muscle tissue, but also nerves and blood vessels. It can also be difficult to remove disintegrated fragments from tissue.
[477] Provided that their effects are specifically limited to the targeted military objective, in compliance with the obligation under Art. 51(4)(b) of AP I to employ only means of warfare which can be directed at a limited or specific military objective, and provided that their use is not of a nature to cause superfluous injury or unnecessary suffering (AP I, Art. 35(2)).
[478] Even though the Rome Statute of the International Criminal Court was amended in 2010 to recognize the use of expanding bullets in NIAC as a war crime, to date, only 45 of the 123 States Parties to the Statute have ratified that amendment; France has not. This is not sufficient to establish the existence of a general State practice or international custom in that matter.
[479] See the Statement by France in explanation of position after the adoption of resolution RC/Res.5, on the amendments to article 8 of the Rome Statute (RC/9/11).
[480] Controlled-expansion bullets are designed so that the resistance encountered by the tip on impact initiates the gradual, controlled deformation of the projectile. The projectile's expansion is limited, as is the propagation of the shock wave to the tissues. As a result, they do not necessarily cause inoperable injuries or death.

mines for anti-personnel purposes[481] is prohibited[482] and may never under any circumstances be justified by military necessity. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped[483].

The French armed forces comply with the prohibition under that Convention to use, or to participate in planning the use of, anti-personnel mines in military operations[484]. This prohibition includes any participation in training activities involving the use of real anti-personnel mines; the development of a doctrine promoting the use of anti-personnel mines, or participation in tactical training aimed at validating such use; agreeing to a document considering the use of such mines, whether on French territory or on the territory of another State, or accepting rules of engagement providing for their use; any takeover of an area where anti-personnel mines have been laid, without the State responsible for the area having carried out a survey prior to the arrival of the French forces; and any transfer, stockpiling of anti-personnel mines. It is forbidden to assist, encourage or induce, in any way, anyone to engage in any of the above-mentioned prohibited activities.

Where French personnel are not involved in any of the above-mentioned prohibited activities, they may participate in a multinational operation involving a State not party to the Convention.

Lastly, the retention or transfer of some anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines must not exceed the minimum number absolutely necessary for the above-mentioned purposes[485].

5.2.7. Cluster munitions

In compliance with the 2008 Convention on Cluster Munitions, the French armed forces refrain from using cluster munitions[486], i.e. any conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, including such explosive submunitions[487]. A cluster munition system consists of an air-dropped or ground-launched container which disperses from a few to several hundred submunitions, normally exploding on contact with the ground or target, or detonating an explosive charge prior to, on or after impact[488].

Given the dispersion effect associated with the use of such weapons, and the risk of harming anyone present in the impact area, their use is incompatible with the prohibition of indiscriminate weapons, even if they are used for anti-materiel purposes. In addition, a large proportion of so-called 'saturation' munitions fail to explode on impact, thus posing a post-use threat to civilian populations if handled or touched unintentionally, even after active hostilities have ceased. The use of such weapons is therefore incompatible with the requirement to control the effects in time and space of the weapons employed by the parties to the conflict.

This prohibition does not concern munitions which, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, contain each fewer than ten explosive submunitions, each of which i) weighs more than four kilograms; ii) is designed to detect and engage a single target object; and iii) is equipped with both an electronic self-destruction mechanism and an electronic self-deactivating feature[489].

Notwithstanding that prohibition, States Parties to the Convention and their military personnel may engage

[481] Under Art. 2(1) of the 1997 Anti-Personnel Mine Ban Convention, "*'Anti-personnel mine' means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons*".
[482] 1997 Anti-Personnel Mine Ban Convention, Art. 1(1)(a).
[483] *Ibid*., Art. 2(1).
[484] *Ibid*., Art. 1(1)(c): it is prohibited "*to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention*".
[485] *Ibid*., Art. 3.
[486] 2008 Convention on Cluster Munitions, Art. 1(1)(a).
[487] *Ibid*., Art. 2(2).
[488] *Ibid*., Art. 2(3).
[489] *Ibid*., Art. 2(2)(c).

in military cooperation and operations with States not party to the Convention that might engage in activities prohibited under said Convention[490]. However, such interoperability must respect the relevant commitments by the States parties. Under Article L2344-3 of the French Defence Code, agents of the French State and individuals with equivalent status may take part in a multinational military operation or in an international organization with States not party to the Convention, provided that they do not themselves use cluster munitions, and that they do not expressly request the use of these weapons, in cases where the choice of munitions lies under their exclusive control. As long as they are never placed in a situation prohibited by the Convention, French military personnel may assume all command, planning, management and support tasks and functions within multinational or national headquarters, or provide or request fire support in the field, as long as they never expressly request the use of cluster munitions. If French military personnel work in such conditions with States not party to the Convention, France must notify the governments of those States of its obligations under the Convention and make its best efforts to discourage States not party to the Convention from using cluster munitions[491].

5.3. The restrictions on the use of certain weapons and means of warfare

5.3.1. Mines other than anti-personnel mines (MOTAPM)

France is party to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II, as amended on 3 May 1996) to the CCW, under which any use on land of mines[492] other than anti-personnel mines (MOTAPM) not consistent with the principles of distinction and prohibition of superfluous injury and unnecessary suffering is prohibited.

Accordingly, it is prohibited to use mines "*which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations*"[493].

It is also prohibited to "*use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning*"[494].

Lastly, it is prohibited to use remotely-delivered mines, "*unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position*"[495].

The French armed forces may use unprohibited MOTAPM on land provided that the general principles of distinction and proportionality are observed, and that all feasible precautions are taken to protect civilians and civilian populations from the effects of these mines. In particular, it is prohibited in all circumstances to direct mines at the civilian population as a whole or at individual civilians, or at civilian objects, whether for offensive, defensive or reprisal purposes. The effect of mines must be controlled, i.e. the armed forces must use them so as to prevent any indiscriminate effects, and limit their effects to the duration of hostilities.

In addition to these prohibitions, the use of such mines is subject to specific restrictions set out in Amended Protocol II to the CCW in terms of location, emplacement, recording, monitoring and clearance.

Precautions must therefore be taken by the armed forces to record the exact coordinates of the location of

[490] *Ibid*., Art. 21(3).
[491] *Ibid*., Art. 21(1) and (2).
[492] 1996 CCW Amended Protocol (II) on Mines, Booby-Traps and Other Devices, Art. 2(1): "*'Mine' means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle*".
[493] *Ibid*., Art. 3(5).
[494] *Ibid*., Art. 3(6). Both prohibitions also apply to booby-traps and other devices.
[495] *Ibid*., Art. 6(3).

mines[496] and not just pre-planned minefields. Mines must be controlled through systematic recording and the implementation of marking and tracking rules. As soon as hostilities cease, mines must be reported and, as far as possible, all appropriate measures must be taken to neutralize them, directly or through assistance and cooperation, in order to protect civilians against their effects over time[497].

In compliance with those legal obligations, a range of technical features may be used, such as remote activation or triggering by heavy charges only (excluding the weight of a single individual). In order to limit the effects of the mine in time and space, it is necessary to limit and control the life time of the mine (either through a built-in feature or set by programming it at the time of laying, or by incorporating a self-destruction or self-neutralization mechanism, or even a remote activation and deactivation feature) and to ensure reliable detectability.

5.3.2. Booby-traps and other devices

It is not prohibited to use booby-traps and other devices[498] in armed conflict, provided that the armed forces comply with the general rules governing the conduct of hostilities and, more specifically, with the restrictions under Amended Protocol II to the CCW.

However, it is prohibited to use booby-traps or other devices "*which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations*"[499].

There are also restrictions on location: it is prohibited to use booby-traps or other devices "*in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either: (a) they are placed on or in the close vicinity of a military objective; or (b) measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences*"[500].

Furthermore, it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with objects or persons protected under IHL (internationally recognized protective emblems, signs or signals; sick, wounded or dead persons; animals or their carcasses; cultural property; medical facilities, equipment, supplies or transportation) or objects specifically associated with the life of civilians (children's toys or products specially designed for the feeding, health, hygiene, clothing or education of children; food or drink; kitchen utensils or appliances except in military establishments, military locations or military supply depots)[501]. More generally, it is explicitly prohibited "*to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material*"[502]. Lastly, all feasible precautions must be taken to protect civilians from the effects of booby-traps and other devices.

Like mines and other devices, booby-traps are subject to clearance requirements once active hostilities have ceased[503].

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[496] *Ibid*., Art. 9(1) and (2).
[497] *Ibid*., Art. 10.
[498] *Ibid*., Art. 2(4): "*'Booby-trap' means any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act*"; *ibid*., Art. 2(5): "*'Other devices' means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are activated manually, by remote control or automatically after a lapse of time*".
[499] *Ibid*., Art. 3(5).
[500] *Ibid*., Art. 7(3).
[501] *Ibid*., Art. 7(1).
[502] *Ibid*., Art. 7(2).
[503] *Ibid*., Arts. 3(2) and 10.

5.3.3. Incendiary weapons

Under the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the CCW, "*it is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons*"[504]. It is also prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons[505]. However, it is not prohibited to use incendiary weapons other than air-delivered incendiary weapons to attack a military objective located within a concentration of civilians, provided that such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects[506]. Moreover, it is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives[507]. Both those specific restrictions and the general principles governing the conduct of hostilities must be observed when using incendiary weapons.

The use of incendiary weapons for anti-personnel purposes against combatants is not prohibited under Protocol III, provided that it is in fact impossible to use a less harmful weapon to incapacitate such combatants and that the prohibition of superfluous injury is observed.

Under Protocol III, 'incendiary weapon' means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target[508]. Incendiary weapons do not include munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems[509], nor munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect[510]. Therefore, their use by the armed forces is not prohibited provided that such incidental incendiary effects are, as far as possible, limited to the military objective.

Moreover, it is possible to use shells combining multiple effects with an incendiary effect against 'hard targets', in particular armoured vehicles. The armed forces may also use white phosphorus munitions to generate smoke or light in order to conceal a maneuver or mark a location, with incidental incendiary effects limited to the military objective (see Subsection 5.2.2. on chemical weapons above). Under no circumstances may such devices be used against the civilian population, and they must be employed in compliance with the general principles governing the conduct of hostilities.

5.4. Using certain weapons and means of warfare may constitute a war crime

Under Article 8 of the Rome Statute of the International Criminal Court (ICC), the use by a person of certain weapons, means or methods of warfare may constitute a war crime and thus entail the criminal individual responsibility of such person. However, war crimes under the Rome Statute are distinguished depending on whether they are committed in IAC or NIAC, and the original version of the Statute, adopted in 1998, included the unlawful use of certain weapons as a war crime in IAC but not in NIAC. Although Article 8 was amended in 2010 by the ICC Assembly of States Parties to extend those war crimes to situations of NIAC[511], to date, France has not ratified any of the amendments. Therefore, they do not apply to the French

[504] 1980 CCW Protocol (III) on Incendiary Weapons, Art. 2(1).
[505] *Ibid*., Art. 2(2).
[506] *Ibid*., Art. 2(3).
[507] *Ibid*., Art. 2(4).
[508] *Ibid*., Art. 1(1).
[509] *Ibid*., Art. 1(1)(b)(i).
[510] *Ibid*., Art. 1(1)(b)(ii).
[511] Resolution RC/Res.5 amending Article 8 was adopted by the Review Conference of the Rome Statute in Kampala on 10 June 2010, and the amendments were adopted by the Assembly of the States Parties in 2017 and 2019.

armed forces or to French territory, in accordance with Article 121(5) of the Statute[512].

Accordingly, "*employing poison or poisoned weapons*"[513], i.e. employing "*a substance or a weapon that releases a substance as a result of its employment*"[514] which has toxic properties, constitutes a war crime in IAC. "*Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices*"[515] is also a war crime in IAC. Both of those crimes are limited in scope to weapons or means "*such that it causes death or serious damage to health in the ordinary course of events*"[516], which does not include riot control agents.

The use of expanding munitions, i.e. "*bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions*"[517], also constitutes a war crime in IAC. According to the elements of that crime, the perpetrator must have been "*aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect*"[518]. Upon ratifying the Rome Statute on 9 June 2000, France made an interpretative declaration according to which "*the term 'armed conflict' in article 8, paragraphs 2(b) and (c), in and of itself and in its context, refers to a situation of a kind which does not include the commission of ordinary crimes, including acts of terrorism, whether collective or isolated*"[519], so that the prosecution for war crimes in IAC under Art. 8(b), including the use of expanding bullets, applies only in such situations.

Lastly, it is also a war crime in IAC to employ "*weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute*"[520]. However, such an annex has never been adopted, so that no crime may be prosecuted on the grounds of that provision. Nevertheless, the act of using such means of warfare may constitute a crime against humanity "*when committed as part of a widespread or systematic attack directed against any civilian population*"[521], provided that the relevant elements of crimes are satisfied.

Following the adoption of the 2010 Kampala amendments, which France has not ratified, three war crimes in NIAC were added to Article 8 of the ICC Rome Statute: the use of poison or poisoned weapons[522]; the use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices[523]; and the use of expanding bullets[524].

Article 8 was amended again more recently[525], in 2017, to include as war crimes, both in IAC and NIAC, the use of biological weapons[526]; the use of weapons primarily injuring by fragments non-detectable by X-rays[527]; and the use of blinding laser weapons[528], i.e. "*weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision*". One of

[512] However, the use of certain weapons prohibited under Amended Article 8 by French nationals on the territory of a State which, unlike France, has ratified said amendments may entail their criminal individual responsibility before the ICC.
[513] Rome Statute, Art. 8(2)(b)(xvii).
[514] Rome Statute, Elements of Crimes, Art. 8(2)(b)(xvii).
[515] Rome Statute, Art. 8(2)(b)(xviii).
[516] Rome Statute, Elements of Crimes, Art. 8(2)(b)(xviii).
[517] Rome Statute, Art. 8(2)(b)(xix).
[518] Rome Statute, Elements of Crimes, Art. 8(2)(b)(xix).
[519] France's Interpretative Declarations upon Ratification on 9 June 2000 of the Rome Statute, §3. Also refer to Decree No. 2002-925 of 6 June 2002 publishing the Convention on the Statute of the International Criminal Court, adopted in Rome on 17 July 1998.
[520] Rome Statute, Art. 8(2)(b)(xx).
[521] *Ibid*., Art. 7.
[522] *Ibid*., Art. 8(2)(e)(xiii).
[523] *Ibid*., Art. 8(2)(e)(xiv).
[524] *Ibid*., Art. 8(2)(e)(xv).
[525] Resolution ICC-ASP/16/Res.4 on amendments to article 8 of the Rome Statute of the International Criminal Court, adopted at the 12th plenary meeting, on 14 December 2017.
[526] Rome Statute, Arts. 8(2)(b)(xxvii) and 8(2)(e)(xvi).
[527] *Ibid*., Arts. 8(2)(b)(xxviii) and 8(2)(e)(xvii).
[528] *Ibid*., Arts. 8(2)(b)(xxix) and 8(2)(e)(xviii).

the elements of that crime is that "*the blinding was not an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment*"[529].

Since France has not ratified any of those amendments, they do not apply to French nationals or to French territory. However, this does not affect the obligation of the French armed forces to comply with the prohibition of such weapons, in compliance with France's international commitments.

5.5. The prohibition of certain methods of warfare

In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited[530]. The expression 'methods of warfare' means the strategies and tactics employed by the armed forces and how they use any weapon or means of warfare[531].

Further, that expression is used for both IAC and NIAC as the term 'war' refers to any 'armed conflict', whether international or non-international, and not to its traditional meaning of 'state of war'[532]. However, while the use of certain methods of warfare is specifically prohibited or restricted in IAC, it is not necessarily the case in NIAC[533]. When such situations arise, the lawfulness of any specific method of warfare may be determined based on the basic principles of IHL.

The following subsections deal with the prohibition or restrictions on certain methods of warfare. In each case, the applicability to situations of NIAC will be discussed.

5.5.1. The prohibition of area bombardments

It is prohibited to conduct "*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*"[534].

Such bombardment is known as 'area bombardment', or carpet or saturation bombing, and "*it is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there*"[535]. Therefore, it violates the principle of prohibition on indiscriminate attacks[536]. The drafters of AP I considered it necessary to include a specific prohibition on area bombardments as a testimony of their condemnation of the World War II bombings.

An area bombardment is an attack in a populated area using any type of projectile, except for direct fire by small arms. The relevant provision prohibits such attacks by bombardment which treats as a single military objective military targets that could have been attacked separately. However, even if there are no means of

[529] Rome Statute, Elements of Crimes, Arts. 8(2)(b)(xxix) and 8(2)(e)(xviii).
[530] AP I, Art. 35(1).
[531] 'Strategy' means "*the art and science of developing and employing instruments of national power in a synchronized and integrated fashion to achieve theatre, national and/or multinational objectives*", NATO Glossary AAP-39. 'Tactics' is defined as "*the art and method of combining, during engagement, the effects of military capabilities to fulfil the missions and tasks set for achieving the objectives under the operational strategy*", French Joint Glossary of Operational Terminology (*glossaire interarmées de terminologie opérationnelle, GIATO*), DC-004(A)_GIATO(2024) N° 37/DEF/CICDE/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 12 February 2024. See also ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35(1), §1402.
[532] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 35(1), §§1382 and 1402.
[533] As will be discussed below, certain methods of warfare are not specifically prohibited or restricted under the international instruments governing the conduct of hostilities in NIAC, such as the prohibition of area bombardments or the prohibition on attacking works and installations containing dangerous forces.
[534] AP I, Art. 51(5)(a).
[535] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 51, §1968.
[536] AP I, Art. 51(4).

separately attacking several military objectives in the same area, this does not relieve the party using the weapon of its obligations under the principles of distinction, proportionality and precaution.

Area bombardment is not specifically prohibited in NIAC. Yet, the principles of distinction and proportionality are fundamental, customary principles of IHL which govern any armed conflict. Therefore, the prohibition on attacks striking combatants and civilians without distinction also applies to NIAC[537]. Consequently, it is recognized that the prohibition of area bombardments[538] is also, by extension, part of customary IHL and applies in all armed conflicts, for the purpose of upholding the principles governing the conduct of hostilities.

Lastly, area bombardments constitute a war crime in IAC[539].

5.5.2. The protection of combatants through the prohibition on denial of quarter and on attacking a combatant which is *hors de combat*

5.5.2.1. The prohibition on ordering that there shall be no survivors or to threaten an adversary therewith (denial of quarter)

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis[540]. This is also known as denial of quarter, which means attacking with the aim of killing all opposing combatants, including combatants which are *hors de combat* (i.e., deemed as not, or no longer, actively engaged in hostilities). This is considered an unlawful attack (see Subsection 5.5.2.2. below). This prohibition protects all opposing forces without distinction. It is prohibited to order that there shall be no survivors, whether the opposing forces are members of State armed forces, mercenaries, civilians participating directly in hostilities, etc.

This prohibition must not be construed as creating an obligation to capture rather than kill. This method of warfare is prohibited because it causes superfluous injury and unnecessary suffering beyond what is necessary to weaken the forces of the opposing party, especially to place them *hors de combat*.

As a corollary obligation of the prohibition on denial of quarter, the parties to the conflict must refrain from using means of warfare in such a way as to result in a refusal to give quarter. For example, in the case of an air strike, it is prohibited to conduct an immediate second attack[541] if it is carried out with the aim of neutralizing the wounded survivors of the first attack. Indeed, that second strike would violate the prohibition on denial of quarter, as it is carried out with the intention of leaving no survivors by killing the wounded. However, immediate second attacks are not, *a priori*, a prohibited method of warfare: if the second strike is carried out in order to destroy a military objective, it will not be considered a refusal to give quarter as there is no intention of leaving no survivors. Nevertheless, such an attack must still respect the principles of proportionality and precaution.

The prohibition on denial of quarter must also be observed in NIAC[542]. Refusing to give quarter is a war

[537] See AP II, Art. 13. See, in that regard, the prohibition of indiscriminate attack recalled by the ICTY, Appeals Chamber, *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, §§100-127. In that decision, the Appeals Chamber stressed that customary rules relating to the conduct of hostilities also apply to situations of NIAC. See also Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, 2006, "Rule 1", p. 63 ff., "Rule 7", p. 34 ff. (distinction in NIAC), "Rule 14", p. 62 ff. (proportionality in NIAC), "Rule 11", p. 50 ff. (indiscriminate attacks in NIAC).
[538] Area bombardments are indiscriminate attacks under Art. 51 AP I.
[539] Rome Statute, Art. 8(2)(b)(v); French Penal Code, Art. 461-27.
[540] AP I, Art. 40 (applicable to IAC); French Defence Code, Art. D4122-9 (applicable both to IAC and NIAC).
[541] An immediate second attack is a second salvo fired immediately after the first attack.
[542] AP II, Art. 4(1); French Defence Code, Art. D4122-9 (applicable to any armed conflict). Besides, conducting hostilities on the basis of the denial of quarter would violate Article 3 common to the Geneva Conventions which prohibits the murder of persons placed *hors de combat*.

crime in any armed conflict[543].

5.5.2.2. The prohibition to attack enemy combatants *hors de combat*

Whether in IAC or NIAC, combatants may no longer be attacked once they have been placed *hors de combat*[544], i.e. when they are in the power of an adverse party, when they clearly express an intention to surrender[545] (including by throwing up their arms, dropping their weapons or waving a white flag), or when they are incapacitated by wounds or sickness and refrain from any act of hostility. They are therefore no longer a threat, and are protected by virtue of the balance between the principle of humanity and military necessity: attacking them would be disproportionate to the small military advantage that neutralizing them would bring.

Likewise, it is also forbidden to attack a person parachuting from an aircraft in distress during their descent. Up until the moment the combatant lands, they are unable to defend themselves and are therefore entitled to protection from attack. Upon reaching the ground, they must be given the opportunity to surrender, unless it is apparent that the combatant is engaging in a hostile act[546].

Lastly, directly attacking a person in the knowledge that they are *hors de combat* is a grave breach of AP I if the attack intentionally causes serious injury to body or health. Such attacks constitute war crimes[547].

5.5.3. The protection of enemy property against destruction, seizure and pillage

5.5.3.1. The prohibition of property destruction or seizure

The prohibition of the destruction and seizure of enemy property when not required by imperative military necessity is one of the earliest prohibitions in IHL[548]. 'Destruction' means extensively or permanently damaging property in hostilities. Conducting an attack with a view to destroying the enemy's property indicates an intention to cause damage of a certain seriousness, beyond that required by military necessity, because such destruction aims either at annihilating the enemy's property, or at damaging it to such a degree as to preclude its normal use. 'Imperative military necessity' may under no circumstances be invoked to justify the destruction of civilian objects in cases where such destruction or damage are prohibited by other rules. 'Seizure' is a comprehensive term for the taking of any property against its owner's will. It includes the taking, theft, requisition, spoliation and pillage of property.

If carried out on a large scale (extensively), unlawfully, intentionally and wantonly (i.e. not justified by military necessity), the destruction and seizure of enemy property constitute a grave breach of the Geneva Conventions (GC)[549]. "*Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war*" constitutes a war crime in any armed conflict[550].

Situations of belligerent occupation (IAC) require more precise rules to regulate the use of property by the occupying force. Movable public property that can be used for military operations may be confiscated in exceptional cases. Immovable public property may not be confiscated and must be administered in a reasonable manner. Private property must be respected and protected from attack. It may not be confiscated,

[543] Rome Statute, Arts. 8(2)(b)(xii) applicable to IAC and 8(2)(e)(x) applicable to NIAC. French Penal Code, Art. D461-8.
[544] AP I, Art. 41; Common Article 3 of the Geneva Conventions; AP II, Art. 4; French Defence Code, Art. D4122-9.
[545] Surrender is always unconditional, and should therefore not be confused with capitulation.
[546] AP I, Art. 42. Airborne troops are not protected by this article.
[547] Grave breach of AP I: see AP I, Art. 85(3)(e); war crimes: see Rome Statute, Art. 8(2)(b)(vi) applicable to IAC and French Penal Code, Art. 461-10 applicable both to IAC and NIAC.
[548] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Art. 23(g). See also French Defence Code, Art. D4122-10.
[549] GC I, Art. 50; GC II, Art. 51; GC IV, Art. 147.
[550] Rome Statute, Arts. 8(2)(b)(xiii) applicable to IAC and 8(2)(e)(xii) applicable to NIAC. French Penal Code, Art. D461-16 applicable both to IAC and NIAC.

except for property that can be used for military operations[551].

5.5.3.2. The prohibition of pillage

Pillage is absolutely prohibited both in IAC and NIAC[552]. Pillage means the unlawful appropriation of enemy property in the course of and in relation to armed conflicts[553]. Perpetrators of acts of pillage appropriate enemy property for their private or personal use, which is different from the act of seizure of property. The prohibition of pillage is corollary to the general prohibition of theft which applies in most domestic legal systems.

Pillage constitutes a war crime in any armed conflict[554].

5.5.4. The protection of the civilian population against the use of starvation as a method of warfare

In any armed conflict, starvation of civilians as a method of warfare or combat is prohibited[555]. For detailed information, refer to Chapter 4, Subsection 4.3. of this Manual on the protection of objects indispensable to the survival of the civilian population.

Moreover, parties to an armed conflict must comply with their subsidiary obligation to provide access for humanitarian relief to civilians in need[556].

Conversely, methods of warfare which may involve an incidental reduction of resources indispensable to the survival of the population are *a priori* lawful. This is for example the case of blockade and siege, provided that they are directed solely at enemy armed forces.

Focus: The Legal Framework for Blockade and Siege

A **siege** is a method of warfare consisting in the encirclement and subsequent confinement of an enemy city or zone, combined with attacks on specific military objectives in the besieged area aimed at suppressing any will to resist and ultimately compelling the enemy to surrender. This method is lawful only where it is intended to achieve this military objective and provided that all other rules protecting the besieged population are respected; it is unlawful when conducted to starve the population. In compliance with the prohibition of starvation as a method of warfare, the warring parties must allow the free passage of supplies and other essentials to the civilian population. They must also endeavour to conclude local agreements concerning the evacuation of the wounded and sick, disabled persons, children and maternity cases, and more generally the civilian population. Such agreements must also provide for the free passage into the besieged area of medical and religious personnel, as well as medical supplies for the population[557]. The rules of IHL governing the conduct of hostilities also apply to siege warfare. In implementing the relevant rules under the principles of distinction and precaution, both parties must take all feasible measures to protect the civilian population, in particular by allowing civilians to leave the besieged area whenever possible.

[551] GC IV, Art. 53; see also the 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Arts. 53(1), 56, 55 (public property), 46 and 53 (private property).
[552] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Arts. 28 and 47; GC I, Art. 15; GC II, Art. 18; GC IV, Art. 33; AP II, Art. 4(2)(g).
[553] ICTY, Trial Chamber, *Delalic and Others*, Judgement, IT-96-21-T, 16 November 1998, §591.
[554] Rome Statute, Arts. 8(2)(b)(xvi) applicable to IAC and 8(2)(e)(v) applicable to NIAC; French Penal Code, Art. 461-15 applicable both to IAC and NIAC.
[555] AP I, Art. 54; AP II, Art. 14.
[556] See, in that regard, GC I, Art. 15; GC II, Art. 18; GC IV, Art. 23; AP I, Arts. 70 and 71; AP II, Arts. 4, 14 and 18.
[557] See, in that regard, GC I, Art. 15; GC II, Art. 18; GC IV, Art. 23; AP I, Arts. 70 and 71; AP II, Arts. 4, 14 and 18.

A **blockade** is a method of warfare consisting in cutting off the sea trade of a country or one of its coastal territories. It constitutes an act of war, and is therefore distinct from an embargo[558]. For such act to qualify as a blockade, two criteria must be fulfilled: it must be declared by the government which imposes it, or by the naval command which implements it; and it must be effective, i.e. maintained by a force located close to the coast and sufficiently large to actually block access to a sea area. Like a siege, it is unlawful if it aims to starve the civilian population or deprive it of other items essential to its survival, or if the damage caused to the civilian population is, or can be expected to be, excessive in relation to the concrete and direct military advantage anticipated (see Part 4, Chapter 1 below). Furthermore, if the civilian population of the territory under blockade is insufficiently supplied with food and other items necessary for its survival (in particular medicines), the party imposing the blockade must allow the free passage of foodstuffs and other essential supplies[559].

5.5.5. The protection of recognized emblems and signs, and of the emblems of nationality of other parties to the conflict and of third States against improper use

The armed forces must respect recognized emblems and signs, as well as emblems of nationality[560]. Accordingly, it is prohibited to misuse them, i.e. make an improper use which is inconsistent with relevant rules of international law. In that regard, IHL provides for a specific legal regime for acts of espionage.

5.5.5.1. The prohibition on misusing recognized emblems under IHL

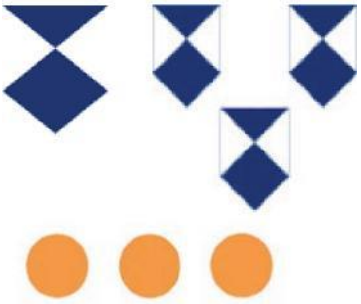
Certain emblems are entitled to a special protection under IHL. They were established by the international community with the aim of giving visibility to persons and objects that enjoy special protection against attack. Therefore, it is forbidden to misuse the following emblems.

The red cross, red crescent, red lion-and-sun and red crystal (here on the right from top to bottom) are internationally recognized emblems for the identification and protection of medical and religious personnel and activities. They offer protection to individuals, vehicles and buildings displaying them. Such protection applies to both IAC and NIAC[561] (see Part 3, Chapter 4, Subsections 4.1. et seq. on the protection of medical units above).

[558] An embargo is not a combat action. It consists in banning or restricting economic relations with another State. It is lawful if it is imposed by a resolution of the United Nations Security Council.
[559] See, in that regard, GC IV, Art. 23; AP I, Arts. 70 and 71; AP II, Arts. 4, 14 and 18.
[560] Cf. French Defence Code, Art. D4122-9.
[561] AP I, Art. 38; AP II, Art. 12.

The emblems or signs of certain objects enjoying special protection against attack are also protected from improper use:

- cultural property, represented by one or three blue shields, is protected in IAC and NIAC [562] (cf. Part 3, Chapter 4, Subsections 4.2. et seq. on the protection of cultural property above);
- works and installations containing dangerous forces [563], symbolized by three bright orange circles, are protected in IAC[564] (cf. Part 3, Chapter 4, Subsections 4.5. et seq. on the protection of works and installations containing dangerous forces).



Likewise, the international distinctive sign of the civil defence, responsible for protecting and assisting the civilian population (the civil defence regime only exists in IAC)[565], is also protected from misuse.

The flag of truce, also known as white flag, protects combatants wishing to negotiate or surrender, who are considered *hors de combat*; it is prohibited to misuse it both in IAC and NIAC[566].

Further, under AP I, it is prohibited to misuse the distinctive emblem of the United Nations[567].

Lastly, the parties to the conflict must protect any other internationally recognized protective emblems, signs or signals that might be established in order to afford protection to specific persons or objects displaying them[568].

5.5.5.2. The protection of the emblems of nationality of other parties to the conflict and third States

In IAC, it is prohibited at all times to make use of the emblems of nationality of States not parties to the conflict[569].

Further, it is prohibited in IAC to make use of the emblems of nationality of adverse parties while engaging in attacks or in order to shield, favour, protect or impede military operations[570]. However, it is not prohibited to use military emblems or uniforms of adverse parties for non-hostile purposes (e.g. fleeing or retreating without military purposes).

Notwithstanding, the improper use of such emblems is a war crime wherever it is made as part of a perfidious act (see Subsection 5.5.6. below).

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[562] See AP I, Art. 38, and the 1954 Hague Cultural Property Convention, Art. 17 (application in IAC) and 19 (application in NIAC). See also the French Defence Code, Art. D4122-10 applicable both to IAC and NIAC.
[563] Namely dams, dykes and nuclear electrical generating stations.
[564] The special sign protecting works and installations containing dangerous forces is explicitly provided for in Article 56 of AP I. Although there is no mention of such a sign under AP II, works and installations containing dangerous forces are still protected under its Article 15.
[565] AP I, Art. 66.
[566] It is prohibited to misuse the flag of truce under Art. 38 of AP I, which is applicable to IAC. However, it is generally recognized that this rule is of customary nature and therefore also applies to NIAC, because it is corollary to the customary protection afforded to parlementaires (the term 'parlementaire' means a person who enters into communication with the enemy in order to negotiate, bearing a white flag).
[567] AP I, Art. 38(2).
[568] AP I, Art. 38(1).
[569] AP I, Art. 39(1).
[570] AP I, Art. 39(2).

5.5.5.3. Espionage under cover of an enemy uniform is not a violation of IHL

Espionage is the act of gathering or attempting to gather information in a belligerent's area of operation, acting clandestinely or under false pretences, with the intention of communicating such information to an adverse party. It is not prohibited under IHL, and the specific legal regime of espionage under IHL exists only in IAC[571].

Any combatant who falls into the power of an adverse party while engaging in espionage under cover of a uniform other than that of the armed forces to which he belongs, or wearing civilian clothes, loses the right to the status of prisoner of war and becomes subject to the domestic law of that party. Such persons regain the combatant privilege[572] as soon as they have stopped engaging in espionage and have returned to the armed force to which they belong. If captured subsequently, they are entitled to combatant privilege and will not be prosecuted for previous acts of espionage. *A contrario*, a soldier in uniform is not a spy and does not fall under that regime, even if that person goes undercover to gather intelligence.

If the spy uses their disguise to kill, wound or capture an enemy combatant, their actions may violate the prohibition of perfidy and therefore constitute a war crime (see Subsection 5.5.6. below).

The provisions relating to the improper use of the emblems of nationality of a party to a conflict or of another State, as well as those relating to perfidy, do not affect the legal regime governing espionage[573]. Accordingly, the use of an enemy uniform for information-gathering purposes, and not in the course of operations or to shield, favour, protect or impede military operations, still falls within the scope of espionage, and does not amount to improper use of a foreign emblem of nationality (see Subsection 5.5.5.2. above).

5.5.6. The prohibition of perfidy

Perfidy, which is prohibited both in IAC and NIAC, is the act of killing, wounding or capturing an adversary by inviting their confidence, with intent to betray that confidence[574]. Accordingly, the following acts are examples of perfidy for any combatant or civilian taking a direct part in hostilities: the feigning of an intent to negotiate under a flag of truce or of a surrender; the feigning of an incapacitation by wounds or sickness; the feigning of civilian, non-combatant status. In short, it is an act of perfidy to lead an adversary to believe that they are obliged to accord protection to the perfidious combatant, and then to attempt to neutralize them.

Perfidy casts doubt on the good faith of persons displaying protective signs or emblems, and consequently undermines the protection regimes established under IHL. Its prohibition is thus intended to ensure the effectiveness of such protective regimes.

Accordingly, "*killing or wounding treacherously individuals belonging to the hostile nation or army*" is a war crime in any armed conflict[575].

Furthermore, "*making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury*", for example in order to or while attempting to neutralize an adversary, is a war crime in IAC[576]. In particular, deliberately making perfidious use of the distinctive emblem of the red cross, red crescent, red crystal or red lion-and-sun or of other recognized protective signs or emblems in

[571] *Ibid*., Art. 46.
[572] 'Combatant privilege' is the right to participate directly in hostilities with immunity from domestic prosecution for lawful acts of war (1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Arts. 1 and 2; AP I, Art. 43).
[573] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 39, §1583.
[574] AP I, Art. 37(1).
[575] Rome Statute, Arts. 8(2)(b)(xi) applicable to IAC and 8(2)(e)(ix) applicable to NIAC; French Penal Code, Art. 461-11 applicable both to IAC and NIAC.
[576] *Ibid*., Art. 8(2)(b)(vii); French Penal Code, Art. 461-29.

order to kill, wound or capture an adversary is a grave breach of AP I[577].

Lastly, perfidy should not be confused with ruses of war, which are lawful acts "*intended to mislead an adversary or to induce him to act recklessly*" and not perfidious acts inviting the confidence of an adversary in order to take advantage of a protective regime under IHL[578]. The following are examples of such ruses: camouflage, decoys, mock operations, misinformation, deception and other similar stratagems.

5.6. The legal review of new weapons, means and methods of warfare

Under Article 36 of AP I, in the study, development, acquisition or adoption of a new weapon, means or method of warfare, States parties are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by IHL provisions or by any other rule of international law applicable to them in armed conflict. States parties are free to decide how to carry out such legal review, provided that the object and purpose of the provision, i.e. the conformity of the use of such weapons, means or methods of warfare with the relevant rules of international law, are respected.

Thanks to this legal review, it is possible to prevent the acquisition or use by the French armed forces of weapons, means or methods of warfare that would be inconsistent with international law in all circumstances, or to impose such restrictions on their use as may be necessary to ensure their conformity. In the event that a weapon, means or method of warfare is not deemed incompatible with international law in all circumstances, notably due to its specific characteristics, such review can, if necessary, enable prior technical adaptation of armament procurement projects or doctrines of use in order to ensure their legality under IHL.

The principles and procedures for carrying out this review are laid down by ministerial directive[579].

5.6.1. Scope of the legal review under Article 36 AP I

This legal review covers any offensive or defensive device designed, directly or indirectly, to kill, damage or neutralize persons or objects, including weapons and means of all types, whether lethal or not, intended for anti-personnel or anti-materiel use[580]. This includes light and heavy weapons, small arms, weapon systems and any technology specifically designed to damage or neutralize the enemy's systems or property, as well as projectiles, munitions or weapon components designed to kill, wound or damage.

The legal review mechanism also encompasses methods of warfare, i.e. the way in which weapons or means of warfare are to be used – in other words, any concept for the use of force – and doctrines for their use. Preparatory studies[581] fall outside this scope as they concern the development of technologies that are not part of a device designed to kill, damage or neutralize. Weapons, means and doctrines that are not intended to be employed in any armed conflict, whether international or non-international, and in particular those used to maintain law and order, are not subject to this legal review.

Weapons, means and methods of warfare are considered "new" if they are not already available to the armed forces, and have distinct characteristics or functions. They can also qualify as "new" when an existing device incorporates innovations or new components likely to significantly alter its effects.

The legal review must be carried out at the time of study, development, acquisition or adoption of new

[577] AP I, Art. 85(3)(f).
[578] *Ibid*., Art. 37(2).
[579] Ministerial Directive No. 6255/ARM/CAB of 31 October 2019 on the legal review of new weapons, means and methods of warfare, pursuant to Article 36 of the 1977 First Additional Protocol of the 1949 Geneva Conventions.
[580] Upon acceding to AP I in 2001, France made reservations and interpretative declarations according to which the provisions of the Protocol relate to conventional weapons only and do not apply to nuclear weapons. See Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, §2.
[581] Preparatory studies refer to technology development research the purpose of which is not to develop a means of warfare as such.

weapons, means or methods of warfare. This refers, first of all, to procurement projects implemented at national level or jointly with other countries, from the planning and implementation stages through to the use of weapons, means or methods of warfare, as provided for in Ministerial Directive No. 1618[582]. This includes the following stages: definition of the armament project's specifications, including in relation to acquisition; development monitoring; project implementation prior to operation; as well as operational deployment.

Therefore, the legal review mechanism operates either as a planned process implemented at any change from one stage to the next in procurement project, carried out at the latest when the implementation phase is launched, or as an unplanned process when changes or reorientations in the project are likely to have consequences in terms of legality. Such legal review also covers other forms of acquisition (Foreign Military Sales, Direct Commercial Sales, off-the-shelf procurement, projects outside the scope of Ministerial Directive No. 1618, operational emergencies, etc.).

The conformity of concepts of use with IHL and other relevant provisions of international law must be controlled from concept inception through to stabilization and integration into an operational doctrine. The evolution of doctrines of use during the use phase of a weapon system must also be considered if there are consequences in terms of legality.

5.6.2. Obligations in carrying out the legal review

The State is responsible for carrying out the legal review, which may not be delegated to any other institution, in particular an arms manufacturer, or to another State. Any State wishing to use any weapons, means and methods of warfare which fall within the scope of Article 36 of AP I must systematically carry out a legal review itself, even if such a review for the same weapon has already been carried out by another State.

The legal review is based on normal or intended use, in all circumstances or in specific circumstances considering the foreseeable and usual situations of use for which the weapons, means and methods of warfare under review are developed or acquired. The operational environment in which they are to be deployed, or the nature of their intended targets, should also be taken into account.

The lawfulness of the use of a weapon, means or method of warfare depends on whether it complies with relevant IHL rules, be they treaty-based or customary (see the Subsections above), in particular the basic principles of distinction, proportionality, the prohibition of superfluous injury and of widespread, long-term and severe damage to the natural environment. For example, assessing compliance with the principle of distinction may involve considering the capacity of a weapon or means of warfare to be directed at a specific military objective (integration of a guidance system, sensors), the weapon's accuracy in general, or its effects in time and space (weapon's impact area, lethal radius, blast or fragmentation effects). As regards the prohibition of widespread, long-term and severe damage to the natural environment, such criteria as the lasting alteration of fauna or flora, the deterioration of living conditions for populations, particularly in terms of access to resources or human health, or the geographical or temporal extent, or even the reversibility, of the damage may be considered. The assessment criteria for each legal review must be determined on a case-by-case basis, according to the nature of the weapon, means or method of warfare under review, its intended use, and its effects in a given environment.

The lawfulness is also assessed in light of any other relevant rules of international law applicable to France, in particular treaty provisions prohibiting or restricting the use of certain weapons (CCW and its protocols, Anti-Personnel Mine Ban Convention, Convention on Cluster Munitions and any other treaty to which France is a party; see Chapters 3, 4 and 5 above). Besides, the legal review may, where appropriate, take account of emerging prohibition or restriction standards supported by France.

[582] Ministerial Directive No. 1618/ARM/CAB of 15 February 2019 on armament procurement projects.

5.6.3. Consequences of the legal review

The legal review aims to determine the total or partial compatibility or incompatibility of a weapon, means or method of warfare with the international law applicable to France, with regard to its intended ordinary use in all or some circumstances.

Once it has been determined that the intended use of the weapon, means or method of warfare complies with international law applicable to France, the review is completed. In the event of partial compliance, i.e. where the specific characteristics of the weapon, means or method of warfare comply with international law only in certain circumstances of use, and if the authorities in charge of the armament programme or acquisition project decide to proceed further, corrective measures must be taken, involving either modifications to the technical characteristics of such weapons or means of warfare, or the adoption of doctrines restricting the use of such weapons, means or methods of warfare to specific environments or targets.

If the legal review concludes that the weapon, means or method of warfare in question is absolutely illegal, it may not be developed, acquired or used by the French armed forces.

5.6.4. Procedure and outcome of the legal review

The legal review consists of one or two steps.

First, a preliminary check is carried out to determine whether the weapon, means or method of warfare being studied, acquired or developed falls within the scope of Article 36 of AP I. This preliminary check may be limited to certain components or functions of a weapon system where only such components or functions can be considered as new weapons or means of warfare.

In France, this preliminary check is carried out by the Joint Defence Staff (*état-major des armées, EMA*) and the Directorate-General of Armament (*direction générale de l'armement, DGA*) of the Ministry of Defence, both of which can draw, where necessary, on the legal expertise of the Legal Unit of the Cabinet of the Chief of the Defence Staff and the MoD Legal Affairs Directorate (*direction des affaires juridiques, DAJ*).

Where the preliminary check confirms that the weapon, means or method of warfare does fall within the scope of Article 36 AP I, a legality assessment is carried out to determine whether its normal or intended use complies with IHL and other relevant provisions of international law. This legality assessment is performed by a committee comprising one or more experts from the Joint Defence Staff, the DGA and the DAJ.

As regards procurement projects, the legal review is carried out during the planning stage, and may be reiterated whenever changes or reorientations in the project are likely to have consequences in terms of legality. Changes in applicable international law may also require a new legal review.

The legal review may also be continued during the implementation stage of the project, if there is a change in operational requirements, or where the integration of new features is likely to have an impact on the conclusions of the legal review issued during the planning stage.

The legal review may also be organized during the use stage, when the preliminary check has concluded that the mitigation of obsolescence or the integration of innovations has contributed to an evolution of functions such that the results of the previous legal review may be called into question.

Doctrines of use are systematically reviewed in line with developments in the technical performance of weapons and means of warfare. For all other forms of procurement, the organizations in charge are responsible for conducting the legal review, in particular at the preliminary check stage, and may refer the review to the aforementioned committee for an opinion on legality.

In the context of a weapon acquisition (Foreign Military Sales, Direct Commercial Sales, off-the-shelf procurement, projects outside the scope of Ministerial Directive No. 1618, operational emergencies, etc.), the legal review is carried out as soon as the acquisition process is sufficiently advanced for the integration of the weapon or means of warfare into the French arsenal to be reasonably envisaged. In any event, it takes place before the acquisition of the equipment considered as such and before its operational deployment.

The formal outcome of the legal review consists of an opinion on legality based on four central points: characteristics and effects of the weapon, means or method of warfare; operational environment for its intended use; conformity of characteristics and circumstances of use with international law; decision on the total or partial lawfulness or unlawfulness of the weapon, means or method of warfare.

CHAPTER 6: THE ARMED FORCES' OBLIGATIONS TO PERSONS IN THEIR POWER

In armed conflict, there are two categories of individuals who may fall into the power of the French armed forces: persons deprived of their liberty for security reasons related to the conflict (prisoners of war and civilian internees) and persons prosecuted for previously committed acts related to the conflict. By way of reminder, persons detained for alleged offences under local criminal law remain under the jurisdiction of the authorities of the State on whose territory they are being held.

A number of rules apply to persons deprived of their liberty in armed conflict. For France, it is a fundamental principle to respect the right of any person who is in the power of the French armed forces to be treated humanely and without any adverse distinction[583].

Deprivation of liberty is a regular and ordinary occurrence in armed conflict. However, arbitrary deprivation of liberty is unlawful.

Armed conflicts are specially governed by international humanitarian law (IHL), the *lex specialis*; however, it does not mean that international human rights law (IHRL) ceases to apply. In international armed conflicts (IAC), specific and precise rules for detention are provided for under the Third and Fourth Geneva Conventions of 12 August 1949, therefore allowing the relevant IHRL rules to be interpreted and applied in light of IHL which is the main applicable body of law.

On the other hand, IHL norms regarding deprivation of liberty in non-international armed conflict (NIAC) are not as precise and complete as those governing IAC. Furthermore, IHRL is not easy to apply in such situations, both because it was originally designed for times of peace, including regarding detention, and because some of its norms may be derogated from, depending on whether the parties to a NIAC are bound by any given IHRL instrument. In light of the foregoing, France chooses to apply the full force of relevant IHL and IHRL both in IAC and in NIAC, and complies with its obligations while taking into account the specific context of each situation and the duration of each detention.

6.1. Deprivation of liberty: a common and normal occurrence in armed conflict

The deprivation of liberty by State parties to a conflict and by non-State parties (organized armed groups) is a common and normal practice in armed conflict. However, not any deprivation of liberty is *ipso facto* lawful. Indeed, in armed conflict as in peacetime, arbitrary deprivations of liberty as well as inhuman or degrading treatment remain prohibited[584].

6.1.1. Internment: a deprivation of liberty specific to armed conflict

Internment[585] is defined as the administrative detention of a person by a military authority in armed conflict; it does not refer to a detention sanctioned by court order as part of criminal proceedings. This non-criminal detention is based on the serious threat that the detained person's activity poses to the security of the detaining authority in an armed conflict. Internment is justified by imperative security reasons related to the armed conflict. It must end as soon as possible, and at the latest when the security reasons justifying the measure

[583] Under Art. 3(1) common to the Geneva Conventions, persons who do not, or no longer, participate in hostilities, including detained persons, "*shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria*". Moreover, the decision to order detention is made on a case-by-case basis and may only concern one individual at a time; such decision may not be made in respect of any predefined group, in compliance with the prohibition of collective punishments under Art. 75(2)(d) of Additional Protocol I (applicable to IAC) and Art. 4(2)(b) of Additional Protocol II (applicable to NIAC).

[584] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, 2006, "Rule 99".

[585] This Subsection deals with internment in general; there are significant differences in the law applicable to internment depending on the nature of the armed conflict, which will be addressed further in the following Subsections.

have ceased to exist. There are two ways of ending internment: the interned person is either released, or transferred to the competent authorities of the State on whose territory that person was captured.

Before an individual may be interned, they must first be captured by the armed forces, i.e. temporarily deprived of their freedom of movement. 'Capture' means the act of arresting and temporarily taking control of a person with a view to detaining them. Accordingly, a 'captured person' means any person whose freedom of movement was temporarily restricted in the context of an armed conflict and who was subsequently placed under the control of adverse armed forces.

Not any deprivation of liberty taking place in the conduct of military operations constitute an internment. Security checks of an individual's status, identity or of the level of threat they may pose to the security of forces or the civilian population do not amount to internment, for instance stops at control posts or temporary restrictions on the freedom of movement during searches. The restraining of a person for security reasons may turn into a capture prior to internment as soon as it becomes apparent that such person poses a serious threat to the security of forces or the civilian population. Once the decision to detain an individual has been made, the armed forces must clearly state the reasons for the internment and follow the procedures to guarantee the detainee's rights, as this is the precondition to prevent any arbitrary deprivation of liberty.

6.1.2. Arbitrary deprivation of liberty is unlawful even in armed conflict

Arbitrary detention is a deprivation of liberty which is inconsistent with the relevant grounds, procedures and criteria for detention provided for under both IHL and IHRL. As far as IHL goes, Article 3 common to the GC and their Additional Protocols I (AP I) and II (AP II) require that all persons who do not, or no longer, take a direct part in hostilities and those who have been placed *hors de combat* must be treated humanely. Further, arbitrary arrest and detention are also prohibited under IHRL. Accordingly, articles 3 and 9 of the 1948 Universal Declaration of Human Rights (UDHR) provide, respectively, that "*everyone has the right to life, liberty and security of person*" and that "*no one shall be subjected to arbitrary arrest, detention or exile*". Under Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) to which France is party, "*everyone has the right to liberty and security of person*" and "*no one shall be subjected to arbitrary arrest or detention*". This principle has also been recognized by the European Court of Human Rights (ECtHR). Such right to liberty entails a prohibition of arbitrary deprivation of liberty and applies to all instances involving restrictions on the liberty of individuals, including arrests and detentions[586].

6.1.3. Internment is governed by different bodies of law in IAC and in NIAC

In IAC, IHL provides for specific safeguards and rules governing the detention of combatants (who enjoy the status of prisoner of war, POW) and that of civilians, respectively in the Third Geneva Convention relative to the Treatment of Prisoners of War (GC III) and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV) of 12 August 1949. Nevertheless, IHRL does not cease to apply; in such simultaneous application, its norms must be construed in the light of IHL, which is the *lex specialis* in armed conflict. Indeed, States have agreed that IHL rules apply specifically in IAC[587].

In NIAC, the paucity of IHL treaty rules relating to administrative detention (low-intensity NIAC is governed only by Common Article 3; in high-intensity NIAC, relevant rules are also found in Articles 4 and 5 of AP II[588]) may cause difficulties in determining relevant safeguards. Indeed, unlike the specific substantive and procedural safeguards set out for IAC, the lack of such safeguards in respect to NIAC often gives rise to the question of which rules of IHL or IHRL should apply to each aspect of administrative detention, which is a multifaceted issue. In foreign operations, there may be, under certain conditions[589], an extraterritorial

[586] See, for example, ECtHR, *Guzzardi v. Italy*, Judgment, Application No. 7367/76, 6 November 1980, §§92-95.
[587] The ECtHR construes the ECHR in a manner consistent with international law (cf. ECtHR, *Hassan v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 29750/09, 16 September 2014, §§101-106). However, this is no reason to assume that IHRL cannot supplement IHL.
[588] Refer to Part 3, Chapter 1 for the definition of low-intensity NIAC and high-intensity NIAC.
[589] Refer to Part 3, Chapter 3.

application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, better known as the European Convention on Human Rights (ECHR).

This difference in the applicable legal regime between both types of armed conflict is the result of the will of States. As regards NIAC, States did not agree to waive their right to prosecute members of organized armed groups or civilians taking a direct part in hostilities, as they did for combatants of State armed forces. This is mainly why they did not agree to confer combatant status and the associated privilege on these belligerents.

Whatever the nature of the conflict, the fundamental rights and safeguards of persons deprived of their liberty must be respected. The protection of the life, health and dignity of persons detained by the French armed forces, in accordance with France's international commitments, as well as respect for the universal principles and values of human protection, are cardinal requirements. The decision to detain a person must be justified in accordance with international law, and substantive and procedural safeguards must be appropriate, particularly regarding the duration of the detention, in order to avert arbitrary detention.

6.2. In IAC, internment is governed mainly by IHL

In IAC, IHL provides for the possibility of interning combatants as POWs and, under certain conditions, civilians. As the *lex specialis* crafted specifically for situations of armed conflict, IHL contains rules for almost all aspects of the deprivation of liberty in IAC. The right of the parties to an IAC to detain combatants and civilians who pose a threat to their security is corollary to the inherent sovereign right of States to protect their territorial integrity, political independence and the security of their population. All States are party to the Geneva Conventions. Such universality is a guarantee for States that their respective nationals will be treated humanely by any adverse party in case of detention.

6.2.1. Internment of POWs under GC III

GC III provides for the possibility of interning enemy combatants until the end of active hostilities. Such combatants are referred to as 'prisoners of war', which is defined as combatants "*who have fallen into the power of the enemy*"[590]. Under Article 21 of GC III, "*the Detaining Power may subject prisoners of war to internment*" without prior judicial or legality control of the internment justification[591]. Internment consists in placing a combatant *hors de combat* in a specific location, generally a camp, and forbidding them to go outside its perimeter, which does not necessarily mean being confined to a cell or room[592]. The detaining party is not required to explain or justify the necessity for interning POWs. Such necessity is simply presumed since combatants participating in hostilities is evidently harmful to the security of the adverse party. Internment thus aims at preventing combatants from rejoining the armed forces of their State or going back to the battlefield to resume their participation in hostilities[593]. However, once active hostilities have ceased, POWs must be released and repatriated without delay[594].

'Combatant' – a notion which only applies in IAC – means any member of the armed forces of a party to the conflict who has the right to participate directly in hostilities[595]. It follows that a POW may not be prosecuted

[590] See GC III, Art. 4; AP I, Art. 44.
[591] POWs may also be interned if they are being lawfully prosecuted or have been convicted for indictable offences (see GC III, Arts. 85, 99, 119 and 129).
[592] ICRC, *Commentary on the 1949 Third Geneva Convention relative to the Treatment of Prisoners of War*, 1960 (1st edition), Art. 21: "*such confinement may only be imposed in execution of penal or disciplinary sanctions, for which express provision is made in Section VI, Chapter III, below. Health considerations may also justify additional restrictions on the liberty of prisoners of war as envisaged by the term 'internment'*".
[593] GC III, Art. 21; 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Art. 11.
[594] GC III, Art. 118(1).
[595] AP I, Art. 43(2): "*Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities*". Thus, the notion of 'combatant' does not include medical and religious personnel.

by the detaining State for lawful acts of war committed in hostilities. However, POWs may be prosecuted for grave violations of IHL (war crimes, crimes against humanity, genocide) or alleged offences against the laws, regulations and orders in force in the armed forces of the detaining power[596].

The notion of 'prisoner of war' is defined more broadly than that of 'combatant' under Article 43(2) of AP I. Indeed, POWs in the sense of GC III are persons who have fallen into the power of the enemy and belonging to one of the categories enumerated in Article 4, including members of the armed forces; members of militias and members of other volunteer corps under specific conditions; persons who accompany the armed forces without actually being members thereof[597]; participants in a *levée en masse*; members of crews of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law[598], etc. Should any doubt arise as to whether a captured belligerent may be entitled to the prisoner-of-war status, Article 5 of GC III provides that such person must enjoy the protection of the Convention until such time as their status has been determined by a competent tribunal[599]. Members of the medical and religious personnel who are retained by the detaining power with a view to assisting POWs are not considered as POWs; however, they must receive as a minimum the benefits and protection of the Convention, and also be granted all facilities necessary to provide for the medical care of, and religious ministration to POWs[600].

POWs must not be subjected to ill-treatment. In accordance with Article 13 of GC III, "*prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity*". Similarly, under Article 14 of GC III, "*prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men*".

6.2.1.1. The substantive safeguards for POWs under GC III

GC III provides for specific substantive safeguards for POWs which must be observed from the planning stage of a military operation onwards. They include:

- Quarters[601]: POWs must be quartered under conditions as favourable as those for the French armed forces who are billeted in the same area. Said conditions must in no case be prejudicial to their health or security.

- Food[602]: The basic daily food rations must be sufficient in quantity, quality and variety to keep POWs in good health and to prevent loss of weight or the development of nutritional deficiencies. POWs who are compelled to work must be supplied with such additional rations as are necessary for the labour on which they are employed.

[596] GC III, Art. 82: "*A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. […]*".
[597] Annex IV–A to GC III provides for a model identity card for persons who accompany the armed forces.
[598] GC III, Art. 4(A)(5).
[599] The role of such competent tribunal, which must be able to function in a combat zone, is restricted to determining the status of captured belligerents.
[600] GC III, Art. 33.
[601] *Ibid*., Art. 25.
[602] *Ibid*., Art. 26.

- Clothing[603]: The detaining power must provide POWs with clothing, underwear and footwear. Such articles must not be prejudicial to the POWs' honour or person. They must be supplied to POWs in sufficient quantities, taking into account the climate of the region where the POWs are detained. POWs should be allowed to keep their uniforms upon capture, and uniforms of enemy armed forces captured by the detaining power should, if suitable for the climate, be made available to clothe POWs. The detaining power may only use its own uniforms to clothe POWs as a last resort and after having removed any distinctive emblems or signs, emblems of nationality and rank indications. The detaining authority must also take care of the regular replacement, washing and repair of such articles and provide spare clothing for such time as needed. Such articles must also be appropriate in the case where POWs must work or for intellectual, educational, recreational or sport activities.

- Hygiene[604]: The detaining power must take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics. POWs must have for their use, day and night, separate sanitary conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. POWs must be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time must be granted them for that purpose.

- Medical attention[605]: POWs must be provided with the medical attention they may require, as well as access to appropriate diet. POWs suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given. The detaining authorities must, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of their illness or injury, and the duration and kind of treatment received. A duplicate of this certificate must be forwarded to the Central Prisoners of War Agency provided for under GC III. The costs of treatment, including those of any apparatus necessary for the maintenance of POWs in good health, particularly dentures and other artificial appliances, and spectacles, are to be borne by the detaining power. Medical inspections of POWs must be held at least once a month.

- Religious duties[606]: POWs enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities. Adequate premises must be provided where religious services may be held. Chaplains who remain or are retained with a view to assisting POWs are allowed to minister to them and to exercise freely their ministry amongst POWs of the same religion, in accordance with their religious conscience. When POWs do not have the assistance of a retained chaplain or of a POW minister of their faith, a minister belonging to the POWs' or a similar denomination, or in their absence a qualified layman, if such a course is feasible from a confessional point of view, must be appointed, at the request of the POWs concerned, to fill this office.

- Intellectual, educational and recreational pursuits, sports and games[607]: The detaining power must take the measures necessary to encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst POWs, and must provide them with adequate premises and necessary equipment for this purpose. This must, in the first place, afford POWs with a means of relaxation; every POW must be able to follow his individual preferences. POWs must also have opportunities for taking physical exercise, including sports and games, and for being out of doors.

- Labour[608]: The detaining power may utilize the labour of POWs who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in

[603] *Ibid*., Art. 27.
[604] *Ibid*., Art. 29.
[605] *Ibid*., Arts. 30, 31 and 32.
[606] *Ibid*., Arts. 34, 35, 36 and 37.
[607] *Ibid*., Art. 38.
[608] *Ibid*., Arts. 49 to 57.

a good state of physical and mental health. Authorized work may not include any work which is military in character or purpose. Working conditions must remain suitable, especially as regards accommodation, food, clothing and equipment. There are also rules for the duration of the daily labour. Unless they be a volunteer, no POW may be employed on labour which is of an unhealthy or dangerous nature. A working pay is due to POWs.

- Ready money[609]: The detaining power may determine the maximum amount of money in cash or in any similar form, that POWs may have in their possession. The detaining power must hold an account for each POW in order to keep track of the amounts due to the POW or received by them as advances of pay, as working pay or derived from any other source; the sums taken from them and converted at their request into the currency of the said power; the payments made to the POW in cash, or in any other similar form; the payments made on their behalf and at their request; the sums transferred to the power on which they depend, subject to the consent of the detaining power.

- Relations of POWs with the exterior[610]: The detaining power must inform the power on which POWs depend of the measures taken to carry out the provisions of Articles 69 to 77 of GC III. Every POW must be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency, on the other hand, a 'capture card' similar, if possible, to the model annexed to the Convention, informing their relatives of their capture, address and state of health. POWs are allowed to send and receive letters and cards. Since electronic communication plays a major role in today's world, correspondence may be sent or received by electronic means, provided that the detaining power can examine and censor it as necessary. POWs are allowed to receive collective relief shipments.

- Transfers of POWs[611]: POWs may be transferred, provided that their transfer can be carried out in adequate conditions of safety, or if they are exposed to greater risks by remaining on the spot than by being transferred. The detaining power must take account of repatriation perspectives.

6.2.1.2. The procedural safeguards for POWs under GC III

GC III also provides for specific procedural safeguards for POWs regarding their relations with the detaining authorities. They include:

- Complaints regarding the conditions of captivity[612]: POWs have the right to know the rules governing their captivity and they may submit complaints and requests to the representatives of the detaining power if they find that those rules are not properly observed. Moreover, GC III provides for this right of complaint and request specifically for POWs compelled to carry out unauthorized work (Art. 50(3)), POWs undergoing confinement as a disciplinary punishment (Art. 98(1)) and POWs sentenced to a penalty depriving them of their liberty (Art. 108(3)).

- POWs representatives[613]: In all places where there are POWs, representatives are designated to handle relations with the representatives of the detaining power. In camps for officers, the senior officer among the POWs is appointed as representative; for all other personnel categories, the POWs elect their representatives. Representatives must further the physical, spiritual and intellectual well-being of POWs.

- Penal and disciplinary sanctions[614]: In principle, the law applicable to POWs is based on the principle of assimilation, according to which POWs are subject to the same penal and disciplinary legislation as members of the armed forces of the detaining power. Under Article 82 of GC III, "*a prisoner of*

[609] *Ibid*., Arts. 58 to 68.
[610] *Ibid*., Arts. 69 to 77.
[611] *Ibid*., Arts. 46 to 48.
[612] *Ibid*., Art. 78.
[613] *Ibid*., Arts. 79 to 81.
[614] *Ibid*., Arts. 82 to 119.

war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders", although the detaining power must, wherever possible, resort to disciplinary rather than judicial measures. However, the application of this principle is mitigated by humanitarian considerations and by the fact that the situation of POWs admittedly cannot be conflated with that of the armed forces of the detaining power[615]. Therefore, no penal or disciplinary sanction may be enforced if inconsistent with Articles 82 to 108 of GC III. Moreover, offences against regulations specially adopted in respect of POWs may entail disciplinary punishments only (Art. 82(2) GC III). POWs prosecuted under the laws of the detaining power for acts committed prior to capture (common offences, offences related to the armed conflict) retain, even if convicted, all the benefits of the Convention (Art. 85 GC III). In no circumstances whatever may a POW be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence (Art. 84 GC III). POWs may not be sentenced to any penalties except those provided for in respect of members of the armed forces of the detaining power who have committed the same acts (Art. 87 GC III). A POW who attempts to escape is liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence (Art. 92 GC III). No POW may be tried or sentenced for an act which is not forbidden by the law of the detaining power or by international law, in force at the time the said act was committed (Art. 99 GC III). In any case in which the detaining power has decided to institute judicial proceedings against a POW, it must notify the protecting power[616] as soon as possible and at least three weeks before the opening of the trial (Art. 104 GC III). POWs are entitled to assistance by one of their prisoner comrades, to defence by a qualified advocate or counsel of their own choice, to the calling of witnesses and, if they deem necessary, to the services of a competent interpreter (Art. 105 GC III). Every POW has, in the same manner as the members of the armed forces of the detaining power, the right of appeal or petition from any sentence pronounced upon them, with a view to the quashing or revising of the sentence or the reopening of the trial (Art. 106 GC III).

Lastly, POWs must be released and repatriated without delay after the cessation of active hostilities[617], unless criminal proceedings against them are pending or they are completing a punishment pursuant to a prior conviction[618]. POWs may also be released on medical grounds[619] or on parole[620].

6.2.2. Detention of civilians under GC IV

The terms and conditions for detaining civilians are provided for by GC IV, which authorizes the internment and placement in assigned residence of protected persons and other civilians in the territory of the belligerent States or on occupied territory. Even though no prior judicial or legality control of such measure is required, the necessity for doing so, albeit presumed, must be based on the grounds provided for under GC IV.

The grounds on which a civilian may be detained differ depending on whether the detention occurs in the territory of a party to the conflict or in occupied territory. In the former instance, the applicable rule is set forth in Article 42(1) of GC IV which provides that "*the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary*". The latter instance is governed by Article 78(1) of GC IV which provides that "*if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected*

[615] While certain acts may well be punishable when committed by the armed forces of the detaining power serving the cause of their State, such acts cannot be punishable in respect of POWs, who are bound to said power only by virtue of their captivity.
[616] In accordance with the Geneva Conventions, each party to an armed conflict must designate another State as 'protecting power'. A 'protecting power' is a neutral State which is entrusted with safeguarding the interests of the designating party in its relations with the other party or parties to the conflict. Accordingly, the protecting powers must ensure that the warring parties comply with their humanitarian obligations under relevant international law.
[617] GC III, Art. 118(1).
[618] *Ibid*., Art. 119(5).
[619] *Ibid*., Arts. 119(1) and 110.
[620] *Ibid*., Art. 21(2).

persons, it may, at the most, subject them to assigned residence or to internment". It follows that internment of protected persons in occupied territory should be even more exceptional than when it occurs within the territory of the parties to a conflict. Besides, such internment may not be decided as a collective measure; rather, each case must be decided on an individual basis[621].

As part of this obligation to justify the reasons for the internment, the parties to the conflict must also comply with Article 75 of AP I under which "*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*".

6.2.2.1. The procedural safeguards for civilians under GC IV

GC IV also provides for procedural safeguards which enable control mechanisms of internment measures with a view to upholding the principle of humanity. Such safeguards may differ depending on whether the detention occurs in the territory of a party to a conflict or in occupied territory.

On the one hand, where such internment would take place on French territory, Article 43 of GC IV would apply. Its first paragraph provides that "*any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit*". Accordingly, States may choose to resort either to a court or an administrative procedure. The court or administrative board must assess the lawfulness of such internment or placement in assigned residence at least twice a year[622], based on a balance between the detainee's right to liberty and the detaining power's security. In particular, such procedure must take account of potential misevaluations of the risk posed by a detained civilian that may result from the intricate and uncertain settings of armed conflicts. Unless the detainees object, the detaining power must promptly notify the protecting power[623] of the names of any protected persons who have been interned or subjected to assigned residence, including those who have been released. The decisions of the courts or boards must also be notified as rapidly as possible to the protecting power, so that the national authorities on which the detainees depend have an accurate picture of the situation of all their nationals who remain in the territory of the adverse party.

On the other hand, where such internment would take place in the occupied territory of a foreign State, Article 78 of GC IV would apply. Under its second paragraph, "*decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set*

[621] ICRC, *Commentary on the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, Art. 78.

[622] See; for example, the Report on Terrorism and Human Rights of the Inter-American Commission on Human Rights (IACHR), OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, §143: "*The applicable rules of international humanitarian law relative to the detention of civilians also require that any detention be made pursuant to a 'regular procedure', which shall include the right of the detainee to be heard and to appeal the decision, and any continuation of the detention must be subject to regular review*" (https://www.cidh.org/Terrorism/Eng/part.e.htm).

[623] To ensure the protection of populations in IAC, IHL provides for a system of protecting powers entrusted with safeguarding the interests of persons protected by the Geneva Conventions (GC III, Arts. 8-11; GC IV, Arts. 9-12; AP I, Art. 5) and facilitating continued dialogue between the parties to the conflict concerning the protection of populations. The delegates appointed by and representing the designated protecting power must be accepted by the designating party with which they are to carry out their duties. The mission of the protecting powers is to monitor and safeguard the interests of the parties to the conflict and their nationals. To this end, they are granted various rights: the right to visit protected persons; the right to assess their living conditions in detention or in occupied territories; the right to assess the general supply situation, etc. (see GC IV, Arts. 30 and 143). In principle, they are representatives of neutral States not party to the conflict, who agree to ensure compliance with humanitarian law on the territory of the designating party. If, despite the ICRC's intervention, the protecting powers have not been designated, the Geneva Conventions provide that the ICRC shall act as a substitute for and fulfil the functions of such protecting powers.

up by the said Power". This 'regular procedure' refers to the provisions of Article 43 of GC IV which sets out the procedure that States must follow for interning or placing in assigned residence protected persons who find themselves in the territory of a party to the conflict after hostilities have begun. The detaining power must implement such procedure in respect of any civilian internees, whatever status has been conferred on them and whether they are in the territory of a party to the conflict or in occupied territory[624]. The occupying power must carry out a "*periodical review, if possible every six months*".

It might prove difficult to respect such a periodicity; therefore, the review may be carried out within a reasonable timeframe which in certain circumstances may exceed six months. Unlike the provisions of Article 43 of GC IV, Article 78 does not require any notification of the decisions on assessment or review to the protecting power. Such a periodical review requires the responsible authorities to take into account the progress of events and changes as a result of which it may be found that the continuing internment or assigned residence of the person concerned are no longer justified[625]. A situation only governed by IHRL would be somewhat different, as the "*review proceedings must be conducted with due expedition*" and "*at reasonable intervals*"[626].

Representatives or delegates of the protecting powers or of the ICRC "*shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work. They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter*"[627]. Such access may not be completely prohibited, and may not be restricted except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

Lastly, other procedural safeguards are also provided for, such as the right to receive the visit of international control institutions, in particular the ICRC.

6.2.2.2. Living conditions in detention

The living conditions in detention must not be prejudicial to the detainees' dignity and health. Further, the detaining or occupying power must provide for basic individual needs such as food, clothing, hygiene and medical care, as well as the liberty to exercise their religious duties or to take physical exercise (GC IV, Arts. 93-94). This includes the following:

- Prohibition of ill-treatment: Civilian internees must not be subjected to torture or to any violence to their life, health, or physical or mental well-being, and must be protected against public curiosity; they may not be taken hostage[628].

- Maintenance of internees[629]: The detaining power must provide free of charge for the maintenance of internees, as well as for that of their dependents if they are without adequate means of support or are unable to earn a living.

- Food and clothing[630]: Detainees must be provided with food and water supplies sufficient in quantity, quality and variety to keep them in a good state of health and prevent the development of nutritional deficiencies or the loss of weight. Internees must be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if

[624] See, for example, U.S. Supreme Court, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (https://supreme.justia.com/cases/federal/us/542/507/#tab-opinion-1961673).
[625] ICRC, *Commentary on the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, Art. 43.
[626] ECtHR, *Lebedev v. Russia*, Judgment, Application No. 4493/04, 25 October 2007, §§78-79.
[627] GC IV, Art. 143.
[628] See GC IV, Arts. 27 and 37; AP I, Art. 75; Article 3 common to the GC.
[629] GC IV, Art. 81.
[630] *Ibid*., Arts. 89-90.

required. Such articles and the outward markings placed on them must not be ignominious, degrading or humiliating, nor expose them to ridicule.

- Accommodation and hygiene[631]: Internees must have for their use, day and night, sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness.

- Medical attention[632]: Every place of internment must have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require. Maternity cases and internees requiring special treatment must receive care not inferior to that provided for the general population. The medical authorities must, upon request, issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate must be forwarded to the Central Information Agency for protected persons provided for under GC IV and created, in particular for internees, in a neutral country.

6.2.2.3. The specific protections for women and children

Expectant and nursing mothers and children under fifteen years of age must be given additional food, in proportion to their physiological needs (GC IV, Art. 89(5)). A woman internee must not be searched except by a woman (GC IV, Art. 97(4)). The parties to the conflict must endeavour, during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children (GC IV, Art. 132(2))[633].

Children are also entitled to special protection based on the detaining power's obligation to provide for the support of those dependent on the internees (GC IV, Art. 81(3)). Throughout the duration of their internment, members of the same family, and in particular parents and children, must be lodged together in the same place of internment (GC IV, Art. 82(2)). Special playgrounds must be reserved for children and young people for physical exercise, sports and outdoor games (GC IV, Art. 94(3)).

6.2.2.4. The prohibition of *refoulement*, deportation and mass transfer

IHL imposes strict restrictions on the transfer of detained persons. The principle of *non-refoulement* is enshrined in Article 45 of GC IV under which "*in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs*". As is the case in IHRL, the prohibition of *refoulement* under Article 45 of GC IV is absolute[634].

Moreover, "*individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive*" under Article 49 of GC IV. Forcible transfers are unlawful even if the occupying power invokes security reasons for doing so; however, said article allows for one very limited exception only, according to which emergency evacuations are permissible "*if the security of the population or imperative military reasons so demand*".

[631] *Ibid*., Art. 85(3).
[632] *Ibid*., Arts. 91-92.
[633] See also Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Cambridge, 2006, Rules 119 and 134.
[634] See the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3; the 2010 UN International Convention for the Protection of All Persons from Enforced Disappearance, Art. 16; the 2000 EU Charter of Fundamental Rights, Art. 19(2).

6.2.2.5. Termination of the detention of civilians

Civilian detainees must be released as soon as the security reasons justifying the internment have ceased to exist. In any case, the internment must cease "*as soon as possible after the close of hostilities*"[635]. In accordance with IHL, IHRL and certain national court rulings, no exceptional circumstances whatsoever can justify the indefinite, secret or protracted detention of individuals, even in armed conflict. Such forms of detention may violate the prohibition of inhuman and degrading treatment and/or torture.

6.3. The substantive and procedural safeguards for persons in the power of the French forces in NIAC

6.3.1. Like in IAC, internment is a regular occurrence in NIAC

6.3.1.1. The States' right to detain individuals for security reasons related to the NIAC

In NIAC, States have the right to detain individuals for security reasons related to the conflict. Such 'right to detain' is based on a number of legal grounds.

Internment is a common and inevitable occurrence in NIAC (see Subsection 5.1. above), as it is in IAC. It is an extensive and virtually uniform[636] operational practice used by States parties to NIACs, which is not fundamentally called into question, although few courts have had the occasion to rule on this matter in the context of NIAC.

Such practice is based on the principle of reality as much as on the principles of military necessity and humanity. The power to intern individuals flows from the very logic of IHL, whereby parties to a conflict may arrest persons who pose a serious threat to their security and keep them interned for such time as they do so, until the end of active hostilities. Failing to recognize such a power would be tantamount to locking the parties to a conflict into a radical alternative of either releasing captured persons, or killing them altogether[637], which would be blatantly inconsistent with the principle of humanity and most of IHL and IHRL obligations (prohibition on attacking persons *hors de combat*, respect for the right to life, etc.).

This practice is also legitimized by IHL, including under Article 3 of AP II which provides that "*nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State*". The expression "*all legitimate means*" is intended to include any measures which may be implemented by a State in order to preserve its security within its territory[638].

This right to intern is also recognized by the ICRC, as 'guardian' of the Geneva Conventions and more generally IHL. At the 61st Session of the United Nations Commission on Human Rights (UNCHR)[639], the President of the ICRC stated that "*there is no question that States are entitled to detain people on a number*

[635] GC IV, Arts. 46(1) and 133(1).
[636] ICJ, *North Sea Continental Shelf*, Judgment, 20 February 1969, I.C.J. Reports 1969, p. 44, §74.
[637] Els Debuf, "Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict – Chatham House and International Committee of the Red Cross, London, 22–23 September 2008", *International Review of the Red Cross*, Vol. 91, No. 876, 2009, p. 863. However, the power to intern individuals, including for security reasons, should not be conflated with the right to target individuals during armed conflict, since IHL does not require that a protected person must have already caused actual harm through their activities in order for them to be interned. Article 42 of GC IV provides for the internment or placing in assigned residence of protected persons "*if the security of the Detaining Power makes it absolutely necessary*". Distinct legal rules apply to internment and to targeting.
[638] By way of reminder, such 'right to detain' may be inferred from Article 3 common to the Geneva Conventions and from Articles 4 and 5 of AP II, which provide for a framework with specific safeguards applicable to such situations. Such safeguards would not be specifically provided for if IHL would not confer any right to detain on the parties to a NIAC.
[639] The UNCHR was replaced on 15 March 2006 by the UN Human Rights Council (UNHRC).

of grounds, including for reasons related to security"[640]. Likewise, the ICRC recalled that "*deprivation of liberty is an ordinary and expected occurrence during all types of armed conflicts, including those involving non-State parties to a NIAC. In recognition of the reality that seizing and holding one's adversaries is an inherent feature of NIAC, IHL does not prohibit deprivation of liberty by either party to such conflicts. Indeed, from a humanitarian perspective, the availability of detention as an option – when carried out in a way that safeguards the physical integrity and the dignity of the detainee – can often mitigate the violence and the human cost of armed conflict*"[641]; at the same time, the ICRC calls for the establishment under domestic or international law of specific grounds and procedures for internment in NIAC.

In the preamble of its resolution 1[642], the 32nd International Conference of the Red Cross and Red Crescent, which took place in Geneva on 8-10 December 2015 with the participation of most States, also recalled the States' right to intern: "*The 32nd International Conference of the Red Cross and Red Crescent […], mindful that deprivation of liberty is an ordinary and expected occurrence in armed conflict, and that under international humanitarian law (IHL) States have, in all forms of armed conflict, both the power to detain, and the obligation to provide protection and to respect applicable legal safeguards, including against unlawful detention for all persons deprived of their liberty […]*". In that resolution, the International Conference "*recommends that States engage in further work on strengthening international humanitarian law protecting persons deprived of their liberty*", "*acknowledges that strengthening the IHL protection for persons deprived of their liberty by any party to an armed conflict is a priority*" and "*reaffirms the paramount importance and continued relevance of treaty-based and customary international humanitarian law in protecting persons deprived of their liberty in relation to armed conflict*".

The right to intern may also be derived from treaty law. This is for instance the case when there is an intergovernmental agreement between France and another State on whose territory French forces are involved. Such an agreement specifies the rights and obligations of the States parties to persons who may be captured and interned – until their transfer to the authorities with territorial jurisdiction – by the French forces on that territory in the context of a NIAC. Such a situation occurred under Article 10 of the Agreement by exchange of letters between the Governments of the French Republic and the Republic of Mali, defining the status of the *Serval* force and signed in Bamako on 7 March 2013 and Koulouba on 8 March 2013.

According to many legal scholars, the internment by States of persons who pose a threat to their security is a lawful practice[643].

Lastly, it seems that international law is not opposed to conferring the same power to intern individuals on non-State actors as it does on States. Although no treaty-based or customary rule specifically provides that non-State parties to a NIAC may detain individuals, internment is a common practice for them too. In line with this reality of armed conflict, part of IHL obligations must also be observed by organized armed groups. Accordingly, Common Article 3 provides that all parties to an armed conflict must treat humanely persons who were placed *hors de combat*, including by detention.

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[640] ICRC, "61st Session of the United Nations Commission on Human Rights, 16 March 2005 – Statement by the President of the International Committee of the Red Cross, Jakob Kellenberger", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 213-216 (https://international-review.icrc.org/fr/articles/61eme-session-de-la-commission-des-nations-unies-sur-les-droits-de-lhomme).

[641] ICRC, Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty, Meeting of All States, 27-29 April 2015, Geneva, Switzerland, Background Document (https://www.icrc.org/en/download/file/6588/background-document-all-states-compliance-apr-2015.pdf).

[642] Resolution 1, 32nd International Conference of the Red Cross and Red Crescent, "Strengthening international humanitarian law protecting persons deprived of their liberty", 32IC/15/R1 (http://rcrcconference.org/app//uploads/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf); see also ICRC, Concluding Report 2015, 32IC/15/19.1 (http://rcrcconference.org/app//uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf).

[643] See, for instance, "The Copenhagen Process On The Handling of Detainees In International Military Operations" (http://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf).
See also Zelalem Mogessie Teferra, "National Security and the Right to Liberty in Armed Conflict: The Legality and Limits of Security Detention in International Humanitarian Law", *International Review of the Red Cross*, Vol. 98, No. 3, 2016 (https://international-review.icrc.org/sites/default/files/irrc-903-14.pdf).

6.3.1.2. Conditions for a deprivation of liberty in NIAC

The lawful deprivation of liberty in NIAC must respect a number of conditions:

- **Relation to the armed conflict**. A State may resort to security internment under IHL only where the threat posed by the captured person to the security of forces and/or civilians is related to an armed conflict.

- **Seriousness of the threat**. Said threat must reach a minimal threshold of seriousness[644]. The information available to the commander must provide clear and convincing evidence that, if detention is not ordered, there is a reasonable probability that the individual will pose a real threat to the security of forces and/or the population. The reality of the threat, both specific and individual, must be established on the basis of the connection and contribution to the organized armed group's combat actions or to an isolated act of direct participation in hostilities, which must be sufficient to include the individual in hostilities in the broadest sense, so that their detention may be justified.

- **Preventive measure**. Security internment does not aim at punishing a previously committed offence, but at preventing a person from committing an offence and/or posing a threat to the security of forces and/or the population. Such detention may last for as long as the threat continues, but it must end as soon as the reasons justifying the measure have ceased to exist[645].

- **Absolute necessity and imperative reasons of security[646]**. Even if those criteria were provided for in IAC under Articles 42 and 78 of GC IV, they must be regarded as also applying to NIAC. On that basis, the armed forces may detain certain individuals on grounds related to the security of forces and/or the population where it cannot be guaranteed with less restrictive means. Detention is thus always an exceptional measure. In short, as recalled by the Supreme Court of Israel, security detention is "*designed to prevent and frustrate a security danger that arises from the acts that [a detainee] may perpetrate and which may not reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences (for the purpose of reaching conclusions from past acts with regard to future danger)*"[647].

Although the question of the legal basis for detention by States in NIAC is important, that of the living conditions in detention may carry even more weight from an IHL standpoint.

6.3.2. Incompleteness and imprecision of IHL regarding detention safeguards in NIAC

6.3.2.1. Incompleteness of the law applicable to NIAC

IHL contains specific and precise provisions on the substantive safeguards that apply in case of detention. Conversely, it is less accurate regarding the grounds for and legal basis of detention, as well as on the safeguards in case of judicial proceedings. However, France's detention practice thwarts related pitfalls by

[644] See ICRC, *Commentary on the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, Art. 42: "*Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage*".
[645] GC IV, Art. 132.
[646] GC IV, Arts. 42 and 78. The seriousness of a measure of internment or placement in assigned residence requires a higher level of necessity and proportionality than the ordinary cases of necessity under IHRL or Article 103 of GC III, which provides that a prisoner of war may not "*be confined while awaiting trial unless [...] it is essential to do so in the interests of national security*". In IHRL, the term 'necessary' is not synonymous with 'indispensable'.
[647] Supreme Court of Israel, *Sejadia v. Minister of Defence*, Case No. HCJ 253/88, IsrSC 43(3) 801, 1988.

focusing on short-term detention and prompt transfer to the competent authorities with territorial jurisdiction.

6.3.2.2. The basic IHL rules applicable to internment in NIAC

Article 3 common to the GC provides a foundation of general minimum safeguards which apply in any armed conflict. It lays down minimum safeguards against all forms of ill-treatment, enshrines the right to a fair trial in criminal proceedings and, in keeping with the general principle of humane treatment, requires that living conditions in detention comply with minimum standards[648]. However, it does not contain any specific provisions concerning certain categories of detainees, the grounds and procedures for detention, or the measures to be taken before or after transfer[649].

AP II, which applies in high-intensity NIACs, expands on the provisions of Common Article 3.

Like Common Article 3, AP II does not confer any special status on members of armed forces or organized armed groups who fall into enemy hands; in NIAC, such persons do not come under the legal definition of 'prisoners of war' who are entitled to specific protection. In fact, the provisions of AP II are limited to establishing minimum standards for persons in the power of a party to a conflict.

Article 4(1) of AP II establishes the fundamental guarantees of humane treatment for all persons under the control of one of the parties to the conflict, i.e. "*all persons who have not taken, or who have ceased to take, a direct part in hostilities, whether or not they are deprived of their liberty*".

Article 5 of AP II guarantees decent conditions of detention for "*persons deprived of their liberty for reasons related to the armed conflict*". It covers persons who are detained in the course of criminal proceedings or for security reasons only[650]. It applies from the moment a person is deprived of their liberty until they regain it, even if hostilities have ceased in the meantime.

Article 5(1) specifies further obligations in addition to those set out in Article 4. Its subparagraph (a) lays down the duty of protection and care of the wounded and sick. Subparagraph (b) requires that persons deprived of their liberty "*be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict*". Under subparagraph (c), they must "*be allowed to receive individual or collective relief*". Subparagraph (d) guarantees the detainees' right to exercise their religion and to receive spiritual assistance. Lastly, subparagraph (e) provides for acceptable working conditions for detainees who are required to work.

Taking account of the armed forces' capabilities, Article 5(2) of AP II sets out a number of rules to be applied wherever possible. Accordingly, its subparagraph (a) provides that women must be held in quarters separated from those of men and must be under the immediate supervision of women, except when men and women of a family are accommodated together. In cases where it is not possible to provide separate quarters, provision should in any case be made for separate sleeping quarters and separate washing facilities[651]. Under Article 5(2)(b), detainees have the right to correspondence, i.e. they are "*allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary*". Subparagraph (c) specifies that places of internment and detention must not be located close to the combat zone, and that evacuation may be carried out when the detention premises "*become particularly exposed to danger arising out of the armed conflict*". Under subparagraphs (d) and (e) respectively, detainees must

[648] For a more detailed interpretation of Common Article 3, see ICRC, *Commentary on the 1949 Third Geneva Convention relative to the Treatment of Prisoners of War*, 2020 (2nd edition), Art. 3; and Jelena Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross*, Vol. 93, No. 881, 2011 (https://international-review.icrc.org/sites/default/files/irrc-881-pejic_0.pdf).
[649] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 3, §§708 and following.
[650] Accordingly, this article does not cover persons who are detained for reasons not related to the armed conflict.
[651] ICRC, *Commentary on the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, Art. 5, §4584.

"*have the benefit of medical examinations*", in the interests of all concerned, detainees and guards alike; and their physical or mental health and integrity must not be endangered by any unjustified act or omission.

Article 5(3) bridges a legal gap by granting certain protection safeguards to persons who are not detained or interned, but whose liberty was restricted in any way whatsoever for reasons related to the armed conflict. Lastly, Article 5(4) provides that upon releasing detainees, measures necessary to ensure their safety must be taken[652].

Article 6 of AP II sets out universal principles related to penal prosecutions, thus supplementing the provisions of Common Article 3(1)(d), which prohibits "*the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples*". This was designed so as to strengthen the prohibition of summary justice and of convictions without trial. Article 6 thus reiterates the principles contained in GC III and GC IV, and for the rest is largely based on the International Covenant on Civil and Political Rights (ICCPR), particularly its Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation[653].

Article 6 "*applies to the prosecution and punishment of criminal offences related to the armed conflict*" and reaffirms the right to be tried "*by a court offering the essential guarantees of independence and impartiality*". The accused must be informed as quickly as possible of the particulars of the offence alleged against him, and of his rights, and they must be in a position to exercise them and be afforded the rights and means of defence "*before and during his trial*", i.e. at every stage of the procedure[654]. Article 6(2)(b) establishes the principle of individual responsibility by providing that "*no one shall be convicted of an offence except on the basis of individual penal responsibility*". That article also enshrines the general principles of legality of criminal offences and penalties and of non-retroactivity of criminal law[655], the principle of the presumption of innocence, the right of the accused to be present at their own trial, the right not to be compelled to testify against oneself or to confess guilt, and the right to be informed of judicial remedies and of the time-limits in which they must be exercised. Lastly, Article 6 provides for the prohibition on pronouncing the death sentence upon persons under eighteen years and on carrying it out on pregnant women and mothers of young children[656].

Notwithstanding the above, the reach of AP II is limited in terms of rules governing detention in armed conflict since it only applies in high-intensity NIAC, it does not specify the grounds or procedures for internment and nor does it contain any norm for the transfer of detainees.

Other rules of IHL, which were identified as customary rules by the ICRC[657], also offer significant protections for persons deprived of their liberty in NIAC. However, the general provisions of IHL do not provide practical guidance on how to administer an appropriate detention regime in NIAC.

6.3.3. France's detention practice in NIAC

The rules applied in NIAC are inspired from those applicable to IAC and come from treaty and customary

[652] ICRC, *Commentary on the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, Art. 5, §4596.
[653] *Ibid*., Art. 6, §4597.
[654] *Ibid*., Art. 6, §4602.
[655] *Nullum crimen, nulla poena sine lege*: no one shall be found guilty of an offence and criminally sanctioned for it if there was no previously published legal text explicitly providing for that offence and the related penalties at the time the act or omission was committed.
[656] *Ibid*., Art. 6, §§4603-4613.
[657] By way of reminder, the 2005 ICRC Study on customary IHL enumerates other fundamental guarantees related to the treatment of persons deprived of their liberty which also apply in NIAC, such as the rules relating to the treatment of detainees (rules 87-99), the rules concerning judicial proceedings (rules 100-103) and the rules on the conditions of detention and the treatment of specific categories of detainees (rules 118-128). However, those general rules, whose customary nature does not always enjoy consensus among States, do not provide for a practical framework for implementing an appropriate detention system in NIAC.

IHL and IHRL as well as from the jurisprudence of domestic and international judicial bodies. In NIAC, France's practice regarding the detention of persons in its power is characterized by the simultaneous application of IHL and IHRL which takes into account the specific features of each conflict to which it is party[658].

6.3.3.1. France's safeguards in relation to detention

Where it becomes necessary to resort to detention in NIAC, France implements specific safeguards which are adapted to the detention's location and duration and to operational constraints. Those safeguards are consistent with short-term detention, which corresponds to France's practice in current military operations in foreign States. In foreign operations, the infrastructures or means available to the French armed forces are not always such as to permit a comparable level of compliance with the same standards as those applicable on France's territory in peacetime.

6.3.3.2. France's simultaneous application of IHL and IHRL in NIAC detention

The interplay between IHL and IHRL rules is very intricate in such situations (see, in general, Part 3, Chapter 2, Subsections 2.1. et seq. above).

In practice, the humanitarian safeguards implemented by France in situations of detention in NIAC include certain IHL provisions applicable to IAC, those applicable to NIAC as well as IHRL norms construed in light of IHL, the *lex specialis* in armed conflict.

6.3.3.3. The substantive safeguards ensuring humane treatment of detainees

The conditions of detention must be appropriate, and thus meet the following standards. Detainees must first be registered. For the whole duration of their detention, they are entitled to regular medical care and examinations to ensure proper treatment of the wounded and sick, including an initial examination to assess their health (including potential wounds or illness) prior to detention and determine whether their health status is compatible with detention. Medical care is provided if detainees are found to be wounded or sick, or upon request if their health condition so requires. A medical examination is also carried out prior to the detainee's transfer to the host State's competent authorities in order to determine their health condition upon leaving the detention centre. If it is found that the detainee is too badly injured to be transferred, an extension of the detention may be ordered to improve their health condition while awaiting transfer. Medical care can also be provided following the detainee's release to tend to the wounds inflicted during combat. Moreover, detainees are entitled to the same food rations as French soldiers and to individual or collective accommodation. Lastly, they must have for their use sanitary conveniences as well as circumscribed access to the exterior, including a right to correspondence, for example via the ICRC's representatives or delegates.

The French armed forces also take into account the specific needs of vulnerable categories of detainees. Indeed, certain people are particularly vulnerable in situations of armed conflict, as they are more likely than others to be subjected to general violence because they belong to an ethnic or sexual minority, or to sexual or gender-specific violence such as rape, forced prostitution or other forms of violence. Accordingly, women are held in quarters separate from men for safety reasons. They also have specific needs in terms of hygiene and medical care, in particular pregnant women who need additional food and pre- and post-natal care. The

[658] IHL is the *lex specialis* in armed conflict, but IHRL still continues to apply. In that regard, see, *inter alia,* ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, §25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I.C.J. Reports 2004, §106; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, I.C.J. Reports 2005, §116. This viewpoint is shared by the UN Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights. The ICRC also took this position in its 2011 Report *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, pp. 13-22. The question is, however, to what extent IHRL treaties may apply extraterritorially or in times of armed conflict, and how they interplay with applicable IHL in force.

specific needs of other categories such as elderly people or persons with disabilities must also be considered.

Focus: Detention of Minors in Armed Conflict

Under IHL, it is explicitly prohibited to recruit children under the age of 15 years into the State armed forces or organized armed groups[659]. In spite of that prohibition, many minors are still being forcibly recruited in contemporary armed conflicts. In such situations, a minor may be regarded as a member of such an organized armed group or as a civilian taking a direct part in hostilities, thus losing the protection afforded to civilians under IHL (cf. Part 3, Chapter 3, Subsection 3.2.1. above). However, wherever minors fall into the power of an adverse party, the latter must apply the relevant special protection rules under IHL[660].

In operations, the French armed forces may be confronted with recruited children and sometimes have to capture them as members of organized armed groups or where they take a direct part in hostilities. In order to improve the protection of children in armed conflicts, a specific policy must be implemented. Accordingly, wherever possible, a partnership must be concluded with child protection bodies, to which captured children may be transferred.

As part of Operation *Sangaris* in the Central African Republic (CAR), the *Sangaris* Force Commander and the Representative of the United Nations Children's Fund (UNICEF) signed a 'Handover Protocol' on 22 October 2014 for the Transfer of Children Associated with Armed Forces and Armed Groups (CAAFAG). That protocol provided, *inter alia*, that any child recovered or captured by elements of the *Sangaris* Force on the ground must be transferred to UNICEF as promptly as possible. To that end, the *Sangaris* Force undertook to appoint a single person in charge of liaising with UNICEF or its operational partners, while the UNICEF committed to designate points of contact who could receive transferred children at all times. Moreover, that protocol also provided that children who were not CAR nationals were subject to the same transfer and reception procedures, and that the ICRC was in charge of their repatriation, with the support of UNICEF and in coordination with the States concerned.

Similar procedures were implemented in Mali and Niger in Operation *Barkhane*. Accordingly, any captured individual believed to be under the age of 18 years[661] was subjected to special treatment (e.g. held in quarters separate from adults) and transferred, under the supervision of an ICRC representative, to the National Directorate for the Promotion of the Child and the Family. Subsequently, so transferred minors were handled in accordance with the Handover Protocol signed on 1 July 2013 between the United Nations and the Government of Mali on the Release and Handover of Children Associated with Armed Forces and Armed Groups and the interministerial circular of 7 February 2013 relating to the prevention, protection and return of children associated with armed forces or armed groups.

6.3.3.4. The procedural safeguards necessary to prevent arbitrary detention, ill-treatment and enforced disappearances

The decision to deprive a captured individual of their liberty is always based on the threat that they pose to the security of the mission or the population. The authority ordering the internment must follow a procedure to verify the existence of valid reasons justifying the measure, i.e. the existence of a real, direct and imperative security threat which requires an immediate arrest and detention. In practice, a person's direct participation in hostilities or membership in the military wing of an organized armed group are sufficient grounds to reach the threshold for such threat.

[659] AP I, Art. 77(2); AP II, Art. 4(3)(c). Besides, under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which France ratified on 5 February 2003, "*armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years*" (Art. 4(1)) and "*States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces*" (Art. 2).
[660] AP I, Art. 77(3); AP II, Art. 4(3)(d).
[661] The French armed forces determine the age of any captured individual based on the initial declaration of such person and on any objective or operational element which may disprove or confirm that declared age.

The detention's duration must be as short as possible. In NIACs to which it is a party, France chooses to implement detention measures as short as possible prior to the detainee's transfer to the competent authorities with territorial jurisdiction.

The internment may be followed by a judicial detention after the transfer, if the authorities with territorial jurisdiction so agree. Such a transfer operation does not preclude criminal prosecution by French courts, where, for instance, captured and transferred persons allegedly perpetrated crimes against French nationals. In such a situation, the international mechanism of 'mutual assistance in criminal matters' takes over, in accordance with applicable bilateral agreements and the French Code of Criminal Procedure. Detainees who allegedly committed an offence in relation to an armed conflict are entitled to a fair trial. Common Article 3, which applies to NIAC, enshrines the right to a fair trial in criminal proceedings in a very general manner. Article 75(4) of AP I, which was drafted based on the relevant provisions of Article 6(5) of the ICCPR, and Article 6 of AP II, which provides for specific safeguards in case of criminal proceedings, may be regarded as reflecting customary law, which applies to all armed conflicts. Indeed, they enumerate, in an almost identical list, fair trial rights, which the State with territorial jurisdiction must respect upon transfer.

The situation of a detainee must be periodically reviewed. Although IHL does not specifically provide for such periodical review in NIAC, France implements it anyway as a supplementary safeguard against arbitrary detention. According to the ECtHR case law, the existence of threats to the national security, such as terrorism, does not give States *carte blanche* "*to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions*"[662]. In the case of *Hassan v. the United Kingdom*, the Court stressed that "*whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent 'court' in the sense generally required by Article 5 § 4 […], nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the 'competent body' should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness*"[663].

As regards NIACs on foreign States' territory to which France is a party, based on France's practice of short-term detention, the periodical review of the detainees' situation is carried out by a military authority distinct from that which ordered the detention in the first place. The more times detention is extended, the higher is the level of authority required to authorize such extension in order to confer a certain degree of independence and impartiality on the decision taken.

The ICRC is present at the most important steps along the detention process. Representatives of the ICRC are present at the beginning of the detention; they may visit detainees and they supervise the detainees' transfer to the competent authority with territorial jurisdiction. The ICRC's regular and unannounced visits of detainees are a way to assess the conditions of detention and treatment and, where necessary, to make recommendations in a constructive and confidential dialogue.

France's practice of administrative detention follows rules in terms of implementation and recording, and is subject to regular monitoring and control.

[662] ECtHR, *Sakık and Others v. Turkey*, Judgment, Application No. 87/1996/706/898-903, 26 November 1997, §44.
[663] ECtHR, *Hassan v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 29750/09, 16 September 2014, §106.

Focus: Capture in Operations by Other Allied States

Where the French armed forces are deployed in foreign operations alongside other States, the applicable framework for capture and detainee transfer may be different depending on the situation and entail different legal consequences.

The NATO ISAF mission in Afghanistan. As part of the NATO International Security Assistance Force (ISAF) operation in Afghanistan (which was replaced by the Resolute Support Mission in 2015), a national control mechanism was created with a view to monitoring the mission's use of the means made available to it. Since Afghanistan – the State with territorial jurisdiction – did not provide any guarantees to France as a member of the Coalition (while it did to other Coalition States), no capture operation was organized directly by the French authorities. Those Coalition States which carried out such operations then transferred captured persons only to the Afghan authorities; there was no handover between NATO Member States.

France's operational control over partner forces. Where a third State's forces under French operational control capture an individual, it means that France exercises its jurisdiction[664] over the captured person, who must as such enjoy their rights under IHL and IHRL, in particular ECHR law, which both apply in armed conflict. Accordingly, France must comply with all its obligations under international law in implementing capture, detention and transfer procedures, including by standardizing such procedures where they must be applied by the partner State.

Operational control is not exercised by France. Where a partner State's forces capture an individual on the territory of the State with territorial jurisdiction and wish to transfer that person to the French authorities, such an operation would be then subject to the prior consent of the State with territorial jurisdiction. Upon reception of the transferred person, France would then exercise its jurisdiction over them. Furthermore, such a partner State may require France to provide guarantees of compliance with its IHL and IHRL obligations to transferred persons, in particular when it considers that such transferred person may face a risk of persecution, torture or inhuman or degrading treatment. Given the inherent legal risks of such a situation and the conditions for formalizing the consent of the State with territorial jurisdiction (such a step could undermine its territorial sovereignty), it is preferable to avoid that type of situation in the first place.

6.3.5. France's conditions for transferring detainees to third States' authorities in foreign operations

In foreign operations ('*opération extérieure*', *OPEX*), Frances attaches certain conditions to the transfer of detainees to third States' authorities, including those of the State on whose territory such persons were captured.

6.3.5.1. The transfer of prisoners of war and protected persons in IAC

In IAC, the transfer of POWs and of protected persons is governed by concrete rules set out respectively in Article 12 of GC III and Article 45 of GC IV.

Accordingly, the transfer of any person is subject to compliance with the following conditions:

- A person may only be transferred by the detaining power to a power which is a party to the Convention.
- The detaining power must satisfy itself of the willingness and ability of such transferee power to apply the Convention. Following the transfer, if the transferee power fails to carry out the provisions of the Convention in any important respect, the power by which the persons were transferred must, upon being so notified by the protecting power, take effective measures to correct the situation or must request the return of the transferred persons. Such measures must be consistent with France's

[664] The exercise by a State party to the ECHR of its jurisdiction over an individual is is a necessary condition for that State to be able to be held responsible for an alleged violation of the Convention. In principle, jurisdiction is territorial; however, the ECtHR may, by way of derogation, apply the Convention extraterritorially if it holds the view that a State party does exercise its jurisdiction over a person because of certain factual or legal circumstances. Such threshold circumstances may include a State's effective control over an individual while using force on foreign territory in the context of an armed conflict, or the delegation to a State party to the Convention of certain sovereign powers by a State on whose territory the agents of the former State are deployed.

international human rights commitments.

6.3.5.2. The transfer of captured or detained persons in NIAC

In NIAC, the transfer of captured or detained persons is subject to compliance with the prohibition on inhuman and degrading treatment. Indeed, under the principle of *non-refoulement*, a State is prohibited from transferring any person to another State or to a non-State actor where there is a risk that such person will be subjected to torture or degrading treatment, arbitrary deprivation of life, enforced disappearance or persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

This principle is enshrined in several international agreements, including in Article 33 of the UN Convention relating to the Status of Refugees of 28 July 1951[665]; Article 3(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984[666]; and Article 16 of the UN International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006[667].

The ECtHR also endorsed that principle of *non-refoulement* when applying Article 3 of the ECHR which prohibits torture and inhuman or degrading treatment or punishment. That prohibition of *refoulement* was first recognized by the Court in the 1989 case of *Soering v. the United Kingdom*[668] and then reaffirmed in its 1996 *Chahal v. the United Kingdom* judgment, which stressed that while States have the right to control the entry, residence and expulsion of aliens, they are prohibited from transferring a person "*where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country*"[669].

Moreover, the Court holds the view that the principle of *non-refoulement* also applies where the transfer of an individual would blatantly violate their right to liberty and security[670] (Art. 5 ECHR), their right to a fair trial[671] (Art. 6 ECHR) or their right to respect for private and family life[672] (Art. 8 ECHR).

According to the ICRC, "*because of the fundamental rights it protects, common Article 3 should be understood as also prohibiting Parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer*"[673].

6.3.5.3. France's international human rights commitments in relation to transfer

The transfer of captured persons by the French armed forces to another State's authorities must comply with France's international human rights commitments. To this end, France implements a regulated transfer procedure.

First, transfer is not always the chosen alternative. The French forces may determine that a previously

[665] https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees.
[666] https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.
[667] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced.
[668] ECtHR, *Soering v. the United Kingdom*, Judgment, Application No. 14038/88, 7 July 1989, §§74-80.
[669] ECtHR, *Chahal v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 22414/93, 15 November 1996, §§73-74.
[670] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Judgment, Application No. 8139/09, 17 January 2012, §§233-235; ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, Judgment of the Court (Grand Chamber), Application No. 39630/09, 13 December 2012, §233; ECtHR, *Al Nashiri v. Poland*, Judgment, Application No. 28761/11, 24 July 2014, §§527-532.
[671] ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Judgment, Application No. 61498/08, 2 March 2010, §149.
[672] ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, Judgment of the Court (Grand Chamber), Application No. 39630/09, 13 December 2012, §249.
[673] ICRC, *Commentary on the 1949 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016 (2nd edition), Art. 3, §708.

captured and subsequently detained individual no longer poses a threat to the mission and/or civilian population, and that such person is to be released.

Furthermore, prior to each transfer, the French authorities carry out an assessment to determine whether there are substantial grounds to believe that the transfer will violate the person's rights and the safeguards under international law. Where such substantial grounds are shown, the transfer may not take place unless preventive measures are taken to dispel related risks.

Once the transfer has been agreed upon and accepted by the authorities of the transferee State, France notifies the ICRC of that decision so that the ICRC representatives may attend the transfer and speak with the transferred person. The captured person is then transferred with their personal belongings, as well as any seized items or equipment (identity papers, miscellaneous documents, means of communication, weapons, etc.). Any photographs taken during detention, together with medical certificates, are also handed over and recorded in a report.

France systematically requires the transferee State to refrain from resorting to the death penalty or inhuman or degrading treatment. For example, Article 10 of the 2013 Agreement by exchange of letters between the Governments of the French Republic and the Republic of Mali defining the status of the *Serval* force provided for the obligation of the Malian party to ensure the custody and security of persons handed over by the French party in compliance with the applicable IHL and IHRL rules. In accordance with that article, "*[…] the Malian Party shall ensure that, in case the death penalty or a punishment amounting to cruel, inhuman or degrading treatment is incurred by a transferred person, such penalty or punishment shall neither be sought against nor imposed on such person, and that, in the event such penalty or punishment has indeed been imposed, it shall not be enforced*".

France may also request the right to visit. Indeed, France does not consider that its responsibility ceases once a captured person has been transferred to another State. As part of its agreements with host States, France requests the right to carry out post-transfer visits, in order to ensure concrete and full compliance with all relevant principles of IHL and IHRL.

Focus: The ICRC's Role in Respect of Persons Deprived of Their Liberty[674]

As part of its mandate, the ICRC must ensure that persons deprived of their liberty are being held in decent conditions and receive humane and fair treatment in accordance with applicable laws and standards.

- **Right to access detainees**

In IAC, Articles 126 of GC III and 143 of GC IV give the ICRC the right to have access to all protected persons who are deprived of their liberty. In NIAC, the ICRC has a broad right to 'offer its services' to the parties to the conflict under Common Article 3. Such offers of services include visiting detainees held in relation to the conflict. In other situations warranting humanitarian action, the ICRC has a right of initiative as set out in the Statutes of the International Red Cross and Red Crescent Movement.

Excluding IAC, the detaining authorities are under no legal obligation to accept the ICRC's visits of and help for detainees. Nonetheless, the ICRC has continued to offer and carry out such visits for decades, and these visits have, over time, become a central and recognized part of the ICRC's mission and activity, including in NIAC.

- **Assessment of the detainees' needs**

[674] Refer to ICRC, "Protecting People Deprived of their Liberty", *International Review of the Red Cross*, Vol. 98, No. 3, 2016, pp. 1043-1066.

The ICRC has the capacity to visit places of detention. Such visits allow for the identification of possible deficiencies or human rights violations. The ICRC must be able to have private conversations with detainees during these visits. Visits also enable the ICRC, where necessary, to provide direct services to detainees, such as re-establishing contact with their families.

- **Tenets of ICRC visits**

The ICRC's visits to detainees are based on the following tenets[675]:

- The right to access all detainees unrestrictedly, at all stages of their detention, whatever status has been conferred on them by the authorities and wherever they are held.
- The right to have access to all premises used by and for the detainees.
- The right to speak freely and in private, without witnesses, with individual detainees of the ICRC's choice.
- The right to register detainees of the ICRC's choice. The registration of detainees allows the ICRC to follow up on the specific needs of selected individuals. For example, this might concern minors detained among adults, sick detainees, security detainees or individuals who fear or report abuses.
- The right to repeat visits. The repetition of visits enables the ICRC to monitor the results of its action, to follow up the individual cases and ensure that its visits do not have undesirable consequences for detainees. The frequency of ICRC visits to a given place of detention depends on the needs identified by the ICRC.

- **Process of ICRC visits to detainees**

Initial meeting with the detaining authorities. This is an opportunity for the ICRC's representatives or delegates to introduce themselves and explain the visits' objectives and procedures. For the authorities, it is an opportunity to explain their main concerns, how the detention facility functions and what support they may need.

Tour of areas used by and for detainees. Together with staff from the detention facility, ICRC delegates conduct a tour of all areas used by and for detainees: sleeping quarters, kitchens, sanitary facilities, exercise yards, disciplinary cells, workshops, infirmaries, etc.

Private interviews with detainees and individual registration. ICRC delegates hold private interviews, without witnesses, with groups of detainees or with selected individuals, for as long as necessary. At this stage, delegates may record the names and personal details of detainees who they feel are in need of individual follow-up.

Final meeting with the authorities. During this stage of the visit, delegates submit their observations and preliminary conclusions to the detaining authorities. They give recommendations and take note of the authorities' responses. They also tell them how the ICRC intends to follow up on the visit.

[675] Those tenets are derived from the obligations under Arts. 126 of GC III and 143 of GC IV, with which States parties to an IAC must comply.

CHAPTER 7: THE LEGAL PROTECTION OF MILITARY PERSONNEL IN OPERATIONS

Historically, it has been clear that the specificities of national defence and the military condition called for a special legal status, often in derogation from ordinary law. Maurice Hauriou, a French jurist whose writings shaped French administrative law in the late 19th and early 20th century, coined the term '*cantonnement juridique des militaires*' (legal confinement of the military), by contrast with the ordinary law system and the regime applicable to civil servants, to describe the specific restrictions on the freedoms of military personnel. The legal particularities relating to military personnel have evolved since then, but they remain strong to this day. Indeed, military personnel are governed by a special status, both in terms of civic rights and disciplinary system. And while obligations such as reserve in expression and neutrality concern both civilian and military personnel, the latter are required to observe them with the utmost rigour. As a counterweight to their duties, military personnel are entitled to special benefits, for example in terms of retirement and recognition.

However, since World War II, the specific legal handling of military matters has been called into question. For instance, political authorities took the view that depriving military personnel of their right to vote was an excessive restriction in relation to the need for neutrality in the armed forces (Ordinance No. 45-1839 of 17 August 1945). The 1972 reform of the general status of military personnel also led to a number of advances, including the introduction of equality between men and women in the armed forces.

This initial trend has been amplified by rulings from national and European courts, which strive to construe the law with due regard for certain legal developments – most notably France's accession to the European Convention on Human Rights (ECHR) and its additional protocols – as well as societal changes, and to keep the derogatory legal treatment of military issues to what is absolutely necessary to guarantee the proper operation of the armed forces.

The progressive incorporation of the military justice system into ordinary law jurisdiction, a process which may be referred to as 'civilianization' of the military justice system, was largely achieved through the law of 21 July 1982 relating to the judicial reorganization of military criminal matters[676], and was finalized by the law of 13 December 2011 enacting the dissolution of the Paris Armed Forces Tribunal.

Over time, the successive changes in legislation have curtailed the specific features of military criminal law, ultimately leading to the removal of the last two military courts in 1999[677] and 2011[678] and the introduction of a right of appeal, thus completing the process of convergence with ordinary law.

Lastly, in 2014[679], the 37 ordinary law courts specialized in military criminal matters (*juridiction de droit commun spécialisée en matière militaire, JDCS*), which were then divided between Courts of Appeal (*cour d'appel*) and Higher Courts of Appeal (*tribunal supérieur d'appel*), were replaced by 9 "revamped" JDCS with extended territorial jurisdiction. Henceforth, French military justice in peacetime would come fully under ordinary law.

However, the risk of excessive judicialization, a phenomenon that affects every facet of society, extends to

[676] Following the adoption of the law of 21 July 1982, permanent courts for the armed forces were replaced by specialized chambers within ordinary law courts. These specialized chambers had jurisdiction over military offences and ordinary law offences committed by military personnel while on duty. The only remaining permanent courts for the armed forces were those located in Paris, for offences committed outside French territory, and in Landau, Germany, for offences committed by French troops stationed there. Pursuant to the reform, prosecution was no longer the responsibility of the Minister of Defence, but that of the Public Prosecutor. However, a special system providing for the re-establishment of military courts in wartime was maintained in French law.

[677] Law No. 99-929 of 10 November 1999 reforming the Code of Military Justice and the Code of Criminal Procedure.

[678] Law No. 2011-1862 of 13 December 2011 concerning the division of litigation competence and the simplification of certain court procedures.

[679] Decree No. 201-1443 of 3 December 2014 amending Decree No. 82-1120 of 23 December 1982 establishing the list and jurisdiction of specialized courts that have competence over offences in military and State security matters.

military activities as well. In military matters, such judicialization involves in particular that the individual criminal responsibility of military personnel may be challenged in court, especially for command actions carried out while on duty. Considering the specific nature of their missions, military personnel, who are governed by a general status[680] that requires them to "*serve at all times and in all places*" and demands "*discipline, availability, loyalty and neutrality*" as well as a "*spirit of sacrifice, up to and including the supreme sacrifice*", should not be regarded as any ordinary litigants in criminal proceedings.

Such status, the importance of which was recently reiterated by the French *Conseil constitutionnel* (Constitutional Council)[681], which is in charge of controlling that legislative and regulatory provisions uphold the French Constitution, in itself justifies the implementation of a number of derogatory rules and of a specialized justice system to protect the military institution from "*unnecessary judicialization*"[682].

7.1. The French military criminal justice system

The French military criminal justice system establishes a particular legal regime which is adapted to the specificities of the military, although it is based on four different statutory texts: the Code of Military Justice, the Defence Code, the Penal Code and the Code of Criminal Procedure.

The Penal Code, which applies fully and at all times, including to French soldiers, contains all ordinary law offences, including violations of national defence secrets, war crimes and crimes against humanity and violations of the fundamental interests of the Nation.

The Code of Criminal Procedure contains a section on "*Military offences and felonies and misdemeanours against the fundamental interests of the Nation*" (Book IV, Title XI) which specifies, *inter alia*, the composition and jurisdiction of specialized courts as well as the procedures of *dénonciation* and *avis* (see Subsection 7.1.1. below).

The Defence Code encompasses all the provisions relating to the general principles of defence, the applicable legal regimes, the organization of the Ministry of Defence, the status of military personnel and the administrative and financial means of the armed forces. In particular, it contains provisions governing the criminal responsibility of military personnel which may only be entailed in the light of the "*specific constraints of the mission entrusted to them by law*" (Article L4123-11).

Lastly, the Code of Military Justice enumerates those offences that are specific to military personnel (e.g., desertion, military conspiracy, insubordination) and which may only be prosecuted by the JDCS, the ordinary law courts of military jurisdiction. In wartime, the Code of Military Justice prevails over the Penal Code and the Code of Criminal Procedure; it provides for the re-establishment of military courts and specifies their composition, jurisdiction and rules of procedure.

In peacetime, a French member of the military who commits an offence may be judged by one of the three following types of court depending on the circumstances of the offence: an ordinary law court for offences committed while not on duty; any of the nine JDCS[683] for offences under ordinary law committed on French territory while on duty or for military offences (which are covered by the Code of Military Justice); or the Paris JDCS for ordinary law or military offences committed outside France while on duty or not (subject to France being granted a primary right to exercise jurisdiction in a status-of-forces agreement – SOFA – with

[680] French Defence Code, Art. L4111-1 et seq.
[681] In its Decision No. 2018-756 of 17 January 2019, the *Conseil constitutionnel* declared, based on the specific nature of the military condition, that the third paragraph of Article 697-1 of the Code of Criminal Procedure assigning jurisdiction to specialized ordinary law courts over offences committed by members of the *gendarmerie* in the maintenance of law and order, was consistent with the Constitution.
[682] First address of President François Hollande to the Armed Forces on 19 Mai 2012.
[683] Decree No. 82-1120 of 23 December 1982 establishing the list and jurisdiction of specialized courts that have competence over offences in military and State security matters. There are nine such cross-regional JDCS on French metropolitan and overseas territories, located in the following cities: Rennes, Bordeaux, Toulouse, Marseille, Dijon, Metz, Lille, Paris, Cayenne.

the partner State on whose territory the French armed forces are deployed).

In case of proceedings before such specialized JDCS courts, the defendant military personnel are governed by an adapted criminal regime, with penalties or measures that may be applied to them by virtue of their status (Book III of the Code of Military Justice), but also by an adapted procedure, as the Public Prosecutor must obtain the opinion of the Minister of Defence prior to prosecution.

7.1.1. The procedures of *dénonciation* and *avis*

In proceedings before specialized courts for military matters, the Public Prosecutor (*Procureur de la République*) obtains specific information from the military authority, so that the competent court may hear and judge the case. There are two ways in which such information may be transmitted: the military authority can either provide it spontaneously together with the alleged acts (so-called *dénonciation*), or in lack thereof as a reply to a request by the Public Prosecutor (so-called *avis*).

7.1.1.1. *Dénonciation*: a spontaneous report by the military authorities to the Public Prosecutor of alleged criminal offences by military personnel

The procedure of *dénonciation*, which is provided for in Article 698-1 of the Code of Criminal Procedure, refers to the direct, i.e. unsolicited, report by the Minister of Defence (or any military authority empowered by a decree of the Minister) of alleged offences by military personnel to the Public Prosecutor. After having considered such report, the Public Prosecutor may then decide to conduct a preliminary enquiry, initiate legal proceedings or close the case without taking any further action.

Dénonciation is a way to inform the Public Prosecutor of the usual conduct of the member of personnel in question, of any proposition of transfer they may have been made, of any disciplinary sanction that may have already been taken and of the particulars surrounding the alleged acts. It is substantiated with appropriate legal arguments and circumstantial elements, and it may contain a criminal classification drawn up by the military authority.

Therefore, such report is an appropriate step only if the military authority deems itself to be sufficiently well informed to take a position on whether or not criminal proceedings should be initiated.

The procedure of *dénonciation*, which may contain an opinion on the appropriateness of criminal proceedings, should not be conflated with the other reporting obligation of *révélation* or *signalement* provided for in Article 40 of the Code of Criminal Procedure, under which "*any constituted authority*" or "*civil servant acting in an official capacity*" must notify the Public Prosecutor of alleged criminal acts that would have come to their knowledge.

7.1.1.2. *Avis*: a request-for-opinion procedure prior to prosecution

Under Article 698-1 of the Code of Criminal Procedure, the Public Prosecutor must, in lack of *dénonciation* and except in cases of *flagrance*[684], request the *avis* (opinion) of the Minister of Defence or any empowered military authority before initiating any legal proceedings. Such opinion may be requested by any means which must be filed in the record of the case, failing which the prosecution is liable to be declared void. Most of the time, it is done by transmitting a copy of the available case documents.

This request-for-opinion procedure was introduced in 1982. The objective was twofold: not only was it a

[684] Under French law, cases of '*flagrance*' (flagrant offences punishable by imprisonment) warrant the conduct of expedited investigations due to the urgent character of the situation. *Flagrance* has a more restrictive scope than the notion of '*flagrante delicto*' because it only covers felonies and misdemeanours that are punishable by at least a penalty of imprisonment. '*Enquête de flagrance*' refers to the expedited investigation initiated in cases of *flagrance* which grants extended powers to judicial police officers (see Part 1, Chapter 2, Subsection 2.1.4.1. above).

way to inform the judges of any military-related particulars which may impact their legal determination upon the case, but also to enable the military authority to take appropriate measures where a member of personnel was involved in any criminal proceedings. According to Robert Badinter, the then French Minister of Justice who initiated the bill, "*by sharing information with the judges, the military authorities can take account of any criminal proceedings against the member of personnel concerned, which may in turn have an influence on the way that person shall serve, their availability and thus their operational capacity*"[685].

Such an opinion may only be delivered by the Minister of Defence or any military authority empowered to do so by a decree of the Minister, within one month following the Public Prosecutor's request. It should be made in writing so that it can be added to the case file.

If the Public Prosecutor fails to request such an opinion, the proceedings they may later initiate shall be null and void.

Such an opinion contains a more or less detailed analysis about the legal classification of the alleged acts and further information about the usual conduct or behaviour and the 'way to serve' of the member of personnel concerned as well as any disciplinary sanctions imposed on them and circumstantial elements surrounding the alleged acts. It is a way to submit specific information to the Public Prosecution's Office and, if criminal proceedings are initiated, to the competent court, so that the judges may hear and determine upon the case in knowledge of the operational context, scope, technical specificities and constraints of the accused member's mission.

7.1.2. Military courts and direct summons

Unlike victims of any other indictable offence, the victim of any felony or misdemeanour committed on French territory by a member of the armed forces while on duty is not entitled to bring an action before a specialized court by direct summons where the impugned acts were committed under the conditions set out in Article 697-1 of the Code of Criminal Procedure. Its Article 698-2 §1 provides that "*the public prosecution may be initiated by the injured party under the conditions set out in articles 85 and following*" of said Code. As a result, such victims are only entitled to lodge a complaint together with an application to be joined as a civil party to the proceedings, after a simple complaint has failed to materialize; any attempt to lodge a complaint by direct summons shall therefore be deemed inadmissible by the court. As this exception flows from a rule of public policy, it may be invoked at any stage of the proceedings by the Public Prosecutor, the accused or even directly by the court. Besides, if the victim were to be able to use the direct summons, this would negate the military authority's obligation to produce an opinion prior to the proceedings in compliance with Article 698-1 of the Code of Criminal Procedure, thus obviating and nullifying the provisions of that article.

Considering the constraints of the armed forces' missions, the legislative intent was to limit the risk of abusive criminal prosecution by direct summons.

7.1.3. The Public Prosecutor has the exclusive power to prosecute acts committed by French military personnel in foreign operations

As an exception to ordinary law, victims of a criminal offence committed by French military personnel while on duty outside French territory or territorial waters do not have the power to initiate public prosecution (Code of Criminal Procedure, Art. 698-2§2).

This exception is justified on two counts.

[685] Debates at the *Assemblée nationale*, the lower house of the French Parliament, 2nd meeting of 14 April 1982, French Government Gazette (*Journal officiel, Année 1982, n° 22 A. N. (C. R.), 2e Séance du Mercredi 14 Avril 1982*, in French only), p. 1128.

Firstly, it allows a military force operating abroad room to make its own assessments and decisions, without burdening the justice system with the responsibility of judging *a posteriori* the merits or otherwise of military decisions made on the battlefield.

Secondly, the aim is to preserve the effectiveness of military action, by ensuring that deployed military personnel, in fear of subsequently being held liable, do not end up trying to remove all possible risk when planning military actions.

This is consistent with former French Minister of Justice Robert Badinter's idea behind the 1982 law, according to which "*if all those who claim to be victims were granted the right to directly summon for trial any officer or soldier at their sole discretion, it would allow 'false victims', who are not at all worried about any sanction for slander which would be imposed months or years later, free rein for destabilizing our republican army*".

In order to prevent such manipulation of the justice system, the power to initiate proceedings against military personnel for acts committed in foreign operations lies solely with the Public Prosecutor[686].

7.1.4. Assessment of unintentional offence

Article 121-3 of the Penal Code[687] sets out the rules governing unintentional offences in French criminal law.

The moral element of an unintentional offence is constituted where the impugned acts are found to have been caused by recklessness, negligence or a failure to observe an obligation of due care or precaution imposed by any statute or regulation.

This type of misconduct will only entail the member's criminal responsibility where they have failed to 'show normal diligence', which must be assessed *in concreto*, i.e. taking into account the reality of their resources and skills.

For military personnel, the conditions for assessing such normal diligence are provided for under Article L4123-11 of the Defence Code, which thus affords them special protection. According to that article, "*subject to the provisions of the fourth paragraph of Article 121-3 of the Penal Code, military personnel may only be convicted on the basis of the third paragraph of the same Article for unintentional acts committed while on duty if it is found that they failed to show normal diligence, taking into account their competence, the power and means at their disposal, and the constraints inherent in the missions entrusted to them by law. Such normal diligence is assessed in particular with regard to the urgency under which they performed their duties, the information available to them at the time of their intervention and the circumstances of the combat action*".

In accordance with the principle of presumption of innocence, the onus of proving that the soldier's conduct

[686] The *Conseil constitutionnel* confirmed that this rule was consistent with the Constitution in its decision No 2019-803QPC of 27 September 2019.

[687] French Penal Code, Art. 121-3: "*There is no felony or misdemeanour in the absence of an intent to commit it.*
However, the deliberate endangering of others is a misdemeanour where the law so provides.
A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration, where appropriate, the nature of their role or functions, of their capacities and powers and of the means then available to them.
In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen or who failed to take steps enabling it to be avoided, shall be criminally responsible where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware.
There is no petty offence in the event of force majeure".

was wrongful in the circumstances falls on the prosecutor.

Proving criminal responsibility therefore presupposes a different type of misconduct which depends on whether the causal link between the misconduct and the harm is direct or indirect.

In that regard, the causal link qualifies as direct whenever the alleged recklessness or negligence is either the sole or exclusive cause, or the immediate or decisive cause, of the injury to the person. Where the injury is the consequence of a physical attack inflicted by the accused, be it through the use of an object (instrument, medicine, vehicle, etc.), there is no doubt as to the direct nature of the causal link.

The causal link between the misconduct and the harm will be indirect where the person has merely created or contributed to creating the situation that led to the harm, or has failed to take measures to prevent it.

If the soldier's misconduct indirectly caused the harm, it must also be established that the misconduct was intentional or grossly negligent, in addition to proving that they failed to show normal diligence.

Any misconduct is intentional when the perpetrator manifestly and deliberately broke a specific duty of care or precaution laid down by statute or regulation.

Gross negligence occurs when the perpetrator's misconduct exposed others to a particularly serious risk of which they could not have been unaware. Proving intentional misconduct may also, in cases of direct causation, constitute an aggravating circumstance.

7.1.5. Exemption from criminal prosecution under Article L4123-12(II) of the French Defence Code

French law provides for a particular cause of criminal non-responsibility for military personnel involved in foreign operations. Indeed, under Article L4123-12(II) of the Defence Code, "*military personnel involved in any operation using military capabilities outside French territory or territorial waters, whatever its purpose, duration or scale, including digital actions, hostage rescue, evacuation of nationals or policing the high seas, shall not be held criminally responsible for taking coercive measures or using armed force, or for giving the order to do so, where such acts are necessary to perform their mission, provided that they comply with the rules of international law*".

This exemption from criminal prosecution applies to military personnel involved in any operations outside French territory and specifically refers to the act of "*taking coercive measures or using armed force*". 'Coercive measures' means the use of military force to compel the adversary, including through persuasion, to stop its current activities. To that end, such means are used in accordance with principles of proportion and control and in a graduated approach, up to the effective use of armed force if the adversary does not comply.

Article L4123-12(II) of the Defence Code thus grants military personnel a broader legal protection than that of self-defence provided for in Article 122-5 of the Penal Code. Indeed, by contrast with self-defence which only qualifies as a protective and individual reaction, Article L4123-12(II) covers planned missions, which may be offensive and are always collective or part of a collective action. It protects both the soldiers who execute an order to take coercive measures and the commanders who gave such orders. It thus allows for leeway in performing the mission, which may include the use of armed force beyond self-defence, for example to avert violence by the adversary.

That article encompasses a very broad scope regarding the nature of operations concerned. Therefore, this particular cause of criminal non-responsibility for military personnel appears particularly protective. Nevertheless, it remains subject to compliance with international law, and the coercive measure or use of armed force in question must be "*necessary to perform their mission*".

More specifically, Article L4123-12(II) only applies if the following cumulative conditions are met:

- **'Military personnel'**. The specific exemption from criminal prosecution applies to active or reserve members of the military. It may also apply to members of the *Gendarmerie nationale* – a branch of the French Armed Forces which is, alongside the *Police nationale*, one of the two law enforcement bodies in France. However, it does not apply to civilians, agents of private military and security company (PMSC), local civilian personnel recruited abroad by the French armed forces, etc.

- **'Involvement' in operations**. The military personnel must be "*involved*" in the operation, which includes members of the military authority who give instructions or orders from French territory as part of "*any operation using military capabilities outside French territory or territorial waters, whatever its purpose, duration or scale, including digital actions, hostage rescue, evacuation of nationals or policing the high seas*". Those members thus also enjoy the related exemption from criminal prosecution.

- **'Necessity' for the performance of the mission**. The exemption from criminal prosecution applies to acts of the military personnel which are "*necessary to perform their mission*". It is thus conditional on the exigencies of the mission, and not on fulfilling the strict criteria of self-defence set forth in Article 122-5 of the Penal Code. However, the condition of necessity, albeit only for the performance of the member's mission, remains relevant. Therefore, the use of force is only lawful where it has been made necessary by the exigencies of the mission, which is assessed on a case-by-case basis by the court in case of prosecution. On the other hand, 'mission' must be understood *stricto sensu* and in proportion to the member's level of responsibility.

- **Proportionality**. Although the requirement of proportionality is not explicitly provided for under Article L4123-12(II), it is corollary to the condition of necessity. Accordingly, any use of force must in all circumstances be proportionate to the seriousness of the enemy threat or action, or to the operational objective. Such proportionality requirement is consistent with France's commitments under international humanitarian law (IHL) and the European Convention on Human Rights.

- **Modalities of the use of force**. The use of force and how it is to be implemented must always comply with applicable international law. Accordingly, no domestic law, including Article L4123-12(II), may exempt military personnel from such obligation. Although the principle of respect for international law seems obvious, determining what it actually involves in the field might be intricate at times, particularly where international human rights law (IHRL) must be concurrently applied with IHL.

Based on that article, armed force may be used in operational situations that so require. This includes:
- protecting objects or property which are indispensable to the mission, or missions to protect specific objects or property;
- responding to a hostile act (HA), i.e. any intentional act which does not constitute an attack but causes serious harm or poses a significant danger to the mission's forces or other persons, such as an intrusion into a military compound, a deliberate obstruction of movement, etc.;
- responding to a hostile intent (HI), i.e. any action constituting a plausible threat which can be identified based on objective information indicating an intention to attack or to cause harm and demonstrating the capabilities of the individuals or groups of individuals who pose the threat, such as any gathering of armed individuals, suspect behaviour of members of organized armed groups in the near vicinity of a military compound or vehicles of the mission, preparation of combat actions aiming at destroying lines of communication which are necessary to the mission, etc.;
- targeting military objectives;
- taking coercive measures to end any restriction on the freedom of movement of the armed forces or specific persons or organizations, such as tactical immobilization, obstruction of movement, detention, jamming, influence, intelligence gathering, counter-propaganda, etc.

Notwithstanding the need to comply with the conditions governing its applicability, Article L4123-12(II) of the Defence Code and its exemption from criminal prosecution must be kept in perspective, as it is without prejudice to the application of French criminal law in foreign operations. Moreover, the use of force in operations is not exempt from a post-operational judicial review. In particular, the military judicial police prerogatives vested in the French Provost Gendarmerie are not affected by Article L4123-12(II).

Article L4123-12(II) does not introduce an absolute exemption from criminal responsibility. Rather, it creates a particular cause of criminal non-responsibility for military personnel using force in the performance of their mission, i.e. in accordance with the instructions received, provided that such instructions fall within the legal framework of the 'command by a lawful authority' (cf. Part 1, Chapter 3, Subsection 3.1.2.2.). That article does not purport to establish criminal immunity for all acts performed in foreign operations. Accordingly, uses of force unrelated to the purpose of the operation do not fall within its scope of application.

Lastly, Article L4123-12(II) has no bearing on the fact that the Rules of Engagement (ROE) of any operations have no legal value. ROE are instructions issued by a specific military authority, endorsed at political level and addressed to the forces engaged in a given foreign operation, defining the circumstances and conditions under which these armed forces may use force or carry out any action that could be construed as hostile.

Focus: Drafting History of Article L4123-12 of the Defence Code

Before the 2005 overhaul of the French general regime of military personnel which introduced the specific criminal immunity for military personnel in foreign operations, the only lawful ground under French law for the use of force in such operations was self-defence. Indeed, from the perspective of French law, the application of the combatant privilege under the law of armed conflict, which permits the use of force beyond self-defence, was not explicit, as foreign operations do not require the Parliament to issue a formal declaration of war (which triggers one of the regimes under which military personnel may use force lawfully).

The restrictive framework of causes of criminal non-responsibility for the use of force or coercion under French law had thus come to be considered ill-suited to the missions entrusted by France to its armed forces in foreign operations. Objective causes of criminal non-responsibility (known as 'justifying facts') include:

- The 'state of necessity' (cf. Part 1, Chapter 3, Subsection 3.1.2.1.) provided for in Article 122-7 of the Penal Code, the applicability of which was uncertain. Under that article, "*a person who is confronted with a present or imminent danger threatening themselves, another person or property shall not be held criminally responsible for performing an act necessary to ensure their safety or that of the other person or property, unless the means used are not proportional to the seriousness of the threat*". However, jurisprudence on the use of force pursuant to that article remains scant. Moreover, the admissibility conditions for a state of necessity are quite restrictive, as it requires the existence of a threat, which is not always the case in the context of military operations. The proportion requirement, which arose from case law, also seems difficult to satisfy as far as the use of armed force is concerned.
- The 'order by the law', i.e. requirement or authorization by statute or regulation (cf. Part 1, Chapter 3, Subsection 3.1.2.2.), provided for in Article 122-4§1 of the Penal Code does not apply to military operations. Under that article, "*a person shall not be held criminally responsible for performing an act prescribed or authorized by legislative or regulatory provisions*". However, neither the orders received by soldiers in operations, nor the ROE, which contain the instructions relating to the use of force, are "*legislative or regulatory provisions*". Absent this condition, said article is not applicable.
- The 'command by a lawful authority' (cf. Part 1, Chapter 3, Subsection 3.1.2.2.) provided for in Article 122-4§2 of the Penal Code protects the military personnel in foreign operations who carry out the orders, but not the commanders. Under that article, "*a person shall not be held criminally responsible for performing an act commanded by a lawful authority, unless such act is manifestly unlawful*".
- Article 122-5 of the Penal Code lays down the rules for personal self-defence (cf. Part. 1, Chapter 3, Subsection 3.1.2.1.) and the conditions under which it may apply (both relative to the attack and the response). Thus, the sole ground of self-defence under that article does not match the exigencies of the use of force in foreign operations, because the mere

performance of mandated tasks almost always requires the use of force in a manner which extends beyond the scope of self-defence or the state of necessity. In accordance with that article, the use of force in self-defence is only permissible where the required six cumulative conditions are met. In French law, self-defence is applicable both to the defence of persons and of property. In the latter case, however, acts of defence do not include wilful murder. Since deadly force is not permissible under that provision, the framework of self-defence provided for in that article appears ill-suited to the missions which must be performed by military personnel.

After such limitations were deemed excessive during certain operations (Bosnia, Côte d'Ivoire, Kosovo), the overhaul of the general status of military personnel, with Article 17 of the Law No. 2005-270 of 24 March 2005 (now Article L4123-12 of the Defence Code), enhanced the guarantees granted by France to its military personnel, particularly in terms of legal protection, considering the constraints and risks involved in their work and the use of force. Article 17§I establishes an exemption from criminal prosecution for the use of armed force to prevent intrusion into a highly sensitive defence area and to arrest the intruder, while §II creates a new cause of criminal non-responsibility for the exclusive benefit of military personnel using force to carry out their mission in accordance with instructions received, provided such instructions comply with international law.

Subsequently, to avoid any doubt as to whether this criminal immunity applies not only to foreign operations (Harmattan in Libya, Serval in Mali, etc.), but also to more ad hoc military interventions such as hostage rescue, evacuation of nationals or policing the high seas, Article L4123-12 of the Defence Code was amended by Article 31 of the Military Planning Law for 2014-2019 of 18 December 2013. The amendments were designed to reduce the risk of legal action being taken against military operations outside France, by extending the justification for the use of force in foreign military operations to unintentional acts of violence. Accordingly, the criminal responsibility of military personnel for such acts may only be entailed after criminal courts have examined and ruled out certain circumstances that reveal the specific difficulties of military action. Lastly, in the context of the Military Planning Law No. 2018-607 for 2019-2025 of 13 July 2018, Article L4123-12(II) was amended to include digital actions in its scope, so that cyber combatants also enjoy this criminal immunity, regardless of whether they give or carry out the orders, provided that the digital actions are part of a military operation outside French territory or territorial waters, whatever its purpose, duration or scale.

7.1.6. Status of death in foreign operations

The status of death in foreign operations is set out in Article L211-7 of the Code of Military Justice[688], which was amended as part of the Military Planning Law for 2014-2019. Under that article, the death of a member of military personnel in a combat action is considered as not having an 'unknown or suspicious' cause. This means that, barring special circumstances, it will not give rise to an investigation into the cause of death.

Military personnel therefore benefit from legal provisions adapted to their situation and constraints, which are particularly taken into account by the judiciary and help to curb excessive judicial action.

7.2. Operational SOFAs

To ensure the legal security of the French forces deployed in foreign operations, it is necessary to conclude robust status-of-forces agreements (SOFAs), which have a threefold purpose: ensuring immunity from arrest and prosecution by domestic courts to French military personnel; providing all means necessary to their deployment in terms of logistics and facilities; and guaranteeing that France's partners comply with their obligations under IHL and IHRL to persons captured in accordance with IHL and handed over to them by the French forces.

By way of reminder, it is necessary to distinguish between 'cooperation' SOFAs, which are designed to provide a framework for instruction, training or exercise activities as part of a defence partnership (see Chapter 2, Subsection 2.2. above), and 'operational' SOFAs, which set out the rules governing a specific

[688] French Code of Military Justice, Art. L211-7: "*For the purpose of the application of Article 74 of the Code of Criminal Procedure, any violent death of a member of military personnel in a combat action as part of a military operation outside the territory of the Republic is considered as not having an unknown or suspicious cause*".

foreign operation.

7.2.1. SOFAs and the conduct of operations: operational agreements

Since foreign operations have gained in importance in the activities of the armed forces, the legal framework for such operations needed to be reinforced, and new operation-specific provisions were introduced, either directly into specific operational agreements based on standard cooperation agreements, or, on a more *ad hoc* basis, into specific annexes to such general agreements.

One example of the latter case, i.e. technical cooperation agreements containing an operational annex, is the agreement of 8 April 2010 establishing a defence partnership between France and the Central African Republic. This agreement includes a specific annex on the *Boali* mission, which was tasked with providing logistical support for the peacebuilding mission MICOPAX, a multinational African operation set up in 2008by the Economic Community of Central African States. This annex contains only provisions relating to the facilities granted to the French *Boali* detachment, in particular in terms of taxation, with no specific clauses relating to the conduct of operations.

Such drafting approach combines, within the same agreement, activities that each have a very distinct material and temporal scope:
- as regards *ad hoc* foreign operations, the scope is short-term and likely to evolve quickly;
- as regards structural operational cooperation, the scope is long-term and stable.

However, this is not the preferred format, as it presupposes the prior existence of an operation for the conclusion of a cooperation agreement.

7.2.1.1. SOFAs alone are not sufficient to authorize operations in foreign territory

Under international law, a military intervention in the territory of another State is only permissible if at least one of the following conditions is satisfied (see Part 2 above):
- The competent authorities of the State on whose territory the operation takes place have given their consent[689]; or
- The intervention is based on the exercise of individual or collective self-defence under Article 51 of the Charter of the United Nations (see Part 2, Chapter 2 above).

In the former case, the competent authorities must establish their consent formally, including via official correspondence (for example by an exchange of letters between Heads of State) or as part of an intergovernmental agreement specifying the threats currently faced, the means which may be used by the French party, the conditions for the forces' intervention and the applicable operational SOFA. France's partner may request the non-disclosure of such international agreements.

7.2.1.2. The limits of standard military cooperation agreements make it necessary to conclude *ad hoc* operational SOFAs

Only SOFAs with specific operational provisions can offer the appropriate legal protection for foreign operations.

Indeed, the standard defence cooperation agreements concluded by France with numerous partner States do not allow for the conduct of operations, as such agreements are structurally designed to apply in peacetime. As a result, they are usually based on a reciprocal basis, and generally contain no specific provisions adapted to the conduct of operations on the territory of either party.

[689] Such consent must be express, i.e. in the form of an official letter or as part of a SOFA.

The conduct of operations by French forces, which may involve the use of force, calls for a higher level of protection for France's personnel, particularly in criminal matters.

In addition, the implementing modalities of such operations must be covered by appropriate provisions:

- entry and exit procedures differ from those used in standard agreements: in the case of cooperation agreements, entry is via official border entry points; in the case of operational SOFAs, on the other hand, entry is unrestricted at any point on the territory of the partner State, possibly without prior notice or after the partner State has been informed in advance;
- certain provisions are specific to operational SOFAs, as they are not relevant in standard cooperation agreements. This is the case of provisions relating to the transfer and handling of captured persons.

7.2.2. Legal protection in foreign operations: the content of operational SOFAs

Operational SOFAs provide legal protection for the French forces as regards the use of force and the conduct of operations, and reaffirm the parties' fundamental obligation to comply with IHL and IHRL in armed conflict, particularly concerning the capture of individuals and the transfer, monitoring and prosecution of captured persons.

Some of the provisions of operational SOFAs are often similar in scope to those contained in the standard cooperation agreements on which they are based, but others are very different.

It should be noted that operational SOFAs apply only to members of the operation, whether civilian or military, and not to dependents which are covered by standard cooperation agreements, because their presence is excluded in the context of foreign operations. In principle, the status of any private contractors of the mission is not governed by operational SOFAs.

7.2.2.1. Operational SOFAs: the legal protection instrument of personnel in foreign operations

7.2.2.1.1. The legal protection of personnel is achieved mainly through immunities

Given the specific risks faced by the French forces as a result of the use of force in foreign operations, it is imperative to provide them with a comprehensive legal protection regime.

Operational SOFAs, which are non-reciprocal in nature, usually provide that "*[...] the military personnel of the French forces [...] shall enjoy the same immunities from prosecution and execution as those granted to experts on missions by the Convention on the Privileges and Immunities of the United Nations of 13 February 1946*"[690].

This reference to the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 has several implications. Section 22 of the Convention provides that experts "*shall be accorded: (a) Immunity from personal arrest or detention and from seizure of their personal baggage; (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind*".

As a result, members of the French forces who are on the territory of the partner State may not be arrested or detained, whatever the alleged acts that may give rise to such arrest or detention.

However, the immunity from prosecution granted to personnel members by virtue of their function only covers acts performed in the course of their mission. Any acts not related to their mission may therefore be prosecuted by competent local courts, although the initiation of such proceedings does not entitle them to

[690] Cf., for example, the provisions of the SOFA concluded between France and Afghanistan on 30 December 2001.

arrest or detain French personnel. In theory, the immunities granted to the members of the force under the SOFA could be waived by the French government. However, these immunities have been specifically required by France to ensure the protection of its personnel abroad, in line with its treaty commitments and constitutional requirements concerning the prohibition of the death penalty and of inhuman and degrading treatment. It therefore seems unlikely that France would easily waive these immunities, and in fact, operational SOFAs contain no such obligation.

Lastly, the granting of immunities on the territory of another State in no way deprives French courts[691] of jurisdiction over offences committed by the French forces on the territory of the partner State. Furthermore, such provisions do not confer on the French courts a primary right to exercise jurisdiction.

7.2.2.1.2. The legal protection of deployed forces is strengthened by the specific provisions on the settlement of damage

While standard cooperation SOFAs are generally based on the principles of amicable settlement of claims for harm caused by a member of personnel while on duty and of replacement at the proceedings, operational SOFAs contain more robust provisions based mainly on three principles:

- The principle of mutual waiver of any claims for reciprocal harm caused to the personnel and property of either party, including if such harm has entailed death, but excluding serious or willful misconduct;
- The principle of responsibility of the host State for the reparation of any harm suffered by third parties, including where the French party caused, or contributed to cause, such harm;
- The principle of replacement at the proceedings: Given that members of the French personnel enjoy immunity from prosecution and execution on the territory of the host State, the sending State is replaced by the host State in any proceedings initiated by a third party before competent local courts.

7.2.2.2. Operational SOFAs simplify the conduct of operations

Operational SOFAs contain several provisions that are similar to those of standard cooperation SOFAs. Some of them are nearly identical (division of disciplinary competence, wearing of the uniform, validity of driving licences), although most of them reflect simplified procedures that aim at facilitating the deployment of contingents which are often larger due to the conduct of operations (exemption from visa requirements, very simplified import procedures). On the other hand, certain provisions designed to provide a framework for the conduct of operations are drafted in a specific way (cf. Subsection 7.2.1.2. above).

In the former case, the provision in question is simply adapted to the SOFA's operational nature. This is for example the case for the provision governing the carrying and use of weapons on the territory of the host State. Since such weapons are to be used in an offensive way, that provision sets out the rule according to which French law shall apply, and not the law of the partner State, which is the case in standard cooperation SOFAs.

In the latter case, certain provisions designed to facilitate the operation of deployed forces are specific to such operational SOFAs. One example is the provisions setting out the conditions for the use of force by the French armed forces in land, air or sea operations, which may be led either in coordination between the parties or individually in case of imperative operational necessity, provided the other party is informed as soon as possible.

[691] French Penal Code, Art. 113-6: "*French criminal law is applicable to any felony committed by a French national outside the territory of the Republic. It is applicable to any misdemeanour committed by a French national outside the territory of the Republic, provided that the impugned act is punishable by the law of the State on whose territory it was committed […]*".

Focus: Model Clauses of an Operational SOFA

Article 1

Principles of the cooperation (compliance with local legislation), immunities granted to members of the French forces (offences) and conditions for the use of force in land, air or sea operations, which may be led either in coordination between the parties or individually in case of imperative operational necessity (provided the other party is informed).

Article 2

Entry and exit conditions via official border entry points: presentation of identity papers, passports with or without visa, mission orders.

Article 3

Division of disciplinary competence, wearing of the uniform.

Article 4

Driving licence for any military vehicles.

Article 5

Freedom of movement for deployed forces without having to be accompanied by local forces, obligation to report any such movement as soon as possible.

Article 6

Carrying and use of weapons in compliance with applicable French law, measures of protection for deployed forces.

Article 7

Import of equipment and supplies free of custom duties following simplified procedures.

Article 8

Facilities and logistical support provided to deployed forces: provision, free of charge, of terrains, facilities and equipment with simplified management procedures (only major works requiring authorization).

Article 9

Mutual waiver of any claims for reciprocal harm, responsibility of the host State for costs incurred in the reparation of harm caused to third parties.

Article 10

Protection of captured persons: rules for detention by the French party and for the subsequent transfer and detention by the partner State.

Article 11

Settlement of disputes through negotiation.

Article 12

Interplay with any other agreements between the parties.

7.2.2.3. Operational SOFAs guarantee the parties' compliance with their obligations to captured persons

7.2.2.3.1. Establishing bilateral safeguards by recalling the parties' obligations under IHL and IHRL

France and its operational State partners are legally bound to comply with their respective international commitments under IHL and IHRL, including mainly:

- The four 1949 Geneva Conventions and their Additional Protocols, including the 1977 Second Protocol Additional relating to the Protection of Victims of Non-International Armed Conflicts[692];
- The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[693].

Moreover, contrary to its non-European partners, France is also bound by obligations under the ECHR. In order to incorporate those legal obligations as well as the related jurisprudence of the European Court of Human Rights into France's operational relations with partner States, a specific article governing the transfer of detained persons has been added to operational SOFAs.

For example, Article 10 of the *Serval* SOFA with Mali contains a 'transfer clause' (cf. Focus below) which sets out the conditions for the transfer to competent authorities of persons captured by the French forces as well as the safeguards to which they are entitled.

The pursued goal is threefold. First, beyond the mere reminder of IHL and of the 1984 Convention against torture which both apply *per se*, such clause aims at recalling the host State's obligations to transferred persons as part of its operational relation with France. Second, it incorporates France's commitments under the ECHR into the bilateral relation and thus imposes on the partner State the obligation to comply with certain rules that are normally not applicable (in particular, the prohibition on enforcing the death penalty against captured persons who are handed over to local authorities, or the mandatory notification to French authorities prior to any transfer to a third State). Lastly, it lays down the rights of the International Committee of the Red Cross – after consultation with and approval by the latter – to visit transferred persons without any restrictions and to consult records established as required by IHL.

7.2.2.3.2. The ICRC's essential role

After the ICRC so approved, the ICRC's rights and duties are incorporated into the articles on transferred persons in operational SOFAs between France and its State partners. The ICRC is explicitly mentioned in the provisions on the right to visit detained persons, which include the following: "*The foregoing provisions shall not prejudice the ICRC's right to access transferred persons. The ICRC's visits to transferred persons shall take place in compliance with its institutional working methods*".

7.2.2.3.3. Respect for the rights of transferred persons

The provisions relating to the respect for the rights of transferred persons concern both parties to the SOFA, but at different stages of the capture and transfer process.

Firstly, the French party, which is responsible for the custody and security of any persons captured by the French forces until their transfer to the host State's competent authorities, must comply with the general IHL and IHRL rules applicable to transferred persons, in particular AP II and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in the stage of operations between capture

[692] Accession by France on 7 August 1980, by Burkina Faso on 20 October 1987, by Mali on 8 February 1989, by Mauritania on 14 March 1980, by Niger on 8 June 1979 and by Chad on 17 January 1997.
[693] Accession by France on 18 February 1986, by Burkina Faso on 4February 1999, by Mali on 26 February 1999, by Mauritania on 17 November 2004, by Niger on 5 October 1998 and by Chad on 9 June 1995.

and handover.

Secondly, such provisions bind the State party on whose territory the operation takes place to comply with the same rules as the French party while ensuring the custody and security of transferred persons. Furthermore, the host State, as the 'detaining power' which may exercise its jurisdiction over detained persons through its courts in proceedings against them, is also bound to comply with the following additional obligations:

- **Prohibition on enforcing the death penalty or any punishment amounting to cruel, inhuman or degrading treatment**. This provisions allows France to ensure that the partner State complies with the same obligations as France under its treaty commitments and constitutional requirements. Thus, the host State must ensure that such penalty or punishment will neither be sought against nor imposed on any transferred person, and that, in the event they have indeed been imposed, they will not be enforced.

- **Prohibition on further transfer to a third State**. A person who was handed over to the host State's authorities may not be further transferred or extradited to another State without the consent of French authorities.

- **Right to a fair trial**. A person who was handed over to the host State's authorities must benefit by the rules and procedures ensuring such person's right to a fair trial and the periodical review of such person's detention.

- **Right to visit**. This provision confers on the French party as well as on the ICRC or any other competent human rights organization approved by the host State the right to visit detainees. Such access to any persons handed over to the host State, which must maintain a detailed record of all such individuals, is a permanent right that may not be restricted, except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

Focus: Model Provisions for the Transfer of Detained Persons

In a SOFA governing a foreign operation of the French forces in a situation of non-international armed conflict, the provisions for the transfer of detained persons, including a stipulation on the right to a fair trial (see paragraph 5 below), must be drafted as follows:

"*The French Party shall treat any detained persons, while ensuring their custody and security, in compliance with the applicable rules of international humanitarian law and international human rights law, including the Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) of 8 June 1977 and the Convention against torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984.*

The [X] Party, while ensuring the custody and security of any persons handed over by the French Party, shall comply with the applicable rules of international humanitarian law and international human rights law, including the Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) of 8 June 1977 and the Convention against torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984.

In keeping with the French Party's treaty commitments and constitutional requirements, the [X] Party shall ensure that, in case the death penalty or a punishment amounting to cruel, inhuman or degrading treatment is incurred by a transferred person, such penalty or punishment shall neither be sought against nor imposed on such person, and that, in the event such penalty or punishment has indeed been imposed, it shall not be enforced.

No person handed over to the [X] authorities pursuant to this Article shall be transferred to a third party without the prior approval of the French authorities.

Any person handed over to the [X] authorities shall benefit by the rules and procedures provided for under each Party's treaty commitments and otherwise legal obligations, including those ensuring the respect for such person's right to a fair trial and the periodical review of such person's detention.

The French Party, the International Committee of the Red Cross (ICRC), or, after approval of the [X] Party, any other competent human rights organization, shall have the right to unrestricted access to any transferred persons.

The representatives of the French Party, of the ICRC and, where applicable, of any other such organization as referred to in the preceding paragraph, shall have permission to go to all places where transferred persons may be. They shall have access to all premises used by transferred persons. They shall also be allowed to go to the places of departure, passage and arrival of transferred persons. They shall be able to interview any transferred persons without witnesses, personally or through an interpreter.

The above-mentioned representatives shall have full liberty to select the places they wish to visit; the duration and frequency of these visits shall not be restricted. They may not be prohibited, except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The [X] Party shall keep a record of all the personal details of each transferred person (identity, date of the transfer, place of detention, state of health, any equipment or belongings seized).

Upon request, such record may be consulted by the Parties to this Agreement, by the ICRC or, where applicable, by any other competent human rights organization as referred to in paragraph 5 of this Article.

The foregoing provisions shall not prejudice the ICRC's right to access transferred persons. The ICRC's visits to transferred persons shall take place in compliance with its institutional working methods."

CHAPTER 8: INTERNATIONAL HUMANITARIAN LAW APPLIED IN OPERATIONS – KINETIC ENGAGEMENT AND RULES OF ENGAGEMENT

One basic principle under international humanitarian law (IHL) is that of distinction, which was codified in Article 48 of the first Protocol additional (AP I) to the Geneva Conventions: "*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*".

France considers that compliance with IHL is of paramount importance. Therefore, the French armed forces uphold their obligations to protected persons and civilian objects, as both a condition for and an objective of the planning and conduct of military operations.

This commitment is implemented in the commanders' decision-making mainly through two instruments: the targeting process and Rules of Engagement[694] (ROE). ROE are instructions on the use of force which either authorize or prohibit the use of force or coercion in specific circumstances. The process of 'targeting' is designed to provide a framework for engaging specific targets in compliance with the fundamental principles and rules of IHL[695].

8.1. The French targeting process complies with IHL

8.1.1. Targeting process: a methodology for selecting targets and analysing risks of incidental civilian casualties and damage, and a function implemented in command structures

According to the French definition[696], joint targeting refers to the whole process that enables action to be taken on methodically identified and selected targets[697]. It creates controlled and synchronized effects in the physical or virtual dimensions as a result of planned lethal, less lethal or non-lethal military actions. It makes a decisive contribution to achieving the commander's objectives and the desired end state[698].

This broad definition of the targeting process is reflected in the concept of full-spectrum targeting which refers to a process of planning, conducting and coordinating operations with the aim of achieving more comprehensive effects than mere physical or kinetic effects. This full-spectrum approach aims at combining lethal effects with non-lethal effects (e.g. those relating to military influence) in order to reach the desired end state more efficiently.

Full-spectrum targeting thus encompasses kinetic targeting, but also targeting mechanisms associated with psychological, electronic warfare (EW) and deception or diversionary operations as well as cyberoperations

[694] Instructions delivered by a specific military authority (and validated by the political authority) to the military personnel deployed in a given foreign operation, defining the circumstances and conditions in which they may use force or undertake any action that may be construed as provocative.

[695] This Chapter deals with the targeting process. However, certain kinetic actions are conducted as part of combat engagement without resulting from a targeting process (e.g. Close Air Support, Close Combat Attack, Artillery Fire Support). Nevertheless, strikes must always comply with IHL, whether they are conducted as a result of targeting or as part of combat engagement.

[696] French Joint Doctrine (*Doctrine Interarmées*) for Joint Targeting supplementing the NATO Allied Joint Doctrine for Joint Targeting (AJP-3.9), DIA-3.9_CIBLAGE_SUP-FR-AJP-3.9 N°006/DEF/CICDE/DR, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 10 January 2014 (as amended on 23 April 2018) [hereinafter referred to as "*French Doctrine for Joint Targeting*"].

[697] A target is any area, structure, object, person, group of people, mindset, thought process, attitude or behaviour against which weapons or military actions can be directed. A target can be engaged using lethal, less lethal or non-lethal means, or a combination thereof. *French Doctrine for Joint Targeting*, Annex G, Part 2, p. 88.

[698] According to the *French Doctrine for Joint Targeting*, the 'desired end state' is the situation to be attained at the end of an operation, corresponding to the achievement of the political objective. It is overarching and covers several dimensions, including social, military, humanitarian, institutional or security aspects, etc. By defining the overall desired end state, authorities can determine the criteria to be met for the operation to be successful. The desired end state may change in the course of the operation.

(see Part 4, Chapter 4 below). The different categories of full-spectrum targeting may overlap; a psychological operation may thus include ruses of war or disinformation components.

The following Subsections deal with the different processes of kinetic targeting[699] and how the French armed forces implement it in compliance with IHL fundamental principles and rules.

8.1.1.1. The targeting process is integrated into the operation cycle

The targeting process is a cycle based on intelligence, spanning from the strategic to the tactical level and closely linked to the planning and conduct of operations. It is an iterative process integrated into the operation cycle and divided in successive phases.

8.1.1.1.1. The targeting process is adapted to the cycle of planning and conduct of operations

The use of force takes place within an operational continuum which covers the operation planning phase, real-time target analysis and combat actions[700].

Therefore, the targeting process must be adapted to the cycle of planning and conduct of operations. Even in circumstances where it is not feasible to conduct a formal targeting process due to the immediacy of the engagement (troops in contact), an estimation of the risks of incidental civilian casualties and damage (collateral damage or effects) is systematically carried out[701]. Indeed, the IHL rules governing the conduct of hostilities apply to all engagement situations, including in self-defence.

Figure 1 below depicts the adaptation of the targeting process resulting from the evolving operational continuum.

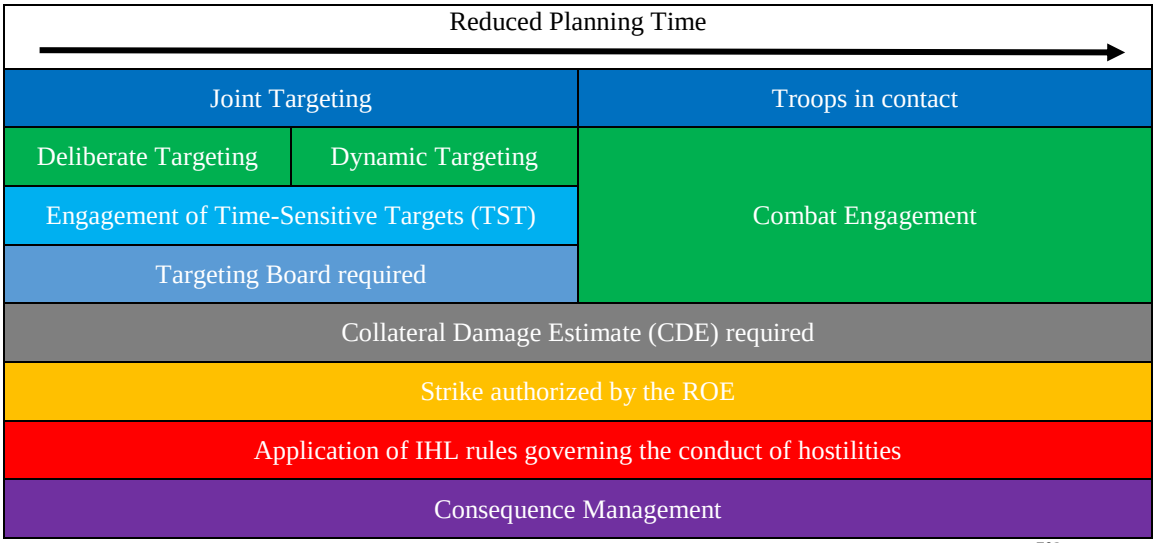

Figure 1: Targeting in the different phases of operational engagement in armed conflict[702]

[699] For specific information about the targeting process through cyber means, see Part 4, Chapter 4.
[700] Without prejudice to the right of every individual to resort to force in self-defence in accordance with applicable law (including Article 122-5 of the French Penal Code) and regardless of ROE.
[701] In such situations, the commander in the field must, in compliance with IHL fundamental principles, conduct a basic collateral damage risk estimation based on the reasonable use of available information and all feasible precautions that can be taken with a view to minimizing collateral effects in the circumstances ruling at the time.
[702] Adapted figure from NATO Allied Joint Publication AJP-3.9, *Allied Joint Doctrine for Joint Targeting*, Edition B, Version 1, November 2021, Figure 1.1, p. 1-11.

8.1.1.1.2. The two different targeting approaches: deliberate targeting and dynamic targeting

Deliberate targeting and dynamic targeting are two different targeting approaches which differ in the responsiveness and engagement timeframe[703] necessary to prosecute upcoming targets.

Deliberate targeting[704] is the process conducted against planned targets known to exist in the area of operations and based on comprehensive target analysis which ensures an accurate estimation of the effects to be created and resulting consequences. Deliberate targeting relies upon the quality of the intelligence provided for systemic analysis[705], target identification or effect assessment. Based on that accurate target information, planned targets may be prosecuted on either a scheduled or on-call basis: 'deliberate scheduled targets' are identified for engagement at a specific time while 'deliberate on-call targets' have actions planned but not for a specific delivery time; rather, they may be prosecuted once the triggering conditions are met. Those two types of prosecution may be used to achieve desired effects effectively while preserving the consistency of the campaign plan.

Furthermore, 'time-sensitive targets'[706] (TST) are high-value targets (HVT) previously identified but with a random and often short-term visibility in the theatre of operations. Therefore, the prosecution of such targets once identified requires immediate action, which is planned in deliberate targeting.

Dynamic targeting[707] is the process conducted against 'targets of opportunity', which lack previous target analysis, or have received some target development but were not detected, located, or selected for action in sufficient time to be included in deliberate targeting. Dynamic targeting unfolds in a time-compressed fashion and require specific resources, structures and procedures to complete target development, validation, prioritization and prosecution (partial or total destruction, capture or neutralization). There are two types of targets of opportunity: 'dynamic anticipated targets' (or 'dynamic unplanned targets') which are known to exist in the area of operations, but no action has been planned against them, and 'dynamic unanticipated targets' which were unknown or not expected to exist in the area of operations, and are newly detected in the course of operations. Dynamic targeting is to be distinguished from 'combat engagement', which is not part of the joint targeting process (but still complies with fundamental IHL principles and rules).

8.1.1.1.3. Targeting is an iterative process integrated into the operation cycle and divided in successive phases[708]

Whatever the chosen approach, the targeting process is based on the development of the targets to be prosecuted in order to achieve the desired effects, in compliance with IHL.

In deliberate targeting, a target may be considered once it has been officially validated and placed on one of the various target lists[709].

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[703] Long-term, short-term, time-delayed.

[704] Cf. NATO Allied Joint Publication AJP-3.9, *Allied Joint Doctrine for Joint Targeting*, Edition B, Version 1, November 2021, p. 1-12.

[705] Systemic analysis consists in understanding the adversary by studying its operating methods in order to detect critical vulnerabilities and identify appropriate targets.

[706] *French Doctrine for Joint Targeting*, §8, p 13.

[707] Cf. NATO Allied Joint Publication AJP-3.9, *Allied Joint Doctrine for Joint Targeting*, Edition B, Version 1, November 2021, p. 1-12.

[708] *French Doctrine for Joint Targeting*, Chapter 2, pp. 32-35, and Chapter 3, pp. 36-42.

[709] The Joint Target List (JTL) includes validated targets for a given operational area. The No-Strike List (NSL) is a JTL subset which covers objects, locations or entities characterized as protected from the effects of military operations under IHL or the ROE (places of worship, hospitals, cultural property, etc.). The Restricted Target List (RTL) includes validated targets that have specific constraints or the prosecution of which is subject to certain operational restrictions. The Target Nomination List (TNL) is drawn up based on the JTL and contains specific targets for each component command. Within the Joint Targeting Cycle (JTC), individual component commands may identify new targets at the operational level based on their specific TNL. The Joint Prioritized Target List (JPTL) contains targets

The purpose of the targeting process is to translate the commander's objectives into tactical-level activities to engage selected targets, and to assess the engagement effects created at the local level and in the theatre of operations. Therefore, whatever the level of command, the targeting process is based on a cycle which is closely intertwined with the intelligence cycle and the planning and conduct of operations.

Within that targeting cycle, intelligence is used to produce target folders[710] on the basis of which the command staff can select the targets to be prosecuted by military action. In turn, the effects of such action will be analysed to produce new intelligence. It is therefore an iterative process which is integrated into the operation cycle and divided in successive phases:

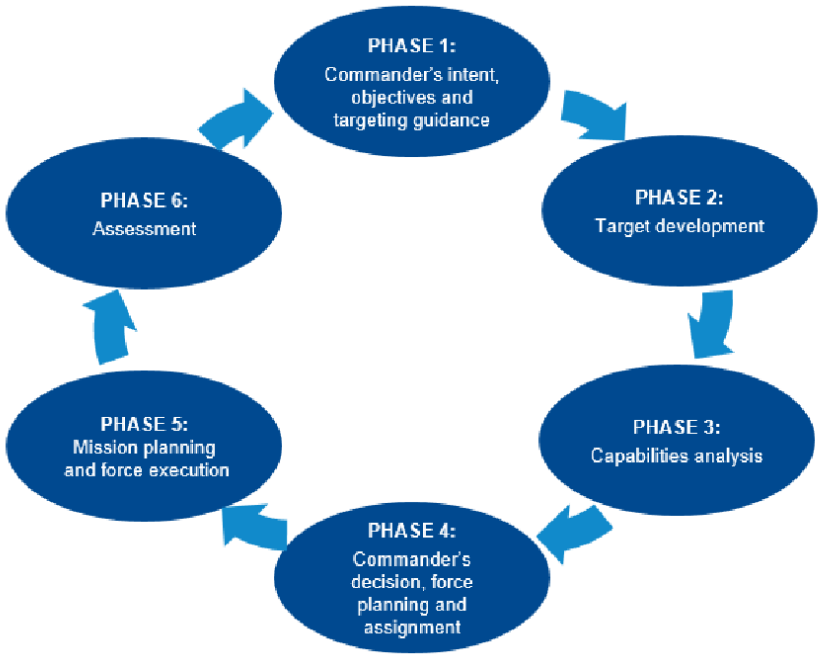

Figure 2: The Joint Targeting Cycle[711]

Phase 1 consists of an analysis of strategic-level military objectives based on the collection of relevant intelligence.

Phase 2 is target development. Based on the outputs of phase 1, targeting structures identify, examine and select relevant targets that may be engaged in a given operational stage to achieve the commander's military objectives. This analysis process for targeting purposes results in the modelling of systems that are relevant both for operational planning and targeting itself, the identification of the enemy's centres of gravity, critical capabilities and vulnerabilities and the definition of a list of possible actions in every dimension of the full-spectrum approach. Potential targets are also subjected to an IHL compliance test in order to ensure that they are lawful military objectives offering a definite military advantage, and that the estimated incidental civilian

prioritized by the operation command based on component TNLs. Lastly, the Prioritized Target List (PTL), derived from the JPTL, allocates prioritized targets to each individual component command. See *French Doctrine for Joint Targeting*, Annex G, Part 2, pp. 88-89.

[710] A target folder contains all available information relating to a specific target as well as an analysis of engagement options depending on the desired effect to be achieved. It is more exhaustive than a target intelligence folder (TIF), which may be used as a baseline for producing a target folder. Target folders must be validated by the competent authority prior to any action, and they are also a guidance and instruction tool in engagement.

[711] Cf. NATO Allied Joint Publication AJP-3.9, *Allied Joint Doctrine for Joint Targeting*, Edition B, Version 1, November 2021, p. 1-14.

casualties and damage are not excessive in relation to that advantage, depending on the most appropriate modes of action and capabilities selected for engagement.

Phase 3 concerns the identification of relevant component capabilities to be used for the synchronized engagement of selected targets and the achievement of desired effects.

Phase 4 relates to the allocation of selected targets to appropriate component commands and joint organizations.

Phase 5 is the execution of missions. It includes tactical-level planning and conduct of missions. It generally falls under the responsibility of the relevant component command, but the Joint Force Commander (JFC) has authority to reallocate missions between component commands in case of changes in priorities.

Lastly, phase 6 is the Battle Damage Assessment (BDA), in which created effects are assessed against desired effects[712]. The first-level BDA is the tactical-level assessment of the results of each target engagement which enables commanders to determine corrective measures where necessary. The second-level BDA is an operational-level, overall analysis based on first-level BDA which aims at ensuring that every action, including targeting, has contributed to the achievement of the commander's objectives and at supplementing tactical-level, component assessments with an overall target assessment. The third-level BDA is a strategic-level assessment which focuses on whether the desired end state was achieved.

In dynamic targeting, one part of this cycle unfolds within an expedited timeframe. Even in such context, it remains imperative to comply with the 'five pillars of kinetic engagement' (see Focus below): 1) Positive Identification (PID); 2) Rules of Engagement (ROE); 3) Collateral Damage Estimation (CDE); 4) Target Engagement Authority (TEA)[713].

8.1.1.2. Targeting is based on the estimation of incidental civilian casualties and damage

Military actions involve a risk of incidental civilian casualties and damage ('collateral damage[714]') which is estimated based on Collateral Damage Estimation (CDE) Methodology (CDEM)[715]. CDEM encompasses a set of joint standards, methods, techniques and processes to conduct collateral damage analysis and produce collateral damage estimates. It consists in examining the potential effects of a military action on civilians and civilian objects based on their location in relation to the intended impact area.

In practice, this methodology establishes different probability levels of collateral damage within a given radius around the point of impact. The risk of collateral effects is estimated by accounting for any civilians or civilian objects within a number of concentric circles the centre of which is the intended point of impact. In case civilian concerns are present within a given area around impact point, additional precautionary measures (for instance more accurate munitions or more appropriate methods of warfare) must be taken to mitigate the weapon effects and decrease the risk of collateral damage.

Ultimately, CDEM assesses the risk incurred by civilian concerns once all feasible precautions have been taken.

Each CDE level is associated with a specific Target Engagement Authority (TEA) which is responsible for

[712] This phase also includes an assessment of the effects of munitions, including in terms of efficiency and effectiveness, as well as a Collateral Damage Assessment (CDA), i.e. an estimation of civilian casualties and damage where circumstances permit.
[713] See Subsection 8.1.2.
[714] The term 'collateral damage' is used instead of AP I's 'incidental damage' because it is well established within operational procedures (CDE, CDA, etc.). Besides, the word 'damage' is used in its broadest sense and includes both damage to objects and injury to civilians; 'collateral damage'and 'collateral effects' are thus used as synonyms.
[715] The CDEM was developed by the United States and then adapted by NATO to fit its purposes. It was subsequently transposed with some variations into French doctrine and practice.

deciding to engage depending on the estimated risk[716]. TEA are decided per military operation.

8.1.1.3. The targeting function: permanent and *ad hoc* structures organized in a chain and network of functional contributors

In France, the targeting community is composed of the following permanent and *ad hoc* structures:

Level	Permanent Structures	*Ad Hoc* Structures in Operations
Strategic	Full-spectrum joint targeting: Targeting and Military Influence Cells of the Centre for Planning and Conduct of Operations (*Centre de planification et de conduite des operations, CPCO*) French Targeting Centre (*Centre national de ciblage, CNC*) Joint CIMIC and Information Warfare Centre (*Centre interarmées des actions sur l'environnement, CIAE*) Special Operations Command (*commandement des operations spéciales, COS*) Operation Centre of the Cyber Command (*Centre d'opération du commandement de la cyberdéfense, CO COMCYBER*)	Participation of the Targeting and Military Influence departments in crisis cells Where necessary, support from the CNC and CIAE Deployed National Approval Authority cell for multinational operations where French forces are placed under the operational control of a foreign commander
Operational / Joint	Operational Control (OPCON) Headquarters and the Special Operations Command (*commandement des operations spéciales, COS*)	Targeting Cell of Joint Headquarters (HQ) Info Ops Cell of Joint Headquarters (HQ) Deployed National Approval Authority cell for multinational operations where French forces are placed under the operational control of a foreign commander
Tactical	Key nucleus staff at component level: • Targeting Cells • Info Ops Cells	Key nucleus staff at component level: • Targeting Cells • Info Ops Cells

[716] The higher the CDE level, the higher the TEA is placed in the chain of command.

At strategic level, the outputs from those different structures are fueled by contributions from other participants in the targeting process such as the Targeting Cell and Info Ops Cell, the Special Operations Command, J2, J3, J5, the Information Systems Analysis Cell, Political Advisors (POLAD), Legal Advisors (LEGAD), etc.

At operational level, the Targeting Cell also receives inputs from other participants in the targeting process which may differ depending on command organization (Info Ops, J2, J3, J5, LEGAD, etc.)

At this level of command, targeting coordination is conducted by preparatory groups and boards, which examine potential targets, and a decision-making board, which selects and validates targets.

8.1.1.3.1. The JTC preparatory bodies

The Target Development Working Group (TDWG) can carry out preparatory work prior to the involvement of the Joint Targeting Working Group. It is usually led by the Head of the Targeting Cell and composed of representatives of governmental (or allied) bodies and of the non-lethal targeting community, such as Psychological Operations (PsyOps), Civil-Military Co-Operation (CIMIC), POLAD, Key Leader Engagement, etc. The TDWG can confirm whether a potential target is lawful or in fact aligned with the desired effect, and decide whether intelligence gathered is relevant for further study.

The Target Validation Board (TVB) is a decision-making meeting to review candidate targets and decide whether or not they are valid military targets. It is chaired by the Target Validation Authority (TVA). On JFC's decision, some validated targets may be inserted into the Restricted Target List (RTL). The outputs of the TVB are the Joint Target List (JTL) and the RTL.

The Joint Targeting Working Group (JTWG), usually led by the Head of the Targeting Cell, is responsible for developing, in line with command targeting instructions, valid targets and target lists which will be forwarded to the Joint Targeting Coordination Board for prioritization. In particular, the JTWG reviews Target Folders and either approves them for forwarding to the Joint Targeting Coordination Board or decides that they need further development.

The Joint Targeting Coordination Board (JTCB) is usually led by the Head of the Targeting Cell and validates all outputs from the operational-level targeting staff. The JTCB develops draft target lists, which include already identified targets, and takes into account specific requests from component commands as well as results from military actions assessed against operational objectives, command instructions and targeting analyses. The JTCB also proposes a draft allocation of targets among the different component commands with a description of appropriate courses of action and engagement capabilities. Together with the Information Activities Coordination Board, the JTCB coordinates targeting actions in the physical environment with those implemented in the human and information environments. The output of the JTCB is a draft Joint Prioritized Target List (JPTL).

The Information Activities Coordination Board (IACB) coordinates targeting actions relating specifically to information operations. In conjunction with the JTCB, the IACB assesses the cognitive effects of targeting actions on the different persons involved within a theatre of operations.

8.1.1.3.2. The Joint Coordination Board (JCB): The JTC coordination and decision-making body

The JCB, led by the JFC, approves targets and matches the appropriate response to them (except for targets which require strategic-level approval), the Joint Prioritized Target List (JPTL) and Prioritized Target Lists (PTL), and allocates them to the Component Commanders. Furthermore, the JCB prepares decisions which require approval from a higher level (strategic or political level), provides for the coordination necessary to the engagement of selected targets in relation to the middle-term conduct of the campaign, and defines areas

of action and targeting priorities as well as coordination measures.

Each of those working groups or board must include a LEGAD who is in charge of verifying the lawfulness of intended targeting actions based on available information. In particular, LEGADs assess whether the identified target is a valid military objective and whether the targeting action involves risks of collateral effects which would be excessive in relation to the concrete and direct military advantage anticipated, and proposes specific precautions where relevant.

Focus: Target Intelligence Folder (TIF)

In deliberate targeting, legal advisors may encounter specific challenges when reviewing a target intelligence folder. Here is a summary of the information it generally contains.

A target intelligence folder (TIF) usually contains the following information necessary to analyse a target, and for its validation within the JCB by the authority which is empowered to order target engagement:

- geospatial coordinates of the target;
- surrounding entities (protected entities or entities which may be military objectives) within a 500 m radius (lowest CDE level[717]).
- summary of the target's characteristics and engagement objectives;
- delimitation (accurate imagery, floor plans);
- elements indicating that the target is a valid military objective[718];
- additional information from the coordination with the broader targeting community;
- any recommendations about, *inter alia*, the placement of the target on the RTL for later engagement.

In order to gain the reasonable certainty that the reviewed target, as a functionally and geospatially defined entity, is a valid military objective under applicable IHL and ROE, the TIF must provide available, sufficiently accurate, recent and time-consistent information:

- The intelligence available at the time of target analysis must be consistent with the folder content, including with the target description in the folder summary. Moreover, the target delimitation must be consistent with the available intelligence in order to identify critical elements (entities which must be considered the military objectives to be engaged), and they must also be geographically consistent. Available intelligence must pinpoint one or more entities which meet all the criteria required to be valid military objectives under IHL[719]. If such entities fail to do so, they must be regarded as civilian objects in compliance with the principle of distinction and thus taken into account in CDE.
- Available intelligence must meet the validation criteria set out in the National Targeting Directive. In multinational operations, intelligence must be marked as "open", i.e. France must be able to access it, or marked for declassification so that the French National Representative may eventually access it.
- Available intelligence must be significant. Informational 'tear lines' may not be sufficient to classify the target as valid military objective, because they only aim at reporting events or describe entities which are not related to the anticipated function of the target. Intelligence summaries must provide tangible information such as target classification, location, date, duration, etc.
- Intelligence must come from different sources to permit cross-checking and compliance with the validation criteria set out in the National Targeting Directive applicable to the operation. Each intelligence summary is given a single national number to identify each intelligence source.

8.1.2. Application of IHL fundamental principles and rules in the targeting process

[717] The lowest CDE level is the 'CDE 1 Low' according to which a reviewed target is a valid military objective under applicable law.
[718] Some of this intelligence may be classified, which means in a multinational operation that some coalition partners may not have access to some elements depending on their authorization level. France refers to such situation as 'closed intelligence' (*renseignement fermé*) as opposed to 'open intelligence' (*renseignement ouvert*).
[719] See AP I, Art. 52. See also Part 3, Chapter 3 above and Subsection 8.1.2.2.2. below.

France complies with its international obligations under customary and treaty-based law of arms control, including in peacetime regarding the study, development, acquisition or adoption of any weapons, means and methods of warfare which may be used by the French armed forces in any armed conflict, in accordance with Article 36 of AP I.

In operations, the targeting process also complies with the basic tenets of IHL (balance between military necessity and principle of humanity, principles of distinction, proportionality, precaution, prohibition of superfluous injury[720]). If, in any phase of the targeting cycle, the process fails to comply with any of those tenets, it is cancelled or suspended.

8.1.2.1. Distinction in targeting: Target Positive Identification as valid military objective

The Positive Identification (PID) method, which determines the function and location of a potential target, provides the reasonable certainty that a functionally and geospatially defined entity (individual or object) is a valid military objective. PID is carried out as soon as the Target Analysis (TA) stage and again prior to any engagement. PID is based on the observation and analysis of target characteristics using, *inter alia*, visual recognition, electronic support systems, non-cooperative target recognition techniques, identification friend or foe systems, or other physics-based identification techniques. The quality and accurate interpretation of intelligence collected[721] is crucial to successful PID; failing to complete PID results in the suspension of the targeting process.

Furthermore, the risk of attacks directed at protected objects can be significantly lowered by establishing, prior to the targeting process, a No-Strike List (NSL) which contains civilian entities (with their location and function) protected under IHL or representing prohibited targets under applicable ROE or policy reasons.

Such NSL is established based on intelligence collected during operation planning and data provided by bodies external to the Ministry of Defence, including UNESCO, museum curators, NGOs, etc. Its content may change depending on intelligence gathered during operation conduct. In practice, protected objects are placed on the NSL together with their geospatial coordinates. NSL entities must not be engaged unless their protection is forfeited[722]. The withdrawal of an entity from the NSL does not mean that such entity loses its protection under IHL.

8.1.2.2. The military necessity of target engagement must be established

Military necessity means that the parties to an armed conflict are allowed to use those means that are necessary to achieve the specific military objectives of the operation, in compliance with IHL (see Part 3, Chapter 3).

[720] See Part 3, Chapter 3.

[721] The accuracy of the target's coordinates is one of the most important piece of information. A strike on a target whose coordinates are extracted by a system with a medium degree of accuracy presents a higher risk of causing incidental civilian casualties and damage. It is therefore preferable to use such a system only for targets located in areas with a low risk of incidental civilian casualties and damage, such as uninhabited or sparsely populated areas.

[722] During operation planning, a civilian object may need to be removed from the NSL on the basis of intelligence indicating that such object has lost its protection under IHL. In this case, such removal lies with the military authority that placed the entity on the NSL. During the operation conduct phase, an object is no longer protected under IHL if it becomes, and for such time as it remains, a lawful military objective. Objects or property enjoying special protection may be targeted when the more restrictive conditions for loss of protection are met (e.g. for the particular case of cultural property loss of protection and the requirement of imperative military necessity, see Part 3, Chapter 4, Subsection 4.2, as well as Chapter 3 for the loss of protection of medical personnel, hospitals and and other medical objects). Dual-use entities are classified at CDE5 level due to their civilian component. The TEA for CDE5 military objectives is the strategic level, i.e. the level of command that established the NSL. Thus, the strategic level of command is the competent authority for removing an entity from the NSL, both in the planning and conduct of operations.

8.1.2.2.1. The military necessity derives from the force mandate and the relevant desired effects

Under IHL, the destruction or neutralization of an object or property must "*be imperatively demanded by the necessities of war*"[723]. In accordance with Article 52(2) of AP I, only military objectives are lawful targets (See Part 3, Chapter 3, Subsection 3.2.2. above). It is therefore prohibited to target an entity which is not a lawful military objective on the grounds that targeting it would "*be imperatively demanded by the necessities of war*".

In practice, the assessment whether specific actions are required by military necessity is based on the mandate given to the French armed forces by the political authority. Such mandate is structured around 'desired military effects' which includes a systemic analysis of the enemy to identify its 'centres of gravity' (CoG)[724] and the interrelations between them[725]. Such analysis determines the decisive conditions[726] required to defeat the enemy, which are organized in strategic[727], operational[728] and tactical[729] objectives.

Dissemination of the commander's intents at every level of responsibility helps ensure that the military action is in line with the force mandate and operation orders.

These intents are reflected in National Targeting Directives and applicable rules on the use of force (ROE).

8.1.2.2.2. IHL rules for assessing military necessity

Under IHL, only 'military objectives' are lawful targets. Further, it is prohibited to target an entity which is not a military objective solely on the ground that targeting it would be imperatively demanded by the necessities of war (see Part 3, Chapter 3, Subsection 3.2.2. above).

Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to the enemy's military action and whose total or partial destruction, capture or neutralization offers a definite military advantage to the attacker[730]. An object is considered to be a valid military objective only when both parts of that definition are cumulatively fulfilled[731].

'Military objective by nature' means any objects which, because of their specific features, make an effective

[723] 1907 Regulations of The Hague concerning the Laws and Customs of War on Land, Art. 23(g); Rome Statute, Art. 8(2)(b)(xiii).
[724] A centre of gravity is a physical or virtual element from which a State – or group of States –, an alliance, a military force or other grouping derives its strength, freedom of action or will to fight. The notion of 'centre of gravity' may cover different dimensions (strictly military, economic, political, geographic, cognitive, etc.) depending on the analysis level (strategic, operational, tactical) and be either abstract, particularly at strategic level (e.g. support of the population, alliances), or concrete (expeditionary force, strategic reserve, command network, military base, etc.).
[725] French Joint Publication (*Publication Interarmées*) for Operational-Level Planning based on Chapter 4 of the NATO Comprehensive Operations Planning Directive (COPD), PIA-5(B)_PNO(2014) N° 152/DEF/CICDE/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 26 June 2014; see also *French Doctrine for Joint Targeting*.
[726] A decisive condition is a combination of circumstances, effects, or a specific key event, critical factor, or function that, when achieved, allows commanders to gain a marked advantage over an opponent or contribute materially to achieving an objective. NATO Glossary of Terms and Definitions (English and French) AAP-06, Edition 2021.
[727] The (military) strategic objective is the decisive point which must be reached to achieve the military dimension of the desired end state. It is based on the relation between the intended political objectives and the assessment of the situation. See French Joint Doctrine (*Doctrine Interarmées*) for Strategic Anticipation and Planning, DIA-5(C)_A&PS(2019) N° 8/ARM/CICDE/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 9 January 2020, §311, p. 29.
[728] An operational objective is the military objective which must be achieved by the force commander in the conduct of a given operation. Achieving operational objectives ultimately creates the conditions required to reach strategic objectives. *Ibid*., §411, p. 37.
[729] A tactical objective is the military objective which must be achieved by the tactical-level commander to contribute to achieving the operational objective(s).
[730] AP I, Art. 52(2).
[731] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 52, §2018.

contribution to military action, such as weapons, equipment, transports, fortifications, military depots, barracks and other buildings occupied by armed forces or organized armed groups, staff headquarters, training camps, plants for the manufacture of improvised explosive device (IED), etc.[732] Police weapons as well as civilian equipment, transports or depots are not military objectives by nature.

'Military objective by location' means such zones or structures that are not military by nature, but are situated so that they make an effective contribution to the enemy's military action. This may be, for example, a bridge or a site, the destruction or neutralization of which offers, in the circumstances ruling at the time, a definite military advantage, for instance preventing the enemy from seizing it or forcing the enemy to retreat from it[733].

'Military objective by use' means any object which, because of their present function, is useful to enemy forces in such a way that it falls within the scope of military objectives. For instance, if a civilian object such as a school or a hotel is used to accommodate troops or as a command post or staff headquarters, it becomes a military objective[734].

'Military objective by purpose' means any object whose future use, i.e., the use intended by the enemy, is known for a fact, and not just hypothetically determined, by the attacker[735].

The total or partial destruction, capture or neutralization of such military objectives must offer a definite military advantage. Accordingly, the strategic, operational or tactical military relevance of attacking such objectives must be demonstrated in the planning or conduct of the operation.

Moreover, the attack must offer a concrete and direct advantage. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages[736]. Only material and tangible objects which make an effective contribution to the enemy's military action are valid targets[737].

The attack must also offer a "*definite military advantage*" (AP I, Art. 52). This notion does not only cover tactical, short-term advantages, but also those advantages which can be anticipated from the whole campaign.

Even where the destruction of a military objective would not offer a *decisive* military advantage, attacking it may, in certain circumstances, offer a *definite* military advantage[738]. It is the case where such destruction contributes to increasing the freedom of movement of French or allied forces, to diminishing the enemy's command and control ability in order to break a front line, or to any other incapacitation of the enemy for a given period of time.

At this stage of target analysis, the function of the target must be determined as accurately as possible given the means available to the French armed forces. The definite military advantage which would be offered by the destruction or neutralization of the target must also be clearly identified.

8.1.2.3. The four-step proportionality test

8.1.2.3.1. Determining the nature of incidental effects to be taken into account

Under Articles 51 and 57 of AP I, the incidental loss of civilian life, injury to civilians and damage to civilian objects, or a combination thereof, must not "*be excessive in relation to the concrete and direct military*

[732] *Ibid*., §2020.
[733] *Ibid*., §2021.
[734] *Ibid*., §2022.
[735] *Ibid*.
[736] *Ibid*., §2024.
[737] *Ibid*., §2007-2008.
[738] See the 2001 Reservations and Interpretative Declarations concerning Accession by France to the *1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*.

advantage anticipated".

The obligation contained therein is intricate because it establishes a relation between notions that are different in nature ('harm' caused to civilians and civilian objects weighed against a 'military advantage').

Nevertheless, the objective assessment under that obligation must be based on the estimation of direct incidental damage, but also of indirect effects, provided such effects are reasonably predictable at the time of the attack. Contrary to the 'military advantage anticipated' which must be "*concrete and direct*", it is apparent from the drafting of Article 51(5)(b) AP I ("*an attack which may be expected to cause…*") that certain middle- and long-term effects must be taken into account where a causal link can be clearly identified between the attack and its potential effects. In practice, the notion of "*incidental loss of civilian life, injury to civilians and damage to civilian objects*" under said Article should include, for example, casualties among the medical and religious personnel (who are regarded as civilians in attacks), as well as damage to economic infrastructures or the natural environment [739]. Other forms of indirect damage, such as poverty, unemployment, anxiety or the weakening of a region's economic potential, on the other hand, appear to be excluded, as the wording of Article 51 is confined to "*damage to civilian objects*".

No civilian, including for instance those who deliberately serve as human shields, may be excluded from the proportionality test. The same applies when a party to an armed conflict uses civilians as involuntary human shields, in violation of IHL.

In any event, the command staff must anticipate and estimate the attack's incidental harm and damage[740] based on the information reasonably available to them at the time of the attack.

8.1.2.3.2. Quantitative assessment of the risk of collateral effects (CDEM)

Depending on the situation, CDE (see Subsection 8.1.1.2.) is carried out by computer simulation, visual observation or using various statistics (strength of building materials, population density in different geographical areas, etc.). For example, these techniques make it possible to extrapolate the extent of destruction of a building and the resulting projection of debris into the surrounding area, which could have collateral effects. The use of the CDE methodology is an important decision-making aid; based on the outcome, the attack may need to be cancelled or postponed, or the mode of action changed (using other assets or capabilities, types of munitions, modified angle of attack, etc.), should the estimated direct or indirect casualties and damage appear excessive in relation to the direct and concrete military advantage anticipated.

8.1.2.3.3. Designating a TEA which takes responsibility for any collateral effects upon target engagement

Each CDE level is associated with a specific Target Engagement Authority (TEA) which has exclusive power to decide upon a strike.

The greater the risk of incidental civilian casualties and damage, the higher the TEA must be placed in the chain of command. Depending on the theatres of operation and applicable ROE, such responsibility can rest with the lowest-level up to the highest-level military commanders.

Such decision-making framework ensures that the responsibility for engagements which could cause

[739] The natural environment includes all elements that exist or occur naturally (air, water, flora, fauna, etc.) and the system of interrelations between living organisms and their inanimate environment. It also includes natural elements that are or may be the product of human intervention (drinking water, livestock, etc.). The assessment of incidental damage to the natural environment must also take account of the attack's indirect effects, provided such effects are reasonably predictable given the information available and the circumstances ruling at the time of the attack. See, in general, Part 3, Chapters 3 and 4 above.

[740] In accordance with France's reservations and interpretative declarations concerning its accession to AP I, France considers that, in certain circumstances, commanding officers must give priority to their duty to ensure the safety of the troops under their responsibility or to maintain their military position (§§3 and 9).

significant collateral damage does not fall upon junior ranking officers, but upon military authorities which have a broader vision of a target's military significance within a single campaign.

Lastly, in multinational operations involving France where the TEA is from another State, a French National Approval Authority (NAA), also referred to as the Red Card Holder (RCH), is designated to ensure that engagements based on French capabilities and commanded by foreign authorities are consistent with France's restrictions on force employment ('national caveats'[741]).

8.1.2.3.4. Using most appropriate weapons and munitions

Among available military capabilities, the weapons and munitions used to create desired effects must be chosen with a view to minimizing the risk of incidental civilian casualties and damage[742].

The CDE level is conditional on the characteristics of the weapons and munitions used (quantity of explosive munitions, settings of the explosion, accuracy of the weapon system, etc.), on the methods of warfare chosen (angle of attack, engagement timeframe, quantity of munitions used, etc.)[743] and on the circumstances and environment of the attack. By calibrating those different parameters, commanders can adjust the desired effects while ensuring compliance with the principles of proportionality and precaution.

Weapon guidance systems help increase the engagement accuracy and thus reduce the risk of collateral damage. The use of such systems, albeit not a legal obligation, should be considered in the prior assessment of whether an attack is lawful, in compliance with the obligation under IHL to take all feasible precautions[744].

[741] By imposing specific 'caveats', i.e. national limitations on the use of force, States can adapt their participation in a multinational operation or international organization to their individual operational, legal or political constraints. For example, a State might use caveats to circumscribe its involvement in an armed conflict. It is the case where a State participates in a coalition, while limiting the use of its national capabilities only to intelligence missions that do not include use of force, or to defensive purposes. The aim of such caveats can also be to facilitate the interoperability between national contingents within the coalition, while recalling national specificities. Such is the case of restrictions on the use of equipment for technical purposes (compatibility between aircraft and foreign air-to-air refueling systems, etc.).
[742] AP I, Art. 51(5)(b).
[743] A munition set to explode before impact disperses more fragments, whereas a munition detonating after impact buries itself before exploding, thus reducing its lethality at the surface. The nature of the military objective is also a factor: a hardened structure such as a bunker will retain bomb fragments better than a cob dwelling.
[744] AP I, Art. 57.

Focus: The Five Pillars of Kinetic Engagement

In military operations, the assessment of whether an attack is lawful is carried out based on a methodology called 'the five pillars of kinetic engagement', which was developed to ensure compliance with the fundamental principles of IHL in the use of force. It can be depicted as follows:

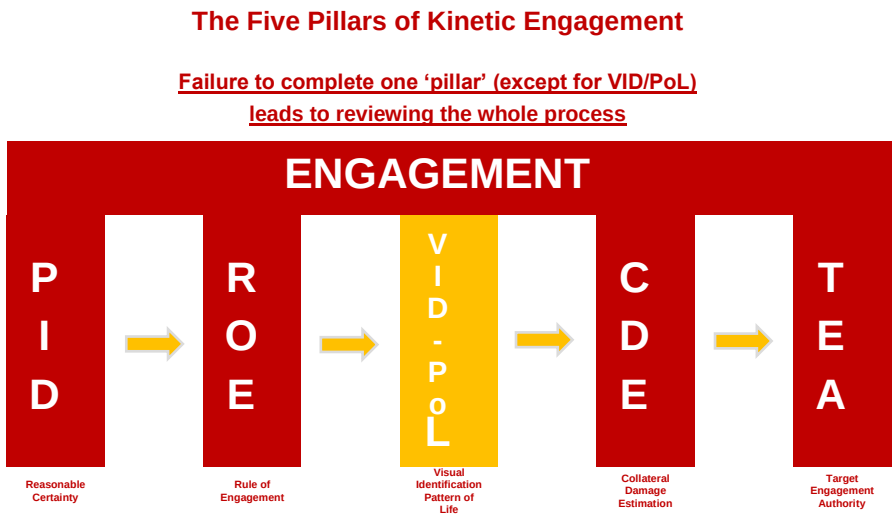

Figure 3: The Five Pillars of Kinetic Engagement

The five pillars of Kinetic Engagement are:

1) Positive Identification (PID)

In application of the principle of distinction, this pillar aims at providing the reasonable certainty that a functionally and geospatially defined entity is a valid military objective by determining the target characteristics, nature and behaviour.

Several means can be used to carry out PID: direct visual identification (VID), human intelligence, electronic and other means. Should VID not be possible, it may be necessary, depending on the operation, to cross-check several information sources to achieve PID. Relevant criteria are set out in National Targeting Directives and applicable ROE.

2) Rule of Engagement (ROE)

The ROE ensures compliance with the principle of military necessity. This pillar aims to ensure that force is used both within the framework of the force mandate and with the authorization of the relevant command staff in the circumstances at hand.

3) Collateral Damage Estimation (CDE)

This pillar helps ensure compliance with the principle of proportionality by estimating collateral damage based on the target environment and the munition used. The CDE level is calculated systematically, unless in situations of extreme emergency where time does not allow implementation of the CDE methodology; in such cases, a summary estimate is produced nonetheless.

4) Target Engagement Authority (TEA)

This pillar helps ensure compliance with all IHL principles, in particular the principle of proportionality, through the designation of an authority which has the exclusive power to decide upon the engagement of a target based on the calculated CDE level and relevant national caveats.

*****

5) Visual Identification (VID) and Pattern of Life (PoL) may constitute another pillar, but it is not applicable in all situations or engagements. Failure to complete this step does not necessarily lead to reviewing the whole process.

VID, which consists in a visual assessment of the target and its environment, is a concrete expression of the principle of precaution. In targeting intelligence, 'Pattern of Life' means a succinct description of the presence and behaviour of civilian concerns for a given period of time on or around the target. The VID/PoL process aims, *inter alia*, to ensure that the target remains a valid military objective throughout the whole engagement process.

In general, the visual on the target must be maintained without interruption from the moment when the entity was classified as a military objective, and no civilian entity (object or individual) which could compromise the calculated CDE level must be or come in the vicinity of the target. This VID/PoL process is required in most engagement situations.

However, failure to complete VID/PoL does not make it impossible to engage a target. For example, in air-to-air combat, it is not possible to complete such procedure prior to firing due to the aircraft high speed. Likewise, VID is sometimes impossible in certain long-range surface or air-to-ground engagements if ground troops are absent or too far from target, if air superiority is not acquired or if weather conditions do not enable aircraft to get a visual through the cloud layer. In such situations, engagement of target may be considered on a case-by-case basis, taking into account the level of risk of collateral damage and the relevance of the target.

8.1.3. The specific challenges of non-kinetic targeting

8.1.3.1. Targeting in psychological operations

Psychological Operations (PsyOps) are "*planned activities using methods of communication and other means directed at approved audiences in order to influence perceptions, attitudes and behaviour, affecting the achievement of political and military objectives*"[745].

PsyOps aim at leading a targeted audience (local population, enemy forces, specific individuals) to adopt a specific behaviour which facilitates the achievement of the campaign's objectives. Desired effects include the development of a specific attitude which fosters the action of friendly forces, as well as the discreditation of individuals who display oppositional behaviour towards friendly forces.

Such operations may be based on the following actions:
- using pamphlets;
- disseminating messages in print media, television or radio broadcasting;
- posting messages on social media (Facebook, Instagram, websites, etc.);
- disseminating direct messages to the target audience.

Such messages must not infringe IHL rules, whether in form or content. Accordingly, the following acts are expressly prohibited under IHL: inciting others to commit crimes, including violations of IHL; threats of reprisals[746], denial of quarter[747] or violence with a view to spreading terror among the civilian population[748]; threats to commit acts prohibited under IHL against a person in the power a party to the conflict[749] or any acts of perfidy[750].

[745] NATO Glossary of Terms and Definitions (English and French) AAP-06, Edition 2021, p. 105.
[746] AP I, Art. 20.
[747] *Ibid*., Art. 40.
[748] *Ibid*., Art. 51(2) and AP II, Art. 13.
[749] AP I, Art. 75(2)(e) and AP II, Art. 4(2)(h).
[750] AP I, Art. 37.

Draft messages aiming at influencing the civilian population must be reviewed carefully prior to dissemination to ensure compliance with the following prohibitions under IHL:

- messages designed to spread terror among the civilian population, for instance urging civilians to leave a specific area, failing which they are to be exposed to ill-treatment[751];
- messages threatening to commit violence to the life, health, or physical or mental well-being of civilian persons in the power of the enemy[752].

On the other hand, it is an obligation under IHL to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit[753]. Strictly speaking, this obligation does not pertain to full-spectrum targeting; however, the dissemination of such warning messages can be carried out by the personnel and means which are assigned to psychological operations (due to their capabilities in terms of printing and information dissemination).

Lastly, psychological operations may also be designed to discredit specific enemy individuals. Such ruse of war is not prohibited as long as it does not infringe a rule of IHL[754]. However, if such operations indirectly lead to the lethal neutralization of a targeted individual due, for instance, to reprisals by the enemy itself, the kinetic targeting process must be applied.

8.1.3.2. Targeting in operations of electronic warfare

An operation of electronic warfare (EW) is a "*military action that exploits electromagnetic energy to provide situational awareness and create offensive and defensive effects*"[755].

The defensive or offensive jamming of certain frequencies may create uncontrolled collateral effects. It is therefore necessary to assess the potential effects associated with the jamming methods used with a view to avoiding excessive incidental harm to civilians or civilian objects.

For example, the jamming of radio and Global Positioning System (GPS) signals may affect adversely civilian air traffic (that is if it has not already been stopped because of hostilities). Such disturbances increase the risk of air traffic incidents resulting in civilian casualties, which justifies the implementation of specific measures designed to decrease that risk: limitation of the jamming in terms of duration or geographic scale, advance warnings to airlines, cancellation or postponement of the jamming, etc.

8.2. Rules of Engagement

The Rules of Engagement (ROE[756]) provide a framework for the use of force by setting out the conditions in which it is authorized. Thus, ROE are the instrument ensuring compliance with the rules governing the conduct of hostilities. The *ad hoc* development of ROE is an integral part of the planning of each operation.

8.2.1. ROE: a control instrument of the use of force in operations

[751] *Ibid*., Art. 51(2).
[752] *Ibid*., Art. 75(2)(a) and (e).
[753] *Ibid*., Arts. 57(2)(c) and 58(c).
[754] See Part 3, Chapter 5, Subsection 5.5.6.
[755] NATO Glossary of Terms and Definitions (English and French) AAP-06, Edition 2021, p. 47.
[756] The acronym 'ROE' for 'rules of engagement' is also used in French for '*règles opérationnelles d'engagement*' referring to the same concept.

8.2.1.1. ROE: rules for the use of force in operations both in and outside national territory[757]

ROE are instructions delivered by a specific military authority (and validated by the political authority) to the military personnel deployed in a given foreign operation, defining the circumstances and conditions in which they may use force or undertake any action /that may be construed as provocative.

The use of force includes the use of weapons and any other coercive measure or action which may involve restrictions on people's liberty or rights[758].

ROE provide a framework for the use of force in situations which go beyond the legal framework of self-defence under Article 122-5 of the French Penal Code.

ROE serve a threefold political, legal and operational purpose:
- translating a political intent into operational instructions on the use of force;
- informing subordinate levels of command of the legal framework governing the use of force;
- authorizing or prohibiting certain actions involving the use of force.

In practice, ROE are a set of prohibited or authorized actions organized based on the type of use of force considered (provocations, emergency defence, attack, constraints), which regulates the use of force depending on the political intent, the force mandate and operational needs. When issued as prohibitions, the rules are orders to commanders not to take the designated action(s). When issued as permissions, they define the limits of the threat or use of force authorized for commanders to accomplish their mission.

8.2.1.2. ROE have no legal value

The ROE do not create the legal basis governing the use of force. Rather, ROE constitute the 'command by a lawful authority' with which the armed forces must comply.

From the point of view of French administrative law, they are regarded as an 'internal measure' (*mesure d'ordre intérieur*[759]) and in particular as instructions given to subordinate levels designed to ensure that the authorized or prohibited coercive actions comply with directives issued by political and military authorities, and with relevant legal and operational frameworks.

Therefore, ROE are instructions to subordinate personnel that provide them with direction and guidance. Any violation of the ROE may entail disciplinary sanctions, or even criminal penalties where such violation also constitutes a criminal offence.

8.2.1.3. ROE development takes account of the legal, political and military operational constraints

From a legal point of view, the ROE may authorize the use of force only in compliance with applicable law[760]. In practice, France may include certain of its treaty obligations in ROE where the operation so

[757] The French armed forces use the term '*règles d'emploi de la force (REF)*' (rules for the use of force) in operations where they are deployed in French territory in peacetime (which may include crisis management) to support internal security forces as part of 'civil defence and security' within the French legal framework of Military Defence (see Part 1).
[758] This definition of ROE and the use of force is translated from the French Joint Doctrine (*Doctrine Interarmées*) for the Use of Force in Military Operation Outside National Territory, DIA-5.2 N°805/DEF/EMA/EMP.1/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations*, CICDE), 25 July 2006, based on NATO Military Committee's Rules of Engagement (MC 362/2).
[759] Instructions issued by administrative authorities to clarify the internal functioning of the departments or divisions under their responsibility. The '*mesures d'ordre intérieur*' are not opposable in case of litigation due to their lack of legal value.
[760] Domestic law of the sending State (including, for France, Article L4123-12(II) of the Defence Code), domestic law of the host State, public international law applicable to the operation.

requires. This is for example the case of its obligations under the 2008 Convention on Cluster Munitions, which are incorporated as caveats or 'amplified instructions', restricting France's use of such weapons in multinational operations with partners that are not party to that Convention.

The ROE are a concrete expression of the political intent behind the operation and the resulting constraints. For example, political authorities may wish to impose even more restrictive conditions on the use of force authorized than what is considered lawful under IHL in order to secure the possibility of future peace negotiations. In any event, ROE may only be more restrictive than the applicable legal framework, never more permissive.

Lastly, ROE take into account the specific constraints of operations.

Each operation takes place in a specific operating environment or domain (land, sea, air, cyber, space) which each possesses its own specific characteristics, having a direct bearing on the ROE chosen for an operation. In the air and maritime domains, the ROE that relate specifically to the movement of forces in spaces (air or sea) under different legal jurisdictions are of particular significance. The domains, which have each specific geographical features, also determine the reaction time needed to respond to enemy attacks – seconds, minutes, hours, or even days, depending on the movement dynamics of enemy forces. The ability to carry out control, seizure, destruction, search or detention operations is also greatly domain-dependent. Other operational factors are also relevant in defining ROE: the level of interference between enemy forces and the civilian population, the enemy use of weapons, proxies, perfidy, human shields, forced enlistment, etc.

As regards the air domain, ROE must be developed specifically depending on whether they relate to anti-missile defence, close air support (CAS), area surveillance or the conduct of deliberate or dynamic targeting operations. Indeed, anti-missile defence requires an engagement timeframe in seconds as well as specific identification zones and kill boxes, whereas in CAS there is a greater margin for assessing the situation as well as a need to delegate ROE to the cockpit.

As regards the maritime domain, ROE are also different whether the operation aims to protect a maritime exclusion zone, to establish an embargo or to enforce a naval blockade. In the first case, the use of force may be authorized in response to the violation of the maritime exclusion zone by the enemy, even though such zone is not a free-fire area in the legal sense. In the second situation (embargo), the authorized use of force is primarily directed at the interception of a ship and the search of its cargo, and, where necessary, at its diversion. Lastly, in the third case, the purpose of the ROE may be to intercept, capture or divert a ship that breaches the blockade, which requires a proportional use of force that may nonetheless include the need to neutralize the infringing ship.

As regards the land domain, terrain is also of crucial importance. Considering the geographical extent to which forces may be deployed, the ROE should include a sufficiently low level of responsibility delegation in order not to delay manoeuvers and give the unit commander the greatest freedom of action possible at tactical level. ROE relating to the capture of individuals or to the seizure or destruction of certain objects must also be defined carefully and confer the necessary authority on the right level of command in order to preserve the mobility and agility required for manoeuvers.

Additionally, the constraints associated with the different modes of action of the armed forces must also be taken into account. For instance, the ROE may include a prohibition on the use of certain methods of warfare, even though they may be legal under IHL.

8.2.1.4. The ROE comprise the operation plan and instructions specific to the operation, especially in coalition

ROE are neither legal norms nor operations orders; rather, they are instructions giving a framework for the use of force by the assets concerned (ground troops, warships, combat aircraft, cyber operators, etc.). The

first considerations in developing ROE are laid down in the Initiating Military Directive (IMD) and the Commander's Planning Guidance (CPG) which are the military expression of the political-level guidelines on the use of force. At each level, the operational plan is developed based on a concept of operation with a set of Annexes covering all aspects of the operation. The applicable ROE, which are listed in Annex E to the operation plan, set out clear instructions for each dimension of the mission to be conducted.

In multinational operations, ROE are a manifestation of each State's commitment to the general operation plan, including possible reservations which are translated into national caveats.

Caveats are restrictions imposed by troops-contributing nations (TCN) which serve different objectives.

Firstly, caveats aim at ensuring the national troops' compliance with the laws of their own State. For example, France systematically issues caveats restricting the use of mines by its armed forces, in compliance with its obligations under the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, as well as caveats relating to its treaty commitments for the protection of cultural property.

Secondly, caveats may be issued by TCNs to express specific differences in the interpretation of certain rules of international law, including regarding the temporary detention of persons in the territory of the host State, or of the mandate given by the UN Security Council.

Lastly, caveats may also be imposed by a TCN on its own armed forces based on the political intent which gave rise to their deployment (for instance, caveats restricting the use of troops to military compounds security missions only).

Therefore, such national caveats may create significant limitations on the use that multinational operations commanders may make of national troops placed under their command.

8.2.2. ROE are developed in the operation planning phase

8.2.2.1. In general, ROE are based on predefined templates and adapted to each operation

In order to optimize the development of ROE in the planning of operations, certain States – including France – and international organizations (UN, NATO, EU) have created guidance on the use of ROE, including a compendium of ROE templates based on the concepts for the use of force adopted by those States and organizations.

In France and within NATO, the ROE compendium is structured in series of templated ROE numbered according to a three-digit nomenclature and categorized by type of use of force[761]:

Series 100/200	Actions that may be construed as provocative.
Series 300	Defensive use of force.
Series 400	Attacks against units constituting a threat. Attacks against declared hostile forces.

[761] The detailed list of ROE series (in French) is included in the French Joint Publication (*Publication Interarmées*) relative to the Joint Directive on the Use of Force in Military Operation Outside National Territory, PIA-5.2 N°805/DEF/EMA/EMP.1/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 25 July 2006. [available for download on the Intradef network of the French Ministry of Defence at http://portail-cicde.intradef.gouv.fr/images/documentation/PIA/20060725-NP-EMA-EMP-PIA-5.2-USAGE-FORCE-OPMIL-EXT-TN-2006.pdf].

When France participates in an operation led by one of the above-mentioned organizations, the ROE issued are based on the relevant compendium or templates and may be adapted through a number of national caveats.

8.2.2.2. The ROE take account of legal, political and operational constraints to match the commander's intents

Generally, ROE are model messages which are given the same classification level as the operation plan (OPLAN) and included in Annex E thereto.

Such list of ROE for an operation is the result of an iterative process which is integrated into the planning of operations. This process is based on political-level directives and aims at developing a 'ROE profile'[762] which matches the commander's intents as best as possible. ROE that relate to strategic-level actions often remain generic, while those governing tactical-level actions are drafted more accurately for practical purposes.

Drafting the ROE profile is a prerogative of the command staff which mobilizes every structure associated with the planning and conduct of operations. Legal advisors are systematically involved in this process. Commanders translate political intents into accurate possibilities for action and practicable directives, while legal advisors assess the actions' expected effect while ensuring that the ROE for each desired effect is in line with the applicable legal framework.

The ROE profile begins with a summary of the operation's context and the force mandate, specifies the "*friendly forces*" and "*enemy forces*", and defines certain notions used in the ROE. Here is an illustrative ROE matrix:

ROE No	RULE	ROE implementing level		
		Strategic Level	Operational Level	Tactical Level
XXX	ENTRY INTO XXX AIRSPACE IS AUTHORIZED	X		
XXX	POSITIONING OF FRENCH AIRCRAFT CLOSER THAN X RANGE OF XXX AIRCRAFT IS PROHIBITED	X		
XXX	PASSING OF WARNING, OTHER THAN WARNING SHOTS, FOR THE ACCOMPLISHMENT OF THE MISSION IS AUTHORIZED		X	
XXX	ILLUMINATION OF OPPOSING FORCES BY ALL MEANS IS AUTHORIZED			X
XXX	ATTACK AGAINST MILITARY OBJECTIVES BELONGING TO XXX ARMED FORCES IS AUTHORIZED		X	

Figure 3: Illustrative ROE Matrix

A first draft of ROE is annexed to the concept of operation (CONOPS) and submitted for validation to the strategic-level authority responsible for the conduct of operations. In France, that responsibility lies with the

[762] The 'ROE profile' is a list of ROE that are considered, from the outset, essential to the success of an operation. Such profile must as far as possible cover all operational needs identified in the planning phase, and it may therefore be modified in the conduct of the operation, taking into account latest developments.

Chief of the Defence Staff (*chef d'état-major des armées, CEMA*), who is the French highest-ranking military officer.

Building on that first draft, a more detailed ROE profile is developed in conjunction with the targeting community, the personnel responsible for the different aspects of the use of force and, where necessary, the subordinate levels (operational and tactical).

8.2.2.3. ROE specific notions related to the use of force

ROE implement a number of notions (minimum force, hostile act, hostile intent, self-defence) which are used both by legal advisors and by operational units.

'Minimum force' means the use of force which is absolutely necessary for the performance of the mission, including the use of deadly force. This concept is essential for the application of the principles of military necessity, proportionality and precautions under IHL.

'Hostile intent' (HI) means any action constituting a plausible threat which can be identified based on objective information indicating an intention to attack or to cause harm and demonstrating the capabilities of the individuals or groups of individuals who pose the threat.

The following may constitute hostile intents depending on the situation:
- gathering of armed individuals who may belong to an armed group;
- suspect behaviour of members of armed groups in the near vicinity of a military compound or vehicles of the mission;
- preparation of combat actions aiming at destroying lines of communication which are necessary to the mission;
- taking aim with a firearm.

'Hostile act' (HA) means any intentional act which does not constitute an attack but causes serious harm or poses a significant danger to the mission's forces or other persons.

The following acts may amount to hostile acts depending on the situation:
- any intrusion, or attempted intrusion, into a protected military area;
- any entry of an enemy military aircraft into the airspace above a protected military area;
- any entry at supersonic speed of an aircraft from a potentially hostile area into a regulated or no-fly zone under the control of French or French-led forces.
- any deliberate obstruction of the forces' movement;
- any provocative movement dynamic from a mobile object which does not respond to warnings or warning shots;
- any participation in an attack against a military ship or a civilian ship under escort.

The notions of 'hostile act' and 'hostile intent' may have different meanings depending on national and international ROE systems. Certain States use those notions to refer to the use of force in self-defence, while others may use them to justify an offensive use of force in military operations.

In a multinational operation or organization, the concepts of 'hostile intent', 'hostile act' and 'attack' are used to standardize the behaviours that different national contingents may adopt in response to the same type of threat depending on the law applicable to them.

8.2.2.4. Adaptation of the use of ROE

The use of ROE in operations can be adapted through specific types of ROE:

- **Delegated ROE**: Following its adoption, a list of ROE may be delegated to one or more subordinate commanders. The higher-level authority allocates initial delegations and specifies whether they may be sub-delegated. Subordinate commanders make their own delegations and a specific ROE may be delegated down to the lowest-level end asset in the field. Such 'lowest-level' delegations authorizing the use of force may be useful where a more aggressive posture is adopted, because they reduce significantly the decision-making timeframe and thus increase responsiveness.

- **Retained ROE**. Retained ROE are those ROE which have not been delegated to subordinate commanders. The decision whether to capture and/or detain a person may thus be "retained" at a higher level of command in order to prevent arbitrary detention. Likewise, a disengagement posture can lead to the cancellation of ROE delegations to subordinate commanders.

- **Dormant ROE**. Certain previously established ROE or ROE profiles may remain inactive, i.e. 'dormant', until a specific triggering event occurs or certain triggering conditions are met, which activates relevant ROE and their associated use. This type of ROE increases the force responsiveness. Examples of such triggering events are the crossing of borders by enemy troops, the use of certain types of weapons (e.g. calibre, laser-guided, etc.) or methods (e.g. jamming) and the finding of committed violence against the civilian population.

ROE may be modified in the conduct of operations to take into account tactical, operational or strategic developments.

To that end, different types of formatted message are used to request, authorize, deny, or implement ROE, including the ROE Request (ROEREQ), which is issued by a subordinate commander to higher-level authorities to request a change in the ROE and make suggestions, and the ROE Implementation (ROEIMPL), which is issued by higher-level authorities to update the ROE profile and associated documents.

PART 4

THE DOMAIN-SPECIFIC RULES APPLICABLE TO OPERATIONS

CHAPTER 1: THE LAW OF NAVAL OPERATIONS

Naval operations are primarily governed by a specific body of public international law: the law of the sea[763]. The gradual codification of that body of customary law, dominated by the principle of Freedom of the Seas, culminated in the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in Montego Bay in 1982, a "*constitution for the oceans*" laying down the rules applicable to that domain which came into force in November 1994[764]. UNCLOS strikes a balance between the interests of coastal States and those of maritime or naval powers by ensuring that maritime spaces are used according to rules that are compatible with the deployment, training and presence at sea of naval forces. The UNCLOS rules applicable to straits and archipelagic waters guarantee strategic mobility. Furthermore, specific international conventions were concluded to facilitate certain maritime practices and establish, or transpose, new protection measures for the marine environment or certain sea resources, in accordance with UNCLOS principles.

Peacetime naval operations (fight against piracy, drug trafficking, etc.) are governed by the general legal framework under UNCLOS, which has been incorporated into French domestic law under a specific maritime law enforcement legal body called "*police en mer*"[765].

1.1. The specificity of the maritime environment

1.1.1. Specific rules for a specific environment

1.1.1.1. From the Freedom of the Seas to the extension of the coastal States' sovereignty and the contemporary territorialization of maritime spaces[766]

Maritime space, which makes up 75% of the planet's surface area, may be defined as the body of all salt water areas in free and natural communication. This definition excludes any freshwater body as well as inland seas. Although maritime space has a certain degree of unity, it is not governed by a homogeneous legal status.

For a long time, the ocean remained an unregulated space of freedom. The first substantial regulations appeared in 1856 around a central idea: bringing together the protection of coast lines and the freedom of passage and trade. In 1949, following the growing claims of many States, the United Nations began a process of codification of the law of the sea to provide a framework governing the rights and obligations of States at sea.

International trade has developed based on the principle of freedom of navigation. However, that principle has not stopped States from gradually appropriating territorial seas up to 12 nautical miles seaward. As States continued to extend their claims over the seas, the need for international agreement grew stronger, ultimately leading to the adoption of UNCLOS, which reflects the precarious balance between the Freedoms of the Seas principle supported by certain States and the wish of others to territorialize the seas.

UNCLOS incorporated and developed the provisions governing continental shelves contained in earlier treaties, and created exclusive economic zones, thereby placing greater emphasis on economic matters in the international law of the sea.

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[763] According to Jean-Paul Pancracio, the law of the sea is the body of rules that defines both the legal status of maritime spaces and the rights and responsibilities of States when using such spaces (translated from French). See Jean-Paul Pancracio, *Droit de la mer*, Dalloz, 2010.

[764] UNCLOS has been ratified by 169 parties, including 168 States and the European Union. 15 States did not sign the Convention, including Venezuela, Turkey, Israel, Peru and Syria. 12 signatory States have not ratified it, including Colombia, North Korea, Libya, Iran, the United Arab Emirates and the world's leading maritime power, the United States.

[765] Mainly provided for in the French Defence Code; Transport Code; Environmental Code; and in the French Code of Entry and Residence of Foreigners and of the Right to Asylum (*code de l'entrée et du séjour des étrangers et du droit d'asile, CESEDA*).

[766] This Chapter discusses the legal framework governing French naval operations. For specific information on the law of the sea, please refer to relevant legal texts.

Moreover, UNCLOS provides a clear definition for the different maritime zones, enshrines the legal regime of the 'freedom of the high seas' (freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, freedom of overflight) and reaffirms the practical importance of the flag State principle.

1.1.1.2. Classification of maritime spaces

One basic idea in the classification of maritime spaces is that the rights of coastal States decrease with increasing distance from the coast. There are two main types of maritime spaces which are subdivided in specific zones:

- Maritime spaces under national sovereignty or jurisdiction:

  - **Internal (or inland) waters**. The sea area landward of baselines (including the mouths of rivers and bays recognized as such), in which the coastal State exercises full sovereignty.

  - **Territorial sea**. The sea area that extends seaward to 12 nautical miles from baselines. The coastal State also exercises full sovereignty over its territorial sea, but foreign vessels have the right of 'innocent passage'.

  - **Contiguous zone**. The sea area located between 12 and 24 nautical miles from baselines. The coastal State exercises jurisdiction over its contiguous zone in taxation, customs, sanitary and immigration matters.

  - **Exclusive economic zone (EEZ)**. The sea area located between 12 and 200 nautical miles from baselines. Within its EEZ, the coastal State enjoys sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters.

  - **Continental shelf**. The seabed and subsoil of the submarine areas that extend beyond the territorial sea and up to 350 nautical miles from baselines. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

- Maritime spaces beyond any national sovereignty or jurisdiction:

  - **The high seas**. All parts of the sea that are not included in the EEZ, the territorial sea or the internal waters of a State, or in the archipelagic waters of an archipelagic State. The high seas are governed by a principle of freedom which is, however, subject to certain limited exceptions.

  - **The 'Area'**. The seabed beyond the continental shelf. The Area is governed by a special legal status under UNCLOS.

Focus: The Ships' Rights of Passage
Under the international law of the sea, the principle of the coastal State's sovereign rights is subject to a number of rights of passage granted to foreign ships under UNCLOS: 1. **Right of innocent passage**[767] Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.

[767] UNCLOS, Arts. 17 et seq.

Passage must be **continuous** and **expeditious**. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress.

Further, passage must be **innocent** and take place in conformity with UNCLOS, i.e. it must not be prejudicial to the peace, good order or security of the coastal State. Accordingly, the following acts, *inter alia*, are prohibited: any exercise or practice with weapons of any kind; any act aimed at collecting information; the launching, landing or taking on board of any aircraft; underwater navigation of submarines.

Foreign vessels may use their right of innocent passage without having to require permission from or issue prior notification to the coastal State.

Aircraft are not entitled to the right of innocent passage, i.e. they may not overfly foreign territorial waters without permission from the coastal State (this is governed by rules similar to the regime applicable to overflight of land territory).

The coastal State may suspend in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension must be temporary, non-discriminatory and previously published.

2. **Right of unimpeded transit passage**[768]

Foreign ships are entitled to a right of unimpeded transit passage in most international straits, which ensures a certain strategic mobility for warships. This regime is more flexible than that of the right of innocent passage in so far as it ensures the ship's free passage in its normal navigation mode (underwater for submarines, possibility of operating aircraft for aircraft carriers, etc.) as well as the right of overflight, provided that the transit is continuous and expeditious. Aircraft are also entitled to the right of unimpeded transit passage.

The right of unimpeded transit passage may not be suspended.

3. **Right of archipelagic sea lanes passage**[769]

The right of archipelagic sea lanes passage is very similar to the right of unimpeded transit passage which applies to international straits. All ships and aircraft may exercise this right for the continuous and expeditious passage through or over the archipelagic waters and the adjacent territorial sea of an archipelagic State, using:

- sea lanes and air routes specifically designated by this archipelagic State ('archipelagic sea lanes', ASL); or in lack thereof
- the routes normally used for international navigation.

Outside ASL, the applicable regime is that of innocent passage because archipelagic waters are included in territorial waters.

1.1.2. Specific rules justified by the specificity of naval capabilities

1.1.2.1. Warship

The notion of 'ship' is not universally defined under international law. Therefore, each international navigation treaty has its own definition for its purposes. Accordingly, the same watercraft may be classified as 'ship' or not depending on the subject concerned[770].

The notion of 'warship', however, is defined under Article 29 of UNCLOS[771] based on four cumulative criteria. Thus, warship means a ship:

[768] *Ibid*., Arts. 37 et seq.
[769] *Ibid*., Art. 53.
[770] Including liability for collisions, assistance, steering and sailing rules, legal classification of 'piracy' or 'maritime banditry'.
[771] UNCLOS, Art. 29: "*For the purposes of this Convention, 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government*

- belonging to the armed forces of a State (listed on the official fleet register);
- under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent;
- manned by a crew which is under regular armed forces discipline;
- bearing the external marks distinguishing such ships of its nationality.

The French Navy uses those criteria to classify its ships as warships.

The nature (or even the presence) of weapons on board is not a constituent criterion for classification as warship. The colour of the hull and the ship's battle preparedness or entrusted missions have also no bearing on such classification.

Focus: The Definition of Warship under French Law
Under Article L5000-2 of the French Transport Code, 'warship' is defined as any vessel, including autonomous ships in trial or service, belonging to the French Navy or a foreign naval force. In accordance with French positive law and case law[772], warships are not considered to be an extension of the national territory. Nonetheless, Article 113-3 of the French Penal Code provides that French ships are governed by French criminal law only[773].

1.1.2.2. Consequences of classification as warship

Warships classified as such may exercise sovereign prerogatives of the flag State, including law enforcement powers over national and foreign ships, in accordance with international law[774] and domestic law[775].

In accordance with UNCLOS, warships enjoy immunity from the jurisdiction of States other than the flag State, including prosecution and enforcement of penalties (immunity from execution).Warship commanders are responsible for ensuring compliance by foreign States with those immunities, and they "*have the duty to resist*" any foreign intervention "*with the character of a manifestation of sovereignty*"[776].

Warships enjoy such immunities under UNCLOS[777] in all waters, including the internal waters of any foreign State.

The immunities of warships are applicable whatever the subject matter. Accordingly, many conventions specify that the coercive measures and sanctions they provide for do not apply to warships (for example, Article 236 of UNCLOS concerning the protection and preservation of the marine environment).

Notwithstanding, warships must comply with the rules of innocent passage within any State's territorial sea. If they fail to do so, the coastal State concerned may require them to leave its territorial sea[778].

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of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline".

[772] According to the French *Conseil constitutionnel* (Constitutional Council), "*Under the current rules of the law of the sea, a ship flying the French flag cannot be considered to be a part of the French territory*". Conseil constitutionnel, 28 April 2005, n° 2005-514 DC, §33.

[773] French criminal law is applicable to any offence committed onboard ships flying the French flag, and to any offence committed against such ship or persons onboard that ship, whatever its location. Only French criminal law is applicable to offences committed onboard ships of the French Navy, and to offences committed against such ship or persons onboard that ship, whatever its location.

[774] For instance, 1982 UN Convention on the Law of the Sea, Art. 107 (piracy), Art. 110 (right of visit), Art. 111 (right of hot pursuit); 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 17(10).

[775] French Defence Code, Art. L1521-2.

[776] French Defence Code, Art. D3223-29.

[777] UNCLOS, Arts. 32, 95 and 236.

[778] *Ibid*., Arts. 30 and 32.

In addition, the flag State is responsible for any loss or damage caused to the coastal State by its warships[779].

In France, vessels in the following categories are included in the official fleet register:
- submarines;
- battleships and support vessels for forces in operation;
- auxiliary vessels;
- port vessels, which include all vessels used for certain port connections, or used in naval bases and support points to meet the needs of the ports and the forces stationed there or calling at such ports.

1.2. Naval operations in and related to armed conflict are governed by the rules of naval warfare and the law of armed conflict

The law of naval warfare is mainly derived from international customary law[780], but some particular provisions stem from general[781] or specific[782] international conventions. It is consistent with the principles of international humanitarian law (IHL), even though its implementation is adapted to the peculiarity of the maritime environment, which is particularly due to the great strategic importance of maritime trade routes for international economic relations. Naval warfare entails the risk of compromising such routes, which causes significant insecurity, including for non-belligerents. This opposition between 'neutral' and 'belligerent' parties underlies the law of naval warfare.

1.2.1. Scope of application of the law of naval warfare

The law of naval warfare reflects the unique features of the maritime environment, particularly in terms of the different spaces in which operations take place.

1.2.1.1. Combatants

Armed conflicts are governed by the rules referred to in Part 3, Chapter 3 above. Accordingly, only combatants, civilians who take a direct part in hostilities and members of organized armed groups, as well as their ships, submarines, unmanned systems and aircraft may be made the object of attack, subject to compliance with all other IHL principles (balance between military necessity and principle of humanity, principles of distinction, proportionality, precaution, prohibition of superfluous injury, etc.).

1.2.1.2. Ships

At sea, warships are valid military objectives.

Civilian ships may also constitute military objectives within the meaning of Article 52(2) of Protocol I Additional to the Geneva Conventions if they make an effective contribution to enemy military action (see Part 3, Chapter 3, Subsection 2.3. above).

[779] *Ibid*., Art. 31.
[780] The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea (available on the website of the ICRC: https://www.icrc.org/en/doc/resources/documents/article/other/57jmsu.htm) codifies the main customary rules of naval warfare.
[781] For example, the Second Geneva Convention of 12 August 1949 (GC II) relating to armed conflict at sea.
[782] For example, the 1907 Hague Convention (VIII) on Submarine Mines.

Focus: Unmanned Maritime Systems as Warships

Can an unmanned maritime system (UMS) meet the UNCLOS definition of a warship?

1. Remotely operated vehicles (ROV), which are usually small and operated from a warship, cannot be considered as warships themselves.

Many unmanned systems (ROV, underwater drones, etc.), operated from a warship and by the crew of that warship, are an attachment to the warship and cannot operate independently. This is the case, for example, with most systems used in mine warfare and deployed from a mine hunter, without which they could not be deployed. They do, however, enjoy the immunities accorded to their support vessel if that vessel qualifies as warship.

2. A UMS, with a certain degree of autonomy and no need for support from a base ship, can meet the criteria for warship status under UNCLOS, provided it is under the command of a commissioned officer and manned by a crew under regular armed forces discipline, as both criteria may be fulfilled remotely.

1.2.1.3. Areas of naval hostilities

Naval hostilities may be conducted in the following areas:
- the internal and territorial waters as well as the land territory (including the airspace above it) of the States party to the conflict;
- the EEZ, continental shelf and, where applicable, contiguous zone and archipelagic waters of the States party to the conflict;
- the high seas;
- the contiguous zone, EEZ and continental shelf of States not party to the conflict (in such case, belligerents endeavour to respect the rights and duties of neutral States regarding exploration and exploitation of economic resources within the EEZ and continental shelf and the protection and preservation of the marine environment).

Enemy warships and military aircraft may be made the object of attack in all waters beyond neutral sea areas[783]. Auxiliary vessels used for replenishment or troop transport may be attacked under the same conditions.

Maritime exclusion zones (or maritime operational zones) are military exclusion zones at sea established by belligerents for the conduct of hostilities. Their purpose is to warn neutral ships and aircraft to avoid the area, thereby reducing the risk of collateral damage. Such zones are lawful provided they do not disproportionately interfere with neutral trade. Establishing such zones does not exempt belligerents from applying the rules of IHL within them.

1.2.1.4. Lawful combat actions

Lawful combat actions in naval warfare include:
- the attack or capture of certain persons or objects in waters beyond neutral sea or land areas;
- the laying of mines;
- the visit, search and diversion of ships under the conditions provided for in UNCLOS.

Merchant vessels may not be made the object of attack[784]; however, they may be captured as prize.

'Prize' means both the naval operation by which a belligerent gains control of an enemy or neutral merchant vessel or of enemy or neutral goods at sea, with a view to confiscation by a competent prize court (in France,

[783] Waters under the sovereignty of neutral States.
[784] Except for cases referred to below.

the Council of Prizes), and the captured vessel or goods themselves.

Outside neutral waters, warships are allowed to capture enemy vessels, whether merchant or otherwise, and goods on board such vessels without having to carry out prior visit and search.

Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in activities which make an effective contribution to enemy military action or if it is determined as a result of visit and search or by other means that they:

- are carrying contraband;
- are on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
- are operating directly under enemy control, orders, charter, employment or direction;
- present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- are violating regulations established by a belligerent within the immediate area of naval operations; or
- are breaching or attempting to breach a blockade.

1.2.2. Restrictions on the conduct of hostilities based on the specificity of the maritime domain

1.2.2.1. Restrictions on the use of force based on personal status

Civilians who do not take a direct part in hostilities, the shipwrecked and the religious, medical and hospital personnel of hospital ships and their crews are respected and protected under international law.

1.2.2.1.1. Civilians

Civilians who are in a zone of naval armed conflict are entitled to protection.

1.2.2.1.2. Persons *hors de combat*

Persons *hors de combat* are persons who are defenceless because of sickness, wounds or shipwreck, provided they refrain from any hostile act and do not attempt to escape[785].

'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 keep the 'shipwrecked' status until their rescue has been achieved[786].

The Second Geneva Convention of 12 August 1949 is specifically dedicated to the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea.

It is prohibited to attack an enemy warship or military aircraft that has indicated its readiness to surrender and cease combat. Once a vessel has done so, any attack must be discontinued. Such intention to surrender may be indicated by:

- hauling down its flag;
- hoisting a white flag;
- surfacing (in the case of submarines);
- stopping engines and responding to the attacker's signals;
- taking to lifeboats;

[785] AP I, Art. 41(2).
[786] AP I, Art. 8

- at night, stopping engines and switching on all lights on the ship.

1.2.2.1.3. Religious, medical and hospital personnel

Under Article 36 of GC II, "*the religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board*".

The medical and hospital personnel must wear an armlet bearing the distinctive emblem (red cross, red crescent or red crystal) and carry a special identity card bearing the distinctive emblem. The crews of hospital ships or sick-bays may be armed for the maintenance of order, for their own defence or that of the sick and wounded; this does not deprive hospital ships and sick-bays of vessels of their special protection[787].

1.2.2.2. Restrictions on the use of force based on the protection of certain objects or zones

1.2.2.2.1. Objects protected at sea

Civilian and government ships, whether neutral or enemy, may not be captured unless they constitute military objectives.

Accordingly, such vessels may become valid military objectives if they:
- are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
- engage in belligerent acts on behalf of the enemy, e.g. by laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
- act as auxiliaries to the enemy's armed forces; e.g. by carrying troops or replenishing warships;
- are incorporated into or assist the enemy's intelligence system; e.g. by engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- sail under convoy of enemy warships or military aircraft;
- refuse an order to stop, or actively resist, visit, search or capture; or
- otherwise make an effective contribution to the enemy's military action, e.g. by carrying military materials for either belligerents.

Unless circumstances do not permit, neutral merchant vessels which engage in activities making an effective contribution to the enemy's military action must be given a warning prior to attack, so that they can re-route, off-load, or take other precautions. The attacking forces must give such vessels the opportunity to first place passengers and crew in a place of safety. In any event, the attack must comply with the principles of the conduct of hostilities.

– Hospital ships

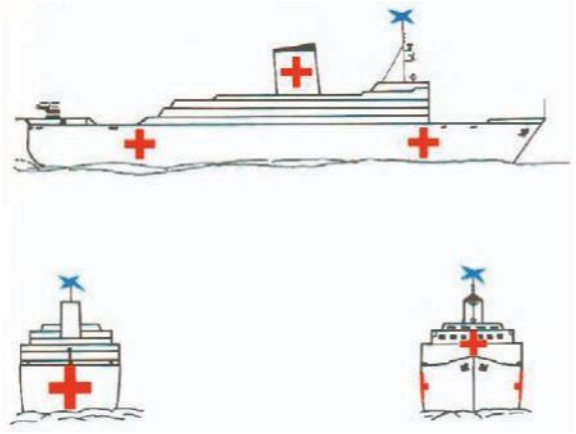
A 'hospital ship' is a ship built or equipped specially and solely with a view to assisting, treating and transporting the wounded, sick and shipwrecked. There are three categories of hospital ships that are entitled to the same protection: military hospital ships (government ships belonging to the war fleet), private hospital ships (ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons) and neutral hospital ships (private ships utilized by neutral States).

Hospital ships may not be attacked or captured and must at all times be respected and protected, provided

[787] GC II, Art. 35(1).

that they comply with the conditions of exemption as referred to below.

Hospital ships must be distinctively marked and identifiable: all exterior surfaces must be white and bear one or more distinctive emblems (red cross or red crescent), a white flag with the distinctive emblem (red cross or red crescent) must be flown as high as possible, or a flashing blue light visible at a minimum distance of 3 nautical miles must be used as distinctive light signal.



Hospital ship bearing the distinctive emblems and using blue lights
(flashing blue lights are additional to mandatory navigation lights)

– Coastal lifeboats

The small watercraft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations must also be respected and protected.

– Other classes of vessels exempt from attack

The following classes of enemy vessels are exempt from attack: vessels engaged in humanitarian missions, vessels engaged in transporting cultural property under special protection; passenger vessels when engaged only in carrying civilian passengers; vessels charged with religious, non-military scientific or philanthropic missions; small coastal fishing vessels and small boats engaged in local coastal trade; vessels used exclusively for responding to pollution incidents in the marine environment; vessels which have surrendered; life rafts and life boats.

The same protection applies to vessels granted safe conduct by agreement between the belligerent parties, including vessels designated for and engaged in the transport of prisoners of war, etc.

– Conditions of exemption

Protected vessels are exempt from attack if they meet the following cumulative conditions:
- they are innocently employed in their normal role;
- they submit to identification and inspection when required; and
- they do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

– Loss of exemption

Protected vessels are liable to lose their exemption if they meet the following cumulative conditions:
- diversion or capture is not feasible;

- no other method is available for exercising military control;
- the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective.

In case of doubt whether a vessel exempt from attack is being used to make an effective contribution to military action, it will be presumed not to be so used.

The exemption from attack of a hospital ship may cease only after due warning has been given naming a reasonable time limit to discharge itself of the cause endangering its exemption, and after such warning has remained unheeded.

1.2.2.2.2. Sea areas protected from hostilities

– **Neutral waters**

Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters of any neutral States. Belligerents are prohibited to conduct any hostile actions (including capture, visit, laying of mines) within and above neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised.

Belligerent vessels are entitled to a right of innocent passage through neutral territorial waters, but they may not use neutral waters as a sanctuary.

– Sea areas neutralized or regulated by international agreement

Certain areas of sea are protected under international agreements, including the Antarctic[788], the Panama Canal[789], the Kiel Canal[790], the Suez Canal[791], the Strait of Magellan[792] and the Aaland archipelago between Finland and Sweden[793].

1.2.3. Naval means and methods of warfare under international law

Warships and auxiliary vessels (also known as ‘naval auxiliaries’) are the only vessels that may lawfully conduct hostile actions in armed conflict. Such actions include the use of weapons, visit, diversion, capture, seizure of cargo, blockade. However, the use of certain weapons and means is restricted.

1.2.3.1. Prohibited or restricted means of warfare

1.2.3.1.1. Submarine mines

Under the 1907 Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, the use of such mines is limited to legitimate military purposes only, including the denial of certain sea areas to the enemy. Under the Convention, it is prohibited[794]:

- To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

[788] 1959 Antarctic Treaty.
[789] 1977 Treaty concerning the Permanent Neutrality and Operation of the Panama Canal, concluded by the United States and the Republic of Panama.
[790] 1919 Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles. The international protected status of the Kiel Canal was confirmed by the Permanent Court of International Justice in the 1923 Steamship Wimbledon case.
[791] 1888 Constantinople Convention respecting the Free Navigation of the Suez Maritime Canal.
[792] 1881 Boundary Treaty between Chile and Argentina.
[793] 1921 Convention relating to the Non-Fortification and Neutralization of the Aaland Islands.
[794] Upon acceding to the Convention, France made a reservation at signature excluding the application of Article 2 and maintained it at ratification on 7 October 1910.

- To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

Furthermore, the laying of mines must comply with a number of conditions or restrictions:
- Obligation of notification: The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives;
- Prohibited areas for minelaying: neutral waters and passage areas between neutral waters and international waters;
- Authorized areas for minelaying: belligerents' waters, subject to providing for free exit of neutral merchant vessels when the mining is first executed, and provided that transit passage of such vessels through international straits and archipelagic sea lanes is ensured;
- Mine control restrictions: It is forbidden to use free-floating mines unless they are directed against a military objective, or unless they become harmless within an hour after loss of control over them;
- Obligations following the end of hostilities: Belligerents must record the locations where they have laid mines in order to later notify their position and facilitate their removal; Each party must remove its own mines and notify the enemy of the position of mines laid in its territorial sea.

1.2.3.1.2. Torpedoes

It is prohibited to use torpedoes which do not sink or otherwise become harmless when they have missed their mark or completed their run[795].

1.2.3.1.3. Submarines

In their action with regard to merchant ships, submarines must conform to the same IHL rules as surface vessels.

Under Article 22(2) of the 1930 London Treaty for the Limitation and Reduction of Naval Armaments (Part IV, Art. 22, relating to submarine warfare), "*except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety*". It further specifies that the ship's boats are not necessarily regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

1.2.3.1.4. Missiles

There are no specific provisions concerning the use of missiles in naval warfare. Nevertheless, their use, including that of missiles with over-the-horizon capabilities, must comply with all IHL rules applicable to naval warfare, including the principles of distinction between military objectives and civilian objects (target discrimination), proportionality and precautions in attack. Attacks from the sea using missiles against targets on land must respect the same rules of protection of the civilian population against the effects of hostilities as apply to ground combat.

1.2.3.2. Prohibited or restricted methods of warfare

1.2.3.2.1. Perfidy

Perfidy, i.e. acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray

[795] 1907 Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, Art. 1.

that confidence, is prohibited under IHL. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:

- hospital ships, small coastal rescue craft or medical transports;
- vessels on humanitarian missions;
- passenger vessels carrying civilian passengers;
- vessels protected by the United Nations flag;
- vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
- vessels entitled to be identified by the emblem of the red cross or any other like emblems; or
- vessels engaged in transporting cultural property under special protection.

Contrary to military aircraft, warships may, as a ruse of war, simulate civilian status (such as that of a merchant vessel) where such status does not fall within any of the categories referred to above, and fly a foreign flag. This may also be the case of the ships' satellite automatic identification systems (SAT-AIS). However, it is prohibited to launch an attack while feigning protected status, or surrender or distress, or while flying another flag than the national flag.

1.2.3.2.2. Blockade

A blockade is a hostile action specific to naval warfare, by which a belligerent declares the prohibition of communication, by entry or exit, between the high seas and the enemy coastline. Such prohibition is enforced by the arrest or capture of infringing vessels. It is an act of war involving the use of force governed by IHL, in particular the principle of proportionality in the conduct of hostilities. On this last point in particular, the blockade differs from the embargo. A blockade is a lawful combat action if the following conditions are met:

- A blockade must be declared and notified to all belligerents and neutral States by the blockading government or the implementing naval command. The declaration must specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline;
- A blockade must be effective. It must be maintained by a force large enough and close enough to prevent access to an area of sea. A ship which breaches a blockade may be captured. The vessel and its cargo may be seized;
- A blockade must be applied impartially to all vessels and aircraft of all States, including ships and aircraft flying the flag of the blockading State;
- A blockade must not bar access to the ports and coasts of neutral States.

The declaration or establishment of a blockade is prohibited if it has the purpose of starving the civilian population or denying it medicine or any other objects essential for its survival, which would be a violation of IHL.

1.3. Peacetime maritime operations: law enforcement at sea

Focus: Control and Coercion Measures
Warships may exercise certain control and coercion measures as part of law enforcement at sea. Such measures are different depending on the controlled vessel's nationality and on the maritime zone considered. 1. Approach and visit (boarding) are two measures of control at sea provided for under international law which were incorporated into French domestic law under the Defence Code. Where necessary, the controlled vessel may be diverted from its declared destination.

2. Coercion measures may be applied, and lead to the use of force, not only against the vessel but also against persons on board, who may thus be subjected to restriction or deprivation of liberty under the conditions laid down by law[796].

1.3.1. The legal framework for peacetime maritime operations

In addition to a consensus definition of maritime zones, the main contribution of UNCLOS lies in the recognition of the principle of freedom of navigation. The high seas are declared open to all States and may not be subjected to any State's sovereignty.

Article 87 of UNCLOS recognizes the principle of the freedom of the high seas, including the following principles:

- freedom of navigation;
- freedom of overflight;
- freedom to lay submarine cables and pipelines;
- freedom to construct artificial islands and other installations permitted under international law;
- freedom of fishing;
- freedom of scientific research.

On the high seas, the applicable law is international law and the domestic law of the flag State.

Freedom of the high seas does not mean that this maritime zone is an area outside the law where everything is permitted.

1.3.1.1. International law of peacetime maritime operations

In peacetime, it is possible to conduct military operations, generally within the framework of the European Union or NATO, for example to enforce the application of United Nations Security Council (UNSC) resolutions for the implementation of embargoes. Therefore, the applicable legal framework for such operations is not international humanitarian law, which applies in armed conflict, but the law of the sea, which is mainly regulated by UNCLOS.

One example of such operation is EUNAVFOR MED IRINI which was established by the Decision (CFSP) 2020/472 of the EU Council to implement UNSC resolution 2292 (2016) and Council Decision (CFSP) 2015/1333 relating to the arms embargo on Libya.

Unlike a blockade, an embargo is not a combat action. Its purpose is to put pressure on a State, as a complement to other actions.

An embargo consists of prohibiting or restricting economic relations with a State, by stopping commercial transport and banning the export of all or certain goods to that State. Embargoes can be sector-specific, covering only certain goods (weapons, petroleum products, etc.).

An embargo may be imposed by a UNSC resolution. In practice, a sanctions committee set up by the UNSC can issue exemptions to exports of goods, taking into account the nature of the transaction and the goods concerned.

In the case of trade embargoes, such resolutions must ensure that humanitarian aid can be delivered without hindrance.

[796] French Defence Code, Arts. L1521-11 et seq.; amended French Law No. 94-589 of 15 July 1994 relating to the exercise of powers of enforcement at sea by the State for combatting certain offences under international conventions.

1.3.1.2. French domestic law of peacetime maritime operations: France's Standing Maritime Safeguard Posture

The Standing Maritime Safeguard Posture (*Posture permanente de sauvegarde maritime, PPS-M*) is France's capstone naval policy which is implemented by the Navy in two main sectors: The Maritime Defence of the Territory (*défense maritime du territoire, DMT*) and the Action of the State at Sea (*action de l'État en mer, AEM*).

DMT consists in monitoring France's maritime approaches, and identifying and thwarting potential threats, including by using force where necessary. The intervention part includes all actions and operations by the French Navy in France's territorial waters and maritime approaches to face a military threat or an aggressive opposing force.

AEM includes a range of missions which aim at defending France's sovereign rights and interests at sea: maintaining public order, protecting persons and property, protecting the environment and coordinating the fight against illicit activities. AEM missions are conducted under the authority of the 'Representative of the State at Sea' (Maritime Prefect for mainland France and Government's Delegate for overseas territories) who reports to the Secretary-General for the Sea, who answers to the Prime Minister.

1.3.1.3. The 'flag State principle'

Law enforcement on the high seas covers a wide variety of matters such as piracy, terrorism, the transport of weapons of mass destruction, human trafficking, drug trafficking, the protection of submarines cables and pipelines, the fight against illegal fishing, pollution, the smuggling of migrants, the transport of illegal products, etc.

The procedures for intervention by warship on the high seas must comply with the principle of exclusive flag-State jurisdiction.

Nationality is the legal connection between a vessel and a State, and the flag the material expression of that connection. The 'flag State principle' was first developed by the Permanent Court of International Justice in its 1927 Lotus case, and later enshrined in UNCLOS.

A ship is an organized unit placed under the command of a master who derives their authority from a specific State. Therefore, it seems logical that that State, the flag of which the ship flies (the 'flag State'), should exercise its jurisdiction over acts which occur on board the ship when such ship is sailing in a maritime space beyond any State's sovereignty, such as the high seas.

Maritime law enforcement operations are consistent with the flag State principle where they are conducted by, or with the prior approval of, the flag State. However, certain operations may derogate from that principle of exclusive flag-State jurisdiction where another State's intervention does not require the flag State's authorization. In such cases, the applicable law is primarily that of the intervening State, which does not preclude that State from seeking the flag State's jurisdiction. Historically, typical examples include offences such as piracy, unauthorized broadcasting from the high seas, failure to fly a flag or slave trade (UNCLOS, Art. 110), all of which do not require the flag State's consent for boarding.

In practice, national law enforcement forces on the high seas can adapt the terms of their cooperation through the jurisdiction interplay between the flag State and the intervening State. This includes authorizing a ship visit, waiving courts' jurisdiction, up to the use of force by warships flying the flag of the intervening State as well as the resulting prosecution by that State's courts (e.g. regarding drug trafficking).

1.3.1.3.1. Fight against illicit drug trafficking

International law and French law[797] both facilitate cooperation between States for the fight against drug trafficking, and provide the Navy with appropriate means to detect, ascertain, investigate and punish drug offences.

Under Art. 108 of UNCLOS, all States must cooperate in the suppression of illicit drug trafficking at sea. Further, the fight against such traffic is specially covered by the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. However, those conventions do not provide for any exemption from the principle of exclusive flag-State jurisdiction on the high seas. Therefore, where there is no special agreement between States (such as the 2003 San José Agreement concerning co-operation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean area between France, United States and Belize, cf. below), only flag States may conduct maritime law enforcement operations against foreign vessels.

1.3.1.3.2. Fight against illegal migration at sea

Under international law as well as the amended French Law No. 94-589 of 15 July 1994 relating to the exercise of powers of enforcement at sea by the State for combatting certain offences under international conventions, authorized personnel of the French Navy have jurisdiction to apprehend and arrest smugglers in maritime spaces under French sovereignty and on the high seas[798]. Where the Navy encounters at sea a vessel carrying migrants whose lives are in danger, its action falls within the scope of the rescue of persons in distress. Compliance with international rules on rescue at sea is therefore a key factor in such operations.

1.3.1.3.3. Fight against terrorism at sea

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), concluded in Rome on 10 March 1988, is one of the international agreements adopted in the wake of the hijacking of the cruise ship *Achille Lauro* in October 1985. It creates a range of offences criminalizing different acts of terrorism on the high seas, which were integrated into French criminal law following France's ratification of the SUA Convention. The Convention offences differ from acts of piracy because of the different underlying motives for committing them: While the commission of piracy offences is based on private purposes, the SUA Convention requires the unlawful acts to be committed for political or ideological purposes.

The SUA Convention, which applies to acts committed on the high seas and in territorial waters:

- authorizes warships to intervene on the high seas against a vessel flying a different flag if it carries terrorists, subject to the flag State's consent;
- organizes the terms for prosecution and the cooperation between different States.

The 9/11 attacks in the United States prompted the International Maritime Organization (IMO) to undertake a revision process of this convention, which led to the adoption of a protocol amending and supplementing the convention (2005 London Protocol to the SUA Convention). The Protocol defines two new types of offences:

- acts that, by their nature or context, aim "*to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act*"; and
- the use and threat of biological, chemical or nuclear (BCN) weapons from or against a ship, and the

[797] See French Defence Code, *inter alia*, Arts. L1521-1 et seq., and the amended French Law No. 94-589 of 15 July 1994 relating to the exercise of powers of enforcement at sea by the State for combatting certain offences under international conventions.

[798] From the perspective of French domestic law, migrants are not in breach of the law as long as they are not on French territory. However, smugglers may be prosecuted for abetting the entry and residence of foreigners, which is prohibited under Art. L622-1 of the French Code of Entry and Residence of Foreigners and of the Right to Asylum (*code de l'entrée et du séjour des étrangers et du droit d'asile, CESEDA*).

transport aboard a ship of BCN weapons or related items, whether for terrorist purposes or otherwise.

The SUA Convention was introduced into French criminal law by the amended Law No. 94-589. Article 689-5 of the Code of Criminal Procedure refers to offences provided for in Articles 224-6 to 224-8-1, 224-9, 224-10, and 421-1 of the Penal Code. They include:

- the offence of 'ship hijacking', i.e. "*the seizure or taking over by violence or threat of violence of a [...]ship [...] on board which persons have taken their places*";
- other terrorist felonies and misdemeanours that may be committed from or against a ship, or objects or individuals on board, including wilful attacks on the life or physical integrity of persons, abduction and unlawful detention, theft, extortion, destruction, defacement and damage, offences committed by combat organizations and disbanded movements and offences related to weapons or explosive devices.

1.3.1.4. Piracy: an exception to the flag State principle

Under international law, piracy is defined in Article 101 of UNCLOS mainly around three elements: the location (high seas), the nature of the act (illicit acts of violence or detention) and the motive of the act (private gain, as opposed to terrorist acts committed for political purposes). Piracy justifies an exception to the principles of exclusive flag-State jurisdiction and freedom of navigation, as international law provides every States with legal means to capture and prosecute pirates. France has gradually equipped itself with an effective legal arsenal in this area, consistent with European human rights law.

1.3.2. Conditions for the use of force and coercion in peacetime

On the high seas, the intervention of a warship against a civilian vessel is carried out according to the following procedure:

- approach, which means controlling the nationality of the vessel by inviting it to hoist its flag, and which can be carried out against any vessel;
- flag verification, which means sending a team on board to check the nationality documents of the vessel[799];
- visit (boarding), which can only be conducted with the flag State's consent;
- diversion to a suitable position or port.

These steps may be combined with coercive measures, towards both the vessel and individuals on board, in compliance with the European Convention on Human Rights (ECHR) regarding detention.

1.3.2.1. Right of visit

Article 110 of UNCLOS provides that, on the high seas, a warship may board a vessel flying a foreign flag if there is reasonable ground for suspecting that:

- the ship is engaged in piracy;
- the ship is engaged in the slave trade;
- the ship is engaged in unauthorized broadcasting for the general public, which violates relevant international rules;
- the ship is without nationality; or though flying a foreign flag or refusing to show its flag (concealment of nationality), the ship is, in reality, of the same nationality as the warship.

To this end, the warship may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship,

[799] Flag verification is different from visit because its purpose is precisely to determine the nationality of a ship, which means that the flag State's consent cannot be obtained before such determination.

which must be carried out with all possible consideration.

Outside of these cases, the flag State's consent must be systematically sought. Although facilitative mechanisms may exist in other United Nations conventions (such as the procedure under Article 17 of the 1988 Vienna Convention on drug trafficking), the only mitigations or exceptions to this principle derive from UNSC resolutions related to the enforcement of embargoes.

Focus: Good-Faith Efforts

Mitigating the principle of flag State's consent

The UN Security Council can adopt resolutions mitigating the principle of flag State's consent, without entirely derogating from it, through the need to make "*good-faith efforts*"[800]. According to this provision, a State that wishes to inspect a foreign vessel may consider that the flag State's consent is deemed to be given where that flag State did not respond to a due request through appropriate channels within a reasonable time. In practice, such 'reasonable time' is generally considered to be a period of four hours. Outside the framework of the United Nations, regional agreements may establish comparable mechanisms among their States parties, such as the 2003 San José Agreement concerning co-operation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean area between France, United States and Belize.

Focus: Master's Consent Boarding

France does not recognize the legality of this boarding approach

Some States argue for the existence of a right to board on the high seas based on the sole consent given by the master of the vessel ("boarding with master's consent"), which would add to the exceptions to the principle of exclusive flag-State jurisdiction on the high seas.

France does not recognize the legality of the 'Master's Consent Boarding' approach. It considers that flag privileges are granted to States and not to vessels. Therefore, the master's consent may not replace the consent of the State's official authorities. Thus, outside the aforementioned exceptions to the principle of exclusive flag-State jurisdiction on the high seas, any boarding of a foreign vessel is subject to the flag State's consent (which must be given by the competent governmental authorities through diplomatic channels).

Consequently, outside the exceptions to the flag State principle provided for by UNCLOS or in certain cases by UNSC resolutions, no boarding may be conducted on the high seas by a French warship without the flag State's consent.

1.3.2.2. The right of hot pursuit

Originating from Anglo-Saxon custom, the right of hot pursuit has been enshrined in international law under Article 111 of UNCLOS: "*The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State*". 'Hot pursuit' is the right granted to certain vessels to pursue a foreign private vessel into the high seas, with a view to stopping it for inspection by the competent authorities, if such vessel has committed an offence in the coastal State's internal waters, territorial sea, contiguous zone, EEZ, or above the continental shelf. Essentially, the right of hot pursuit is an extension of the coastal State's jurisdiction into the high seas and therefore an exception to the flag State principle.

The competent authorities of the coastal State must have reasonable grounds to believe that the vessel has violated the laws and regulations of that State.

[800] UNSC resolution 2292 (2016) of 14 June 2016, operative §3 et seq., which extend the arms embargo in Libya.

For such pursuit to be lawfully conducted, the following criteria must be met:

- It must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State;
- It must cease as soon as the ship pursued enters the territorial sea of its own State or of a third State;
- It must not be interrupted;
- The coastal State must have good reason to believe that the foreign vessel has violated its laws and regulations or has infringed upon the rights protected by a special jurisdiction zone (protection zone) established by the coastal State;
- It may only be conducted by the coastal State's warships or government ships that have previously been authorized and clearly identified for use on government service.

1.3.2.3. Diversion

A warship may order a private vessel to suspend its course and proceed without delay to a maritime port specified by the warship[801].

There are various situations in which the diversion of a vessel may be considered:

- When access on board that vessel has been refused or is not feasible;
- When provided for by specific stipulations of international law (convention, intergovernmental agreement, UNSC resolution) or domestic law;
- When requested by a competent judicial authority (e.g. a prosecutor for the purposes of criminal proceedings; a judge for the enforcement of a court decision).

1.3.2.4. Measures of restriction or deprivation of liberty

Measures of restriction or deprivation of liberty (*mesures restrictives et privatives de liberté, MRPL*) are measures of administrative coercion towards persons provided for under French domestic law that aim to secure the presence of individuals on board, preserve the vessel and its cargo, or ensure the safety of individuals. They should not be confused with two other types of measures:

- 'Simple measures': time-limited steps taken for the proper conduct of a visit and which do not require oversight by a judge, such as gathering the crew on the exterior decks, etc.;
- Custody: measure enforced by a judicial police officer and which thus falls under the judicial procedure.

Measures of restriction or deprivation of liberty are decided by the commander of the warship, where they become necessary[802]. When a commander takes such measures as part of the Action of the State at Sea (*AEM*, see above), they must report to the Representative of the State at Sea, who must in turn inform the Public Prosecutor (*Procureur de la République*) without delay. The Public Prosecutor has the obligation to refer the matter to the Liberties and Detention Judge (*juge des libertés et de la detention, JLD*) within 48 hours. The JLD will then decide whether to extend the measures ordered (in increments of 120 hours) until the individuals are handed over to the competent authorities. The JLD decision is based only on the proportionality and the conditions of application of the measures taken by the commander in relation to the objective sought (security of the ship and transfer of the individuals to judicial authorities). For their assessment, the JLD may request to speak with the detained individuals or to set up a video conference where feasible.

Measures of restriction or deprivation of liberty, in compliance with the ECHR, provide detainees with safeguards (health check, control by an independent judge, etc.) which are applied even if no further legal action is taken (e.g. where the impugned violation of an embargo is ultimately not criminally punished).

[801] Under amended French Law No. 94-589 of 15 July 1994 relating to the exercise of powers of enforcement at sea by the State for combatting certain offences under international conventions.

[802] For instance, when it becomes necessary to divert a vessel from its destination in order to subject it and its crew to legal proceedings.

<table>
<tr><td colspan="2">Right of approach
Verifying the identity and nationality of a vessel by inviting it to hoist its flag</td></tr>
<tr><td>Visits consistent with
the flag State principle</td><td>Visits derogating from
the flag State principle</td></tr>
<tr><td>Flag State consent

- drug trafficking
- unlawful acts at sea
- migrant smuggling
- maritime terrorism
- most UNSC resolutions

Consent must be obtained through diplomatic channels.</td><td>Right of visit – flag verification boarding (Art. 110 UNCLOS)

Boarding permitted if “there is reasonable ground for suspecting that”:
- the ship is engaged in piracy;
- the ship is engaged in the slave trade;
- the ship is engaged in unauthorized broadcasting;
- the ship is without nationality; or
- though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.</td></tr>
<tr><td>↳ Hot pursuit permitted</td><td>UNSC resolutions explicitly authorizing visits without the flag State’s consent (most often in connection with an embargo)
Very rare (Iraq, former Yugoslavia, Libya). Analog resolutions do not provide for such a right (North Korea, Iran).
However, there has been a shift since 2014 (e.g. UNSC resolution 2498 on the arms embargo in Somalia; resolution 2509 on the arms embargo in Libya).</td></tr>
<tr><td>Master’s Consent Boarding
Not recognized by France</td><td>Right of hot pursuit (Art. 111 UNCLOS)
Extension of the coastal State’s jurisdiction</td></tr>
<tr><td></td><td>↳ Hot pursuit permitted</td></tr>
</table>

1.3.2.5. Coercion towards infringing vessels, and opening fire

Where infringing vessels refuse to comply, which constitutes a misdemeanour, measures of coercion towards vessels may be implemented to compel a non-compliant vessel to halt its course and send a boarding party for visit or capture, or to compel such vessel to divert to a designated port.

Under French law, there are three types of coercive measures at sea:

- ‘*Action de vive force*’ (“great force action”), which consists in sending a boarding party that may use force to take control of the vessel;
- Warning shots, which include off-target warning shots (‘*tir de semonce*’) and shots across the bow of the ship (‘*tir d’arrêt*’) and are necessarily used as a predicate to ‘*tir au but*’;
- ‘*Tir au but*’ (“fire at target”, i.e. disabling fire), which is never directed against individuals and always carried out with inert munitions.

In compliance with the French Defence Code, the *action de vive force* and warning shots are carried out upon the order of the Representative of the State at Sea. The ‘*tir au but*’ requires authorization from the Prime Minister. Under certain restrictive conditions, the Prime Minister may delegate that authorization power to the Representative of the State at Sea[803].

[803] French Defence Code, Art. R1521-5; Interministerial Directive No. 57 of 20 April 2020.

CHAPTER 2: THE LAW APPLICABLE TO AIR OPERATIONS

France carries out air operations for the purposes of protecting and defending French national territory, preserving national interests abroad – in particular the safety of French nationals – and assuming its responsibilities in maintaining national security.

Air operations, which may be conducted at any time and place, sometimes at short notice, are governed by a legal framework that follows the same principles as those governing other domains.

In peacetime, the use of aerial force is regulated by the Convention on International Civil Aviation, and general international law. As regards France, it also complies with the provisions of, *inter alia*, the Civil Aviation Code and the Transport Code, as well as with interministerial procedures. The legal scope of air operations is strictly defined and does not permit any action endangering the lives of passengers, except where a civil aircraft is being used in armed attack.

In armed conflict, the use of aerial force is governed by the basic principles of international humanitarian law (IHL). As the codification attempt undertaken with the drafting of the 1923 Hague Rules of Air Warfare failed to produce an internationally adopted instrument, air operations are governed by the general rules of IHL, except where provisions relating to the protection of medical aircraft[804] may apply.

However, the procedures for the use of aerial force reveal the specific challenges faced by those planning and conducting military operations in and from the 'third dimension', both in peacetime and in armed conflict. Such challenges include the responsive implementation of a chain of command faced with sudden airborne threat (aircraft, missile, etc.)[805] as well as the necessary adaptability for an appropriate response[806] to any type of operational situation, particularly to the enemy's increasingly complex and ambiguous operating methods.

2.1. The use of force in airspace outside armed conflict is strictly regulated

2.1.1. Sources and scope of the law applicable to the air domain outside armed conflict

2.1.1.1. The main sources of the law applicable to aircraft

International civil aviation and international air transport services are governed by rules of international law that mainly originate in the 1944 Chicago Convention on International Civil Aviation, which has been regularly amended since its adoption. It lays down the following three principles:

- Sovereignty of any State over the airspace above its territory, under Article 1 of the Convention. This sovereignty is "*complete and exclusive*"[807], but it is subject to some qualifications to facilitate air services. Indeed, while the general rule is that flights into or in transit across the airspace of another State must be first authorized by that State, civil aircraft not engaged in scheduled international air services are not required to request prior authorization[808];
- Equal treatment of all civil aircraft, regardless of nationality. This principle means that the national laws of the State flown over must apply without discrimination to all civil aircraft of other States parties to the Convention flying over its territory;

[804] AP I, Arts. 24-31.
[805] Airborne threats are particularly sudden because of the travelling speed of the civil or military aircraft or missile in flight, but also because of the urgent nature of support requests by ground troops in contact with the enemy.
[806] Both within and outside the national territory, air operations are characterized by their large geographical extent. France's Standing Air Security Posture aims to defend and protect the French national airspace and air boundaries under all circumstances. In foreign operations, the endurance of airborne capabilities, especially unmanned aerial systems (UAS), and the air-to-air refuelling systems enable the force to ensure long-term and continued presence and high responsiveness over a given area of action.
[807] 1944 Chicago Convention on International Civil Aviation, Chapter 1, Art. 1.
[808] *Ibid*., Chapter 1, Art. 5. However, the State flown over has the right to require landing.

- Encouragement of States parties to align their national legal, technical, and economic regulations to promote the expansion of aviation.

These rules have been subsequently supplemented to address specific issues, such as air carrier liability[809] or aviation and navigation safety[810]. Similarly, following several instances of civil aircraft being destroyed in flight[811], the principle of prohibiting the use of weapons against civil aircraft in flight was enshrined in international law[812].

In France, the principles set out in international law are implemented under the Transport Code and the Civil Aviation Code, which specify the terms for their application.

For instance, Article L6211-1 of the Transport Code incorporates the principle of sovereignty[813], while Article L6100-1 integrates paragraphs (a) and (b) of Article 3 of the 1944 Chicago Convention, introducing under French law the distinction between civil aircraft and State aircraft (military aircraft, aircraft owned by the State, or aircraft exclusively used for government service) on the basis of which State aircraft are excluded from the scope of application of most air traffic regulations[814].

2.1.1.2. Classification of airspace

'National airspace' means the atmospheric space above a State's territory.

In terms of lateral boundaries, national airspace is the airspace over a State's land territory and, in the case of a coastal State, over its territorial waters, in accordance with Article 2 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The boundaries of the national airspace of States not party to UNCLOS are determined either by the rules of customary law governing territorial waters (as airspace is located directly above them) – unless those States are persistent objectors thereto –, or by their own delimitation of their territorial waters or the components forming them, provided that it has been made public.

Airspace that extends beyond territorial waters, i.e. above exclusive economic zones and the high seas, is international airspace, which is not subject to the sovereignty of any State. Although free passage is the general principle in international airspace, civil aircraft flying across it remain subject to the rules set out by the International Civil Aviation Organization (ICAO), especially regarding navigation and manoeuvering.

In particular, Flight Information Regions (FIR)[815] were established by ICAO and States to delegate authority to certain States to oversee general air traffic within a demarcated area that may extend beyond the boundaries of their territory, over international waters, and occasionally into sections of airspace belonging to other States. The national authorities responsible for managing the FIR provide a flight information service and an alerting service pursuant to the Global Air Navigation Plan (GANP).

[809] Air carrier liability is governed mainly by the 1929 Warsaw Convention and the 1999 Montreal Convention.
[810] Aviation and navigation safety is addressed by many conventions: 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 1988 Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; 1991 Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection; 2010 Beijing Convention on the Suppression of Unlawful Acts relating to International Civil Aviation; 2010 Beijing Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft.
[811] Examples include the Korean Air Lines Flight 007 shot down on 1 September 1983, or the Libyan Arab Airlines Flight 114 shot down on 21 February 1973.
[812] This prohibition was incorporated into the 1944 Chicago Convention on International Civil Aviation in 1984 under Article 3 bis.
[813] French Transport Code, Art. L6211-1: "*Any aircraft may fly over French territory unrestrictedly. However, a foreign aircraft may only fly over French territory if that right has been granted to it by a diplomatic convention or if has received, for this purpose, authorization under conditions laid down by decree of the Council of State*".
[814] Specific rules for use, registration and airworthiness are laid down under Decree 2013-367 of 29 April 2013.
[815] Flight Information Regions are defined under Chapter 1 of Annex 2 of the 1944 Chicago Convention on International Civil Aviation and were established by the ICAO Council pursuant to Articles 37 and 54 of said Convention.

By contrast, Air Defence Identification Zones (ADIZ) may be established by unilateral decision of a State. Annex 15 to the Chicago Convention defines an ADIZ as a "*special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures that supplement those related to civil air traffic services (ATS)*". While certain temporary ADIZs were justified during significant crises[816], the lawfulness of ADIZs established over international waters remains controversial, in particular where they are permanent. Such is the case, for instance, of the ADIZ maintained by China since 2013 above its claimed EEZ. Likewise, the United States established an ADIZ around its national territory which permanently extends over a substantial portion of Canadian territory. Given the additional identification requirements imposed on civilian traffic, which occasionally exceed what is necessary for effective air traffic management, an ADIZ reflects a State's aspiration to assert its sovereignty beyond its national airspace, which may sometimes conflict with the Convention on International Civil Aviation and UNCLOS, particularly when the ADIZ encompasses maritime areas, islands, or islets whose sovereignty is contested.

The vertical boundary of airspace lacks universal consensus. No international legal instrument specifically defines the boundary between airspace and outer space, including the 1944 Chicago Convention on International Civil Aviation and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Furthermore, there is no common State practice in this regard that could be invoked to offset the lack of a treaty-based rule.

As regards the law applicable to air and space activities, France thus adopts a "functionalist" approach based on the technical attributes of the craft and the purpose of each activity (see Part 4, Chapter 3 below). Under this approach, an object that travels across outer space to directly reach another point on Earth, without completing a full orbit around it, remains subject to the law applicable to airspace (ballistic missiles, sounding rockets, and suborbital vehicles), regardless of the maximum altitude reached by the object. Consequently, the passage in the ascending phase (by a rocket) or in the descending phase (by a space object re-entering the atmosphere) through the airspace of another State without the authorization of said State constitutes a violation of its sovereignty[817], without prejudice to the application of space law to that activity.

2.1.2. Airspace law and the use of force

Although States have complete and exclusive sovereignty over the airspace above their territory, they must refrain from using weapons against civil aircraft in flight and, when intercepting civil aircraft, from endangering the lives of persons on board and the safety of the aircraft.

This prohibition was enshrined in 1984 under Article 3 bis of the 1944 Chicago Convention on International Civil Aviation following many years of reflection. In its resolution 927 of 14 December 1955, the United Nations General Assembly (UNGA) calls upon all States to take the necessary measures to avoid "*incidents involving attacks on civilian aircraft innocently deviating from fixed plans in the vicinity of, or across, international frontiers*"[818].

This Article 3 bis prohibition came about in the wake of several major air incidents, in particular the destruction in flight of a Korean Air Lines Boeing 747 by Soviet fighter jets over the territory of the Soviet Union on 1 September 1983.

Since 1983, this principle has been reaffirmed several times by various bodies, including international and national courts and commissions. For instance, the United Nations Security Council (UNSC) condemned, in 1996 and 2014, the use of weapons against civil aircraft in flight following incidents where such aircraft

[816] For example, the ADIZ established by the United Kingdom during the 1982 Falklands War.
[817] See, for example, the Settlement of Claim between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954" of 2 April 1981, Art. II of the Protocol and §21 of the Canadian Statement of Claim.
[818] UNGA resolution 927 of 14 December 1955 concerning the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers.

were destroyed in flight[819].

At the regional level, in a case involving the destruction of civil aircraft in flight by the Cuban Air Force, the Inter-American Commission on Human Rights condemned the Republic of Cuba for violating the right to life which is recognized by the American Convention on Human Rights[820]. The European Court of Human Rights (ECtHR) has not yet had the opportunity to rule on a similar case; however, while regularly and generally recalling the effectiveness of the right to life, it considers that "*in a lawful security operation which is aimed, in the first place, at protecting the lives of people who find themselves in danger of unlawful violence from third parties, the use of lethal force remains governed by the strict rules of 'absolute necessity' within the meaning of Article 2 of the Convention*"[821].

At the national level, on 15 February 2006[822], the German Federal Constitutional Court invalidated the provisions of the 2004 Aviation Security Act which authorized the Minister of Defence, as a last resort, to order the destruction of a civil aircraft. The Court thus considered that these provisions violated the right to life as well as the right to respect for human dignity[823].

In accordance with Article 3 bis of the 1944 Chicago Convention, France considers that the protection afforded to civil aircraft in flight against the use of weapons applies only to the extent that such aircraft are used for purposes consistent with those of civil aviation. Consequently, France adopts a graduated approach: In the event of a violation of its airspace, by an aircraft which either flies over its territory without authorization or does not respect regulated zones restricting or prohibiting flights over certain areas of its territory[824], France may "*resort to any appropriate means consistent with relevant rules of international law*"[825] to end that violation. Therefore, it remains possible to use force against an infringing civil aircraft, provided that the safety of persons on board and the integrity of the aircraft are preserved. The use of coercive means, excluding the use of weapons for destruction purposes, is authorized (visual or radio interrogation, deviation from the route, interception, etc.).

In the event that French sovereignty is breached by a civil aircraft, whether fixed-wing or rotary-wing and whether remotely operated or not, in flagrant armed attack or when behaviour and circumstantial evidence suggest that the imminent breach meets the threshold of such armed attack under Article 51 of the United Nations Charter, France considers that the use of weapons against such civil aircraft may be authorized, as a last resort, under Article 3 bis(a)[826] of the Chicago Convention and Article 51 of the United Nations Charter.

Such violation by a civil aircraft shall be classified as armed attack on a case-by-case basis taking into account the specific circumstances ruling at the time. The Prime Minister, who is responsible for national defence under French law[827], ultimately decides, within the limits of international law, the most appropriate response depending, *inter alia*, on the nature of the intrusion and the attacker. In this context, any use of force against

[819] UNSC resolution 1067 of 26 July 1996 endorsing the conclusions of the ICAO report on the shooting down by the Cuban Air Force of two civil aircraft; UNSC resolution 2166 of 21 July 2014 concerning the downing of Malaysia Airlines flight MH17 on 17 July 2014.
[820] See IACHR, case No. 11.589, *Armando Alejandre Jr. et al. v. Cuba*, 29 September 1999, regarding the downing by two military aircraft (a MiG-29 and a MiG-23) of the Cuban Air Force of two civil aircraft flown by pilots belonging to the "Brothers to the Rescue" organization.
[821] See ECtHR, *Tagayeva and Others v. Russia*, Judgment, Application No. 26562/07 and 6 other applications, 13 April 2017, §595.
[822] Bundesverfassungsgericht, Judgment of the First Senate of 15 February 2006, 1 BvR 357/05; §§115, 118 [151].
[823] On the grounds that shooting down aircraft when people who are not involved in a crime are on board would be tantamount to treating the hostage passengers and crew as mere objects, and to depriving these victims of the value due to human beings. To order their death as a means of saving other lives would constitute a deprivation of their rights. Article 1.1 of the Basic Law, which guarantees human dignity, makes it inconceivable, in a desperate situation, to intentionally kill people solely on the basis of statutory authorization (*ibid*., §§120-130). Unlike the right to life, the right to respect for human dignity is not subject to any exceptions.
[824] 1944 Chicago Convention on International Civil Aviation, Chapter II, Art. 9.
[825] *Ibid*., Chapter I, Art. 3 bis.
[826] *Ibid*., Chapter I, Art. 3 bis(a): "*The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations*".
[827] French Constitution of 4 October 1958, Art. 21; French Defence Code, Arts. L1131-1 and D1441-1.

a civil aircraft would fall within the framework of the Air Defence of the Territory[828] against a potential attacker and would be implemented under the responsibility of the Air Defence and Air Operations Commander (*Commandement de la défense aérienne et des opérations aériennes, CDAOA*)[829] as part of the Standing Air Security Posture (cf. Subsection 2.1.3. below).

Focus: Integration of the French Air Defence into NATO

The French air defence system is integrated into the European defence framework of the North Atlantic Treaty Organization (NATO).

The Alliance's air defence component, also referred to as NATO Integrated Air and Missile Defence (NATO IAMD), is designed to address any military air threat. It is operated by the Integrated Air and Missile Defence Policy Committee (IAMD PC), which reports directly to the North Atlantic Council, under the command of the Supreme Allied Commander Europe (SACEUR).

NATO IAMD was created in the 1960s. Its activities include NATO Air Policing which aims at safeguarding the security of Alliance airspace[830]. Since the 2010 Lisbon summit, NATO IAMD also includes a Ballistic Missile Defence (BMD) capability, which provides the NATO European defence system with a command and control structure to address the increasing threat posed by the proliferation of ballistic missiles.

Although NATO IAMD has control over the air assets under its authority, France retains sovereignty over its capabilities at all times. Authority from the CDAOA to one of the NATO Combined Air Operations Centres is transferred on a case-by-case basis, and the decision is revocable[831].

2.1.3. The use of coercion and force under France's Standing Air Security Posture

The use of aerial coercion and force against aircraft above France's national territory is implemented within the framework of the Standing Air Security Posture (*Posture permanente de sûreté-air, PPS-A*), a system structured around command (operations centre), detection (sensors, intelligence, etc.) and intervention (fighters, helicopters, ground-to-air capabilities) ensuring permanent monitoring of French airspace.

2.1.3.1. Definition and legal basis of PPS-A

France's Standing Air Security Posture is defined as the array of permanent measures taken in every domain (land, sea, air, space, cyber, information) to counter, in all circumstances, any aggression or attack, regardless of its scale, against its territory, population or interests. The missions entrusted to the armed forces within this framework include the deep surveillance and control of national spaces and approaches[832].

In particular, PPS-A contributes to Air Defence, which is defined under the French Defence Code[833] by the following elements:

[828] French Defence Code, Art. D1441-1.
[829] French Defence Code, Art. D1442-5.
[830] There is a debate regarding the possibility of intervening beyond the limits of national airspace. Under French air security law, Active Air Security Measures (*mesures actives de sûreté aérienne, MASA*) may only be conducted within French airspace, while within the French legal framework of Air Defence, approaches can only warrant surveillance and threat assessment. Unless there is a bilateral agreement based on which destructive action may be taken in the airspace of another State, nothing indicates that anticipatory action is possible. Article D1441-1 of the French Defence Code only allows for the possibility of "*resisting any use of national airspace*" by an attacker. However, Article 5 of the NATO treaty provides for a collective self-defence response to an attack against the territory of Member States, which is the framework within which NATO IAMD is operated.
[831] NATO IAMD also provides for specific deployments to ensure air defence in Europe, for example the reassurance mission in Poland since 2014, in which France participates.
[832] French Joint Glossary of Operational Terminology (*glossaire interarmées de terminologie opérationnelle, GIATO*), DC-004(A)_GIATO(2024) N° 37/DEF/CICDE/NP, French Joint Centre for Concepts, Doctrine and Experimentation (*Centre interarmées de concepts, de doctrines et d'expérimentations, CICDE*), 12 February 2024.
[833] French Defence Code, Art. D1441-1.

- Specific objectives, including ensuring national sovereignty in French airspace and defending the territory against any air threat;
- Permanent implementation in peacetime and in all circumstances;
- Continuity between the Standing Security Posture and Air Defence of the national territory in times of crisis, including the use and intervention of all military capabilities of the armed forces.

The mission of PPS-A is twofold:

- Air policing, which has a two main purposes: ensuring compliance with air traffic rules, which may lead to the intervention of internal security forces on the ground in case of infringements; and providing assistance to aircraft and individuals in distress;
- Air Defence, which applies where the level of threat reaches a given threshold.

The general legal basis for organizing PPS-A has its roots in Articles 5, 15 and 21 of the French Constitution, under which the French President is both the guarantor of national independence and territorial integrity and Commander-in-Chief of the Armed Forces, and the Prime Minister is responsible for national defence. More particularly, PPS-A is implemented based on an interministerial directive and classified directives.

The French Defence Code provides for the detailed organization of PPS-A: Article L1131-1 specifies the Prime Minister's role, in particular as regards national defence[834], while Articles D1441-1 and following define Air Defence and set out the terms for its implementation as well as the associated line of authority, including the particular role of the Air Defence Commander who is responsible for the application in all circumstances of security measures in French airspace. These provisions are supplemented by several sub-regulatory legal texts.

PPS-A was originally designed to provide for a response capacity to military threat, but it has been adapted to address other air threats, such as the use or hijacking of civil aircraft for malicious or terrorist purposes. In this regard, France concluded bilateral agreements with all neighbouring States (United Kingdom, Belgium, Netherlands, Luxembourg, Germany, Switzerland, Italy, Spain) to enhance responsiveness to air threats other than military, to coordinate the use of each State's air defence means, to increase the scope of airborne action (cross-border intervention may be authorized[835]), and to complement NATO's action framework which is aimed solely at responding to military threats.

In metropolitan France and French Guiana, around forty permanent no-fly zones have been established by joint decrees of the Minister of Defence and the Minister in charge of civil aviation. There are also temporary flight restrictions areas, as well as zones regulated by floor or ceiling flight prohibition levels, which aim to enable the French Air and Space Force to respond to the risk of air attacks or accidents on critical installations such as nuclear power plants, highly sensitive defence areas and certain institutions, or in the context of specific events (travel of political leaders, international summits, etc.).

In the overseas departments, regions and communities, as well as in New Caledonia, air defence responsibilities are exercised by an officer appointed by the Minister of Defence[836]. As air events may occur very suddenly, the Prime Minister and their military staff are in direct contact with this officer, who is responsible for assessing the situation, monitoring developments and taking any necessary action.

2.1.3.2. Legal framework for implementing PPS-A

Where technically feasible (via radar coverage or because of the inherent features of the aircraft), all aircraft

[834] "*The Prime Minister, who is responsible for national defence, exercises general and military leadership in defence matters. Accordingly, the Prime Minister sets out general directives for, and monitors the development of, defence negotiations. The Prime Minister has the authority over the preparation and higher conduct of operations and ensures coordination of defence activities across all ministerial departments*".

[835] This specific purpose was a central aspect of the different intergovernmental agreements and technical arrangements concluded with Germany, Belgium, the Netherlands, Luxembourg, the United Kingdom, Spain, Italy and Switzerland.

[836] French Defence Code, Art. D1681-14.

in flight must undergo systematic monitoring.

Should an anomaly be detected regarding an aircraft in flight[837], a specific classification of that aircraft will be determined for subsequent actions. This classification may be adapted based on the aircraft's ongoing behaviour. When warranted by the classification, Active Air Security Measures (*mesures actives de sûreté aérienne*, *MASA*) are initiated. Such measures aim to precisely identify the infringing aircraft, monitor its flight behaviour, provide assistance or enforce relevant obligations, restrictions or prohibitions, where necessary through interception aiming at determining any infringement. As a last resort, MASA may, upon order by the political authority, result in the destruction of the aircraft if it is found to be employed in an attack that meets the threshold of armed attack within the meaning of Article 51 of the United Nations Charter. At the national level, decision-makers and PPS-A commanders operate in compliance with regulations and interministerial directives, while enjoying the legal immunity derived from the 'command by lawful authority' principle provided for under the French Penal Code[838].

MASA actions are carried out using military capabilities of the Standing Security Posture or other government air assets deployed as necessary[839]. PPS-A activities are closely coordinated with the Ministry of the Interior, Ministry of Justice, Ministry for the Economy and Ministry for Transport. This collaborative framework encompasses the development and implementation of rules as well as administrative[840] or judicial[841] law enforcement on the ground.

2.1.4. Coercive measures outside armed conflict and national territory

In a number of circumstances, France may implement coercive measures beyond its national borders, including outside armed conflict.

Firstly, France may use international airspace for training or military operations, in which case it must inform concerned States of the risks such activities pose to civilian air traffic (e.g. test or training sites for air-to-air or ground-to-air missile or shell firing) using NOTAM messages (Notice to Airmen), which in France are issued by the Directorate-General for Civil Aviation (*Direction générale de l'aviation civile, DGAC*).

Furthermore, France may conduct actions outside its national airspace as part of an air embargo decided by the UNSC for the purpose of maintaining international peace and security, including outside armed conflict. Under Article 41 of the United Nations Charter, the UNSC has the authority to impose "*complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication*" with a State. Article 41 embargoes may be applied only to certain types of goods, such as arms or certain raw materials, and are often supplemented by other international sanctions under Article 42. For instance, in operative paragraph 3 of resolution 670 (1990) on air embargo against Iraq following its invasion of Kuwait, the UNSC decided "*that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement […], shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances […]*". This resolution did not authorize the use of force, nor did it provide a legal basis for establishing a no-fly zone (NFZ).

Finally, France may conduct air actions outside its national airspace to enforce a NFZ[842] under a UNSC

[837] Such anomalies include discrepancies between the aircraft's actual trajectory compared to its planned route; failure to maintain permanent contact with air traffic control bodies; failure to respond positively to identification of aircraft in flight; dangerous behaviour displayed by persons on board the aircraft.
[838] French Penal Code, Art. 122-4§2.
[839] French Civil Aviation Code, Art. R133-9: "*Any aircraft in flight must comply with the injunctions of police and customs services as well as of military aircraft intervening at the request of these services to the minister responsible for the armed forces*".
[840] *Ibid*., Art. 330-1: "*Decisions concerning operating licences for public air carriers, including issuance, conversion into temporary licences, suspension and withdrawal, are made by order of the minister responsible for civil aviation*".
[841] For example, this includes the determination of the offence resulting from entry into a no-fly zone.
[842] Unlike the embargo, which only prohibits certain types of flights and mainly concerns imports to and exports from the State concerned, a NFZ prohibits all air traffic in a given area.

resolution. Although lacking a universally agreed definition, the establishment of such NFZ can be decided by the UNSC under Article 42 of the United Nations Charter, which allows the Council to "*take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security*", including "*demonstrations, blockade, and other operations by air, sea, or land forces*".

NFZs can be implemented outside armed conflict, but imposing them effectively may involve the use of force, which could escalate into armed conflict.

However, such escalation does not necessarily occur. In order to protect civilians or civilian objects, the UNSC can adopt measures to prevent attacks against places where there is a large concentration of persons who do not participate in hostilities. No-fly zones are often "*a compromise in situations where the international community is demanding a response to ongoing violence, but full military intervention would be politically untenable*"[843].

In other cases, the establishment of an NFZ derives from a UNSC resolution under Chapter VII authorizing States to take military action to maintain or restore international peace and security. For example, in its resolution 1973 (2011) on Libya, the UNSC decided to "*establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians*" and authorized States "*to take all necessary measures to enforce compliance with the ban on flights*". In this case, the NFZ was imposed in a situation of armed conflict, where IHL rules apply. However, it should be noted that neither the 1949 Geneva Conventions, nor their 1977 Additional Protocols I and II, nor customary rules of IHL[844] contain specific provisions on NFZs.

2.2. Specificities of implementing IHL in air operations

2.2.1. Implementation of the principle of distinction

2.2.1.1. Protections applicable to certain aircraft

2.2.1.1.1. Civil, neutral, and military aircraft

The Geneva Conventions (GC) and their Additional Protocols I (AP I) and II (AP II) prohibit the use of force against civil aircraft in armed conflict, unless these aircraft qualify as military objectives because they make an effective contribution to enemy military action, and their total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage[845], provided that weapons are used in compliance with all applicable IHL rules. Accordingly, if a party to the conflict uses a civil aircraft to transmit military intelligence the immediate use of which permits an attack[846], or to transport troops, that civil aircraft becomes a valid military objective. However, regarding troop transport by civil aircraft, it is necessary to distinguish between the status of the aircraft itself and the status of the persons on board by determining those who are taking a direct part in hostilities and those who, in the event of an attack, must be considered as incidental casualties to be taken into account in compliance with the principles of proportionality and precautions in attack. In want of information based on which the status of persons on board can be determined, those persons must be presumed to be civilians.

[843] Joshua E. Keating, "Do No-Fly Zones Work?", FP Explainer, *Foreign Policy*, 2011 (https://foreignpolicy.com/2011/02/28/do-no-fly-zones-work/).
[844] Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 198-212.
[845] AP I, Art. 52.
[846] See, *inter alia*, ICTY, *Strugar*, Judgement, IT-01-42-A, 17 July 2008, §177: "*Examples of active or direct participation in hostilities include: […] transmitting military information for the immediate use of a belligerent […]. Examples of indirect participation in hostilities include: […] gathering and transmitting military information […]*".

Any neutral aircraft that takes part in hostilities loses its protection against attack[847].

By contrast to civil and medical aircraft, military aircraft, whether manned or unmanned, are valid military objectives by nature. Similar to combatants who must display a distinctive sign, military aircraft must, in accordance with the principle of distinction[848], be sufficiently recognizable (roundel, symbol, insignia, camouflage pattern) to avoid being confused with aircraft used in civilian aviation or by other States[849].

Therefore, in armed conflict, it is a violation of IHL to conceal the distinctive insignia clearly connecting a military aircraft to specific armed forces or to make improper use of distinctive emblems, signs or signals in order to feign a protected status[850], such as that of a medical, civil or neutral aircraft. It is also prohibited to use the distinctive insignia of an enemy aircraft[851].

However, the use of enemy aircraft's Identification Friend or Foe (IFF) codes when responding to an IFF interrogation is a lawful ruse of war[852] and does not constitute a violation of Article 39 of AP I on emblems of nationality.

As the area of operations is monitored primarily via radar systems, an aircraft can mask its radar signature using that of another aircraft in close proximity, especially if the radar echo from that aircraft has a broader wavelength (which is the case for most commercial aircraft). This technique qualifies as 'camouflage', although it actually involves using the protection of a civil aircraft to conceal a military objective, which may violate the principle of precautions with respect to civilians on board or nearby. Unlike stealth techniques, which only aim to avoid enemy detection, this method could be considered as a perfidious act, even if it is not defined as such in treaty law, or as a use of human shields (i.e. covering military operations using the presence of civilians) in some cases.

2.2.1.1.2. Precautions to protect civil and neutral aircraft

Parties to a conflict must take all necessary precautions for the security of civil aircraft, especially the State which has sovereignty over the airspace in which the conflict takes place. In particular, belligerents must issue risk alerts in case of hazardous activities related to the conduct of hostilities which pose a threat to the security of civil aircraft flying within the airspace where the conflict takes place. The establishment of temporary NFZs or ADIZs in armed conflict as a precautionary measure can reduce the risk of attack against civil aircraft which do not participate in hostilities by informing such aircraft of the risks in that zone. However, this does not relieve belligerents of their obligation to protect civil aircraft in such zones under the principles of distinction, proportionality and precaution.

On 17 July 2014, a missile was launched against Malaysia Airlines flight MH17 in Ukrainian airspace, killing 298 civilians. In the subsequent case before the International Court of Justice, Ukraine raised the argument that Russia's proxies directly targeted this civil aircraft although they were "*fully aware that the skies of eastern Ukraine within range of their weapon were open to civilian air traffic. Under a public Notice to Airmen ('NOTAM'), the airspace below 32,000 feet was restricted to Ukrainian state aircraft, meaning that civilian air traffic above that level was expressly permitted*"[853].

In armed conflict, the failure by a civil aircraft to comply with the instructions from a military aircraft would

[847] 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Art. 17.
[848] AP I, Art. 48.
[849] *Ibid*., Art. 39.
[850] *Ibid*., Arts. 37 and 38.
[851] *Ibid*., Art. 39(2).
[852] Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2010, Rule 116(c)(2), p. 256.
[853] Memorial submitted on 12 June 2018 by Ukraine to the International Court of Justice in the case concerning the Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, §69.

only be a first indication that this civil aircraft may be being used for belligerent purposes. It would not be sufficient evidence for that civil aircraft to qualify as a military objective.

Aircraft may be made the object of attack if they are military objectives[854].

In air-to-air combat, visual identification of aircraft is particularly difficult due to a number of factors. Interactions often occur beyond visual range, and the speed of aircraft makes it unlikely to establish visual identification with certainty. In most cases, identification can therefore only be achieved through other means: infrared signature, electromagnetic waves emitted by engine vibrations, point of origin, heading, etc. In practice, aircraft are classified according to their level of threat using an identification matrix based on several criteria in order to ensure that any use of force against them complies with the principle of distinction.

2.2.1.1.3. Civil aircraft acting for the benefit of armed forces

Civil aircraft that are used by armed forces to perform logistics missions or any other task for their benefit may qualify as military objectives and be made the object of attack.

Civil personnel operating such aircraft only lose their protection under IHL if they take a direct part in hostilities[855]. For example, if the crew is transporting weapons to a combat situation, they may be targeted. Conversely, crew members who do not take a direct part in hostilities (e.g. who are transporting weapons from their place of manufacture to a storage location) must be considered civilians protected by IHL.

2.2.1.1.4. Military medical aircraft

Aircraft that are exclusively assigned to a medical function, whether permanently or temporarily, enjoy special protection[856] and, like any medical unit or medical personnel, may only be made the object of attack if they lose such protection under IHL. In particular, medical aircraft lose their protection only if they are used to commit, outside their humanitarian duties, acts harmful to the enemy. However, protection will cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded[857].

Medical aircraft must bear their distinctive emblem. The immunity of medical aircraft in contact zones or in areas controlled by the opposing party is subject to prior agreement between the belligerents[858].

2.2.1.2. Protection of civilians and civilian objects and of persons *hors de combat*

2.2.1.2.1. Ground targets

Undeniably, contemporary warfare is, alas, not one that spares civilians. This is particularly the case in non-international armed conflicts where hostilities tend to take place in civilian populated areas. The intermingling of organized armed groups within the civilian population, as well as the use of civilians as human shields, are factors that contribute to this regrettable development.

It is prohibited to target the civilian population or individual civilians, and to conduct indiscriminate air strikes[859]. It is also prohibited to target civilian objects – residential areas, businesses, schools, places of entertainment and worship, transportation facilities, cultural property, hospitals, medical facilities, etc. – unless it makes, by its location, purpose or use, an effective contribution to military action and its total or

[854] AP I, Art. 52(2).
[855] Cf. Part 3, Chapter 3, Subsection 3.2.1., Focus on Direct Participation in Hostilities.
[856] GC I, Art. 36; GC II, Art. 39; GC IV, Art. 22.
[857] Cf. Part 3, Chapter 4, Subsection 4.1.2.
[858] GC IV, Art. 22; AP I, Arts. 26 and 27.
[859] AP I, Art. 48.

partial destruction, capture or neutralization offers, in the circumstances ruling at the time, a definite military advantage, or unless it has lost its special protection[860] (for the special protection afforded to certain civilian objects, see Part 3, Chapter 4, above). Compliance with those prohibitions is ensured by conducting a strict targeting process (see Part 3, Chapter 8, above) in accordance with the principles of distinction, proportionality and precautions, and other relevant rules governing the conduct of hostilities.

The principles of distinction, proportionality and precautions apply to combatants *hors de combat*[861] in the same way as to civilians. In air operation, any re-attack (i.e. any new air strike on the same target immediately following a first strike that did not achieve the desired effect) is therefore subject to taking specific precautions, i.e. using advanced sensors or establishing contact with ground troops to determine whether the first strike has neutralized the target. If combatants are *hors de combat* and expressing an intention to surrender, an immediate second attack is prohibited; conversely, combatants who remain engaged in combat may be made the object of a new strike. Those conducting air strikes must also take all feasible precautions not to target relief personnel or civilians who may have moved to the site of the attack, in which case a re-attack would be unlawful.

2.2.1.2.2. Parachutists in distress

It is prohibited to attack a person parachuting from an aircraft in distress during their descent, because this person is considered *hors de combat* unless they engage in hostile acts[862]. Upon reaching the ground in territory controlled by the enemy, they must be given the opportunity to surrender.

However, airborne troops are not protected by those provisions, so that the application of the rule can involve difficulties, for it is not always easy, in particular for combatants on the ground or at night, to distinguish between a parachutist in distress and a parachutist who is attacking. According to the ICRC's Commentary on AP I[863], it is the responsibility of belligerents to determine to which category a parachutist belongs.

2.2.1.2.3. Surrendering aircraft

Enemy military aircraft are military objectives by nature and may be made the object of attack, or may be diverted if the crew expresses their intention to surrender (for example a defector). Such intention can also be difficult to ascertain. Rocking the aircraft's wings, lowering the landing gear, flashing navigational lights and certain signals to enemy pilots such as pointing at the ground with a finger, or sending a distress message by radio, may be regarded as indications of an intent to surrender, but such intent can never be conclusively established.

2.2.2. Principle of proportionality in air warfare

Applying the principle of proportionality in aerial warfare is particularly challenging due to the complexity of air operations.

2.2.2.1. Attack against aircraft, and ground damage caused by a downed aircraft

Prior to an attack against an aircraft classified as military objective, a proportionality test must be conducted to assess:

- Any collateral damage likely to be caused to non-combatants on board the aircraft, in case of a hijacked commercial aircraft;
- Any collateral damage likely to be caused to other aircraft in flight, in case the missile or anti-

[860] *Ibid*., Arts. 48 and 52.
[861] *Ibid*., Art. 41.
[862] *Ibid*., Art. 42.
[863] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 42, §1643.

aircraft artillery fire were to miss target[864];
- Any collateral damage likely to be caused on the ground upon impact of the downed aircraft.

The first step considered against an aircraft is the use of non-deadly force, but the possibilities offered by such mode of action remain limited. Rather than resorting to armed force, interception is used to notify a civil aircraft that it must not enter an area of operations, to facilitate visual identification of an aircraft exhibiting suspicious behaviour, or to compel an aircraft to land or alter its course.

Where there is a military necessity to shoot down the aircraft, the presence and number of passengers on board is a major factor to take into account before deciding on the destruction of the aircraft.

Regarding collateral damage on the ground, the main impact area of the downed aircraft can only be estimated very roughly in the conduct of operations. The most appropriate time for attack must be assessed within strong time constraints and chosen such as to minimize foreseeable incidental civilian casualties and damage (e.g., where feasible, ensuring that the wreckage and any debris fall into the sea or onto sparsely inhabited areas).

2.2.2.2. Prohibition of complete bombardment of an area containing one or more military objectives

Certain methods of warfare are prohibited as indiscriminate types of attacks, such as area bombardments which strike military objectives and civilians or civilian objects without distinction. Area bombardment is an attack which treats as a single military objective a number of "*clearly separated and distinct*" military objectives located in an area where there are civilians or civilian objects[865].

Such method of warfare is prohibited as indiscriminate attack[866].

This prohibition applies only to populated areas or other areas containing a similar concentration of civilians or civilian objects. Thus, a military objective in an uninhabited area occupied by the enemy may be made the object of an area attack[867], provided that all precautions are taken to make sure that no civilians or persons *hors de combat* and no civilian objects are in that area.

2.2.3. Principle of precautions in air warfare

One of the specificities of air power is the ability to conduct deep strikes, beyond the front line and potentially in the vicinity of civilian populated areas.

Thanks to the accuracy of certain weapons used in current air operations, incidental civilian casualties and damage can be minimized.

However, this does not mean that air strikes are always risk free or without failings. Incidents can affect the precision of a strike, and also result in a failed shot.

Various measures can be implemented to minimize incidental civilian casualties and damage, and conduct air operations in compliance with the precautions provided for in Article 57(2) of AP I.

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[864] In some missile systems, such as the SAMP/T (*Système Sol-Air Moyenne Portée/Terrestre*, a French surface-to-air medium range air defence system), the firing function deactivates itself if the probability of hitting another aircraft or missing the target is too high.
[865] AP I, Art. 51(5)(a).
[866] AP I, Art. 51(4). See also ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 51, §1968.
[867] ICRC, *Commentary on the 1977 First Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts*, 1987, Art. 51, §1973.

2.2.3.1. Warnings

Effective advance warning must be given of attacks which may affect the civilian population, unless "*circumstances do not permit*", for example when the element of surprise in the attack is a condition of its success[868]. Such warning can be made by radio or by means of pamphlets, for example.

In practice, implementing this type of warning can bring difficulties, as it may lead to disclosing information about planned operations, such as time and place. Conversely, overly general warnings (such as pamphlets merely urging the population to move away from military targets) are hardly effective[869].

Pre-strike warnings do not relieve the attacking party of its obligation to take all other feasible precautionary measures. In particular, it must ensure that civilians who stay in the attacked area, whether willingly or not, remain protected.

2.2.3.2. Risk reduction measures through area observation

Measures to reduce the risk of collateral damage include several operational procedures. First, prolonged observation of recurrent human activity in an area (Pattern of Life) can be conducted before a strike using available intelligence, surveillance, and reconnaissance (ISR) capabilities, supplemented, where necessary, by assets on the ground to confirm information. This allows for the identification of civilian activities as well as of the most favourable times for a strike.

The choice of a specific time for strike can also help reduce the risk of incidental collateral effects. A night-time strike may be preferred for attacking a road or a railway station, while daytime may be decided for attacking a military objective located near an area where collected intelligence indicates that civilians are more present at night.

Observing an area prior to the moment of a strike ('scan for transient') to detect the passage of non-combatants near the point of impact is an additional precautionary measure. Based on collected information, a strike can be delayed as long as needed or, if necessary, cancelled altogether, or even diverted, in order to avoid undesired incidental casualties and damage.

2.2.3.3. The choice of munition

Aerial weapons do not all have the same accuracy. The use of guided munitions is not an obligation under IHL; unguided munitions may be used in certain situations.

However, the munition to be used must be chosen in accordance with the principles of distinction, precautions[870] and proportionality, and with all relevant rules governing the use of means and methods of warfare.

2.2.3.4. The angle and axis of attack

The angle of attack determines how the bomb explodes on the ground and the direction in which the fragments will travel. By choosing a specific angle of attack, it is possible to reduce the effect of fragments

[868] AP I, Art. 57(2)(c).

[869] The Report of the United Nations Fact-Finding Mission on the Gaza Conflict of 25 September 2009 (A/HRC/12/48) analyses the legality of several types of warnings used by the Israeli armed forces. It notes the effectiveness of the telephone warning given at 1:45 a.m. as a result of which up to 40 people could be evacuated before the area was attacked by a missile strike seven minutes later (§503). However, the report highlights the "*complete ineffectiveness*" of certain kinds of routine and generic warnings, such as those given before the artillery attacks on al-Wafa hospital (§§40 and 651). The report also condemned the practice of giving warnings by dropping lighter explosives on roofs (so-called roof knocking), even though civilians inhabiting the building apparently remained there despite warnings. According to the report, this technique constitutes a form of attack against civilians rather than a warning (§37).

[870] AP I, Art. 57(2)(a)(ii).

in one direction or another.

Moreover, calibrating the axis of attack makes it possible to take account of the fact that some munitions may fall beyond the intended point of impact. In the event of a malfunction of the munition (such as overshooting the target), a different axis of attack can enable the munition to explode in an area where its effects are likely to cause minimal incidental damage and casualties.

2.2.4. Principle of humanity and prohibition of unnecessary suffering

Under Article 35(2) of AP I, "*it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering*"[871].

In aerial warfare, the implementation of this obligation primarily involves controlling the effects of air-launched munitions.

Focus: Role and Use of Legal Advisors (LEGAD) in Air Operations

The role of LEGADs in air operations entails certain specificities.

1) The position of LEGADs in air operations structures

LEGADs engage directly with authorities responsible for the planning and conduct of operations, particularly if such operations involve kinetic aspects. Consequently, they must be able to monitor the progress of operations.

Within the Joint Force Air Component Headquarters (JFAC HQ), the LEGAD is stationed under the command of and liaises directly with the component commander. The LEGAD has also access to the Combined Air Operations Centres (CAOC)[872] or its equivalent, which is responsible for conducting and monitoring air operations.

Where the staff structure is particularly developed to conduct numerous and sustained operations, several LEGADs may be assigned within a single JFAC HQ. In such case, a senior officer will be specifically responsible for advising the higher levels of the JFAC (the commander and the component leaders), and one or more officers, under the authority of the senior officer, may be assigned to the CAOC or the equivalent structure. Where necessary, rotation systems will be implemented among them to ensure continuous real-time monitoring of operations.

In multinational operations involving France and led by another State which provides most of the staff structure, a French representative is designated to ensure that the air capabilities provided by France to the coalition are used in accordance with national directives. Such national representative may be referred to by different titles:

- National Representative (NR);
- Air Component Commander (ACC);
- National Approval Authority (NAA);
- Red Card Holder (RCH).

National representatives exercise their responsibilities with the help of their teams composed of technical advisors (specialists in the provided air assets, intelligence officers, targeting staff) and one or more LEGADs.

[871] To this end, many international instruments regulate the use of weapons by States parties (see Part 3, Chapter 5).
[872] NATO Allied Joint Publication AJP-3.3, *Allied Joint Doctrine for Air and Space Operations*, Edition B, Version 1, April 2016, Chapter 2, §2.1(4), p. 2-1.

2) The specific role of LEGADs in air operations: Disseminating IHL and the rules for using force

Aircraft must be used in compliance with strict procedures to minimize the inherent risks of air activities, which also applies in air warfare. Therefore, LEGADs must be familiar with all operational documents and regulations related to air engagement[873].

LEGADs are responsible for incorporating into operational documents provisions authorizing, restricting or prohibiting the use of force that must be observed by aircrews and those planning operations.

3) Decision support in the planning and conduct of air operations

The conduct of air campaigns involves the implementation of targeting processes that must be mastered, in particular by LEGADs[874].

Air operations are particularly transient, requiring great responsiveness. An air-to-ground engagement resulting in the delivery of munitions on a target of opportunity may last up to a few hours, but in most cases takes place within minutes. LEGADs must therefore be able to monitor closely the progress of operations involving air-launched munitions in order to advise decision-makers in a timely fashion on any legal risk arising from the evolving situation which may require prior additional checks or even the suspension of the strike.

Given the powerful kinetic effects of aerial weapons, capable of causing significant damage and casualties, decision-makers must take into account and assess any relevant factors brought to their attention by the LEGAD. In such situations, it is essential to estimate the consequences of an airstrike in light of the principles governing the conduct of hostilities to minimize potential collateral damage.

As regards the aftermath of air strikes, LEGADs involved in air operations may be tasked with the monitoring of consequences on the theatre of operations, ensuring in particular the proper handling of explosive remnants of war[875].

Air strikes unfold in such a time-compressed fashion that it is sometimes impossible for a LEGAD to advise decision-makers in real time, which is particularly the case in air-to-air engagements. The duration of an aerial confrontation between aircraft or between ground-to-air defence and aircraft is a matter of seconds to minutes.

The lack of real-time legal advice in such circumstances must lead decision-makers to focus on preparing air-to-air engagements by taking into account, as far upstream as possible and in close coordination with aircrews, legal constraints related to the different scenarios. High tactical responsiveness in such limited time requires prior preparation based on diagrams and flowcharts which translate legal constraints and predefined criteria into schematic possibilities for action that can be easily memorized and implemented by aircrews.

[873] Including, *inter alia*, the Special Instructions (SPINS) and Air Tasking Order (ATO) at the tactical level. See *ibid*., Chapter 1, §1.4(2), p. 1-7.
[874] See Part 3, Chapter 8.
[875] In compliance with the 2003 CCW Protocol on Explosive Remnants of War (Protocol V to the 1980 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).

CHAPTER 3: THE LAW OF OPERATIONS IN OUTER SPACE

Outer space is a crucial environment with respect to military operations, and it has become an operational domain in its own right[876]. Like the high seas and the Antarctica, outer space, as *res communis*, falls outside the sovereignty of States. However, this does not mean that outer space is a place where there is no law; rather, it is governed by general international law as well as particular international conventions.

3.1. Military space operations under the principle of peaceful use of outer space

The 1967 Outer Space Treaty[877] recognizes that the exploration and use of outer space must be carried out for peaceful purposes. France considers that this principle of peaceful use of outer space allows for the conduct of non-aggressive activities in space. Accordingly, this principle does not preclude the conduct of military space operations in outer space, in compliance with the various restrictions applicable to weapons of mass destruction (WMD) and celestial bodies.

3.1.1. Outer space is not delimited

There are two distinct approaches among States in the Committee on the Peaceful Uses of Outer Space (COPUOS)[878] regarding the definition and delimitation of outer space.

According to the "spatialist" approach, which supports the definition of a physical boundary between airspace and outer space, there is a tacit consensus that this artificial boundary is defined as the lowest orbit where an object can remain in orbit around the Earth, i.e. an altitude between 100 and 110 kilometres above mean sea level, corresponding approximately to the Kármán line[879]. In this approach, that boundary defines the lower limit of outer space, which is governed by international space law, and the upper limit of airspace, which is governed by international air law. Some States, such as Australia[880], Canada[881] or Denmark[882], have incorporated this delimitation of outer space into their domestic law.

Proponents of the "functionalist" approach determine the applicable legal regime based on the nature or use of objects (aircraft or space object) and not on the delimitation of the space where their activity takes place. The purpose and technical characteristics of the object in question determine whether the activity is of a 'spatial' nature or not. Criteria include the purpose of orbital insertion, i.e. whether the object is intended to be placed in orbit or beyond Earth orbits; if it is, then its function is necessarily space exploration and it is therefore subject to space law. The characteristics of the object are also determinative, including its ability to complete at least one full orbit around Earth. Thus, missiles that incidentally travel through outer space, without it being their main mission, do not fall under the scope of space law[883].

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[876] In June 2019, NATO Defence Ministers adopted NATO's first space policy, and by the end of the same year, Alliance leaders officially recognized space as the fifth operational domain, alongside air, land, maritime, and cyberspace (NATO, 2019).

[877] The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, commonly known as the Outer Space Treaty, was concluded on 27 January 1967, and entered into force on 10 October 1967. This treaty has been signed and ratified by all historical and recent spacefaring nations.

[878] Note by the Secretariat, Committee on the Peaceful Uses of Outer Space, 21 February 2012 (A/AC.105/889/Add.10).

[879] The Kármán line is the altitude above which the speed of aircraft – which can stay aloft only by generating aerodynamic lift at increasingly higher speed as air density decreases – would need to become so high that it would equal the first space velocity (or 'minimum space velocity'), i.e. the speed required to place an object in orbit.

[880] The Australian Government agrees that there is no universally agreed definition of 'space', nor is the term defined under their domestic law. The most relevant Australian law relating to this subject, the Space Activities Act No. 123 of 21 December 1998, was amended in 2002 to replace the term 'space' by "*area beyond the distance of 100 kilometers above mean sea level*". At the time of this change in its legislation, Australia declared that it did not wish to take a position on the delimitation of outer space.

[881] Canadian Space Agency Act, 1990.

[882] Denmark, Law on Activities in Outer Space, 3 May 2016, Chapter II – Definitions, "Outer Space": "*Outer space: The area located more than 100 kilometers above sea level*".

[883] Statement by the Minister of State attached to the Minister for Foreign Affairs in debates at the *Assemblée nationale*, the lower house of the French Parliament, meeting of 5 Mai 1970, French Government Gazette (*Journal official de la République française, Année 1970, n° 30 A. N., Séance du Mardi 5 Mai 1970*, in French only), p. 1515; Council of State (French highest administrative body), "Pour une

Focus: Suborbital Aircraft

On 21 June 2004, the US experimental private aircraft SpaceShipOne reached the altitude of 100 km and made what is considered the first privately funded human spaceflight in history. While the experimental phase involving the development and production of such suborbital vehicles, which often have hybrid design (part aircraft, part rocket), continues to this day, it is likely to be followed, in the relatively near future, by a phase of commercial exploitation.

The hybrid nature of these new modes of access to and return from space raises the fundamental question of what legal regime applies to them. Several answers are possible: air law regime under the "functional" approach (as suborbital vehicles do not complete a full orbit around the Earth), space law regime under the "spatial" approach (for vehicles that exceed the altitude of 100 km), a specific hybrid regime (combination of air law and space law), or even a *sui generis* regime. At this stage, no international consensus has emerged to determine the legal regime applicable to these activities.

French law adopts the "functionalist" approach and considers that "*international treaties and conventions relating to space aim to regulate space operations, namely the launching, control and use of space objects that are placed in Earth orbit or travelling beyond Earth orbits. Objects travelling through outer space that are not placed in orbit or do not travel beyond Earth's gravitational field are not governed by space law*"[884].

3.1.2. Use 'for peaceful purposes' of outer space

The peaceful use of outer space is the first rule of space law recognized by the United Nations[885].

This principle of peaceful use can be inferred from the preamble and body of the 1967 Outer Space Treaty, which provides that activities in the exploration and use of outer space by States parties must be carried out "*in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding*"[886], and that the States parties must, by sharing information, promote international co-operation in the peaceful exploration and use of outer space[887]. Furthermore, this principle of peaceful use is also reiterated in the 1979 Moon Agreement[888].

However, no international treaty explicitly defines the notion of 'peaceful use'. Certain States consider that this principle prohibits any military use of space, and that space would therefore be absolutely civilian and preserved directly and indirectly from the preparations and consequences of armed conflict. However, France, like other States, considers that only aggressive activities are prohibited.

3.1.2.1. Non-military use of outer space – the "idealistic" approach

The "idealistic" approach construes the use of outer space for peaceful purposes as the non-militarization of outer space. Certain States[889] interpret the 'peaceful use' principle as prohibiting any military use of space[890]; space would then be a civilian sanctuary directly and indirectly preserved from war.

According to this approach, the placement of any weapon in outer space is to be prohibited. A spacefaring nation engaging in military space activities in outer space would therefore engage in a practice considered

politique juridique des affaires spatiales" (For a Legal Policy on Space Activities, in French only), 6 April 2006, p. 70. See also News Conference of Secretary of Defence Robert S. McNamara at Pentagon, 3 November 1967, National Security File, Files of Charles E. Johnson, Box 11, Folder 4 "Bombs in Orbit – General (Ballistic missiles in orbit, FOBS, MOBS, etc.)", LBJ Library.

[884] Report of the *Assemblée nationale* on the draft law relating to space operations of 2 April 2008.

[885] UNGA resolution 1348 (XIII) of 13 December 1958 on the Question of the peaceful use of outer space.

[886] 1967 Outer Space Treaty, Art. III.

[887] *Ibid*., Art. XI.

[888] The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, commonly known as the Moon Agreement, was concluded on 18 December 1979, and entered into force on 11 July 1984.

[889] Including Sweden and the former Republics of the Union of Soviet Socialist Republics (USSR).

[890] M.S. McDougal, H.S. Lasswell & I.A. Vlasic, *Law and Public Order in Space*, New Haven, Yale University Press, 1963, p. 395.

unlawful[891].

3.1.2.2. France's realistic approach based on non-aggressive use of outer space

France endorses the realistic approach according to which outer space must be used for peaceful, i.e. non-aggressive, purposes[892].

In accordance with the provisions of the Outer Space Treaty – including the principles of the freedom of access to, and use of, space – and State practice, the military use of space is not prohibited.

Indeed, the Outer Space Treaty guarantees the freedom to use outer space in general[893] as well as the freedom of scientific research in particular; no space application, whether civilian or military, is *a priori* prohibited, as stated in the French Space Defence Strategy[894].

Moreover, military or dual-use space activities conducted by all major military powers since the Cold War[895] have never been contested by spacefaring nations, whether historical or recent, or by non-spacefaring powers.

In this regard, France has never considered that the Outer Space Treaty prohibits the conduct of military space activities. During debates at the *Assemblée nationale* (the lower house of the French Parliament) on the draft law authorizing the ratification of the Outer Space Treaty in 1970, the Minister of State attached to the Minister for Foreign Affairs recalled the three principles on which the treaty is based, namely: freedom of exploration and use of outer space; prohibition of any national appropriation of outer space; prohibition on placing in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, on installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner, on establishing military bases, installations or fortifications on celestial bodies, and on testing any type of weapons or conducting military manoeuvres on celestial bodies[896].

Those debates, which are based on the provisions of the Outer Space Treaty, do not refer to any general prohibition on military space activities. This position has been reaffirmed by the French Space Defence Strategy[897].

In light of the foregoing, the principle of peaceful use of outer space[898] therefore cannot be interpreted as authorizing only the deployment of strictly civilian objects into space.

However, the conduct of military space activities is subject to two limitations.

Firstly, Article III of the Outer Space Treaty provides that "*States Parties to the Treaty shall carry on*

[891] Hans Günter Brauch, *Military Technology, Armaments Dynamics and Disarmament – ABC Weapons, Military Use of Nuclear Energy and of Outer Space and Implications for International Law*, Mcmillan, 1989, pp. 471-475.
[892] The same applies to the high seas, the use of which by warships, whether for exercises or operations involving the use of force, is not contested, although the high seas are "*reserved for peaceful purposes*" under Article 88 of the 1982 United Nations Convention on the Law of the Sea.
[893] 1967 Outer Space Treaty, Art. I.
[894] French Space Defence Strategy, 2019, 1.1.2 A liberal legal framework.
[895] The conquest of space itself has been, since 1957, but a demonstration of technical and military capabilities, first by the USSR which launched the Sputnik satellite and thus demonstrated its ability not only to place a space object in orbit but also to fire an intercontinental ballistic missile carrying a WMD; the United States followed suit in 1958. The European stance is also informative: Under Article 2 of the Convention for the establishment of the European Space Agency, concluded in Paris on 30 May 1975, the Agency must carry out its missions "*for exclusively peaceful purposes*"; yet, the Agency has developed programmes serving both civilian and military objectives (e.g. the SPOT series, or Galileo), reinforcing the non-aggressive interpretation.
[896] Debates at the *Assemblée nationale*, the lower house of the French Parliament, meeting of 5 Mai 1970, French Government Gazette (*Journal official de la République française, Année 1970, n° 30 A. N., Séance du Mardi 5 Mai 1970*, in French only), p. 1515.
[897] French Space Defence Strategy, 2019, 1.1.2 A liberal legal framework, p. 16: "*The Outer Space Treaty permits the militarization and even weaponization of Earth orbits, provided that weapons of mass destruction are not deployed there*".
[898] See also, in that regard, Council of State (French highest administrative body), "Pour une politique juridique des affaires spatiales" (For a Legal Policy on Space Activities, in French only), 6 April 2006, p. 46.

activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations". Under the UN Charter, States must "*settle their international disputes by peaceful means*"[899] and "*refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*"[900].

In this context, the principle of 'peaceful use of outer space' means a 'non-aggressive use of outer space'. States must not engage in internationally wrongful acts in the conduct of their space activities, particularly such acts involving the threat or use of force, and, *a fortiori*, armed attack. However, they may prepare for defence and protect their space assets by developing, acquiring or adopting any necessary means or methods to safeguard their interests, except for means or methods prohibited under international law, including space law and international humanitarian law.

Secondly, certain military activities in space are explicitly prohibited. The 1967 Outer Space Treaty prohibits States parties from installing weapons of any kind, establishing military installations and conducting weapon testing or military manoeuvres on the Moon and other celestial bodies, which must be used exclusively for peaceful purposes[901]. Furthermore, States parties are prohibited from placing in orbit around the Earth any kinds of nuclear, biological or chemical WMD[902].

Apart from those two limitations, space[903] may be militarized and even weaponized[904]. Examples of such militarization include the placement in orbit around Earth of space objects that enable the production of target folders[905] or the conduct of precision strikes[906] in armed conflict, whereas weaponization includes the placement in orbit around Earth of space objects that are equipped with 'active defence' capabilities or self-defence systems. It is not prohibited to place conventional weapons systems[907] in orbit around Earth, subject to compliance with both *jus ad bellum* and *jus in bello*. No relevant sources of law provide for the classification of specific weapons systems as aggressive by nature, which would make them illegal under space law. Only intents and acts can be classified as aggressive (i.e. hostile), such as the threat or use of force[908].

3.1.3. Peaceful use of outer space is compatible with various types of military space operations

Military space operations span all activities carried out in, from and towards space in order to ensure the availability, tracking, safety and security of the national or national-interest space capabilities and services

[899] UN Charter, Art. 2(3),
[900] *Ibid*., Art. 2(4).
[901] 1967 Outer Space Treaty, Art. IV.
[902] As regards WMD and biological, chemical and nuclear weapons, see UNSC resolution 1540 of 28 April 2004, and UNGA resolution 32/84B of 12 December 1977, which defines WMD as "*atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons and any weapons developed in the future which might have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above*".
[903] France has signed (but not ratified) the Moon Agreement, which was adopted on 5 December 1979 in annex to UNGA resolution 34/68, and entered into force on 11 July 1984. In accordance with its article 1(2), France must refrain from placing weapons around the Moon and other celestial bodies. This prohibition does not apply to circumterrestrial space, nor to space between celestial bodies (interplanetary space).
[904] According to the French Space Defence Strategy (2019), militarization means "*the placement in orbit of satellites for military purposes, such as intelligence, navigation and telecommunication satellites*" and weaponization means "*the placement in orbit of systems capable of attaining objectives on Earth or in orbit, and not merely systems to support military operations*".
[905] For example, military or dual-use remote sensing satellites.
[906] Satellite navigation systems, including Global Navigation Satellite Systems (GNSS) such as GPS, GLONASS, Beidou and Galileo, enable precision strikes on military objectives using military frequencies, which contributes to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
[907] The Outer Space Treaty does not prohibit the placement of conventional weapons in orbit around Earth. In the 1927 Lotus case (France v. Turkey), the Permanent Court of International Justice held that "*restrictions upon the independence of States cannot therefore be presumed*". Everything that is not expressly prohibited under international law is, *de jure*, permitted.
[908] On the legality of the possession and use by States of certain weapons, see ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 246, § 47.

of a spacefaring nation that contribute to national security and the protection of the population[909].

Military space operations consist in operating space capabilities that provide services[910] in support of government authorities and military operations, thus helping to increase the effectiveness of action. They also include action taken in space to protect State assets and discourage any aggression.

Military space operations are organized around four functions[911]: space service support; space situational awareness; operations support; action in space.

3.1.3.1. Space service support

This function concerns the deployment, implementation and availability of space capabilities. It includes the following operations: launch and placement; operating launch pads; keeping satellites in service and in orbit; reconstituting capabilities (restoring, compensating for or replacing a diminished or missing capability, including the possible use of complementary allied or commercial capabilities).

3.1.3.2. Space situational awareness

Control of space situational awareness (SSA) is a prerequisite for the commercial exploitation of space and the conduct of military operations of all kinds.

SSA supplements and interprets information provided by space surveillance and tracking (SST) to assess threats to space systems and prevent risks of collision in space between active space objects and other objects. SSA is essential for coordination with other space actors to limit interactions or other material incidents.

3.1.3.3. Operations support

Space operations support refers to the use of space by the armed forces of States with space capabilities to support operations on Earth through the implementation and operation of payloads (on space platforms). Some space systems are used for intelligence, surveillance and reconnaissance (ISR), while others are used for satellite communications (SATCOM), early warning or monitoring of the overall space environment, and even play a role in positioning, navigation and timing (PNT). These diverse functions are essential capabilities in the conduct of terrestrial operations.

3.1.3.4. Action in space

In order to preserve freedom of access to and action in space, and to deter and thwart any party whose actions are unfriendly, unlawful or even aggressive, French military space operations include a specific component named ‘action in space’.

Action in space involves passive measures such as the resilience of all space assets, or preventive measures. It also includes active measures, such as the defence of space assets by space means, the use of which must comply with public international law.

3.1.4. Restrictions on the use of WMD in outer space

3.1.4.1. Definition of WMD

There is no universally agreed, exhaustive definition of WMD. However, the scope of this notion has been

[909] French Space Defence Strategy, 2019, 3.1.1 Military space operations.
[910] Observation; signals intelligence; early warning; communications; positioning, navigation and timing (PNT).
[911] French Space Defence Strategy, 2019, 3.1.1 Military space operations.

clarified by international legal instruments, including space agreements, and by United Nations Security Council (UNSC) resolutions.

The 1967 Outer Space Treaty and the 1979 Moon Agreement unambiguously classify nuclear weapons as WMD. Article IV of the Outer Space Treaty provides that "*States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner*". Article 3(3) of the Moon Agreement develops this proscription by prohibiting States Parties from placing such weapons in orbit around, or on another trajectory to or around, celestial bodies (other than the Earth) and from placing or using such weapons on or in such celestial bodies.

The UNSC also clarified the notion of WMD. In its resolution 1540 (2004) on the non-proliferation of WMD, the UNSC classifies nuclear, chemical and biological weapons as WMD and affirms that proliferation of such weapons, as well as their means of delivery, constitutes a threat to international peace and security[912]. Furthermore, UNSC resolution 1810 (2008) requires States to ramp up their legal arrangements to prevent proliferation in all its aspects of WMD, their means of delivery and related materials. This obligation was introduced under French domestic law by Act No. 2011-266 of 14 March 2011 on combating the proliferation of weapons of mass destruction and their means of delivery.

To date, only nuclear weapons, chemical weapons as defined by the 1993 Chemical Weapons Convention, biological or bacteriological weapons as defined by the 1972 Biological Weapons Convention, and WMD defined as "*atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons and any weapons developed in the future which might have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above*"[913] are classified as WMD under international law.

3.1.4.2. Use of WMD in outer space: restrictions and permissions

3.1.4.2.1. Restrictions

It is prohibited to place in orbit any space object carrying WMD under Article IV of the Outer Space Treaty, which prohibits States Parties from "*plac[ing] in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction*". The prohibition on placing WMD in orbit intersects with the issue of defining the boundary between airspace and outer space, and consequently with the criterion of ability to complete a full orbit around Earth required to classify an object as a space object.

According to France's "functional" approach, an object cannot be categorized as a space object placed in orbit if that object is not able to complete a full orbit around the Earth. It follows that ballistic missiles are not regarded as space objects[914]; the same applies to objects travelling only on part of Earth orbits.

Article IV of the 1967 Outer Space Treaty and Article 3(3) of the Moon Agreement establish the principle of prohibition of installing any kind of WMD on celestial bodies, including the Moon, which must be used "*exclusively for peaceful purposes*".

Furthermore, in accordance with Article 1(1) of the Moon Agreement, the prohibition of placing WMD in

[912] UNSC resolution 1540 of 28 April 2004. In its resolutions 1810 (2008), 1673 (2006), 1977 (2011), 2325 (2016) and 2572 (2021), the UNSC reaffirmed that "*proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security*".
[913] UNGA resolution 32/84B of 12 December 1977. See also W. Seth Carus, Defining "Weapons of Mass Destruction", *Occasional Paper 8*, Centre for the Study of Weapons of Mass Destruction, p. 24.
[914] Ballistic missiles only arc or pass through space, they are therefore not classed as space weapons subject to space law, nor to the prohibition on placing WMD in space.

orbit is extended to all celestial bodies within the solar system (other than the Earth)[915], and under Article 3(3) to any "*other trajectory to or around the Moon*". Under the Outer Space Treaty, that prohibition was provided for only for circumterrestrial orbits.

While space law prohibits the testing of any type of weapons on celestial bodies, the prohibition of WMD tests in space is provided for under international law of arms control. Nuclear tests in space are prohibited both under Article 1 of the 1963 Partial Test Ban Treaty[916] and Article 1 of the 1996 Comprehensive Nuclear-Test-Ban Treaty[917]. The use, and therefore testing, of chemical weapons is prohibited under Article 1 of the 1993 Chemical Weapons Convention[918], while the use of biological or bacteriological weapons is prohibited under Article 1 of the 1972 Biological Weapons Convention[919].

The use, in certain circumstances, of nuclear weapons in armed conflict is, *de jure*, not specifically prohibited[920].

3.1.4.2.2. Transit of WMD through outer space

The 'placement' of objects carrying WMD in orbit around the Earth or any other celestial bodies, or in any other manner in space, is subject to a complete prohibition. However, the 'transit' of such objects through outer space is permitted provided that they are not classed as space objects governed by space law.

This applies to ballistic missiles[921], because they only pass through space in their trajectory from one point of the Earth to another and are therefore not considered to be space objects placed in orbit around Earth[922].

Transit of WMD through space is lawful only if it involves WMD the use of which is not specifically prohibited. The transit of nuclear deterrent through outer space is not prohibited by international law, including space law.

3.2. Peacetime military space operations are governed by general international law and space law

3.2.1. Space law – the *lex specialis* applicable to peacetime military space operations

3.2.1.1. Freedom of access to space

The principle of freedom of access to space was established under Article I of the 1967 Outer Space Treaty. It guarantees States the right to launch objects into space and to place space objects in orbit, unless such activities are prohibited under international law (such as placing WMD in orbit). However, this freedom must

[915] More precisely, Article 1(1) specifies that "*the provisions of this Agreement relating to the Moon shall also apply to other celestial bodies within the solar system, other than the earth, except in so far as specific legal norms enter into force with respect to any of these celestial bodies*".
[916] The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water was signed on 5 August 1963 in Moscow, and entered into force on 10 October 1963. France did not sign this treaty.
[917] The Comprehensive Nuclear-Test-Ban Treaty was adopted by the UN General Assembly on 10 September 1996, but it has not yet entered into force due to a lack of ratifications. However, France, which signed it on 24 September 1996 and ratified it on 6 April 1998, applies its provisions nonetheless.
[918] The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction was signed in Paris on 13 January 1993 and entered into force on 29 April 1997.
[919] The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction was signed on 12 April 1972 and entered into force on 26 March 1975.
[920] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 262, §§95-97.
[921] However, space launch vehicles are included in the category of space objects in accordance with Article 1(d) of the Convention on International Liability for Damage Caused by Space Objects, which was signed on 29 March 1972 and entered into force on 1 September 1972.
[922] Cf. Statement by the Minister of State attached to the Minister for Foreign Affairs in debates at the *Assemblée nationale*, the lower house of the French Parliament, meeting of 5 Mai 1970, French Government Gazette (*Journal official de la République française, Année 1970, n° 30 A. N., Séance du Mardi 5 Mai 1970*, in French only), p. 1515.

be exercised while respecting the complete and exclusive sovereignty of States over their respective national airspace. Accordingly, any State that wishes to exercise its freedom of access to space must ensure that this will not involve entering another State's airspace without its authorization, during both ascent and descent of the space object. The State's responsibility may also be entailed where the space object re-enters the atmosphere in an uncontrolled manner. For example, when the Soviet satellite Cosmos 954 disintegrated in January 1978, debris from the satellite was deposited on Canadian territory, following which the Government of Canada presented a claim for compensation for damage resulting from the intrusion into Canadian airspace of a Soviet space object, which constituted a violation of Canada's sovereignty[923].

In order to prevent such risks, States have, where possible, situated their space launch infrastructures near international waters (Cape Canaveral, Kourou, Satish Dhawan, Vandenberg, etc.) or away from the territory of other States (Baikonur, Plesetsk, Taiyuan, Xichang, etc.).

The interplay between freedom of access to space and the State's sovereignty over its national airspace is sometimes determined by international agreement. For example, the Russian Federation and Kazakhstan entered into an agreement regarding the Baikonur Cosmodrome operated by Russia within Kazakhstan, under which Russia may use Kazakh airspace when launching space objects from this spaceport[924].

3.2.1.2. Freedom of exploration and use of space

The principle of freedom of exploration and use of space, which is provided for under Article I of the 1967 Outer Space Treaty, has a broad scope. It applies to space, including Earth orbits, and to celestial bodies, including the Moon, and their orbits, and it concerns the exploration and use of space – whereas the term 'use' is not defined under international space law.

This principle means that every State is free to undertake space activities and, consequently, to explore and use space, provided that such activities are not prohibited by space law and are "*carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development*"[925]. In keeping with this perspective, it is that same principle of freedom that warrants the use of space by defence bodies.

Under this principle, no State can subject another State to any restrictions or conditions on its freedom to explore and use space in accordance with international law[926] (see Subsection 3.2.1.3. below regarding the establishment of safety or exclusion zones), excluding the specific authorizations needed for a space object to travel through the airspace of other States in ascent or descent. Unlike airspace, outer space is thus a space of freedom for States, which also explains why its definition and delimitation continue to be debated (see Subsection 3.1.1. on the delimitation of outer space above).

It should be noted that the principle of freedom of exploration and use of space is recognized only for the benefit of States. Private space activities are not prohibited, but they are assimilated to government activities in accordance with Article VI of the Outer Space Treaty which provides that "*States Parties to the Treaty shall bear international responsibility for national activities in outer space […], whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty*". The freedom of non-governmental entities thus appears to be attached to that of States.

[923] Settlement of Claim between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954" of 2 April 1981, §21.
[924] Memorandum between the Russian Federation and the Republic of Kazakhstan of further development of cooperation concerning ensuring functioning of the Baikonur complex, concluded on 19 June 2000.
[925] 1967 Outer Space Treaty, Art. I.
[926] *Ibid*.

3.2.1.3. Principle of non-appropriation

The principle of non-appropriation of outer space is one of the cardinal principles of space law. This principle originates from customary law[927] and was codified in Article II of the 1967 Outer Space Treaty, under which "*outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means*". The status of outer space thus differs from that of the atmosphere, which is governed by the principle of complete and exclusive sovereignty of States over their respective national airspace[928]. As outer space may not be subjected to national appropriation[929], it may be explored and used without any authorization, provided that international law and the interests of other States are respected.

The principle of non-appropriation of the Moon and other celestial bodies within the solar system, other than the Earth, is also provided for in the 1979 Moon Agreement[930]. That treaty not only specifies that the Moon, other celestial bodies, and their natural resources are the common heritage of mankind[931] but also provides for the obligation for States parties to establish an international regime governing the exploitation of the natural resources of celestial bodies as such exploitation is about to become feasible[932]. The prospect of having to share the profits of exploiting the natural resources of celestial bodies with other States has led most space powers, whether historical or recent, not to sign or ratify the Moon Agreement. However, they remain bound to comply with the customary principle of non-appropriation.

To date, there is no international consensus regarding appropriation of the natural resources of celestial bodies[933]. In particular, certain States argue that the principle of non-appropriation of celestial bodies does not apply to minerals and other resources that could be extracted from them, and have therefore enacted laws to authorize and organize the private exploitation of these resources[934]. International or multilateral cooperation initiatives, such as the Artemis program[935], are also underway with a view to regulating future civil space exploration activities, both on the Moon and eventually on or around other celestial bodies.

Certain activities conducted in space as well as on celestial bodies may involve establishing safety or security zones in outer space. Their legality is examined in light of applicable law, particularly the principle of non-appropriation.

The principle of non-appropriation does not preclude the establishment of safety or security zones in outer space, including the Moon and other celestial bodies, nor do the international legal instruments governing space activities, which do not contain any relevant provisions on this matter.

Establishing safety or security zones in outer space is therefore permitted, provided that international law

[927] UNGA resolution 1962 (XVIII) of 13 December 1963, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, A/RES/1962(XVIII). This resolution was adopted unanimously.
[928] 1944 Chicago Convention on International Civil Aviation, Art 1.
[929] However, under Art. VIII of the Outer Space Treaty, a State on whose registry an object launched into outer space is carried retains jurisdiction and control over such object, and over any personnel thereof (see Subsection 3.2.1.6. below).
[930] 1979 Moon Agreement, Art 11(2).
[931] *Ibid*., Art 11(1).
[932] *Ibid*., Art 11(5).
[933] The regulation of space resource exploitation has been on the agenda of the UNCOPUOS Legal Subcommittee since 2017.
[934] For example, the United Arab Emirates, the United States of America, Japan and Luxembourg.
[935] The Artemis program of the National Aeronautics and Space Administration (NASA) is primarily intended to re-establish a human presence on the Moon, with a first lunar landing planned for 2024. Its long-term goal is to establish a permanent lunar base. According to the NASA, the exploitation of natural resources, including lunar water ice, is an essential condition for the program to succeed.
Under the Artemis program, interested States politically commit to adhere to a set of principles (peaceful purposes, transparency, interoperability, assistance, registration, open sharing and public release of scientific data, protection of historic sites and artifacts, exploitation of space resources, and coordination) to be respected in the conduct of their civil space activities (space activities of States and their national space agencies) to explore and use the Moon and Mars as well as their orbits, Lagrange points, comets and asteroids. The Accords were originally signed on 13 October 2020 by representatives of the national space agencies of eight countries: Australia, Canada, Italy, Japan, Luxembourg, the United Arab Emirates, the United Kingdom, and the United States. Other States have since joined the program.

and the rights and freedoms of other States are respected. In particular, the establishment and implementation of such zones cannot result in affecting the rights and freedoms of other States within them, nor in creating sovereign rights over the portions of outer space concerned or interference with the freedom of access to, and exploration and use of, space, including the Moon and other celestial bodies.

In this regard, the establishment and implementation of space defence identification zones (SDIZ) in space, including the Moon and other celestial bodies, are controversial. SDIZ may be established around satellites of interest for national security protection or by military necessity, but for their legality under international law not to be challenged, their creation must, *inter alia*, not entail any extension of sovereignty as per Article II of the Outer Space Treaty. Under current law, this negative obligation seems difficult to reconcile with the fact of requiring prior identification to authorize access to the SDIZ[936]. Indeed, requiring identification to authorize – or not – access to a delimited zone of space could be interpreted as a unilateral manifestation of sovereignty, a sustained appropriation of the concerned part of outer space, or an infringement of the freedom to explore and use space. Under these circumstances, the legality of these zones appears dubious, which, in turn, limits the spectrum of responses permitted under international law in the event of refusal to provide identification, or of unauthorized entry into these zones.

On the other hand, the establishment and implementation by States of safety zones in space seem more consensual, especially when these zones aim to prevent and, in any case, minimize potentially harmful interference that could be caused to other parties by national activities or experiments in outer space, including the Moon and other celestial bodies. Where that is in fact their purpose, and provided that other States or their operators are not hindered from accessing a region of space, a segment of space orbit or a portion of a celestial body, establishing such safety zones can be a precautionary measure taken by a State under Article IX of the Outer Space Treaty as part of the obligation to "*undertake appropriate international consultations*" to mitigate harmful interference with activities of other parties. Conversely, the establishment of such zone encourages other parties to provide identification to and coordinate with the implementing State to mitigate potentially harmful interference with its activities within that zone. However, other parties retain full discretion to enter the space safety zone without prior coordination, as they are not required to undertake such consultations[937]. Thus, entry into a space safety zone does not appear to constitute an internationally wrongful act warranting the taking of countermeasures[938].

In any case, the establishment, implementation and removal of safety or security zones in outer space, including the Moon and other celestial bodies, should be publicized in order to inform other space users of their existence and to contribute effectively not only to the transparency but also to the security of space activities.

Furthermore, as some uses of outer space may result in a lasting exclusion of certain space actors in favour of one party, the implementation of the principle of non-appropriation is sometimes organized by the international community so that space activities can be "*carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development*"[939]. This is the case regarding the allocation of radio frequency bands and orbital positions, including in the geostationary-satellite orbit.

The distribution of frequencies and orbital positions is carried out within the framework of the International Telecommunication Union (ITU). The ITU *allocates* frequency bands of the radio spectrum to different categories of telecommunication services, *allots* them to States based on these uses, and registers frequency

[936] In SDIZ, the presence of civilian satellites of other States would be authorized subject to prior notification, while the presence of such States' military satellites would be prohibited (in which case a SDIZ would amount to a 'keep-out zone' or space exclusion zone) unless agreed otherwise.
[937] 1967 Outer Space Treaty, Art. IX.
[938] However, in the absence of any prior consultation or notification, entry into a space safety zone can lawfully give rise to close monitoring by the implementing State seeking to protect its interests (prevention of collision, mitigation of potentially harmful interference, early detection of threats). In this regard, uncoordinated entry into a safety zone may, depending on the context, indicate malicious intent (espionage, threat of force, conduct of an attack, etc.).
[939] 1967 Outer Space Treaty, Art. I.

assignments and any associated orbital positions in the geostationary-satellite orbit to prevent harmful interference between the radio stations of different States. At the national level, State agencies (in France, the *Agence nationale des fréquences*, National Frequency Agency) then *assign* frequencies to radio stations. The Ministry of Defence is represented on the board of directors of this Agency by the general officer in charge of frequencies, who is attached to the director general of digital and information and communication systems. This officer also represents the interests of the Ministry of Defence in the field of radio frequency at the international, European and national levels.

The distribution of frequency bands and orbital positions is governed by the principle of "first come, first served". The proliferation of actors and increasing needs have led to tensions in the allocation of these scarce resources. Strategies to circumvent these tensions have emerged, including the reservation, by States, of an orbital position and corresponding frequencies in advance for a fictitious satellite system project for potential future uses (in the context of another project whose incompleteness would not have allowed for such allocation) or for commercial resale to another user (speculation). Faced with this situation, the ITU has adapted its procedures to combat this practice known as 'paper satellites'.

3.2.1.4. Principle of international responsibility for national space activities

Under Article VI of the 1967 Outer Space Treaty[940], every State bears international responsibility for all its national activities in space, including those conducted by non-governmental entities such as private companies. To prevent any violation of space law by private entities, States parties are required to authorize and continuingly supervise the space-related activities of those entities, if necessary by incorporating this obligation into their domestic law[941].

Based on a literal interpretation of this article, any private space activity (launch, space manoeuvre) that constitutes an internationally wrongful act would be attributable to the State. This means that a victim State would be justified in taking necessary measures[942] to end the wrongful act if such act can be linked to a State (i.e. to a territory, a national, or a national registry). The victim State would not have to demonstrate that the private entity acted on the instructions of, or under the direction or control of, that other State.

According to this interpretation, the international responsibility of a State could be entailed for any internationally wrongful act resulting from a space activity, conducted from its territory or by one of its nationals, of which it had no knowledge or which it did not authorize[943].

Such automatic attribution of private space activities to a specific State does not guarantee the identification of the true instigator of the internationally wrongful act. Therefore, it appears more appropriate in such cases to rely on the general mechanism of the responsibility of States for internationally wrongful acts, as under this mechanism the conduct of a person or group of persons is considered an act of a State only if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

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[940] "*States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty*".

[941] For example, Australia's Space Launch Activities Act or France's Space Operations Act (Amended Law No. 2008-518 of 3 June 2008 concerning space operations).

[942] Faced with certain incidents, a victim State may consider diplomatic responses, countermeasures, or even coercive action involving its armed forces in the event of acts amounting to an armed attack.

[943] For example, in January 2018, the U.S. company Swarm Technologies procured the launching of four picosatellites as secondary payloads on an Indian rocket, which were not authorized by the Federal Communications Commission, the independent U.S. authority in charge of telecommunications, and was ultimately fined $900,000. Based on a literal interpretation of Article VI of the Outer Space Treaty, the United States of America could have been held responsible for Swarm Technologies' conduct, i.e. for the placement in orbit or operation of any of the satellites launched without the authorization or knowledge of the U.S. government.

In light of the foregoing, Article VI of the Outer Space Treaty should be interpreted as imposing on every State party a particular international obligation to authorize and continuingly supervise the space-related activities of non-governmental entities, and not as automatically entailing the responsibility of that State for any internationally wrongful act that may be committed without its knowledge or against its will.

3.2.1.5. Principle of international liability for damage caused by space objects

The principle of the States' international liability for damage caused by their space activities appears to be corollary to the principle of freedom of access to, and exploration and use of, outer space.

Due to the highly dangerous nature of space activities and as a corollary to the principle of freedom, spacefaring nations have agreed to guarantee non-spacefaring States' nationals against risks resulting from the conduct of such activities. Consequently, an adequate regime for compensation for damage was established under international law. This regime is based on the principle that a State which launches, or attempts to launch, an object into outer space (the 'launching State'[944]) is internationally liable for any damage caused to another State by such object on the Earth, in air or in outer space. It is possible, and even common, that the same launch is carried out jointly by two or more States, which are then all 'launching States' within the meaning and for the purposes of the Convention on International Liability for Damage Caused by Space Objects. In such case, the launching States are jointly and severally liable for any damage caused[945] and the victim State can take action against any one of them for a full measure of compensation.

This international liability for damage is set forth in Article VII of the 1967 Outer Space Treaty and was specifically elaborated upon under the 1972 Convention on International Liability for Damage Caused by Space Objects, which specifies the constituent elements of such liability. Under both instruments, there are two types of liability depending on whether the damage occurs in the air, on Earth[946] or in outer space[947]. To date, no claim has ever been presented pursuant to those instruments, i.e. on grounds of a State's international liability for damage caused by its space activities. The Canadian claim for the disintegration of the Soviet satellite Cosmos 954 in 1978 was settled through diplomatic channels, not through international litigation.

The principle of international liability for damage caused by space objects was incorporated into the French legal system under the 2008 Space Operations Act[948]. This law clarifies in particular the division of responsibility between the State and the 'operator', defined as any natural or legal person who, under the responsibility of that State and independently, launches, or attempts to launch, an object into outer space or ensures the control over a space object while in outer space, including the Moon and other celestial bodies, as well as, if applicable, while its return to Earth. The operator is liable for any damage caused to other parties as a result of the operation they conduct, up to an amount defined under the authorization granted to the operator by the administrative authority within a range established by law. The French Amending Finance Law of 30 December 2008 sets this range between 50 and 70 million euros[949]. However, above this amount borne by the operator, the State is liable for damage caused to property, persons or the environment. Such coverage by the State is corollary to the operator's compliance with their professional, moral, financial[950] and technical obligations under the law.

The international responsibility under Article VI and the international liability under Article VII of the Outer Space Treaty are distinct from one another: While the former concerns space activities and aims to ensure the lawfulness of such activities through governmental supervision, the latter concerns space objects and

[944] 1972 Convention on International Liability for Damage Caused by Space Objects, Art. I: "*The term 'launching State' means: (i) A State which launches or procures the launching of a space object; (ii) A State from whose territory or facility a space object is launched*".
[945] *Ibid*., Art. V.
[946] Strict, absolute and unlimited liability (*ibid*., Art. II).
[947] Liability for fault (*ibid*., Art. III).
[948] Amended Law No. 2008-518 of 3 June 2008 concerning space operations.
[949] Amending Finance Law No. 2008-1443 of 30 December 2008, Art. 119.
[950] Every operator is required to take out insurance covering damage and loss that may be caused to other parties by a space object.

aims to ensure compensation for any damage caused by such objects to other parties.

3.2.1.6. Principle of jurisdiction and control over registered space objects

The registration of space objects primarily serves two objectives which are both essential for the safety and sustainability of space activities. Registration first allows for the identification of the launching State, and ensures that activities conducted aboard the space object remain under the jurisdiction and control of a State, even if the nationality of the operator changes while the satellite payload is being operated, for example.

To ensure that space objects and the personnel aboard them remain subject to national jurisdiction and control after their launch into space, space objects must be registered. This rule is provided for, in nearly identical terms to those of the declaration adopted unanimously by the UN General Assembly on 13 December 1963[951], under Article VIII of the Outer Space Treaty: "*A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body*". It further adds that if space objects or component parts thereof are found beyond the limits of the State on whose registry they are carried, they must be returned to that State[952]. Accordingly, the ability of a State to assert its jurisdiction and control over objects launched into outer space is clearly contingent upon their registration on the national registry. This creates an effective legal connection between the space objects and the State of registry.

The registration of space objects on a national registry is an obligation which has been provided for by the 1967 Outer Space Treaty and specifically developed by the 1975 Registration Convention[953]. It applies to all objects, whether civilian or military, that are "*launched into Earth orbit or beyond*"[954]. It does not apply to objects that cannot be placed in orbit or escape Earth gravitational pull, such as suborbital vehicles or ballistic missiles (see Subsection 3.1.1. on the delimitation of outer space above).

Registration of space objects means that a State which launches any object into outer space must carry that object on its national registry, and then notify that registration to the UN Secretary-General so that they can, in turn, record this information in the international registry under their responsibility. The contents of the national registry and the conditions under which it is maintained are determined by the State of registry concerned [955] . Accordingly, in cases where France is the State of registry under Article II of the 1975 Registration Convention and, where applicable, other international agreements, space objects are carried on a registry maintained on behalf of the Government by the National Centre for Space Studies (*Centre national d'études spatiales*) according to the procedure determined by decree of the Council of State (France's highest administrative body)[956]. That procedure is detailed in the implementing regulations of French space law, particularly in Articles 14-1 to 14-6 of Decree No. 84-510 of 28 June 1984, as amended, relating to the National Centre for Space Studies[957] and in the order of 12 August 2011 establishing the list of information necessary for the identification of a space object[958].

Each time a State carries a space object on its national registry, it is required to furnish to the UN Secretary-General, as soon as practicable, the following information: (a) name of launching State or States; (b) an appropriate designator of the space object or its registration number; (c) date and territory or location of

[951] UNGA resolution 1962 (XVIII) of 13 December 1963, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, A/RES/1962(XVIII).
[952] 1967 Outer Space Treaty, Art. VIII.
[953] 1975 Convention on Registration of Objects Launched into Outer Space, commonly known as the Registration Convention.
[954] *Ibid*., Art. II(1).
[955] *Ibid*., Art. II(3).
[956] French 2008 Space Operations Act, Art. 12.
[957] For example, in accordance with Art. 14-2 of Decree No. 2009-644 of 9 June 2009, the operator is required to transmit the requested information to the National Centre for Space Studies no later than sixty days after the launch.
[958] Order in application of Title III of Decree No. 84-510 of 28 June 1984 relating to the National Centre for Space Studies.

launch; (d) basic orbital parameters, including nodal period, inclination, apogee and perigee[959]; and (e) general function of the space object[960]. Additionally, the State must "*notify the Secretary-General of the United Nations, to the greatest extent feasible and as soon as practicable, of space objects concerning which it has previously transmitted information, and which have been but no longer are in Earth orbit*"[961]. Furthermore, the State may, from time to time, provide the UN Secretary-General with additional information concerning a space object carried on its registry[962]. The registration process is thus organized to provide flexibility of application to the States parties and acknowledges that the transmission of certain information to the UN Secretary-General may not be feasible for confidentiality reasons.

Registration is the prerogative of the launching State, or of one of the launching States where the launch was jointly carried out[963]. This also covers the scenario where, during the operational phase, the ownership of the space object is transferred from the State of registry to one of the other launching States. In such case, in accordance with the relevant framework, the transfer of jurisdiction and control that typically accompanies the ownership transfer is effective when the object is removed from the registry of the selling launching State and carried on that of the acquiring launching State. It should be noted that under Article IV(2) of the Registration Convention, the selling launching State is not required to notify the UN Secretary-General of the change in ownership of the space object.

The 1975 Registration Convention does not provide for the possibility for a State that is not a launching State to register a space object; however, this is not specifically precluded by any of its provisions. Furthermore, it is not forbidden under the Registration Convention, nor under the Outer Space Treaty or the Convention on International Liability for Damage Caused by Space Objects, that a State – or a natural or legal person under its jurisdiction – acquires ownership of a space object launched into outer space where that State does not qualify as launching State with respect to that object.

3.2.1.7. Principle of due regard to the corresponding interests of States

Under Article IX of the 1967 Outer Space Treaty, States "*shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty*". This notion of due regard for the interests of other States, which is also mentioned several times in the 1982 law of the sea Convention[964], must be understood as an obligation not to interfere with the space activities of other States, especially in respect to control over satellites.

That article also provides that "*if a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment*".

It is the responsibility of the State planning an activity or experiment to determine whether that activity or experiment may cause potentially harmful interference. Although a State may request appropriate international consultations in respect to space activities of another State, Article IX of the Outer Space Treaty does not make the conduct of a potentially harmful activity contingent upon any agreement from other States.

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[959] According to the UN Office for Outer Space Affairs, 'nodal period' means the time for the satellite to orbit the Earth; 'inclination' means the angle from the equator of the orbit of the satellite; 'apogee' means the furthest distance the orbit is from the Earth; and 'perigee' means the closest distance the orbit is from the Earth.
[960] 1975 Registration Convention, Art. IV(1).
[961] *Ibid*., Art. IV(3).
[962] *Ibid*., Art. IV(2).
[963] 1975 Registration Convention, Art. I(c): "*The term 'State of registry' means a launching State on whose registry a space object is carried in accordance with article II*"; Art. II(1): "*When a space object is launched into Earth orbit or beyond, the launching State shall register the space object […]*"; and Art. II(2): "*Where there are two or more launching States in respect of any such space object, they shall jointly determine which one of them shall register the object […]*".
[964] 1982 UN Convention on the Law of the Sea, Arts. 27, 62, 116, 125, 148 and 267.

In armed conflict, these provisions continue to apply, in particular where attacks create space debris, as such debris can hinder other States from carrying out certain space activities.

3.2.2. Military space operations are also subject to general public international law

3.2.2.1. Military space operations must comply with public international law

Under the 1967 Outer Space Treaty, States must carry on space activities in accordance with international law[965]. This includes the law on the use of force (*jus ad bellum*) as well as the law governing the conduct of hostilities (*jus in bello*).

Military space operations are therefore not prohibited by space law and remain governed by public international law.

3.2.2.2. State responses to hostile actions in space

3.2.2.2.1. Retaliation for unfriendly acts

No space law instrument defines the notion of 'unfriendly act'[966]. The various United Nations outer space treaties and principles do not provide a clear framework for the classification of such acts[967].

However, it can generally be understood that an unfriendly act is any conduct (act or omission) by a State which adversely affects the interests of another State without constituting a violation of an international obligation of the former State.

Examples of such unfriendly acts include: the unintentional creation of orbital debris, or the intentional creation of such debris, however not directly aimed at disrupting another State's satellite (e.g. the test of an anti-satellite missile by a State against one of its own satellites), unintentional jamming, or observation or intelligence activities resulting from a spacecraft approach at a potentially dangerous distance, or at a distance, albeit safe, such that the missions of the approached satellite must be changed.

The implementation of retaliatory measures (retortion) essentially depends on a political assessment of the situation and of the adequacy of the response, in accordance with international law. However, the targeted State is not required to legally justify the adoption of such measures.

Possible measures of diplomatic retortion include: (a) summoning the ambassador of the unfriendly State, recalling the ambassador stationed in the unfriendly State; (b) temporarily and partially breaking off diplomatic relations, for instance suspending security dialogues and cooperation, cancelling visits, etc.; (c) expelling diplomats.

Depending on the situation, retortion measures may be made public or remain confidential.

[965] 1967 Outer Space Treaty, Art. III.

[966] The UNGA resolution 2625 of 24 October 1970 specifies what should constitute friendly relations and co-operation among States under principles of international law.

[967] With the notable exception of the ITU, a specialized agency of the United Nations, no universal organization has acquired international legitimacy or means to regulate the use of outer space. The ITU's mission includes allocating the limited resources of radio frequency spectrum and geostationary orbits for telecommunications services. It is based on the principle of international cooperation between governments (the Member States) and the private sector. However, it does not have authority to arbitrate conflicts.

Retortion measures[968] are intrinsically lawful[969].

3.2.2.2.2. Countermeasures for internationally wrongful acts

Under Article 2 of the 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts, "*there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State*". Furthermore, "*an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs*"[970]. Spacefaring nations are all subject to the general rules of international law.

Therefore, "*if a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'counter-measures'*", as stated in the Reports of International Arbitral Awards[971]. That arbitral award was also confirmed by Article 22 of the Draft articles on Responsibility of States for Internationally Wrongful Acts: "*The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State*". Accordingly, in order to ensure respect for and protect its interests, a State may adopt measures that are inconsistent with its international obligations to respond to a situation that constitutes a breach of an international obligation by another State.

The purpose of such countermeasures is not to punish a State for its conduct; rather, it aims to put an end to the internationally wrongful act of which a State is a victim, in accordance with the obligations under Article 50 of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

Countermeasures, which must comply with the principles of necessity and proportionality, are lawful provided that the following conditions are met: (i) the action is taken in response to an initial act that is unlawful under international law (including the use of force), and aims solely at its cessation; (ii) the action taken after notification is necessary and commensurate with this objective and must remain peaceful (i.e. below the threshold of the use of force).

The scope of countermeasures under international law in the space domain includes temporary actions with reversible effects, such as jamming, dazzling or placing satellites to disrupt adversary space activities.

3.2.3. Application of *jus ad bellum* to military space operations

International law applies to outer space, which is governed by the principles of non-appropriation and freedom of use[972]. The absence of State sovereignty in outer space does not preclude the application of international law, as provided for under Article III of the Outer Space Treaty: "*States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding*".

Consequently, the principle of the prohibition of the use of force under Article 2(4) of the United Nations Charter applies in outer space just as it does in other domains. The applicability of the principles governing

[968] International Law Commission, *Third report on State responsibility*, Chapter I(C) "Retortion", Doc. A/CN.4/440, 10 June 1991; *Fourth report on State responsibility*, Chapter V "Prohibited countermeasures", Doc. A/CN.4/444/Add.1, 25 Mai 1992.
[969] For jurisprudence dealing with the lawfulness of reprisals, refer to the *Naulilaa* and *Cysne* cases, Arbitral awards of 31 July 1928 and 30 June 1930 respectively, *Reports of International Arbitral Awards*, Vol. II, p. 1025 and p. 1056.
[970] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), Art. 13
[971] *Reports of International Arbitral Awards*, Vol. XVIII, p. 443.
[972] 1967 Outer Space Treaty, Art. II.

the use of force is not contingent upon the type of weapon employed[973]. Although outer space may not be subject to national appropriation, space objects fall under the jurisdiction of the State of registry[974].

A hostile act directed against a space system in outer space may amount to a use of force, or even an armed attack[975], against the State of registry if it reaches a significant scale and gravity[976], regardless of the technical means used. Concerning the territorial segments of the space system, international law applies. Under these conditions, an act directed against a space system may qualify as an armed attack if it causes substantial loss of human life or significant physical damage, on Earth, in outer space, or from outer space onto Earth.

Based on the personal jurisdiction of the State, any violence to nationals of that State committed by another State in outer space could also reach the threshold of use of force, and even armed attack.

Consequently, a State that is the victim of an armed attack in outer space may exercise its right to self-defence under Article 51 of the United Nations Charter[977].

3.3. In armed conflict, military space operations are subject to international humanitarian law (IHL)

3.3.1. IHL applies to space operations conducted by a party to an armed conflict

In accordance with Article III of the 1967 Outer Space Treaty, the entirety of international law applies to outer space and activities conducted therein. Accordingly, IHL is applicable to space operations conducted by a party to an armed conflict.

Indeed, the use of armed force between States, including when exercised in self-defence under Article 51 of the United Nations Charter, may trigger an international armed conflict (IAC)[978] between the parties involved. Such a conflict, if its triggering event occurred in outer space or if its effects extend to outer space, is governed not only by space law but also by IHL[979], as the *lex specialis* for the conduct of hostilities[980].

A non-international armed conflict (NIAC), whether of low[981] or high intensity[982], may also be triggered in outer space or extend into outer space if an organized armed group gains control of payloads or even of the platform of a satellite. For example, in 2007, the Tamil Tigers rebel group hijacked an Intelsat satellite to broadcast propaganda[983]. Operations carried out by organized armed groups can have particularly serious

[973] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 244, §39.
[974] 1967 Outer Space Treaty, Art. VIII.
[975] See Part 2, Chapter 2.
[976] ICJ, *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 103, §195; UNGA resolution 3314 of 14 December 1974 on the Definition of Aggression, A/RES/3314(XXIX), Art. 2: "*The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression*", provided that the acts concerned or their consequences are of "*sufficient gravity*".
[977] UN Charter, Chapter VII, Art. 51: "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security*".
[978] ICTY, Appeals Chamber, *Tadic*, Judgement, IT-94-1-A, 2 October 1995, §70: "*an armed conflict exists whenever there is a resort to armed force between States*".
[979] The 1949 Geneva Conventions (GC), as well as their 1977 Additional Protocol (AP) I, state in their first article that they must be respected "*in all circumstances*".
[980] In this regard, by stipulating that (all) space activities must be carried out in accordance with existing international law, the Outer Space Treaty (Art. III) recognizes the applicability of *jus in bello* to military operations conducted in, from and into outer space.
[981] GC, Common Art. 3. The terms 'low intensity' and 'high intensity' are used in this Manual primarily for pedagogical purposes. However, they do have certain limitations. For instance, the intensity of the fighting may well be very high in some NIACs without Protocol II being applicable. This is the case, for example, when armed groups do not control any territory. Each situation requires from the legal advisors an analysis on a case-by-case basis of all the criteria set out in IHL instruments. See Part 3, Chapter 1, Subsection 1.2.
[982] AP II, Art. 1(1).
[983] Reuters, "Intelsat stops Tamil Tiger satellite broadcasts", 9 August 2007 (https://www.reuters.com/article/idUSN24434540).

consequences that may ultimately lead to a NIAC[984]. In practice, the classification of a conflict as low-intensity or high-intensity NIAC and, consequently, the determination of the applicable law, largely depend on whether the organized armed group concerned exercises any control over a territory on Earth.

3.3.2. Principle of distinction in space warfare

Under the principle of distinction, parties to an armed conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives[985].

It is therefore prohibited under IHL to conduct attacks in outer space or against space objects which are not directed at a specific military objective or the effects of which cannot be limited[986]. A space operation qualifies as an attack where the targeted materiel or systems, such as satellites, can no longer serve the purpose for which they are normally operated, whether temporarily or permanently, reversibly or non-reversibly. In the case of temporary and/or reversible effects, an attack exists whenever an intervention by the targeted party is necessary to make the space infrastructure or system operational again (e.g. repositioning on the initial orbit). In other words, the classification of an operation as an attack under IHL does not solely depend on material criteria.

In accordance with the 1967 Outer Space Treaty, astronauts are "*envoys of mankind in outer space*"[987]. While this status does not grant them any special legal protection, it imposes on States a duty to assist and promptly return astronauts[988] who fall into their power to the State of registry of their space vehicle, particularly following a space incident. This poses the question of whether this status, which proceeds from space law, would preclude the possibility in armed conflict, in accordance with IHL, for a belligerent to attack enemy astronauts taking part in hostilities and to detain under the status of prisoner of war[989] those who are members of the armed forces.

In armed conflict, an astronaut may *prima facie* enjoy protected person status under IHL, whether or not they belong to the armed forces of a party to the conflict[990]. In this perspective, such status prohibits belligerents from targeting astronauts and requires them to take all feasible precautions to protect astronauts from the effects of attacks. Accordingly, astronauts are assimilated to non-combatants, even when they are members of the armed forces, as long as they do not take a direct part in hostilities.

Military astronaut who commit acts harmful to the enemy outside of their peaceful exploration of space functions and activities will be deemed to have waived their 'envoy of mankind' status and therefore their protection. Consequently, they may be definitively classified as combatants and may be targeted at any time in the future, without prejudice to possible rescue in case of space incident. If they are captured in IAC, they are entitled to prisoner of war status as members of the armed forces[991].

Civilian astronauts may be made the object of attack only when and for such time as they take a direct part in hostilities[992]. Losing the special protection attached to the 'envoy of mankind' status does not deprive civilian astronauts of the immunity against direct attacks to which all civilians are entitled as long as they do not take a direct part in hostilities.

The distinction between civilian objects and military objectives is based on several identification criteria,

[984] ICTY, Appeals Chamber, *Tadic*, Judgement, IT-94-1-A, 2 October 1995, §70: "*an armed conflict exists whenever there is […] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*".
[985] AP I, Arts. 48 and 51; AP II, Art. 13.
[986] AP I, Art. 51.
[987] 1967 Outer Space Treaty, Art. V.
[988] *Ibid*.
[989] Prisoner of war status is only granted in IAC and does not apply in NIAC, where only detainee status applies.
[990] AP I, Art. 43. It should be noted that certain members of the armed forces such as medical and religious personnel do not enjoy combatant status and therefore may not be targeted as such.
[991] GC III, Art. 4(A)(1).
[992] PA I, Art. 51(3).

including a criterion of 'nature' and a criterion of 'use': "*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*"[993]. In outer space, military satellites (e.g. Helios, Syracuse, Ceres) are 'military objectives by nature', whereas civilian satellites assigned to the conduct of hostilities (Pleiades, Galileo) may become 'military objectives by use', excluding those used as 'national technical means of verification' under certain disarmament treaties[994]. In case of doubt whether a satellite or any other space object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it must be presumed not to be so used[995].

The dual use of certain space systems therefore poses few difficulties as to their classification as military objectives. However, since they are also used for civilian purposes, their destruction, capture or neutralization is likely to have harmful consequences for the civilian population. In this perspective, dual-use satellites are not an issue in terms of distinction, and any attacks against such satellites must, most importantly, comply with the principles of proportionality and precautions.

3.3.3. Taking into account incidental damage caused in space and on Earth

The principle of proportionality is a fundamental IHL rule which prohibits causing civilian casualties and damage "*which would be excessive in relation to the concrete and direct military advantage anticipated*"[996]. The concrete and direct military advantage anticipated from attacks on space objects – particularly those providing services to the population – must be assessed in relation to all foreseeable, direct and indirect damage that may result from the attack, including the effects on individuals likely to be impacted by the malfunction or destruction of the targeted systems or objects. For example, targeting dual-use satellite communication systems could impede civil security and law enforcement forces and hinder the rescue of persons in distress, while targeting GNSS could, due to the development of vehicle and aircraft automation technologies, lead to a chain of incidents resulting in significant civilian casualties and damage. Therefore, to limit the occurrence of such events, a specific protection regime could be developed[997] for satellites indispensable to the survival of the civilian population.

Lastly, the use of force in space can cause the creation of more or less long-lived space debris[998], depending on the perigee of the target. Due to celestial mechanics, these debris continue to orbit and risk intersecting with other debris, thereby creating a cloud of debris capable of causing damage to other civilian or dual-use satellites, but also to other space objects, potentially triggering a chain reaction known as the Kessler syndrome[999]. This risk illustrates the need to take all feasible precautions in attack to minimize incidental damage, including through precise modelling of resulting debris, or by using certain means (e.g. high-powered lasers) capable of creating only a single debris – the satellite itself – or by using a space tug to transfer the satellite to a graveyard orbit or to project it towards Earth for disintegration upon re-entry into the atmosphere.

3.3.4. Application in space of rules on means and methods of warfare

The obligation to ensure the lawfulness of new weapons, means and methods of warfare under Article 36 of Additional Protocol I to the Geneva Conventions also applies to warfare in outer space. Under that article,

[993] *Ibid*., Art. 52(2).
[994] Cf., for example, Article XII of the 1987 Intermediate-Range Nuclear Forces Treaty.
[995] AP I, Art. 52(3).
[996] *Ibid*., Art. 51(5)(b).
[997] For instance, "*through the further development and implementation of norms, rules and principles of responsible behaviours*" as promoted in UNGA resolution 75/36 of 7 December 2020 entitled "Reducing space threats through norms, rules and principles of responsible behaviours".
[998] The number of which can vary depending on the accuracy of the weapon system used (high-powered lasers, anti-satellite missiles, etc.)
[999] Named after NASA consultant Donald J. Kessler, who described the increasingly rapid growth of space debris in Earth orbit caused by collisions between space objects and resulting in new debris at a rate higher than their decay rate.

States must, in the study, development, acquisition or adoption of a new weapon, means or method of warfare, determine whether its employment would be prohibited by the Protocol or by any other rule of international law applicable to them.

3.3.5. The specificity under space law of the neutrality of non-belligerent States and entities subject to their jurisdiction

Under Article VI of the 1967 Outer Space Treaty, States bear "*international responsibility for national activities in outer space*". While automatic State responsibility for private conduct should be ruled out, the State is still required to prevent any non-governmental assistance to belligerents, pursuant to its obligations to authorize and continuingly supervise national space activities.

It follows that a State, in the event of armed conflict, must ensure to restrict the provision of private space services "*which can be of use to an army or a fleet*"[1000], but also sales of space objects that qualifies as "*war material*"[1001]. In particular, there should be restrictions on the sale, by the State itself or by an individual under its jurisdiction, of telecommunication services or satellite imagery of the theatre of operations or geographical areas which could be of interest to the belligerents, or of satellites that could be used for military operations.

Failure by the State responsible for national activities to implement these restrictions in respect to entities under its jurisdiction may entail its international responsibility under Article VI of the Outer Space Treaty.

Furthermore, neutrality is the policy adopted by a State to remain aloof from an armed conflict affecting two or more States by refraining from participating directly in hostilities or indirectly by assisting one of the belligerents[1002]. For instance, satellites registered by neutral States may be used in hostilities by belligerents that would thereby benefit from their protected status. Such use, apart from possibly constituting a crime of perfidy if the intention is to kill, injure, or capture an adversary[1003], as well as a violation of the "*sovereign rights of neutral Powers*"[1004], prevents the other party to the conflict from immediately resorting to the use of force against a military objective.

Indeed, under space law, every State exercises its sovereignty over its registered space objects, in compliance with the principle of jurisdiction and control over such objects. Therefore, if a State uses the space objects of another State to commit acts of war, such use constitutes both a violation of the neutrality of the State of registry by the former State and possibly an internationally wrongful act by the neutral State failing to uphold its international obligations wherever that State is aware of the way in which means under its jurisdiction are in fact used[1005].

A belligerent State which becomes aware of the use by another party to the conflict of a neutral State's satellites for hostile purposes must alert that State, and may, if necessary, implement non-armed countermeasures until the internationally wrongful act ceases.

When the space activities of a neutral State are hindered by the conduct of hostilities, particularly because of space debris from destroyed satellites, the neutral State can respond based on different legal grounds depending on the situation.

A neutral State which, in the course of its space activities, is injured by an internationally wrongful act

[1000] 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Art. 7.
[1001] 1928 Havana Convention on Maritime Neutrality, Art. 16.
[1002] 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War.
[1003] AP I, Art. 37(1).
[1004] 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, Art. 1.
[1005] This scenario bears resemblance to the 1949 Corfu Channel case, where Albania was condemned by the International Court of Justice for failing to timely warn a British vessel that it was navigating through mined waters, despite having prior knowledge of it.

committed by a belligerent State may take action against that State to seek cessation of and full reparation for the internationally wrongful act as well as guarantees of non-repetition.

A belligerent State that conducts a space attack in violation of international law (i.e. the United Nations Charter, IHL, international space law[1006], etc.) is thus required to remedy the direct and indirect[1007] consequences of this unlawful act, particularly concerning neutral States.

Lastly, if a State party to an armed conflict interferes with the space activities of a neutral State and causes damage reaching the threshold of armed attack, the neutral State may take measures in self-defence under Article 51 of the United Nations Charter.

[1006] For States parties to space law agreements. For example, if space debris created in armed conflict by a belligerent State which is party to the Outer Space Treaty causes any damage to a neutral State also party to this treaty or prevents that State from conducting its space activities optimally, the neutral State is entitled to seek redress for the injury suffered due to the violation of the obligation under Article IX of the Outer Space Treaty, which provides that "*States Parties to the Treaty […] shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty*".

[1007] Where the injury suffered by the neutral State results from the effects of space debris created by the internationally wrongful act committed by the belligerent State.

CHAPTER 4: THE LAW APPLICABLE TO OPERATIONS IN CYBERSPACE

Cyberspace is an operational domain in its own right, in the same way as land, sea, air and outer space. While cyberspace is the only artificial and virtual domain, all human modern activity heavily depends on it.

The French armed forces are fully involved in this new domain, particularly by conducting defensive cyberoperations (DCO), offensive cyberoperations (OCO)[1008], and influence cyberoperations (ICO)[1009]. In armed conflict, cyber means are used in combination with and in support of conventional means (force multiplier).

International law applies to cyberoperations. France detailed the terms for its specific implementation in cyberspace in its 2019 report entitled "International Law Applied to Operations in Cyberspace". The conclusions of that report build on discussions within the United Nations Group of Governmental Experts (GGE) and Open-ended Working Group (OEWG) on Developments in the Field of Information and Telecommunications in the Context of International Security, which aim to regulate cyberoperations to promote an open, stable and peaceful cyberspace.

4.1. Characteristics of the cyber environment: a revolution in the analytical and decision-making framework

Cyberspace is divided into three layers:

- A physical network layer, i.e. the hardware, computer systems and their material and sometimes electromagnetic networks (computers, processors, cables, fibres, transmitters, receivers, satellite links, routers, etc.);
- A logical network layer, i.e. the data, firmware and software (files, websites, addresses, login codes, protocols, applications, etc.) which are embedded in hardware;
- A cyber-persona layer, which reflects the various kinds of information and social interactions found in cyberspace, as well as the multiple digital identities of individuals (email addresses, usernames, social media accounts, etc.). This concentration of information makes the cyber-persona – or cognitive – layer a major interface with the other layers of cyberspace, populations, and their information environment.

Cyberoperations can be designed and planned based on each of those closely intertwined layers, which multiplies the angles and possibilities of attack. Consequently, any threat or operation in cyberspace must be assessed according to a multidimensional risk management approach.

Cyberspace is essentially a virtual space where boundaries are not clear-cut. Because of its specific characteristics, cyber actors can operate covertly by using different techniques (anonymization, remote operations, mimicry, volatility and dispersion of technical traces, etc.). The resulting challenge of accurately attributing the source of cyberattacks can only be met through an approach based on a convergence of evidence. Furthermore, given the hyperconnectivity of such a system, stealthy cyberattacks can quickly spread significant adverse effects.

4.2. French cyber defence

[1008] OCO encompass all actions taken in cyberspace against adversary information systems for intelligence purposes or to support operations in other domains. For example, OCO may involve the introduction of a malware into the computer networks of an enemy military infrastructure or command network with the aim of gathering intelligence or disrupting the operation of such infrastructure or network to support a military operation.

[1009] ICO encompass all military operations conducted autonomously or in combination with other actors in the cyber-persona or cognitive layer of cyberspace to influence perceptions and behaviours in the context of operations, and in accordance with strategic communication directives of the armed forces. For example, ICO may involve delivering more or less targeted messages on social media or networks to promote the actions of the armed forces in a given theatre of operations.

4.2.1. A unified, centralized and specialized national cyber defence chain

4.2.1.1. Key principles of French cyber defence

French cyber defence depends on an organizational and governance model based on a distinction between defensive (cyber security and protection) and offensive (mainly intelligence-led) missions, actions, resources and capabilities.

That distinction allows the French model to ensure respect for individual freedoms and privacy protection, and facilitates the acceptance of State intervention in the security of information systems, whether in public administration or the economic sphere[1010].

4.2.1.2. The legal framework governing French cyber defence

At the interministerial level, the Prime Minister determines the policy and coordinates the Government's action in matters of 'security and defence of information systems'[1011]. The Secretary-General for Defence and National Security (*Secrétaire général de la défense et de la sécurité nationale, SGDSN*)[1012] advises the Prime Minister and implements the Government's cyber security and defence policy. For this purpose, the SGDSN oversees the French National Information Systems Security Agency (*Agence nationale de la sécurité des systèmes d'information, ANSSI*), also known as the National Cyber Security Agency, which is the 'national authority for the security and defence of information systems' responsible for defining the national cyber defence policy and carrying out its operational implementation for the State and key stakeholders.

Within the scope of action of the armed forces[1013], the Chief of the Defence Staff (*chef d'état-major des armées, CEMA*) is responsible for the defence, in coordination with ANSSI, of the information systems of the Ministry of Defence, excluding certain intelligence services[1014]. To exercise its responsibilities, the CEMA relies on a General Officer, Commander of Cyber Defence (OG COMCYBER)[1015].

When a cyberattack[1016] is likely to threaten the fundamental interests of the Nation[1017], the OG COMCYBER can ask for the support of the French 'specialized intelligence services', which may, as part of their missions of counter-intelligence, counter-espionage and counter-terrorism, request the implementation of an 'intelligence-gathering technique'[1018] to supplement available information at the national or international

[1010] Secretariat-General for Defence and National Security, *Strategic Review of Cyber Defence* (Summary in English), February 2018, "2.1. Consolidating the organisation of French cyber defence", p. 5.
[1011] French Defence Code, Art. L2321-1.
[1012] *Ibid*., Art. R1132-3.
[1013] *Ibid*., Art. D3121-14(1).
[1014] The Directorate-General for External Security (*direction générale de la sécurité extérieure, DGSE*) and Defence Intelligence and Security Directorate (*direction du renseignement et de la sécurité de la défense, DRSD*).
[1015] French Defence Code, Art. D3121-24(2).
[1016] 2019 French report on International Law Applied to Operations in Cyberspace, p. 18: A cyberattack is "*a deliberate offensive or malicious action carried out via cyberspace and intended to cause damage (in terms of availability, integrity or confidentiality) to data or the systems that treat them, which may consequently harm the activities for which they are the medium*". The following actions may constitute cyberattacks (examples from Council Regulation (EU) 2019/796 of 17 May 2019):
- intentional access to an information system, whether remotely or not, without due authorization by its owner or owners;
- preparing such access, particularly by seeking to induce legitimate users of the system to behave in a way that would facilitate such access, or by inserting malicious codes;
- staying in an information system, even without hostile intent, including conducting reconnaissance actions;
- intercepting, extracting, deleting, altering, or making inaccessible the data contained in an information system;
- altering or seeking to alter the operation of an information system.
[1017] French Internal Security Code, Art. L811-3.
[1018] Techniques used for intelligence gathering which are specifically regulated by French law. Intelligence-gathering techniques for anticipation, classification and attribution purposes are implemented within the framework of the Intelligence Act of 24 July 2015 and under the prior and subsequent control of the National Oversight Commission for Intelligence-Gathering Techniques (*Commission nationale de contrôle des techniques de renseignement, CNCTR*).

level.

Under Article L2321-2 of the Defence Code[1019], certain services or divisions[1020] are provided with the necessary legal tools to conduct actions under conditions set by the Prime Minister to defend and protect vital infrastructures against cyberattacks that may affect the Nation's war or economic potential, security or ability to survive, without such actions amounting to criminal offences related to information technology[1021]. Such actions are carried out under the responsibility of ANSSI which defines, organizes and conducts the technical operations necessary for the classification of the cyberattack. As a second step, the SGDSN conducts, where required, the technical operations necessary for the neutralization of the cyberattack's effects, after a prior assessment of the potential consequences of such operations[1022].

By way of derogation from ANSSI's competence, where the cyberattack exclusively targets the operational capabilities of the armed forces or the defence command chains, cyber defence actions are conducted under the authority of the Cyber Command (COMCYBER) in conjunction with ANSSI[1023].

4.2.1.3. The national cyber defence decision-making chain

Cyber defence policy guidelines and directions are established during meetings of the Defence and National Security Council (*Conseil de défense et de sécurité nationale, CDSN*).

The Cyber Defence Steering Committee is responsible for monitoring the implementation of policy decisions on the development and general organization of cyber defence.

The Cyber Crisis Coordination Centre (C4) is in charge of coordinating French cyber defence. C4 brings together all stakeholders concerned as a permanent interministerial mechanism for threat analysis and the preparation of the State's response options.

4.2.1.4. French cyber defence: four operational chains and six associated missions[1024]

4.2.1.4.1. The four operational chains of French cyber defence

French cyber defence State action is organized around four 'operational chains', with each one contributing to one or more of the 'cyber defence missions' (see Subsection 4.2.1.4.2.): the 'protection' chain, the 'military action' chain, the 'intelligence' chain and the 'judicial investigation' chain.

[1019] French Defence Code, Art. L2321-2: "*To respond to a computer attack targeting information systems and affecting the Nation's war or economic potential, security or ability to survive, the State services may, under the conditions set by the Prime Minister, carry out the technical operations necessary for the classification of the attack and for the neutralization of its effects by accessing the information systems at the origin of the attack. To be able to respond to the attacks mentioned in the first paragraph, the State services determined by the Prime Minister may possess equipment, instruments, computer programmes, and any data which may enable the commission of one or more of the offences referred to in Articles 323-1 to 323-3 of the Penal Code, in order to analyse their design and observe their operation*".

[1020] The services and divisions concerned are listed under the Order of 17 July 2015 determining the State services mentioned in the second paragraph of Article L2321-2 of the Defence Code. These include ANSSI, the Cyber Defence Staff (EM CYBER), the service of the senior defence official of the Ministry of the Interior, and the technical directorates of the DGSE, Directorate-General for Internal Security (*direction générale de la sécurité intérieure, DGSI*) and Directorate-General of Armament (*direction générale de l'armement, DGA*).

[1021] French Penal Code, Arts. 323-1 to 323-3.

[1022] Classified directive from the Prime Minister of 7 March 2016.

[1023] French Defence Code, Art. D3121-14(1).

[1024] Secretariat-General for Defence and National Security, *Strategic Review of Cyber Defence* (Summary in English), February 2018, "2.1.1. Four operational chains", pp. 5-6.

- **'Protection' chain**

The 'protection' chain is led by the SGDSN under the authority of the Prime Minister and primarily aims to ensure national security in the event of a cyberattack. Its scope of action covers the security of information systems as well as DCO[1025]. The 'protection' chain contributes to all six cyber defence missions referred to under Subsection 4.2.1.4.2 below. The Director-General of ANSSI is responsible for the conduct of DCO.

In conjunction with ANSSI, COMCYBER is responsible for the conduct of operations within the scope of action of the Ministry of Defence.

- **'Military action' chain**

Under the authority of both the French President – Commander-in-Chief of the Armed Forces – and the CEMA, the 'military action' chain may engage in active cyber warfare, and aims to enable the conduct of defence and national security operations[1026].

COMCYBER is responsible for planning and coordinating OCO for joint manoeuvring. It ensures consistency in the planning and conduct of OCO with the operational staffs (joint staff, Army, Navy, Air and Space Force, Special Forces) and intelligence services, from the strategic to the tactical level. Lastly, COMCYBER develops and manages the OCO-related aspect of the military cooperation with allies.

OCO are designed at both strategic (overall joint operational manoeuvre) and tactical levels (manoeuvre of military components in theatres of operations).

OCO are conducted by specialized units, whose expertise ensures the analysis of technical risks and, in particular, control over collateral effects, including on allied forces, which may arise due to the domain complexity. OCO are fully integrated into military manoeuvres, whether they are conducted directly on the ground or remotely.

OCO rely on a unified command chain and specialized units, and require expertise and know-how. Offensive cyber warfare is a major component of sovereign defence, which makes it necessary to exercise strategic control over the planning and conduct of OCO as well as related intelligence-gathering.

- **'Intelligence' chain**

Under the authority of the Government, the 'intelligence' chain covers all actions taken for intelligence purposes, in particular with the aim of attributing cyberattacks.

Book VIII of the Internal Security Code regulates the intelligence services' capabilities to intercept data for intelligence purposes. Such capabilities are used under the direction of the heads of the different intelligence services under the authority of their respective supervising ministry.

The National Intelligence and Counter-Terrorism Coordination (*Coordination nationale du renseignement et de la lutte contre le terrorisme, CNRLT*) facilitates the sharing of cyber-relevant intelligence among services.

[1025] 2019 French report on International Law Applied to Operations in Cyberspace, p. 18: Defensive cyber warfare is "*a coordinated set of actions carried out by a State which consists in detecting, analysing and preventing cyberattacks and responding to them where appropriate*". DCO refer to all technical and non-technical measures which may be taken to face a significant level of threat or an actual attack, and aim to preserve the freedom of action in cyberspace. For example, the detection of a virus on the networks of the Ministry of Defence would require defensive cyber action in several steps: preserving the unaffected networks by isolating the attacked one; studying the virus to understand how it functions; and integrating its markers into the internal protection tools to enhance the level of protection of the whole of the Ministry's networks.

[1026] The description of this chain is protected by national defence secrecy.

After consulting and obtaining the opinion of the CNCTR, the Prime Minister authorizes intelligence operations conducted on national territory in compliance with the Internal Security Code, particularly regarding the data retention period and the regulated purposes for intelligence-gathering.

- **'Judicial investigation' chain**

The 'judicial investigation' chain covers cyber actions of the police, gendarmerie and justice services. As part of their investigations, the police and gendarmerie work under the control of the judicial authority, i.e. the Public Prosecutor (*Procureur de la République*), the Liberties and Detention Judge (*juge des libertés et de la detention, JLD*) or an investigating judge.

4.2.1.4.2. The six missions of French cyber defence

French cyber defence missions are classified into six categories: prevention, protection, anticipation, detection, reaction and attribution.

4.2.2. Role of the military in the permanent cyber defence posture

4.2.2.1. France's Standing Cyber Defence Posture

Under the operational control of OG COMCYBER, the Standing Cyber Defence Posture (*Posture permanente de cyberdéfense, PPC*)[1027] encompasses all measures taken to ensure the continuous defence of the armed forces in cyberspace, whether in times of peace, crisis or war. This Posture applicable to cyberspace is similar to France's traditional Standing Air Security Posture (see Part 4, Chapter 2, Subsection 2.1.3. above) and Standing Maritime Safeguard Posture (see Part 4, Chapter 1, Subsection 1.3.1.2. above).

PPC aims to preserve the freedom of action of the armed forces and the Ministry of Defence in cyberspace and has three main missions:

- Surveillance of cyberspace and detection of harmful acts affecting the Ministry of Defence;
- Preparedness for safe deployment and mission accomplishment taking into account cyber threats;
- Response to cyberattacks of all types, including by taking measures to neutralize their effects.

4.2.2.2. The Defence Ministry's information systems security policy for the 'protection' and 'prevention' missions

Information systems protection involves all regulatory, technical and non-technical protective measures contributing to achieving cyber security[1028].

Within the Ministry of Defence, the cyber protection chain is under the responsibility of the Head of the Minister's military cabinet, who exercises the role of Senior Defence and Security Official (*haut fonctionnaire correspondant de défense et de sécurité, HFCDS*) with the support of an Information Systems Security Official (*fonctionnaire de sécurité des systèmes d'information, FSSI*) working in the Directorate for the Protection of Defence Installations, Capabilities and Activities (*direction de la protection des installations, moyens et activités de la defense, DPID*). In addition, five 'qualified authorities' (*autorités qualifies, AQ*) are responsible for the protection of information systems in their respective services or divisions: Chief of the Defence Staff (CEMA), Director-General of Armament (DGA), Secretary-General for Administration (*secrétariat général pour l'administration, SGA*), Director-General for External Security

[1027] Directive No. 101000/ARM/CAB of 24 December 2018 relating to the cyber warfare and defence policy of the Ministry of Defence, in particular Section 3.2. entitled "Standing Cyber Defence Posture".
[1028] Including technical (cryptography, data screening and analysis, installing anti-virus, etc.) and organizational (awareness-raising, training, monitoring, process standardization, etc.) measures.

(DGSE) and Defence Intelligence and Security Director (DRSD).

4.3. International law applied to cyberspace

International law applies to cyberspace. Existing norms, when interpreted in light of the purpose of international law and taking into account the specificities of the cyber domain, provide a sufficient framework for regulating activities in cyberspace both in peacetime and in armed conflict.

The applicability of international law to cyberspace is discussed within the United Nations Group of Governmental Experts (GGE) and Open-ended Working Group (OEWG) on Developments in the Field of Information and Telecommunications in the Context of International Security. These international discussions tend to encourage harmonization of the terms and conditions for applying international law to activities in cyberspace in order to reduce risks to international peace, security and stability, and to promote a peaceful, safe, open and cooperative cyber environment.

The three 2013, 2015 and 2021 GGE reports are unanimous in recognizing that international law, particularly the United Nations Charter, applies to the use of information and communication technologies (ICTs)[1029]. They also recognize that the following principles are applicable to cyberspace: obligation to respect State sovereignty[1030]; settlement of international disputes by peaceful means[1031]; non-intervention in the internal affairs of other States; human rights and fundamental freedoms[1032]; and the prohibition for States to knowingly allow their territory to be used for internationally wrongful acts using ICTs[1033] or to use proxies to commit such acts using ICTs[1034].

In its latest report, the GGE emphasizes the applicability of international humanitarian law (IHL) to the use of ICTs in armed conflict. The GGE further recognized "*the need for further study on how and when these principles apply to the use of ICTs by States*". Reflection on the terms and conditions for applying IHL ("*how*") to cyberoperations in armed conflict is undoubtedly necessary. However, the scope of application of IHL ("*when*") appears to be already well established for cyberspace as the specificities of that domain are not likely to challenge the criteria for the existence of an armed conflict.

Following the basic recognition of the applicability to cyberspace of the general principles of international law, in particular the provisions of the United Nations Charter on respect for State sovereignty and the obligation to settle disputes by peaceful means, challenges persist in recognizing certain principles. This includes the obligation of due diligence (which is often viewed merely as a standard of conduct), the classification of certain cyberoperations as use of force or armed attack, and the right of a victim State to respond in self-defence to cyberattacks.

France set out its position as to the applicability of international to cyberspace, which is in line with the GGE's conclusions, in its 2019 report entitled "International Law Applied to Operations in Cyberspace".

4.3.1. Peacetime cyberoperations are governed by public international law

International law, and in particular the United Nations Charter, applies to cyberspace. Consequently, the use of ICTs must comply with the principles of international law, including State sovereignty, sovereign equality, the settlement of disputes by peaceful means and non-intervention in the internal affairs of States. The

[1029] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, 22 July 2015, A/70/174, §24.
[1030] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, 24 June 2013, A /68/98, §20.
[1031] 2015 GGE Report, op. cit., §28(b).
[1032] *Ibid*., §26
[1033] *Ibid*., §13(c).
[1034] *Ibid*., §28(e).

international norms and principles that flow from sovereignty apply to the use of ICTs by States.

4.3.1.1. Due diligence requirement

France exercises its sovereignty over the information systems located on its territory and thus ensures that its territory is not used for internationally wrongful acts using ICTs, especially by non-State actors. This customary obligation of due diligence is "*every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*"[1035]. It follows that States should not "*knowingly allow their territory to be used for internationally wrongful acts using ICTs*"[1036], including acts that infringe the territorial integrity or sovereignty of other States, whether committed by State organs or private individuals. In addition, States must ensure, by all available means, that other States and non-State actors do not use their territory to commit such acts. Lastly, it is prohibited to use proxies to commit internationally wrongful acts using ICTs.

In cyberspace, States are therefore required to take all measures that can reasonably be expected of them, considering their capacities and available information, to neutralize or minimize the effects of an operation in cyberspace which is already launched, or to prevent a serious risk of such effects occurring regarding a cyberoperation in planning. This is not an obligation of result, but an obligation of conduct, namely to implement all means that are reasonably available to the State, especially considering its technical and technological capabilities, to end or prevent cyberattacks originating from, or even transiting through, its territory. Adopting preventive measures to reduce such a risk, including strengthening the resilience of information systems, can contribute to a State's compliance with the principle of due diligence.

The application of the principle of due diligence involves a procedure developed by the national decision-making chain referred to in Subsection 4.2.1.3. above.

4.3.1.2. Cyberoperations which violate norms flowing from the principle of sovereignty

Cyberoperations must be conducted in compliance with the sovereignty of States, in accordance with the obligation to refrain, in international relations, from any intervention in the internal affairs of other States[1037] or from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations[1038].

Any cyberattack against information systems or any harmful effects produced through cyber means by a State organ, a person or an entity exercising elements of governmental authority or by a person or persons acting on the instructions of, or under the direction or control of, another State may constitute a breach of sovereignty, in accordance with the right to integrity and inviolability under obligations to respect the territorial integrity of States and to refrain from the use or threat of force.

Interference by digital means in the *domaine réservé* (reserved domain, i.e. domestic jurisdiction) of a State, i.e. "*one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely*"[1039], such as a cyberoperation which causes or may cause harm to a State's political, economic, social and cultural system, may constitute a violation of the principle of non-intervention in the internal affairs of States. This includes cyberoperations that disrupt a State's electoral process, or alter its results, including

[1035] ICJ, *Corfu Channel case*, Judgment, 9 April 1949, I.C.J. Reports 1949, p. 22; ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, 20 April 2010, I.C.J. Reports 2010, p. 55.
[1036] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, 22 July 2015, A/70/174, §13(c).
[1037] ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment, 27 June 1986, I.C.J. Reports 1986, p. 106, §202: "*The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law*".
[1038] UN Charter, Art. 2(4).
[1039] ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment. 27 June 1986, I.C.J. Reports 1986, p. 108, §205.

through manipulation of electronic voting infrastructure.

4.3.1.3. Cyberoperations which amount to a use of force or armed attack

The principles governing the use of force apply to the activities of States in cyberspace. Certain cyberoperations, considering their scale and effects, may thus constitute a violation of the prohibition of the use of force under Article 2(4) of the United Nations Charter. In digital space, crossing the threshold of the use of force depends not on the digital means employed but on the effects of the cyberoperation[1040].

A cyberattack may violate the prohibition of the use of force if its effects are similar to those resulting from the use of a conventional weapon. It should be noted that cyberoperations which cause damage strictly limited in scope and effects do not necessarily amount to a use of force under Article 2(4) of the United Nations Charter; however, such cyberoperations may still constitute internationally wrongful acts.

France does not rule out the possibility that a cyberoperation without physical effects may also be classified as use of force, especially considering the origin of the operation, the nature of the instigator, the extent of intrusion, the desired effects or the nature of the target. For example, penetrating military systems in order to compromise French defence capabilities could be classified as use of force, even if that act has not, or not yet, caused significant effects.

In accordance with the case law of the International Court of Justice (ICJ), it is necessary to distinguish the most grave forms of the use of force – i.e. those constituting an armed attack to which the victim State may respond in individual or collective self-defence – from other less grave forms[1041].

An armed attack is a use of force that reaches a certain gravity threshold, regardless of the means employed[1042].

A cyberattack may constitute an armed attack within the meaning of Article 51 of the United Nations Charter if its scale and effects reach a certain gravity threshold and are comparable to those resulting from the use of physical force[1043]. A cyberattack could thus be categorized as an armed attack if it caused substantial loss of life or considerable physical or economic damage, such as a failure of critical infrastructure with significant consequences or consequences liable to paralyse whole swathes of the country's activity, trigger technological or ecological disasters and claim numerous victims.

Cyberattacks that individually do not reach the threshold of armed attack may be classified as such if their cumulative effects reach a sufficient threshold of gravity[1044], or if they are carried out in combination with operations in the physical domain which do constitute an armed attack, where such attacks are coordinated and stem from the same entity or from different entities acting in concert.

To be categorized as an armed attack, a cyberattack must also have been perpetrated, directly or indirectly, by a State. Leaving aside acts committed by persons belonging to State organs or exercising elements of governmental authority, a State is responsible for acts committed by non-State actors[1045] on its territory only

[1040] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 244, §39.
[1041] ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment. 27 June 1986, I.C.J. Reports 1986, p. 101, §191.
[1042] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 244, §39.
[1043] ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment. 27 June 1986, I.C.J. Reports 1986, p. 103, §195. UNGA resolution 3314 of 14 December 1974 on the Definition of Aggression, A/RES/3314(XXIX), Art. 2: "*The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression*", provided that the acts concerned or their consequences are of "*sufficient gravity*".
[1044] Secretariat-General for Defence and National Security, *Revue stratégique de cyberdéfense* (in French), 12 February 2018, p. 82; ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 200, I.C.J. Reports 2003, pp. 191-192, §64: The Court does not rule out the approach of assessing whether a series of attacks against the United States may constitute an armed attack.
[1045] France has, in exceptional circumstances, invoked self-defence against an armed attack perpetrated by an actor having the characteristics of a "quasi-State" as legal basis for its intervention in Syria against the terrorist group Daesh (ISIS/ISIL). However, this

if they in fact acted on the instructions of, or under the direction or control of, that State[1046].

4.3.1.4. International law permits several responses to cyberoperations constituting internationally wrongful acts

4.3.1.4.1. Non-armed measures by States in response to a cyberattack

States can take a number of measures to prevent, anticipate, protect against, detect and respond to cyberattacks, primarily by strengthening the defence capabilities of their information systems, but also by neutralizing the effects of such cyberattacks.

Given the significant impact that certain cyberattacks can have on national security, a State which is the victim of a cyberattack having its origin in another State may, in accordance with international law, respond in different ways depending on the situation.

Firstly, States may implement retaliatory measures (retortion), i.e. unfriendly measures which are nonetheless intrinsically lawful under international law, such as initiating diplomatic steps (summoning of ambassadors), making a public denunciation, breaking off diplomatic relations, or suspending international agreements.

Such retortion measures can be taken even if the initial cyberoperation does not amount to an internationally wrongful act. They can be adopted individually or collectively.

A victim State can take countermeasures to respond to a cyberoperation conducted by another State which constitutes an internationally wrongful act, such as disrupting collective services or significant industrial activities, pre-positioning software implants within critical infrastructure that can be activated at a later point in time for sabotage purposes, or that aim to corrupt or alter data for malicious purposes, etc.

The adoption of countermeasures is subject to the attribution of the internationally wrongful act to a State[1047]. Due to the characteristics of cyberspace, attributing a cyberoperation to a State can be particularly challenging, which in turn makes it difficult to resort to countermeasures in response to a cyberattack.

In any case, such countermeasures must be limited to the need for the victim State to ensure respect for and protect its interests, but also to induce the responsible State to comply with its obligations[1048]. Such countermeasures are also subject to a set of conditions and restrictions: the injured State must, before taking countermeasures and except in cases of urgency, endeavour to settle the dispute through negotiations[1049]; countermeasures must aim, as previously indicated, to induce the State responsible for the wrongful act to comply with its obligations (condition of necessity), and be reversible[1050] and commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act[1051].

Countermeasures must comply with certain obligations under international law, such as the prohibition of the threat or use of force, or the protection of fundamental human rights[1052]. However, international law does

shall remain an exceptional case as France does not recognize any extension of the right of self-defence to attacks which are not attributable to a State.

[1046] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), Art. 8.

[1047] Including a person or group of persons acting on the instructions of, or under the direction or control of, that State (*ibid.*).

[1048] *Ibid*., Art. 49(1).

[1049] *Ibid*., Art. 52(1).

[1050] ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, I.C.J. Reports 1997, pp. 56-57, §87: "*[The] purpose [of a countermeasure] must be to induce the wrongdoing State to comply with its obligations under international law […] the measure must therefore be reversible*".

[1051] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), Art. 51.

[1052] Article 50 of the Draft articles (*op. cit.*) provides for a list of all obligations that may not be affected by countermeasures.

permit measures which aim at impeding normal economic and financial relations with the wrongdoing State, such as no longer complying with existing agreements or making decisions that go against the usual framework of their relations.

Under Article 49 of the Draft articles on Responsibility of States for Internationally Wrongful Acts and in accordance with related case law, only the 'injured State' has the right to take countermeasures[1053]. It is therefore prohibited to take collective countermeasures.

The fact that France does not recognize the right to take collective countermeasures is not inconsistent with its international commitments relating to collective response to a cyberoperation, including within the North Atlantic Treaty Organization (NATO) or the European Union[1054]. Multilateral initiatives taken to promote and enhance security and stability in cyberspace (including the 2018 Paris Call[1055], the work of the UN GGE and OEWG on cyber security, the EU Cyber Diplomacy Toolbox, or the NATO Cyber Defence Pledge), as well as to strengthen related cooperation (particularly in judicial matters), do not constitute countermeasures and can be implemented jointly by States. Similarly, States can, at all times, individually or collectively ensure the security and resilience of their information systems. Therefore, French cyber defence capabilities and resources can contribute to support other States or regional and international organizations to ensure the protection of their systems against cyberattacks.

4.3.1.4.2. Only cyberattacks constituting an armed attack give entitlement to use force in self-defence

Under Article 51 of the United Nations Charter, a State that suffers an armed attack is entitled to use individual or collective self-defence. This is the only case where unilateral use of armed force is lawful.

Self-defence in response to an armed attack carried out in cyberspace may involve digital or conventional means, in compliance with the principles of necessity and proportionality[1056]. The Ministry of Defence may conduct operations in cyberspace subject to the decision by the French President to engage the armed forces.

In exceptional circumstances, it is possible to respond in preemptive self-defence to a cyberattack that "*has not yet been, but is imminently and certainly about to be, launched, provided that the potential effects and scale of such attack reach a certain gravity threshold*"[1057]. As is the case in the physical domain, preventive self-defence is not recognized by international law and may not be used in cyberspace[1058].

4.3.1.5. France's cyberattack response mechanism

France implements its cyberattack response mechanism based on a decision by political authorities which carry out a concrete assessment of the impact of the cyberattack following a national schema of classification

[1053] *Ibid*., Art. 49(1); ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment. 27 June 1986, I.C.J. Reports 1986, p. 127, §249.
[1054] For example, mutual defence or solidarity clauses, or cyber-specific arrangement such as the EU Cyber Diplomacy Toolbox or the NATO Cyber Defence Pledge.
[1055] 2018 Paris Call for Trust and Security in Cyberspace (https://pariscall.international/en/).
[1056] ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment. 27 June 1986, I.C.J. Reports 1986, p. 103, §194 and p. 141, §282: "*The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. […] the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary'*"; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 245, §41: "*there is a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law*"*.*
[1057] Cf. Secretariat-General for Defence and National Security, *Revue stratégique de cyberdéfense* (in French), 12 February 2018, p. 84.
[1058] Preventive self-defence is exercised in response to a potential armed attack, i.e. one that is latent and more or less likely to occur in the future. According to the ICJ, this hypothetical behaviour cannot warrant the invocation of self-defence. ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment. 27 June 1986, I.C.J. Reports 1986, p. 103, §195.

and characterization of incidents.

In accordance with France's Cyber Defence Strategy, France endeavours "*to resort to mechanisms of international cooperation and peaceful dispute resolution*"[1059]. Indeed, priority must be given to de-escalation and stability in cyberspace, and responses must be commensurate with the injury suffered.

The implementation of responses depends on the classification of the cyberoperation as reaching a certain gravity threshold. This threshold is determined politically on a case-by-case basis according to a number of criteria (political or diplomatic context, existence of damage, origin of the instigator, existence of a hostile intent, extent of impact, consequences on national security interests, or even jeopardization of critical services, etc.).

France has established a doctrine for action in order to identify options for responding to a cyberattack based on its nature and characteristics. The following schema for classifying cyberattacks is a peacetime decision-making tool for authorities to study such options[1060]:

Gravity level	Impact classification	Cyberattack classification
Level 5 – Extreme Emergency	Extreme impact	Classification as armed attack under Art. 51 of the United Nations Charter possible, must be assessed on a case-by-case basis
Level 4 – Major Crisis	Major impact	Classification as armed attack under Art. 51 of the United Nations Charter very unlikely. However, cyberoperations under those levels may amount to internationally wrongful acts (intervention, breach of sovereignty, use of force, etc.)
Level 3 – Crisis	Strong and extensive impact	
Level 2 – Grave Incident	Strong but limited impact	
Level 1B – Incident	Significant but limited impact	
Level 1A – Significant Event	Low impact	
Level 0 – Event	Negligible/Insignificant impact	

This classification schema is essentially based on the effects caused by the incident and allows for coordination at the national level while providing for political, economic, military, diplomatic or judicial response options to political authorities. Response to a cyberattack may involve the use of force in self-defence under Article 51 of the United Nations Charter. It is important to note that this schema is an analysis grid and a decision-making tool used for a concrete assessment of the situation; in any case, it does not prejudice the ultimate decision of political authorities.

This classification and response validation process is implemented by the national decision-making chain referred to in Subsection 4.2.1.3. above. Based on the output, the French President, as Commander-in-Chief of the Armed Forces[1061], ultimately determines the most appropriate response in accordance with international law. These response capabilities depend, of course, on the ability to attribute the attack to a specific entity.

[1059] Cf. Secretariat-General for Defence and National Security, *Revue stratégique de cyberdéfense* (in French), 12 February 2018, pp. 81-82.
[1060] National Cyberattack Classification Schema, *ibid*., p. 80, Subsection 2.5.3.
[1061] French Constitution of 4 October 1958, Art. 15.

When the instigator is identified, public attribution can also be a response in itself. In France, this public attribution is decided where appropriate by the highest authorities of the State. Similarly, it is a sovereign prerogative of the State to decide to make, or not, a collective attribution in connection with partner States.

4.3.2. Application of international humanitarian law to cyberspace in armed conflict

IHL applies to any operation conducted in cyberspace in the context of, or in connection with, armed conflict. Although the use of cyber means can potentially amplify operational capabilities while limiting physical damage, there is a risk that parties to the conflict fail to strictly comply with their obligation to respect IHL at all times and with the same vigilance.

4.3.2.1. Cyberoperation may characterize the existence of an armed conflict

Cyberoperations that constitute hostilities between two or more States may characterize the existence of international armed conflict (IAC)[1062]. Likewise, protracted cyber confrontation between government armed forces and the forces of one or more armed groups, or between such groups, may constitute a non-international armed conflict (NIAC), provided that such groups show a minimum of organization and the effects of such operations reach a minimum level of intensity[1063].

Generally, such cyberoperations are military operations conducted concurrently with conventional military operations. For this reason, the situation is not difficult to classify as armed conflict. While the possibility of an armed conflict consisting exclusively of cyber activities cannot be ruled out in principle, the threshold of violence required to be categorised as such must still be reached.

Although virtual, cyberoperations still fall within the geographical scope of IHL, insofar as their main effects must arise in IAC on the territory of the States parties, and in NIAC on the territory where the hostilities are taking place.

4.3.2.2. IHL applies to all cyberoperations conducted in the context of, or in connection with, armed conflict

As IHL applies to all military operations conducted in or from cyberspace, the operations of defensive, offensive and influence cyber warfare conducted by the French armed forces are governed by doctrines and frameworks consistent with the principles governing the conduct of hostilities. Although cyberspace is virtual, it is intrinsically linked to the physical environment where cyberoperations may have material effects. Therefore, operations must comply with the rules governing the conduct of hostilities based on those effects which may legitimately be anticipated or presumed.

Cyber weapons can technically be developed based on a specific target and specific desired effects and can therefore be employed in compliance with the principles governing the conduct of hostilities.

[1062] GC I/II/III/IV, Common Art. 2; AP I, Art. 1(3).

[1063] See Part 3, Chapter 1, Subsection 1.2. In the case of protracted armed violence reaching a certain level of intensity between two parties, including at least one non-State party, IHL distinguishes between low-intensity NIAC governed by Article 3 common to the Geneva Conventions (the armed group or groups show a minimum of organization) and high-intensity NIAC governed by Common Article 3 and Additional Protocol II (AP II) (the level of organization required of the armed group or groups is particularly high: responsible command, exercise of control over part of the territory such that sustained and concerted military operations can be conducted). Some conflicts between government forces and one or more armed groups may take place on the territory of two or more neighbouring States. It is thus accepted that parties to a NIAC may continue their fighting on the territory of those third States which are not party to the original NIAC if such States consent to it (failing which the trespassing of government forces could lead to an IAC). Such situation is referred to as 'exported NIAC'. The criteria applicable to the exported NIAC are the same as those applicable to the original NIAC (nature of the parties to the conflict and intensity of violence). Therefore, operations in cyberspace, whether conducted individually or in combination with conventional operations, that meet those criteria may qualify as an exported NIAC.

Cyber means are first and foremost a weapon[1064] which can be used in combination with, or support of, conventional effects, although a cyber weapon can also be used autonomously. For example, cyber weapons can be used in OCO for intelligence, neutralization or deception[1065] purposes, and bear similar effects to those generated by offensive means in the physical domain.

The specific nature and complexity of offensive cyber warfare resources demand risk control arrangements just as robust as those applied to conventional operations, taking into account the inherent features of cyberspace. In practice, the risks linked to the use of a cyber weapon, especially the immediacy of the action, the dual nature of targets and the hyperconnectivity and interdependence of networks, require a specific digital targeting process spanning all phases of the cyberoperation.

Cyberoperations must comply with the principles of distinction, precautions and proportionality, particularly with a view to avoiding, and in any event minimizing, incidental civilian casualties and damage. They thus follow a specific cyber targeting process under the responsibility of the CEMA, who can draw on the support of specialized operational experts and legal advisors. This process involves long and specific planning carried out in close coordination with the planning of operations in the physical domain.

4.3.2.2.1. A cyberoperation may constitute an attack within the meaning of IHL

Any cyberoperation which is conducted in the context of, or in connection with, armed conflict and constitutes an act of violence, whether offensive or defensive, against another party to the conflict is an attack within the meaning of Article 49 of Protocol I additional to the Geneva Conventions (AP I)[1066].

In armed conflict, the primary purpose of cyber weapons is to produce effects against an adversary information system in order to alter its availability or integrity, or compromise the confidentiality of data contained therein. Their effects can be material (e.g. neutralization of a weapons system) or virtual (e.g. intelligence-gathering), temporary, reversible or final[1067].

For example, the destruction of enemy military offensive cyber or conventional capabilities by disruption or the creation of major damage is an attack within the meaning of IHL. This also includes actions that damage enemy military cyber or conventional capabilities by the neutralization of ICT equipment or systems or the alteration or deletion of digital data.

In the conduct of hostilities, a cyberoperation constitutes an attack where the targeted ICT equipment or systems no longer provide the service for which they were implemented, whether temporarily or permanently, reversibly or non-reversibly. In the case of temporary and/or reversible effects, an attack exists whenever an intervention by the targeted party is necessary to make the infrastructure or system operational again (repair of equipment, replacement of a part, reinstallation of a network, etc.). In other words, the classification of an operation as an attack under IHL does not solely depend on material criteria.

Most cyberoperations conducted by the French armed forces in armed conflict, whether OCO or ICO, do not meet the definition of an attack. In fact, they mostly involve intelligence-gathering. For example, altering the adversary's propaganda capabilities, such as making an influence site or social networks unavailable by saturation or distributed denial-of-service (DDoS) cannot be classified as an attack, by analogy with the jamming of radio communications or TV broadcasts. However, such operations, in the same way as general information-gathering with the aim of evaluating enemy military capabilities or hacking a system in order to gather data, are still governed by the provisions of IHL applicable to any military operation conducted in

[1064] The term 'weapon' is used here in a generic sense. A 'cyber weapon' refers to all digital means used in the context of, or in connection with, armed conflict, i.e. weapons, means and methods of warfare within the meaning of Art. 35 of AP I, but also digital means that do not have destructive effects (e.g. those used for intelligence purposes).
[1065] Deception, which can be implemented in OCO and ICO, includes concealment, diversion and manipulation of information to mislead the opponent about one's intentions.
[1066] AP I, Art. 49: "*'Attacks' means acts of violence against the adversary, whether in offence or in defence*".
[1067] Public Elements for the Military Cyber Warfare Doctrine, 2019.

armed conflict.

4.3.2.2.2. Application of the principles governing the conduct of hostilities to cyberoperations conducted in armed conflict

In cyberspace, applying the rules governing the conduct of hostilities is particularly challenging. Owing to the very characteristics of cyberspace, such as the immediacy of the action, the dual nature of targets, and the hyperconnectivity and interdependence of information systems and networks, cyberoperations can have swift, devastating effects. Serious violations of those rules as a result of a cyberoperation may constitute a war crime under the Rome Statute of the International Criminal Court.

4.3.2.2.2.1. Principle of distinction

Under the principle of distinction, the parties to an armed conflict must at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives[1068]. Accordingly, cyberattacks carried out in armed conflict which are not directed at a specific military objective or the effects of which cannot be limited are prohibited[1069]. In case of doubt whether a person is a combatant or civilian, that person must be considered to be a civilian[1070]. Likewise, in case of doubt whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it must be presumed not to be so used[1071].

Under the authority of the CEMA, operations of offensive and influence cyber warfare are planned and coordinated in compliance with this principle by taking all feasible measures to ensure that targeted objectives are not civilians, or civilian objects. Commanders implement the principle of distinction by ensuring that the necessary intelligence are gathered to identify the target and choose the most suitable engagement means. Even though cyber weapons can have immediate effects, their integration into operational manoeuvre is based on long and specific planning designed to ensure the gathering of the information necessary for identifying the nature of the targeted system (e.g., mapping the enemy network) in order to ensure compliance with IHL. A cyberoperation will be cancelled if the target under consideration proves not to be a military objective.

- **Distinction between military objectives and civilian objects[1072]**

In cyberspace, ICT equipment or systems and the data, processes or flows which provide a service may constitute military objectives if (i) they contribute to military action by their nature (armed forces computer workstations, military command, localization or surveillance networks, etc.), location (places from which the cyberattacks are carried out), purpose (intended use of ICT networks for military purposes) or use (use of a network segment for military purposes), and (ii) their total or partial destruction, capture or neutralization offers a definite military advantage. Accordingly, a propaganda centre may constitute a lawful military objective and be made the object of a cyberattack if it disseminates instructions related to the conduct of hostilities[1073].

Conversely, all objects which are not military objectives are civilian objects[1074]. An attack carried out in

[1068] AP I, Art. 48: "*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives*".
[1069] *Ibid*., Art. 51(4).
[1070] *Ibid*., Art. 50(1).
[1071] *Ibid*., Art. 52(3).
[1072] *Ibid*., Art. 52.
[1073] ICTR, Trial Chamber I, *Nahimana, Barayagwiza and Ngeze*, Judgement, ICTR-99-52-T, 3 December 2003. Such was the case with the Rwandan National Radio *des Mille Collines*, which transmitted precise information about the location of Tutsi people and provided them with false information to persuade them to regroup in supposedly protected areas.
[1074] AP I, Art. 52(1).

cyberspace may not be directed against ICT systems used by schools, medical facilities or any other exclusively civilian service, nor against systems whose destruction would only have tangible effects on civilian objects, unless those objects are used for military purposes. Given the current state of digital dependence, content data (such as bank or medical data) are protected under the principle of distinction.

Cyberoperations must also take into account the special protection of certain objects, such as medical units[1075], cultural property[1076], the natural environment[1077], objects indispensable to the survival of the civilian population[1078], humanitarian relief objects[1079], and installations containing dangerous forces[1080]. This protection extends to ICT equipment and services and to the data needed to operate them, such as medical data linked to the operation of a hospital.

ICT infrastructure or a system used for both civilian and military purposes may, after detailed analysis on a case-by-case basis, be deemed a military objective. They may be targeted provided that the principles of proportionality and precautions are respected. Given the hyperconnectivity and interdependence of systems, commanders exercise vigilance over the entire targeting process with a view to avoiding, and in any event minimizing, incidental civilian casualties and damage.

- **Distinction between civilians and combatants[1081]**

Cyber combatants[1082], including military personnel assigned to a cyberoperations command, hackers under State command, or members of an organized armed group[1083] conducting cyberoperations against the enemy, may be made the object of attack, unless they are *hors de combat*.

Any other person is considered to be a civilian and enjoys general protection against dangers arising from military operations[1084], unless and for such time as they take a direct part in hostilities[1085]. A cyberoperation conducted to adversely affect the military operations or military capacity of a party to an armed conflict, to the detriment of that party and in support of an enemy party, or which is likely to cause loss of civilian life, injury to civilians and damage to civilian objects, may constitute direct participation in hostilities[1086].

For example, penetrating a military system of a party to an armed conflict to collect tactical intelligence for the benefit of an enemy party for the purposes of an attack is direct participation in hostilities, as is installing malicious code, preparing a botnet[1087] with the aim of launching a DDoS attack, or developing software specifically intended for the perpetration of a hostile act[1088].

[1075] GC I, Arts. 19(1), 24, 25, 35 and 36; GC II, Arts. 22(1), 36 and 39; GC IV, Arts. 18(1), 20(1) and 22(1); AP I, Arts. 12(1), 15(1) and 21.
[1076] AP I, Art. 53; 1954 Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict.
[1077] AP I, Art. 353(3) and 55(1).
[1078] *Ibid*., Art. 54(2); AP II, Art. 14.
[1079] AP I, Art. 70(4).
[1080] *Ibid*., Art. 56(2).
[1081] *Ibid*., Art. 48.
[1082] Ibid., Art. 43.
[1083] The International Criminal Tribunal for the former Yugoslavia (ICTY) identified several indicative factors for determining whether an armed group is 'organized', including the existence of a command structure and disciplinary rules and mechanisms within the group, the existence of headquarters, control exercised by the group over a certain territory, ability to gain access to weapons, other military equipment and recruits and to provide military training, ability to plan, coordinate and carry out military operations, including troop movements and logistics, ability to define a unified military strategy and use military tactics, ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords. For more information on the level of organization required, see, *inter alia*, ICTY, Trial Chamber, *Boškoski and Tarčulovski*, Judgement, IT-04-82-T, 10 July 2008, §§194-205.
[1084] AP I, Art. 51(1).
[1085] *Ibid*., Art. 51(3); AP II, Art. 13.
[1086] The criteria of threshold of harm, direct causation and belligerent nexus must be fulfilled.
[1087] A botnet (or network of zombie machines) is a group of computers connected to the Internet that, without the knowledge of their respective owners, have been configured to transmit information (including spam or computer worms) to other computers connected to the Internet. These computers or connected devices, called 'zombies' or 'bots', serve the interests of the originator of the spam or worm.
[1088] The aforementioned criteria must be fulfilled.

4.3.2.2.2.2. Principles of proportionality and precautions

In the conduct of cyberoperations, constant care shall be taken to spare the civilian population, civilians and civilian objects[1089].

Despite necessary precautions having been taken, civilian casualties or damage that may be caused by the neutralization or destruction of a military objective by digital means must not be excessive in relation to the concrete and direct military advantage anticipated [1090]. The risks inherent in cyberspace must therefore be taken into account in order to determine the modes of action and means to be implemented in cyber warfare, in compliance with the principle of proportionality.

Even though the anticipated effect of a cyberoperation may be difficult to measure, given the interconnectivity and interdependence of information systems, particularly due to the risk of propagation beyond the intended target, it is possible to circumscribe the potential consequences of such operations by developing specific cyber weapons which are to be used based on pre-determined desired effects (activation of malware only in the presence of a specific network previously identified through system penetration, existence of a deactivation time, etc.).

The use of malware which deliberately self-replicates and propagates with no possible control or reversibility, and is hence likely to cause significant damage to critical civilian systems or infrastructure, is contrary to IHL, in the same way as the temporary interruption without military advantage of an adversary system followed by physical damage to civilian infrastructure.

The assessment of the effects of a cyberoperation takes into account all the foreseeable damage caused by the cyber weapon, whether direct (such as damage to the ICT equipment directly targeted or interruption of the system) or indirect (such as the effects on the infrastructure controlled by the attacked system, or on persons affected by the malfunction or destruction of the targeted systems or infrastructure, or by the alteration and corruption of content data).

In order for OCO to be conducted in compliance with the principle of precautions, the Ministry of Defence consults operational experts in military cyber defence under the responsibility of COMCYBER. They possess the necessary technical knowledge, are able to exploit the available information (gathered intelligence, strict identification of targets, correlation between the weapon chosen and the desired effects, etc.) and have been given specific training in the complexity of cyber weapons. Additionally, the OG COMCYBER can rely on three dedicated operational legal advisors for each type of cyber warfare (defensive, offensive, influence) to fulfil their mission of defining the legal framework for cyber defence operations, relevant cyber rules of engagement and appropriate levels of delegation, in conjunction with the operational legal cell of the CEMA cabinet.

These precautionary measures in attack are complemented by precautionary measures against the effects of attack which a State must take in order to protect the civilian population, individual civilians and civilian objects against the dangers resulting from cyberoperations[1091].

[1089] AP I, Art. 57(1).
[1090] *Ibid*., Art. 57(2)(a)(iii).
[1091] *Ibid*., Art. 58.

PART 5

COMPLIANCE WITH THE LAW AND RULES GOVERNING THE USE OF FORCE IN OPERATIONS: MONITORING AND SANCTIONING MECHANISMS

CHAPTER 1: THE MECHANISMS CONTRIBUTING TO COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Compliance by a State with international humanitarian law (IHL) and international human rights law (IHRL) depends on the fundamental values pursued by that State and on a number of internal political, institutional, regulatory, judicial and technical mechanisms, as well as on external entities, such as the International Committee of the Red Cross (ICRC) or non-governmental organizations (NGOs), which, through their actions and monitoring or advocacy functions, aim to influence State policy and behaviour towards that end.

IHL and IHRL are fully incorporated into the French constitutional system and positive law through the hierarchy of norms and the judicial and non-judicial review of legality and responsibility, which are both standards required by the rule of law.

Those robust review mechanisms of effective compliance with the law have been supplemented by other control systems, such as the corresponding competence vested in national institutions for the promotion and protection of human rights, in accordance with the Paris Principles annexed to resolution 48/134 adopted by the General Assembly of the United Nations on 20 December 1993.

Lastly, the regular and high-level training of personnel in the implementation of IHL and IRHL is a cardinal obligation that aims to provide national decision-making chains, as well as partners and other stakeholders where relevant, with comprehensive advice on the application of and compliance with those bodies of law, in accordance with the obligation of ensuring respect for the Geneva Conventions (GC) in all circumstances under their Common Article 1.

1.1. Application of Article 1 common to the GC and of IHRL provisions

1.1.1. The three categories of obligations under Common Article 1

There are three types of obligations under Article 1 common to the GC, which provides that "*the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances*".

States thus have (i) the negative obligation to refrain from any deliberate violation of IHL; (ii) the 'internal' positive obligation to ensure national implementation and application of IHL; and (iii) the 'external' obligation, both positive and negative, to exert their influence on other States or belligerents to ensure that they respect international humanitarian law, and "*not to encourage*"[1092] such violations. This last obligation is an obligation of conduct, not an obligation of result, which must be assessed *in concreto* taking account of France's actual ability to influence other parties. Such obligation cannot entail France's responsibility for IHL violations by other parties, excluding the cases explicitly provided for under the law of the responsibility of States for internationally wrongful acts.

Under French domestic law, compliance with IHL and IHRL is a principle enshrined in the Preamble to the 1946 Constitution of the IVth French Republic[1093], which is part of the 'block of constitutionality' under the current French Constitution, and it is not subject to a condition of reciprocity. Indeed, although Article 55 of the Constitution provides that "*Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the*

[1092] ICJ, *Military and Paramilitary Activities in und against Nicaragua*, Judgment. I.C.J. Reports 1986, p. 103, §194 and p. 114, §220; See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, pp. 199-200, §§158-159.

[1093] Preamble to the 1946 Constitution of the IVth Republic, §14: "*The French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people*".

other party", the French Constitutional Council specified in a decision the scope of the reciprocity condition contained therein. Pursuant to that decision, depending on the purpose of the international commitment considered, "*the obligations flowing from such commitments must be imposed on all States Party whether or not they are implemented by the others*". According to the Council, there is therefore no condition of reciprocity in the case of treaties concluded "*with a view to encouraging peace and security in the world*", including human rights treaties[1094].

1.1.2. The full implementation of IHL and IHRL in the French domestic legal framework

1.1.2.1. IHL and IHRL norms have a supra-legislative value and may be invoked under domestic law

The French constitutional system is monistic. Under Article 55 of the Constitution, treaties and international agreements which are duly ratified and published have a supra-legislative value, which means that they prevail over domestic law. This applies to IHL and IHRL; both bodies of law thus have a prominent place in the hierarchy of norms.

This predominant position enables administrative and judicial courts to review whether regulatory acts taken by public authorities and laws passed by the Parliament are consistent with France's international commitments.

French criminal law has been amended to include offences corresponding to violations of IHL and IHRL within the meaning of, and for the application of, the GC, their Additional Protocols I (AP I) and II (AP II) and the Rome Statute of the International Criminal Court (ICC).

1.1.2.2. Orders and instructions by military authorities are consistent with IHL and IHRL

1.1.2.2.1. Commanders have the preventive role of respecting and ensuring respect for international law

Under French domestic law, a military commander who exercises authority "*has the right and the duty to demand obedience from subordinates; [commanders] may not order the performance of acts contrary to laws, to rules of the international law applicable in armed conflicts and to international conventions in force*"[1095]. Articles D4122-7 and following of the Defence Code specify the scope of the military personnel's obligations of compliance with IHL.

Article L4122-1 of the French Defence Code provides that "*military personnel must abide by the orders of their superiors and are responsible for performing the missions entrusted to them. However, they may not be ordered to accomplish acts that are contrary to laws, to customs of war or to international conventions*". Under the rules of general discipline (Art. D4122-1 *et seq*., Defence Code), military personnel "*must obey the orders given in accordance with the law […] they must not execute an order to accomplish an act which is manifestly unlawful or contrary to the rules of international law applicable in armed conflicts or to international conventions in force*".

Commanders must ensure that military personnel under their control are properly trained in applicable international and domestic law, in compliance with Article 87(2) of AP I and Articles D4122-2(8) and D4122-11 of the Defence Code.

[1094] Constitutional Council, Decision No. 98-408 DC of 22 January 1999, "Treaty laying down the Statute of the International Criminal Court", §12.
[1095] Defence Code, Art. L4122-1.

Any infringement of the rules of IHL may be punished by means of disciplinary sanctions, but also criminal penalties in case of serious offences.

In compliance with domestic[1096] and international[1097] law, military commanders and civilian hierarchical superiors[1098] must take all necessary and reasonable steps to prevent or suppress the commission by subordinates of a breach of IHL or IHRL. Where such steps are not feasible, they must inform competent authorities with a view to initiating investigation and prosecution[1099]. In case the offence could not be prevented, they must endeavour to end the violation and, wherever necessary, elucidate the facts and circumstances of the events by initiating investigation.

1.1.2.2.2. Command investigation: a tool to ensure respect for international law

Under IHL, States have the obligation to investigate any alleged breach of the GC or their Additional Protocols brought to their attention[1100].

A command investigation is carried out in case of serious failure or risk thereof. This covers a wide array of situations, including any accident, incident or act which may have significant human, financial or material consequences and involving civilian or military personnel; any situation which may give rise to a serious risk for the personnel or chain of command; and any case which may result in criminal proceedings or public scrutiny.

In armed conflict, a command investigation must be carried out if there is reliable information indicating any loss of civilian life, injury to civilians or damage to civilian objects associated with an attack conducted by the French armed forces, where such civilian casualties or damage were not expected to be caused, or appear to be excessive in relation to the concrete and direct military advantage anticipated.

There are three levels of authority that can initiate a command investigation[1101]: level 1 is the commander of the administrative division; level 2 is the authority which is the direct superior in the chain of command of the division or unit concerned; level 3 if the Chief of the Defence Staff ("*chef d'état-major des armées*", *CEMA*). Level 2 investigations are carried out by the Inspectorate of the Armed Forces, whereas level 3 investigations are conducted by a General Officer thereof. In principle, the closest level is responsible for such investigation; however, in certain circumstances, including the particular gravity of the alleged violations, the need for prompt action or potential conflicts of interests, a superior military authority may entrust the superior levels with that responsibility.

A command investigation has three objectives: establishing the facts, their cause and possible consequences;

[1096] *Ibid*., Art. R4137-13: "*Any superior has the right and the duty to demand that military personnel under them in the hierarchical order be punished for their misconduct or any breaches they may have committed. The same applies to any civilian superior towards military personnel under their authority*".

[1097] AP I, Art. 87(3); 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 6; 2010 UN International Convention for the Protection of All Persons from Enforced Disappearance, Art. 12; 1954 Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict, Art. 28; 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Arts. 15-17.

[1098] Penal Code, Art. 462-7(2): As regards civilian hierarchical superiors, the criteria for entailing responsibility are more restrictive than those applicable to military commanders. Indeed, civilian superiors must either "*know*" that subordinates were committing, or were about to commit, such breach, or have "*intentionally failed to take account of information*" which clearly indicated that circumstance.

[1099] *Ibid*., Art. 462-7(1). As regards the obligation to take measures necessary for the suppression of all acts contrary to the GC other than the grave breaches, see GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Art. 86.

[1100] AP I, Art. 87(3). Even though the obligation to investigate alleged violations of IHL in NIAC is not expressly prescribed under Article 3 common to the GC or AP II, France considers that it derives from the general principles of IHL. See also the 2013 Second Turkel Commission Report on the conformity under international law of the Israeli mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, pp. 79 ff.; and Geneva Academy of International Humanitarian Law and Human Rights, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, And Good Practice*, ICRC, 2019.

[1101] See Directive No. 241/DEF/IdA/G.IdA of 30 October 2013 relating to command investigations within a joint framework; and Directive No. 6296/DEF/CM13 of 20 Avril 2017 relating to command investigations.

determining the responsibility of perpetrators and, where appropriate, take the necessary steps to initiate disciplinary sanctions and/or criminal proceedings; drawing conclusions and lessons for the future.

The investigation, including the submission of the report, must take place in a reasonable timeframe (around three weeks) and the authority in charge of closing the investigation has around two weeks to take action. The authority which initiated the investigation can then either approve the report, request supplementary information, or order that a higher-level investigation be initiated, in which case the authority thereover will be transferred to the superior level. The initial investigation reports and the closing documents are sent to the Inspection and the Chief of Staff of the military branch concerned by the investigation.

Command investigations are independent from judicial investigations. In certain cases, both types of investigation may be undertaken simultaneously. In case a judicial investigation is initiated (see Part 5, Chapter 2, Subsection 3.2. below), the judge often requests the transmission of any command investigation findings or report[1102]; for this reason, command investigation reports should be verified by a qualified jurist[1103].

1.1.2.2.3. Command investigation disciplinary and penal consequences

If a command investigation reveals any misconduct or breaches, disciplinary sanctions may be imposed (see Part 5, Chapter 2, Subsection 2.3.1. below).

Where such misconduct or breaches, including outside national territory, fall under French criminal law, the military authority must notify the Public Prosecutor (*Procureur de la République*) in accordance with Article 40 of the Code of Criminal Procedure (see Part 3, Chapter 7, Subsection 7.1.1. above).

1.1.2.2.4. The command authority over Provost Gendarmerie

The French Provost Gendarmerie is placed under the operational chain of command to exercise their missions pursuant to Article 411-2 of the Code of Military Justice. In theatres of operations, the commander of the Provost Gendarmerie component is placed under the authority of the force commander (COMANFOR) if the force commander is French, or under the authority of the French contingent commander, who is the representative of the Chief of Staff to the operation commander.

Outside French national territory, the Provost Gendarmerie perform their missions in accordance with the international agreements and treaties to which France is a party, including those relating to the stationing of foreign troops and to the status of forces, and with French law and regulations, in compliance with IHL and the Rome Statute of the ICC.

When required by the military authority, the Provost Gendarmerie may participate with other divisions of the Ministry of Defence in the missions of general police within the armed forces, including where incidents may entail the responsibility of France or members of the French armed forces. Where appropriate, the Provost Gendarmerie proposes disciplinary and administrative measures to the military authority at theatre level, which is the second-level authority for all military personnel deployed.

Furthermore, the Provost Gendarmerie is the 'judicial police of the military' acting under the direction of the Public Prosecutor of the Paris Judicial Tribunal, in accordance with the Code of Criminal Procedure. Their missions cover the determination of offences committed by or against the French armed forces (and any associated persons) or against their facilities or materiel, the collection of evidence and the identification of

[1102] In accordance with French law, judges can order the transmission of such information (a step known as '*réquisition judiciaire*', judicial requisition) – where necessary after its declassification following a request for opinion to the Commission for national defence secrecy under Art. L2312-4 of the Defence Code. This information is then added to the case file.
[1103] See the Guide for the conduct of command investigations within a joint framework, Note No. 086/DEF/IdA/G.IdA/DR of 2 July 2014.

and search for perpetrators to hand them over to judicial authorities. If and as soon as a judicial investigation is initiated, they carry out their missions on the instructions of the investigating judge[1104].

The personal jurisdiction of the Provost Gendarmerie is vast and extends beyond the members of the French armed forces, including to civilian personnel employed by the armed forces on a permanent or contract basis[1105].

Investigations by the Provost Gendarmerie are promptly conducted when offences are committed or reported. For this purpose, they are placed under the direction of the civil judges within the Paris ordinary law court specialized in military criminal matters, to whom they directly answer while being completely independent from military authorities.

The Provost Gendarmerie carries out investigations in full compliance with French law and IHL, the force mandate, international defence agreements, intergovernmental agreements (in particular status-of-forces agreements) and the law applicable where they are deployed.

1.1.2.2.5. Operational Legal Advisors: the guarantors of respect for IHL and IHRL within the chain of command

Under Article 82 of AP I, "*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*".

Operational Legal Advisors (LEGAD) are active or reserve officers who hold a university degree in the legal field (at least at the undergraduate level). Furthermore, LEGADs must successfully complete a special two-tier training course ("*stage LEGAD*"). The first-level part is coordinated with the San Remo International Institute of Humanitarian Law in Italy, or any other equivalent training institution, while the second-level is organized directly by the Ministry of Defence on a yearly basis.

Article 82 of AP I sets a broad but binding framework for the role of LEGADs within command structures. Their mission primarily has three objectives: operational advice, training and prevention.

The first function of LEGADs is to "*advise military commanders at the appropriate level*" on the application of IHL during the planning and conduct of operations, but also in the phase following the completion of such operations. In the planning phase, LEGADs participate in operation planning groups or boards, in the drafting and continued adapting of the operation plan (OPLAN), operation orders (OPORD), rules of engagement (ROE) and of the National Targeting Directive. LEGADs provide legal advice on actions envisaged (deliberate targeting, attacks, searches, seizures of weapons, detention, etc.). Where French armed forces participate in multinational or joint operations, French LEGADs work in cooperation with LEGADs from partner States to ensure consistency in the interpretation of applicable rules.

In the conduct of operations, LEGADs play an active advising role in the decision-making process, including in dynamic targeting or on issues related to ROE. In combined operations, LEGADs ensure compliance with 'national caveats', i.e. restrictions on the employment of forces, and participates in national control[1106].

LEGADs may also be requested to provide legal opinions in the phase following the completion of military actions, including for the purposes of investigations on collateral effects.

LEGADs are also responsible for monitoring compliance with applicable conventions, including regarding

[1104] Code of Military Justice, Art. L211-2.
[1105] See Code of Military Justice, Art. L121-1 to L121-5 for the different categories of persons concerned.
[1106] See Subsection 1.1.3.3.

the deprivation of liberty of persons captured by the force and transferred to local authorities. They carry out visits and ensure that the detention procedure is observed from the outset, including applicable directives and international instruments (cf. Part 3, Chapter 6 above). They are present during the transfer to local authorities and ensure a follow-up of transferred individuals.

The second function of LEGADs is to provide appropriate training in IHL to the armed forces, including the rules governing the use of force. In compliance with the obligation of conduct to ensure respect for IHL under Article 1 common to the GC, the audience of this training mission may be extended, beyond national forces, to local and allied forces.

Lastly, LEGADs participate in the relations of the force with key external partners to ensure the application of international law and compliance with France's commitments, including the ICRC, public prosecutors of the host State, UNICEF, organizations responsible for handling Children Associated with Armed Forces and Armed Groups (CAAFAG), etc.

During their deployment, LEGADs are placed under the functional authority of the operational legal cell of the CEMA.

In principle, at least one LEGAD is deployed in each operation.

1.1.3. Training in and dissemination of IHL and international law

1.1.3.1. Training of French military personnel deployed in foreign operations

Under the French Defence Code, all military personnel engaged in combat must abide by their obligations under international law applicable to armed conflict [1107], in accordance with France's international commitments. All military personnel must know and comply with those rules[1108].

Knowing those legal norms is essential to their proper implementation. For this purpose, all military personnel, regardless of their rank, receive a basic education and further in-service training in international law, as well as *ad hoc* training prior to and during their deployment in foreign operations.

France considers it a priority to provide appropriate education to its nationals deployed as civilian or military personnel or experts in national or international missions. They must be exemplary in terms of knowledge of the legal framework for their action on national territory, in foreign operations or within international organizations, and of respect for the ethical and moral imperatives associated with the profession of arms and the mandate that they receive.

1.1.3.2. Training of partners or officers from other States

1.1.3.2.1. Training of nationals from troop-contributing States in peace or multinational operations

France also plays a role in the training of partners or nationals from other States. Since 2016 and in conjunction with the International Organization of the Francophonie, France organizes yearly training for officers from States which provide military and law enforcement personnel to UN peacekeeping operations. This UN-labelled training aims to guarantee consistency in the training of contingents from different States or regions and to facilitate the engagement of those States in such peacekeeping missions. It is also a means to ensure that national training programmes prior to deployment are consistent with UN operational requirements (peacekeeping operations structures and functions, protection against new asymmetrical

[1107] Defence Code, Art. D4122-7.
[1108] *Ibid*., Art. D4122-11.

threats, etc.) as well as with legal norms (IHL, rules on the conduct of personnel in operations, etc.) and general and professional ethics standards. Thanks to this training programme, more than a hundred military and law enforcement personnel from African and Asian States have received an education on staff procedures of peacekeeping operations and on the rules of conduct and professional ethics that prevail within the UN.

Furthermore, France takes joint initiatives together with recognized IHL or human rights organizations, such as the San Remo International Institute of Humanitarian Law in Italy, to develop and provide further training, including on strengthening the protection of women during conflicts and increasing the participation of women in peace negotiations and decision-making processes.

French officers contribute to disseminating IHL where they are deployed in UN, EU or NATO-led multinational operations. For example, French officers who were deployed in the European Union Training Mission (EUTM) in Mali and the Central African Republic participated in the training of Malian and Central African armed forces to supplement training by international actors such as the ICRC, UN missions and the European delegation. A French LEGAD also took part in the NATO Mission Iraq as senior LEGAD responsible for organizing and providing IHL training to Iraqi armed forces; this mission was suspended following the Covid-19 outbreak.

1.1.3.2.2. Training of nationals from partner States and provision of French LEGADs

France also supports and participates in the initiative of the European Union and the UN Office of the High Commissioner for Human Rights (OHCHR) aiming at providing the G5 Sahel Joint Force (Burkina Faso, Chad, Mali, Mauritania, Niger) with long-term knowledge on IHL standards, in conjunction with the San Remo International Institute of Humanitarian Law and the ICRC.

On foreign theatres of operations where the French armed forces are deployed, LEGADS also play an essential role in disseminating IHL to foreign armed forces and instructing them on the rules of conduct to be observed prior to each operation. Where French forces are stationed jointly with allied troops, IHL training sessions are organized as needed.

For example, France provides a ‘combatant booklet’ which is translated into eight languages to organized armed groups that French armed forces come across during their deployment. This booklet includes explanations and illustrations promoting compliance with IHL.

1.1.3.3. Clear operational rules in partnerships with foreign armed forces

The French armed forces’ kinetic support to foreign armed forces complies with the French targeting process and rules of engagement. Therefore, no attack can be launched without France’s consent where France exercises operational control over the armed forces of a partner State.

Furthermore, where France participates in a multinational operation led by another State, it retains full authority over its national armed forces and can freely decide whether to let them participate in an attack based on an independent assessment whether this attack complies with its international commitments and domestic law.

Where France provides kinetic support to a partner State, an attack may only be conducted when it is jointly authorized by the French armed forces and the military authorities of that partner State.

Lastly, where French armed forces provide support in an operation led by another State or an international organization, they may inform the persons responsible for that operation of the national restrictions applicable to them, i.e. actions or operations where they would not participate for political, legal or capability reasons. Such mechanism is another means to ensure the proper implementation of international law by

national forces.

Sharing operational documents is also a way to remind all parties of their obligations and duties. Inappropriate behaviour and breaches of IHL rules by partners must systematically be reported to the hierarchical superior and handled on a case-by-case basis. Such misconduct or breaches may result in the suspension of the cooperation with the partner State, as well as in diplomatic protests.

Operational directives at all levels (strategic, operational, tactical) specify the proper conduct to adopt in different situations (how to react in order to end a breach of IHL, how to report to commanders, etc.)

1.1.4. IHL and IHRL review and advisory authorities

1.1.4.1. Political control, advisory boards and annual debates

The French Parliament can use a wide array of means to review compliance by the Government with France's treaty obligations. Those means can be subsumed under four categories: means of information (written questions and answers published in the government gazette; oral questions followed by a debate; "Questions for the Government" format during parliamentary meetings for topics related to current affairs, which is broadcast on television); means of investigation (hearings of parliamentary committees and delegations; information missions and working groups established by permanent committees; commissions of inquiry); means of assessment of public action (monitoring and assessment missions of the National Assembly Finance Committee, Public Policies Monitoring and Assessment Committee); means of effective review by special rapporteurs of the Finance Committee of how public funds are used.

1.1.4.2. The National Advisory Commission on Human Rights

Under Article 1 of the Law No. 2007-292 of 5 March 2007, the National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l'homme, CNCDH*) supports the Government by providing advice and making propositions in the fields of human rights, international humanitarian law and humanitarian action. It assists the Prime Minister and ministers by providing opinions on all general issues falling under its area of competence on both national and international level. The Commission can also act on its own initiative to publicly draw the attention of the Parliament and/or Government on measures that the Commission considers may be appropriate to promote and protect human rights. The Commission fulfils its mission independently. It does not receive or request any instructions from administrative or governmental authorities. Its composition and operation are set out in Decree No. 2007-1137 of 26 July 2007.

The CNCDH is the French 'national institution for the promotion and protection of human rights' as recognized by the United Nations. Under this status, the Commission may exercise certain rights in its relations with international organizations: the right to speak within certain fora and the right to contribute in its own name, in the same way as States and NGOs. The Commission deals with matters concerning respect for, and protection of, IHRL as well as IHL.

1.1.4.3. The Defence Ethics Committee

The French Defence Ethics Committee was established by Ministerial Order of 17 July 2019 as a permanent structure for discussion on ethical matters relating to the evolution of the profession of arms or the advent of new technologies in the field of defence, such as the use of artificial intelligence. The Committee provides opinions and makes propositions and recommendations on such matters, excluding issues directly related to the conduct of operations or litigation.

The Committee is chaired by an honorary member of the Council of State (France's highest administrative body) and composed of 18 qualified individuals from the field of defence and other fields, appointed by the Minister of Defence for a three-year renewable term. Members include military figures from all armies

(army, navy, air force, cyber) and experienced personnel with in-depth knowledge of the Ministry of Defence, as well as experts in the fields of health, philosophy, new technologies and military history. The presence of experts from civil society in the membership of the Committee is essential to fuel reflection and debates.

Since January 2020, the Committee has been working on several issues and topics such as the augmented soldier, lethal autonomous weapon systems (LAWS), the digital environment of combatants, ethics in military training, etc.

1.1.4.4. The Biennial Humanitarian Conference

Since 2011, France's Biennial Humanitarian Conference is a key opportunity for reflection and discussion on the country's engagement in humanitarian action. This initiative shows France's commitment thereto and the importance of its partnerships with the different players involved.

1.1.5. Obligations to investigate under IHRL and IHL

Under Article 2(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), "*Everyone's right to life shall be protected by law*".

The European Court of Human Rights (ECtHR) had the opportunity to rule on the three questions raised by the application of that article in situations of international armed conflict (IAC)[1109].

Firstly, as regards the scope of application and extent of the positive obligation to protect life in extraterritorial armed conflict, the Court held that the obligation under Article 2 to safeguard life entails that all reasonable steps must be taken to ensure that some form of effective, independent investigation is conducted when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State, including in a context of armed conflict. States thus have the obligation to investigate into alleged breaches of the right to life. The Court recognizes that complying with that obligation in such context may prove difficult in practice. 'Reasonable steps' means that the obligation is an obligation of means, not an obligation of result[1110]. Such steps must aim, *inter alia*, to secure the evidence concerning the incident, including eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death[1111].

The scope of application of the obligation to investigate under IHRL is not entirely congruent with that of the same obligation under IHL. Indeed, while States have the obligation to investigate into any alleged breaches of the right to life under Article 2 of the ECHR, not every deprivation of life in the conduct of hostilities entails such an obligation for States under IHL. Accordingly, in armed conflict, States are not under the obligation to investigate into the death of combatants, of members of the armed wing of an organized armed group, or of civilians taking a direct part in hostilities, who all constitute valid military objectives under IHL (cf. Part 3).

Under IHL, States do have an express obligation to investigate in certain specific situations, such as the death or serious injury of a prisoner of war[1112] or an internee[1113] in their power. In addition, they must investigate into any alleged war crime that comes to their attention[1114], including any allegation of intentional use of force against the civilian population or civilian individuals; any alleged intentional indiscriminate attack that

[1109] ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 55721/07, 7 July 2011, §163.
[1110] *Ibid.*, §§164-168.
[1111] *Ibid.*, §166.
[1112] GC III, Art. 121.
[1113] GC IV, Art. 131.
[1114] AP I, Arts. 11, 85 and 86.

caused harm to civilian population or damage to civilian objects; or any alleged disproportionate attack that was 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.

Secondly, as regards the investigation effectiveness and quality requirement, according to the ECtHR case law, "*for an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence*"[1115]. However, on some occasions, the Court also recognized that "*there are important differences of context and purpose*" between certain measures depending on whether they were "*carried out during peacetime*" or "*in the course of an armed conflict*"[1116]. In the case of *Hanan v. Germany*[1117], the Court was called upon to move away from an organic approach to assess the facts *in concreto*, and to consider that the absence of total statutory independence of a military investigative body is a problem only when it appears that this circumstance may undermine the quality of the investigation. Taking into account the specific challenges and constraints surrounding investigations carried out in armed conflict, *a fortiori* in active hostilities, the Court considered that the fact that the German military police were under the overall command of the German contingent in the United Nations International Security Assistance Force (ISAF) did not affect their independence to the point of impairing the quality of their investigations. Although the Court did not hold that the investigation had been ineffective, it considered by contrast that the officer who ordered the impugned strike should not have been involved in investigative steps, and that the initial on-site assessment should not have been done exclusively by members of the contingent under that officer's command.

In order to be effective, the investigation must therefore be capable of leading to the establishment of the facts, determining whether the force used was justified based on a thorough, objective and impartial analysis of the circumstances of the deprivation of life, and identifying and – if appropriate – punishing those responsible. The investigation must also be prompt and reasonable expeditious, and the authorities must act of their own motion once the matter has come to their attention. The Court takes account of all those elements in its determination.

1.1.6. Technical arrangements contributing to compliance with IHL and IHRL: The legal review under Article 36 AP I

Under Article 36 of AP I, in the study, development, acquisition or adoption of a new weapon, means or method of warfare, States parties are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by IHL provisions or by any other rule of international law applicable to them in armed conflict. France's principles and procedures for carrying out this legal review are laid down by Ministerial Directive No. 6255/ARM/CAB of 31 October 2019 and further, unpublished annexes.

Under this legal framework applicable in France and in compliance with IHL, the implementation of this legal review of new weapons, means and methods of warfare falls under the responsibility of the Joint Defence Staff, the Directorate-General of Armament and the other competent divisions of the Ministry of Defence.

For detailed information, refer to Part 3, Chapter 5, Subsection 5.6.

[1115] See, *inter alia*, ECtHR, *Jaloud v. the Netherlands*, Judgment of the Court (Grand Chamber), Application No. 47708/08, 20 November 2014, §186.
[1116] See, *inter alia*, ECtHR, *Hassan v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 29750/09, 16 September 2014, §97.
[1117] ECtHR, *Hanan v. Germany*, Judgment of the Court (Grand Chamber), Application No. 4871/16, 16 February 2021.

1.1.7. Integration into domestic law of the obligation to suppress breaches of IHL and IHRL and to prosecute perpetrators

Under IHL[1118], States parties must enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of IHL, search for persons alleged to have committed, or to have ordered to be committed, such breaches, and bring such persons before their own courts[1119]. Other international instruments also provide for the obligation to investigate allegations of serious violation of their stipulations.

Furthermore, in accordance with the principle of complementarity under the Rome Statute of the ICC, States parties must carry out an effective criminal investigation to rule out the jurisdiction of the ICC[1120], as "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*"[1121].

1.1.7.1. French courts have quasi-universal jurisdiction over certain violations of international law

Universal or quasi-universal jurisdiction is an exception to the traditional rules of jurisdiction for the courts of the State on whose territory an offence was committed (territorial jurisdiction) or the State of nationality of the perpetrator or the victim of the offence (active or passive personal jurisdiction).

French law contains two exceptions to the principle of territorial and personal jurisdiction, allowing a French court to prosecute alleged perpetrators of foreign nationality for certain offences committed abroad against a foreign victim.

Under Article 689-1 of the Code of Criminal Procedure, the first exception is the criterion of mere presence on French territory of a foreign national who allegedly committed the violations provided for in Articles 689-2 to 689-10 and 689-12 to 689-13 of the Code of Criminal Procedure, in accordance with relevant international conventions[1122].

The second exception is the criterion of habitual residence on French territory of an alleged perpetrator of foreign nationality (Articles 689-11 and 689-14 of the Code of Criminal Procedure). This criterion applies for prosecution of alleged perpetrators of crimes falling under the jurisdiction of the ICC: war crimes, crimes against humanity, and the crime of genocide. However, the prosecution of a person who has their habitual residence on French territory is subject to several conditions listed under Article 689-11: the submission of a request from the public prosecutor[1123], the absence of an extradition request by a foreign court or of a request for surrender by an international court, which implies the absence of prosecution by the ICC. Lastly, except for the crime of genocide, either the acts must be punishable under the domestic law of the State on whose territory they were committed, or the State of nationality of the alleged perpetrator must be a party to

[1118] GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; AP I, Arts. 11, 85 and 86.
[1119] GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Art. 86.
[1120] Rome Statute, Arts. 17 and 18.
[1121] *Ibid*., Preamble.
[1122] 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1977 European Convention on the Suppression of Terrorism; 1980 Vienna Convention on the Physical Protection of Nuclear Material; 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and 1988 Rome Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; 1988 Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law; 1997 International Convention for the Suppression of Terrorist Bombings; Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport; 2010 UN International Convention for the Protection of All Persons from Enforced Disappearance.
[1123] The monopoly of the public prosecutor's office does not preclude a victim from reporting facts to the prosecutor or from lodging a complaint to take part in the proceedings once they were initiated by the prosecutor's office. The dismissal of a complaint must be justified and can be appealed to the public prosecutor's office (Code of Criminal Procedure, Art. 40-3).

the Rome Statute of the ICC.

In France, the prosecution of such offences is conducted by the Division for crimes against humanity, war felonies and war misdemeanours of the National Anti-Terrorism Prosecution Department.

There is no provision under French constitutional law or international law (customary law, treaty law, United Nations Security Council resolution) that requires France to enact in its domestic law a universal jurisdiction allowing it to prosecute unconditionally the perpetrators of crimes falling under the jurisdiction of the ICC[1124].

In the specific case of Articles 49, 50, 129 and 146 of the four GC[1125], States parties may, in accordance therewith, either bring alleged perpetrators before their own courts or hand them over for trial to another State party that has made out a "*prima facie*" case (according to the principle of "*aut dedere, aut judicare*").

According to French jurisprudence, the provisions of the GC and both their 1977 Additional Protocols (Articles 85 *et seq*.) are not are not self-executing[1126]. Consequently, it is necessary to enact national laws to give universal or quasi-universal jurisdiction to French criminal courts. To date, no such general provisions have been adopted.

However, there are three specific cases where French law granted universal jurisdiction to its courts.

The first two cases concern the laws enacted in 1995 and 1996 to implement under domestic law the United Nations Security Council resolutions 827 and 955 establishing, respectively, the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). In accordance with those laws, if they are "*found in France*", perpetrators of or accomplices to acts which constitute, under the statute of the relevant international tribunal, grave breaches of the GCs, violations of the laws or customs of war, genocide, or crimes against humanity, may be prosecuted and judged by French courts.

This universal jurisdiction therefore applies to certain crimes committed in certain States during a certain period of time, and is contingent upon the presence of the alleged perpetrator on French territory. Under their respective statutes, the ICTY and ICTR (now the International Residual Mechanism for Criminal Tribunals) have primacy over national courts, which allows them to request national courts to defer to its competence at any stage of the procedure.

[1124] The 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide provides for the principle of territorial jurisdiction; UN Security Council resolutions 827 of 25 May 1993 and 955 of 8 November 1994, establishing the *ad hoc* International Criminal Tribunals (for the former Yugoslavia and for Rwanda), did not impose any rule of universal or quasi-universal jurisdiction. However, France decided on its own initiative to enact legislation (Laws No. 95-1 of 2 January 1995, and No. 96-432 of 22 May 1996) to confer on its courts a quasi-universal jurisdiction, which nevertheless remains limited not only *ratione materiae* (crimes against humanity, genocide, and war crimes), but also *ratione loci* (crimes committed in the territory of the former Yugoslavia and Rwanda) and *ratione temporis* (crimes committed during a certain period of time). It is also necessary that the perpetrators of or accomplices to the offences be found in France.

[1125] GC I, Art. 49: "*Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case*".

[1126] Court of Cassation (Criminal Division), ruling, 26 March 1996, confirming Court of Appeal of Paris, 24 November 1994: "*on the grounds that under the four Geneva Conventions which entered into force for France on 28 December 1951, States parties undertake to adopt necessary legislative measures to punish grave breaches with appropriate sanctions; that these Conventions also require contracting parties to search for the perpetrators of those grave breaches, bring them before their own courts regardless of their nationality, or hand them over for trial to another contracting party; that from the wording of these texts it can be inferred that the aforementioned obligations are incumbent only on the States parties and are not directly applicable under domestic law; that these provisions are too general in nature to directly create rules of extraterritorial jurisdiction in criminal matters, which must necessarily be drafted in a detailed and precise manner; that in the absence of direct effect of the provisions of the four Geneva Conventions regarding the search and prosecution of perpetrators of grave breaches, Article 689 of the Code of Criminal Procedure (CPP) do not apply*".

The third specific case concerns the Rome Statute of the ICC, which enshrines the principle of complementarity between the ICC and national courts. While no provision of the Rome Statute requires States to confer on their courts any universal or quasi-universal jurisdiction[1127], Article 689-11 of the Code of Criminal Procedure provides for the specific cases where French courts have jurisdiction to prosecute and judge alleged perpetrators of genocide, other crimes against humanity, and war crimes and offences (see above).

The criterion of habitual residence also applies for prosecuting alleged perpetrators of offences against cultural property committed in armed conflict, in accordance with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Second Protocol, subject to the submission of a request from the public prosecutor[1128].

1.1.7.2. Participation in or cooperation with commissions of inquiry and investigation mechanisms for prosecuting perpetrators of breaches of IHL or IHRL

France may be called upon to participate in or cooperate with third-party initiatives for the purposes of prosecuting perpetrators of violations of IHL or IHRL. For example, France responded to information requests from the International Commission of Inquiry established pursuant to Article 46 of the 2015 Agreement on Peace and Reconciliation in Mali emanating from the Algiers process, which provides that "*the Parties agree to promote genuine national reconciliation based on the […] establishment of an International Commission of Inquiry to investigate all war crimes, crimes against humanity, genocide, sex crimes, drug trafficking and other serious violations of international law, human rights and international humanitarian law throughout Mali*".

The broad mandate of this Commission covered the period from 1 January 2012 to 19 January 2018. The Commission was entrusted with a threefold mission: Investigating allegations of abuses and serious violations of IHRL and IHL committed throughout the territory of Mali between 1 January 2012 and 19 January 2018; Establishing the facts and circumstances concerning the commission of such abuses and violations, including those that may constitute international crimes, and identifying those allegedly responsible for such abuses and violations; Submitting a written report on its investigation and its conclusions to the United Nations Secretary-General within a year from the date of the effective commencement of its work, with recommendations to the Secretary-General and all competent authorities for combating impunity in relation to the abuses and violations identified.

In the event of requests or direct solicitations from such *ad hoc* institutions, it is the responsibility of the deployed force and its LEGAD(s) to refer the request directly to the Ministry of Defence with a view to providing a consolidated and, if necessary, interministerial response.

France also cooperates with the International, Impartial and Independent Mechanism (IIIM) established by the United Nations General Assembly (UNGA) on 21 December 2016 to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011. The cooperation of French courts with IIIM was enabled by an international judicial cooperation agreement concluded in 2021[1129].

1.2. The Protecting Powers mechanism has not been used since 1982

It is specified in the four GC that the conventions "*shall be applied with the cooperation and under the*

[1127] In its decision No. 2010-612 DC of 5 August 2010 entitled "Law adapting the criminal law to the creation of the International Criminal Court", the Constitutional Council held that there was no constitutional requirement in that regard.
[1128] Code of Criminal Procedure, Art. 689-14.
[1129] International Judicial Cooperation Agreement between the Government of the French Republic and the United Nations Organization, represented by the International, Impartial and Independent Mechanism for Syria, done at Geneva on 29 June 2021.

scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict"[1130]. The Protecting Powers mechanism for supervising compliance with the four GC, including the rules governing the conduct of hostilities and the obligatory character of that general mandate, was implemented on five occasions[1131], but it has not been used in IAC since 1982. In any case, this mechanism does not apply to non-international armed conflict.

1.3. The role of the ICRC, other international organizations and NGOs

The ICRC, other international organizations and NGOs as well as civil society also play a critical role in the application of IHL.

Each of those institutions, based on its own mandate and with its own way of functioning, makes a significant contribution, including by reporting inappropriate conducts from parties to the conflict, participating in collecting information on collateral damage, or disseminating international law to State and to non-States parties. Their mere presence can have a deterrent effect on parties which would otherwise have been tempted, in the absence of witnesses, to break the rules of IHL.

The French armed forces therefore maintain a close relationship with those actors, whether on theatres of operations or within and among domestic institutions, to increase compliance with international law in the long term.

1.3.1. The vital role of the ICRC

The ICRC acts as a guardian of IHL and its application in armed conflict.

Under IHL, the ICRC is an "*impartial humanitarian body*"[1132] that plays a vital role in armed conflict. The parties to the conflict are thus under the obligation to grant to the ICRC all facilities within their power so as to enable it to carry out its humanitarian functions in order to ensure protection and assistance to the victims of conflicts[1133]. Subject to the consent of the parties to the conflict, the ICRC may also undertake activities for the protection and relief of medical personnel and chaplains[1134], and carry out any other humanitarian activities[1135]. Similar facilities must, as far as possible, be granted to National Red Cross and Red Crescent Societies.

In IAC, the ICRC is responsible for the creation of the Central Information Agency for prisoners of war and civilian internees which is in charge of collecting all information on prisoners of war and providing relief to detainees[1136]. The ICRC has permission to go to all places where prisoners of war and civilian internees may be, and has access to all premises occupied or used by them; the ICRC is also allowed to go to the places of departure, passage and arrival of prisoners of war and civilian internees who are being transferred, and it is able to interview them without witnesses. The duration and frequency of these visits is not restricted, except for reasons of imperative military necessity, and then only as an exceptional and temporary measure[1137].

Furthermore, the ICRC must provide humanitarian assistance to civilian populations in armed conflict[1138].

The ICRC can act as conciliator in cases of disagreement between the parties to the conflict as to the

[1130] GC I/II/III, Art. 8; GC IV, Art. 9.
[1131] Suez conflict (1956); Bizerte conflict (1961); Goa crisis (1961); the conflict between India and Pakistan (1971); the Falkland/Malvinas Islands' conflict (1982).
[1132] GC I/II/III/IV, Common Art. 3.
[1133] See AP I, Art. 81.
[1134] GC I/II/III, Art. 9; GC IV, Art. 10.
[1135] AP I, Art. 81.
[1136] GC III, Art. 123; GC IV, Art. 140.
[1137] GC III, Art. 126; GC IV, Art. 143.
[1138] GC III, Arts. 123, 125 and 126; GC IV, Arts. 140, 142 and 143.

application or interpretation of the provisions of the applicable GC[1139].

1.3.2. Cooperation with the United Nations

In situations of serious violations of the GC or of their Protocols, the States parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter[1140].

In accordance with the United Nations Charter, which aims "*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*"[1141], the UN assumes a major responsibility in ensuring compliance with international law.

Under Chapter VII of the Charter, the UN Security Council can adopt resolutions and decide measures to maintain or restore international peace and security in case of threat to the peace, breach of the peace, or act of aggression, including imposing economic or diplomatic sanctions[1142], approving the deployment of peacekeeping or peace enforcement missions[1143], and authorizing, where necessary, the use of force when there is a threat to international peace and security[1144]. It can refer situations in which international crimes (genocide, crimes against humanity, war crimes, aggression) appear to have been committed to the Prosecutor of the ICC[1145].

The United Nations General Assembly (UNGA) can initiate studies and make recommendations for the purpose of encouraging the codification and progressive development of international law[1146]. Numerous subsidiary organs of the United Nations are also competent in specific areas of international law, particularly the International Law Commission (ILC), a subsidiary organ of the UNGA tasked with carrying out work to strengthen international law. Most legal questions are first reviewed by the Sixth Committee of the UNGA and then discussed during plenary sessions.

1.3.3. Other humanitarian organizations

The GC provide that, subject to the consent of the parties to the conflict, the humanitarian activities which any impartial humanitarian organization other than the ICRC may undertake for the protection and relief of the wounded and sick must be authorized, and that their action for victims must be facilitated by the parties to the greatest extent possible[1147].

The activities of any other organization working impartially and in accordance with humanitarian principles for the benefit of prisoners of war or civilians – visits, assistance, distribution of relief supplies and material intended for religious, educational or recreative purposes, and organization of leisure activities – must also be facilitated, subject to justified restrictions, particularly those related to security[1148].

NGOs that act in accordance with humanitarian principles, especially the principle of impartiality, can thus, under the conditions set by applicable national and international legal norms:

- Provide medical care to the wounded and sick;
- Have secure and unhindered access to conflict victims;
- Assess the humanitarian needs of these victims;

[1139] GC I/II/III, Art. 11; GC IV, Art. 12.
[1140] AP I, Art. 89.
[1141] UN Charter, Preamble.
[1142] *Ibid*., Art. 41.
[1143] See Part 2, Chapter 1 for more detail on peacekeeping operations.
[1144] UN Charter, Art. 42.
[1145] Rome Statute, Art. 13(b).
[1146] UN Charter, Art. 13.
[1147] GC III, Arts. 8-9; GC IV, Arts. 9-10.
[1148] GC III, Art. 125; GC IV, Art. 142.

- Undertake relief actions when the population suffers excessive deprivation due to a lack of essential supplies for survival;
- Ensure that these relief efforts are provided without any adverse discrimination other than that based on need.

NGOs do not have any international legal personality, nor specific legal responsibilities under IHL, and they remain subject to the domestic law of the State where they are established, but they can assume an advocacy function in order to remind States of their responsibilities.

CHAPTER 2: JUDICIAL AND NON-JUDICIAL REVIEW MECHANISMS

The responsibility and liability of the State or members of the armed forces may be engaged under various national and international judicial review mechanisms for non-compliance with the rules of international humanitarian law or international human rights law.

In accordance with French law, certain State acts considered as inseparable from the conduct of international relations cannot be subject to judicial scrutiny under the act-of-government doctrine. In certain circumstances, the responsibility and liability of the French State can nonetheless be involved before its domestic courts because of the armed forces' actions as part of legal requisitions or the Action of the State at Sea (*action de l'État en mer, AEM*). Based on a broad interpretation of its territorial jurisdiction, the European Court of Human Rights (ECtHR) may also be seized of matters involving France's compliance with the European Convention on Human Rights (ECHR) in cases of extraterritorial acts where the State exercises its authority and control through one of its agents or exercises effective control over the foreign territory. Lastly, the International Court of Justice (ICJ) may be called upon to settle a dispute between France and another State relating to France's compliance with its obligations under international law, subject to France's recognition of the ICJ's jurisdiction over the matter.

Beyond State liability, individual members of the French armed forces may, in addition to disciplinary sanctions, be subject to judicial proceedings, particularly before domestic courts, and liable to criminal punishment for alleged offences. Certain specificities apply where the offences are committed outside French territory, including in terms of jurisdiction (status-of-forces agreements applicable in foreign operations may establish certain primary jurisdictions for either the host State's or French courts); public prosecution, which the Public Prosecutor (*Procureur de la République*) has the exclusive power to initiate at national level; and immunity, to which military personnel are entitled in certain situations under French law. At international level, the competence of the International Criminal Court (ICC) is limited by the rules governing the exercise of its jurisdiction, by the scope of the offences within its jurisdiction and by the principle of complementarity. Beside penal sanctions, military personnel may also incur civil liability before French courts for personal faults or in case of faults of the institution (*fautes de service*).

The functional protection mechanism allows the State to ensure the legal protection of military personnel and their families who are either implicated in criminal proceedings or the victim of threats or attacks, including through the coverage of legal fees related to judicial proceedings.

2.1. The International Humanitarian Fact-Finding Commission

The International Humanitarian Fact-Finding Commission (IHFFC) is a permanent non-judicial body established pursuant to Article 90 of Protocol I additional to the 1949 Geneva Conventions (AP I) and constituted in 1991 after 20 States have accepted its compulsory competence. Its mission is twofold: (i) enquire into any facts alleged to be a grave breach as defined in the Geneva Conventions and AP I or other serious violation of the Conventions or AP I – excluding breaches and violations committed in non-international armed conflict (NIAC)[1149]; (ii) facilitate, through its good offices, the restoration of an attitude of respect for international humanitarian law (IHL).

The IHFFC can institute an enquiry at the request of parties that previously recognized its competence[1150], whether or not they are party to the armed conflict, or on an *ad hoc* basis at the request of parties to the conflict, subject to "*the consent of the other Party or Parties concerned*"[1151]. The wording "*Party to the conflict*" means that both States and National Liberation Movements may submit a request to the IHFFC

[1149] In practice, the IHFFC considered itself to be competent to investigate alleged breaches in NIAC. In 2007 for example, the IHFFC declared itself willing to investigate into such alleged breaches in the NIAC taking place in Ukraine following a request from the Organization for Security and Co-operation in Europe (OSCE) and with the consent of Ukraine.
[1150] AP I, Art. 90(2)(a).
[1151] *Ibid*., Art. 90(2)(d).

under AP I.

The composition and organization of the IHFFC offer guarantees of impartiality in the conduct of enquiries. Unless otherwise agreed by the parties concerned, all enquiries are undertaken by a Chamber consisting of seven members: 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; and two *ad hoc* members, not nationals of any party to the conflict, one to be appointed by each side.

The Chamber is to invite the parties to assist it and to present evidence. The Chamber may seek such other evidence as it considers appropriate and may carry out an investigation of the situation on the ground. The parties may comment on and challenge the evidence disclosed to them by the Chamber. Once that procedure of the gathering of evidence is complete, the Chamber is to make findings. It submits to the parties a report on those findings, along with such recommendations as it may consider appropriate. That report is confidential, unless the parties to the conflict agree that the Commission reports its findings publicly.

The competence of the IHFFC has been recognized by 76 States, including all Member States of the European Union except Latvia and France[1152]. Among the permanent members of the UN Security Council, only the United Kingdom recognized the competence of the IHFFC (in 1999)[1153]. However, France, just like any other State, reserves the possibility to recognize the competence of the IHFCC on an *ad hoc* basis.

2.2. State liability mechanisms before national courts and the ECHR

2.2.1. General remarks

2.2.1.1. Acts of Government are not subject to any judicial review

Under the act-of-government doctrine, 'acts of Government', i.e. certain decisions of the executive branch, are not subject to scrutiny from domestic administrative courts and therefore escape any judicial monitoring or review.

In France, this preclusion of judicial scrutiny concerns two very different categories of acts of Government: acts relating to the relations between the executive branch and other powers instituted as per the Constitution; and acts relating to the relations between the Government and a foreign State.

That second category includes acts of Government which are inseparable from the conclusion of treaties, the conduct of international relations or diplomatic action. Examples include decisions by France's highest administrative court to resume temporarily its nuclear testing in 1995[1154], to deploy military personnel in foreign territory[1155] and to refuse the export of war materiel to another State[1156].

The notion of 'act of Government' may also cover decisions related to compensation litigation where such a decision is challenged before court for being a wrongful act[1157].

[1152] France has not recognized the competence of the IHFFC due to the IHFFC's broad interpretation of its mandate, to the challenges associated with the performance of its mission, including classification of elements pertaining to French operations, and to the lack of effectiveness of this mechanism which is subject to the parties' will to cooperate and limited to fact-finding, whereas France takes a full part in the fight against impunity, including through its domestic framework (Penal Code, command investigations) and cooperation with the International Criminal Court as a State party to the Rome Statute.
[1153] https://www.ihffc.org/index.asp?page=statesparties_list.
[1154] Council of State, *Association Greenpeace France*, decision, case No. 171277, 9 September 1995.
[1155] Council of State, *M. et autres*, decision, cases Nos. 206303 and 206965, 5 July 2000.
[1156] Council of State, *Société Héli-Union*, decision, case No. 162131, 12 March 1999.
[1157] Council of State, *Société des Étains et Wolfram du Tonkin*, decision, case No. 98750, 1 June 1951.

2.2.1.2. International agreements may be invoked before national courts only if they have direct effect

A provision of an international convention which was duly ratified and published in accordance with French domestic law may be invoked before a domestic court only if it has direct effect, whether it be a case of '*ultra vires*' litigation (i.e. litigation aiming at quashing a decision) or compensation litigation[1158].

French administrative courts may recognize that a provision of international law has direct effect where that provision does not exclusively aim at governing relations between States and does not require any supplementary acts in order to generate effects on individuals and create rights which they may directly invoke, taking into account the intention of the parties to the treaty as well as the general thrust, content and terms of that treaty. The direct effect of a provision cannot be ruled out on the sole ground that States are the only subjects of the international obligation under that provision.[1159].

Whether a provision of international law has direct effect must be assessed on a case-by-case basis.

It should be noted that the Court of Cassation (French highest judicial authority) held that the provisions of the 1949 Geneva Conventions relating to the search for and prosecution of perpetrators of grave breaches do not have direct effect[1160]. The Council of State (French highest administrative court) has not had the opportunity to rule on that matter.

It should also be noted that since 1990, the Council of State has stopped referring questions for preliminary opinion to the Minister for Foreign Affairs, and carries out its own interpretation of treaty provisions, as it does for national laws or regulations[1161].

2.2.1.3. Conditions on which the State may incur liability

Under Article 1240 of the Civil Code, any act by a person which causes damage or harm to another person must be remedied by the person responsible for the fault. The principle of *responsabilité* (responsibility and liability) established thereunder is a principle which has constitutional value[1162].

For the *responsabilité* of the State (just like any other person) to be entailed, there must be a damage or harm caused to a person as well as a direct and certain causal link between a generating event which must be attributable to the State, and the damage or harm.

The generating event must generally be considered to be a fault. This legal regime is that of fault liability. Besides, 'simple fault' may sometimes be deemed insufficient to entail the State's liability depending on the activities concerned; instead, the administrative courts might require that a gross fault be committed, i.e. one of particular gravity.

In certain situations, the State's liability may be involved even though no fault has been committed. This is known as a strict liability regime.

A strict liability regime may be established by way of legislation or, in want of statute law, arise from the case law of administrative courts. In the latter case, the State's liability may be involved based on either the risks of its activities for third parties, or on a breach of equality before public burdens which may arise from

[1158] Council of State, *Syndicat CGT des chômeurs et précaires de Gennevilliers-Villeneuve-Asnières*, decision, case No. 411846, 28 December 2018.
[1159] Council of State, *GISTI-FAPIL*, decision, case No. 322326, 11 April 2012.
[1160] Court of Cassation (Criminal Division), ruling, 26 March 1996, confirming Court of Appeal of Paris, 24 November 1994.
[1161] Council of State, *GISTI*, decision, case No. 78519, 29 June 1990.

[1162] Court of Cassation, decision No. 82-144 DC, 22 October 1982.

the State's decisions.

In a strict liability regime based on a breach of equality before burdens, the damage or harm can be redressed only if it is:

- 'special', i.e. affect only a limited number of persons;
- 'abnormal', i.e. exceed the normal burden which may be imposed to the plaintiff by the State in the name of general interest.

Yet other strict liability regimes can be established by legislation[1163] or case law on the mere basis of the existence of a damage or harm and a causal link.

Furthermore, the applicable regime may vary depending on the status of the victim, i.e. depending on whether they suffered the damage or harm as a participant in the performance of a public service (in a broad sense), or as a user of said service, or as a third party.

The existence of a condition of a direct causal link between the act of the State and the damage or harm suffered by the victim implies the existence of certain grounds for exemption from liability:

- *Force majeure*, i.e. an irresistible, unforeseeable and insurmountable force, event or obstacle of an external nature. *Force majeure* is rarely found by courts;
- Fault of the victim;
- Act of a third party, which is not necessarily a fault[1164].

These causes may result in the total or partial exemption from liability.

Lastly, the fact that the victim was in an illegal situation when they suffered the damage or harm may constitute a ground for precluding the State's liability only if that damage or harm was exclusively and directly caused by that situation[1165].

2.2.2. State liability mechanisms before national courts in cases of use of force outside foreign operations

2.2.2.1. State liability in case of legal requisition of the armed forces

The legal framework for the use of force by security forces in peacetime is based on the interplay between two fundamental freedoms: the right to life and the right to security. This interplay is balanced under Article 2 of the ECHR, which permits the use of force where it is absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection[1166].

In accordance with Article L2338-3 of the Defence Code and Article L435-1 of the Internal Security Code, there are five situations in which military personnel may use their firearm as part of a legal requisition to participate in a law enforcement operation under Article L1321-1 of the Defence Code: self-defence or defence of others; impossibility otherwise to defend places or persons under their protection; arrest of persons who seek to evade custody or investigation and pose a threat to the life or physical integrity of others; immobilization of a vehicle whose driver fails to obey an order to stop; prevention of a 'murderous journey' ("*périple meurtrier*"), i.e. preventing the repetition of murder or attempted murder where such repetition is

[1163] For example, under Article L211-10 of the Internal Security Code, "*the State bears civil liability for damage and harm resulting from felonies and misdemeanours committed […] by armed or non-armed assemblies or gatherings against persons or property*".
[1164] Council of State, *Commune de Cilaos*, decision, case No. 45296, 14 Mai 1986.
[1165] Council of State, decision, case No. 339918, 20 January 2013.
[1166] As regards the interplay between international human rights law and IHL, which is the *lex specialis* in armed conflict, refer to Chapter 2 of this Manual.

deemed highly likely.

In any event, the use of firearms must comply with the principles of proportionality and absolute necessity of the use of force. The notion of 'murderous journey' added a qualification to a third principle which had been intangible until then, that of the immediacy of the threat in response to which the weapon may be used. Beside those principles, the use of force must comply with rules of procedure: two warnings must be given prior to the use of weapons where feasible, and the member of personnel must be currently performing their missions and wearing their uniform.

Notwithstanding this common framework applicable to all forces exercising missions of internal security, military personnel continue to enjoy the special regime for dispersing unlawful assemblies as part of the restoration of public order[1167]. However, this regime is applicable only if it is expressly mentioned in the requisition letter, in compliance with Article R211-15 of the Internal Security Code.

In litigation, the decision of requisition of military personnel by a civil authority is first an administrative act which may be challenged before administrative courts.

Secondly, administrative courts may be called upon to rule on the State's liability for domestic military operations (such as operation *Sentinelle*). Depending on the complexity of the operation and on whether weapons deemed dangerous have been used or not, the applicable regime will be that of gross fault, simple fault or strict liability based on the risk. In principle, operations in which military personnel are "*legally required*" (requisitioned) to participate in law enforcement to maintain public order[1168] have a preventive character. Such operations are conducted under the authority of the administrative police, and administrative courts have jurisdiction over related claims for damages.

Where the damage or harm arose as a result of the use of "*weapons or devices entailing exceptional risks for persons and property*", the liability of public authorities may be engaged even if no fault was committed. However, only third parties, i.e. "*persons not involved in the operation*", are entitled to this strict liability regime. Additionally, the harm or damage must usually be "abnormal" (see above), i.e. "*of such gravity that it exceeds the burdens which must be supported in exchange for the advantages resulting from the existence of the public service*".

In accordance with the case law of the Council of State (French highest administrative court), all firearms must be considered as weapons entailing exceptional risks for persons or property[1169].

Where an injured party is directly concerned by the police operation, only simple fault is required to entail State liability[1170].

Lastly, administrative courts also have jurisdiction to hear cases where the State incurs strict liability for "*damage or harm resulting from felonies and misdemeanours committed […] by armed or non-armed assemblies or gatherings against persons or property, including against persons participating in said assembly, including where felonies or misdemeanours are committed by persons participating in said assembly*", in accordance with Article L211-10 of the Internal Security Code.

2.2.2.2. The State's liability within the framework of the Action of the State at Sea

Armed force may be used within the framework of the Action of the State at Sea (*action de l'État en mer,*

[1167] Penal Code, Art. 431-3; Internal Security Code, Art. L211-9.
[1168] Defence Code, Art. D1321-3.
[1169] Council of State, *Demoiselle Bonnet*", decision, case No. 89891, 26 Mai 1950; Council of State, *Epoux Jung*, decision, case No. 6967, 1 June 1951.
[1170] Council of State, *Dame Aubergé et Dumont*, decision, case No. 01074, 27 July 1951; Council of State, *Berrandou*, decision, case No. 21304, 13 October 1982.

AEM – for more information, refer to Part 4, Chapter 1, Subsection 1.3.1.2. above), in particular under Article L1521-7 of the Defence Code and Decree No. 2020-342 of 26 March 2020 relating to the modalities of the use of coercion and force at sea.

Under Article 1521-7 of the Defence Code, coercive measures include warning shots as well as the use of force, which may consist either in '*action de vive force*' (i.e. sending a boarding party that may use force to take control of a ship) or '*tirs au but*' (i.e. disabling fire)[1171].

In its case law, the Council of State (France's highest administrative court) progressively shifted from a gross fault requirement to a simple fault requirement in order to entail the State's liability for harm resulting from the performance of its sea rescue mission[1172].

2.2.3. State liability mechanisms before national courts for military operations and violations of IHL

In accordance with Article 121-2 of the Penal Code, the criminal responsibility of the State, or of its organs or of officials acting on its behalf, cannot be engaged before national courts.

In addition, decisions made on theatres of operations must first be considered as 'acts of Government' (see above). Therefore, national courts do not have jurisdiction to rule on the lawfulness of such decisions.

In accordance with the case law of the Council of State (French highest administrative court), including "*Compagnie générale d'énergie radioélectrique*" (30 March 1966, case No. 50515), there are two conditions for the State to incur strict liability on the basis of equality before public burdens for damage or harm resulting from an international agreement to which France is a party and which entered into force under French domestic law: first, neither the international agreement itself nor the domestic law authorizing its ratification may be interpreted as intending to preclude any compensation; second, the damage or harm must have such a serious and special character that it cannot be considered as a burden which could normally be supported by the alleged victim[1173]. Building on that jurisprudence, the Council of State recognized the possibility for the State to incur strict liability for an act of Government which would itself not be opposable, including statements by the Government that are inseparable from the action of the Government in favour of a new State's independence[1174].

However, the Council of State considers that military operations are not of a nature to entail the State's liability, including strict liability, on the basis of a breach of equality before public burdens. Accordingly, harm or damage resulting from operations which constitute such a breach may give rise to a right to redress by the State only on the basis of express laws[1175]. Such operations include operations by the French armed forces, but also by allied or enemy forces, or by forces of unknown origin, and must have a military character and not be a mere police operation.

2.2.4. State liability mechanisms before the ECHR

As a preliminary, it should be noted that national courts, whether administrative or judicial, have primary jurisdiction to rule on the application of the ECHR. However, there are specific circumstances in which matters may be referred to the ECtHR (see below).

[1171] See Part 4, Chapter 1, Subsection 1.3.2.5. above.
[1172] Council of State, *Améon*, decision, case No. 89370, 13 March 1998.
[1173] Since its decision of 30 March 1966, the Council of State found that the State was liable only in rare cases (*Aff. étrangères c/ Cts Burgat*, case No. 94218, 29 October 1976; *Almayrac et a*, case No. 262190, 29 December 2004; *Susilawati*, case No. 325253, 11 February 2011; *Om Hashem Saleh et a.*, case No. 329788, 14 October 2011).
[1174] Council of State, decision, case No. 382319, 27 June 2016.
[1175] Council of State, *Sociétés Touax et Touax Rom*, decision, case No. 328757, 23 July 2010.

Firstly, the application of the ECHR is mostly based on the territorial jurisdiction principle.

Under Article 1 of the ECHR, States parties must "*secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*". The exercise by a State of 'jurisdiction' within the meaning of that article is a necessary condition for that State to be able to be held responsible for acts or omissions imputable to it, and and which allegedly constitute a violation of Convention rights or freedoms according to a private person, a non-governmental organization or another State party.

In multiple cases, the ECtHR had to rule on the compliance with the Convention of operations conducted on national territory. In accordance with its case law, national authorities must regulate policing operations within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force[1176]. That legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of applicable international standards[1177]. Lastly, the use of force is permissible only where it is absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) in action lawfully taken for the purpose of quelling a riot or insurrection, in accordance with Article 2 of the ECHR[1178]. The Court takes into consideration, *inter alia*, the planning and control of the actions of State agents who used force [1179]. Regarding self-defence more specifically, which is defined under Article 2(a) of the ECHR as shown above, a response to an attack may be recognized as self-defence warranting the use of force only upon fulfilling the three cumulative conditions of being (i) immediate, (ii) strictly necessary and (iii) strictly proportionate.

In the case of *Guerdner and Others v. France*[1180], the Court had to rule on whether Article L2338-3 of the French Defence Code was consistent with Article 2 of the ECHR with respect to the use of force by French gendarmes. It held that the relevant French law then in force was consistent with the Convention, noting that the provisions of Article L2338-3 were further specified in a restrictive manner by various circulars and largely mitigated by the case law of the Court of Cassation (France's highest judicial authority), which requires that the use of lethal force be absolutely necessary in view of the circumstances ruling at the time.

As regards the territorial jurisdiction principle recalled above, the ECtHR recognized the extraterritorial application of the Convention only in exceptional cases and after having carefully reviewed the particulars of each case[1181]. In accordance with its case law, there are mainly two situations in which the Convention applies extraterritorially: (i) where the State party to the Convention exercises its authority and control through one of its agents (e.g. aboard a vessel of the national navy, during capture operations or when handling over captured individuals to local authorities with territorial jurisdiction); or (ii) where the State party to the Convention exercises "*effective control*" over an area outside its territory, whether directly through its armed forces or through a subordinate local administration.

Secondly, as regards procedural aspects of applications before the ECtHR, an application by the direct, indirect or potential victim, or an heir or close relative thereof, of a Convention (including its Protocols) violation may be declared admissible by the Court only if it is submitted within a period of six months after all domestic remedies have been exhausted, in compliance with Article 35(1) of the ECHR. Under Protocol No. 15 to the Convention, which entered into force on 1 August 2021, the six-month time-limit is reduced to

[1176] ECtHR, *Celniku v. Greece*, Judgment, Application No. 21449/04, 5 July 2007, §48 (in French only).
[1177] ECtHR, *Makaratzis v. Greece*, Judgment of the Court (Grand Chamber), Application No. 50385/99, 20 December 2004, §59.
[1178] As regards the interplay between international human rights law and IHL, which is the *lex specialis* in armed conflict, refer to Chapter 2 of this Manual.
[1179] ECtHR, *McCann and Others v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 18984/91, 27 September 1995, §150; ECtHR, *Andronicou and Constantinou v. Cyprus*, Judgment, Application No. 25052/94, 9 October 1997, §171.
[1180] ECtHR, *Guerdner and Others v. France*, Judgment, Application No. 68780/10, 17 April 2014 (in French only).
[1181] See, *inter alia*, ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 55721/07, 7 July 2011; and ECtHR, *M.N. and Others v. Belgium*, Decision of the Court (Grand Chamber), Application No. 3599-18, 5 March 2020.

four months[1182]. However, that domestic remedy exhaustion criterion is required by the Court only if such remedies have been effective, i.e. accessible, adequate, sufficient and fulfilling the obligation of promptness.

Notwithstanding the above, the Convention right to remedy before national courts is not absolute, as it can be restricted in case of acts of war or acts of foreign policy. In the case of *Markovic and Others v. Italy*[1183], the ECtHR recognized the consistency with Article 6 of the Convention of proceedings in which the Italian Court of Cassation had held that Italian courts had no jurisdiction to examine a claim against Italy for compensation for damage sustained as a result of NATO bombings. To assess the lawfulness of a right to remedy restriction, the Court examines whether the limitation imposed pursues a legitimate aim, impairs the essence of the right and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Finally, the interplay between applicable bodies of law in the ECtHR's assessments, including the application by the Court of IHL which is the *lex specialis* in armed conflict, is a matter of cardinal importance for France as a State party to the ECHR. Pursuant to Article 19 of the Convention, the ECtHR is set up "*to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto*". It is not part of the Court's mission to ensure respect for IHL by States parties. The Court chose to follow an interpretation approach based on a conciliation between the extraterritorial application of the Convention and IHL in situations of international armed conflict (IAC). Accordingly, in the case of *Hassan v. the United Kingdom*[1184] which concerns an IAC, the Court considered that, "*even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law*". The Court acknowledged that it "*must endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice*" and accepted "*the [British] Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5* [right to liberty and security] *in this case*".

To date, the Court has mainly been called upon to rule on the extraterritorial application of the Convention in IAC. The interpretation of the Convention in light of IHL might be hindered by the scant and imprecise IHL safeguards provided for in NIAC. For this reason, the French armed forces implement guarantees and procedures which go beyond the minimum IHL standards applicable in NIAC, especially when the ECHR applies extraterritorially.

States parties to the Convention may implement guarantees, which can take the form of agreements, exchanges of *notes verbales* or unilateral State commitments to ensure that there is no ill-treatment against persons prior to their expulsion or transfer and to mitigate liability risks. In situations of NIAC, French authorities conclude agreements with the territorially competent State based on jurisprudence criteria and best practices to guarantee the rights of individuals in case of capture and transfer (living conditions and public freedoms recognized in detention, access to a judge and right to a fair trial, etc.), and to organize independent monitoring of the implementation of those diplomatic assurances.

In its assessments, the ECtHR considers the situation at the time where the effective control over a person is exercised by the State party to the Convention (e.g. in the case of a transfer to local authorities). In light of the elements the State party knew or should have known at that date, the Court examines the foreseeable consequences of that State's actions, taking into account the general situation in the host State's territory and the specific circumstances of the applicant. Based on those contextual elements, the Court can assess whether that State party committed violations of rights protected by the Convention and its Protocols.

The State party will not be liable for the applicant's claim if it can demonstrate that the severity threshold

[1182] France ratified that Protocol on 3 February 2016.
[1183] ECtHR, *Markovic and Others v. Italy*, Judgment of the Court (Grand Chamber), Application No. 1398/03, 14 December 2006.
[1184] ECtHR, *Hassan v. the United Kingdom*, Judgment of the Court (Grand Chamber), Application No. 29750/09, 16 September 2014.

required for the alleged violation of the Convention and/or the Protocol had not been reached, or that guarantees are effectively implemented, for example through bilateral agreements, or that its authorities had no knowledge that such violations were being committed.

The Court's judgments are binding on condemned States, which must execute them.

The Committee of Ministers of the Council of Europe ensures that the Court's rulings are implemented, particularly that the sums of money awarded by the Court to applicants in compensation for the harm they have suffered are effectively paid to them.

Focus: The International Court of Justice

According to Article 92 of the United Nations Charter, the International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It functions in accordance with its Statute, which is annexed to the Charter and based upon the Statute of its predecessor, the Permanent Court of International Justice (1922-1946). The ICJ is both an independent judicial body and one of the main organs of the United Nations. Its jurisdiction is general (as opposed to other judicial bodies with special jurisdiction) and universal (any State, without geographical limitation, may, under certain conditions, refer a matter to the Court). Its primary mission is to settle disputes between States only (Art. 34(1) of the Statute). Secondly, the ICJ can give an advisory opinion on any legal question at the request of various other United Nations bodies (Chapter IV of the Statute and Article 96 of the Charter). Based on its general jurisdiction, the Court may be called upon to rules on matters related to the use of force between States or the application of IHL.

Its contentious jurisdiction is subject to the consent of States. The expression of this consent must be clear and is carefully considered by the Court. States may express their consent to the ICJ's jurisdiction in different ways. It may be apparent from 'any conclusive act' of the respondent State subsequent to an application instituting proceedings against it. Jurisdiction is most often established by an *ad hoc* agreement between the two parties allowing them to refer disputes to the ICJ for arbitration. Jurisdiction may also result from the consent of a State to a judicial settlement clause stipulated in a treaty or convention and pursuant to its terms (Art. 37 of the Statute) or from a declaration (with or without reservations) deposited with the Secretary-General of the United Nations accepting the optional clause of the ICJ's compulsory jurisdiction (Art. 36)[1185]. When the Court is seized by means of a unilateral application pursuant to Article 36(2) of the Statute, the Court's jurisdiction is established only if both States are equally bound by their declarations of acceptance.

The Court consists of fifteen judges, no two of whom may be nationals of the same State, elected for nine-year terms separately by the General Assembly and the Security Council of the United Nations, by an absolute majority of the votes in both bodies. The Court must be composed so as to ensure that the Court as a whole represents the main forms of civilization and the principal legal systems of the world. In order to guarantee their independence, no Member of the Court can be dismissed. They enjoy diplomatic privileges and immunities, and cannot hold any other position. The Statute (Art. 31) provides for the appointment of *ad hoc* judges for specific disputes to guarantee the equality of the parties and ensure the proper administration of justice.

The procedural rules of the ICJ are set out in Chapter III of its Statute and are supplemented by the rules of procedure adopted by the Court (Art. 30 of the Statute).

The Court must rule in accordance with international law (Art. 38 of the Statute). The Court has the power to decide a case *ex aequo et bono*, if the parties agree thereto (Art 38(2) of the Statute).

According to the principle of *res judicata*, the Court's decisions are binding and final for "*the parties and in respect of that particular case*" (Art. 59 of the Statute). Article 94(2) of the UN Charter provides that "*if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the*

[1185] On 10 January 1974, France withdrew its declaration of acceptance of the ICJ's compulsory jurisdiction following the Court's order of 22 June 1973 in the case concerning *Nuclear Tests (New Zealand v. France)*. However, France recognized the jurisdiction of the Court on a case-by-case basis (Art. 38(5) of the Rules of Court), including in the cases concerning *Certain Criminal Proceedings in France (Republic of the Congo v. France)* or *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

judgment". In the vast majority of cases, the Court's rulings have been implemented, sometimes with delays. The Security Council has rarely been seized of cases of non-execution of the Court's decisions.

In certain circumstances requiring urgent action, the Court can indicate provisional measures which are also binding[1186].

States are not authorized to request the Court to give an advisory opinion. Only international organizations may do so: the General Assembly or the Security Council, on any legal question; other principal or subsidiary organ of the UN and any specialized agency authorized by the General Assembly, on legal questions arising within the scope of their activities. Although advisory opinions are not binding judicial acts and are regarded as representing the Court's opinions, in practice, they are placed on the same level as the Court's judgments concerning its interpretation of the Charter, international law, and the determination of its jurisprudence.

2.3. Individual responsibility of members of the French armed forces

2.3.1. Liability to disciplinary action

Disciplinary measures are generally taken by the employer against an employee as punishment for a breach of professional duties.

Article L4122-1 of the French Defence Code provides that "*military personnel must abide by the orders of their superiors and are responsible for performing the missions entrusted to them. However, they may not be ordered to accomplish acts that are contrary to laws, to customs of war or to international conventions*". Under the rules of general discipline (Art. D4122-1 *et seq*., Defence Code), military personnel "*must obey the orders given in accordance with the law […] they must not execute an order to accomplish an act which is manifestly unlawful or contrary to the rules of international law applicable in armed conflicts or to international conventions in force*". A military commander who exercises authority "*has the right and the duty to demand obedience from subordinates; [commanders] may not order the performance of acts contrary to laws, to rules of the international law applicable in armed conflicts and to international conventions in force*". Articles D4122-7 and following of the Defence Code specify the scope of the military personnel's obligations of compliance with IHL.

Disciplinary punishments for breaches of IHL are taken according to a specific procedure provided for under Articles L4131-7 and following of the Defence Code. In its decision of 16 March 2016 (case No. 389361), the Council of State (France's highest administrative court) held that the proportionality between disciplinary measures taken against military personnel and the severity of the misconduct was not to be scrutinized by administrative courts alone anymore but would be subject to review by ordinary courts instead.

2.3.2. Criminal responsibility

2.3.2.1. The competing jurisdictions of French and foreign courts

In most cases, the division of jurisdiction between French and foreign courts for offences committed by French military personnel in foreign operations is provided for in a status-of-forces agreement (SOFA) concluded by the French government and the host State government.

SOFAs are the outcome of negotiations with partners whose legal systems may be very different from the French system, and may vary in content.

SOFAs may, for example, provide that military personnel enjoy the same immunities and privileges as those granted to experts on missions by the 1946 United Nations Convention on the Privileges and Immunities. French military personnel enjoy immunity from personal arrest and detention and immunity from legal

[1186] ICJ, *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, I.C.J. Reports 2001, p. 479, §32.

process in respect of acts done by them in discharging their duties. Upon returning to France, military personnel who have committed an indictable offence are subject to French criminal courts. This practice and such provisions are consistent with those adopted by the United Nations regarding the status of forces deployed in peace operations.

SOFAs may also establish primary jurisdiction among France and the host State. For example, SOFAs may provide that French courts have primary jurisdiction over any offence committed by a French member of personnel while on duty and that even where French courts have no jurisdiction, military personnel will enjoy certain protective safeguards, particularly against the death penalty.

Prior to any foreign operations, the Ministry of Defence, in particular the Legal Affairs Directorate and the Joint Defence Staff, in conjunction with the Ministry for Foreign Affairs, engages in joint negotiations to conclude a SOFA with the State on whose territory the operation is meant to take place.

Under a SOFA, French courts may have jurisdiction over felonies and misdemeanours committed abroad by or against French nationals, under certain conditions related to the host State's domestic law, the official reporting of the facts, or the submission of a complaint by the victim – considering that the latter two conditions are no longer required for sexual offences committed abroad by French nationals against minors.

Foreign courts may have jurisdiction over offences committed on the host State's territory by French nationals while not on duty where the relevant SOFA does not provide for any specific protection and, in exceptional cases, while on duty where France does not have primary jurisdiction under any international agreement for such offences. In such cases, French authorities may not even be aware of the existence of such proceedings, increasing the risk of criminal penalties for military personnel, who may still request consular protection.

2.3.2.2. Two prosecution regimes depending on whether military personnel commit offences in or outside France

Under the provisions of both Article 697-1 of the Code of Criminal Procedure and Article 111-1 of the Code of Military Justice, ordinary law courts specialized in military criminal matters (*juridiction de droit commun spécialisée en matière militaire, JDCS*) have jurisdiction over felonies and misdemeanours committed in peacetime on French territory by military personnel while on duty. In accordance with Article 698-2§1 of the Code of Criminal Procedure, victims of such offences may join the proceedings as civil party, and an injured party may even initiate the public prosecution.

Under Article 697-4 of the Code of Criminal Procedure and Articles L121-1 and L121-7 of the Code of Military Justice, the Paris JDCS has jurisdiction over all offences committed in peacetime outside French territory by or against French military personnel, and over offences committed against the French armed forces or their facilities or materiel. Where such offences are committed outside France by military personnel while on duty, third parties may not join the proceedings as civil party.

In its decision No. 2019-803 QPC of 27 September 2019, the Constitutional Council held that the co-existence of both those prosecution regimes was consistent with the Constitution.

The National Anti-Terrorism Prosecution Department (*parquet national anti-terroriste, PNAT*) has jurisdiction over three categories of criminal offences: terrorist felonies and misdemeanours and certain offences by persons prosecuted for terrorist acts; crimes against humanity, war felonies and war misdemeanours; and felonies and misdemeanours related to the proliferation of weapons of mass destruction and their means of delivery.

The Division C3 of the Paris Public Prosecution Department has an exclusive jurisdiction over offences committed by military personnel in foreign operations.

2.3.2.3. The French criminal courts' jurisdiction and procedure

In accordance with Article 698 of the Code of Criminal Procedure, offences committed by French military personnel outside French territory, which fall under the jurisdiction of the Paris JDCS, are prosecuted in principle under the rules of criminal procedure applicable under ordinary law, subject to the special provisions of Articles 698-1 to 698-9 of said Code and of the Code of Military Justice. This type of criminal proceedings has three specificities.

Firstly, in order to avoid excessive judicialization of military action conducted outside French territory, the Public Prosecutor has the exclusive power to initiate prosecution of "*offences committed by military personnel while on duty in a military operation outside French territory or territorial waters, whatever its purpose, duration or scale, including hostage rescue, evacuation of nationals or policing the high seas*", in accordance with Article 698-2 of the Code of Criminal Procedure. Under ordinary law, it is for the Public Prosecutor to assess whether criminal proceedings should be initiated, taking into account, *inter alia*, the government's criminal policy, the specific circumstances of the case and the personality of the alleged perpetrator. Under Article 689-1 of said Code, the Public Prosecutor must, in lack of *dénonciation* (see Part 3, Chapter 7, Subsection 7.1.1. above), request the opinion of the Minister of Defence or any military authority empowered by them prior to any prosecution, including where a complaint was lodged together with an application to join the proceedings as civil party, except in cases of flagrant felony or misdemeanour.

Secondly, barring special circumstances, there is no judicial investigation into the cause of death of a French member of military personnel who died in a combat action where that death is considered as not having an 'unknown or suspicious' cause, in accordance with Article L211-7 of the Code of Military Justice.

Lastly, adjustments were made as regards unintentional offences. While Article 121-3 of the Penal Code provides that "*there is no felony or misdemeanour in the absence of an intent to commit it*", it also specifies that "*a misdemeanour […] exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration, where appropriate, the nature of their role or functions, of their capacities and powers and of the means then available to them*". In general, the criterion of showing "*normal diligence*" is assessed *in concreto*, taking into account what the authority concerned was or should have been able to predict and avoid given the circumstances ruling at the time. If all measures were taken to prevent the occurrence of the harm or damage, the risk of criminal conviction is very limited, if not non-existent.

In this regard, Article L4123-11 of the Defence Code provides that such normal diligence must be assessed with regard to "*the constraints inherent in the missions entrusted to them by law*" and "*in particular with regard to the urgency under which they performed their duties, the information available to them at the time of their intervention and the circumstances of the combat action*". Therefore, the individual criminal responsibility of military personnel may be entailed for unintentional offences only after the courts have carefully reviewed a number of circumstances which are indicative of the inherent challenges of military action.

While those procedural safeguards do not grant general immunity to military personnel, they provide a framework for legal security indispensable to military action within which military personnel can perform their mission without risking to be confronted with an excessive judicialization of their actions.

2.3.2.4. Causes of criminal non-responsibility for military personnel

Under Article D1321-3 of the Defence Code, military personnel who are "*legally required*" (requisitioned) to participate in law enforcement on national territory are assimilated with the "*public force*", i.e. internal security forces, and may therefore use their firearms under the conditions applicable to them. Accordingly, military personnel enjoy an exemption from legal prosecution upon using their firearms in self-defence or

based on another legal cause of criminal non-responsibility.

In addition to objective causes of criminal non-responsibility under ordinary law, French law provides for a particular cause of criminal non-responsibility for military personnel involved in foreign operations. Indeed, under Article L4123-12(II) of the Defence Code, "*military personnel involved in any operation using military capabilities outside French territory or territorial waters, whatever its purpose, duration or scale, including digital actions, hostage rescue, evacuation of nationals or policing the high seas, shall not be held criminally responsible for taking coercive measures or using armed force, or for giving the order to do so, where such acts are necessary to perform their mission, provided that they comply with the rules of international law*". The Defence Code thus provides for four cumulative conditions to be met to enjoy such criminal immunity, including compliance with the rules of international law.

2.3.2.5. Criminal offences and limitation periods

In criminal matters, there is a criminal offence only if there is an intent to commit it (mental element, in French law 'moral element').

Military personnel are liable to be prosecuted for many different criminal offences under French law, including those relating to breaches of IHL provided for in the Penal Code, including felonies and misdemeanours against persons [1187], crimes against humanity [1188] and war felonies and war misdemeanours[1189].

The limitation period of public prosecution is 10 years for ordinary felonies and 6 years for ordinary misdemeanours. It starts on the date when the offence was committed.

Under Article 462-10 of the Penal Code, the limitation period of public prosecution is 30 years for war felonies and 20 years for war misdemeanours. The penalties imposed for a war felony or a war misdemeanour are barred by limitation after 30 years have passed from the date when the conviction became final. Under Article 133-2 of the Penal Code, only crimes against humanity and the crime of genocide are not time-barred from prosecution[1190].

2.3.3. Civil liability of military personnel

Under French law, the State is in principle only liable for its own faults, which are known as '*fautes de service*' (faults of the institution) and defined as a breach of a pre-existing obligation. Faults committed by State agents in the performance of their functions, i.e. while on duty, using the means of the institution and without any personal interest, are *fautes de service* for which the State is liable to payment of compensation.

When an agent acts on the orders or instructions of their superiors, their individual responsibility cannot, in principle, be engaged, as their status binds them by a duty of obedience[1191].

By contrast, a personal fault ('*faute personnelle*') is a fault that is separable ('*détachable*') from the agent's functions or duties. A State agent commits a *faute personnelle* when they commit, while on duty, a particularly reckless or self-interested act which is incompatible with public service or normal administrative practices. State agents are liable to prosecution before judicial courts for personal faults.

Acts committed by a State agent that constitute a criminal offence do not necessarily fall under the category of personal fault. Such acts may also be a *faute de service* or a fault separable from their functions or

[1187] Penal Code, Book II.
[1188] *Ibid*., Book II, Title I.
[1189] *Ibid*., Book IV bis.
[1190] Penal Code, Arts. 211-1 to 212-3.
[1191] Conflict Tribunal [Court of jurisdictional disputes], *Laumonnier-Carriol*, decision, 5 mai 1877.

duties[1192].

The State may incur liability before administrative courts for personal faults committed by its agents while on duty or not, even where the fault is devoid of any link with the institution, upon a complaint by the victim. The victim also retains the ability to bring the matter before judicial courts where the State agent then would incur individual criminal responsibility. Where the State incurs liability for a personal fault, it can bring a recourse action against the agent to have them bear the compensation costs. A recourse action involves the State establishing the agent as the debtor by issuing an enforceable order. If the agent challenges the enforceable order, the recourse action leads to proceedings before administrative courts, which have jurisdiction because, despite the existence of a personal fault (the jurisdiction over which lies in principle with judicial courts), the dispute mainly concerns the relationship between the State and its agents.

When the harm or damage results from both a personal fault and a fault of the institution, the victim can also bring an action before administrative courts against the State, which will be liable to payment of full compensation. The State can then, in turn, bring a recourse action against the agent to have them bear the part of the compensation which corresponds to the harm or damage caused by their personal fault.

In the opposite scenario, where the public agent has been convicted by a judicial court for a personal fault that actually amounts to a fault of the institution, or for a personal fault combined with a fault of the institution, the agent can bring an action against the State to cover the part of the compensation that they wrongly bore. The obligation for the State to protect the agent in such a case is expressly provided for in Article L4123-10 of the Defence Code and Article 11.II of Law No. 83-634 of 13 July 1983 concerning the rights and obligations of public agents[1193].

Focus: The International Criminal Court

The International Criminal Court (ICC) is a permanent international court with universal jurisdiction, distinct from the United Nations system. It is composed of eighteen independent judges elected by the Assembly of States Parties for a non-renewable nine-year term.

The founding treaty of the ICC, the Rome Statute, was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries. France signed and ratified the Rome Statute before its entry into force on 1 July 2002. 123 States are parties to the Rome Statute; 30 States have signed but not ratified the Statute. States non-parties include the United States, China, and Russia.

1. Competence of the ICC

The Court has *ratione materiae* jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes and the crime of aggression. France has not ratified the various amendments to Article 8 of the Statute on war crimes adopted on 10 June 2010 by the Review Conference of the Rome Statute in Kampala (Uganda) in Resolution RC/Res.5, which were adopted on 14 December 2017 by the Assembly of States Parties in Resolution ICC-ASP/16/Res.4. Under Article 121(5) of the Statute, "*in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory*".

The Court's jurisdiction over the crime of aggression, which amounts to a violation of *jus ad bellum* rather than *jus in bello*, was defined by amendment during the 2010 Kampala Review Conference. This jurisdiction became effective on 17 July 2018. The crime of aggression cannot be invoked against nationals of States that have not ratified the 2010 amendment or when it is committed on the territory of a State that has not ratified this amendment, such as France.

The Court has *ratione loci* jurisdiction over crimes committed on the territory of a State party – including on board a ship or aircraft registered by that State – or by a national of a State party on the territory of a non-State party, or on any territory when

[1192] Conflict Tribunal [Court of jurisdictional disputes], *Thépaz*, decision, 14 January 1935.
[1193] Council of State, *Papon*, decision, case No. 238689, 12 April 2002.

the United Nations Security Council refers a situation to the Prosecutor under Article 13(b) of the Statute (e.g. Sudan in 2005 under Resolution 1593 and Libya in 2011 under Resolution 1970).

The Court has *ratione personae* jurisdiction to rule on the criminal responsibility of individuals who are nationals of States parties to the Statute, or nationals of non-States parties when the crime was committed on the territory of a State party, and over any alleged perpetrator of a crime when the Security Council has referred a situation to the Prosecutor.

The Court has *ratione temporis* jurisdiction for crimes committed after the entry into force of the Statute on 1 July 2002, or, where States become party to the Statute subsequently, after the respective entry into force of the Statute for these States, or from the date a non-State party accepts the exercise of jurisdiction by the Court (Article 12(3) of the Statute). Regarding the crime of aggression, the amendment therefor has been ratified by 45 States to date, the Court's jurisdiction became effective as of 17 July 2018. For States that have ratified it, these amendments took effect one year after the deposit of their instrument of ratification or acceptance.

2. Referral, admissibility and complementarity

There are three ways in which matters can be brought before the Court (Articles 13 to 15 of the Statute): (i) a State party to the Statute may refer to the Prosecutor a situation in which crimes appear to have been committed on its territory or by its nationals, or on the territory of another State party; (ii) the UN Security Council may refer to the Prosecutor a situation in which crimes appear to have been committed on the territory of a State, whether party or not to the Statute; (iii) the Prosecutor may initiate investigations on its own initiative (*proprio motu*) "*on the basis of information on crimes within the jurisdiction of the Court*".

To initiate investigations, the Prosecutor must first "*analyse the seriousness of the information received*" (Art. 15(2) of the Statute) and ensure that the alleged crimes indeed fall within the jurisdiction of the Court. If, after analysis, the Prosecutor concludes that there is a "*reasonable basis*" to proceed, an investigation can be opened upon request to the Pre-Trial Chamber (Art. 15(3) of the Statute).

If an investigation is initiated by the Prosecutor, States, whether parties or not to the Statute, whose judicial authorities have jurisdiction over the alleged perpetrators can request to be entrusted with the investigation and prosecution (Art. 18(2)). The Pre-Trial Chamber can ultimately decide that the ICC Prosecutor remains in charge of the investigation. Where the ICC Prosecutor defers to the State's investigation, they retain the ability to review the deferral based on the State's unwillingness or inability genuinely to carry out the investigation and prosecution. In addition, the State in question may appeal against a ruling of the Pre-Trial Chamber.

3. Applicable law

The Court applies the Statute, the Elements of Crimes, and its Rules of Procedure and Evidence, as well as the principles and rules of international law, including IHL. It can derive general principles of law from national laws of legal systems of the world. Finally, the application and interpretation of law must be consistent with internationally recognized human rights. Article 25 of the Statute defines the conditions under which a person who commits a crime within the jurisdiction of the Court is individually responsible and liable for punishment. Article 28 specifies the responsibility of military commanders and other superiors.

The risk of French military personnel being prosecuted before the ICC is hypothetical, given the principle of complementary to national criminal jurisdictions enshrined in the Rome Statute, under which States have primary responsibility to prosecute and try the perpetrators of the most serious crimes, and given the recognized jurisdiction of French national courts and France's emphasis on complying with *jus in bello* in the conduct of foreign operations. In any case, in the event of a violation of *jus in bello*, French criminal courts have primary jurisdiction to prosecute the alleged perpetrators of war crimes, in accordance with the principle of active and passive personal jurisdiction.

Moreover, French domestic law has been expanded to introduce war crimes into the Penal Code under the categories of war felonies and war misdemeanours, in consistency with the provisions of the Rome Statute, and to define the procedural

conditions under which French criminal courts can also prosecute individuals of foreign nationality for crimes within the jurisdiction of the ICC committed abroad on persons of foreign nationality (Art. 689-11 Code of Criminal Procedure).

4. Obligations of cooperation

State parties are bound by extensive cooperation obligations with the ICC and its various organs, including the Office of the Prosecutor, the Registry and the Chambers.

In their relations with the various organs of the Court that may be present in a theatre of foreign operations due to their investigations, the force commander or operational legal advisers recall that any request for cooperation must be addressed through the diplomatic channel to the French Embassy in The Hague (Article 87(1)(a) of the Statute[1194]). These requests are then processed by Ministries concerned, in conjunction with the Paris Public Prosecutor's Office.

2.3.4. Functional protection

2.3.4.1. Protection for military personnel who allegedly committed or are the victim of intentional offences connected to their duties

Functional protection is designed to be the necessary support provided by the State to its agents in the performance of their duties, and thus ultimately protects the State which performs sovereign acts through its agents.

While all public agents enjoy functional protection under a general principle of law, Article L4123-10 of the Defence Code specifically provides it for military personnel. Under that article, functional protection is granted to military personnel:

- who face criminal prosecution;
- who are the victim of threats or attacks in the performance of their functions.

This protection extends to the family of the military personnel (spouses, partners in a civil union, children, and direct relatives in ascending line) where, due to the functions of the military personnel, they are the victim of threats or attacks or when they initiate civil or criminal proceedings against the perpetrators of an intentional attack on the life of the military personnel related to their functions.

Focus: Functional Protection of Locally Employed Civilian Personnel and Their Dependents

When service requirements justify it, State services abroad, including the armed forces deployed in foreign operations, can, in accordance with international conventions, employ local personnel under employment contracts subject to the host State's domestic law[1195].

In its decision of 1 February 2019[1196], the Council of State (France's highest administrative court) expanded the scope of beneficiaries of functional protection by clarifying that the general legal principle of protection for public agents also extends to agents employed abroad under domestic law contracts. This protection must be granted to them if they are the victim of personal, current and real threats or attacks related to their function[1197].

[1194] Under that article, "*the Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession*". Pursuant to Article 87, the French authorities specified that all communication between France and the ICC must be transmitted through the diplomatic channel to the French Embassy in The Hague. In urgent situations, documents can be transmitted by any other means to the Paris Public Prosecutor and the information is subsequently transmitted through the diplomatic channel.
[1195] Law No. 2000-331 of 12 April 2000 relating to the rights of citizens in their relations with State services, Art. 34.
[1196] Council of State, case No. 421694, 1 February 2019.
[1197] Council of State, case No. 430056, 12 July 2019.

In its decision, the Council of State also specified that, in certain exceptional circumstances, functional protection could be granted by issuing a visa or residence permit to locally employed civilian personnel and their family members.

Subsequently, the Council of State extended this form of functional protection to the spouse, partner in a civil union, children, and direct relatives in ascending line (but not siblings) of current and former locally employed civilian personnel who are the victim of threats or attacks due to the functions performed by the latter[1198]. In doing so, the Council of State endorsed an extensive interpretation of the scope of the Law of 13 July 1983, which provides partial functional protection to direct relatives in ascending line, upon their request, only in civil or criminal proceedings they initiate against perpetrators of wilful attacks on their integrity due to the functions performed by the agent. Direct relatives in ascending line must also justify that they are subject to personal, current and real threats due to the functions performed by their direct descendants.

Criminal prosecution

Functional protection is provided to military personnel who are subject to criminal prosecution or certain preliminary measures (suspected and placed under the status of 'assisted witness' or taken into police custody) for acts committed while on duty, provided that these acts do not constitute personal faults.

Personal faults encompass a range of behaviours that, although they may be materially linked to the institution due to being committed while on duty, are separable from it because the individuals involved are driven by motivations unrelated to their duties (excessive behaviour, violence, exceptionally serious misconduct).

Threats and attacks

This provision concerns military personnel who are the victim of intentional offences related to their duties and motivated by or occurring due to their status as military personnel.

Military personnel who are the victim of accidental events, even if they occur while on duty, are not eligible for functional protection. They benefit from the common compensation schemes for military personnel (military disability pensions, additional compensation for non-material damage) to cover the injuries sustained.

In the performance of their functions

Military personnel who are the victim of attacks in circumstances unrelated to their duties are not covered by functional protection. For instance, this applies to military personnel while not on duty who are the victim of an altercation in a restaurant, where the incident has no connection to their status as military personnel.

Coverage of civil convictions in the absence of jurisdictional conflict

This provision concerns military personnel who are wrongfully referred to a civil court and sentenced by it to pay damages, even though the acts leading to the sentence were related to a fault inseparable from the service, for which the civil court should have dismissed the case due to a lack of jurisdiction so that it could have been brought before the administrative court.

In such cases, unlike criminal fines which constitute a penalty and must be personally executed by the convicted under the principle of the individual nature of penalties, the State must cover civil convictions.

[1198] Council of State, case No. 436176, 26 February 2020.

2.3.4.2. Protection in form of coverage of legal fees in civil and criminal proceedings

The most frequent form of functional protection provided by the State involves covering the legal fees for civil and criminal proceedings. This entails the State negotiating and signing a fee agreement with the lawyer chosen by the beneficiary of the protection.

Functional protection encompasses various forms of assistance.

Military personnel who are the victim of press defamation are entitled to a right of reply.

The State can also bring a direct action before a criminal court by joining the proceedings as civil party to seek reimbursement from the perpetrator for sums allocated to the victim.

When the use by military personnel of their firearms in operations such as *Sentinelle*, *Vigipirate*, or *Cuirasse* results in injuries or deaths, a judicial investigation is conducted by national police or gendarmerie. This often leads to the military personnel involved being taken into custody or questioned as an 'assisted witness'. In such cases, functional protection includes providing clear preliminary explanations about their rights and the ongoing procedure.

2.3.4.3. Emergency procedure for granting functional protection during operation *Sentinelle*

On national territory, requests and follow-ups for functional protection are typically managed through the military chain of command to which the service member belongs. In principle, the local litigation service of the member's place of employment, acting under the functional authority of the Legal Affairs Directorate (*direction des affaires juridiques, DAJ*) of the Ministry of Defence, provides initial advice. The DAJ directly handles the protection requests in the most sensitive cases (harassment, financial offences, high-profile cases).

Due to the unprecedented scale and duration of domestic military engagements on the ground, there is increased exposure to criminal procedures following the use of firearms. To ensure comprehensive functional protection, an emergency procedure was jointly developed by the DAJ, the different staffs (Air and Space Force, Army, Navy), and the Service of the Armed Forces Commissariat.

This emergency procedure, supported by a 24/7 hotline, aims to address urgent situations requiring a decision on functional protection within hours, such as when military personnel:

- face potential custody after using a firearm,
- is the victim of an attack without having used their firearm, where the assailant is scheduled for immediate court appearance without enough time to follow the normal protection request process.

Local command initiates the emergency procedure, reporting to the Centre for Planning and Conduct of Operations (*Centre de planification et de conduite des operations, CPCO*), until the request can be processed through the standard chain of command. The DAJ, contacted by the local command, determines whether the urgent request warrants protection and, if so, connects the service member with a lawyer. This action is later formalized through the standard procedure for granting functional protection (written, signed, and justified decision).

2.3.4.4. Functional protection in foreign operations

Functional protection for military personnel in foreign operations is governed by Article L4123-10 of the Defence Code and, where applicable, by status-of-forces agreements (SOFAs).

The DAJ has exclusive authority for evaluating protection requests from military personnel stationed or

residing in overseas territories or abroad[1199].

In the absence of a SOFA giving primary jurisdiction to French courts for service-related offences, functional protection can be granted for acts committed while on duty which are prosecuted by the host State's courts. However, as is the case on national territory, protection can be denied in case of personal faults. For example, functional protection was denied to a soldier responsible for involuntary manslaughter, who aimed their weapon in jest at someone, falsely believing it was unloaded, and accidentally discharged it.

[1199] Decree of 23 December 2009 defining the competencies of the Service of the Armed Forces Commissariat regarding the settlement of damage caused or suffered by the Ministry of Defence, the legal defence of the Ministry before administrative courts, and the legal protection of its military and civilian agents, Art. 9.

ABBREVIATIONS AND ACRONYMS

A

ACC	Air Component Commander
ADIZ	Air Defence Identification Zone
AEM	*Action de l'État en Mer* [Action of the State at Sea]
AFISMA	African-led International Support Mission in Mali
AIG	*Accord Intergouvernemental* [intergovernmental agreement]
AJEPP	Allied Joint Environmental Protection Publication
AJP	Allied Joint Publication
ANSSI	*Agence Nationale de la Sécurité des Systèmes d'Information* [National Information Systems Security Agency]
AP I	Protocol I additional to the 1949 Geneva Conventions
AP II	Protocol II additional to the 1949 Geneva Conventions
AP III	Protocol III additional to the 1949 Geneva Conventions
APM	*Affaire(s) Pénale(s) Militaire(s)* [military criminal case(s)]
AQ	*Autorité(s) Qualifiée(s)* [qualified authorities]
Art.	Article
ASL	Archipelagic Sea Lane
ATO	Air Tasking Order
ATS	Air Traffic Services

B

BCN	Biological, Chemical and Nuclear (weapons)
BDA	Battle Damage Assessment
BMD	Ballistic Missile Defence

C

C4	Cyber Crisis Coordination Centre
CAAFAG	Children Associated with Armed Forces and Armed Groups
CAR	Central African Republic
CAS	Close Air Support
CAOC	Combined Air Operations Centre
CBRN	Chemical, Biological, Radiological and Nuclear
CCW (Conv.)	Convention on Certain Conventional Weapons
CDA	Collateral Damage Assessment
CDAOA	*Commandement de la Défense Aérienne et des Opérations Aériennes* [Air Defence and Air Operations Command(er)]
CDE	Collateral Damage Estimation / Collateral Damage Estimate
CDEM	Collateral Damage Estimation Methodology
CDSN	*Conseil de Défense et de Sécurité Nationale* Defence and National Security Council
CESEDA	*Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile* [Code of Entry and Residence of Foreigners and of the Right to Asylum]
CEMA	*Chef d'État-Major des Armées* [Chief of the Defence Staff]
CFSP	Common Foreign and Security Policy
CIAE	*Centre Interarmées des Actions sur l'Environnement* [Joint CIMIC and Information Warfare Centre]
CICDE	*Centre Interarmées de Concepts, de Doctrines et d'Expérimentations* [Joint Centre for Concepts, Doctrine and Experimentation]
CIMIC	Civil-Military Co-Operation
CNC	*Centre National de Ciblage* [French Targeting Centre]

CNCDH	*Commission Nationale Consultative des Droits de l'Homme* [National Advisory Commission on Human Rights]
CNCTR	*Commission Nationale de Contrôle des Techniques de Renseignement* [National Oversight Commission for Intelligence-Gathering Techniques]
CNRLT	*Coordination Nationale du Renseignement et de la Lutte contre le Terrorisme* [National Intelligence and Counter-Terrorism Coordination]
COMCYBER	*Commandement/Commandant de la Cyberdéfense* [Cyber Command(er)]
COMSUP	*Commandant Supérieur de forces* [Senior Forces Commander]
CO COMCYBER	*Centre d'Opération du Commandement de la Cyberdéfense* [Operation Centre of the Cyber Command]
CoG	Centre of Gravity
COMANFOR	Force Commander
CONOPS	Concept of Operation(s)
COPD	Comprehensive Operations Planning Directive
COPUOS	Committee On the Peaceful Uses of Outer Space
COS	*Commandement des Opérations Spéciales* [Special Operations Command]
CPCO	*Centre de Planification et de Conduite des Opérations* [Centre for Planning and Conduct of Operations]
CPG	Commander's Planning Guidance
CPP	*Code de Procédure Pénale* [Code of Criminal Procedure]
CWC	Chemical Weapons Convention
CZM	*Commandant de Zone Maritime* [Maritime Area Commander]

D

DAJ	*Direction des Affaires Juridiques* [Legal Affairs Directorate]
DA	*Défense Aérienne* [Air Defence]
DCO	Defensive Cyber Operation(s)
DCP	*Document Conjoint de Procédure* [Standard Operating Procedure]
DDoS	Distributed Denial-of-Service
DGA	*Direction Générale de l'Armement* [Directorate-General of Armament]
DGAC	*Direction Générale de l'Aviation Civile* [Directorate-General for Civil Aviation]
DGSE	*Direction Générale de la Sécurité Extérieure* [Directorate-General for External Security
DGSI	*Direction Générale de la Sécurité Intérieure* [Directorate-General for Internal Security]
DIA	*Doctrine Interarmées* [joint doctrine]
DMD	*Délégué Militaire Départemental* [Departmental Military Delegate]
DMT	*Défense Maritime du Territoire* [Maritime Defence of the Territory]
DoI	Declaration of Intent
DOS	Department of Operational Support (UN Secretariat)
DOT	*Défense Opérationnelle du Territoire* [Operational Defence of the Territory]
DPH	Direct Participation in Hostilities
DPO	Department of Peace Operations (UN Secretariat)
DPID	*Direction de la Protection des Installations, moyens et activités de la Défense* [Directorate for the Protection of Defence Installations, Capabilities and Activities]
DRC	Democratic Republic of the Congo
DRM	*Direction du Renseignement Militaire* [Military Intelligence Directorate]
DRSD	*Direction du Renseignement et de la Sécurité de la Défense* [Defence Intelligence and Security Directorate]
DUF	Directives on the Use of Force

E

ECHR	European Convention on Human Rights

ECOWAS	Economic Community Of West African States
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
EM CYBER	*État-Major de la Cyberdéfense* [Cyber Defence Staff]
EMA	*État-Major des Armées* [Joint Defence Staff]
ENMOD (Conv.)	Environmental Modification Convention
ERW	Explosive Remnant(s) of War
ESID	*Établissement du Service d'Infrastructure de la Défense* [Defence Infrastructure Support Unit]
EU	European Union
EUFOR	European Union Force
EUTM	European Union Training Mission
EW	Electronic Warfare

F

FIR	Flight Information Region
FMJ (bullet)	Full Metal Jacket bullet
FSSI	*Fonctionnaire de Sécurité des Systèmes d'Information* [Information Systems Security Official]

G

GANP	Global Air Navigation Plan
GC	Geneva Convention(s)
GGE	Group of Governmental Experts
GIATO	*Glossaire Interarmées de Terminologie Opérationnelle* [Joint Glossary of Operational Terminology]
GLONASS	(Russian) Global Navigation Satellite System
GNSS	Global Navigation Satellite Systems
GPS	Global Positioning System

H

HA	Hostile Act
HFCDS	*Haut Fonctionnaire Correspondant de Défense et de Sécurité* [Senior Defence and Security Official]
HI	Hostile Intent
HOM	Head Of Mission
HPCR (Prog.)	Program on Humanitarian Policy and Conflict Research (at Harvard University)
HQ	Headquarters
HVT	High-Value Target

I

IAC	International Armed Conflict
IACB	Information Activities Coordination Board
IACHR	Inter-American Commission on Human Rights
IAMD PC	Integrated Air and Missile Defence Policy Committee
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICO	Influence Cyber Operation(s)
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTs	Information and Communication Technologies
ICTY	International Criminal Tribunal for the former Yugoslavia

IED	Improvised Explosive Device
IFF	Identification Friend or Foe
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIIM	International, Impartial and Independent Mechanism for Syria
ILC	International Law Commission
IMD	Initiating Planning Directive
IMO	International Maritime Organization
Info Ops	Information Operation(s)
IPCR	Integrated Political Crisis Response
ISAF	International Security Assistance Force
ISIS	Islamic State of Iraq and Syria
ISIL	Islamic State of Iraq and the Levant
ISR	Intelligence, Surveillance and Reconnaissance
ITU	International Telecommunication Union

J

J2	
J3	
J5	
JCB	Joint Coordination Board
JDCS	*Juridiction de Droit Commun Spécialisée en matière (pénale) militaire* [ordinary law court specialized in military criminal matters]
JFAC	Joint Force Air Component
JFAC HQ	Joint Force Air Component Headquarters
JFC	Joint Force Commander
JLD	*Juge des Libertés et de la Détention* [Liberties and Detention Judge]
JPTL	Joint Prioritized Target List
JTC	Joint Targeting Cycle
JTCB	Joint Targeting Coordination Board
JTL	Joint Target List
JTWG	Joint Targeting Working Group

K

KFOR	Kosovo Force

L

LAWS	Lethal Autonomous Weapon System
LEGAD	Legal Advisor
LOAC	Law Of Armed Conflict
LoI	Letter of Intent

M

MASA	*Mesure Active de Sûreté Aérienne* [Active Air Security Measure]
MICOPAX	Mission for the Consolidation of Peace in Central African Republic
MINURCAT	*Mission des Nations Unies en République Centrafricaine et au Tchad* [United Nations Mission in the Central African Republic and Chad]
MINUSCA	*Mission Multidimensionnelle Intégrée des Nations Unies pour la Stabilisation en République Centrafricaine* [United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic]

MINUSMA	*Mission Multidimensionnelle Intégrée des Nations Unies pour la Stabilisation au Mali* [United Nations Multidimensional Integrated Stabilization Mission in Mali]
MISCA	*Mission Internationale de Soutien à la Centrafrique sous Conduite Africaine* [African-led International Support Mission to the Central African Republic]
MoD	Ministry of Defence
MONUSCO	*Mission de l'Organisation des Nations Unies pour la Stabilisation en République démocratique du Congo* [United Nations Organization Stabilization Mission in the Democratic Republic of the Congo]
MOTAPM	Mine(s) Other Than Anti-Personnel Mines
MoU	Memorandum of Understanding
MRPL	*Mesure Restrictive et Privative de Liberté* [Measure of restriction or deprivation of liberty]

N

NAA	National Approval Authority
NASA	National Aeronautics and Space Administration
NATO	North Atlantic Treaty Organization
NATO AWACS	NATO Airborne Warning and Control System
NATO IAMD	NATO Integrated Air and Missile Defence
NFZ	No-Fly Zone
NGOs	Non-Governmental Organizations
NIAC	Non-International Armed Conflict
NOTAM	Notice To Airmen
NR	National Representative
NSL	No-Strike List

O

OCO	Offensive Cyber Operation(s)
OEWG	Open-Ended Working Group
OG COMCYBER	*Officier Général Commandant de la Cyberdéfense* [General Officer, Commander of Cyber Defence]
OGZDS	*Officier Général de Zone de Défense et de Sécurité* [general officer of the defence and security area]
OHCHR	Office of the High Commissioner for Human Rights
ONUCI	*Opération des Nations Unies en Côte d'Ivoire* [United Nations Operation in Côte d'Ivoire]
OP	Operative Paragraph
OPCON	Operational Control
OPEX	*Opération Extérieure* [foreign operation]
OPLAN	Operation Plan
OPORD	Operation Order(s)
OSCE	Organization for Security and Co-operation in Europe
OTIAD	*Organisation Territoriale Interarmées de Défense* [joint defence territorial organization]
OUP	Operation Unified Protector

P

PDSS	Person with Designated Special Status
PfP	Partnership for Peace
PIA	*Publication Interarmées* [joint publication]
PID	Positive Identification
PIM	*Protection des Installations Militaires* [Protection of Military Installations]

PKO	Peacekeeping Operation
PNAT	*Parquet National Anti-Terroriste* [National Anti-Terrorism Prosecution Department]
PNT	Positioning, Navigation and Timing
PoL	Pattern of Life
POLAD	Political Advisor
POW	Prisoner Of War
PP	Preambular Paragraph
PPC	*Posture Permanente de Cyberdéfense* [Standing Cyber Defence Posture]
PPS-A	*Posture Permanente de Sûreté-Air* [Standing Air Security Posture]
PPS-M	*Posture Permanente de Sauvegarde Maritime* [Standing Maritime Safeguard Posture]
PsyOps	Psychological Operation(s)
PTL	Prioritized Target List

R

R2P	Responsibility to Protect
RCH	Red Card Holder
ROE	Rules of Engagement
ROEIMPL	Rules of Engagement Implementation
ROEREQ	Rules of Engagement Request
ROV	Remotely Operated Vehicle
RST	Red Card Holder
RTL	Restricted Target List

S

SACEUR	Supreme Allied Commander Europe
SAMP/T	*Système Sol-Air Moyenne Portée/Terrestre* [surface-to-air medium range air defence system]
SAT-AIS	Satellite Automatic Identification System
SATCOM	Satellite Communications
SDIZ	Space Defence Identification Zone
SGA	*Secrétariat Général pour l'Administration* [Secretariat-General for Administration]
SGDSN	*Secrétariat Général de la Défense et de la Sécurité Nationale* [Secretariat-General for Defence and National Security]
SID	*Service d'Infrastructure de la Défense* [Defence Infrastructure Service]
SOFA	Status-Of-Forces Agreement
SPINS	Special Instructions
SPOT	*Système Probatoire d'Observation de la Terre* or *Satellite Pour l'Observation de la Terre* [Satellite for observation of Earth]
SRSG	Special Representative of the Secretary-General
SSA	*Service de Santé des Armées* [health service of the armed forces]
SSA	Space Situational Awareness
SST	Space Surveillance and Tracking
STANAG	NATO Standardization Agreement
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

T

TA	Target Analysis
TA	Technical Arrangement
TCN	Troop-Contributing Nation
TDWG	Target Development Working Group

TEA	Target Engagement Authority
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIF	Target Intelligence Folder
TNL	Target Nomination List
TST	Time-Sensitive Target
TVA	Target Validation Authority
TVB	Target Validation Board

U

UAS	Unmanned Aerial System
UCDP	Uppsala Conflict Data Program
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMID	African Union-United Nations Hybrid Operation in Darfur
UNCHR	United Nations Commission on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNCOPUOS	United Nations Committee On the Peaceful Uses of Outer Space
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo
UNO	United Nations Organization
UNSC	United Nations Security Council
UMS	Unmanned Maritime System
US	United States
USSR	Union of Soviet Socialist Republics

V

VID	Visual Identification

W

WMD	Weapon(s) of Mass Destruction
WWII	Second World War

Z

ZDHS	*Zone de Défense Hautement Sensible* [highly sensitive defence area]
ZNAR	*Zone Nucléaire à Accès Réglementé* [restricted nuclear area]
ZP	*Zone Protégée* [protected military area]

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A

Act of aggression
Act of government
Act harmful to the enemy
Action in space
Action of the State at Sea
Administrative detention
Agent of the public force
Air Defence
Air Defence Identification Zone
Air operation
Air traffic
Airspace
Anti-personnel mine
Anti-satellite missile
Anticipatory self-defence
Arbitrary deprivation of liberty
Arbitrary deprivation of life
Arbitrary detention
Area bombardment
Armed attack
Astronaut
Avis

B

Bacteriological weapon
Belligerent
Biennial Humanitarian Conference
Biological weapon
Blockade
Blue shield
Booby-trap
Breach of the peace

C

Capture
Cause of criminal non-responsibility
Caveat
Cease-fire
Celestial bodies
Central Information Agency
Centre for Planning and Conduct of Operations
Centre of Gravity
Chaplain
Charter of the United Nations
Chemical weapon
Children Associated with Armed Forces or Armed Groups
Citizen's arrest

Civil aircraft
Civil authority
Civil Defence
Civil liability
Civil Security
Civilian object
Cluster munitions
Coalition
Coastal lifeboat
Collateral damage
Collateral effect
Collateral Damage Estimation
Collective self-defence
Combat engagement
Combatant
Combatant privilege
Command by a lawful authority
Command investigation
Commander's Planning Guidance
Concrete and direct military advantage anticipated
Conflict classification
Constitution
Constitutional Council (Conseil constitutionnel)
Contact zone
Contiguous zone
Continental shelf
Convention for the Protection of Human Rights and Fundamental Freedoms
Convention on International Civil Aviation
Convention on International Liability for Damage Caused by Space Objects
Council of State (Conseil d'Etat)
Countermeasure
Crime against humanity
Crime of aggression
Crime of genocide
Criminal immunity
Criminal non-responsibility
Criminal responsibility
Cruel, inhuman or degrading treatment
Cultural property
Cyber combatant
Cyber defence
Cyber security
Cyber weapon
Cyberattack
Cyberoperation
Cyberspace

D

Dangerous forces
Death penalty
Deception
Defence and National Security Council
Defence and security area

Defence Ethics Committee
Defensive cyberoperations
Delegated ROE
Deliberate targeting
Denial of quarter
Denunciation
Departmental Military Delegate
Detaining Power
Direct participation in hostilities
Discrimination
Dispersal of unlawful assemblies
Dispersion
Distinction
Distinctive sign
Diversion
Dormant ROE
Due diligence
Dynamic targeting

E

Economic Defence
Effective control
Embargo
Emblem
Espionage
European Convention on Human Rights
European Court of Human Rights
European Union
Evacuation
Exclusive economic zone
Exemption from criminal prosecution
Expanding munitions
Expedited investigation
Exploding munitions
Explosive remnants of war
Exploration
Exported non-international armed conflict
Extradition
Extrajudicial, summary or arbitrary executions
Extraterritorial application

F

Fault of the institution
Felony
Flag State
Flag State principle
Flag verification
Flagrance
Force majeure
Foreign operation
Freedom of access to space
Freedom of exploration and use of space

Full-spectrum targeting

G

General Assembly of the United Nations

H

High seas
High-intensity non-international armed conflict
Highly sensitive defence area
Hors de combat
Hospital
Hospital ship
Hostage rescue
Hostile act
Hostile intent
Human shield
Humanitarian organization
Humanity

I

Immunity
Immunity from arrest
Immunity from execution
Immunity from jurisdiction
Immunity from prosecution
Imperative military necessity
Incendiary weapon
Incidental damage
Indiscriminate
Individual self-defence
Influence cyberoperations
Information Activities Coordination Board
Initiating Military Directive
Interception
Internal Disturbances and Tensions
Internal Security
Internal security forces
International armed conflict
International Commission of Inquiry
International Committee of the Red Cross
International Court of Justice
International Covenant on Civil and Political Rights
International Criminal Court
International Criminal Tribunal for Rwanda
International Criminal Tribunal for the former Yugoslavia
International Humanitarian Fact-Finding Commission
International Law Commission
International organization
International peace and security
International responsibility
Internationalized non-international armed conflict

Internationally wrongful act
Internment
Invasion
Investigating judge

J

Jamming
Joint Coordination Board
Joint Prioritized Target List
Joint Target List
Joint targeting
Joint Targeting Coordination Board
Joint Targeting Working Group
Judicial authority
Judicial detention
Judicial police

K

Kampala amendments
Kessler syndrome
Kinetic engagement
Kinetic targeting

L

Law enforcement at sea
Law of arms control
Launching State
Legal advisor
Legal review
Lex specialis
Limitation period
Low-intensity non-international armed conflict

M

Maintenance of public order
Maritime Defence of the Territory
Maritime exclusion zone
Maritime space
Means and methods of warfare
Means of combat
Means of warfare
Medical aircraft
Medical personnel
Medical units and transports
Mercenary
Merchant vessel
Method of warfare
Militarization
Military aircraft
Military Defence

Military justice
Military necessity
Military objective
Mine
Mine other than anti-personnel mine
Misdemeanour
Mobilization
Multinational operation

N

National Advisory Commission on Human Rights
National Approval Authority
National Gendarmerie
National liberation
National Police
National Security
National security reserve mechanism
Natural environment
Naval operation
Naval warfare
Neutral aircraft
Neutral Power
Neutral State
Neutral waters
Neutrality
New weapon, means or method of warfare
No Strike List
No-fly zone
Non-combatant
Non-compliance
Non-governmental organization
Non-international armed conflict
Non-Military Defence
Non-Permanent Intervention
Normal diligence
North Atlantic Treaty Organization
Notice To Airmen
Nuclear deterrence
Nuclear test
Nuclear weapon

O

Obligation to investigate
Occupation
Occupying Power
Offence
Offensive cyberoperations
Operation Barkhane
Operation Harmattan
Operation order
Operation plan
Operation Résilience

Operation Sangaris
Operation Sentinelle
Operation Serval
Operational continuum
Operational Defence of the Territory
Operational legal advisor
Orbit
Order by the law
Ordinary law court specialized in military criminal matters
Organized armed group
Outer space
Outer Space Treaty
Overall control

P

Parachutist
Parliament
Pattern of Life
Peace enforcement operation
Peace operation
Peace support operation
Peacekeeping operation
Perfidy
Permanent Court of International Justice
Permanent Intervention
Person holding public authority
Pillage
Piracy
Poison
Poisoned weapon
Positive Identification
Positive obligation to protect
Precaution
Preemptive self-defence
Preliminary enquiry
Prêt de main forte
Preventive self-defence
Principle of complementarity
Principle of distinction
Principle of due diligence
Principle of due regard to the corresponding interests of States
Principle of exclusive flag-State jurisdiction
Principle of flag State's consent
Principle of freedom of navigation
Principle of Freedom of the Seas
Principle of humane treatment
Principle of humanity
Principle of jurisdiction and control over registered space objects
Principle of legality of penalties
Principle of non-appropriation
Principle of non-intervention
Principle of non-refoulement
Principle of non-use of force

Principle of peaceful use of outer space
Principle of precaution
Principle of precautions against the effects of attacks
Principle of precautions in attack
Principle of presumption of innocence
Principle of proportionality
Principle of replacement at the proceedings
Principle of sovereignty
Principle of territorial jurisdiction
Prisoner of war
Prohibition of superfluous injury and unnecessary suffering
Prohibition on indiscriminate attacks
Procedural safeguard
Prohibition of the use of force
Proportionality
Protected military area
Protected object
Protected person
Protecting Power
Provost Gendarmerie
Public emergency threatening the life of the nation

R

Re-attack
Recourse action
Red Card Holder
Religious personnel
Reprisal
Request for assistance
Request for Support
Requisition
Requisition by the civil authority
Requisition by the judicial authority
Responsibility to Protect
Restricted nuclear area
Restricted Target List
Retained ROE
Retaliation
Right of hot pursuit
Right of visit
Right to access
Retortion
ROE Implementation
ROE Request
Rome Statute
Rules governing the use of force
Rules of Engagement
Ruse of war

S

Sabotage
Safety zone

Satellite
Security Council of the United Nations
Security detention
Seizure
Self-defence
Shipwrecked
Siege
SOFA
Soft law
Solidarity clause
Sovereignty
Space activities
Space debris
Space object
Space operation
Space Situational Awareness
Space surveillance and tracking
Space Defence Strategy
Special proteciton
Spy
Standing Air Security Posture
Standing Cyber Defence Posture
Standing Maritime Safeguard Posture
Starvation
State of emergency
State of necessity
State of registry
State of siege
Strict liability
Submarine
Submarine mine
Superfluous injury
Surrender
Surrendering aircraft

T

Target Development Working Group
Target Engagement Authority
Target Validation Authority
Target Validation Board
Targeting process
Territorial sea
Territorial waters
Terrorism
Threat to the peace
Threshold
Torture
Transfer

U

Unavoidable necessity
Unfriendly act

Uniform
Unintentional offence
United Nations Convention on the Law of the Sea
United Nations Organization
Universal jurisdiction
Unnecessary suffering
Use of force
Use of weapons

V

Visual Identification

W

War crime
Warning
Warship
Weapon of mass destruction (WMD)
Weapon primarily injuring by fragments non-detectable by X-rays
Weaponization
White flag
White Paper on Defence and National Security
Widespread, long-term and severe damage to the natural environment
Works and installations containing dangerous forces
Wounded