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Voluntary Report on the Implementation of International Humanitarian Law at the Domestic Level

2024

Contents

Introduction	4
List of Frequently Used Acronyms	5
Part I – General domestic implementation	6
Canada’s international humanitarian law (IHL) treaty obligations	6
The role of the Canadian Red Cross Society	6
The role of the Canadian National Committee for Humanitarian Law	6
Part II – Dissemination, Training and Legal Advice	8
Dissemination of IHL and training	8
<i>Law of Armed Conflict at the Operational and Tactical Levels</i>	10
Legal advice to the Government of Canada on IHL	10
Part III – Domestic Jurisdiction over Violations	12
The legal basis for prosecution and punishment	12
Prosecution of war crimes, crimes against humanity or genocide	13
Holding commanders and other individuals criminally responsible	14
Extradition	15
Part IV – Protections	17
Protections for persons deprived of their liberty outside Canada	17
Determination of prisoner of war (PW) status	18
Protection of medical personnel, religious personnel and war correspondents	19
Addressing conflict-related SGBV	20
Protections for cultural property in armed conflict	22
Protections for civilians and civilian objects in armed conflict	23
Protection of the distinctive emblems	23
Part V – Means and Methods of Warfare	25
Prohibitions and restrictions	25
Determination of whether new weapons and means or methods of warfare may be employed lawfully	30
Sharing information and best practices with other States	30
Measures related to the export of conventional arms	31

Annex A: Table of selected implementing legislation	32
Annex B: References	34
Selected IHL Treaties to which Canada is party	34
Selected Legislation	37
Selected Regulations	37
Selected Doctrine	38
Other Selected Sources	39

Introduction

International humanitarian law (IHL) governs the conduct of hostilities during armed conflict and protects the victims of armed conflict. There are two types of armed conflicts: international armed conflicts (IACs) and non-international armed conflicts (NIACs). IHL is found in treaties, in customary international law, and in general principles of international law. IHL protects persons who are not taking part in an armed conflict (such as civilian populations) or are no longer participating (such as the wounded). IHL also restricts the means and methods of warfare. All parties to an armed conflict must respect their applicable IHL obligations. Respect for IHL mitigates the effects of armed conflict on people, property, and the environment.

The primary responsibility for implementation of IHL lies with States. States have a legal obligation to adopt, in peacetime, legislative, regulatory and administrative measures to ensure respect for IHL at the national level. States must teach respect for IHL to their armed forces and ensure that serious violations of IHL can be prosecuted and punished. States must also pass laws protecting the Red Cross, Red Crescent and Red Crystal emblems.

For Canada, it is both urgent and essential to disseminate IHL broadly and work toward universal implementation. While many States are vigilant in their application and respect for IHL, Canada remains dismayed by repeated violations observed around the world. Many IHL violations are due to a State's failure to implement the rules, rather than an inadequacy of the rules. In many cases, violations can be traced to ignorance of the rules' content and application.

Canada is party to the four 1949 Geneva Conventions and their Additional Protocols as well as other IHL treaties (see Annex B). To implement its IHL obligations, Canada has adopted robust domestic laws, policies and programs. A concerted effort is made to instruct both Canadian armed forces and civilians on IHL. War crimes and other serious violations of IHL are punishable under Canadian criminal law. The Department of National Defence, Global Affairs Canada, the Department of Justice, and the Royal Canadian Mounted Police work in collaboration with the Canadian Red Cross (Canada's Red Cross National Society) so that all Canadians can understand IHL.

Canada supports the establishment of special bodies to advise and assist governments in implementing and disseminating IHL (as recommended by the 26th International Conference on the Red Cross and Red Crescent in 1995). Canada established its national committee for this purpose in 1998. The Canadian National Committee for Humanitarian Law (CNCHL) is currently working to modernize its activities. Part of this effort has resulted in the production of this Voluntary Report, for which we give the CNCHL sincere thanks.

We were also pleased to see the importance of IHL implementation recognized at the 33rd International Conference of the Red Cross and Red Crescent in 2019. At this Conference, Canada supported the resolution "Bringing IHL home: A road map for better national implementation of international humanitarian law." Canada also joined the United Kingdom's pledge to prepare a Voluntary Report.

This Voluntary Report will serve as a useful reference for the concrete steps Canada has taken to implement its IHL obligations and related commitments.

List of Frequently Used Acronyms

AP I	Additional Protocol I to the Geneva Conventions
AP II	Additional Protocol II to the Geneva Conventions
APMCIA	<i>Anti-Personnel Mines Convention Implementation Act</i>
CAF (or CF)	Canadian Armed Forces (or Canadian Forces)
CAHWCA	<i>Crimes against Humanity and War Crimes Act</i>
CCW	Convention on Certain Conventional Weapons
CDS	Chief of Defence Staff
CNCHL	Canadian National Committee for Humanitarian Law
CRC	Canadian Red Cross Society
CSD	Code of Service Discipline
CWC	Chemical Weapons Convention
CWCIA	<i>Chemical Weapons Convention Implementation Act</i>
DND	Department of National Defence
GAC	Global Affairs Canada
GC I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC II	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC III	Convention (III) relative to the Treatment of Prisoners of War
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War
IAC	International armed conflict
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
JAG (or OJAG)	Judge Advocate General (or Office of the Judge Advocate General)
LOAC	Law of Armed Conflict
NIAC	Non-international armed conflict
PW	Prisoner of War
RCMP	Royal Canadian Mounted Police
SGBV	Sexual and Gender Based Violence

Part I – General domestic implementation

Canada’s international humanitarian law (IHL) treaty obligations

Annexes A and B set out the international humanitarian law (IHL) treaties to which Canada is a party.

Canada’s treaty obligations are implemented in domestic legislation, policy or programs.¹ Annex A specifies when certain IHL treaties were ratified or acceded to, along with any directly corresponding domestic implementing legislation.

The role of the Canadian Red Cross Society

Canada’s national society is the Canadian Red Cross (CRC) Society. Canada conferred legal status on the CRC by enacting the *Canadian Red Cross Society Act* in 1909.²

The CRC fulfils many roles, including first aid training, emergency disaster preparedness, response and recovery, refugee services, restoring family links, and violence prevention. The CRC is recognized as auxiliary to public authorities in the areas of disaster response and preparedness. It also cooperates with the government to promote respect for international humanitarian law and to protect the distinctive emblems recognized by the Geneva Conventions and their Additional Protocols.

Another CRC mandated responsibility is to help disseminate IHL, including to government bodies, the armed forces, academia, policy makers, teachers, and youth. The CRC holds events across the country to help educate Canadians on the importance of IHL and to foster dialogue on contemporary challenges and debates, for example, through its training for secondary school teachers and its bilingual IHL Summer School hosted in collaboration with the Human Rights Research and Education Centre at the University of Ottawa which is supported by the Canadian Armed Forces’ Office of the Judge Advocate General (OJAG), the Department of Justice as well as others.

The role of the Canadian National Committee for Humanitarian Law

The Canadian National Committee for Humanitarian Law (CNCHL) was established in 1998, following the 26th International Conference of the Red Cross and Red Crescent. The CNCHL consists of representatives from the CRC and various departments and agencies of the Government of Canada: Department of National Defence and the Canadian Armed Forces, Global Affairs Canada, the Department of Justice, and the Department of Public Safety, including the RCMP.

The CNCHL’s main task is facilitating IHL implementation in Canada, including the Geneva Conventions and their Additional Protocols. The CNCHL is a forum for sharing information and discussing recent IHL developments. Ongoing exchanges take place between CNCHL

¹ Canada takes a “dualist” approach to the domestic effect of international treaties. In a nutshell, a “monist” State’s treaties have immediate force of law, without implementation in legislation, policy, or programs.

² *An Act to incorporate the Canadian Red Cross Society*, S.C. 1909, c. 68.

members on their respective IHL-related activities, to ensure coordination and transparency across relevant organizations. More specifically, the main functions of the CNCHL are to:

- a) monitor new developments in IHL and consider implications for Canada;
- b) consider and, where appropriate, recommend Canadian negotiation and ratification of IHL instruments;
- c) consider and facilitate implementation of IHL instruments and obligations, including by reviewing and advising on national legislation and administrative measures relating to such implementation;
- d) advise on and encourage the dissemination of and training on IHL within Canada, including within the CAF, the police, civil servants, humanitarian organizations, the judiciary, the legal and medical professions, schools and universities, journalists and other members of the general public;
- e) promote consultation with Government of Canada departments and other relevant organizations in strengthening respect for and implementation and dissemination of IHL;
- f) examine and, where appropriate, recommend measures to promote or assist the national implementation of IHL in other countries drawing on Canadian expertise;
- g) maintain a pool of personnel knowledgeable about IHL, and liaise and exchange information with other States' national committees and the International Committee of the Red Cross regarding IHL; and
- h) identify opportunities to promote greater domestic and international efforts to strengthen the respect for and implementation and dissemination of IHL.

Part II – Dissemination, Training and Legal Advice

Dissemination of IHL and training

Members of the CAF: All CAF members receive training on the four Geneva Conventions and their Additional Protocols during their basic military training. Eleven key IHL rules are also set out in the Code of Conduct for CAF Personnel.³ The Code of Conduct is applicable to all CAF members taking part in all military operations other than Canadian domestic operations. The Code of Conduct is purposely framed as a clear and simple list of IHL rules, virtually universal in application, which helps point soldiers to the right choice of conduct when faced with quick decisions under considerable stress and in times of confusion. The Code of Conduct is taught during basic military training for all CAF members, whether officers or non-commissioned members.

Furthermore, CAF members are taught that, as a matter of policy, the basic principles and spirit of IHL are to be applied, as a minimum, in all Canadian military operations outside of Canada. For example, CAF members must, in accordance with CAF policy, apply the spirit and principles of the protective elements of IHL to peacekeeping missions in which they participate, irrespective of the existence of an armed conflict or of its characterization. This policy ensures that there is no confusion among CAF members as to which set of rules apply. It also ensures that there is a strong baseline from which no derogation is permitted, irrespective of the circumstances.

This initial training is reinforced throughout a member's career in both collective training and individual career learning and development opportunities. Notably, a more in-depth 4-day IHL course is provided for officers and senior non-commissioned members. The OJAG also provides IHL training to CAF members on an *ad hoc* basis, including before and during operational deployments.

Members of Other States' Armed Forces: The Code of Conduct also forms the basis of much of the IHL training provided by the CAF to foreign militaries, including in the context of operations overseas. For instance, the CAF developed and updates the curriculum for the LOAC portion of the Caribbean Junior Command and Staff Course which runs twice yearly and is attended by 30-50 candidates from Jamaica, and various Caribbean, South American and African nations. Canada also provides IHL training during a five-day workshop on Women, Peace and Security at various locations worldwide, attended by approximately 50 foreign military members. The CAF also offers regular IHL training on courses it delivers, including the United Nations Staff Officer Course, the United Nations Military Expert on Mission Course, and the Army Operations Course.

Canada led a collaborative process with the United Nations, United Nations Member States, and civil society to develop the *Implementation Guidance for the Vancouver Principles on Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers*.⁴ The aim of this non-binding guidance is to support States as they develop the national-level policies, doctrine, training, and education required to implement the *Vancouver Principles*. Accordingly, the implementation guidance contains numerous recommendations aimed at disseminating IHL, including relevant prohibitions. To support these efforts internally, the

³ CFJP 1-2, Code of Conduct for CF Personnel (February 2007).

⁴ Online: <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/vancouver-principles.html>.

Canadian Army Doctrine and Training Centre and the Peace Support Training Centre in Kingston, Ontario, have expanded their pre-deployment training to include a package on children in armed conflict, which includes references to prohibitions against sexual and gender-based violence (SGBV) and the recruitment and use of child soldiers.

The general public: As mentioned above, the CNCHL is mandated to promote the dissemination of IHL, including to the general public. The CNCHL has engaged in various related activities including workshops and presentations. The Government of Canada and the CRC work closely together to promote awareness of the principles and rules of IHL by engaging in several dissemination activities. These include delivering the ICRC's *Exploring Humanitarian Law* and the CRC's *Canada and Conflict: A Humanitarian Perspective* educator training⁵ across Canada. Educator trainings are held for high school teachers who teach a range of subject specialities, including law, social studies, history, civics, global issues, and political science. The goal is to promote the introduction of these materials and concepts in the classroom and increase teacher understanding of the main principles of IHL. For example, the OJAG supports this training across Canada by presenting their unique operational perspectives to teachers.

In addition, the CRC hosts IHL academic conferences in partnership with post-secondary academic institutions across Canada to provide increased education and professional development opportunities for students and young professionals.⁶ The conference series is part of an overall public engagement strategy, with a focus on young people. It provides a space to engage the academic community in impartial and neutral discussions on IHL as it relates to contemporary humanitarian and legal issues. The OJAG has participated in the conference series in order to increase public discourse and dialogue on the importance of compliance with IHL.

The CRC also provides tools and training to journalism students and journalists.⁷

The Department of Justice provides IHL education and training to several Government of Canada departments, including front-line workers such as customs agents and immigration officers. The Department of Justice is also involved in the dissemination of IHL principles to the general public in a variety of ways. These include teaching or guest lecturing at post-secondary institutions, organizing cultural community or public outreach programs and interacting with individual groups or members of the public through ongoing casework.

Finally, the Canadian Foreign Service Institute and Global Affairs Canada's International Humanitarian Assistance Bureau, in collaboration with the ICRC, offer an annual two-day course on the Protection of Civilians in Armed Conflict and other Situations of Violence. This course is offered to GAC officers and, in particular, officers deploying on Foreign Service assignments to conflict-affected countries. The course equips participants with the basic knowledge of IHL as the primary legal framework governing the protection of civilians in armed conflict as well as the intersection between IHL, international human rights law, and international refugee law. It also examines the legal, policy and operational aspects of humanitarian principles and action. Participants benefit from diverse perspectives on IHL application and implementation in the field from the OJAG as well as the ICRC, CRC, and

⁵ Online: <https://www.redcross.ca/crc/documents/Canada-Conflict-April-29-2.pdf>.

⁶ Online: <https://www.redcross.ca/how-we-help/international-humanitarian-law/conferences-trainings-and-events/ihl-now-2021> and <https://www.redcross.ca/how-we-help/international-humanitarian-law/conferences-trainings-and-events/past-events/2020-events>

⁷ Online: <https://www.redcross.ca/how-we-help/international-humanitarian-law/tools-for-journalists>.

other humanitarian organizations. GAC practitioners with extensive policy and field experience also share insights on key Canadian policy priorities and objectives concerning the protection of civilians in armed conflict and other complex emergencies.

Law of Armed Conflict at the Operational and Tactical Levels

The CAF's key joint doctrine manual in relation to IHL is titled: *Law of Armed Conflict at the Operational and Tactical Levels* (the LOAC Manual). Drafted in 2001, it remains in use today.

The LOAC Manual covers the law related to the conduct of hostilities and the protection of victims of armed conflict. This manual is an account of the law applicable to international armed conflicts and to non-international armed conflicts.

The CAF has numerous other manuals addressing various topics specifically related to armed conflict such as targeting, handling of prisoners of war and detainees, use of force for CAF operations, and peace support operations.

LOAC is taught at the theoretical level to officers and operators, and it is practiced regularly during practical exercises and collective training. In all operations, a legal officer—whether embedded or available on call when required by operational circumstances—supports Commanders on any questions related to LOAC.

Legal advice to the Government of Canada on IHL

CAF and DND: In accordance with the obligation under Article 82 of AP I, the LOAC Manual states:

As a party to AP I, Canada has the obligation to ensure that legal advisors are available to advise military commanders on the application of the LOAC and the appropriate instruction to be given to the CAF.⁸

Legal officers with the OJAG fulfil this mandate and provide legal advice on all areas of IHL at the tactical, operational and strategic levels. Only OJAG legal officers may provide legal advice to military commanders on these issues.

The JAG is statutorily responsible to the Minister of National Defence and is accountable for the legal advice given to the Governor General, the Minister of National Defence, the Chief of the Defence Staff, and the military chain of command in matters relating to military law.⁹ The Judge Advocate General has command over all officers and non-commissioned members posted to a position established within the Office of the Judge Advocate General. This clear accountability structure was designed to enhance the integrity of the OJAG and

⁸ Paragraph 1505(1), *Law of Armed Conflict at the Operational and Tactical Levels* (LOAC Manual).

⁹ The *National Defence Act* provides that the Judge Advocate General acts as legal adviser to the Governor General, the Minister of National Defence, the DND and the CAF in matters relating to military law. It also provides that the JAG has the superintendence of the administration of military justice in the Canadian Forces. In Canada, the JAG is responsible to the Minister of National Defence—rather than to the Chief of the Defence Staff—in the performance of their duties and functions. The JAG and the legal officers reporting to the JAG are therefore independent from the Chain of Command they advise.

ensure the independence of the JAG from the chain of command in the provision of legal advice in all areas of its mandate, including IHL and military justice.¹⁰

Civilian Legal Officers: Civilian legal officers within various departments and agencies of the Government of Canada, such as Global Affairs Canada and the Department of Justice, may also provide legal advice on IHL in contexts that are outside, or complementary to, military operations. The Legal Advisor to the Department of Global Affairs and the Government of Canada is the Government's principal source of advice on public international law. In addition, IHL policy analysis and development teams are present at both GAC and DND; these teams coordinate closely. However, civilian legal officers do not provide legal advice to military commanders on questions of military law.

The Department of Justice advises on domestic and international legal issues in the negotiation of IHL instruments and represents Canada in the litigation of most IHL cases. The Department of Justice also assists in the domestic implementation of IHL treaties, and its counsel are also responsible for providing legal advice on a variety of domestic issues related to IHL to Ministers and other senior members of the Government of Canada.

Since 2009, the Government of Canada has also implemented between its relevant departments a unique exchange initiative called the Reciprocal Legal Advisor Secondments Programme. Pursuant to this initiative, the OJAG secondments a military lawyer to GAC, and GAC secondments a civilian legal officer to the OJAG, for two to three-year exchange periods. This initiative has improved collaboration between the organizations and with external stakeholders and has enhanced consistency in legal advice, most notably in the area of IHL. A similar agreement between the Department of Justice and the OJAG allows for the secondment of a military lawyer to the Privy Council Office's¹¹ Legal Services.

¹⁰ See the *Queen's Regulations and Orders*, Volume I, Chapter 4, Section 2 - Office of the Judge Advocate General 4.081. Online: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders/vol-1-administration/ch-4-duties-responsibilities-officers.html>.

¹¹ In Canada, the Privy Council Office is the federal department supporting the Prime Minister and Cabinet. Led by the Clerk of the Privy Council, who also serves as Secretary to the Cabinet and Head of Canada's Federal Public Service, the Privy Council Office helps the government in implementing its vision, goals and decisions in a timely manner.

Part III – Domestic Jurisdiction over Violations

The legal basis for prosecution and punishment

The legal basis for the prosecution and punishment of IHL violations includes the *Geneva Conventions Act*,¹² the *Crimes against Humanity and War Crimes Act* (CAHWCA),¹³ and Canada's *Criminal Code*.¹⁴

The *Geneva Conventions Act* provides the legal basis for prosecution and punishment of grave breaches of the four GCs and of AP I.¹⁵ If the grave breach caused the death of any person, then it is punishable by imprisonment for life. In any other case, a grave breach is punishable by a term not exceeding fourteen years.¹⁶

The CAHWCA criminalizes genocide, crimes against humanity and war crimes. Under the CAHWCA, Canadian courts have jurisdiction to prosecute acts of genocide, crimes against humanity, and war crimes (section 6) and breaches of responsibility by military commanders or superiors (section 7), when alleged to have been committed in Canada after the coming into force of the CAHWCA or abroad at any time either before or after the coming into force of the CAHWCA, and when the jurisdictional requirements of section 8 of the CAHWCA are met. These offences are to be interpreted in accordance with customary international law or conventional international law, which includes grave breaches of the GCs and AP I, other serious violations of the laws and customs applicable in international armed conflict, serious violations of Article 3 common to the four GCs and of other serious violations of the laws and customs of armed conflict applicable to non-international armed conflicts.

The *Criminal Code* outlines the procedures to be followed throughout the criminal process, including pre-trial release or detention, preliminary hearings, trials, and sentencing. Some provisions, such as the prohibition against advocating genocide,¹⁷ supplement the core international crimes set out in the CAHWCA. Further, offences under the *Criminal Code*, arising from same circumstances, can be prosecuted jointly with the crimes provided for under the CAHWCA.

For civilians, superior courts of criminal jurisdiction have jurisdiction for the prosecution of genocide, crimes against humanity, war crimes, and other serious international crimes.¹⁸

The RCMP is the lead organization in Canada for criminal investigations of alleged crimes of genocide, crimes against humanity and war crimes. The RCMP can also closely collaborate with domestic and international partners during the course of its investigation.

¹² Online: <https://laws.justice.gc.ca/eng/acts/g-3/index.html>.

¹³ Online: <https://laws-lois.justice.gc.ca/eng/acts/c-45.9/fulltext.html>.

¹⁴ In relation to these crimes, the *Criminal Code* contains mainly procedural provisions, in particular with regards to sentencing where the accused has been found guilty of genocide, crimes against humanity or war crimes and intentional killing was the underlying offence of these crimes. Online: <https://laws-lois.justice.gc.ca/eng/acts/c-46/>.

¹⁵ These are Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV, and Articles 11 and 85 of AP I. See *Geneva Conventions Act*, subsections 3(1) and (1.1).

¹⁶ *Geneva Conventions Act*, subsection 3(1).

¹⁷ *Criminal Code*, section 318.

¹⁸ *Criminal Code*, sections 468 and 469.

Military Justice System: Canada's military courts have jurisdiction over military members and commanders. For offences committed under the CAHWCA, concurrent jurisdiction exists between the military courts and the civilian courts.

Canada's military justice system is a unique, self-contained system that operates in parallel with its civilian criminal justice counterpart.¹⁹ The Code of Service Discipline (CSD) is the basis of the CAF military justice system. The CSD is designed to assist military commanders in maintaining discipline, efficiency, and morale within the CAF. It is found in Part III of the *National Defence Act*. Furthermore, the CSD:

- a) sets out who is subject to the military justice system;
- b) establishes the Declaration of Victims Rights;
- c) establishes service offences for which a person can be charged;
- d) establishes who has the authority to arrest and hold CF members in custody;
- e) provides for the appointment of military judges, who hold office during good behaviour and cease to hold office upon attaining the age of 60 years;
- f) provides for the convening of General Courts Martial and Standing Courts Martial and establishes courts martial jurisdiction to conduct trials of persons charged with service offences; and
- g) establishes processes for the review and appeal of findings and sentence after trial.

The CSD incorporates all offences under the *Criminal Code*, other federal statutes and, in certain circumstances, foreign laws.²⁰

Prosecution of war crimes, crimes against humanity or genocide

The CAHWCA governs Canada's jurisdiction over genocide, crimes against humanity and war crimes. The CAHWCA sets out different rules depending on where the offence was allegedly committed.

For offences committed outside of Canada's territory, Canada can assert broad jurisdiction on the basis of: active nationality, passive personality,²¹ employment by Canada in a civilian or military capacity, citizenship of a State engaged in an armed conflict against Canada, or employment in a civilian or military capacity by such a State engaged in an armed conflict against Canada. Canada also asserts territorial jurisdiction if the alleged offender is present in Canada.

Moreover, genocide, crimes against humanity and war crimes allegedly committed outside of Canada can be prosecuted even if committed before the coming into force of the

¹⁹ For more information: <https://www.canada.ca/en/department-national-defence/services/benefits-military/legal-services/victim-service-offence.html>.

²⁰ For the list of offences that can be charged under the CSD, see QR&O Volume II Chapter 103 Service Offences. Online at: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders/vol-2-disciplinary/ch-103-service-offences/table-contents.html>.

²¹ This includes cases where the victim of the crime was a citizen of a State that was allied with Canada in an armed conflict.

CAHWCA.²² In that situation, the proceedings for such offences shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.²³

As codified in the CAHWCA, any person may be prosecuted for offences committed in Canada.²⁴ Additionally, regardless of where an offence was committed, the fact that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission provides no justification, excuse or defence to the charge.²⁵

Proceedings under sections 6 and 7 of the CAHWCA may be commenced only with the personal written consent of the Attorney General of Canada or of the Deputy Attorney General of Canada. The Attorney General of Canada or counsel acting on their behalf have exclusive authority to conduct these proceedings.

Sentencing: Genocide, crimes against humanity and war crimes are punishable by a sentence of imprisonment for life if intentional killing forms the basis of the offence. The same sentence applies to inchoate offences where intentional killing forms the basis of the offence.²⁶

For other crimes forming the basis of genocide, crimes against humanity or war crimes, the person is liable to imprisonment for life.

Holding commanders and other individuals criminally responsible

Commanders: The CAHWCA provides that a military commander²⁷ or a superior²⁸ may be held criminally responsible for genocide, crimes against humanity and war crimes committed in or outside of Canada if they:

- a) fail to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits genocide, crimes against humanity or war crimes;
- b) know, or are criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
- c) subsequently fail to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of these offences, or fail to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.²⁹

²² *Crimes against Humanity and War Crimes Act*, subsection 6(1) *in limine*.

²³ *Id.*, section 10.

²⁴ *Id.*, subsection 4(1).

²⁵ *Id.*, section 13. This provision specifically applies despite section 15 of the *Criminal Code*.

²⁶ Where there has been intentional killing, a life sentence is both the minimum and the maximum sentence, with section 15 of the *Crimes against Humanity and War Crimes Act* detailing parole eligibility.

²⁷ *Crimes against Humanity and War Crimes Act*, subsections 5(4) and 7(6). A military commander includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander.

²⁸ *Ibid.* A “superior” means a person in authority, other than a military commander.

²⁹ *Id.*, section 5.

Individuals: Under the CAHWCA, a person can be held responsible for genocide, crimes against humanity and war crimes for commission of the offence (personal liability), conspiracy to commit the offence, attempts or counselling to commit the offence which include conspiracy, attempts or counselling to commit the offence, or being an accessory after the fact.³⁰ Furthermore, the *Criminal Code* provides that is a party to an offence every one who actually commits it, does or omits to do anything for the purpose of aiding any person to commit it, or abets any person in committing it.³¹

The *Queen's Regulations & Orders* (QR&O) contain regulations applicable to the governance of the CAF. Chapter 19 (Conduct and Discipline) provides that “[e]very officer and non-commissioned member shall obey lawful commands and orders of a superior officer.”³² The corollary to this obligation is that:

...[a]n officer or non-commissioned member is not justified in obeying a command or order that is manifestly unlawful. In other words, if a subordinate commits a crime in complying with a command that is manifestly unlawful, he is liable to be punished for the crime by a civil or military court. A manifestly unlawful command or order is one that would appear to a person of ordinary sense and understanding to be clearly illegal.³³

The CAHWCA provides that persons, whether military or civilian, may be held criminally responsible for genocide, crimes against humanity and war crimes committed in Canada or outside of Canada.³⁴ It is not a defence that the person was ordered by a government or a superior (whether military or civilian) to perform the act or omission that forms the subject-matter of the offence, unless:

- a) the accused was under a legal obligation to obey orders of the government or superior;
- b) the accused did not know that the order was unlawful; and
- c) the order was not manifestly unlawful.³⁵

Extradition

The *Extradition Act* allows Canada to extradite a person to another State if:

- a) that State is one of the 31 pre-approved extradition partner States listed in the Schedule to the *Extradition Act*;
- b) Canada and that State are bound by extradition provisions contained in an applicable treaty, such as one of Canada's 59 bilateral extradition treaties or a thematic multilateral convention; or

³⁰ *Id.*, subsections 4(1.1) and 6(1.1). Perpetrating offences through any of these modes of liability will result in the same sentencing regime as those committed by way of personal liability.

³¹ *Criminal Code*, section 21.

³² *Queen's Regulations & Orders*, Chapter 19.015.

³³ *Ibid.*

³⁴ *Crimes against Humanity and War Crimes Act*, section 8.

³⁵ *Id.*, subsection 14(1). Note that subsection 14(2) provides that “orders to commit genocide or crimes against humanity are manifestly unlawful.”

- c) Canada and that State conclude a one-time administrative arrangement for the extradition of a single specified person.³⁶

As described above, Canada has also defined war crimes, crimes against humanity and genocide as offences in its domestic law, ensuring that the requirement of dual criminality is met for extradition requests made on the basis of such acts. The cumulative effect of these legal provisions is to permit the extradition from Canada of persons charged with war crimes, crimes against humanity or genocide to any requesting State, whether or not an existing extradition partner.

The *Extradition Act* allows for the extradition of persons charged with genocide, crimes against humanity and war crimes to the International Criminal Court or any other international criminal court or tribunal.³⁷ Moreover, it provides that no person who is the subject of a request for surrender by these international criminal tribunals may claim immunity under common law or by statute from arrest or extradition.³⁸

³⁶ *Extradition Act*, section 3.

³⁷ *Id.*, section 2.

³⁸ *Id.*, section 6.1.

Part IV – Protections

Protections for persons deprived of their liberty outside Canada

The CAF Code of Conduct provides in Rule 5:

1. During armed conflict opposing forces who surrender have the status of Prisoners of War (PWs) while persons detained during peace support operations are not usually considered PWs. Such detained persons are known as “detainees.” The reason for the distinction is that Canada is not normally a party to an armed conflict when taking part in peace support operations.
2. Those who surrender and who are no longer a threat must be protected and treated humanely. The “denial of quarter” is prohibited. In other words, it is unlawful to refuse to accept someone’s surrender or to order that no PWs or detainees will be taken. It is also illegal as well as operationally unsound to make threats to opposing forces that no PWs or detainees will be taken.

Rule 6 of the CAF Code of Conduct provides:

All persons held by CF personnel without their consent, both PWs and detainees, shall be treated in accordance with the standard set by the Third Geneva Convention on the Treatment of Prisoners of War.

More specifically, the manual “Prisoner of War Handling: Detainees and Interrogation & Tactical Questioning in International Operations” (PW Handling manual) is the CAF doctrine on PW and detainee handling.³⁹ This manual is directed exclusively for use in international operations outside of Canada.

During their basic military training, all CAF members receive training on the rules that protect persons deprived of their liberty. CAF members may also receive training, before and during operational deployments, on the handling of persons deprived of their liberty.

It is CAF policy that all detainees shall be treated at all times in accordance with the standard of treatment established for a PW in GC III. PWs must at all times be treated humanely and must be protected, particularly against any acts of violence or intimidation, as well as against insults and public curiosity.⁴⁰ Female PWs must be treated with due regard to their gender and must in no case be treated less favourably than male PWs.⁴¹ Their gender must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities. They must also be specially protected against rape and other sexual assaults.

Rule 6 in the CAF Code of Conduct also provides:

- a) at the tactical level, the legal status of those who are detained does not matter. All persons held by CF personnel without their consent, both PWs and detainees, shall be treated in accordance with the standard set by GC III;
- b) it is a legal obligation for PWs to be treated in accordance with GC III. The CF will also apply GC III to detainees because it represents a high level of protection for

³⁹ CFJP 3-14, Prisoner of War Handling: Detainees and Interrogation & Tactical Questioning in International Operations (1 Aug 2004) (PW Handling manual).

⁴⁰ LOAC Manual, para. 1016, p. 10-6.

⁴¹ LOAC Manual, para. 1017, p. 10-6.

those persons. From an operational perspective it is also advantageous in that CF personnel need only be trained to one set of rules for the treatment of persons held under their control.⁴²

Pursuant to Rule 7 of the CAF Code of Conduct, all the wounded and sick, whether friend or foe, must be respected and protected. In all circumstances they must be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.⁴³ There shall be no distinction among them based on any grounds other than medical ones. Directions for handling PWs and detainees, including those suspected of crimes against humanity or war crimes, are to be included in the operational plan or in Standing Operating Procedures.⁴⁴

Finally, Rule 11 of the CAF Code of Conduct provides that if a CF member believes these rules are being breached, the member must take the appropriate steps to stop the illegal action. This includes mistreatment of any PW or detainee. If the CF member is not in a position to stop the breach, then the member shall report to the nearest military authority who can take appropriate action. Any attempt to cover up a breach of the Law of Armed Conflict or these rules is in itself an offence under the CSD.⁴⁵

Determination of prisoner of war (PW) status

As provided in Article 45 of Additional Protocol I, a person who takes part in hostilities within an international armed conflict (IAC) and who becomes a captive shall be presumed to be a PW if:

- a) they claim this status;
- b) they appear to be entitled to PW status; or
- c) if such status is claimed on their behalf by the Government or power upon which they depend.⁴⁶

Should any doubt arise as to whether that person is entitled to PW status, they shall continue to have such status and, therefore, be protected by GC III until such time as their status has been determined by a competent tribunal.⁴⁷ A competent tribunal is presided by a legal officer of the CAF who is appointed, with the concurrence of the JAG, by the authority who establishes the tribunal.⁴⁸

The *Prisoner of War Status Determination Regulations* provide for CAF Tribunals and set out the rights of detained persons, including the right to representation, right to an interpreter and right to review of determination.⁴⁹

⁴² Code of Conduct, p. 2-9 to 2-12.

⁴³ Code of Conduct, p. 2-11 to 2-12.

⁴⁴ PW Handling Manual, pp. 1-7 and 1-8, para. 109(7).

⁴⁵ Code of Conduct, pp. 2-17 to 2-18.

⁴⁶ See Article 45 AP I.

⁴⁷ *Prisoner-of-War Status Determination Regulations*, section 12. Online at:

<https://laws.justice.gc.ca/eng/regulations/sor-91-134/fulltext.html>.

⁴⁸ *Id.*, section 4. Section 3 provides that the following authorities can establish a tribunal: the Minister of National Defence, the Chief of Defence Staff, an officer commanding a command, an officer commanding a formation, and any other authority that the Chief of Defence Staff may prescribe or appoint.

⁴⁹ *Id.*, sections 10, 11, and 17.

GC III places a duty on all parties in an IAC to open a Prisoner of War Information Bureau (PWIB) at the outset of hostilities. In Canada, the PWIB would be activated when hostilities are imminent and its responsibilities would include:

- a) establishing contact with the ICRC, CRC, GAC, Corrections Canada, and other relevant stakeholders;
- b) acting as a focal point for all enquiries about people who fall within the aegis of the GCs and AP I;
- c) collecting and maintaining information where practical, for example concerning transfers, releases, repatriations, escapes, hospital admissions, and deaths;
- d) ensuring, through the Protecting Power or the ICRC, that this information is forwarded immediately to the States concerned; and
- e) acting as the Canadian Point of Contact for the ICRC.⁵⁰

PW status does not exist in a non-international armed conflict (NIAC). However, as described above, it is CAF policy that all detainees shall be treated at all times in accordance with the standard of treatment established for a PW in GC III.

Protection of medical personnel, religious personnel and war correspondents

Chaplains of the armed forces are non-combatants. They must not be attacked. Chaplains wear a distinctive emblem consisting of a Red Cross, or Red Crescent.⁵¹ Rule 10 of the CAF Code of Conduct states that members must respect all persons and objects bearing the red cross/red crescent, and other recognized symbols of humanitarian agencies. Also Rule 11 of the CAF Code of Conduct provides that if captured, permanent medical personnel and chaplains although detained, will continue to care for their sick and wounded. If there is no such medical requirement, they are to be released and returned to their own forces. The same rules will be applied by CAF members to personnel of the armed forces permanently assigned to medical activities, to the administration of medical units, or to medical transport (“medical duties”). CAF medical personnel wear a distinctive emblem consisting of a Red Cross.⁵²

Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered civilians. As such, they are non-combatants and may not be attacked. Should a journalist be detained, such journalist’s status will be that of a civilian.⁵³

Journalists who are authorized to accompany the armed forces are “war correspondents.” They are non-combatants but risk being attacked as they are often proximate to lawful military targets. War correspondents who are captured are entitled to PW status. War correspondents will possess an identity card attesting to their status.⁵⁴

⁵⁰ PW Handling Manual, p. 1-5, para. 107(3).

⁵¹ LOAC Manual, p. 3-4 para. 310 and p. 3-5 para. 317.

⁵² LOAC Manual, p. 3-4 para. 311 and p. 3-5 para. 317.

⁵³ LOAC Manual, p. 3-4 para. 313.

⁵⁴ LOAC Manual, p. 3-4 para. 314 and p. 3-5 para. 317.

Canada co-sponsored in 2016 United Nations Security Council Resolution 2286 (UNSCR 2286) on the protection of the wounded and sick, medical personnel and humanitarian personnel in armed conflict. The resolution reaffirms that medical personnel be respected and protected, and that the wounded and sick receive medical care and attention without acts or threats of violence. It calls for accountability for attacks on healthcare. Canada has sustained momentum in its advocacy efforts on UNSCR 2286 through its Permanent Missions to the United Nations in New York. In Geneva, Canada co-chairs with Switzerland a cross-regional Informal Group of States and organizations⁵⁵ promoting implementation of UNSCR 2286.

At the multilateral and field-level, Canada continues to advocate for the safety and security of humanitarian and medical personnel and for their rapid and unimpeded access to conflict-affected populations to provide life-saving humanitarian assistance.

Addressing conflict-related SGBV

Canada has taken multiple measures specifically to address the issue of crimes of sexual and gender-based violence (SGBV) in armed conflict and in other situations.

At the 32nd International Conference of the Red Cross and Red Crescent in 2015, Canada and the CRC committed to taking joint action to prevent and respond to SGBV in conflict and disasters. This includes:

- a) disseminating information on existing legal provisions that prohibit SGBV as widely as possible in military education and training; and
- b) ensuring that prohibitions against SGBV, as well as appropriate responses to instances of violations, are fully integrated into doctrine and operation plans, including for partnered military operations.

Canada renewed its commitment to address issues of SGBV in situation of conflict at the 33rd International Conference of the Red Cross and Red Crescent in 2019. This includes:

- a) strengthening Sexual and Gender-Based Violence Programming Responses; and
- b) strengthening Sexual and Gender-Based Violence Policy and Advocacy.

As part of this commitment, the CAF is:

- a) working to disseminate information on existing legal provisions that prohibit sexual and gender-based violence as widely as possible in military instruction and training;
- b) continuing to ensure that prohibitions against sexual and gender-based violence, as well as appropriate responses to instances of violations, are fully integrated into doctrine and operation plans, including for partnered military operations; and
- c) sharing experiences and good practices, where appropriate, with other governments, militaries, and the International Conference.

As a result, the CAF has specifically integrated training on protection of women, children and vulnerable populations into the curriculum for the four-day LOAC course, as well as in

⁵⁵ Australia, Brazil, Botswana, Colombia, Costa Rica, Egypt, France, Germany, Japan, Netherlands, New Zealand, Nigeria, Norway, Slovakia, Spain, Sweden, Switzerland, Uruguay, MSF, WHO and ICRC. (Online: <http://unscr.com/en/resolutions/doc/2286>)

specific Royal Military Colleges Law of Armed Conflict courses. All legal officer candidates are now evaluated on their recognition and advice related to GBA+ issues as part of their qualification course.

Canada's National Action Plan for the Implementation of the United Nations Security Council Resolutions on Women, Peace and Security (Action Plan) for 2017-2022 sets out specific commitments to address SGBV in humanitarian and conflict settings.⁵⁶

Lead partners for the Action Plan are GAC, the DND and the /CAF, and the RCMP. Supporting partners are Public Safety Canada, Status of Women Canada, Immigration, Refugees and Citizenship Canada, and the Department of Justice. The five objectives under the Action Plan 2017-2022 are:

- a) increase the meaningful participation of women and women's organizations and networks in conflict prevention, conflict resolution and post-conflict statebuilding;
- b) prevent, respond to, and end impunity for sexual and gender-based violence perpetrated in conflict and sexual exploitation and abuse by peacekeepers and other international personnel, including humanitarian and development staff;
- c) promote and protect women's and girls' human rights, gender equality and the empowerment of women's and girls' in fragile, conflict and post-conflict settings;
- d) meet the specific needs of women and girls in humanitarian settings, including the upholding of their sexual rights and access to sexual and reproductive health services; and
- e) strengthen the capacity of peace operations to advance the Women, Peace and Security agenda; including by deploying more women and fully embedding the Women, Peace and Security agenda into CAF operations and police deployments.

The Department of National Defense and the Canadian Armed Forces, as committed partners, have identified a number of priority activities to support the ongoing implementation of the Action Plan, consistent with Canada's new defence policy. DND and CAF activities are organized around the following themes: Governance; Training and Education; Accountability; Recruitment and Retention; and Integration into Operations. Each of these themes have specific targets that will be measured and reported on an annual basis. These activities could be re-examined, if required, in line with the departmental and Government of Canada priorities.

The DND and the CAF have updated mandates and realigned policies and priorities to include gender considerations, including the prevention of SGBV in armed conflict and in other situations. They include the following.

- a) Canada's Defence Policy, "Strong Secure Engaged" (2017),⁵⁷ highlights the prevalence of conflict-based SGBV as an issue of concern and specifically reaffirms Canada's commitment to help end it. It also highlights Canadian efforts to build on United Nations Security Council Resolution (UNSCR) 1325 to integrate gender perspectives into the analysis, planning, execution and evaluation of all operations.

⁵⁶ Online: <http://publications.gc.ca/site/eng/9.846056/publication.html>.

⁵⁷ Online: <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/canada-defence-policy.html>.

- b) The CAF published the “Gender Aide-Mémoire for the Canadian Armed Forces” (2019)⁵⁸, which is meant to assist all members of the CAF to integrate gender perspectives and the principles of Gender-based Analysis Plus into operations.
- c) The CDS issued a directive in 2016 for integrating UNSCR 1325 and related resolutions into CAF planning and operations.⁵⁹ The directive requires chains of command to integrate these resolutions by providing clarifications and issuing legal and policy guidance related to SGBV, sexual exploitation and abuse, and the protection of civilians to support future operations.

Finally, the CAF is working to eliminate harmful and inappropriate sexual behaviour within the Canadian military itself. Notably, a CAF Strategic Response Team on Sexual Misconduct was created, which leads the policy development, training and education to eliminate sexual misconduct in the CAF.⁶⁰ Also, the Chief, Professional Conduct and Culture was created to lead a fundamental transformation in the way systemic misconduct (includes sexual misconduct, hateful conduct, systemic barriers, harassment, violence) is understood and addressed in the Department of National Defence and the CAF. By these actions, the CAF is increasing awareness of these issues and creating a shift in culture that will help normalize the prevention of SGBV both at home and during operations abroad.

Moreover, Canada is supporting the deployment of experts through the United Nations Entity for Gender Equality and the Empowerment of Women (also known as UN Women) to secure accountability for sexual and gender-based crimes in various conflicts worldwide.

Protections for cultural property in armed conflict

Canada is party to the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* as well as the first and second Protocols. Canada implemented its obligations through amendments to the *Cultural Property Export and Import Act* and the *Criminal Code*.

Canadian jurisdiction can be asserted over offences related to cultural property allegedly committed outside Canada by a Canadian citizen, by a person who is stateless and ordinarily lives in Canada, or by a permanent resident of Canada who, after the commission of the offence, is present in Canada.⁶¹

The *Geneva Conventions Act*, the *Crimes against Humanity and War Crimes Act* (CAHWCA) and the *Criminal Code* provide protection for cultural property. As noted above, the *Geneva Conventions Act* provides the legal basis for prosecution and punishment of grave breaches of the four GCs and of AP I, including grave breaches committed against cultural property during an IAC.⁶² The CAHWCA provides the legal basis for the prosecution

⁵⁸ Online: <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/integrating-gender-perspectives-operations.html>.

⁵⁹ CDS Directive for Integrating UNSCR 1325 and Related Resolutions into CAF Planning and Operations (January 2016). Online: <https://www.canada.ca/en/department-national-defence/services/operations/military-operations/conduct/cds-directive-unscr-1325.html>.

⁶⁰ CDS Initiating Directive – Sexual Misconduct and Harassment Prevention and Response in the Canadian Armed Forces. Online: <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour/orders-policies-directives/cds-initiating-directive.html>.

⁶¹ *Criminal Code*, subsection 7(2.01).

⁶² *Geneva Conventions Act*, subsection 3(1).

and the punishment of war crimes, including extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, whether in an IAC or NIAC.⁶³

Protections for civilians and civilian objects in armed conflict

Canada has endorsed the Safe Schools Declaration and the related Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict,⁶⁴ and, more recently, the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas. These declarations will inform the planning and conduct of the CAF during armed conflict. Even prior to Canada's endorsement of these declarations, the CAF was already taking steps to ensure civilians and civilian objects (including schools and educational facilities) were protected, including by factoring them into any proportionality analysis as well as other targeting assessments.

In 2019, Canada co-sponsored the United Nations General Assembly resolution designating September 9th as the International Day to Protect Education from Attack.⁶⁵ The resolution reaffirms the need to promote safe and protective school environments by taking all feasible measures to protect schools, learners and educational personnel from actions that impede children's access to education in situations of armed conflict.

Protection of the distinctive emblems

The distinctive emblems protected in Canada include the Red Cross, the Red Crescent, and the Red Crystal. The CAF use the Red Cross emblem for the identification of chaplains as well as medical personnel, medical units, and medical transports.

In times of armed conflict and times of peace, prohibitions of the misuse of the distinctive emblems are provided in the *Canadian Red Cross Society Act*, the *Crimes against Humanity and War Crimes Act* (CAHWCA), the *Trademarks Act*, and the *Geneva Conventions Act*.

Members of the public may report potential misuses of a distinctive emblem to any Canadian Red Cross office or via the Emblem Misuse Form on the CRC website.⁶⁶ Allegations may also be reported to the RCMP.

The *Canadian Red Cross Society Act* protects the distinctive emblems in Canada by making it an offence to unlawfully use these emblems or to fraudulently represent oneself to be a member or representative of, or agent for, the CRC for the purposes of soliciting, collecting or receiving money or material.⁶⁷ Anyone who contravenes these provisions is guilty of an

⁶³ *Crimes against Humanity and War Crimes Act*, subparagraph 2(a)(iv).

⁶⁴ https://www.canada.ca/en/global-affairs/news/2017/02/canada_endorses_safeschoolsdeclaration.html.

⁶⁵ UNGA A/RES/74/275.

⁶⁶ Online at: <https://www.redcross.ca/about-us/about-the-canadian-red-cross/red-cross-emblem/emblem-misuse-form>.

⁶⁷ Subsection 4(2) of the *Canadian Red Cross Society Act* prohibits the wearing, use of display of the Red Cross, Red Crescent, or Red Crystal emblems without the Society's written authorization, or any other word, mark, device or thing likely to be mistaken for these emblems.

offence, and is liable on summary conviction to a fine of not less than \$100 but not more than \$500, or imprisonment for a term not exceeding one year, or both, for each offence.⁶⁸

The CAHWCA provides that a person can be held responsible for misuse of the distinctive emblems of the GCs in armed conflict.

The *Trademarks Act* regulates trademarks in Canada. While the Red Cross emblem is not a registered trademark in Canada, it is protected by the *Trademarks Act*, which lists “marks” that are specifically prohibited from use in connection with business, either as a trade-mark or otherwise. The list includes the distinctive emblems and extends to any mark likely to be mistaken for them.⁶⁹ The Canadian Intellectual Property Office is responsible, among other things, for ensuring protected marks are not registered as trademarks in Canada.

The *Geneva Conventions Act* provides that a person can be held responsible for the perfidious use of the distinctive emblems (a grave breach of Article 85(1)(f) AP I).⁷⁰ This offence is punishable by a term not exceeding fourteen years. If the offence caused the death of any person, it is punishable by imprisonment for life.

⁶⁸ *Canadian Red Cross Society Act*, subsection 4(3).

⁶⁹ Paragraphs 9(1)(f), (g), and (g.1) of the *Trademarks Act* prohibit the adoption in connection with a business any mark consisting of, or so nearly resembling as to be likely to be mistaken for the emblem of the Red Cross, the Red Crescent, the Red Crystal, or the equivalent sign of the Red Lion and Sun used by Iran. Of note, the international distinctive sign of civil defence (equilateral blue triangle on an orange ground) referred to in Article 66(4) of GC IV (which is Schedule V to the *Geneva Conventions Act*) has similar protection.

⁷⁰ *Geneva Conventions Act*, subsection 3(1).

Part V – Means and Methods of Warfare

Prohibitions and restrictions

The limitations on the use of weapons fall into two broad categories:

- a) prohibited weapons; and
- b) restrictions on the use of lawful weapons.

As will be outlined below, DND/CAF carries out legal reviews of weapons pursuant to Article 36 of AP I to determine whether new weapons and means or methods of warfare may be employed lawfully.

Some weapons are totally prohibited by IHL because they are either indiscriminate in their effect or cause superfluous injury and/or unnecessary suffering. Weapons that are indiscriminate in their effect are prohibited. A weapon is indiscriminate if it might strike or affect legitimate targets and civilians or civilian objects without distinction. Therefore, a weapon that cannot be directed at a specific legitimate target or the effects of which cannot be limited as required by IHL is prohibited.⁷¹

Prohibited weapons and methods: The LOAC Manual states that several types of weapons and methods of warfare are prohibited, such as:

- a) poison or poisoned weapons;⁷²
- b) weapons that cause injury by the use of fragments undetectable by X-ray in the human body;⁷³
- c) environmental modification techniques having widespread, long lasting or severe effects;⁷⁴
- d) military or hostile use of environmental modification techniques as the means of destruction, damage or injury to any other State party to the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (ENMOD);⁷⁵ and
- e) the use of asphyxiating, poisonous or other gases.⁷⁶

Prohibited ammunition: The LOAC manual provides that certain types of ammunition are prohibited:

- a) projectiles of a weight below 400 grams that are either explosive or charged with fulminating (exploding) or inflammable substances;

⁷¹ LOAC Manual, p. 5-2, para. 509(1).

⁷² LOAC Manual, p. 5-3.

⁷³ LOAC Manual, p. 5-3.

⁷⁴ LOAC Manual, p. 5-4.

⁷⁵ An “environmental modification technique” is any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the earth which would have widespread, long-term or severe effects. LOAC Manual, p. 6-7.

⁷⁶ Smoke grenades, smoke ammunition from indirect fire weapons, and tank smoke ammunition are not prohibited so long as they are used to conceal position or movement or to mask a target. LOAC Manual, p. 5-4.

- b) bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions (that is, hollow point or “dum-dum” bullets); and
- c) bullets that have been dipped in poison.⁷⁷

Tracer rounds are not prohibited so long as they are used for marking.

Anti-personnel land mines: Canada is party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Canada implemented its obligations through the *Anti-Personnel Mines Convention Implementation Act* (APMCIA).

The APMCIA makes it a criminal offence to: (1) place an anti-personnel mine under, on or near the ground or other surface area with the intent to cause the explosion of the anti-personnel mine by the presence, proximity or contact of a person; or (2) to develop, produce or otherwise acquire, possess or transfer to anyone, directly or indirectly, an antipersonnel mine, or stockpile anti-personnel mines.

The maximum penalty for a violation of the APMCIA is a \$500,000.00 fine, five years imprisonment, or both.

In terms of jurisdiction, the APMCIA applies to any person present in Canada. Therefore, foreign citizens present in Canada may be prosecuted for violating the Act. The APMCIA also applies to CAF members serving anywhere in the world. CAF members who violate APMCIA provisions inside or outside Canada while serving with the CAF or on international staffs, exchange postings or liaison postings are liable to prosecution.

When participating in combined operations with a State not party to the Convention, Canadian contingents may not use anti-personnel mines.⁷⁸ CAF members are not criminally liable if they participate in operations, exercises or other military activities with the armed forces of a State not a party to the Convention that engage in an activity prohibited under the Act, if that participation does not amount to active assistance in that prohibited activity.⁷⁹

CAF members serving on international staffs, exchange and liaison postings and participating in operations must follow specific guidelines set out in the LOAC Manual.⁸⁰ The CAF may not request, even indirectly, the protection of anti-personnel mines or encourage the use of anti-personnel mines by others.⁸¹

Bacteriological/biological weapons: Canada is party to the Biological and Toxin Weapons Convention and has implemented its obligations through a series of domestic laws, including the *Human Pathogens and Toxins Act*.

⁷⁷ LOAC Manual, p. 5-2.

⁷⁸ Canada deposited a Statement of Understanding with respect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction: “It is the understanding of the Government of Canada that, in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with international law, the mere participation by the Canadian Forces, or individual Canadians, in operations, exercises or other military activity conducted in combination with the armed forces of states not a party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in article 1, paragraph 1 (c).”

⁷⁹ APMCIA, paragraph 6(3)(d).

⁸⁰ LOAC Manual, pp. 5A-1 to 5A-3.

⁸¹ LOAC Manual, p. 5A-2.

That Act prohibits all unlicensed use of human pathogens and toxins and prohibits intentional misuse of human pathogens and toxins that create a risk to the health or safety of the public (e.g. biological weapons). The Act prohibits any facility from possessing, handling, using, producing, storing, transferring, exporting, importing, or releasing any human pathogen or toxin unless they have a license from the Public Health Agency of Canada.

Biological non-proliferation is controlled via the *Export Control List* of the *Export and Import Permits Act*. There are also import control lists.

Various provisions in the *Criminal Code* and the *Transportation of Dangerous Goods Act* could be used to sanction the illegal use of biological weapons. Criminal charges could include, for example, terrorism-related offences,⁸² some weapons-related offences as well as the offence of sending to a person or causing a person to take or receive a dangerous substance or thing with the intent to cause bodily harm. A person found guilty of one of these offences is liable to punishment, including imprisonment for life.

Outside of the *Criminal Code*, an act involving biological weapons could also be prosecuted as an act of genocide, crime against humanity or war crime under the CAHWCA.

Blinding laser weapons: Canada is party to the fourth Protocol to the Convention on Certain Conventional Weapons⁸³ dealing with prohibition on the use of lasers and blinding weapons.

Laser weapons specifically designed—as their sole combat function or as one of their combat functions—to cause permanent blindness to unenhanced vision (that is, to the naked eye or to the eye with corrective eyesight devices) are prohibited.

Chemical weapons and riot control agents: Canada is party to the Chemical Weapons Convention. It has implemented the obligations flowing from that Convention through the *Chemical Weapons Convention Implementation Act* (CWCIA).

The CWCIA prohibits:

- a) the development, production, acquisition, stockpiling, retaining, and transfer of chemical weapons;
- b) the use of chemical weapons;
- c) engaging in any military preparations to use a chemical weapon;
- d) assisting, encouraging or inducing, in any way, anyone to engage in any activity prohibited to a State Party under the Convention; and
- e) the production, possession, consumption and transfer of toxic chemicals and precursors.⁸⁴

The CWCIA creates related criminal offences in case of breach and extends jurisdiction to acts committed outside Canada by Canadian citizens or by permanent residents of Canada.

The use of riot control agents, including tear gas and other gases that have debilitating but non-permanent effects, as a means of warfare is prohibited.⁸⁵ However, although prohibited

⁸² *Criminal Code*, sections 83.01 to 83.3.

⁸³ 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 as amended on 21 December 2001.

⁸⁴ *Chemical Weapons Convention Implementation Act*, section 6.

⁸⁵ *Id.*, section 7.

as a means of warfare, riot control agents may be authorized for law enforcement operations.

A person who contravenes a provision of the Act is liable to a maximum fine of \$500,000, imprisonment for up to five years, or both.

Cluster munitions: Canada is party to the Convention on Cluster Munitions and has implemented its obligations through the *Prohibiting Cluster Munitions Act* (PCMA).

The PCMA makes it a criminal offence to use, develop, make, acquire, possess, import, or export a cluster munition, explosive submunition or explosive bomblet, or to move them from a foreign State or territory to another foreign State or territory with the intent to transfer ownership of and control over them. It is also an offence to attempt, aid, abet, counsel another person, or conspire with another person, to commit any of these acts mentioned above. It is also an offence to receive, comfort or assist another person, knowing that the person has committed, or has aided or abetted in the commission of, any act referred to above, for the purpose of enabling the person to escape.

The maximum penalty upon conviction on indictment for a violation of the PCMA is a fine of \$500,000, imprisonment for five years, or both.

The Act provides for a number of criminal liability exceptions for CAF members, including in the course of military cooperation or combined military operations involving Canada and a State not a party to the Convention on Cluster Munitions.

The Chief of the Defence Staff (CDS) issued in 2015 a Directive providing additional direction on prohibited and permitted activities to CAF members, particularly in light of the PCMA's provisions allowing States Parties to continue engaging in some combined military operations or activities with States that are not party to the Convention but which might involve cluster-munitions.⁸⁶ In light of the PCMA requirements and as a matter of CAF policy, the CDS Directive clarifies that CAF members are subject to two restrictions. CAF members shall not:

- a) transport cluster munitions in CAF or CAF-controlled vehicles, vessels or aircraft; or
- b) instruct or receive training on the use of cluster munitions.

Restrictions on the use of lawful weapons: In addition to categories of prohibited weapons described above, there are also limitations on some categories of lawful weapons. No weapon may be used indiscriminately or in such a way as to cause superfluous injury or unnecessary suffering.

Incendiary weapons: Canada is party to the third Protocol to the CCW, dealing with prohibition on the use of incendiary weapons.

Incendiary weapons include any weapon or munition that is designed to set fire to objects or to cause burn injury to humans through the action of flame, heat or a combination of the two caused by a chemical reaction of a substance delivered on a target. Examples of incendiary weapons include napalm, flame-throwers, shells, rockets, grenades, mines, bombs, and other containers of incendiary materials.

⁸⁶ CDS Directive – Cluster Munitions – Prohibited and Permitted Activities for Canadian Forces Members (13 March 2015).

The use of incendiary weapons against combatants is not prohibited unless such use results in superfluous injury or unnecessary suffering. It is prohibited in all circumstances to make the civilian population, individual civilians, or civilian objects the object of attack by incendiary weapons.⁸⁷

The use of incendiary weapons is prohibited:

- a) in all circumstances to make any legitimate target located within a concentration of civilians the object of attack by air delivered incendiary weapons;
- b) to make any legitimate target located within a concentration of civilians the object of an attack by other than air delivered incendiary weapons, except where that target is clearly separated from the civilians and all feasible precautions are taken to minimize collateral civilian damage; and
- c) on forests or plant cover except when they are either being used to cover, conceal or camouflage legitimate targets or are military objectives themselves (for example, if it is necessary to use incendiaries on a forest to clear a field of fire or facilitate an advance or attack against an enemy, the forest has become a military objective and may legitimately be attacked).⁸⁸

Booby traps: The LOAC Manual sets out the prohibitions against booby traps and other devices attached to or associated with the following objects⁸⁹:

- a) internationally recognized protective emblems and signs;
- b) sick, wounded or dead persons;
- c) burial or cremation sites or graves;
- d) medical facilities, equipment, supplies or transportation;
- e) children's toys or objects designed for feeding, health, hygiene, clothing or education of children;
- f) food or drink;
- g) kitchen utensils or appliances (except those in military establishments, locations or supply depots);
- h) objects of a religious nature;
- i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- j) animals or their carcasses.

⁸⁷ LOAC Manual, p. 5-5.

⁸⁸ LOAC Manual, p. 5-5 and 5.6. Incendiary weapons do not include: a) munitions which have incidental incendiary effects (for example, illuminants, tracers, smoke or signalling devices); or b) munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect (for example, armour piercing projectiles, fragmentation shells, explosive bombs and similar combined effects ammunition) in which the incendiary effect is not specifically designed to cause burn injury to humans, but to be used against military objectives such as armoured vehicles, aircraft and installations and facilities.

⁸⁹ LOAC Manual, p. 5-6. "Other devices" means manually placed 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.

Nuclear weapons: When Canada ratified AP I, the following statement of understanding was made: “It is the understanding of the Government of Canada that the rules introduced by Protocol I were intended to apply exclusively to conventional weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.”

Determination of whether new weapons and means or methods of warfare may be employed lawfully

Canada conducts weapons reviews in accordance with Article 36 of AP I. In the study, development, acquisition or adoption of a new weapon, means or method of warfare, Canada has an obligation to determine whether its employment would, in some or all circumstances, be prohibited by AP I or any other applicable rule of international law. DND/CAF has developed and implemented a robust process for these reviews and is well underway in its efforts to continue enhancing existing national review mechanisms. The DND/CAF office considering procurement, development or acquisition submits a written request for review at the earliest possible phase. For acquisition or development projects, a request must be submitted not later than the end of the Project Options Analysis phase.

After receiving and reviewing all the information it deems necessary, an opinion stating if the employment of the new or modified existing capability, or new means or method of warfare, is lawful with regard to international law applicable to Canada is provided by the OJAG.

Even if an Article 36 legal review determines that the proposed new weapon, means or method of warfare would be lawful under international law, other DND/CAF or Government of Canada policy considerations may prohibit or restrict its use.

Sharing information and best practices with other States

Canada has contributed over the years to various initiatives and engagements on State implementation of Article 36 AP I. Canada participates actively in the United Nations Group of Governmental Experts on Lethal Autonomous Weapons at the Conference on Disarmament in Geneva, which has proven to be a useful forum for sharing information and best practices on legal weapons reviews.

Measures related to the export of conventional arms

Canada is party to the Arms Trade Treaty (ATT). The ATT requires a State Party to refuse to authorize the export of conventional arms if it:

- a) has knowledge at the time of authorization that the arms would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks directed against civilian objects or civilians protected as such, or other war crimes;⁹⁰ or
- b) determines that there is an overriding risk that the arms would undermine peace and security, or could be used to commit or facilitate a serious violation of international human rights law or IHL.⁹¹

Canada's domestic legal framework requires the Minister of Foreign Affairs to take into account the ATT assessment criteria when deciding whether to issue an export permit in respect of arms, ammunition, implements or munitions of war. The Minister must take into account several criteria, including whether the goods or the technology could be used to commit or to facilitate serious violations of IHL, serious violations of international human rights law, and/or serious acts of gender-based violence or serious acts of violence against women and children.⁹² If the Minister determines that there is a "substantial risk" that the proposed export would result in any of these negative consequences, they are legally required to deny the permit.⁹³ DND shares the responsibility for Canada's controls over conventional arms transfers. DND facilitates State-to-State arms transfers including loans and leases to foreign governments, donations of equipment, and the sale of surplus equipment. Where DND is the authority for a State-to-State arms transfer not already captured by the GAC export control process, it must complete the ATT assessment procedure prior to transfer.

⁹⁰ The Arms Trade Treaty (ATT), Article 6(3).

⁹¹ ATT, Article 7.

⁹² *Export and Import Permits Act*, subsection 7.3(1).

⁹³ *Id.*, section 7.4.

Annex A: Table of selected implementing legislation

(In Chronological Order of Treaty Ratification or Accession)

IHL Treaty	Ratified/Acceded	Implementing Legislation
Geneva Conventions I – IV 1949	14 May 1965	<i>Geneva Conventions Act</i> <i>Regulations respecting the determination of the entitlement of persons detained by the Canadian Forces to prisoner-of-war status.</i>
Biological Weapons Convention	18 September 1972	<i>Human Pathogens and Toxins Act</i>
Additional Protocol I	20 November 1990	<i>Geneva Conventions Act</i>
Additional Protocol II	20 November 1990	<i>Geneva Conventions Act</i>
Convention on Certain Conventional Weapons (CCW)	24 June 1994	See note 1.
Protocol I to CCW on Non-Detectable Fragments	24 June 1994	See note 1.
Protocol III to CCW on Prohibitions or Restrictions on Use of Incendiary Weapons	24 June 1994	See note 1.
Chemical Weapons Convention	26 September 1995	<i>Chemical Weapons Convention Implementation Act</i>
Anti-Personnel Landmines Convention	3 December 1997	<i>Anti-Personnel Mines Convention Implementation Act</i>
Protocol II to CCW on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices	5 January 1998	See note 1.
Protocol IV to CCW on Blinding Laser Weapons	5 January 1998	<i>Canada Consumer Product Safety Act</i>
Hague Convention for the Protection of Cultural Property	11 December 1998	<i>Cultural Property Export and Import Act</i> <i>Cultural Property Export Regulations</i>

Note 1: Domestic legislation was not necessary to implement these obligations.

Rome Statute of the International Criminal Court	7 July 2000	<i>Crimes Against Humanity and War Crimes Act</i>
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	7 July 2000	<i>National Defence Act</i>
First Protocol to the 1954 Hague Convention	29 November 2005	<i>Cultural Property Export and Import Act</i> <i>Cultural Property Export Regulations</i>
Second Protocol to the 1954 Hague Convention	29 November 2005	<i>Cultural Property Export and Import Act</i> <i>Cultural Property Export Regulations</i>
Additional Protocol III	26 November 2007	<i>Geneva Conventions Act</i>
Cluster Munitions Convention	16 March 2015	<i>Prohibiting Cluster Munitions Act</i>
Arms Trade Treaty	19 June 2019	<i>Export and Import Permits Act</i> <i>Criminal Code</i>

Annex B: References

Selected IHL Treaties to which Canada is party

(In Chronological Order)

Declaration respecting maritime law, Paris, 16 April 1856.

Convention for the amelioration of the condition of the wounded and sick in armies in the field, Geneva, 22 August 1864.

Declaration renouncing the use in time of war, of explosive projectiles under 400 grammes weight, St. Petersburg, 11 December 1868.

Convention for adapting to maritime warfare the principles of the Geneva Convention of August 22, 1864, The Hague, 29 July 1899.

Declaration concerning the prohibition of the use of bullets which expand or flatten easily in the human body with a hard envelope which does not entirely cover the core or is pierced with incisions, The Hague, 29 July 1899.

Declaration concerning prohibition of the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases, The Hague, 29 July 1899.

International Convention with respect to the laws and customs of war by land, The Hague, 29 July 1899.

Convention for the adaptation of the principles of the Geneva Convention to maritime war, The Hague, 18 October 1907.

Convention prohibiting the discharge of projectiles and explosives from balloons, The Hague, 18 October 1907.

Convention relative to certain restrictions on the exercise of the right of capture in maritime war, The Hague, 18 October 1907.

Convention relative to the conversion of merchant-ships into warships, The Hague, 18 October 1907.

Convention relative to the laying of automatic submarine contact mines, The Hague, 18 October 1907.

Convention relative to the opening of hostilities, The Hague, 18 October 1907.

Convention relative to the status of enemy merchant-ships at the outbreak of hostilities, The Hague, 18 October 1907.

Convention respecting bombardments by naval forces in time of war, The Hague, 18 October 1907.

Convention respecting the laws and customs of war on land, The Hague, 18 October 1907.

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 23 (a), pursuant to which it is forbidden to employ poison or poisoned weapons.

Treaty relative to the protection of the lives of neutrals and non-combatants at sea in time of war, and the prohibition of the use in war of noxious gases and chemicals, Washington, 6 February 1922.

Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, Geneva, 17 June 1925.

Procès-verbal relating to the rules of submarine warfare set forth in Part IV of the Treaty of London of April 22, 1930, London, 6 November 1936.

Resolution by Allied Governments respecting the Prosecution of War and Peace, London, 12 June 1941.

Agreement between the Governments of the British Commonwealth and the German Government relating to the Procedure to be followed on the violent death or serious injury of prisoners of war, Berne, 1 September 1942.

Convention (I) for the amelioration of the condition of the wounded and sick in Armed Forces in the field of August 12, 1949, Geneva, 12 August 1949.

Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of Armed Forces at sea of August 12, 1949, Geneva, 12 August 1949.

Convention (III) relative to the treatment of prisoners of war of August 12, 1949, Geneva, 12 August 1949.

Convention (IV) relative to the protection of civilian persons in time of war of August 12, 1949, Geneva, 12 August 1949.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, Washington, 10 April 1972.

Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD), 10 December 1976.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977.

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; Protocol on non-detectable fragments (Protocol I); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices (Protocol II); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992.

Additional Protocol 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 (Protocol IV, entitled Protocol on Blinding Laser Weapons), Vienna, 13 October 1995

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed 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, Geneva, 3 May 1996.

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

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

Amendment 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, Geneva, 21 December 2001

Protocol on Explosive Remnants of War 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 (Protocol V), Geneva, 28 November 2003

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Geneva, 08 December 2005.

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- Note 3-9, "Targeting, 1st Edition" (12 December 2014);
- Note 3-14, "Prisoner of War Handling: Detainees and Interrogation & Tactical Questioning in International Operations" (1 Aug 04); and
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