

# ANNEX D

## THE LAW OF ARMED CONFLICT

### Introduction

The Law of Armed Conflict (LOAC) is central to the way in which the ADF formulates strategy and conducts operations. All ADF members undergo training in the LOAC in order to understand their individual and collective rights and responsibilities, and the consequences of violating such laws.

This annex summarises the meaning, history and application of the LOAC. It explains the responsibilities of individuals and commanders, the need for compliance, and how the LOAC is implemented in the ADF. Additional detail on the LOAC is contained in [ADFP 37, Law of Armed Conflict](#).

### Definition

The LOAC comprises those parts of international law that regulate the conduct of belligerents engaged in armed conflict with one another. The LOAC is about how wars are fought (*jus in bello*) rather than the international laws governing the resort to war by belligerents (*jus ad bellum*). The LOAC lays down the individual rights of non-combatants during armed conflict.

Application of the LOAC does not depend on any assessment of the cause of a particular conflict, nor of the legality of the resort to force by a belligerent. These assessments are the province of *jus ad bellum*, which constrains the formulation of strategy but not the conduct of operations. Furthermore, the LOAC makes no distinction between belligerents acting as aggressors and those who are victims.

### Sources

Like most international law, the LOAC is derived principally from international treaties, customary international law and the decisions of international legal tribunals.

The body of law underpinning the LOAC has been extensively codified in a series of international treaties dating from the 1860s to the present day. These treaties underline the development of two distinct branches in the law: the Geneva series of treaties, which secures the protection of persons and property, including non-combatants; and the Hague series of treaties, which governs the conduct of operations. The most significant treaties are the four Geneva Conventions of 1949 (to which additional protocols were added in 1977 and

1980), which set out to protect the sick and wounded, and the medical services that care for them; the sick and wounded at sea, and those who are shipwrecked; prisoners of war; and the civilian population, especially in respect of occupied territories. Among the Hague series is the 1907 Hague Convention IV respecting the laws and customs of war on land; this convention has been determined to be declaratory of customary international law. These two separate branches of the law have to some extent merged in Protocol I to the Geneva Conventions, which addresses both the protection of non-combatants and the conduct of operations.

In situations not specifically addressed by treaties, or in cases where nation-states are not party to certain treaties, reference may be made to a well-established body of customary international law.

An important source of the LOAC is the practice and decisions of tribunals, such as the International Military Tribunal constituted for the trial of German and Japanese war criminals following World War II. The recent establishment of ad hoc war crimes tribunals for the former Republic of Yugoslavia and for Rwanda constitutes another source of law. As well as providing evidence of customary international law, the judgements of such tribunals have often contributed to the development of international law.

## **Application**

The LOAC, as a matter of law, applies in the event of international armed conflict between nation-states. As a matter of policy, the LOAC may apply the principles and the spirit of particular conventions in the absence of armed conflict. This application allows some humanitarian consideration to apply in the event of the total or partial occupation of the territory of one country by the armed forces of another country.

International armed conflict occurs from the first act of aggression by one belligerent against the sovereignty of another belligerent. This act may be signalled by high-intensity conflict, but even a single incursion in a very low-intensity conflict may be all that is necessary to invoke the application of the LOAC.

The existence of an international armed conflict is always a question of fact, objectively determined rather than signalled by political statements or declarations. Application of the LOAC ceases on termination of the armed conflict in the conclusion of an armistice agreement.

## Nature of Armed Conflict

Armed conflict may be *international* or *internal* in character. International armed conflict occurs between belligerents, while internal armed conflict occurs within the territory of a nation-state and takes place between its armed forces and dissident armed forces or other armed groups. Internal armed conflict must be distinguished from internal disturbances and tensions, such as riots, and from isolated and sporadic acts of violence, which are subject to the domestic law of the state concerned.

The bulk of the LOAC relates to international armed conflict, and in this annex references to the law are confined to that context. There is, however, a small sphere within the LOAC that has been deemed to be specifically applicable to the regulation of armed conflicts generally, whether they be international or internal in nature. This is codified in Article 3 (referred to as 'Common Article 3') to the Geneva Conventions. Protocol II to the Geneva Conventions is specifically applicable to the protection of victims of non-international armed conflicts.

## Individual Responsibility

The LOAC imposes responsibilities on nation-states and individuals. In the first instance, any breach of an international obligation will entail the accountability of the offending belligerent to the aggrieved belligerent, or indeed to the world community. In the second instance, individuals are accountable for their actions largely by means of domestic legal mechanisms.

In Australia the principal domestic legal mechanism for compelling compliance with the LOAC is the *Geneva Conventions Act 1957*. This legislation confers Federal criminal jurisdiction on State and Territory Supreme Courts and on the High Court over 'grave breaches' of the Geneva Conventions and of Protocol I, regardless of the nationality or citizenship of the accused and regardless of the location of the breach. Grave breaches are strictly defined offences committed against protected persons and objects such as willful killing, torture or inhuman treatment, wilful causing of great suffering or serious injury to body or health, and extensive and unjustified destruction and appropriation of property.

Where a 'grave breach' is alleged against a person subject to the *Defence Force Discipline Act 1982*, the person may be prosecuted in a Service tribunal instead of a Supreme Court or the High Court. Many violations of the LOAC are not so serious as to constitute grave breaches, and such violations may also be the subject of prosecution in a Service tribunal.

For members who violate the LOAC and are captured by the enemy there is a third possibility. The enemy is entitled to place the member on trial in his own courts, which may award such penalty as the enemy's laws provide. International law provides minimum safeguards intended to avoid abuse by the enemy of this entitlement.

Countries have prime responsibility for compelling compliance by individuals with the LOAC; however, international law mechanisms have been developed for the prosecution of individuals in certain extraordinary circumstances where a state is unable or unwilling to fulfil that responsibility. Such mechanisms have included the constitution of international tribunals for the trial of war criminals at Nuremberg and Tokyo following World War II, and the establishment in more recent times of war crimes tribunals for the former Yugoslavia and for Rwanda. These mechanisms were developed on an ad hoc basis, but broad agreement has now been reached for the establishment of a permanent International Criminal Court for the trial of individuals charged with a variety of international crimes, including war crimes.

Individuals are accountable under the LOAC for their own acts and omissions, whether they are the direct perpetrators of, or are indirectly involved in, violations. It is a fundamental principle that individuals do not avoid responsibility for violations of the LOAC on the plea that they were obeying superior orders. Manifestly illegal orders engage the individual responsibility of the persons who issue them as well as the persons who carry them into effect.

## **Responsibilities of Commanders**

Commanders at every level have particular responsibilities under the LOAC. In accordance with Protocol I to the Geneva Conventions Article 87, commanders must ensure that members under their command and other persons under their control are aware of their obligations under the Conventions to Protocol I, and they must take all feasible measures to prevent violations and to take appropriate action against offenders. This includes taking action if a commander knows that a subordinate is committing or is going to commit a violation.

An important role of legal officers in the armed forces (as stated in Protocol I to the Geneva Conventions Article 82) is to advise commanders on the application of the Geneva Conventions and Protocol I and on the appropriate instruction to be given to armed forces' members on this subject.

## Other Factors Favouring Compliance

As well as legal and moral obligations, a range of practical considerations based on self-interest strengthen and support Australia's commitment to comply with the LOAC. Compliance with the law can:

- encourage reciprocal compliance with the law by the enemy;
- increase unit morale and discipline;
- win international and domestic support for Australia's role in the conflict;
- neutralise any hostility from the civilian population in an area of operations;
- reduce an enemy's will to resist;
- avoid diversion of resources and attention away from the mission; and
- enhance Australia's post-conflict relations with the enemy, and therefore Australia's long-term national interests.

## Implementation

Compliance with the LOAC by the ADF is achieved through training, the promulgation of ROE and orders for opening fire, and by other means.

All ADF members receive training in the LOAC appropriate to their role in the Defence Force. In addition, a number of training programs and exercises are conducted within formations and units for the purpose of exposing members to practical scenarios. ADF members must be practised in responding lawfully to problems that may arise in complex operations. The use of LOAC simulation technology, tailored to specific units or operations, greatly enhances the scope and opportunities available for realistic training.

ROE are orders to commanders that set parameters for the use of force by ADF members on operations. They are not law in themselves but must always comply with national domestic law. ROE often express, and in the event of hostilities should always comply with, the LOAC. ROE are therefore drafted with regard to a range of legal, diplomatic, political and operational factors. The primary purpose of ROE is to ensure that military action always

aligns with Australian Government policy and Australia's international obligations.

Orders for opening fire translate ROE into simple rules for members of the ADF. These rules are printed on small cards and carried by all members as an aide-mémoire during exercises and on operations. Practical ROE training should be conducted regularly.

Other means of promoting compliance include the use of graphic or written area profiles and control measures, such as restricted firing areas. Area profiles assist commanders at all levels to identify military targets as distinct from civilian concentrations and protected sites such as medical facilities and cultural monuments.

## **Related Doctrine and Instructions**

LOAC guidance for commanders is contained in *ADFP 37, Law of Armed Conflict*. ROE doctrine for the ADF is contained in *ADFP 3, Rules of Engagement*. Policy governing LOAC training, which all members of the ADF are to undertake, is set out in *Defence Instruction (General) Operations 33-1, Australian Defence Force Law of Armed Conflict Training*.