



**Introduction**  
**United States Department of Defense**  
**Law of War Manual - 2015**

A) In General - The law of war is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. The law of war comprises treaties and customary international law applicable to the United States.

B) Historical Perspective - The law of war is of fundamental importance to the Armed Forces of the United States. The law of war is part of who we are. George Washington, as Commander in Chief of the Continental Army, agreed with his British adversary that the Revolutionary War would be “carried on agreeable to the rules which humanity formed” and “to prevent or punish every breach of the rules of war within the sphere of our respective commands.” During the Civil War, President Lincoln approved a set of “Instructions for the Government of the Armies of the United States in the Field,” (The Lieber Code) which inspired other countries to adopt similar codes for their armed forces, and which served as a template for international codifications of the law of war.

After World War II, U.S. military lawyers, trying thousands of defendants before military commissions did, in the words of Justice Robert Jackson, “stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law” in “one of the most significant tributes that Power has ever paid to Reason.” Reflecting on this distinctive history, one Chairman of the Joint Chiefs of Staff observed that “[t]he laws of war have a peculiarly American cast.” And it is also true that the laws of war have shaped the U.S. Armed Forces as much as they have shaped any other armed force in the world.

C) Military Necessity - The law of war is a part of our military heritage, and obeying it is the right thing to do. But we also know that the law of war poses no obstacle to fighting well and prevailing. Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. For example, the self-control needed to

refrain from violations of the law of war under the stresses of combat is the same good order and discipline necessary to operate cohesively and victoriously in battle. Similarly, the law of war's prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission.

D) Purposes- The main purposes of the law of war are aimed at:

protecting combatants, noncombatants, and civilians from unnecessary suffering;

providing certain fundamental protections for persons who fall into the hands of the enemy, particularly prisoners of war, civilians, and military wounded, sick, and shipwrecked;

facilitating the restoration of peace;

assisting military commanders in ensuring the disciplined and efficient use of military; and

preserving the professionalism and humanity of the combatants.

# Part I

## Historical Foundations of the Law of War

A) Common Law of War – The ancient law of war was (and is) considered to be a matter of international common law and generally required combatants to do the following:

Carry their arms openly  
Wear a distinctive uniform or emblem  
Be subject to military authority

B) Historical Examples:

The trial of Major Andre (1780)  
Entry into US of Nazi Saboteurs (1942)

C) Modern-Day Common Law of War - In the modern era, the common law of war implicates the following justifications:

i) Military necessity - The principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.

ii) Humanity - The principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.

iii) Proportionality - The principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive

iv) Distinction (discrimination) - Obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects

v) Honor (Chivalry) - Honor has been vital to the development of the law of war, which was preceded by warriors' codes of ethical behavior.<sup>108</sup> U.S. military canons of personal conduct continue to emphasize the importance of honor as a core value. Honor as a core value and other ethical norms continue to be vital as a medium for the implementation of the law of war.

D) 1863 - The Lieber Code: The First Codification of the Law of War - This Code was the first modern codification of the Law of War and served as the basis for many subsequent international treaties, conventions and agreements on this topic. It was adopted in 1863 by order of the President as General Order 100.

It contained 157 Articles controlling the conduct of the United States military during the Civil War in light of the competing interests of military necessity and humanity. For example, Article 16 states:

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

These sentiments stand in stark contrast to the military philosophy of several of the Union's leadership of the day. Contrast these sentiments with the actions taken by General Grant in the siege of Vicksburg (June-July 1863), the burning of Atlanta (1864) and Sherman's infamous March to the Sea.

Additional examples of the Articles in the Lieber Code include:

Art. 14

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Art. 15

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of

life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Art. 17 [No longer followed as a component of the Law of War]

War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy. (e.g., Vicksburg).

As a matter of military strategy, the Union adopted the so-called “hard war” doctrine in 1864, an early example of the concept of total war (first conceived by the Germans as Totaler Krieg) that was the general rule among all the combatants in World War II.

On the issue of a “hard war”, General William Sherman noted that:

You cannot qualify war in harsher terms than I will. War is cruelty, and you cannot refine it; and those who brought war into our country deserve all the curses and maledictions a people can pour out. I know I had no hand in making this war, and I know I will make more sacrifices to-day than any of you to secure peace. But you cannot have peace and a division of our country.

E) 1865 - First War Crimes Trial - Trial of Captain Henry Wirz – Andersonville -  
In the early days of the Civil War, the governments of the North and South frequently engaged in prisoner exchanges. The North also frequently released captured Confederates “on Parole”, that is their promise not to take up arms again. These practices were later halted during the war by order of General Grant as part of his implementation of “hard war” tactics and strategy. This meant that prisoners of war were now to be held in captivity until the end of hostilities.

While both sides incarcerated prisoners under horrible conditions (e.g., Camp Douglas in Chicago run by the Union), Andersonville deserves special mention for the inhumane circumstances under which its inmates were kept. A stockade held

thousands of men on a barren, polluted patch of ground. Barracks were planned but never built; the men slept in makeshift housing, called “shebangs,” constructed from scrap wood and blankets that offered little protection from the elements. A small stream flowed through the compound and provided water for the Union soldiers, but this became a cesspool of disease and human waste. Erosion caused by the prisoners turned the stream into a huge swamp. The prison was designed to hold 10,000 men but the Confederates had packed it with more than 31,000 inmates by August 1864.

Wirz oversaw an operation in which thousands of inmates died. Partly a victim of circumstance, he was given few resources with which to work, and the Union ceased prisoner exchanges in 1864. As the Confederacy began to dissolve, food and medicine for prisoners were difficult to obtain. When word about Andersonville leaked out, Northerners were horrified. Poet Walt Whitman saw some of the camp survivors and wrote, “There are deeds, crimes that may be forgiven, but this is not among them.”

Wirz was charged with conspiracy to injure the health and lives of Union soldiers and murder. His trial began in August 1865 and ran for two months. During the trial, some 160 witnesses were called to testify. Though Wirz did demonstrate indifference towards Andersonville’s prisoners, he was, in part, a scapegoat and some evidence against him was fabricated entirely.

F) 1945-46 - Nuremberg War Crimes International Tribunal – This trial marked the first time that the military and political leaders of a nation were tried for war crimes and crimes against peace and humanity.

## Part II

### The Modern-Day Law of War

A) In general - The modern law of war is based upon a nation's statutory (and regulatory) law, international treaties and ongoing international common law precedent. Contemporary standards adopted by way of international treaty, statutory law and DoD regulations in the United States would have strictly prohibited many of the military practices engaged in by U.S. forces during World War II.

B) Statutory Law - 18 U.S.C.A. § 2441 – War Crimes

(a) Offense - Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances - The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition - As used in this section the term “war crime” means any conduct:

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the

context of and in association with an armed conflict not of an international character; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

(d) Common Article 3 violations.

(1) Prohibited Conduct. In subsection (c)(3), the term “grave breach of common Article 3” means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

(A) Torture. The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

(B) Cruel or Inhuman Treatment. The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

(C) Performing Biological Experiments. The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate

medical or dental purpose and in so doing endangers the body or health of such person or persons.

(D) Murder. The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

(E) Mutilation or Maiming. The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

(F) Intentionally Causing Serious Bodily Injury. The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

(G) Rape. The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

(H) Sexual Assault or Abuse. The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts

to cause, one or more persons to engage in sexual contact.

(I) Taking Hostages. The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.

(2) Definitions. In the case of an offense under subsection (a) by reason of subsection (c)(3):

(A) the term “severe mental pain or suffering” shall be applied for purposes of paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340(2) of this title;

(B) the term “serious bodily injury” shall be applied for purposes of paragraph (1)(F) in accordance with the meaning given that term in section 113(b)(2) of this title;

(C) the term “sexual contact” shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246(3) of this title;

(D) the term “serious physical pain or suffering” shall be applied for purposes of paragraph (1)(B) as meaning bodily injury that involves--

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

(iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty; and

(E) the term “serious mental pain or suffering” shall be applied for purposes of paragraph (1)(B) in accordance with the meaning given the term “severe mental pain or suffering” (as defined in section 2340(2) of this title), except that--

(i) the term “serious” shall replace the term “severe” where it appears; and

(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term “serious and non-transitory mental harm (which need not be prolonged)” shall replace the term “prolonged mental harm” where it appears.

(3) Inapplicability of certain provisions with respect to collateral damage or incident of lawful attack.--The intent specified for the conduct stated in subparagraphs (D), (E), and

(F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to--

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

(4) Inapplicability of taking hostages to prisoner exchange.--Paragraph (1)(I) does not apply to an offense under subsection

(a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime.

(5) Definition of grave breaches.--The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.

C) 2002 – International Criminal Court – The legacy of Nuremberg is carried on to this day through the efforts of the International Criminal Court (I.C.C.) in the Hague. The court investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. As a court of last resort, it seeks to complement, not replace, national courts. Governed by an international treaty called the Rome Statute, the ICC is the world's first permanent international criminal court. Although there are currently 123 signatory nations to the treaty establishing this court, neither the United States nor Russia participates any longer in the activities of the I.C.C. and have withdrawn.

The Link to ICC is located at: <https://www.icc-cpi.int/>

D) The Geneva Conventions (1949) – The Geneva conventions have represented an attempt on an international level to regulate the law of war. There have been a number of such conventions, beginning in 1964, with additional treaties signed in 1906 and 1929. Following World War II, the nation states revised the protocols in the conventions based upon the world's most recent experiences. The protocols have been revised a number of times since 1949. In general, the four Geneva conventions deal with the following topics:

- Protection of sick and wounded warriors on land during war;
- Protection of sick and wounded and shipwrecked at sea during war;
- Treatment of prisoners of war; and
- Protection of civilians in war zones and occupied territories

Apart from the foregoing, the United States is a signatory to scores of other international treaties, conventions and protocols related to the law of war.

E) United States military law and standards – The Department of Defense has promulgated a series of regulations and orders which control the conduct of officers and enlisted personnel in the conduct of war. According to military law, military commanders have a duty to take appropriate measures as are within their power to control the forces under their command for the prevention of violations of the law of war. Moreover, members of the armed forces must refuse to comply with clearly illegal orders to commit law of war violations. In addition, orders should not be construed to authorize implicitly violations of law of war. Issues related to the conduct of personnel, treatment of prisoners, use of weapons and the legality of the rules of engagement should be determined by command authority with the advice of military lawyers from the Judge Advocate General.

Among the law of war topics covered by United States Military orders and regulations are the following:

Conduct of hostilities  
Military occupation  
Treatment of civilians and children  
Use of authorized weapons  
Care of sick, wounded and shipwrecked  
Treatment & discipline of Enemy prisoners of war  
Cyber operations  
Treatment of neutrals  
Air and space warfare  
Naval warfare  
Non-hostile relations between belligerents

## Part III

### Trial of Offenders

Nation states maintain the authority to try war crimes under their own military or domestic law. In fact, this is what is occurring in the Ukraine right now to select Russian soldiers who have been accused of having committed war crimes.

Under United States law, the principal way for the United States to punish members of the U.S. armed forces for violations of the law of war is through the Uniform Code of Military Justice.

Certain other persons may be tried for violations of the Uniform Code of Military Justice, including, among others:

Members of a regular component of the U.S. armed forces;

EPWs in the custody of the U.S. armed forces; and

In time of declared war or contingency operations, persons serving with or accompanying an armed force in the field; and

For non-United states military personnel, trial outside the United States may also be conducted by way of a military tribunal or military commission, the procedures of which do not carry all the constitutional protections required in a general court-martial. Congress must lawfully authorize the use of a military commission. (Hamden vs. Rumsfeld, 548 U.S. 557(2006)). Among the limited rights of such defendants is the right to file a petition of habeas review. (Boumediene vs. Bush, 553 U.S. 723(2008)). A U.S. citizen subject to military commission also has the right to contest his designation as an enemy combatant before a neutral and detached magistrate. Hamdi vs. Rumsfeld, 542 US 507.

Penalties upon conviction range from a fine, to imprisonment or the death penalty.

## **Appendix**

1) The DOD Law of War Manual can be found at this link:

<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

2) Articles in the Lieber Code are reproduced at this link:

[https://avalon.law.yale.edu/19th\\_century/lieber.asp#art148](https://avalon.law.yale.edu/19th_century/lieber.asp#art148)