

# **CHAPTER-VII**

## **MEANS AND METHODS OF WARFARE**

"Means and methods" is the term commonly used to refer to the area of law governing the conduct of hostilities -the Jus in Bello. The "justness" of the conflict or how the parties ended up at armed conflict is not addressed. Rather, this area of law deals with how the parties conduct the armed conflict once engaged. Portions of this area of law overlap and intermingle with other key law of war documents, particularly the 1949 Geneva Conventions. Therefore it is important when working in this area to also read and cross-reference the related Geneva Conventions to ensure a complete picture of the relevant law.

This area of law addresses two interrelated areas: (1) the methods of warfare; that is, tactics or how we go about fighting; and (2) the means of warfare, that is, what instruments of war we use to fight. This outline discusses both areas.

### **PRINCIPLES OF WARFARE**

There are some principles at the base of Means and methods of warfare which are as under-

#### **A. *The four key principles* -**

1. Military necessity/military objective
2. Distinction/discrimination
3. Proportionality
4. Humanity/unnecessary suffering

**B. *Principle of Military Necessity.*** That principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.<sup>281</sup> Defined originally in the Lieber Code: "those measures

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<sup>281</sup> FM 27-10, para. 3.

which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war."<sup>282</sup>

1. These definitions have two common elements:

- a. A military requirement to undertake the action; and
- b. The action must not be forbidden by the law of war.

2. Are there any exceptions to these elements? In other words, can the military requirement to undertake the action be so great that it can "overcome" a prohibition in international law?

a. Criminal Defense. Military necessity has been argued as a defense to law of war violations and has generally been rejected as a defense for acts forbidden by customary and conventional laws of war. Rationale: laws of war were crafted to include consideration of military necessity. A distinction has been drawn, however, between acts/violations that affect people versus those that affect property.

(1) Protected Persons. Law prohibits the intentional targeting of protected persons (as defined in the Geneva Conventions) under any circumstances. WWII Germans, under a concept called "Kreigsraison," argued that sometimes dire military circumstances allowed them to violate international law --i.e., kill prisoners at Malmedy because they had no provisions for them and their retention would have jeopardized the German attack. This reasoning was rejected at Nuremberg: "The rules of international law must be followed even if it results in the loss of a battle or even a war."

(2) Protected Places -The Rendulic Rule. The law of war does allow for

destruction of civilian property, if military necessity "imperatively demands" such action.<sup>283</sup> The circumstances requiring destruction of

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<sup>282</sup> Lieber Code, art. 14.

<sup>283</sup> Hague, art. 23(g); FM 27-10, para. 56 and 58.

protected property are those of "urgent military necessity" as they appear to the commander at the time of the decision.<sup>284</sup>

3. Military objective. Military objective is a component of military necessity. Once a commander determines he or she has a military necessity to take a certain action or strike a certain target, then he or she must determine that the target is a valid military objective. The current definition of a military objective is found in GP I, article 52(2): "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage." The components of this definition are discussed further in the section on targeting.

C. Principle of Discrimination or Distinction. The principle of distinction is sometimes referred to as the "grandfather of all principles," as it forms the foundation for which of the Geneva tradition of the law of war. The essence of the principle is that military attacks should be directed at combatants and military targets, and not civilians or civilian property. GP I, article 48 sets out the rule: "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

1. GP I further defines "indiscriminate attacks" under Article 51(4) as those attacks that:

a. are "not directed against a specific military objective" (e.g., SCUD missiles during Desert Storm);

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<sup>284</sup> See IX Nuremberg Military Tribunals, Trials of War Criminals Before the Nuremberg Military Tribunals, 11 13 (1950). Charges that General Lothar Rendulic unlawfully destroyed civilian property via a "scorched earth" policy were dismissed by the Tribunal because "the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made."

- b. "employ a method or means of combat the effects of which cannot be directed at a specified military objective" (e.g., area bombing);
- c. "employ a method or means of combat the effects of which cannot be limited as required" (use of bacteriological weapons); and
- d. "consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction."<sup>285</sup>

D. Principle of Proportionality. The test to determine if an attack is proportional is found in GP I, article 5 1(5)(b): "An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" violates the principle of proportionality.<sup>286</sup>

1. Incidental loss of life or injury and collateral damage. This is considered unavoidable damage to civilian personnel and property incurred while attacking a military objective. Such an occurrence, however, is not a violation of international law. The law recognizes that there may be some death, injury and destruction during military operations. The law of war requirement is for the commander to weigh that expected death, injury, and destruction against the military advantage anticipated. The question is whether such death, injury, and destruction are excessive in relation to the military advantage; not whether any death, injury or destruction will occur. In other words, the prohibition is on the death, injury, and destruction being excessive; not on the attack causing such results.

2. Judging Commanders. It is be a grave breach of GP I to launch an attack that a commander knows will cause excessive incidental

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<sup>285</sup> See, A.P.V. Rodgers, *Law on the Battlefield*, 19-24 (1996).

<sup>286</sup> Note: this principle is only applicable when an attack has the possibility of affecting civilians. If the target is purely military with no known civilian personnel or property in the vicinity, no proportionality analysis need to be conducted.

damage in relation to the military advantage gained. The requirement is for a commander to act reasonably.

a. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places, but also that these objectives can be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.<sup>287</sup>

41. In judging a commander's actions one must look at the situation as the commander saw it in light of all circumstances.<sup>288</sup> The question of reasonableness, however, ensures an objective standard that must be met as well. In this regard, two questions seem relevant. Did the commander gather a reasonable amount of information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Of course, factors such as time, available staff, and combat conditions affecting the commander must also factor into the analysis.

b. Example: A1 Firdus Bunker. During Desert Storm, planners identified this bunker as a military objective. Barbed wire surrounded the complex, it was camouflaged, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in 300 civilian casualties. Was there a violation of the law of war? No. Based on information gathered by coalition planners, the commander made a reasonable assessment that the target was a military objective and that incidental damage would not outweigh the military advantage gained. Although the

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<sup>287</sup> FM 27-10, para.

<sup>288</sup> See A.P.V. Rogers, *Law on the Battlefield* 66 (1996) and discussion of the "Rendulic Rule" above.

attack unfortunately resulted in numerous civilian deaths, (and that in hindsight, the attack might have been disproportionate to the military advantage gained --had the attackers known of the civilians) there was no international law violation because the attackers, at the time of the attack, acted reasonably.<sup>289</sup>

E. Principle of Unnecessary Suffering or Humanity. Hague, article 22 states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, "it is especially forbidden . . .to employ arms, projectiles or material calculated to cause unnecessary suffering." HR, art. 23e. This concept is targeted at weaponry, and has two basic elements.

1. A prohibition on use of arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass, irregular shaped bullets, dum- dum rounds, lances with barbed heads).

2. A prohibition on use of otherwise lawful arms in a manner that causes unnecessary suffering (e.g., using a flamethrower against enemy combatants with the intent to "fry those SOBS and make them suffer," even though equally effective and more humane means are available).

3. The key to both prohibitions is the mens rea or intent element.

### **LEGITIMATE TARGETS and it's objects**

A. As discussed above, only valid military objectives are legitimate targets. The current definition of a military objective is found in GP I, article 52(2): "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

1. "Nature, location, purpose, or use"

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<sup>289</sup> See DEPARTMENT CONDUCT GULF WAR, FINAL OF DEFENSE, OF THE PERSIAN REPORTTO CONGRESS 615-616 (1992).

- a. Nature is defined in the Commentary as "all objects used directly by the armed forces," such as weapons, tanks, transports, etc.
  - b. Location is defined in the Commentary as "a site which is of special importance for military operations in view of its location," such as a bridge or a piece of ground.
  - c. Purpose is defined in the Commentary as "concerned with the intended future use of an object."
  - d. Use, on the other hand, is defined in the Commentary as "concerned with [the object's] present function," such as a school being used as a military headquarters.
2. "Make an effective contribution to military action" In theory, even if the object is clearly military in nature, such as a tank, if it does not meet this test (e.g., it is sitting out in the desert abandoned). It cannot be a valid military objective. In reality, such a target would be extremely low on the target list anyway as it would not be considered an effective use of limited resources.
  3. "Offers a definite military advantage." The Commentary states that it is not legitimate to launch an attack which only offers potential or indeterminate advantages. This raises interesting questions regarding attacking enemy morale, deception operations, and strategic views of advantage versus tactical advantages of individual attacks.
- B. People
1. Determining who can be a valid target is either a status based or conduct based determination.
    - a. Status based. The easiest situation is when you are facing an enemy that has been declared a "hostile force." If an individual falls into the group of those declared a hostile force, then he may immediately be targeted without any specific conduct on his part.

(1) Combatants are generally defined as anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat."

(2) Combatants are often referred to as "lawful" combatants if they fall

under the definition given in the Geneva Convention on Prisoners of War for those entitled to PW status:

(a) Under responsible command,

(b) Distinctive sign recognizable at a distance,

(c) Carry arms openly, and

(d) Abide by the laws of war. For a fuller-discussion of these criteria,<sup>290</sup>

(3) Oftentimes you will also hear the phrase "unlawful combatants."

There is no such term in the law of war; however it was used by the Supreme Court in the Quirin case to refer to those who engaged in combat but had no right to do so. The more accurate term is "unprivileged belligerent." These individuals do not meet the criteria listed above, and not only may be targeted, but will not receive the protections of prisoners of war. They may be treated as criminals under the domestic law of the captor. An unprivileged belligerent can be a civilian who is participating in the hostilities or a member of the armed forces who violates the laws of war.

b. Conduct based. As noted above, an unprivileged belligerent, by his or her conduct, can become a lawful target. Thus, although they are not a part of a group declared a hostile force, by their hostile acts they become a legitimate target.

2. Noncombatants. The law of war prohibits attacks on non-combatants, to include those sometimes referred to as those hors de combat, or out of combat.

a. Civilians

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<sup>290</sup> See the chapter on Geneva Convention III, Prisoners of War.

(1) General Rule. Civilians and civilian property may not be the subject

or sole object of a military attack. Civilians are persons who are not members of the enemy's armed forces, and who do not take part in the hostilities.<sup>291</sup>

(2) Furthermore, GP I provides for expanded protections of the civilian

population from "indiscriminate" attacks. Indiscriminate attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated.<sup>292</sup> GP I, art. 5 1 -except for para. 6, is considered customary international law by US.

(3) GP I, article 51(3) states that civilians enjoy protection from targeting "unless and for such time as they take a direct part in hostilities." The Commentary states the requirement that civilians abstain from "all hostile acts," is defined as "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces." This concept is discussed further in the chapter on Geneva Convention IV, Protection of Civilians in Armed Conflict, which includes a discussion of "direct part" versus "active part."

b. Hors de Combat. Prohibition against attacking enemy personnel who are "out of combat." Protected persons:

(1) *Prisoners of War*:<sup>293</sup>

(a) Surrender may be made by any means that communicates the intent to give up. No clear rule as to what constitutes surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.

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<sup>291</sup> GP I, art. 50 and 51.

<sup>292</sup> GP I, art. 5 1 -except for para. 6,

<sup>293</sup> GPW, art. 4, HR, art. 23c,d.

(b) Captors must respect (not attack) and protect (care for) those who

surrender--no reprisals.

(2) *Wounded and Sick in the Field and at Sea*:<sup>294</sup> Those soldiers who have fallen by reason of sickness or wounds and who cease to fight are to be respected and protected. Civilians are included in definition of wounded and sick (who because of trauma, disease . . . are in need of medical assistance and care and who refrain from any act of hostility).<sup>295</sup> Members of the armed forces at sea are to be respected and protected.<sup>296</sup> Shipwrecked includes downed passengers/crews on aircraft, ships in peril, castaways.

(3) *Parachutists*<sup>297</sup>: Paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists who are crewmen of a disabled aircraft are presumed to be out of combat and may not be targeted unless it's apparent they are engaged on a hostile mission. Parachutists, according to GP I, Article 42, "shall be given the opportunity to surrender before being made the object of attack"

and are clearly treated differently from paratroopers.

c. *Medical Personnel*. Considered out of combat if they are exclusively engaged in medical duties. GWS, art. 24. They may not be directly attacked; however, accidental killing or wounding of such personnel due to their proximity to military objectives "gives no just cause for complaint".<sup>298</sup> Medical personnel include:

(1) Medical personnel of the armed forces. GWS, art. 24.

(a) Doctors, surgeons, nurses, chemists, stretcher-bearers, medics, corpsman, and orderlies, etc., who are "exclusively engaged" in the direct care of the wounded and sick.

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<sup>294</sup> GWS, art. 12; GWS Sea, art. 12.

<sup>295</sup> GP I, art. 8. Shipwrecked

<sup>296</sup> GWS Sea, art. 12, NWP 1-14M, para. 11.6.

<sup>297</sup> FM 27-10 para. 30.

<sup>298</sup> FM 27-10, para 225

- (b) Administrative staffs of medical units (drivers, generator operators, cooks, etc.).
- (c) Chaplains.
- (2) Auxiliary Medical Personnel of the Armed Forces.<sup>299</sup> To gain the GWS protection, they must have received "special training" and be carrying out their medical duties when they come in contact with the enemy.
- (3) Relief Societies.<sup>300</sup> Personnel of National Red Cross Societies and other recognized relief Societies. Personnel of relief societies of Neutral Countries.
- (4) Civilian Medical and Religious Personnel. Article 15 of GP I requires that civilian medical and religious personnel shall be respected and protected. They receive the benefits of the provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel. Article 15 also dictates that any help possible shall be given to civilian medical personnel when civilian medical services are disrupted due to combat.
- d. Personnel Engaged in the Protection of Cultural Property. Article 17 of the 1954 Hague Cultural Property Convention established a duty to respect (not directly attack) persons engaged in the protection of cultural property. The regulations attached to the Convention provide for specific positions as cultural protectors and for their identification.
- e. Journalists. Given protection as "civilians" provided they take no action adversely affecting their status as civilians. GP I, art. 79 – considered customary international law by US.

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<sup>299</sup> GWS, art. 25.

<sup>300</sup> GWS, art. 26 and 27

C. 1. Defended Places.<sup>301</sup> As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:

- a. fort or fortified place;
- b. a place occupied by a combatant force or through which a force is passing; and
- c. a city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions. See also, GP I, Article 5 1(5)(a), which seems to clarify this rule. Specifically, it prohibits bombardments which treat "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village."

2. undefended places. The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited. HR, art. 25. An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:

- a. all combatants and mobile military equipment are removed;
- b. no hostile use made of fixed military installations or establishments;
- c. no acts of hostility shall be committed by the authorities or by the population; and
- d. no activities in support of military operations shall be undertaken (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed).<sup>302</sup>

3. Natural environment. The environment cannot be the object of reprisals. In the course of normal military operations, care must be taken to protect the natural environment against long-term, widespread, and severe damage. GP I, art. 55 -U.S. specifically objects to this article.

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<sup>301</sup> FM 27- 10, paras. 39 & 40, change 1.

<sup>302</sup> FM 27-10, art. 39b, change 1.

4. Protected Areas.<sup>303</sup> Hospital or safety zones may be established for the protection of the wounded and sick or civilians. Articles 8 and 11 of the 1954 Hague Cultural Property Convention provide that certain cultural sites may be designated in an "International Register of Cultural Property under Special Protections." The Vatican and art storage areas in Europe have been designated under the convention as "specially protected." The U.S. asserts the special protection regime does not reflect customary international law.

#### D. Property

##### 1. Protected Property

a. Civilian. Prohibition against attacking civilians or civilian property.<sup>304</sup> GP I, art. 5 I(2). Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.). GP I, art. 52(3).

b. Protection of Medical Units and establishments -Hospitals.<sup>305</sup>

(1) Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked.

(2) Protection shall not cease, unless they are used to commit "acts harmful to the enemy."

(a) Warning requirement before attacking a hospital that is committing

"acts harmful to the enemy."

(b) Reasonable time to comply with warning, before attack.

(3) When receiving fire from a hospital, there is no duty to warn before

returning fire in self-defense. Example: Richmond Hills Hospital, Grenada; hospitals during combat in Operation Iraqi Freedom.

c. Medical Transport. Ground transports of the wounded and sick or of

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<sup>303</sup> FM 27-10, para. 45.

<sup>304</sup> FM 27-10, para. 246;

<sup>305</sup> FM 27-10, paras. 257 and 258; GWS art. 19.

medical equipment shall not be attacked if performing a medical function.<sup>306</sup> Under the Geneva Conventions of 1949, medical aircraft were protected from direct attack only if they flew in accordance with a previous agreement between the parties as to their route, time, and altitude. GP I extends further protection to medical aircraft flying over areas controlled by friendly forces. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exists. GP I, art. 25. In "contact zones", protection can only be effective by prior agreement; nevertheless medical aircraft "shall be respected after they have been recognized as such." (GP I, art. 26 -considered customary international law by US.) Medical aircraft in areas controlled by an adverse party must have a prior agreement in order to gain protection.<sup>307</sup>

d. Cultural Property. Prohibition against attacking cultural property. The 1954 Cultural Property Convention elaborates, but does not expand, the protections accorded cultural property found in other treaties.<sup>308</sup> The Convention has not been ratified by the US (treaty is currently under review with a view toward ratification with minor understandings).<sup>309</sup> Cultural property includes buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected.

(1) Misuse will subject them to attack.

(2) Enemy has duty to indicate presence of such buildings with visible and distinctive signs.

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<sup>306</sup> GWS, art. 35.

<sup>307</sup> GP I, art. 27. See more developed discussion in the outline on the Geneva Convention on the Wounded and Sick.

<sup>308</sup> HR, art. 27; FM 27-10, para. 45,57.

<sup>309</sup> See GP I, art. 53, for similar prohibitions.

2. Works and Installations Containing Dangerous Forces.<sup>310</sup>: The rules are not U.S. law but should be considered because of the pervasive international acceptance of GP I and 11. Under the Protocols, dams, dikes, and nuclear electrical generating stations shall not be attacked - even if they are military objectives -if the attack will cause the release of dangerous forces and cause "severe losses' among the civilian population. (U.S. objects to "severe loss" language as creating a different standard than customary proportionality test -"excessive7' incidental injury or damage.)

a. Military objectives that are near these potentially dangerous forces are also immune from attack if the attack may cause release of the forces (parties also have a duty to avoid locating military objectives near such locations).

b. May attack works and installations containing dangerous forces only if they provide "significant and direct support7' to military operations and attack is the only feasible way to terminate the support. The U.S. objects to this provision as creating a standard that differs from the customary definition of a military objective as an object that makes "an effective contribution to military action."

c. Parties may construct defensive weapons systems to protect works and installations containing dangerous forces. These weapons systems may not be attacked unless they are used for purposes other than protecting the installation.

3. Objects Indispensable to the Survival of the Civilian Population. Article 54 of GP I prohibits starvation as a method of war fare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population -such as foodstuffs, crops, livestock, water installations, and irrigation works.

E. Protective Emblems.<sup>311</sup> Objects and personnel displaying emblems are presumed to be protected under Conventions. GWS, art 38.

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<sup>310</sup> GP I, art. 56, and GP 11, art. 15.

<sup>311</sup> FM 27- 10, para. 23 8.

## 1. Medical and Religious Emblems

- a. Red Cross.
- b. Red Crescent.
- c. Lion and Sun.
- d. Red Star of David: Not mentioned in the 1949 Geneva Convention, but is protected as a matter of practice.

## 2. Cultural Property Emblems

- a. "A shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle."<sup>312</sup>
- b. Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War (art. 5). "[L]arge, stiff, rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."

3. Works and Installations Containing Dangerous Forces. Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius.<sup>313</sup>

## **WEAPONS OF MASS DESTRUCTION**

A. The regulation of use of weapons in conflict is governed by essentially two major precepts. The first is the law of war principle prohibiting unnecessary suffering. The second is treaty law dealing with specific weapons or weapons systems.

B. Legal Review. Before discussing these areas, it is important to note first that all U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war.<sup>314</sup> A review occurs before the award of the engineering and manufacturing development contract and again before the award of

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<sup>312</sup> 1954 Cultural Property Convention, art. 16 and 17.

<sup>313</sup> GP I, annex I, art. 16.

<sup>314</sup> Interim Guidance, Defense Acquisition, DEPSECDEF Memo, 30 Oct 2002, AR 27-53, AFI 5 1-402, and SECNAVINST 571 1.8A

the initial production contract. Legal review of new weapons is also required under Article 36 of GP I.

1. The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? Interim Guidance, Defense Acquisition, para. 3.2.1. In TJAG reviews, the discussion will often focus on whether the employment of the weapon or munitions for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to its military effectiveness. This test cannot be conducted in isolation, but must be weighed in light of comparable, lawful weapons in use on the modern battlefield. Weapons may be illegal:

a. Per se. Those weapons calculated to cause unnecessary suffering, determined by the "usage of states." Examples: lances with barbed heads, irregular shaped bullets, projectiles filled with glass.<sup>315</sup>

b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: using a flamethrower against enemy troops in a bunker after dousing the bunker with gasoline; the intent being to inflict severe pain and injury on the enemy troops.

c. By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and non-detectable fragments are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

C. As noted above, Hague, article 22 states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, "it is especially forbidden . . .to employ arms, projectiles or material calculated to cause unnecessary suffering."<sup>316</sup>

The following weapons and munitions are considered under this general principle.

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<sup>315</sup> FM 27- 10, para. 34.

<sup>316</sup> HR, art. 23e.

1. Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). The 1899 Hague Convention prohibits expanding rounds. US practice accedes to these prohibitions as being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).

a. Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict against combatants by customary international and the treaties mentioned above. There are limited situations, however, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security).

b. High Velocity Small Caliber Arms.

(1) Early controversy about M-16 causing unnecessary suffering.

(2) "Match king" ammunition. Has a hollow tip--but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.

c. Sniper rifles, 50-caliber machine guns, and shotguns. Much "mythology" exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.

d. Superfluous Injury and Unnecessary Suffering Project: (Sir US):  
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attempt by the ICRC to bring objectivity to the review of legality of various weapons systems. The Sir US project attempted to use casualty survival rates off the battlefield, as well as the seriousness of the inflicted injury, as the criteria for determining if a weapon causes unnecessary suffering. The U.S. position is that the project was inherently flawed because its database of casualty figures is

mostly based upon wounds inflicted in domestic disturbances, civil wars, from antipersonnel mines and from bullets of undetermined type.<sup>317</sup>

a. Legal unless used in an illegal manner (on a protected target or in a

manner calculated to cause unnecessary suffering).

b. Unlawful if fragments are undetectable by X-ray.<sup>318</sup>

c. Distinguish R2LP rounds (reduced ricochet, limited penetration). These rounds do fragment, but only upon striking a hard surface, such as a ship's hull, and not in the body.

D. The following weapons and munitions are regulated not only by the principle prohibiting unnecessary suffering, but also by specific treaty law. Most of the applicable law is relatively new, dating from post-Geneva Protocol implementation.

1. Landmines. Lawful if properly used, however, regulated by a number of different treaties. Keep in mind that while the U.S. has not signed all the applicable treaties, many of our allies have, and therefore it is important to understand what limitations our coalition partners may be facing and the impact on U.S. operations.

a. The primary legal concern with landmines is that they violate the law of war principle of discrimination. A landmine cannot tell if it is being triggered by an enemy combatant or a member of the civilian population.

b. When considering legal restrictions on landmines, three questions must be answered:

(1) What type of mine is it? Anti-personnel (APL), anti-tank, or anti-tank with anti-handling device?

(2) How is the mine delivered? Remotely or non-remotely?

(3) Does it ever become inactive? Is it "smart" or "dumb"?

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<sup>317</sup> See Maj Donna Verchio, Just Say No! The Sir US Project: Well-Intentioned, but Unnecessary sufferings.

<sup>318</sup> Protocol I, 1980 Conventional Weapons Treaty.

c. The primary treaty that restricts U.S. use of mines is Amended Protocol II. Amended Protocol II amends Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW). The Senate ratified and the President signed the amendment on 24 May 1999. Amended Protocol 11:

(1) Expands the scope of the original Protocol to include internal armed conflicts;

(2) Requires that all remotely delivered APL be equipped with self-destruct devices and backup self-deactivation features (in other words, be smart);

(3) Requires that all non-remotely delivered APL not equipped with such devices (dumb mines) be used % thin controlled, marked, and monitored minefields;

(4) Requires that all APL be detectable using available technology;

(5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use;

(6) Provides for means to enforce compliance.

(7) Amended Protocol I1 also clarifies the use of the M18 Claymore "mine" when used in the tripwire mode (Art. 5(6)). (When used in command-detonated mode, the Protocol does not apply, as the issue of distinction is addressed.) Claymores may be used in the tripwire mode without invoking the "dumb" mine restrictions of Amended Mines

Protocol II if:

(a) They are not left out longer then 72 hours;

(b) The Claymores are located in the immediate proximity of the military unit that emplaced them; and

(c) The area is monitored by military personnel to ensure civilians stay

out of the area.

(d) In addition to Amended Protocol 11, there exists a Presidential Decision Directive that sets out further U.S. policy on anti-personnel land mines. PDD 54 states that U.S. forces may no longer employ "dumb" (those that do not self-destruct or self-neutralize) anti-personnel land mines.<sup>319</sup>

*Exceptions to this policy:*

(1) Use of "dumb" mines on the Korean Peninsula to defend against and armed attack across the DMZ; and

(2) Use of "dumb" mines for training purposes.

(3) Note: as of this writing PDD 54 is under review and may be modified in the near future.

e. Although not applicable to the U.S., many nations, including many of our allies, have signed the Convention on the Prohibition of the Use,

Stockpiling, Production, and Transfer of Anti-personnel Mines and on Their Destruction. This treaty is commonly referred to as the Ottawa Treaty. The treaty entered into force on 1 March 1999. As of 1 April, 2003, 146 states had signed the treaty, and 132 had ratified it. Although the U.S. joined the Process in September of 1997, it withdrew when other countries would not allow exceptions for the use of APL mines in Korea and other uses of smart APL. Note: Ottawa only bans APL; therefore Ottawa does not restrict our allies in regards to anti-tank or anti-tank with anti-handling device mines.

2. Booby Traps. A device designed to kill or maim an unsuspecting person who disturbs an apparently harmless object or performs a normally safe act. Amended Protocol II of the 1980 Conventional Weapons Convention contains specific guidelines on the use of booby-traps in Article 7:

I. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all

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<sup>319</sup> See Presidential Decision Directive 54 (16 May 1996).

circumstances to use booby-traps and other devices which in any way

attached or associated with:

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

a. The above list is a useful "laundry list" for the operational law attorney to use when analyzing the legality of the use of a booby-trap. There is one important caveat to the above list. Sub-paragraph I(f) of article 7 prohibits the use of booby-traps against "food or drink." Food and drink are not defined under the Protocol, and if interpreted broadly, could include such viable military targets as supply depots and logistical caches. Consequently, it was imperative to implement a reservation to the Protocol that recognized that legitimate military targets such as supply depots and logistical caches were permissible targets against which to employ booby-traps. The reservation clarifies the fact that stocks of food and drink, if judged by the United States to be of potential military utility, will not be accorded special or protected status.

3. Cluster Bombs or Combined Effects Munitions: CEM is an effective weapon against such targets as air defense radars, armor, artillery,

and personnel. However, because the bomblets are dispensed over a relatively large area and a small percentage of them typically fail to detonate, there is an unexploded ordinance hazard associated with this weapon. These sub munitions are not mines, are acceptable under the laws of armed conflict, and are not timed to go off as anti-personnel devices. However, if the sub munitions are disturbed or disassembled, they may explode, thus, the need for early and aggressive EOD clearing efforts.<sup>320</sup>

4. Incendiaries.<sup>321</sup> Examples: Napalm, flame-throwers, tracer rounds, and white phosphorous. None of these are illegal per se or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering."

a. Napalm and Flamethrowers. Designed for use against armored vehicles, bunkers, and built-up emplacements.

b. White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.

c. Protocol III of the 1980 Conventional Weapons Convention prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians which has not been ratified by the U.S.

(1)The U.S. is currently considering ratifying the Protocol -with a reservation that incendiary weapons may be used within areas of civilian concentrations if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could, cause fewer incidental

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<sup>320</sup> (US DoD Report to Congress: Kosovo/Operation Allied Force Action Report). See Maj. Thomas Herthel, On the Chopping Block: Cluster Munitions and the Law of War, 51 A.F.L. Rev. 229 (2001).

<sup>321</sup> FM 27-10, para. 36.

civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.

(2) Tracers are not incendiaries<sup>322</sup>

5. Lasers. US Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental damage may occur as the result of legitimate military use of lasers (range finding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty. The Senate is reviewing Protocol IV for its advice and consent for ratification.

6. Chemical Weapons. Poison has long been outlawed battle as it was considered a treacherous means of warfare. Chemical weapons more specifically have been regulated since the early 1900s by several treaties.

a. The 1925 Geneva Protocol.<sup>323</sup> Applies to all international armed conflicts.

(1) Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."

(2) The U.S. considers the 1925 Geneva Protocol as applying to both lethal and incapacitating chemical agents.

(3) Incapacitating Agents: Those chemical agents producing symptoms

that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a "transient" effect --and thus are NOT incapacitating agents. Therefore, the U.S. position is that the treaty does not prohibit the use of RCA in war.

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<sup>322</sup> Art I (1)(b).

<sup>323</sup> FM 27-10, para 38, change 1.

(Other nations disagree with interpretation.) See further discussion below on riot control agents.

(4) Under the Geneva Protocol of 1925 the U.S. reserved the right to use lethal or incapacitating gases if the other side uses them first.<sup>324</sup>

The reservation did not cover the right to use bacteriological methods of warfare in second use. Presidential approval is required for use.<sup>325</sup>

However, the US has ratified the Chemical Weapons Convention (CWC) in 1997. The CWC does not allow this "second use.

(5) Riot Control Agents. U.S. has an understanding to the Treaty that these are not prohibited.

b. 1993 Chemical Weapons Convention (CWC). This treaty was ratified

by the U.S. and came into force in April 1997.

(1) Provisions (twenty four articles). Key articles are:

(a) Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) not allowed; significant departure from 1925 Geneva Protocol. Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a "method of warfare."

(b) Article 11. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.

(c) Article 11. Requires parties to declare stocks of chemical weapons

and facilities they possess.

(d) Articles IV and V. Procedures for destruction and verification, including routine on-site inspections.

(e) Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC).

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<sup>324</sup> FM 27-10, para. 38b, change 1.

<sup>325</sup> E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.

(f) Article IX. Establishes "challenge inspection," a short notice inspection in response to another party's allegation of non-compliance.

7. Riot Control Agents (RCA). Use of riot control agents by U.S. troops is governed by four key documents. In order to determine which documents apply to the situation at hand, you must first answer one fundamental question: is the U.S. currently engaged in war? If so, use of RCA is governed by the CWC and Executive Order 11 850. If not, then use of RCA is governed by CJCSI 3 1 10.07A7 and, more tangentially, by the Senate's resolution of advice and consent to the CWC.

a. War. In determining if the U.S. is at war for purposes of use of RCA, the question is whether the international armed conflict the U.S. is involved in is of a scope, duration, and intensity to be an operation that triggers the application of the law of war (a CA 2 conflict).

(1) CWC. As noted above, the CWC prohibits use of RCA as a "method of warfare." The President decides if a requested use of RCA qualifies as a "method of warfare." As a general rule, during war, the more it looks like the RCA is being used on enemy combatants, the more likely it will be considered a "method of warfare" and prohibited. (2) Executive Order 11 850. Guidance also exists in EO 11850. Note that EO 11850 came into force nearly 20 years before the CWC. EO 11850 applies to use of RCA and herbicides. It requires Presidential approval before use and only allows for RCA use in armed conflicts in

defensive military modes to save lives, such as:

- (a) controlling riots;
- (b) dispersing civilians where the enemy uses them to mask or screen an attack;
- (c) rescue missions for downed pilots, escaping PWs, etc.; and
- (d) for police actions in our rear areas.

(3) The rationale for the prohibition against use of RCA on the battlefield we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. EO 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. However, any use in which "combatant" may be involved will most likely not be approved.

b. Military Operations Other Than War (MOOTW). During MOOTW operations, the CWC and EO 11 850 do NOT apply. Rather, CJCSI 31 1 0.07A applies to RCA use during MOOTW operations. The authorization for RCA use during a MOOTW may be at a lower level than the President. CJCSI 3 1 10.07A states the United States is not restricted by the Chemical Weapons Convention in its use of RCAs, including against combatants who are a party to a conflict, in any of the following cases:

(1) The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict.

(2) Consensual peacekeeping operations when the use of force is authorized by the receiving state including operations pursuant to Chapter VI of the UN charter.

(3) Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN charter.

(4) These allowable uses are drawn from the language of the Senate's resolution of advice and consent for ratification of the CWC (S. Exec. Res. 75 -Senate Report section 3373 of 24 April 1997). The Senate required that the President certify when signing the CWC that the CWC did not restrict in any way the above listed uses of RCA. In essence, then, the Senate made a determination that the listed uses were not "war," triggering the application of the CWC.

(a) The implementation section of the resolution requires that the President not modify E.O. 11850. See S. Exec Res. 75, section 2 (26)(b).

(b) The President's certification document of 25 April 1997 states that "the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces."

(5) Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda and Haiti) it appears U.S. policy will maintain that we are not a party to the conflict for as long as possible. Therefore, RCA would be available for all purposes. However, in armed conflicts (such as Operation Iraqi Freedom, Desert Storm, and Panama) it is unlikely that

the President will approve the use of RCA in situations where Chapter 7 Means and Methods "combatants" are involved due to the CWC's prohibition on the use of RCA as a "method of warfare."

8. Herbicides. EO 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.).

9. Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced & use of biological and toxin weapons.

10. Nuclear Weapons<sup>326</sup>. Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that "There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear

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<sup>326</sup> FM 27- 10, para. 35.

weapons." However, by a split vote, the ICJ also found that "The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The ICJ stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the state would be at stake.<sup>327</sup>

## TACTICS OF WARFARE

### A. "Tricking" the enemy

1. Ruses.<sup>328</sup> Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith). Examples of ruses include:

a. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels.

(1) World War I -Germany: Germany often fitted her armed raiders with dummy funnels and deck cargoes and false bulwarks. The German raider Kormoran passed itself off as a Dutch merchant when approached by the Australian cruiser Sydney. Once close enough to open fire she hoisted German colors and fired, sinking Sydney with all

hands.<sup>329</sup>

(2)World War II -Britain: British Q-ship program during WWII. The British took merchant vessels and outfitted them with concealed armaments and a cadre of Royal Navy crewmen disguised as merchant

mariners. When spotted by a surfaced U-boat, the disguised merchant

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<sup>327</sup> 35 I.L.M. 809 (1996).

<sup>328</sup> FM 27-10, para. 48.

<sup>329</sup> See C. John Colombos, *The International Law of the Sea* 454-55 (1962).

would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage the U-boat. The British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks.<sup>330</sup>

b. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit.<sup>331</sup>

(1) World War II -Allies: The classic example of this ruse was the Allied Operation Fortitude prior to the D-Day landings in 1944. The Allies, through the use of false radio transmissions and false references in bona fide messages, created a fictitious First US Army Group, supposedly commanded by General Patton, located in Kent, England, across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be there, instead of Normandy. The ruse was largely successful.<sup>332</sup>

(2) Gulf War -Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape-recorded tank and truck noises were used, as were inflatable Humvees and helicopters.<sup>333</sup>

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<sup>330</sup> LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, *Nav. War. Coll. Rev.*, Summer 1989, at 60.

<sup>331</sup> FM 27-10, para. 51.

<sup>332</sup> John Keegan, *Second World War* 373-79 (1989).

<sup>333</sup> Rick Atkinson, *Crusade*, 33 1-33 (1993).

c. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:

(1) Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform may lose their PW status if captured and risk being treated as

Spies.<sup>334</sup>

(a) World War 11 -Germany: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from activities during the Battle of Bulge. Otto Skorzeny was brigade commander of the 150th SS Panzer Brigade. Several of his men were captured in US uniforms, their mission being to secure three critical bridges in advance of the German attack. 18 of Skorzeny's men were executed as spies following the battle. Following the war, ten of Skorzeny's officers, as well as Skorzeny himself, were accused of the improper use of enemy uniforms, among other charges. All were acquitted. The evidence did not show that they actually fought in the uniforms, consistent with their instructions. The case generally stands for the proposition that it is only the fighting in the enemy uniform that violates the law of war.<sup>335</sup> For an argument against any use of the

enemy's uniform see Valentine Jobst 111, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?*<sup>336</sup>

(2) Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the U.S. interprets

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<sup>334</sup> FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-3 1, 8-6.

<sup>335</sup> (DA Pam 27- 16 1-2 at 54). For listing of examples of the use of enemy uniforms see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1,77-78 (1 990).

<sup>336</sup> 35 Am. J. Int'l L. 435 (1941).

the "improper use" of a national flag<sup>337</sup> to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat.<sup>338</sup>

(3) Equipment. Must remove all enemy insignia in order to fight with the equipment. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made.<sup>339</sup>

(4) Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items.<sup>340</sup> Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, protect or impede military operations." The U.S. does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on.<sup>341</sup>

2. Treachery perfidy. In contrast to the lawful ruses discussed above, treachery and perfidy are prohibited under the law of war.<sup>342</sup> They involve injuring the enemy by his adherence to the law of war (actions are in bad faith). As noted below, treachery perfidy can be further broken down into feigning and misuse.

a. Condemnation. Condemnation of perfidy is an ancient precept of the

LOW, derived from principle of chivalry. Perfidy degrades the protections and mutual restraints developed in the mutual interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes

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<sup>337</sup> (HR, art. 23(f).)

<sup>338</sup> (FM 27-10, para. 54; NWP 1-14M, para 12.5)

<sup>339</sup> HR, art. 53.

<sup>340</sup> See NPW 1-14M, para 12.5.3.

<sup>341</sup> GP I, art 39(3); NWP 1-14M, para. 12.5.1.

<sup>342</sup> FM 27-10, para. 50; HR. art. 23b.

them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. Practice of perfidy also inhibits restoration of peace.<sup>343</sup>

b. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy.

c. Protocol I. According to GP I, Article 37(1), the killing, wounding, or

capture via "[acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts]." (U.S. considers customary international law.) Article 37(1) does not prohibit perfidy per se; only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at the diplomatic conference.<sup>344</sup> Article 37 also refers only to confidence in international

law (LOW), not moral obligations. The latter viewed as too abstract by

certain delegations.<sup>345</sup> Note, however, that the US view includes breaches of moral, as well as legal obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous.<sup>346</sup>

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<sup>343</sup> Michael Bothe, et. al., *New Rules for Victims of Armed Conflicts*, 202 (1982); FM 27-10, para. 50.

<sup>344</sup> Bothe at 203.

<sup>345</sup> (Id. at 204-05.)

<sup>346</sup> FM 27-10, para 50.

d. Feigning incapacitation by wounds/sickness. GPI, art. 37(l)(b). Whiteman says HR, Article 23b also prohibits this, e.g. faking wounds and then attacking approaching soldier.<sup>347</sup>

e. Feigning surrender or the intent to negotiate under a flag of truce. GP I, Art 37(l)(a). Note that in order to be a violation of GP I, Article 37, the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements.<sup>348</sup> Article 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

(1) Falklands War -British: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and 2 soldiers went forward to accept what they thought was a surrender. They were killed by enemy fire. The incident was disputed. Apparently, one group of Argentines was attempting to surrender, but not another group. The Argentine conduct was arguably treachery if those raising the white flag killed the British soldiers, but it was not treacherous if other Argentines, either unaware of the white flag or not wishing to surrender, killed them. This incident emphasizes the rule that the white flag is an indication of a desire to negotiate only and that its hoister has the burden to come forward.<sup>349</sup>

(2) Desert Storm -Battle of Khafji incident was a perfidious act. Media speculated that Iraqi tanks with turrets pointed to the rear,

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<sup>347</sup> Marjorie M. Whiteman, Dept. of State, 10 Digest of International Law 390 (1968); NWP 1-14M, para. 12.7.

<sup>348</sup> . Morris Greenspan, *The Modern Law of Land Warfare* 320-2 1 (1 959).

<sup>349</sup> See Major Robert D. Higginbotham, *Case Studies in the Law of Land Warfare* 11: The Campaign in the Falklands, *Mil. Rev.*, Oct. 1984, at 49.

then turning forward to fire when action began, was perfidious act. DOD Report to Congress rejected that observation, stating that the reversed

turret is not a recognized symbol of surrender per se. "Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage

Iraqi forces only on a clear indication of hostile intent, or some hostile act."<sup>350</sup>

(3)Desert Storm -On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the

surrender, they took fire from Iraqis hidden in buildings on either side

of street. Id. Similar conduct occurred during Operation Iraqi Freedom

when Iraqis took some actions to indicate surrender and then opened fire on Marines moving forward to accept the surrender.

(4) Desert Storm -On another occasion an Iraqi officer approached Coalition force with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed.

f. Feigning civilian, noncombatant status. "Attacking enemy forces while posing as a civilian puts all civilians at hazard."<sup>351</sup>

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<sup>350</sup> Dept of Defense, Final Report to Congress: Conduct of the Persian Gulf War 621 (1 992).

<sup>351</sup> GP I, art 37(I)(c); NWP 1-14M, para. 12.7.

g. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. GP I, art 37(I)(d).

(1) As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drove up to French position on a Sarajevo bridge in an APC with UN emblems. French forces thought all was normal. The commandos, however, then proceeded to capture French peacekeepers without firing a shot.<sup>352</sup>

(2) It is not perfidy (a violation of Art 37) to misuse the emblem of the UN to try to gain protected status if the UN has member forces in the conflict as combatants (even just as peacekeepers). As in the case of the misuse of the flag of truce, misuse of a UN emblem that does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38 of GPI because that article prohibits the use of the UN emblem without authorization.

h. Misuse of Red Cross, Red Crescent, cultural property symbol.

(1) Designed to reinforce reaffirm HR, Article 23f.

(2) GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. As an example, during the Grenada Invasion, US aircraft took fire from the Richmond Hills Hospital, and consequently engaged it.<sup>353</sup>

(3) Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol.<sup>354</sup>

Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.

B. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is

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<sup>352</sup> Joel Brand, French Units Attack Serbs in Sarajevo, Wash. Post, May 28, 1995, at A1.

<sup>353</sup> DA Pam 27-161-2, p. 53, n. 61.

<sup>354</sup> Bothe at 209.

prohibited.<sup>355</sup> Targeting military leadership, however, is not assassination.<sup>356</sup>

C. Espionage:<sup>357</sup> Acting clandestinely (or on false pretenses) to obtain information for transmission back to friendly side. Gathering intelligence while in uniform is not espionage.

1. Espionage is not a law of war violation.
2. No protection, however, under Geneva Conventions for acts of espionage.
3. Tried under the laws of the capturing nation. E.g., Art. 106, UCMJ.
4. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, past spy cannot be tried for past espionage.

D. Belligerent or wartime reprisals.<sup>358</sup> An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war.

1. Reprisals are authorized if the following requirements are met:
  - a. it's timely;
  - b. it's responsive to enemy's act that violated the law of war;
  - c. it follows an unsatisfied demand to cease and desist; and
  - d. it is proportionate.
2. Prisoners of war and persons "in your control" cannot be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants).<sup>359</sup>

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<sup>355</sup> FM 27-10, para 31; E.O. 12333.

<sup>356</sup> See W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, Army Law. Dec. 1989, at 4.

<sup>357</sup> FM 27-10, para. 75; GP I, art. 46.

<sup>358</sup> FM 27-10, para 497

<sup>359</sup> (GP I, arts. 5 1-56).

The U.S. specifically objects to Article 51(6) as not reflective of customary international law.

3. US policy is that a reprisal may be ordered only at the highest levels

(President).

**Sum up:** War is a form of intentional conflict behaviour between at least two parties using intensive organized physical violence against each other. The character of war is affected both by technology and Political the technological Perspective highlights essential changes in conduct of war Armed conflict is intrastate and so far fought outside the Euro- Atlantic Security Community. Peace operations are not outside the definition of war, if the intervener uses intensive force. Most war actors are small and non-state motivated by a variety of interests. Nevertheless, war is still predominantly a political act to change the distribution of power. Technological development has led to a bifurcation of military capabilities and in the short run a mixed image of war in terms of action strategies. Most developed countries present an image of war with a non-linear battlefield, where fighting occurs between highly mobile integrated forces with capabilities to concentrate accurate firepower at great distances. The dominant image of recent wars, however, it includes mass armies. Their action strategies have often changed only little. In spite of some new technology. Development of information management supports visions of infrastructure warfare, where damage is caused using cumulative effects of relatively minor violence targeted on vulnerable nodes. This may give a softer image of war than is characteristic of traditional conflicts, and future wars may be less total. But they are no less destructive, since the separation of civilians and soldiers becomes more difficult, territorial borders less important and more violent means are still available. Nevertheless, the dominant image of war at the beginning of the 21<sup>st</sup> century seems to remain that of

an armed interstate conflict, with a relatively strong international dimension and some more highly sophisticated technology coming into play.