

THE MEANS AND METHODS OF WARFARE

I. OBJECTIVES

- A. Become familiar with the four key principles of the law of armed conflict.
- B. Understand the major rules regulating use of weapons and tactics in conflict.

II. BACKGROUND

- A. “Means and methods” is the phrase commonly used to refer to law governing the conduct of hostilities—the *jus in bello*. The “justness” of a struggle or how the parties ended up in armed conflict is not addressed. Rather, this area of law deals with how parties conduct the armed conflict once engaged.
- B. In past centuries, ideals of culture, honor, religion, and chivalry helped define battlefield norms. Though these ideals still inform our sense of what conduct is “fair” in combat, four legal principles govern modern targeting decisions: (1) Military Necessity, (2) Distinction, (3) Proportionality, and (4) Unnecessary Suffering/Humanity.
- C. The laws of armed conflict also guide two related choices in combat: (1) the means (the weapons used to fight); and (2) the methods (the tactics) of fighting. JAs must be proficient not only in *what* may legally be targeted, but *how* objectives may be targeted.
- D. This is a complex arena which frequently requires consulting multiple treaties, regulations, commentaries, and case law. Rules of engagement, policy directives, and coalition partner or host nation concerns may further restrict legally permissible acts. Considering the complicated nature of means and methods, there is no substitute for careful research to ensure a thorough grasp of the relevant law and other applicable considerations. Also vital to the targeting process is a judge advocate’s ability to provide well-reasoned advice as to not only the legality of engaging a target, but also the real and practical consequences of engagement (e.g. loss of local population support).

III. PRINCIPLES

- A. Principle of Military Necessity.

1. Definition. “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.” (FM 27-10, para. 3.a.). “This principle limits those measures not forbidden by international law to legitimate military objectives whose engagement offers a definite military advantage.” (JP 3-60, appendix E, para. E.2.b.).
 - a. Elements. Military necessity includes two elements: (1) a military requirement to undertake a certain measure, (2) not forbidden by the laws of war. A commander must articulate a military requirement, select a measure to achieve it, and ensure neither violates the law of armed conflict.
 - b. Sources. The Lieber Code, article 14, first codified military necessity as those measures “indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.” Though many treaties subsequently acknowledged military necessity’s role, the principle arises predominantly from customary international law.¹ The United States follows the definitions cited in FM 27-10 and JP 3-60 above.
 - c. Limits. “Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war . . .” (FM 27-10, para. 3.a.). Specific treaties may, however, provide an exception. The *Hostage Case* at the Nuremberg Tribunal illustrates the difference.²
 - i. General rule. After the Second World War, German General Wilhelm List faced a charge of allowing his soldiers to kill thousands of civilians. He argued in part that the killings were lawful reprisals for casualties inflicted by insurgent uprisings. The Tribunal rejected the German “Kriegsraison” war doctrine that expediency and necessity supersede international law obligations. It held that “the rules of international law must be followed even if it results in the loss of a battle or even a war.” (*Hostage Case* at 1282).
 - ii. Rule-based exception: General Lothar Rendulic faced a charge of ordering extensive destruction of civilian buildings and lands while retreating from an expected attack in a “scorched earth” campaign to

¹ GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 258–59 (2010). Professor Solis observes that major conventions like Hague IV, GC I–IV and AP I and II thereto, and others all acknowledge necessity, but the principle remains undefined by treaty language.

² See “Opinion and Judgment of Military Tribunal V,” United States v. Wilhelm List, X TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230 (Feb. 19, 1948) (Case 7) [hereinafter *Hostage Case*]. The case consolidated charges against twelve German general officers for conduct while in command of armies occupying enemy countries, including the alleged taking of civilian hostages.

deny use to the enemy. He grossly overestimated the danger, but argued that Hague IV authorized such destruction if “imperatively demanded by the necessities of war.”³ The Tribunal acquitted him of this charge, holding that the law’s provisions “are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary.” (*Hostage Case* at 1296).

iii. **Rendulic Rule**. The Rendulic case also stands for a broader proposition regarding a commander’s liability for mistakes in war. The Tribunal observed that Rendulic’s judgment may have been faulty, but was not criminal. “[T]he 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.” (*Hostage Case* at 1297).⁴ The Rendulic Rule is the standard by which commanders are judged today. Plainly stated, the rule stands for the proposition that a commander’s liability is based on the information reasonably available at the time of the commander’s decision.

2. **Military objective**. The goal of military necessity is to identify and pursue lawful military objectives that achieve the conflict’s aims and swift termination. “Only a military target is a lawful object of direct attack. By their nature, location, purpose, or use, military targets are those objects whose total or partial destruction, capture, or neutralization offer a [definite] military advantage.” (JP 3-60, para. E.4.b.). Though this definition closely resembles article 52.2 of AP I, which the United States has not yet ratified, some differences exist.⁵

a. “Nature, location, purpose, or use.” The ICRC Commentary to AP I, at 636–37, defines these terms as follows:

i. “Nature” includes “all objects used directly by the armed forces,” such as weapons, equipment, transports, fortifications, etc.

³ Convention IV Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Law and Customs of War on Land. The Hague, October 18, 1907, art. 23(g). See also U.S. DEPT. OF ARMY, FIELD MANUAL 27-10, THE LAW OF WAR MANUAL, para.56, 58 (Change 1, 1976). FM 27-10, para. 56 and 58; compare GC IV, art. 147.

⁴ Rendulic did not entirely escape judgment. The Tribunal convicted him on other charges and sentenced him to twenty years in prison. See ROBERT H. JACKSON CENTER, NUREMBERG CASE # 7 HOSTAGES, at <http://www.youtube.com/watch?v=RtwOgQEpgCo> (video of Rendulic sentencing, starting at 0:50).

⁵ See also FM 27-10, *supra* note 3, para. 40.c. (incorporating AP I definition, though perhaps prematurely); HEADQUARTERS DEPARTMENT OF THE ARMY FIELD MANUAL 3-60, THE TARGETING PROCESS, para. 1-7 (2010). (listing potential lethal and non-lethal effects of targeting).

- ii. “Location” includes an object or site “which is of special importance for military operations in view of its location,” such as a bridge, a deepwater port, or a piece of high ground.
 - iii. “Purpose” is “concerned with the intended future use of an object,” such as a construction site for a suspected new military facility.
 - iv. “Use,” on the other hand, is “concerned with [the object’s] present function,” such as a school being used as a military headquarters.
- b. “Make an effective contribution to military action.” Under AP I, an object clearly military in nature is not a military objective if it fails to meet the “effective contribution” test—for example, an abandoned, inoperable tank. Though JP 3-60, para. E.4.b. provides more latitude to target potential threats as well as “military adversary capability,” resources should be directed toward highest-priority targets first.
 - c. “Offers a definite military advantage.” The ICRC Commentary to AP I declares illegitimate those attacks offering only potential or indeterminate advantage. The United States takes a broader view of military advantage in JP 3-60, appendix E. This divergence causes debates about attacks on enemy morale, information operations, interconnected systems, and strategic versus tactical-level advantages, to name a few areas.⁶
 - d. Dual use facilities. Some objects may serve both civilian and military purposes, for instance power plants or communications infrastructure. These may potentially be targeted, but require a careful balancing of military advantage gained versus collateral damage caused. Some experts argue that the term “dual use” is misleading in that once a civilian object is converted to military use, it loses its civilian character and is converted to a military objective. However, dual use is still referenced in U.S. doctrine.
- 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 much of the Geneva Tradition of the law of armed conflict. The essence of the principle is that military attacks should be directed at combatants and military targets, and not civilians or civilian property. AP I, art. 48 sets out the rule: “[p]arties 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.”

⁶ This portion of the ICRC Commentary to AP I remain contested. See, e.g., W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 135–49 (1990) (criticizing the ICRC Commentary as “ignorant of the modern target intelligence process,” while noting the psychological utility of U.S. military operations like the 1942 Doolittle raid on Tokyo).

1. AP I, art. 51(4), defines “indiscriminate attacks” as those attacks that:
 - a. Are “not directed against a specific military objective” (e.g., SCUD missiles during Desert Storm);
 - 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” (e.g., 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.”
2. JP 3-60, appendix E, para. 2.e. adds, “[d]efenders are obligated to use their best efforts to segregate noncombatants and to refrain from placing military personnel or materiel in or near civilian objects or locations. Attackers are required to only use those means and methods of attack that are discriminate in effect and can be controlled, as well as take precautions to minimize collateral injury to civilians and protected objects or locations.”
3. People. Only combatants or those directly participating in hostilities may be targeted. Determining who counts as a combatant depends on status or conduct. Non-combatants, including civilians and persons out of combat, may not intentionally be targeted.
 - a. Status-based vs. conduct-based. The United States recognizes these two broad categories of potential belligerents in the Standing Rules of Engagement. The SROE recognize the status-based concept of a declared hostile force. Such groups or individuals may immediately be attacked without any showing of hostility. The SROE also recognize that hostile conduct may also justify attacks on those who commit hostile acts or demonstrate hostile intent, and authorizes several self-defense responses. These concepts are helpful to keep in mind when studying the various categories of persons and their protections under the law.
 - b. Combatants include anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. This can be a status- or conduct-based designation. These persons are lawful targets unless out of combat or hors de combat, e.g., wounded, sick, or taken prisoner.
 - i. Combatants may be referred to as “lawful” or “privileged” if they meet the GC III, article 4 requirements for POW status:

- A. Under responsible command;
 - B. Wear a fixed distinctive sign recognizable at a distance;
 - C. Carry arms openly; and
 - D. Abide by the laws of war.
- ii. The phrase “unprivileged enemy belligerents” (formerly “unlawful combatants”) refers to persons who engage in combat without meeting the criteria above. These may be civilians participating in hostilities or members of an armed force violating the laws of war.
- c. Non-combatants. The law of armed conflict prohibits attacks on non-combatants, to include those sometimes referred to as *hors de combat*, or out of combat.
- i. Civilians.
 - A. 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 any armed force or group, and who do not take a direct part in hostilities (AP I, arts. 50 and 51).
 - B. No indiscriminate attacks. AP I, article 51.4, prohibits attacks not directed at a specific military objective, incapable of being so directed, or whose effects cannot be limited. The U.S. considers the first two restrictions customary international law, but follows a more expansive view of the third, to permit weapons such as cluster munitions and nuclear arms.
 - ii. Hors de Combat. Prohibition against attacking enemy personnel who are “out of combat.” Such persons include:
 - A. Prisoners of War. (GC III, art. 4; Hague IV, art. 23(c), (d))
 - B. Surrender may be made by any means that communicates the intent to give up. No clear rule exists as to what constitutes surrender. However, most agree surrender means ceasing resistance and placing oneself at the captor’s discretion. Captors must respect (not attack) and protect (care for) those who surrender. Reprisals are strictly forbidden.

- C. Wounded and Sick in the Field and at Sea. (GC I, art. 12; GC II, art. 12). Combatants must respect and protect those who have fallen by reason of sickness or wounds and who cease to fight. Civilians are included in the definition of wounded and sick (“who because of trauma, [or] disease . . . are in need of medical assistance and care and who refrain from any act of hostility”). (AP I, art. 8). Shipwrecked members of the armed forces at sea are to be respected and protected. (GC II, art. 12; NWP 1-14M, para. 11.6). Shipwrecked includes downed passengers or crews on aircraft, ships in peril, and castaways.
- D. Parachutists vs. Paratroopers. (FM 27-10, para. 30). Paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists who are crewmen of a disabled/downed aircraft are presumed to be out of combat and may not be targeted unless such crewman are engaged in a hostile mission. Parachutists, according to AP I, art. 42, “shall be given the opportunity to surrender before being made the object of attack” and are clearly treated differently from paratroopers.
- E. Medical Personnel. Considered out of combat if exclusively engaged in medical duties. (GC I, 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” (FM 27-10, para. 225). Medical personnel include: (GC I, art. 24)
1. Doctors, surgeons, nurses, chemists, stretcher-bearers, medics, corpsman, and orderlies, etc., “exclusively engaged” in direct care of the wounded and sick.
 2. Administrative staffs of medical units (drivers, generator operators, cooks, etc.).
 3. Chaplains.
- F. Auxiliary Medical Personnel of the Armed Forces. (GC I, art. 25). To gain the GC I protection, these must have received “special training” and be carrying out their medical duties when they come in contact with the enemy.

- G. Relief Societies. Personnel of National Red Cross societies and other recognized relief societies (GC I, art. 26). Personnel of relief societies of neutral countries (GC I, art. 27).
 - H. Civilian Medical and Religious Personnel. Article 15 of AP 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.
 - I. Personnel Engaged in the Protection of Cultural Property. Article 17 of the 1954 Hague Cultural Property Convention⁷ 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.
 - J. Journalists. Given protection as “civilians,” provided they take no action adversely affecting their status as civilians. (AP I, art. 79; considered customary international law by the U.S.).
- iii. Loss of protection. AP I, article 51.3,⁸ states that civilians enjoy protection “unless and for such time as they take a direct part in hostilities,” commonly referred to as “DPH.” Those who directly participate in hostilities may be attacked in the same manner as identified members of an opposing armed force.
- A. The notion of permitting direct attack on civilians, and the meaning and limits of Article 51(3)’s individual terms remains hotly contested.⁹ The original ICRC Commentary to AP I

⁷ Reprinted in the Documentary Supplement

⁸ AP II, article 13 contains similar language.

⁹ This paragraph is based on the editor’s best understanding of accepted parameters in an ongoing debate both academic and real world. JAs should be aware that the International Committee of the Red Cross has published “interpretive guidance” on what constitutes direct participation in hostilities. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 78 (2009) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0990> [hereinafter ICRC Interpretive Guidance]. The guidance was published after six years of expert meetings; however, many experts, including both U.S. experts assigned to those meetings, withdrew their names from the final product in protest over the process by which Melzer reached the conclusions contained in the study. The United States has not officially responded to the guidance but many of the experts, including Michael Schmitt, Hays Parks, and Brigadier General (Ret.) Kenneth Watkin, have published independent responses to the ICRC’s guidance. See, e.g.,

distinguishes general “participation in the war effort” from DPH: “There should be a clear distinction between direct participation in hostilities and participation in the war effort . . . In modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.”¹⁰ Examples of general “participation in the war effort” that do not constitute direct participation include:

1. Employment in munitions factories;
 2. Participation in rationing/conservation efforts;
 3. Expressions of support for enemy government;
 4. Provision of purely administrative or logistical support to forces not deployed in hostile territory.
- B. Most commentators, including prominent U.S. ones, agree that extremely remote or indirect acts do not constitute DPH (e.g., contractor factory workers distant from the battlefield, general public support for a nation’s war effort). Also, many agree that the mere presence of civilians does not immunize military objectives from direct attack, but rather presents a question of proportionality (not distinction). (e.g., a contractor supply truck driven to the front lines may be attacked, with the civilian driver considered collateral damage).
- C. However, Article 51 recognizes that at a minimum, some acts meet the definition of DPH and justify a response by deadly force (e.g., personally engaging in lethal acts like firing small arms at Soldiers). More difficult cases arise as conduct becomes more indirect to actual hostilities, remote in location, or attenuated in time. For the past decade, the United States has faced determined enemies who are members not of nation state forces, but rather transnational organized armed groups in

Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC’Y J. 5 (2010); and W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT’L L. & POL. 769, 778–80 (2010) (Mr. Parks, a retired Marine Colonel, was one of the two U.S. experts assigned to the study); and Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010).

¹⁰ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 619 (Yves Sandoz et al. eds., 1987).

constantly shifting alliances, sometimes in locations where governments are unable or unwilling to respond. These foes deliberately and illegally use the civilian population and civilian objects to conduct or conceal their attacks as a strategy of war. Further complicating the issue, U.S. and other forces increasingly utilize civilian or contractor support in battlefield or targeting roles, and rely on sophisticated technology and intelligence to plan and conduct attacks.

- D. Thus far, universally agreed-upon definitions of DPH have proven elusive. The International Committee of the Red Cross (ICRC) proposed a narrow reading of DPH requiring a (1) threshold showing or likelihood of harm, (2) a direct causal link between the act in question and that harm, and (3) a belligerent nexus to the conflict as shown by specific intent to help or harm one or more sides. The ICRC also proposed that those individuals engaged in “continuous combat functions” could be attacked at any time, but suggested that combatants should attempt to capture civilians first and use deadly force as a last resort. These proposals and others remain debated by nations, warfighters, and scholars alike, with some allies moving to implement all or part.¹¹
- E. **To date, the United States has not adopted the complex ICRC position, nor its vocabulary.** Instead, the United States relies on a case-by-case approach to both organized armed groups and individuals. U.S. forces use a functional¹² DPH analysis based on the notions of hostile act and hostile intent as defined in the Standing Rules of Engagement, and the criticality of an individual’s contribution to enemy war efforts. After considering factors such as intelligence, threat assessments, the conflict’s maturity, specific function(s) performed and individual acts and intent, appropriate senior

¹¹ See Melzer, ICRC Interpretive Guidance, *supra* note 9, proposed rules IV, V, and IX and related discussion. For a brief discussion of specific examples by the ICRC, see ICRC, Direct Participation in Hostilities: Questions and Answers, Feb. 6, 2009, at <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>. These examples may prove helpful in facilitating discussion with foreign counterparts regarding their position on the ICRC Interpretive Guidance, but should *not* be read as representative of the U.S. position on DPH.

¹² See generally Parks, *supra* note 9; Schmitt, *supra* note 9. See also Col W. Hays Parks, USMC (Ret), *Memo. of Law, Executive Order 12333 and Assassination*, 2 November 1989, ARMY LAW., Dec. 1989, at 5–6 (arguing that attacks on military objective with civilians present, or civilians participating in efforts vital to the enemy war effort, do not constitute prohibited attacks *per se*); Col W. Hays Parks, USMC (Ret), *Memorandum of Law, Law of War Status of Civilians Accompanying Military Forces in the Field*, 6 May 1999 (unpublished and on file with TJAGLCS International and Operational Law Dep’t, pp. 2-4) (advising that, for example, civilians entering a theater of operations in support or operation of sensitive or high value equipment such as a weapon system, may be at risk of intentional attack because of the importance of their duties).

authorities may designate groups or individuals as hostile. Those designated as hostile become status-based targets, subject to attack or capture at any time if operating on active battlefields or in areas where authorities consent or are unwilling or unable to capture or control them.¹³ These designations and processes normally remain classified due to the sensitive nature of intelligence sources and technology, the need for operational security in military planning, and classic principles of war such as retaining the element of surprise. JAs should gather the facts and closely consult all available guidance, particularly the Rules of Engagement and theater-specific directives or references, as well as host nation laws and sensitivities.

4. Places.

- a. Defended Places. (FM 27-10, paras. 39 and 40). As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:
 - i. A fortress or fortified place;
 - ii. A place occupied by a combatant force or through which a force is passing; and
 - iii. A city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions. AP I, art. 51.5(a), further prohibits bombardments that treat “as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village.”
 - iv. Other legitimate military objectives which are not “defended” are also subject to attack. (FM 27-10, para. 40(c)).
- b. 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:

¹³ See, e.g., U.S. Dep’t of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law, Mar. 5, 2012, *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (“[T]here are instances where [the U.S.] government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force. . . . [I]t is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces.”). See also Chapter 5 *infra* on Rules of Engagement.

- i. All combatants and mobile military equipment are removed;
 - ii. No hostile use made of fixed military installations or establishments;
 - iii. No acts of hostility shall be committed by the authorities or by the population; and
 - iv. 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). (FM 27-10, para. 39b).
- c. Natural environment. “It is generally lawful under the LOAC to cause collateral damage to the environment during an attack on a legitimate military target. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practical to do so consistent with mission accomplishment”

[M]ethods and means of attack should be employed with due regard to the protection and preservation of the natural environment. Destruction . . . not required by military necessity and carried out wantonly is prohibited.” JP 3-60, appendix E, para. 8.b.

- i. U.S. policy establishes clear guidelines and requires a mandatory OPLAN annex to protect the environment in certain conditions during overseas operations.¹⁴
 - ii. AP I, article 55 further states that the environment cannot be the object of reprisals, and that care must be taken to prevent long-term, widespread, and severe damage. The United States objects to this article as overbroad (for example, it might categorically rule out napalm or nuclear strikes), and does not consider it to be customary international law.
- d. Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. (GC I, art. 23 & annex I; GC IV, art. 14). 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 are designated under the convention as “specially protected.” The U.S. has ratified this treaty.

¹⁴ See Executive Order 12114, implemented by DoD Directive 6050.7, and Chapter 21 in the Operational Law Handbook, for greater detail.

e. Protected Property

- i. Civilian Objects. It is prohibited to intentionally attack civilian property. (FM 27-10, para. 246; AP I, art. 51(2)). A presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, schools, etc.). (AP I, art. 52(3)).
- ii. Medical Units and Establishments. (FM 27-10, paras. 257 and 258; GC I, art. 19)
 - A. Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked.
 - B. Protection shall not cease, unless they are used to commit “acts harmful to the enemy.”
 - C. **There is a warning requirement before attacking a hospital that is committing “acts harmful to the enemy.”**
 1. Reasonable time must be given to comply with the warning before attack.
 2. **However, if a unit is actively 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.
 - D. Medical Transport. Ground transports of the wounded and sick or of medical equipment shall not be attacked if performing a medical function. (GC I, art. 35). Under GC I, 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. AP 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. (AP 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.” (AP I, art. 26; considered customary international law by U.S.). Medical aircraft in areas controlled by an adverse party must have a prior agreement in order to gain protection.

(AP I, art. 27). For further discussion, see the chapter on GC I, earlier in this Deskbook.

- f. Cultural Property. There is a longstanding prohibition against attacking cultural property. (HR, art. 27; FM 27-10, para. 45, 57; *see* AP I, art. 53, for similar prohibitions). The 1954 Cultural Property Convention elaborates, but does not expand, the protections accorded cultural property found in these other treaties.¹⁵ Misuse by the enemy will subject them to attack however. The enemy has a duty to indicate the presence of such buildings with visible and distinctive signs.

- g. Works and Installations Containing Dangerous Forces. (AP I, art. 56, and AP II, art. 15). Under the Protocols, dams, dikes, and nuclear electrical generating stations shall not be attacked—even if military objectives—if the attack will cause release of dangerous forces and “severe losses” among the civilian population. The United States objects to this language as creating a different standard than customary proportionality test of “excessive” incidental injury or damage. JP 3-60, appendix E, para. 8.a. requires careful consideration of damage when attacking such targets.
 - i. Military objectives 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 placing military objectives near such locations.
 - ii. AP I states that a military force may attack works and installations containing dangerous forces only if they provide “significant and direct support” to military operations and the attack is the only feasible way to terminate the support. The United States objects to this provision as creating a heightened standard for attack that differs from the historical definition of a military objective.
 - iii. 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.

¹⁵ Article 1 of the 1954 Convention defines cultural property as “movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art, or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; . . . buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined [above] such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property . . . [and] centers containing a large amount of cultural property”

- h. Objects Indispensable to the Survival of the Civilian Population. AP I, article 54, prohibits starvation as a method of warfare. 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.
 - 5. Protective Emblems. (FM 27-10, para. 238). Objects and personnel displaying emblems are presumed to be protected under the Conventions. (GC I, art. 38)
 - a. Medical and Religious Emblems.
 - i. Red Cross.
 - ii. Red Crescent.
 - iii. Red Crystal (*see* Additional Protocol III to the Geneva Conventions).
 - b. Cultural Property Emblems
 - i. “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.” (1954 Cultural Property Convention, arts. 16 and 17).
 - ii. 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.”
 - c. 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. (AP I, annex I, art. 16.)
- D. Principle of Proportionality. The test to determine if an attack is proportional is found in AP I, art. 51(5)(b): “[a]n 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. (*See also* JP 3-60, appendix E, para. E.2.d.; FM 3-60, para. 2-88). If the target is purely military with no known civilian personnel or property in jeopardy, no proportionality analysis need be conducted. That is a rare circumstance, though.

1. Incidental loss of life or injury and collateral damage. The law recognizes that unavoidable civilian death, injury, and property destruction - **known collectively as collateral damage** - may occur during military operations. Such losses are always regretted. Commanders must consider such losses both before and during attack, and “weigh the anticipated loss of civilian life and damage to civilian property reasonably expected to result from military operations [against] the advantages expected to be gained.” JP 3-60, appendix E, para. E.2.d. The question is whether such death, injury, and destruction are **excessive** in relation to military advantage linked to the full context of strategy, not simply to the isolated targeting decision. In other words, the prohibition is on the death, injury, and destruction being excessive; not on the attack causing such results.¹⁶ Rules of engagement may require elevating the decision to attack if collateral damage is anticipated to exceed thresholds established by higher-level commanders.

2. Taking Precautions. AP I, art. 57.2 requires commanders to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects[,]” “take all feasible precautions” to avoid or minimize incidental loss or damage, and choose (where possible) objectives “expected to “cause the least danger to civilian lives and civilian objects.” Some have argued this language imposes higher burdens on those parties capable of taking greater precautions, for example, claiming that a party with precision-guided munitions must always use them. The United States disputes any such unequal burden under LOAC, and prefers the term “all practicable precautions” and a reasonableness standard for evaluating command decisions.¹⁷

3. Judging Commanders. AP I, art. 85 states that it is a grave breach of Protocol I to launch an attack that a commander *knows* will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act *reasonably*.
 - a. In judging a commander’s actions one must look at the situation as the commander saw it in light of all known circumstances.¹⁸ This standard has both objective (what would a reasonable commander do?) and subjective (what circumstances affected this commander’s judgment?) components.

¹⁶ This strategic-level perspective is not without controversy. The ICRC Commentary to AP I advocates a far narrower, more tactical view of military advantage.

¹⁷ See *Additional Protocol I as an Expression of Customary International Law*, summarizing the remarks of Michael J. Matheson, a former Department of State Legal Advisor, in the Documentary Supplement. See also FM 27-10, para. 41 (“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 may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated”).

¹⁸ See *id.* at 66; see also discussion of the “Rendulic Rule,” *supra* note 4, and accompanying text.

- b. When conducting this inquiry, two questions seem relevant: First, 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? Factors such as time, available staff, and combat conditions also bear on the analysis.
 - c. Example: Al Firdos Bunker, Baghdad, Iraq, 1991. During Operation DESERT STORM, planners identified this bunker as a military objective. Barbed wire surrounded the complex, camouflage concealed its location, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, high-ranking Iraqi leaders used the shelter as nighttime sleeping quarters for their families, believing it to be impervious to conventional US attack. The complex was attacked with the latest bunker-busting munitions, destroying it and resulting in over 300 civilian deaths. Was there a LOAC violation? No. Based on information gathered by 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 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.¹⁹
4. “The key factor in determining if a target is a lawful military object is whether the desired effect to be rendered on the target offers a definite military advantage in the prevailing circumstances without excessive collateral damage. In all cases, consult the Staff Judge Advocate.” (JP 3-60, appendix E, para. E.4.b.(3))
- E. Principle of Unnecessary Suffering or Humanity. Sometimes referred to as the principle of superfluous injury or humanity, this principle requires military forces to avoid inflicting gratuitous violence on the enemy. It arose originally from humanitarian concerns over the sufferings of wounded soldiers, and was codified as a weapons limitation: “It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering.” HR, art. 23(e). More broadly, this principle also encompasses the humanitarian spirit behind the Geneva Conventions to limit the effects of war on the civilian population and property, and serves as a counterbalance to the principle of military necessity.

¹⁹ See DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-616 (1992).

1. Today, this principle underlies three requirements to ensure the legality of weapons and ammunitions themselves, as well as the methods by which such weapons and ammunition are employed. Military personnel may not use arms that *civilized societies recognize as per se causing* unnecessary suffering (e.g., projectiles filled with glass, hollow point or soft-point small caliber ammunition, lances with barbed heads), must scrupulously observe *treaty or customary limitations* on weapons use (e.g., CCW Protocol III's prohibition on use of certain incendiary munitions near concentrations of civilians), and must not *improperly use* otherwise lawful weapons in a manner *calculated to cause* unnecessary suffering (i.e., with deliberate intent to inflict superfluous or gratuitous injury to the enemy).
2. The prohibition of unnecessary suffering constitutes acknowledgement that necessary suffering to combatants is lawful in armed conflict, and may include severe injury or loss of life justified by military necessity. **There is no agreed upon definition for unnecessary suffering.** A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect, and the injury caused thereby is considered by governments as disproportionate to the military necessity for that effect, that is, the military advantage to be gained from use. This balancing test cannot be conducted in isolation. A weapon's or munition's effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield.
3. A weapon cannot be declared unlawful merely because it may cause severe suffering or injury. The appropriate determination is whether a weapon's or munition's employment for its normal or expected use would be prohibited under some or all circumstances. The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to the military advantage realized as a result of the weapon's use. A State is not required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon can be used in ways that might be prohibited.
4. In practice, DoD service TJAGs oversee legal reviews of weapons during the procurement process. JAs should read these legal reviews prior to deployment for all weapons in their unit's inventory, watch for unauthorized modifications or deliberate misuse, and coordinate with higher headquarters legal counsel if it appears that a weapon's normal use or effect appears to violate this principle. See also the discussion of the DoD Weapons Review Program below.

IV. WEAPONS

- A. Two major precepts govern the regulation of weapons use in conflict. The first is the law of armed conflict 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 armed conflict.²⁰ Reviews occur as early as possible before the award of the engineering and manufacturing development contract and again before award of the initial production contract. Legal review of new weapons is also required under AP I, art. 36.
1. U.S. Policy. “The acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements . . . , customary international law, and the law of armed conflict” (DoD Directive 5000.01, ¶ E1.1.15). In a “TJAG review,” the discussion will often focus on whether employment of the weapon or munition for its normal or expected use would inevitably 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. As discussed above, weapons may be found 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 (FM 27-10, ¶ 34).
 - b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: using a flamethrower against enemy troops in trench after dousing the trench with gasoline. **The intent here is to inflict unnecessary pain and injury on the enemy troops - assuming other weapons would have sufficed.**
 - c. By agreement or specific treaty prohibition. Example: certain land mines, booby traps, and non-detectable fragments are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.
- C. Consideration of Specific Weapons. As noted above, HR 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

²⁰ DoD Directives 3000.3, ¶ 5.6.2 and 5000.01, ¶ E1.1.15; AR 27-53, AFI 51-402, and SECNAVINST 5000.2D ¶ 2.6.

calculated to cause unnecessary suffering.” (HR art. 23(e)). The following weapons and munitions are considered under this general principle.

1. Small Arms Projectiles. Must not be exploding or expanding projectiles. The 1868 Declaration of St. Petersburg prohibits exploding rounds of less than 400 grams (14 ounces). The 1899 Hague Declaration prohibits expanding rounds. The U.S. adheres to this Declaration consistent with HR article 23(e). Current state practice is to use jacketed small arms ammunition, thereby reducing bullet expansion on impact.
 - a. Hollow point ammunition. Typically, this is semi-jacketed ammunition designed to expand dramatically upon impact. Customary international law and the treaties mentioned above prohibit use of this ammunition in armed conflict against combatants. However, under U.S. policy, use of this ammunition may be lawful in limited situations to significantly reduce collateral damage to noncombatants and protected property, e.g., during a hostage rescue, aircraft security mission, or urban combat to minimize penetration of walls or risk to bystanders.
 - b. Frangible ammunition. Ammunition designed to break apart upon impact, thereby reducing ricochet. These rounds are also known to produce wounds similar to those suffered by victims of hollow-point ammunition, possibly violating the principle of unnecessary suffering. Like hollow point ammunition, use of this ammunition under U.S. policy may be lawful in limited situations to significantly reduce collateral damage to noncombatants and protected property.
 - c. High Velocity Small Caliber Arms
 - i. M-16 rifle ammunition. Early critics claimed these rounds caused unnecessary suffering. Legal review found they cause suffering, but it is not deemed to be unnecessary.
 - ii. “Matchking” ammunition. These rounds have a hollow tip, but do not expand on impact. The tip is designed to enhance accuracy only, and does not cause unnecessary suffering.
 - d. Sniper rifles, .50 caliber machine guns, and shotguns. Much mythology exists about the lawfulness of these weapons. They are all considered lawful weapons, although rules of engagement (policy and tactics) may limit their use.
2. Fragmentation Weapons. (FM 27-10, para. 34)

- a. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).
 - b. Unlawful if primary effect is to injure by fragments which in the human body are undetectable by X-ray (Protocol I, CCW, discussed below²¹).
- D. Recent Restrictions. The following weapons and munitions are regulated not only by the principle prohibiting unnecessary suffering, but also by specific treaty law, and in some cases domestic policy. Many of these restrictions followed as Protocols to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW), which provided a framework for human rights-like restrictions on means and methods of warfare.
- 1. Landmines. **U.S. policy before September 2014 was that non-persistent or “smart” antipersonnel landmines (APL) were lawful if properly used, but regulated by a number of different treaties. However, in a September 2014 press release, President Barack Obama directed DoD to cease use and storage of all APLs outside the Korean peninsula, regardless of whether they were persistent or non-persistent. He also directed that the U.S. cease the production of all APLs.**²² Also, keep in mind that while the U.S. has not signed all the applicable treaties, many of our allies are signatories. It is important to understand what limitations our coalition partners may be facing and the impact those limitations may have on U.S. operations.
 - a. The primary legal concern with landmines is that they may violate the law of armed conflict 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* (not policy) restrictions on landmines, three questions must be answered:
 - i. What type of mine is it: anti-personnel, anti-tank, or anti-tank with anti-handling device?
 - ii. How is the mine delivered: remotely or non-remotely?

²¹ Reprinted in the Documentary Supplement.

²² Press Statement from Ms. Jen Psaki, State Department Spokesperson, U.S. Landmine Policy (Sept. 23, 2014). Critics have argued that this new policy is a “backdoor” accession to the Ottawa Convention. Due to the finite service life of landmines, and the cessation of new production and maintenance to extend service life, the mere passage of time will effectively strip all anti-personnel landmines from the US arsenal, even in the Korean peninsula.

- iii. Does it ever become inactive or self-destruct? Is it “smart” or “dumb?” (“Smart” mines are those that are self-destructing, self-neutralizing, or self-deactivating. “Dumb” landmines are persistent, and a threat until they are triggered or lifted. NOTE: Any APLs in the current US inventory, now exclusively for use in Korea, are all “smart” - designed to deactivate if not triggered for a certain period of time. This time period is selectable, from a few days to a few weeks. Persistent mines exist on the Korean peninsula, but are owned and emplaced by North and South Korea.
- c. The primary treaty that restricts U.S. use of mines is Amended Protocol II to the CCW.²³ The U.S. ratified the Amended Protocol on May 24, 1999. Amended Protocol II:
- i. Expands the scope of the original Protocol to include internal armed conflicts;
 - ii. Requires that all remotely delivered anti-personnel landmines be “smart” – or equipped with an effective mechanism for self-destruction after the passage of a certain period of time ;
 - iii. Requires that all “dumb” (do not automatically deactivate) anti-personnel landmines be used within controlled, marked, and monitored minefields; accordingly, they may not be remotely delivered;
 - iv. Requires that all anti-personnel landmines be detectable using available technology (i.e., that they contain a certain amount of iron so as to be detectable using normal mine sweeping equipment);
 - v. Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use; and
 - vi. Provides for means to enforce compliance.
 - vii. Clarifies the use of the M-18 Claymore “mine” when used in the tripwire mode (art. 5(6)). (Note: When used in command-detonated mode, the Protocol does not apply, as the issue of distinction is addressed by the “triggerman” monitoring the area). Claymores may be used in the tripwire mode, without invoking the “dumb” mine restrictions of Amended Protocol II, if:

²³ Reprinted in the Documentary Supplement.

- A. They are not left out longer than 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 II, the United States under President George H.W. Bush, released a revised policy statement on landmines in February 27, 2004. Under this policy:
- i. The United States had committed to end the *use* of all *persistent* (dumb) landmines of any type from its arsenal by the end of 2010.
 - ii. After 2010, the US would still stock non-persistent anti-personnel landmines in the Republic of Korea only. These mines are for possible future use by the United States in fulfillment of our treaty obligations.
- e. **Finally, in September 2014, President Barack Obama directed a new policy on landmines to DoD.**
- i. The United States will no longer stockpile or use ANY APLs (persistent or non-persistent) outside the Korean Peninsula.
 - ii. The United States will no longer produce ANY APLs (persistent or non-persistent) (excluding Claymore mines) and will not replace extend the service life of any APLs currently in service, *including* those inside the Korean peninsula. Thus, when the current stockpile of APLs inside Korea reaches the end of their service life, they will not be replaced. Note: Both North Korea and South Korea possess and have emplaced their own persistent APLs along the DMZ.
- f. 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.²⁴ This treaty is commonly referred to as the Ottawa Treaty and entered into force on March 1, 1999. As of this writing, 161 States have ratified the Convention including Canada and the United Kingdom. The U.S. was active in negotiations, but withdrew in September of 1997 when other countries

²⁴ Reprinted in the Documentary Supplement.

would not allow exceptions for the use of anti-personnel landmines in Korea and other uses of “smart” anti-personnel landmines. The Ottawa Treaty bans ALL anti-personnel landmines, whether they are “smart” or “dumb.” Nations who have signed this treaty can only maintain a small supply for training purposes. **Note:** Ottawa only bans anti-personnel landmines; therefore, Ottawa does not restrict our allies in regards to anti-tank or anti-tank with anti-handling device mines. In addition, Ottawa does not ban Claymore mines as they have a human operator.

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.
 - a. Amended Protocol II of the 1980 Conventional Weapons Convention contains specific guidelines on the use of booby-traps in article 7, prohibiting booby-traps and other devices which are in any way attached or associated with:
 - i. Internationally recognized protective emblems, signs or signals;
 - ii. Sick, wounded, or dead persons;
 - iii. Burial or cremation sites or graves;
 - iv. Medical facilities, medical equipment, medical supplies or transportation;
 - v. Children’s toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing, or education of children;
 - vi. Food or drink;
 - vii. Kitchen utensils or appliances, except in military establishments;
 - viii. Objects clearly of a religious nature;
 - ix. Historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples; or
 - x. Animals or their carcasses.
 - b. 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 1(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 recognizing 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. Incendiaries. (FM 27-10, para. 36). Examples: napalm or flame-throwers. **These are not illegal *per se* or illegal by treaty, though treaties do restrict their use in civilian areas.** 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 Flame-throwers. Designed for use against armored vehicles, bunkers, and built-up emplacements.
 - b. Air-delivered Incendiary Weapons. Protocol III of the 1980 Convention on Certain Conventional Weapons²⁵ prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians.
 - i. The U.S. ratified the Protocol in January 2009, 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 civilian casualties. Conventional explosives would probably disperse the chemicals, while incendiary munitions would burn up the chemicals.
 - ii. Tracers, white phosphorous, and other illuminants, as well as explosive munitions that combine incendiary and other effects such as “thermobaric”/fuel-air munitions, are not considered incendiaries. (Art 1(1)). However, JAs should ensure they are properly used, particularly if near concentrations of civilians.
4. Cluster Bombs or Combined Effects Munitions (CM). These are highly effective against a variety of targets, such as air defense radars, armor, artillery, and large enemy personnel concentrations. Since the bomblets or submunitions

²⁵ Reprinted in the Documentary Supplement.

dispense over a relatively large area and a small percentage typically fail to detonate, this may create an unexploded ordnance (UXO) hazard. CMs are not mines, are acceptable under the laws of armed conflict, and are not timed to go off as anti-personnel devices. However, disturbing or disassembling submunitions may cause them to explode and result in civilian casualties.²⁶ Protocol V on Explosive Remnants of War to the 1980 Convention on Certain Conventional Weapons addresses some aspects of the use of cluster bombs. Protocol V requires Parties to clear areas under its control of unexploded ordnance insofar as is feasible. The U.S. ratified Protocol V in January 2009.

- a. Another NGO-initiated treaty, the 2008 Convention on Cluster Munitions (CCM), prohibits development, production, stockpiling, retention or transfer of cluster munitions between signatory States. Also known as the Oslo Process, this recent treaty binds many U.S. allies, but most nations that manufacture or use CMs (US, Russia, China, India, Israel) still reject it. **The United States is not a party** as it continues to use CMs for certain targets as described above, but lobbied to preserve interoperability for non-signatory states to use and stockpile CM even during multinational operations.
 - b. In 2008, the Secretary of Defense signed a DoD Cluster Munitions Policy mandating by 2018 a reduction of obsolete CM stocks, improvement of CM UXO standards to 1%, and replacement of existing stocks.²⁷ From 2008-2011, the United States also sponsored an unsuccessful effort to add a new CCW Protocol regulating—but not banning—cluster munitions.²⁸ Current U.S. practice is to mark coordinates and munitions expended for all uses of cluster munitions, and to engage in early and aggressive EOD clearing efforts as soon as practicable.²⁹
5. Lasers. U.S. 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. The policy recognizes that collateral or incidental damage may occur as the result of

²⁶ See U.S. DOD REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER ACTION REPORT (JANUARY 31, 2000). See also Maj. Thomas Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F.L. REV. 229 (2001).

²⁷ See ROBERT M. GATES, MEMORANDUM FOR SECRETARIES OF THE MILITARY DEP'TS ET. AL., SUBJECT: DOD POLICY ON CLUSTER MUNITIONS AND UNINTENDED HARM TO CIVILIANS, June 19, 2008.

²⁸ See U.S. Dep't of State, Statement of the [US] on the Outcome of the Fourth Review Conference of the CCW, Nov. 25, 2011, at <http://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-protocol-on-cluster-munitions/>.

²⁹ See Kosovo/Operation Allied Force After Action Report, *supra* note 26. See also Thomas Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F.L. REV. 229 (2001).

legitimate military use of lasers (range finding, targeting, or lasers designed to destroy military targets). This policy mirrors that found in Protocol IV of the CCW.³⁰ The U.S. ratified Protocol IV in January 2009.

6. Chemical Weapons. Poison has long been outlawed in battle as being a treacherous means of warfare. Chemical weapons, more specifically, have been regulated since the early 1900's by several treaties:
 - a. The 1925 Geneva Gas Protocol. (FM 27-10, para 38). Applies to all international armed conflicts.
 - i. Prohibits the use of lethal, incapacitating, and biological agents. The protocol prohibits the use of “asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . .”
 - ii. The U.S. considers the 1925 Geneva Gas Protocol as applying to **both** lethal and incapacitating chemical agents.
 - A. Incapacitating agents are those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. The U.S. views Riot Control Agents (RCA) as having a “transient” effect, and NOT incapacitating agents. Therefore, the U.S. position is that the treaty does not prohibit the use of RCA in war, and it published an Understanding to this effect upon ratifying the treaty. (Other nations disagree with this interpretation). See further discussion below on RCA.
 - iii. Under the Geneva Gas Protocol, the U.S. reserved the right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b). The reservation did not cover the right to use bacteriological methods of warfare in second use. Presidential approval was required for use. (Executive Order 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c.) However, the Chemical Weapons Convention (CWC), which the U.S. ratified in 1997, does not allow this “second” use.
 - b. 1993 Chemical Weapons Convention (CWC).³¹ This treaty was ratified by the U.S. and came into force in April 1997. Key articles are:

³⁰ Reprinted in the Documentary Supplement.

³¹ Reprinted in the Documentary Supplement.

- i. Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) is not allowed, a significant departure from the Geneva Gas Protocol. It requires the destruction of chemical stockpiles. Each party agrees not to use RCAs as a “method of warfare.”
 - ii. Article II includes definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.
 - iii. Article III requires parties to declare stocks of chemical weapons and facilities they possess.
 - iv. Articles IV and V include procedures for destruction and verification, including routine on-site inspections.
 - v. Article VIII establishes the Organization for the Prohibition of Chemical Weapons (OPWC).
 - vi. Article IX establishes “challenge inspection;” a short notice inspection in response to another party’s allegation of non-compliance.
7. Riot Control Agents (RCA). The use of RCA 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 11850. If not, then use of RCA is governed by CJCSI 3110.07C, and, more tangentially, by the Senate’s resolution of advice and consent to the CWC.
- a. **War. For the specific purposes of determining legality of RCA use, “war” is defined as an international armed conflict to which the United States is a party.**
 - i. 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.
 - ii. Executive Order 11850. Guidance also exists in E.O. 11850. Note that E.O. 11850 came into force nearly twenty years before the

CWC. E.O. 11850 applies to use of RCA and herbicides in “war.” 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 POWs, etc.; and
 - D. For police actions in our rear areas.
- iii. What is the rationale for prohibiting use of RCA on the battlefield? First, to avoid giving States the opportunity for subterfuge by keeping all chemical equipment off the battlefield, even if supposedly only for use with RCA. Second, to avoid an appearance problem, in the event that combatants confuse RCA equipment as equipment intended for chemical warfare. E.O. 11850 is still in effect and RCA can be used in certain defensive modes with Presidential authority. However, any use in which “combatants” may be involved will most likely not be approved.
- b. Operations other than “war.” In a situation less than a Common Article 2 conflict to which the U.S. is a party, the CWC and E.O. 11850 restrictions on RCA do **not** apply. Rather, CJCSI 3110.07C applies. The authorization for RCA use may be at a lower level than the President. CJCSI 3110.07C 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:
- i. The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict.
 - ii. Consensual peacekeeping operations when the use of force is authorized by the receiving State, including operations pursuant to Chapter VI of the UN charter.
 - iii. Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN charter.

- iv. 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 Apr. 24, 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, 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 the President not modify E.O. 11850. (*see* S. Exec Res. 75, section 2 (26)(b), s3378)
 - B. The President’s certification document of Apr. 25, 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.”
 - v. 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, Enduring Freedom, Desert Storm, and Panama) it is unlikely that the President would approve the use of RCA in situations where “combatants” are involved due to the CWC’s prohibition on the use of RCA as a “method of warfare.”
8. Herbicides. E.O. 11850 renounces first use in armed conflicts of herbicides (e.g., Agent Orange in Vietnam), except for domestic uses and to control vegetation around defensive areas.
 9. Biological Weapons. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention³² supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. The U.S. renounced all use of biological and toxin weapons.
 10. Nuclear Weapons. (FM 27-10, para. 35). Not prohibited by international law. In 1996, the International Court of Justice (ICJ) issued an advisory opinion³³

³² Reprinted in the Documentary Supplement.

³³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), *available at* <http://www.icj-cij.org/docket/files/95/7495.pdf>.

that “[t]here is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons.” However, by a split vote, the ICJ also found that “[t]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.” The ICJ stated 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.

V. TACTICS

A. “Tricking” the enemy

1. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of armed conflict—actions that 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.
 - i. World War I: Germany often fitted 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.³⁴
 - ii. World War II: The British Q-ship program 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 would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage. The British sank twelve U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks.³⁵
- b. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, or using a small force to simulate a large unit. (FM 27-10, para. 51.)

³⁴ See C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 454-55 (1962).

³⁵ See LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, NAV. WAR. COLL. REV., Summer 1989, at 60.

- i. World War II: During Allied Operation FORTITUDE prior to the D-Day landings in 1944, the Allies transmitted false radio messages and references in bona fide format, and created a fictitious First U.S. Army Group, supposedly commanded by General Patton, in Kent, England across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be at Kent, instead of Normandy. The ruse was successful.³⁶
- ii. Gulf War: 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. Smoke generators and loudspeakers playing tape-recorded tank and truck noises, and inflatable Humvees and helicopters, furthered the ruse.³⁷
- c. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:
 - i. Uniforms. Under US policy, Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform could lose their POW status if captured behind enemy lines and risk being treated as spies (FM 27-10, paras. 54 and 74; NWP 1-14M, para. 12.5.3; AFP 110-31, para. 8-6). In contrast, most European states follow Art. 39 of AP I, which prohibits the use of enemy uniforms and insignia in virtually all cases.
 - A. World War II: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from the use of the “Greif” Waffen SS Commandos during the Battle of the Bulge. Otto Skorzeny commanded the 150th SS Panzer Brigade. Several of his men were captured in U.S. uniforms, their mission being to secure three critical bridges in advance of the German attack. Eighteen of his men were executed as spies immediately following the battle after courts-martial and military tribunal. After the war, Skorzeny was tried for improper use of enemy uniforms, among other charges. He was acquitted. The evidence did not show they actually fought in the uniforms, consistent with their instructions. In addition,

³⁶ See JOHN KEEGAN, *THE SECOND WORLD WAR* 373-79 (1989).

³⁷ See RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR* 331-33 (1993).

he provided evidence that Allied forces used the same tactics. This case *may* suggest that fighting in the enemy uniform is required to violate the law of armed conflict.³⁸

- ii. Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the U.S. interprets the “improper use” of a national flag (HR, art. 23(f)) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para. 12.5).
 - iii. Equipment. Military forces 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. (HR, art. 53)
 - iv. Effect of Protocol I. AP I, art. 39(2), prohibits virtually all use of these enemy items. (*see* NWP 1-14M, para 12.5.3). 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 United States does not consider this article reflective of customary international law. The 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. Similarly, official U.S. Navy policy allows deceptive lighting, as long as units are not actively engaged in combat while using deceptive lighting.** (AP I, art 39(3); NWP 1-14M, para. 12.5.1)
2. Treachery/Perfidy. In contrast to the lawful ruses discussed above, treachery and perfidy are prohibited under the law of armed conflict. (FM 27-10, para. 50; HR, art. 23(b)). These involve injuring the enemy while relying on his adherence to the law of armed conflict (i.e., actions in bad faith). As noted below, treachery/perfidy can be further broken down into feigning and misuse.
 - a. History. Condemnation of perfidy is an ancient precept of the law of armed conflict, derived from the principle of chivalry. Perfidy degrades the protections and mutual restraints developed in the shared interest of all

³⁸ See DEPARTMENT OF THE ARMY PAMPHLET 27-161-2 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 (1990). *Also see* W. Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 2 (2003) For an argument against any use of the enemy’s uniform, *see* Valentine Jobst III, *Is the Wearing of the Enemy’s Uniform a Violation of the Laws of War?*, 35 AM. J. INT’L L. 435 (1941).

parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the law of armed conflict to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. The practice of perfidy also inhibits the restoration of peace.³⁹

- b. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery resulting in killing, wounding, or capturing the enemy. Misuse is an act of treachery resulting in *some other* advantage to the enemy.
- c. Effect of Protocol I. According to AP I, art. 37(1), the **killing, wounding, or capture** via “[a]cts 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].” This prohibition is considered customary international law by the United States. Article 37(1) does not prohibit perfidy *per se* (although it comes very close); rather, only certain perfidious acts that result in killing, wounding, or capturing. The ICRC could not gain support for an absolute ban on perfidy at the diplomatic conference.⁴⁰ Article 37 also refers only to confidence in international law (LOW), not moral, obligations. The latter was viewed as too abstract by certain delegations.⁴¹ The U.S. view includes breaches of moral and legal obligation as being violations, citing the broadcast of a false announcement to the enemy that an armistice had been agreed upon as being treacherous. (FM 27-10, para. 50)
- d. Feigning incapacitation by wounds/sickness. (AP I, art. 37(1)(b)). The U.S. position is that HR, art. 23(b), also prohibits such acts, e.g., faking wounds and then attacking an approaching soldier.⁴²
- e. Feigning surrender or the intent to negotiate under a flag of truce. (AP I, art. 37(1)(a)). Note that in order to be a violation of AP I, art. 37, the feigning of surrender or 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 AP I, art. 38, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of

³⁹ See MICHAEL BOTHE, ET. AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 202 (1982); FM 27-10, para. 50.

⁴⁰ Bothe, *supra* note 39, at 203.

⁴¹ *Id.* at 204-05.

⁴² See Marjorie M. Whiteman, Dep’t of State, 10 *Digest of International Law* 390 (1968); NWP 1-14M, para. 12.7.

truce to gain time for retreats or reinforcements.⁴³ AP I, art. 38, is analogous to HR, art. 23(f), prohibiting the improper use of a flag of truce.

- i. 1982 Falklands War: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and two soldiers advanced to accept what they thought was a proffered surrender. They were killed by enemy fire in a disputed incident. Apparently, one group of Argentines was attempting to surrender, but not the other group. The Argentine conduct was arguably treachery if those raising the white flag killed the British soldiers, but not if other Argentines fired unaware of the white flag. This incident emphasizes the rule that the white flag indicates merely a desire to negotiate, and its hoister has the burden to come forward.⁴⁴
- ii. Desert Storm: The Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed to the rear, then turning forward to fire when action began, was a 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.”⁴⁵
- iii. 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.⁴⁶ 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.
- iv. Desert Storm: On another occasion an Iraqi officer approached Coalition forces with hands up indicating his intent to surrender.

⁴³ See MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 320-21 (1959).

⁴⁴ See Major Robert D. Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, *Mil. Rev.*, Oct. 1984, at 49.

⁴⁵ See DEP’T OF DEFENSE, *FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN CONFLICT* (1992), at 621.

⁴⁶ *Id.*

Upon nearing the Coalition forces he drew a concealed pistol and fired, but was killed.⁴⁷

- f. Feigning civilian/noncombatant status. “Attacking enemy forces while posing as a civilian puts all civilians at hazard.” (AP I, art. 37(1)(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. (AP I, art. 37(1)(d))
 - i. As an example, on 26 May 1995, Bosnian Serb commandos dressed in the uniforms, flak jackets, helmets, and weapons of the French, drove up to French position on a Sarajevo bridge in an armored personnel carrier with UN emblems. French forces thought all was normal. The Bosnian Serb commandos proceeded to capture the French peacekeepers without firing a shot.⁴⁸
 - ii. It is not perfidy (a violation of AP I, art 37) to (mis)use 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 AP I, art. 38, because that article prohibits the use of the UN emblem without authorization.
- h. Misuse of Red Cross, Red Crescent, or cultural property symbol.
 - i. Designed to reinforce/reaffirm HR, art. 23(f).
 - ii. GC I requires that wounded and sick, hospitals, medical vehicles, and, in some cases, medical aircraft be respected and protected. The protection is lost if forces are committing acts harmful to the enemy. As an example, during the Grenada Invasion, U.S. aircraft took fire from the Richmond Hills Hospital, and consequently engaged it.⁴⁹
 - iii. Cultural property symbols include the 1954 Hague Cultural Property Convention, Roerich Pact, and 1907 Hague Conventions symbols.

⁴⁷ *Id.*

⁴⁸ Joel Brand, *French Units Attack Serbs in Sarajevo*, WASH. POST, May 28, 1995, at A1.

⁴⁹ See DA PAM 27-161-2, *supra* note 38, p. 53, n. 61.

- iv. Misuse of internationally recognized distress signals (also prohibited).
- B. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para. 31; Executive Order 12333). Targeting military leadership or individuals is not considered assassination. Recent U.S. practice is to offer money in exchange for "information leading to the capture of" the individual.⁵⁰
- C. Espionage. (FM 27-10, para. 75; AP I, art. 46). Defined as acting clandestinely (or on false pretenses) to obtain information for transmission back to friendly territory. Gathering intelligence while in uniform is not espionage.
1. Espionage is not a law of armed conflict violation.
 2. There is no protection, however, under the Geneva Conventions for acts of espionage.
 3. The spy is tried under the laws of the capturing nation; e.g., Art. 106, UCMJ.
 4. Reaching friendly lines immunizes the spy for past *espionage* activities, but the spy can be prosecuted for any *LOAC violations* committed. Upon later capture as a lawful combatant, the former spy cannot be tried for past espionage.
- D. Belligerent or wartime reprisals. (FM 27-10, para. 497). Defined as 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 armed conflict.
1. Reprisals are authorized if they are:
 - a. Timely;
 - b. Responsive to the enemy's act that violated the law of armed conflict;
 - c. Follow an unsatisfied demand to cease and desist; and
 - d. Proportionate to the previous illegal act.
 2. Prisoners of war and persons "in your control" cannot be objects of reprisals. AP I prohibits reprisals against numerous other targets, such as the entire

⁵⁰ See Parks, *supra* note 12, at 4.

civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, and installations containing dangerous forces (dams, dikes, nuclear power plants) (AP I, arts. 51 and 53 - 56). The U.S. specifically objects to these restrictions as not reflective of customary international law.

3. U.S. policy is that a reprisal may be ordered only at the highest levels (U.S. President).