

Chapter 40

Senior Officer Legal Orientation

THE LAW OF WAR METHODS AND MEANS OF WARFARE

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. I Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362 [hereinafter G.I].
4. II Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, T.I.A.S. 3363 [hereinafter G.II].
5. III Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364 [hereinafter G. III].
6. IV Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, T.I.A.S. 3365 [hereinafter G. IV].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GPI & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].
15. Dep't of Defense Directive 5000.1, The Defense Acquisition System (12 May 2003) [hereinafter DODD 5000.1].

I. **LEGAL FRAMEWORK FOR TARGETING DECISIONS.** The law of targeting is largely the product of treaties and customary international law. The primary sources are as follows:

- A. The Law of the Hague (ref. (1) and (2)). Regulates "methods and means" of warfare -- such as prohibitions against using poison and orders to refuse "quarter" to humanitarian concerns such as warning the civilian population before a bombardment.
- B. Geneva Conventions of 1949 (ref. (3) - (6)). Protects "victims" of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians.
- C. 1977 Geneva Protocols (ref. (7)). The US has not ratified these treaties. Portions, however, do reflect state practice and obligations -- the key ingredient to customary international law.
 - 1. Motivated by International Committee of the Red Cross' belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WWII.
 - 2. New or expanded areas of definition and protection contained in Protocols include provisions for:
 - a. Medical aircraft. Extends further protection to medical aircraft flying over areas controlled by friendly forces and in contact zones. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exist. GP I, supra, article 25, 26 (both considered customary international law by US).
 - b. Wounded and sick. 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). GP I, supra, article 8.
 - c. Prisoners of war. Expands definition of prisoners of war to include "combatants." Combatants include those that don't distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement. GP I, supra, article 44 (portions of this article considered customary international law by US).

- d. Protection of 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, supra, article 55 (US specifically objects to this article).
- e. Protection of works and installations containing dangerous forces. Facilities containing forces that might be harmful to the civilian population (nuclear plants, dams) are subject to enhanced targeting rules. GP I, supra, article 56 (US specifically objects to this article).
- f. Journalists. Given protection as "civilians" provided they take no action adversely affecting their status as civilians. GP I, supra, article 79 (considered customary international law by US).
- g. 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. GP I, supra, article 51 (except for para. 6, considered customary international law by US).
- h. Legal review of new weapons now required. GP I, supra, article 36.
- i. US views these GP I articles as customary international law: 5(appointment of protecting powers);10(equal protection of wounded, sick, and shipwrecked);11(guidelines for medical procedures); 12-34(medical units, aircraft, ships, missing and dead persons);35(1)(2)(limiting methods and means of warfare);37(perfidy prohibitions);38(prohibition against improper use of protected emblems); 44(combatants and prisoners of war (portions)); 45(prisoner of war presumption for those who participate in the hostilities); 51(protection of the civilian population, except para 6 -- reprisals);52(general protection of civilian objects);54(protection of objects indispensable to the survival of the civilian population);57-60(precautions in attack, nondefended localities, and demilitarized zones);62(civil defense protection);63(civil defense in occupied territories);70(relief actions);73-89(treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GPI).

II. GENERAL TARGETING PRINCIPLES.

- A. 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 (FM 27-10, supra, para. 3).
1. "Not forbidden." Targeting of enemy personnel and property permitted unless otherwise prohibited by international law. This check on the application of military force, i.e., international law, is the distinction cited by Dr. Lieber in 1863. This differed from the 19th Century European view as stated below by Germany's Bismarck:

Humanitarian claims such as the protection of men and goods can only be taken into consideration insofar as the nature of war permit." See Dep't of the Army, International Law, Dep't of the Army Pamphlet 27-161-2, 12 (1962) [hereinafter DA Pam. 27-161-2].
 2. Indispensable (relevant).
 3. 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. Approach -- look to whether international law allows targeting of a person or property. Examples:
 - a. Protected Persons: Law generally prohibits the intentional targeting of protected persons under any circumstances. WWII Germans, under concept called "Kriegsraison," 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 their attack. (Rejected as a valid defense.)

b. Protected Places: Law typically allows destruction of civilian property if military circumstances require such destruction (FM 27-10, supra, para. 56 and 58). The circumstances requiring destruction of protected property are those of "urgent military necessity" appearing to the deciding commander at the time of the decision. See IX Nuremberg Military Tribunals, Trials of War Criminals Before the Nuremberg Military Tribunals, 1113 (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." Id. Current norms for protection (and destruction) of civilian property:

(1) GC. IV, supra, art. 53. [Don't destroy real or personal property of civilians] "except where such destruction is rendered absolutely necessary by military operations.

(2) Hague Regulations, supra, art. 23. "[F]orbidden . . . to destroy or seize the enemy's property . . . unless demanded by the necessities of war."

B. Unnecessary Suffering - It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering (Hague Regulations, supra, art. 23e). This concept also extends to unnecessary destruction of property.

1. Can't use arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass).

2. Can't use otherwise lawful arms in a manner that causes unnecessary suffering (e.g., 2000 pound bomb instead of precision guided munition against a military objective where civilians are nearby).

C. Proportionality. A balancing test.

1. The loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained (FM 27-10, supra, para 41, ch. 1).

2. GP I, supra, art. 57(2)(b) requires planners to cancel an attack where incidental damage to civilians or civilian objects would be excessive to "the concrete and direct military advantage anticipated." This provision considered customary international law by US.
3. Judging commanders. It may be 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. 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 (FM 27-10, para. 41).
 - b. In judging a commanders actions one must look at the situation as the commander saw it in light of all circumstances. *See* A.P.V. Rogers, *Law on the Battlefield* 66 (1996). But based on case law and modern applications, the test is not entirely subjective -- "reasonableness" seems to have an objectivity element as well. In this regard, two questions seem relevant. Did the commander reasonably gather 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.

- c. Example: Al Firdus Bunker. During the Persian Gulf War, targeters identified this bunker as a military objective. Barbed wire surrounding the complex, it was camouflaged, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, was that Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in numerous civilian casualties. Was there a violation of the law of war? No. Based on information reasonably 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 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. *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-616 (1992).

III. DETERMINATION OF LAWFUL TARGETS.

Military Objectives (FM 27-10, supra, para. 40, and GP I, supra, art. 52). Combatants, defended places, and those objects which by their nature, location, purpose or use make an effective contribution to military action.

- A. Combatants: Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat" (discussed later).
1. Lawful combatants: Receive protections of Geneva Conventions (specifically, the GC I, II, and III).
 2. Unlawful combatants: May be treated as criminals under the domestic law of the captor. An unlawful combatant can be a civilian who is participating in the hostilities or a member of the armed forces who violates the laws of war.
- B. Defended Places (FM 27-10, supra, paras. 39 & 40, Change 1). As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:
1. a fort or fortified place;

2. a place occupied by a combatant force or through which a force is passing; and
 3. 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, supra, art. 51(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. . . ." Id.
- C. Objects--if their nature, use, location, or purpose makes an effective contribution to military action FM 27-10, supra, para. 40, GP I, supra, art. 52(2).
1. The destruction, capture or neutralization must offer a definite military advantage. There must be a nexus between the object and a "definite" advantage toward military operations.
 2. Examples: munitions factory, bridges, railroads.

IV. TARGETING PROHIBITIONS.

- A. Prohibition against attacking civilians or civilian property (FM 27-10, supra, para. 246, GP I, supra, art. 51(2)).
1. General Rule: civilians and civilian property may not be the subject or sole object of a military attack.
 - a. Civilians are persons who are not members of the enemy's armed forces; and
 - b. who do not take part in the hostilities (GP I, supra, art. 50 and 51).
 2. Incidental Damage: Unavoidable and unplanned damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is not a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. For example, GP I, supra, art. 51(5) describes indiscriminate attacks as those causing "incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated." Id. Caution, however, the law of proportionality still applies.

3. Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.) (GP I, supra, art. 52(3)). Resolve doubtful cases by not targeting.
- B. Prohibition against attacking undefended places. The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited. HR, supra, art. 25. An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:
1. all combatants and mobile military equipment are removed;
 2. no hostile use made of fixed military installations or establishments;
 3. no acts of hostilities shall be committed by the authorities or by the population; and
 4. 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, supra, art. 39b, ch. 1.
- C. Prohibition against attacking enemy personnel who are "out of combat."
1. Prisoners of War. (G. III, supra, art. 4)
 - a. Surrender may be made by any means that communicates the intent to give up. No clear cut rule as to what constitutes a surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.
 - b. Onus on person or force surrendering to communicate intent to surrender.
 - c. Captors must respect (not attack) and protect (care for) those who surrender--no reprisals.
 2. Wounded and Sick (G. I, supra, art. 12). Those soldiers who have fallen by reason of sickness or wounds and who ceases to fight.

3. Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (G. II, supra, art. 12, NWP 1-14M supra, para. 11.6).
 - a. Shipwrecked. Includes downed passengers/crews on aircraft, ships in peril, castaways.
 - b. Includes protection for civilians.
4. Parachutists (FM 27-10, supra, para. 30).
 - a. Paratroopers are presumed to be on a military mission and therefore may be targeted.
 - b. 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.
 - c. Parachutists, according to art. 42, GP I, "shall be given the opportunity to surrender before being made the object of attack."
5. Medical Personnel. Considered out of combat if they don't abuse their status. Accidental killing or wounding of such personnel due to their proximity to military objectives "gives no just cause for complaint" (para. 225, FM 27-10). Medical personnel include:
 - a. Permanent medical personnel of the armed forces (art. 24, G. I).
 - (1) Doctors, surgeons, nurses, chemists, stretcher bearers, medics, corpsman, and orderlies who give direct care to the wounded and sick.
 - (2) Administrative staffs of medical units (drivers, generator operators, cooks, etc.).
 - (3) Chaplains.
 - b. Auxiliary Medical Personnel of the Armed Forces. (art. 25, G. I requires that they have received "special training" and be carrying out their medical duties when they come in contact with the enemy.

- c. Personnel of National Red Cross Societies and other Recognized Relief Societies (art. 26, G. I).
 - d. Personnel of Societies of Neutral Countries (art. 27, G. I)

- D. Prohibition against attacking "Protected Places" (ref. para. 45, FM 27-10). 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.
 - 3. Protection of Hospitals (ref. paras. 257 and 258, FM 27-10).
 - a. Warning requirement before attacking a hospital that is committing "acts harmful to the enemy."
 - b. Reasonable time to comply.
 - 4. Richmond Hills (Grenada) example. When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense.

- E. Prohibition against attacking cultural property. The 1954 Cultural Property Convention (ref. 10 - p. 9 - 51) elaborates, but does not expand, the protections accorded cultural property found in other treaties (summarized in FM 27-10. The Convention has not been ratified by the US (treaty is currently under review with a view toward ratification with minor understandings). See also art. 53, GP I, for similar prohibitions.

- F. Prohibition against attacking "works and installations containing dangerous forces." (ref. art. 56, GP I and art. 15, GP II). **THIS RULE IS NOT US LAW BUT MUST BE CONSIDERED BECAUSE OF THE PERVASIVE INTERNATIONAL ACCEPTANCE OF GP I AND II.**
 - 1. Dams, dikes, and nuclear electrical generating stations shall not be attacked -- even if they are military objectives!

- a. Military objectives that are nearby 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 support to military operations and attack is the only feasible way to terminate the support.
 - 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.
- G. Designated Emblems of Protection (ref. para. 238, FM 27-10). Objects and personnel displaying emblems are presumptively protected under Conventions:
- 1. Medical and Religious Protection Emblems.
 - a. Red Cross.
 - b. Red Crescent.
 - c. Lion and Sun.
 - d. Red Star of David: Not mentioned in the 1949 Geneva Convention but must be protected.
 - 2. Cultural Property Emblems.
 - a. 1954 Cultural Property Convention (art. 16 and 17). "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."

- 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 (Annex I, art. 16, GP I). Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius.
- H. The Warning Requirement (FM 27-10, supra, para. 43,; see art. 26, HR IV). General requirement to warn before a bombardment.
 - 1. Only applies if civilians are present.
 - 2. Exception: if it is an assault (any surprise attack or an attack where surprise is a key element).
 - 3. GP I, supra, art. 57(2)(c), however, requires warning of civilians before an attack (not necessarily a bombardment), unless circumstances do not permit (this is considered customary international law by the US).

V. SPECIAL PROBLEMS.

- A. Stratagems and Ruses (FM 27-10, supra, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith).
 - 1. Examples of stratagems:
 - a. Surprise.
 - b. Ambushes.
 - c. Psychological operations.
 - (1) Leaflet programs.

* Gulf War - US PSYOPS leafletting program. Delivered by aircraft and artillery, US PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance;

inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender." Adolph, PSYOP: The Gulf War Force Multiplier, Army Magazine 16 (December 1992).

2. Examples of Ruses.

- a. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels. Some examples follow:

* 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. See C. John Colombos, The International Law of the Sea 454-55 (1962).

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

* World War II - United States: The US Q-ship program was a disaster. Samuel Eliot Morison says it consumed much time and many lives (1/4 of sailors who volunteered for it). Like the British program, the US used heavily armed merchants disguised as peaceful merchantmen. Morrison says WWII U-boats were too smart and fast to be taken in. But in early 1942, the situation was so dire in the Atlantic that Admiral King (CNO and COMINCH - CINC US Fleet) organized a Q-ship program as a result of pressure from President Roosevelt. In March 1942 three US Q-ships sailed from New England ports. USS Atik was sunk by a U-boat off Chesapeake Bay four days out, losing all hands. USS Foam had the same fate in May 1942. Two others never made a U-boat contact. Ultimately, all were converted to other uses. Samuel Eliot Morison, The Two Ocean War 132 (1963).

- b. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit, etc. FM 27-10, para. 51. Some examples follow:

* 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. John Keegan, The Second World War, 373-79 (1989).

* 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 bootheel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the bootheel, 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. Rick Atkinson, Crusade, 331-33 (1993).

3. Use of enemy uniforms, colors, and equipment.

- a. Uniforms: Combatants may wear enemy uniforms but cannot fight in them. Note, however, the downside: military personnel not wearing their uniform lose their PW status if captured and risk being treated as spies (paras 12.5.3, NWP 1-14M; 8-6, AFP 110-31; 74, FM 27-10).

* World War II - 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. None, however, were convicted of a war crime. 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. DA Pam 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).

* 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).

* Protocol I, 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 US obviously does not consider this article reflective of customary law.

- b. Colors: The US position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the US interprets the "improper use" of a national flag (art 23(f), Hague Regulations) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (para. 54, FM 27-10; para. 12.5, NWP 1-14M). Note the Protocol I position on this issue in the preceding paragraph. Interestingly, even this article contains an exception for the time-honored naval tradition of displaying false colors until prior to an actual engagement.
- c. Equipment: must remove all enemy insignia in order to fight with it.

- (1) However, GP I, supra, art 39(2) prohibits virtually all use of these enemy items - but US does not concur (see para 12.5.3, NWP 1-14M). 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 (GP I, supra, art 39(3); para 12.5.1, NWP 1-14M).
 - (2) 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 IV, supra, art. 53).
 - (a) Captured medical facilities and supplies of the armed forces. (FM 27-10, supra, para. 234).
 - (i) Fixed facilities. May be used by captors, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present.
 - (ii) Mobile facilities. Captors may keep material from mobile medical facilities, provided it is reserved for care of the wounded and sick.
- B. Treachery and Perfidy are prohibited under the law of war (ref. FM 27-10, supra, para. 50). Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith).
1. According to GP I, supra, art 37(1) (US considers customary law), 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]."

2. Condemnation of perfidy is an ancient precept of the LOW - derives from principle of chivalry. Remains a cardinal principle because it 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 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. Michael Bothe, et. al., New Rules for Victims of Armed Conflicts 202 (1982); FM 27-10, para. 50.

3. Art. 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 diplomatic conference. Bothe, supra, at 203. Article 37 also refers only to confidence in international law (LOW), not moral obligations. The latter viewed as too abstract by certain delegations. Id. at 204-05. 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. Para. 50, FM 27-10.

4. Examples:
 - a. Feigning incapacitation by wounds/sickness. Art 37(1)(b) GPI. Whiteman says HR 23b also prohibits this, e.g. if shamming wounds and then attacking approaching soldier. Marjorie M. Whiteman, Dep't of State, 10 Digest of International Law 390 (1968); NWP 1-14M, para. 12.7.

 - b. Feigning surrender or the intent to negotiate under a flag of truce. Art 37(1)(a), GPI.

(1) Some examples follow:

* 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 was attempting to surrender, but not the other group. The Argentinean conduct was clearly treachery if the British soldiers were killed by those raising the white flag, but it was not treacherous if they were killed by other Argentineans either unaware of the white flag, or not wishing to surrender. This incident emphasizes awareness of the fact that the white flag is an indication of a desire to negotiate only and that its hoister has the burden to come forward. 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.

* Gulf War - Coalition: Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed aft, then turning forward 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." Dep't of Defense, Final Report to Congress: Conduct of the Persian Gulf War 621 (1992).

* 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.

* 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. Id.

(2) Note that in order to be a violation of art. 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 art. 38 of Protocol I, which the US also considers reflective of customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. Morris Greenspan, The Modern Law of Land Warfare, 320-21 (1959). Art. 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

c. Feigning civilian, noncombatant status. Art 37(1)(c). "Attacking enemy forces while posing as a civilian puts all civilians at hazard." NWP 1-14M, para. 12.7.

d. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. Art 37(1)(d).

- (1) As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drive 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. Joel Brand, French Units Attack Serbs in Sarajevo, Wash. Post, May 28, 1995, at A1.
 - (2) As in the case of the misuse of the flag of truce, misuse of a UN emblem which does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38, GPI. Note, however, that this prohibition only applies if the UN force is not an actual combatant force, a condition which has only arisen on one occasion: the Korean War. Michael Bothe, et. al., New Rules for Victims of Armed Conflicts 206 (1982).
- e. Certain uses of booby-traps prohibited by the 1980 Conventional Weapons Convention would otherwise be perfidious. Under this convention, it is prohibited to booby trap:
- (1) dead bodies;
 - (2) sick and wounded;
 - (3) burial sites and graves;
 - (4) medical facilities, supplies, or transportation; and
 - (5) historic monuments, works of art which constitute the cultural heritage of a people.
- f. Misuse of Red Cross, Red crescent, cultural property symbol (see also HR, art 23f)
- (1) Designed to reinforce/reaffirm HR 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; Congo 1961 - UN Indian forces alleged Kantanganese were transporting troops in medical vehicles. This allegation was never substantiated. DA Pam 27-161-2, p. 53, n. 61.
 - (3) Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. Bothe, supra, at 209.
- g. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.
- C. Assassination, hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" (para. 31, FM 27-10, and E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, Army Law. Dec. 1989, at 4.
- D. Espionage (para. 75 FM 27-10, art. 46, GP I). Acting clandestinely (or on false pretenses) to obtain information for transmission back to their 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. 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.
- E. Reprisals (ref. para. 497, FM 27-10). 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;
 - c. must first attempt a lesser form of redress; and
 - d. must be proportional.
2. Prisoners of war and persons "in your control" can't be objects of reprisals.
3. US policy is that a reprisal may be ordered only at the highest levels.

VI. RULES OF ENGAGEMENT.

- A. Rules of Engagement Defined: Directives issued by competent superior authority which delineate the circumstances and limitations under which US forces will initiate and/or continue engagement with other forces.
 1. ROE are drafted **in part** based upon the LOW. Drafted considering LOW, political policy, public opinion, and military operational constraints. ROE are usually more restrictive than what the LOW would allow.
 2. Targeting rules are often incorporated within ROE for a given operation.
- B. JCS Standing ROE (CJS Instruction 3121.01 dtd 1 Oct 94): Predetermined guidance as to course of action in specific situations. "Inherent Right of Self-Defense" for both **individual and the unit** is the foundation of document.

VII. DETERMINATION OF LAWFUL WEAPONS.

- A. All U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. DODD. 5000.1, AR 27-53, and SECNAVINST 5711.8A.

- B. **The test:** Is the suffering occasioned by the use of the weapon needless, superfluous, or grossly disproportionate to the advantage gained by its use?

- C. Weapons may be illegal:
 - 1. Per se. Those weapons calculated to cause unnecessary suffering. Example: glass bullets.

 - 2. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available.

 - 3. By agreement or prohibited by specific treaties. Example: some of the booby trap prohibitions in Protocol II of the 1980 Conventional Weapons Treaty.

VIII. PARTICULAR WEAPONS AND WEAPONS SYSTEMS.

- A. Small Arms.
 - 1. Projectiles. Must not be exploding or expanding projectiles. Prohibited by late 19th century treaties (of which US was never a party). US practice, however, accedes to this prohibition being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).

 - 2. 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 by customary international and the treaties mentioned above. There are 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).

 - 3. High Velocity Small Caliber Arms.
 - a. Early controversy about M-16 causing unnecessary suffering.

3. The 1925 Geneva Protocol (para. 38, FM 27-10). Applies to all **international** armed conflicts.
4. Prohibits use of Lethal, Incapacitating, and Biological Agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."
5. The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.
 - a. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. US views riot control agents as having a "transient" effect -- and thus are NOT incapacitating agents. Therefore, their use in war is not prohibited by the treaty. There are, however, policy limitations which are discussed below.
 - b. U.S. reserves right to use lethal or incapacitating gases if the other side uses them first.
 - c. Presidential approval required for use.
6. Riot Control Agents and Herbicides.
 - a. US has an understanding to the Treaty that these are not prohibited.
 - b. US policy restricts their use.
7. US RCA Policy is found in Executive Order 11850. Applies to use of **Riot Control Agents and Herbicides**; requires Presidential approval before first use in an armed conflict.
 - a. **Herbicides**: renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)
 - b. **Riot Control Agents**: renounces first use in armed conflicts **except** in defensive military modes to save lives such as:

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

NCA approval required.

8. Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: Is considered a Riot Control Agent.
9. 1993 Chemical Weapons Convention (CWC) (ref. 9). This treaty was ratified by US on 25 April 1997.
 - a. The CWC went into force on 29 April 1997 (for those States who ratified the treaty). The CWC prohibits use, development, acquisition, transfer, and stockpiling of chemical weapons (SIGNIFICANT DEPARTURE FROM 1925 GENEVA PROTOCOL).
 - b. Second use not allowed (SIGNIFICANT DEPARTURE FROM 1925 GENEVA PROTOCOL).
 - c. RCA controversy. Convention prohibits RCA use as "method of warfare."
 - (1) Initial DoD interpretation. EO 11850 remains valid. *See* CJCS Instruction 3110.07, Nuclear, Biological, and Chemical Defense; Riot Control Agents, and Non Lethal Weapons (3 July 1995).
 - (2) DoS interpretation. EO 11850 portions pertaining to rescue of downed airman and human shield dispersement uses are methods of warfare since the actions include combatants (and therefore can't be used). Rationale of CWC is that any chemical equipment on the battlefield, even if claimed only for RCA use, could be used as a subterfuge for chemical warfare or trigger chemical warfare response.

- (3) President's interpretation. In June 1994, the President agreed with DoS interpretation and submitted this to Senate. In part due to controversy over this interpretation, the treaty was withdrawn from consideration by the Senate for its advice and consent during September 1996.
- (4) Present status. **EO 11850 remains in effect** . It appears that as a condition for its consent to ratification, the Senate reached an agreement with the President that EO11850 guidance on the use of RCAs would remain in effect. *See* Condition 26 of the Senate's resolution of 24 April 1997, giving its advice and consent to ratification of the CWC; and the President's certification of 25 April 1997, in response to the resolution.

10. Biological weapons.

- a. The 1925 Geneva Protocol prohibits bacteriological methods of warfare.
- b. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons.
- c. US renounced all use of biological and toxin weapons.

D. Fragmentation Weapons (FM 27-10, supra, para 34).

1. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).
2. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

E. Booby Traps and Land Mines: Lawful if properly used.

1. Primary legal concern: indiscriminate use which endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty restricts placement of mines and booby traps in areas of "civilian concentration."

- a. Remotely delivered mines (those planted by air, artillery etc.). Only used against military objectives; and then so only if their location can be accurately recorded or if they are self-neutralizing.
 - b. Non-remotely delivered mines, booby traps, and other devices. Can't be used in towns or cities or other places where concentrations of civilians are present, unless:
 - (1) they are placed in the vicinity of a military objective under the control of an adverse party; or
 - (2) measures are employed to protect civilians from their effects (posting of signs etc.).
- 2. Protocol II of the 1980 Conventional Weapons Treaty also prohibits use of booby traps on the dead, wounded, children's toys, medical supplies, and religious objects (Id. art. 6).
- 3. The Senate is currently reviewing amendments to Protocol II for its advice and consent on ratification. The amendments extend Protocol II application to internal conflicts. Antipersonnel landmines used outside marked, fenced, and monitored mine fields must have a self destruct capability with a self-deactivation back up. The amendments will also ban non-detectable landmines (metallic content required).
- 4. US policy on anti-personnel land mines: US forces may no longer employ "dumb" (those that don't self-destruct or self-neutralize) anti-personnel land mines, according to a 16 May 1996 policy statement issued by the President. Exceptions to this policy:
 - a. Use of "dumb" mines in demilitarized zone between North and South Korea; and
 - b. Use of "dumb" mines for training purposes.
- F. 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 may occur as the result of legitimate military use of lasers (rangefinding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this portion not yet ratified by US). The Senate is reviewing the protocol for its advice and consent for ratification.

- G. Nuclear Weapons (FM 27-10, supra, para. 35). 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 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 Court 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. 35 I.L.M. 809 (1996)

IX. SUMMARY AND CONCLUSIONS.