

CHAPTER 12

Deception During Armed Conflict

12.1 GENERAL

The law of armed conflict permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.¹

12.1.1 Permitted Deceptions. Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilization of enemy codes, passwords, and countersigns.²

¹ Lieber Code, art. 101; HR, art. 24; GP I, art. 37(2). These rules are considered applicable to warfare at sea. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, Nav. War Coll. Rev., Summer 1989, at 54-55, sets out a useful flowchart for analysis of proposed deception. *See also* Green 138, 139, 169 & 170.

See paragraph 5.4.2, note 34 (p. 5-13) regarding the U.S. decision not to seek ratification of GP I.

"Rules of international law applicable in armed conflict" has been defined as "the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict." GP I, art. 2(b). *See also* paragraph 6.2.2, note 34 (p. 6-13), for the ICRC definition of "international humanitarian law applicable in armed conflict."

² NWIP 10-2, para. 640 n.41; AFP 110-34, para. 5-1; AFP 110-31, paras. 8-3b & 8-4; FM 27-10, para. 51; DA Pam 27-161-2, at 57; British Manual of Military Law, Part III, para. 312 (1958); 2 Oppenheim-Lauterpacht 428-30; GP I, art. 37(2); Green 139. *See* Hartcup, *Camouflage: A History of Concealment and Deception in War* (1980) and Glantz, *Soviet Military Deception in the Second World War* (1989). These acts are not perfidious because they do not invite the confidence of the enemy with respect to protection under the law. GP I, art. 37(2).

Other permissible deceptions include traps; mock operations; feigned retreats or flights; surprise attacks; simulation of quiet and inactivity; use of small units to simulate large units; use of dummy aircraft, vehicles, airfields, weapons and mines to create a fictitious force; moving landmarks and route markers; pretending to communicate with forces or reinforcements which do not exist; deceptive supply movements; and allowing false messages to fall into enemy hands. *See* Montagu, *The Man Who Never Was* (1954), for an account of a British ruse during World War II regarding the invasion of Europe. It is permissible to attempt to frustrate target intelligence activity, for example by the employment of ruses to conceal, deceive and confuse reconnaissance means. The prohibition in GP I, art. 39, against the use of the adversary's "military emblems, insignia or uniforms" refers only to concrete visual objects and not to his signals and codes. Bothe, Partsch & Solf 214. The United States does not support the prohibition in art. 39 on the use of enemy emblems, insignia and uniforms during military operations except in actual armed engagement. *See* paragraph 12.5.3 (p. 12-6).

AFP 110-31, para. 8-4b, provides the following additional examples of lawful ruses:

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(1) The use of aircraft decoys. Slower or older aircraft may be used as decoys to lure hostile aircraft into combat with faster and newer aircraft held in reserve. The use of aircraft decoys to attract ground fire in order to identify ground targets for attack by more sophisticated aircraft is also permissible.

(2) Staging air combats. Another lawful ruse is the staging of air combat between two properly marked friendly aircraft with the object of inducing an enemy aircraft into entering the combat in aid of a supposed comrade.

(3) Imitation of enemy signals. No objection can be made to the use by friendly forces of the signals or codes of an adversary. The signals or codes used by enemy aircraft or by enemy ground installations in contact with their aircraft may properly be employed by friendly forces to deceive or mislead an adversary. However, misuse of distress signals or distinctive signals internationally recognized as reserved for the exclusive use of medical aircraft would be perfidious.

(4) Use of flares and fires. The lighting of large fires away from the true target area for the purpose of misleading enemy aircraft into believing that the large fires represent damage from prior attacks and thus leading them to the wrong target is a lawful ruse. The target marking flares of the enemy may also be used to mark false targets. However, it is an unlawful ruse to fire false target flare indicators over residential areas of a city or town which are not otherwise valid military objectives.

(5) Camouflage use. The use of camouflage is a lawful ruse for misleading and deceiving enemy combatants. The camouflage of a flying aircraft must not conceal national markings of the aircraft, and the camouflage must not take the form of the national markings of the enemy or that of objects protected under international law.

(6) Operational ruses. The ruse of the "switched raid" is a proper method of aerial warfare in which aircraft set a course, ostensibly for a particular target, and then, at a given moment, alter course in order to strike another military objective instead. This method was utilized successfully in World War II to deceive enemy fighter interceptor aircraft.

While it is common practice among nations to place national markings on both military aircraft and vessels, it is unclear if international law requires nations to do so. The legality of the use of unmarked military aircraft or vessels in combat is unsettled as operational requirements occasionally dictate that markings not be used. *Compare* Jacobsen, A Juridical Examination of the Israeli Attack on the *U.S.S. Liberty*, 36 Nav. L. Rev. 41-44 (1986) (the use of unmarked Israeli aircraft to attack USS LIBERTY on 8 June 1967) with AFP 110-31, para. 7-4 (superfluous marking not required, as "when no other aircraft except those belonging to a single state are flown"). Failure to mark vessels and aircraft clearly in peacetime results in the loss of certain privileges and immunities for such aircraft or vessels, and quite likely for the crew as well. *See* 1982 LOS Convention, arts. 29 & 107, and Chicago Convention, arts. 20 & 89 (reflecting customary international law on the importance of external markings on aircraft and vessels). *See also* paragraphs 2.1.1 (p. 2-1) and 2.2.1 (p. 2-5) for a discussion, respectively, of warships and military aircraft.

The use of deceptive measures to thwart precision guided weapons is legally permissible. Flares, smoke and aerosol material and dissemination devices can lawfully be used as countermeasures against visually guided, laser-guided, infrared and television-guided missiles. Chaff is a lawful countermeasure against active radar-homing missiles. Infrared-absorbing paint and flare technology are lawful countermeasures against infrared sensors.

It would be a legitimate ruse to use the electronic transponder aboard a combatant aircraft to respond with the code used for identifying friendly aircraft (IFF), but it would be perfidious to use for this purpose the electronic signal established under annex I, Art. 8, [GP I] for the exclusive use of medical aircraft.

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12.1.2 Prohibited Deceptions. The use of unlawful deceptions is called "perfidy." Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.³ Feigning surrender in order to lure the enemy into a trap is an act of perfidy.⁴

12.2 MISUSE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

Misuse of protective signs, signals, and symbols (see paragraphs 11.9 and 11.10) in order to injure, kill, or capture the enemy constitutes an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures

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Similarly, the use of distress signals established under the Radio Regulations of the International Telecommunications Union is prohibited under the second sentence of Art. 38, para. 1 [of GP I] and might also be violative of Art. 37 [of GP I].

Bothe, Partsch & Solf 207, *citing* 10 Whiteman 399. The United States considers that GP I, arts. 37 and 38 reflect customary international law. Matheson, remarks, paragraph 11.1, note 2 (p. 11-1) at 425.

During Operation Desert Storm, Coalition Forces employed psychological operations involving air-dropped leaflets and radio broadcasts to destroy enemy morale and to induce Iraqi troops to surrender. Title V Report, at J-536 to 38.

Under the definition of perfidy in GP I it would be improper to disseminate false intelligence reports intended to induce the enemy to attack civilians and civilian objects in the mistaken belief that they are military objects. *See also* paragraphs 8.1.2 (p. 8-3) and 8.5.1.1 (p. 8-23). On the other hand, it is a common practice, not prohibited by GP I, to disguise a military object to appear to be a civilian object. *See, for example,* the cover and deception tactics used in World War II and described in Fisher, *The War Magician* (1983); Reit, *Masquerade: The Amazing Camouflage Deceptions of World War II* (1978); Brown, *Bodyguard of Lies* (1975) (D-Day, 1944); Holmes, *Double-Edged Secrets: U.S. Naval Intelligence Operations in the Pacific During World War II* (1979); and sources cited therein. World War I examples may be found in the sources cited in AFP 110-31, para. 8-4b n.5.

It is not perfidious to use spies and secret agents, encourage defection or insurrection among the enemy, or encourage enemy combatants to desert, surrender or rebel. Bothe, Partsch & Solf 207. Enemy personnel that do desert and surrender cannot be compelled to take an oath of allegiance to the captor. Green 140-41.

Dewar, *The Art of Deception in Warfare* (1989) develops a modern theory of deception. Many modern deception tactics are, of course, classified. *See* OPNAVINST 3070.1 (series), Subj: Operations Security; Joint Pub 18, Subj: Operations Security; and OPNAVINST S3430.21 (series), Subj: Electronics Warfare Operations Security. *See also* OPNAVINST S3490.1 (series), Subj: Military Deception.

³ This definition appears for the first time in GP I, art. 37(1); perfidy had not been previously defined in treaty law. The United States supports the principle that "individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Matheson, remarks, paragraph 11.1, note 2 (p. 11-1) at 425. The rationale for this rule is that if protected status or protective signs, signals, symbols, and emblems are abused they will lose their effectiveness and put protected persons and places at additional risk.

⁴ 2 Oppenheim-Lauterpacht 342; San Remo Manual, para. 111.

and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited.⁵ Similarly, use of the white flag to gain a military advantage over the enemy is unlawful.⁶

12.3 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS

12.3.1 At Sea. Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her

⁵ This customary rule derives from HR, arts. 23(f) & 27; Hague V, art. 5; GWS-Sea, arts. 30, 34, 35, 41 & 45; GWS, arts. 21, 22, 35 & 36; GC, arts. 18, 20-22; GPW, art. 23; Roerich Pact, arts. 1 & 5. See FM 27-10, para. 55; DA Pam 27-161-2, at 53; AFP 110-31, paras. 8-3c, 8-6a(1) & 8-6b; AFP 110-34, para. 5-1a; Slim, Protection of the Red Cross and Red Crescent Emblems, 1989 Int'l Rev. Red Cross 420; and Green 290-91. See also GP I, arts. 18(6) & 38, and Hague Cultural Property Convention (paragraph 8.5.1.6, note 122 (p. 8-26)), arts. 17(3) & (4). The protective signs, symbols, and emblems are illustrated in Figure 11-1 (pp. 11-22 to 24). Protective signals are discussed in paragraph 11.10 (p. 11-20).

⁶ HR, arts. 23(f), 32 & 34; GP I, art. 37(1)(a). See also FM 27-10, paras. 52-53, 458-61 & 504; 2 Oppenheim-Lauterpacht 541; Greenspan 320-21 & 384-85. The white flag symbolizes a request to cease fire, negotiate or surrender. HR, arts. 23(f) & 32; FM 27-10, paras. 53 & 458; AFP 110-34, para. 5-1b; Greenspan 320-21 & 384-85; 2 Oppenheim-Lauterpacht 541. Displaying a white flag before attack to cause the enemy to cease firing is prohibited. As misuse of the red cross (or red crescent) could result in attacks on the sick and wounded, misuse of the white flag might prevent efforts to negotiate on important matters.

However, the enemy is not required to cease firing when a white flag is raised. To indicate that the hoisting is authorized by its commander, the appearance of the flag should be accompanied or followed promptly by a complete cessation of fire from that side. Further, the commander authorizing the hoisting of the flag should also promptly send one or more *parlementaires*. FM 27-10, para. 458, at 167; AFP 110-31, para. 8-6a(2). See DA Pam 27-161-2, at 53. (*Parlementaires* are designated personnel employed by military commanders of belligerent forces to pass through enemy lines in order to negotiate or communicate openly and directly with enemy commanders. Cf. FM 27-10, para. 459, at 167; HR 32; Levie, 1 The Code of International Armed Conflict 154; Green 88-9.) See also paragraph 11.7 and note 43 (p. 11-9) regarding surrender. Application of these principles was illustrated during the battle for Goose Green in the Falklands/Malvinas conflict when some Argentine soldiers may have raised a white flag and others then killed three British soldiers advancing to accept what they thought was a surrender. Higgenbotham, Case Studies in the Law of Land Warfare II: The Campaign in the Falklands, 64 Mil. Rev., Oct. 1984, at 53 ("Whatever the case was at Goose Green, there was no requirement for the British to expose themselves. The hoister of the white flag is the one expected to come forward, and that is what should have been required of the Argentine soldiers in this case."); Middlebrook, Operation Corporate: The Falklands War, 1982, at 269-70. *But see* Middlebrook, The Fight for the 'Malvinas' 189-90 (1989) (British officer killed when returning from an attempt to negotiate a local surrender with Argentine forces).

Similarly, international law prohibits pretending to surrender or requesting quarter in order to attack an enemy because of the obligation of combatants to respect opposing combatants who are *hors de combat* or have surrendered. For an account of the perfidious use of the white flag by Iraqi forces during the Persian Gulf War see Title V Report, at 0-621. A false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be perfidious.

true colors.⁷ Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.⁸

12.3.2 In the Air. Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.⁹

12.3.3 On Land. The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.¹⁰

⁷ 2 Oppenheim-Lauterpacht 509.

The ruse which is of most practical importance in naval warfare is the use of the false flag. It now seems to be fairly well established by the custom of the sea that a ship is justified in wearing false colours for the purpose of deceiving the enemy, provided that she goes into action under her true colours. The celebrated German cruiser "Emden" made use of this stratagem in 1914 when she entered the harbour of Penang [on 28 October] under [then neutral] Japanese colours, hoisted her proper ensign, and then torpedoed a Russian cruiser lying at anchor. It is equally permissible for a warship to disguise her outward appearance in other ways and even to pose as a merchant ship, provided that she hoists the naval ensign before opening fire. Merchant vessels themselves are also at liberty to deceive enemy cruisers in this way.

Smith, *The Law and Custom of the Sea* 115-16 (3d ed. 1959), *citing* Corbett, 1 *Naval Operations* 350 (1920).

Sources differ as to which flag EMDEN was actually flying on entry into Penang harbor. Van der Vat, *Gentlemen of War* 86-87 (1983) (the British white ensign); Lochner, *The Last Gentleman-of-War: The Raider Exploits of the Cruiser Emden* 151 (1979, Lindauer transl. 1988), which van der Vat claims is exhaustive, states EMDEN flew no flag as she entered Penang harbor. Corbett states that the flag appeared to be the British white ensign. 2 Oppenheim-Lauterpacht 510 states that EMDEN was flying the Japanese flag. Flying the enemy flag at sea is discussed in paragraph 12.5.1 (p. 12-6).

GP I, art. 39(3), explicitly states that no changes in the rules applicable to the conduct of war at sea (as set out in the text of paragraph 12.3.1) are made by arts. 39 or 37(1)(d) of that Protocol. Nevertheless the use of these ruses by naval forces today may be politically sensitive, since using neutral emblems might lead a party erroneously to conclude that a neutral has given up its neutrality (*see* Chapter 7) and entered the fighting on the other side. This could lead to an attack or declaration of war on the neutral. AFP 110-34, para. 5-1c; Smith 116-18; Tucker 140-41. *See* paragraph 12.7 (p. 12-8) regarding false claims of noncombatant status.

⁸ 2 Lauterpacht-Oppenheim 509; San Remo Manual, paras. 110 & 111; Heinegg, *The Law of Armed Conflict at Sea*, *in* Fleck at 422.

⁹ AFP 110-31, para. 7-4 & n.5; San Remo Manual, para. 109.

¹⁰ This customary rule is codified in GP I, art. 39(1), and applies whether in attack or to promote the interest of a party to the conflict in the conduct of that conflict. CDDH/215/Rev.1, para. 38; 15 Official Records 259; Bothe, Partsch & Solf, para. 2.2, at 213. "The purpose behind this rule is to avoid escalation of armed conflict to neutral countries in the mistaken belief that the neutral State had abandoned its neutrality." Bothe, Partsch & Solf 213. *See also* Oeter, *Methods and Means of Combat*, *in* Fleck at 202; Green 138-39.

12.4 THE UNITED NATIONS FLAG AND EMBLEM

The flag of the United Nations and the letters "UN"¹¹ may not be used in armed conflict for any purpose without the authorization of the United Nations.¹²

12.5 ENEMY FLAGS, INSIGNIA, AND UNIFORMS

12.5.1 At Sea. Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.¹³

12.5.2 In the Air. The use in combat of enemy markings by belligerent military aircraft is forbidden.¹⁴

12.5.3 On Land. The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following

¹¹ The United Nations flag is white on light blue; the letters "UN" are its emblem.

¹² GP I, art. 37(1)(d), defines as perfidy in land warfare "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict." In addition, GP I, art. 38(2), states that "[i]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization." See AFP 110-34, para. 5-1d. The United States concurs with this statement and has extended its application to operations at sea as a matter of U.S. policy.

¹³ This rule with respect to warships has precedent in the skillful disguise of German armed raiders in World Wars I and II. Tucker 140 n.37; Muggenthaler, *German Raiders of World War II* (1977); Woodward, *The Secret Raiders: The Story of the German Armed Merchant Raiders in the Second World War* (1955). The EMDEN added a false fourth funnel for her entry into Penang in 1914 to make her resemble a British cruiser of the YARMOUTH class. See sources cited in paragraph 12.3.1, note 7 (p. 12-5). On 27/28 March 1942, HMS CAMPBELTOWN (ex-USS BUCHANAN), with two stacks removed and her two remaining funnels cut off at an angle to resemble a German torpedo-boat destroyer entered St. Nazaire harbor in German-occupied Brittany and rammed herself hard up on the outer lock of the the only dry dock large enough to take the German battleship TIRPITZ. Hours later she was blown up with timed charges, putting the dry dock out of the war. (The attack was facilitated by CAMPBELTOWN's responses to German challenges and gun fire with flashing light delaying signal using the call sign of one of the German ships in the local flotilla, and to another with "wait," followed by the emergency signal, "Am being fired upon by friendly forces." See paragraph 12.1.1, note 2 (p. 12-1).) Haines, *Destroyers at War 73-80* (1982); Calvocoressi & Wint, *Total War 450* (1972); Piekalkiewick, *Sea War 1939-1945*, at 206 (1987); Roskill, *2 The War at Sea 1939-1945*, at 168-73 (1956).

A belligerent may prosecute as a war crime the use of its ensigns, emblems or uniforms by enemy forces during actual military operations against it. AFP 110-31, para. 5-1e. See also Heinegg, paragraph 12.3.1, note 8 (p. 12-5) at 422.

¹⁴ Tucker 142 & n.43; AFP 110-31, paras. 7-4 & 8-4b(5). This rule may be explained by the fact that an aircraft, once airborne, is generally unable to change its markings prior to actual attack as could a warship. Additionally, the speed with which an aircraft can approach a target (in comparison with warships) would render ineffective any attempt to display true markings at the instant of attack.

an armed engagement.¹⁵ Combatants risk severe punishment, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.¹⁶

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries are not entitled to prisoner-of-war status or protection and, historically, have been subjected to severe punishment.¹⁷ It is permissible, however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired.¹⁸ As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.¹⁹

12.6 FEIGNING DISTRESS

It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY.²⁰ In air warfare, however, it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack.

¹⁵ HR, art. 23(f), forbids "improper use . . . of the national flag, or of the military insignia and uniform of the enemy." "Improper use" of an enemy's flags, military insignia, national markings and uniforms involves use in actual attacks. This clarification is necessary because disputes arose concerning the meaning of the term "improper" during World War II. Bothe, Partsch & Solf 212-15. A reciprocal advantage is secured from observing this rule. It is clear, however, that this article does not change or affect the law concerning whether a combatant is entitled to PW status. That question is a separate matter determined by the GPW, as well as other applicable international law. AFP 110-31, para. 8-6c. *See also* DA Pam 27-161-2, at 53.

¹⁶ This is based on the necessity to maintain security and to prevent surprise by the enemy. AFP 110-34, para. 5-1e(1).

GP I, arts. 37 & 39(2), provide that even prior to combat the use of enemy flags, insignia, and uniforms to shield, favor, protect or impede military operations is prohibited, thereby attempting to reverse the rule derived from *U.S. v. Skorzeny*, 9 LRTWC 90 (1949), summarized in DA Pam 27-161-2, at 53-56, and reflected in FM 27-10, para. 54. *See also* 10 Whiteman 395-98. Acceptance of this rule would prevent their use as a disguise during any military operation on or over land preparatory to an attack and appears to be impracticable. Bothe, Partsch & Solf 214. The United States considers this departure to be militarily unacceptable since "there are certain adversarial forces that would use enemy uniforms in their operations in any case [and thus] it is important from the beginning to preserve that option for the United States as well." Matheson remarks, paragraph 11.1, note 2 (p. 11-1) at 425 & 435.

¹⁷ FM 27-10, paras. 75-78; DA Pam 27-161-2, at 59; AFP 110-31, para. 9-2b.

¹⁸ Bothe, Partsch & Solf 214-15; AFP 110-34, para. 5-1e. *See also* paragraph 12.7, note 24 (p. 12-8).

¹⁹ Unmarked or camouflaged captured material may, however, be used immediately. Using foreign military uniforms or equipment in training to promote realism and recognition is not prohibited by international law. *Cf.* Bothe, Partsch & Solf 214.

²⁰ GP I, art. 38(1); AFP 110-34, para. 5-1a; AFP 110-31, para. 8-6a(1); FM 27-10, para. 55; and Bothe, Partsch & Solf 207 n.25; Draft Hague Radio Rules, 1923, art. 10; Greenspan 321; 10 Whiteman 399. *See* paragraph 11.10 (p. 11-20). However, a sick or wounded combatant does not commit perfidy by calling for and receiving medical aid even though he may be intending immediately to resume fighting.

Consequently, there is no obligation in air warfare to cease attacking a belligerent military aircraft that appears to be disabled.²¹ However, if one knows the enemy aircraft is disabled so as to permanently remove it from the conflict (e.g., major fire or structural damage) there is an obligation to cease attacking to permit possible evacuation by crew or passengers.²²

12.7 FALSE CLAIMS OF NONCOMBATANT STATUS

It is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an intent to surrender or by feigning shipwreck, sickness, wounds, or civilian status (but see paragraph 12.3.1).²³ A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Similarly, attacking enemy forces while posing as a civilian puts all civilians at hazard.²⁴ Such acts of perfidy are punishable as war crimes.

12.7.1 Illegal Combatants. It is prohibited to kill, injure or capture an adversary by feigning civilian, non-combatant status.²⁵ If determined by a competent tribunal of the captor nation

²¹ AFP 110-34, para. 5-1g; AFP 110-31, para. 4-2d. Further, the practice of submarines in releasing oil and debris to feign success of a depth charge or torpedo attack has never been considered to be unlawful.

²² AFP 110-31, para. 4-2d. There is no duty to cease attack if the disabled aircraft is nevertheless capable of or intent on causing destruction, as for example were the Kamikaze pilots during the latter stages of World War II.

²³ HR, art. 23(b); GP I, art. 37(1). Since civilians are not lawful objects of attack as such in armed conflict, it follows that disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy. This is analogous to other situations where combatants attempt to disguise their intentions behind the protections afforded by the law of armed conflict in order to engage in hostilities. ICRC Report, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 24 May -12 June 1971, Rules Relative to Behavior of Combatants (1971); Greenspan 61; Schwarzenberger, *International Courts, The Law of Armed Conflict* 110 & 114 (1968). See also paragraph 12.2, note 6 (p. 12-4).

²⁴ These rules have developed in recognition of the reality that the enemy will be tempted to attack civilians and the sick and wounded and refuse offers to surrender or negotiate, if it appears dangerous to respect these persons or offers.

Feigning death in order to escape capture is not prohibited. PWs and downed aircrews may feign civilian status for escape and evasion, and are not lawfully subject to punishment on that account if captured. GPW, arts. 83, 89 & 93 in particular, recognize that the wearing of civilian clothing by a PW to escape is permissible and not a violation of the law of armed conflict. It may, however, result in disciplinary punishment under the GPW. Bothe, Partsch & Solf 214-15; AFP 110-24, para. 5-1e. PWs and downed aircrews should avoid combatant or espionage activities while so dressed to avoid loss of PW status if captured. AFP 110-31 quotes FM 27-10 on the uniform requirements of ground forces in para. 7-2; para. 7-3 provides a discussion of the policies regarding aircrews.

Of course it may be difficult to establish military identity if apprehended in civilian clothing. Gathering information while feigning civilian status is discussed in paragraph 12.8 (p. 12-9).

²⁵ Baxter, *So-Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, 28 *Brit. Y.B. Int'l L.* 323 (1951); GP I, art. 44(3) & (4). See paragraph 11.7 note 53 (p. 11-12) for U.S. objections to provisions of GP I, art. 44(3) which
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to be illegal combatants, such persons may be denied prisoner-of-war status and be tried and punished.²⁶ It is the policy of the United States, however, to accord illegal combatants prisoner-of-war protection if they were carrying arms openly at the time of capture.²⁷

12.8 SPIES

A spy is someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent.²⁸ Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies.²⁹ Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.³⁰

Crewmembers of warships and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies unless the ship or aircraft displays false civilian, neutral, or enemy marking.³¹

²⁵(...continued)

blur the distinction between combatants and noncombatants by according combatant status to persons not recognizable as such at a distance or who do not carry their arms openly.

²⁶ GPW, art. 5. For discussions of the tribunals, *see* paragraph 6.2.5.1, note 73 (p. 6-30) and paragraph 11.8, note 73 (p. 11-15), 10 Whiteman 150-95, and Green 109.

²⁷ AR 190-8, paragraph 11.7, note 47 (p. 11-10) at para. 1-5. *Cf.* NATO STANAG 2044. Prisoner-of-war protection is not synonymous with prisoner of war status. Illegal combatants are not accorded prisoner of war status whether or not they were carrying arms openly at time of capture. *See also* paragraph 11.7, note 53 (p. 11-12).

²⁸ Lieber Code, art. 88(1); HR, art. 29; 10 U.S.C. sec. 906 (UCMJ, art. 106); 18 U.S.C. sec. 792-99.

²⁹ HR, art. 29. *See also* Green 116-17, 142-43.

³⁰ HR, art. 29; GP I, art. 46(2). GP I purports to extend those protections beyond the zone of operations of hostile forces to any territory controlled by the enemy, and thus negates the possibility that members of the armed forces who openly seek to gather and transmit intelligence information in the enemy's zone of the interior, including crews of reconnaissance aircraft, may be subject to national espionage legislation. GP I would require only that members of the armed forces be in any customary uniform of their armed forces that clearly distinguishes the members wearing it from nonmembers, including any distinctive sign which shows that the activity in question had nothing clandestine about it. Bothe, Partsch & Solf 265. The United States has not indicated its acceptance of these new provisions.

³¹ AFP 110-31, para. 7-4. *See* Jacobsen, paragraph 12.1.1, note 2 (p. 12-2), at 21-32 for a discussion of intelligence gathering on the high seas.

12.8.1 Legal Status. Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status.³² The captor nation may try and punish spies in accordance with its national law.³³ Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.³⁴

³² HR, art. 24; GP I, arts. 39(3) & 46(1). This is a statement of customary law. Bothe, Partsch & Solf 264-65; Green 190-91.

³³ HR, art. 30; Baxter, paragraph 12.7.1, note 25 (p. 12-8), at 325. The United States would grant such persons a trial that meets international standards for fairness. Matheson remarks, paragraph 11.1, note 2 (p. 11-1), at 427-28, that the United States "support[s] in particular the fundamental guarantees contained in" GP I, art. 75, that entitle such persons to a trial that meets international standards for fairness. *See also* paragraph 6.2.5.4, note 84 (p. 6-33). *See* AFP 110-31, para. 9-2b, for a discussion of the UCMJ and other Federal statutes on espionage, such as 18 U.S.C. sec. 792-99.

³⁴ HR, art. 31; GP I, art. 46(4). These rules apply only to members of the armed forces, including members of those resistance and guerrilla groups who qualify under the applicable international law as members of the armed forces (*see* paragraph 5.3 and note 11 thereunder (p. 5-7)) who gather information under false pretenses. Espionage by civilians remains covered by HR, arts. 29 and 30, as supplemented by GC & GP I, as well as by the national law of espionage. Bothe, Partsch & Solf 267.