The Conduct of Hostilities under the Law of International Armed Conflict

Yoram Dinstein
Article 22 of the Hague Regulations of 1899/1907 proclaims:
The right of belligerents to adopt means of injuring the enemy is not unlimited.¹

Article 35(1) of Additional Protocol I of 1977 reiterates the same concept
under the heading ‘[b]asic rules’:

In any armed conflict, the right of the Parties to the conflict to choose methods
or means of warfare is not unlimited.²

This basic rule resonates across the whole spectrum of LOIAC. In the
present chapter we shall address the concrete issues of (i) perfidy versus
ruses of war; (ii) espionage; (iii) seizure and destruction of enemy
property; and (iv) belligerent reprisals.

I. Perfidy and ruses of war

Perfidy and ruses of war share a common ground: both categories stem
from deception and stratagem. Yet, perfidy is largely a violation of
LOIAC, whereas ruses of war are perfectly legitimate. The question is
how to tell them apart, and the answer depends on a modicum of mutual
trust which must exist even between enemies, if LOIAC is to be fully
complied with.

A. The Hague Regulations of 1899/1907

Under Article 23 of the Hague Regulations (in the 1907 wording), it is
forbidden:

¹ Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague
Convention (II) of 1899 and Hague Convention (IV) of 1907, Laws of Armed Conflicts
63, 75, 82.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the
Protection of Victims of International Armed Conflicts (Protocol I), 1977, Laws of Armed
Conflicts 621, 644.
(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.3

Article 24 promulgates:

Ruses of war and the employment of measures necessary for obtaining information about the enemy are considered permissible.4

These norms plainly reflect customary international law, although the text ‘fails to provide any criteria that would permit a distinction’ between (lawful) ruses of war and (illicit) treacherous or improper conduct.5

The prohibition against treacherous killing of enemy individuals includes any offer of bounty (or reward) for assassination.6 However, there is nothing treacherous in singling out an individual enemy combatant (usually, a senior officer) as a target for a lethal attack conducted by combatants distinguishing themselves as such7 (see supra, Chapter 4, III, (ii)). The attack can be carried out by sniper fire, an ambush, a commando raid behind the lines8 or even an air strike.

A flag of truce is a white flag used for parley between local commanders of opposing belligerent forces, with a view to discussing a short-term ceasefire or negotiating conditions of surrender.9 The flag of truce is carried by an envoy – ‘parlementaire’ is the French term kept in the English translation of the Hague Regulations – who is authorized to enter into communication (‘entrer en pourparlers’ in the original French10) with the enemy, and enjoys inviolability pursuant to Article 3211 (see supra, Chapter 6, I, A, (vi)). But under Article 34, the envoy loses his inviolability if he ‘has taken advantage of his privileged position to provoke or commit an act of treason’.12 In the original French text, Article 23(b) employs the phrase ‘par trahison’ (rendered in English as ‘treacherously’), and

3 Hague Regulations, supra note 1, at 82–3. 4 Ibid., 83.
8 On the legality of a commando raid (in uniform) behind the lines, with a view to killing an enemy commander, see P. Rowe, ‘The Use of Special Forces and the Laws of War’, 33 RDMGD 207, 222–3 (1994).
9 See Y. Dinstein, ‘Flag of Truce’, 2 EPIL 401, id.
10 J. B. Scott, 2 The Hague Peace Conferences of 1899 and 1907 (Documents) 110, 116, 130; 368, 376, 392 (1909).
11 Hague Regulations, supra note 1, at 85–6. 12 Ibid., 86.
Article 34 refers to ‘un acte de trahison’ (translated literally as ‘act of treason’). In English, ‘treachery’ would be the more accurate locution in the latter provision as well.

The theme of Article 23(f) is the ‘improper use’ (‘usuèr indûment’ in French) of the flag of truce. Unlike Article 23(b), treachery is not a required component in action counter to Article 23(f), and any improper use of the flag of truce will suffice. The International Military Tribunal at Nuremberg, in its Judgment of 1946, stated that the Hague prohibition of the improper use of flags of truce had been enforced long before the date of the Regulations and had become a punishable offence against the laws of war since 1907. The ban is admittedly formulated too narrowly. It has always been understood to cover any improper use of the white flag: not only when it serves as a flag of truce but also when it evinces a desire to surrender.

Article 23(f) equally forbids the improper use of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention (nowadays, Conventions in the plural).

B. Protocol I of 1977

(a) The relevant provisions Article 37 of Additional Protocol I sets forth:

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
   (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
   (b) the feigning of an incapacitation by wounds or sickness;
   (c) the feigning of civilian, non-combatant status; and
   (d) 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.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

13 Scott, supra note 10, at 126, 130; 386, 392.  
14 Ibid., 126, 388.  
15 International Military Tribunal (Nuremberg), Judgment and Sentences (1946), 41 AJIL 172, 218 (1947).  
16 See T. E. Holland, The Laws of War on Land (Written and Unwritten) 45 (1908).  
17 Protocol I, supra note 2, at 645.
Article 38 lays down:

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.\(^\text{18}\)

Article 39 adds:

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this Article or in Article 37, paragraph 1(d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.\(^\text{19}\)

\textit{(b) Analysis: unlawful acts of perfidy}

\textit{(aa) Article 37} In keeping with Article 37, the term ‘perfidy’ (preferred by the framers of Protocol I over ‘treachery’) consists of three cumulative elements: (i) the existence of a norm of international law granting in certain circumstances protection (which the enemy is entitled to or is obligated to accord); (ii) inducing the enemy to trust that such circumstances have arisen; and (iii) an intent to breach that trust. Whereas a combatant can lawfully attempt to deceive the enemy by resorting to cunning stratagems, he is not allowed to create the false impression of legal entitlement (on either side) to immunity from attack. The rationale is that foul play in this instance is liable to erode respect for the immunity in future cases.

Article 37 does not ban all acts of perfidy in a comprehensive manner.\(^\text{20}\) The text emulates Article 23(b) of the Hague Regulations by confining unlawful perfidy to a scenario resulting in the killing or injuring of an adversary: the contours of the proscribed acts are only expanded to include capture.\(^\text{21}\) Thus, perfidy leading to the destruction of property is not covered.\(^\text{22}\) Nor is a case in which there is a perfidious intent to kill, injure or capture an adversary, but – for whatever reason – the intent is

not carried out. 23 There is 'a sort of grey area of perfidy' when execution of the intent is attempted unsuccessfully, failing to produce the outcome of killing, injuring or capturing an adversary. 24

As regards the killing of an adversary, Article 37's reach seems to be narrower than that of Article 23(b) of the Hague Regulations. An illustration offered by W. A. Solf concerns bribing an enemy soldier to assassinate his commander: this would come within the ambit of Article 23(b) but would be excluded from Article 37, since the act 'would not involve any reliance by the victim on confidence that international law protects him against the acts of his own troops'. 25 It is, therefore, important to note that Article 37 'does not supersede the provisions of the Hague Regulations to the extent that the latter are broader'. 26

Article 37 offers four examples of perfidy:

(i) Feigning of an intent to negotiate under a flag of truce or of a surrender. There are two dissimilarities compared to the text of Article 23(f) of the Hague Regulations: (aa) Article 37 mentions expressly the feigning of an intent to surrender (which may be done by hoisting the white flag); (bb) as pointed out, Article 37 is circumscribed to perfidious acts resulting in the killing, injuring or capturing of an adversary, whereas Article 23(f) disallows any 'improper use' of the flag of truce for whatever purpose.

The killing, injuring or capture of an adversary, and the perfidious resort to feigning of an intent to surrender, need not be committed by the same person or persons. Should combatants hoisting the white flag of surrender be in collusion with their companions (who are lying in wait), perfidy is consummated once the latter open fire upon enemy soldiers stepping forward to take the former as prisoners of war. Still, collusion is the key to such manifestation of perfidy. In many combat situations, some individuals (or even units) surrender while others continue to fight. Absent collusion, the fact that John Doe persists in shooting does not mean that Richard Roe is feigning when raising the white flag. To be on the safe side, the adverse Party's troops need not expose themselves to unnecessary risks, and they may demand that Richard Roe step forward unarmed. 27

(ii) Feigning of an incapacitation by wounds or sickness, i.e., the state of being hors de combat. Once more, the indispensable setting is the killing, injuring or capturing of an adversary. It is not enough that

---

24 De Preux, supra note 20, at 432–3. 25 Solf, supra note 21, at 204. 26 Ibid.
27 See Law of War Workshop 7-30-7-31 (US Army Judge Advocate General, 1999).
a combatant feigns death in order to save his life.²⁸ Perfidy is perpetrated only if the act is performed with the intent to kill, injure or capture an enemy whose guard is down, and the intent is carried out.²⁹

(iii) Feigning of civilian, non-combatant status. This is a curious and in some respects misleading provision. On the face of it, a radical change is brought about in the status of combatants who feign civilian status by removing their uniforms (or any other fixed distinctive emblem) and wear ordinary clothing. Under customary international law, a combatant doing that becomes an unlawful combatant, i.e., he is denied the privileges of a prisoner of war status and exposed to the full rigour cf the domestic penal system for any act of violence perpetrated by him in civilian clothes (see supra, Chapter 2, III). Yet, the removal of the uniform per se is not considered a violation of LOIAC. Article 37 of the Protocol appears to alter all that. In conformity with Article 37(1)(c), if the perfidious removal of a uniform leads to the killing, injury or capture of an adversary – betrayed to believe that he is facing a civilian – the act constitutes a direct breach of LOIAC itself. This, to say the least, is surprising inasmuch as the Protocol in general – far from imposing more stringent constraints on combatants taking off their uniforms – actually relaxes in a controversial way the standards of customary international law in this context (see supra, Chapter 2, IV). How can one account for the singular thrust of the new stricture? The answer is that Article 37(1)(c) does not amount to much more than lip-service. Any lingering doubt is dispelled by a rider in Article 44(3) (where much of the controversial relaxation of unlawful combatancy occurs):

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).³⁰

Even the ICRC Commentary concedes that ‘[t]here is a certain contradiction in terms’ between the provisions of Article 37(1)(c) and Article 44(3).³¹

(iv) Feigning of protected status by the use of emblems or uniforms of the United Nations or of neutral States. Here, too, the interdiction relates to an attempt to acquire protection in order to kill, injure or

²⁹ See Kalshoven and Zegveld, supra note 23, at 94.
³⁰ Protocol I, supra note 2, at 647.
capture an adversary. The underlying premise with respect to the UN is that it is above the fray. Should a UN force participate in an armed conflict, Article 37 will not apply (although Article 39, pertaining to misuse of enemy emblems and uniforms, will).

(bb) Article 38 There are three categories of prohibitions in Article 38:

(i) Making improper use of the Geneva emblems, signs or signals. This is an elaboration of the injunction in Article 23(f) of the Hague Regulations against the improper use of the Geneva badges. The linchpin of Article 38 (like that of Article 23(f)) is the expression ‘improper use’. Thereby, the application of Article 38 is not contingent on any pernicious killing, injury or capture of an adversary. Here lies the critical dividing line between Article 38 and Article 37 of the Protocol.

(ii) Deliberate misuse of other internationally recognized protective emblems, signs or signals, including the flag of truce and the protective emblem of cultural property. Once more, the stricture is in place independently of pernicious killing, injury or capture of an adversary; hence the new reference to a flag of truce. As indicated, Article 37(1)(a) forbids the feigning of an intent to negotiate under a flag of truce, but only in the context of pernicious use resulting in killing, injury or capture of an adversary. Article 38 essentially reverts to the broad prohibition of Article 23(f) of the Hague Regulations in alluding to any ‘deliberate misuse’ of a flag of truce. The sole linguistic divergence is that the original expression ‘improper use’, appearing in Article 23(f), is substituted in Article 38 by ‘deliberate misuse’. The practical difference between these two phrases is not pellucid. An example of a deliberate misuse of the flag of truce which would be a violation of Article 38 as well as of Article 23(f), but not of Article 37(1)(a), is the use of a flag of truce solely ‘to gain time for retreats or reinforcements’.

Article 38’s stigmatization of the deliberate misuse of internationally recognized protective emblems, signs or signals is open-ended. The scope is wide enough to include deliberate misuse both of existing protective emblems and signs (e.g., distress signals), and of ones to be adopted in the future. There is also every reason to believe

---

32 See de Preux, supra note 20, at 439. 33 See Solf, supra note 21, at 206.
35 See ibid., 456–8.
37 See de Preux, supra note 34, at 456, 458.
that the distinctive protective emblem used by Israel (the Red Shield of David) comes within the purview of Article 38.38

(iii) Making unauthorized use of the distinctive emblem of the United Nations. Again, the UN emblem is mentioned already in Article 37(1)(d), but only in the setting of perfidious use resulting in killing, injury or capture of an adversary. In Article 38, the repudiation of unauthorized use is absolute. Nevertheless, the protection of the UN emblem in Article 38 – no less than in Article 37(1)(d) – must be understood as confined to circumstances in which the UN is not itself taking part in the armed conflict.39

(cc) Article 39 Article 39 prohibits:

(i) The use of flags, military emblems, insignia or uniforms of neutral States. This ban is unqualified.

(ii) The use of enemy flags, military emblems, insignia or uniforms, but only when engaging in attacks or in order to shield, protect or impede military operations. This is an obvious attempt to define what amounts to an ‘improper use’ of enemy flags, insignia and uniforms (disallowed in Article 23(f) of the Hague Regulations).40 The issue was sharpened by the controversial Skorzeny trial of 1947, in which a US Military Court acquitted German soldiers who, in the course of the Battle of the Bulge in December 1944, had worn American uniforms prior to engaging in combat.41 Contrary to that decision, Article 39 delegitimizes the use of the enemy uniform and insignia not only during an attack but in all situations directly related to military operations, including preparatory stages preceding an attack.42 That is not to say that all use of enemy uniform is necessarily improper. It has always been acknowledged that members of the armed forces who don enemy uniforms as a result of shortage of supplies – and without intention to deceive – do not act in breach of LOJAC, provided that alterations are made in those uniforms (and enemy insignia are removed) so as to avoid confusion as to which belligerent State they belong.43 Captured enemy vehicles, tanks, etc., can be turned around and used in battle, but only after effacing the enemy national markings.44 Moreover, escaping prisoners of war are allowed to wear enemy uniforms – to conceal their true identity – even without taking off the enemy insignia45 (provided that they do

39 See de Preux, supra note 34, at 459.
41 Trial of Skorzeny et al. (US Military Court, Germany, 1947), 11 LRTWC 90, 93.
42 See de Preux, supra note 40, at 466, 471. 43 See Holland, supra note 16, at 45.
45 See de Preux, supra note 40, at 467.
not commit an attack while in disguise\(^{46}\). A special dispensation exists with respect to spies (see infra, II, B).

As stated explicitly in Article 39(3), neither Article 37(1)(d) nor Article 39(1)–(2) applies to the use of flags in the conduct of armed conflict at sea. Warships have traditionally been conceded the right to disguise themselves – inter alia, by flying false neutral colours – except when going into action.\(^{47}\) The 1995 San Remo Manual, without departure from the classical rule allowing the use of a false neutral flag, specifically forbids warships to simulate the status of hospital ships, cartel ships, passenger liners, vessels protected by the UN flag, etc.\(^{48}\) The use of false colours (which can serve a deceptive purpose only upon visual contact with the enemy) has lately diminished in importance because much of modern naval warfare entails over-the-horizon targeting. However, it is still an effective ruse in some close-waters encounters where ‘visual identification remains the most reliable means of distinguishing friend from foe’.\(^{49}\) The most effective (and, of course, lawful) measure for concealing the presence of a warship today would consist of discontinuance of all electronic emissions emanating from it.\(^{50}\)

(c) Legitimate ruses of war Ruses of war are warranted by both Article 24 of the Hague Regulations and Article 37(2) of Protocol I. As Article 37(2) explains, ruses of war are intended to mislead the enemy – or to induce him to act recklessly – but they (i) do not infringe any rule of LOIAC; and (ii) are not perfidious, because they do not invite the enemy’s confidence with respect to protection under LOIAC.

Article 37 lists only four examples of ruses of war: camouflage, decoys, mock operations and misinformation. Evidently, there are countless other acceptable ruses of war. For instance, a Party to the conflict is allowed to use misleading electronic, optical, acoustic or other means to implant illusory images in the mind of the enemy.\(^{51}\) It is permissible to alter data in the enemy’s computer databases, and to pass to enemy subordinate units false instructions that appear to come from their headquarters.\(^{52}\)

A belligerent State may set up surprise attacks and ambushes, place in


\(^{47}\) See, e.g., Annotated Supplement 511.


\(^{50}\) See San Remo Manual, supra note 48, at 184.

\(^{51}\) See de Preux, supra note 20, at 441.

position dummy constructions and weapons, use false codes, and so forth.\textsuperscript{53} It is a lawful ruse for tanks to advance with their turrets pointed aft, turning them forward when action begins, because reversed turrets are not a recognized symbol of surrender.\textsuperscript{54}

It may as well be added that psychological warfare is lawful, not only through spreading misinformation (or disinformation), but also through inciting enemy combatants to rebel, mutiny or desert.\textsuperscript{55} A belligerent is further allowed to counterfeit the enemy's currency, in order to undermine its monetary system and credits.\textsuperscript{56}

\textbf{C. Other texts relating to perfidy and ruses of war}

The distinction between perfidy and ruses of war is dealt with not only in Protocol I. The dichotomy is addressed also in other instruments:

(i) In accordance with Article 21 of the (non-binding) 1923 Hague Rules of Air Warfare, aircraft can be used for the purpose of disseminating propaganda.\textsuperscript{57} This entitlement covers the dropping of defeatist and even subversive leaflets inciting revolt and encouraging desertions.\textsuperscript{58}

(ii) Following Article 10 of the (equally non-binding) 1923 Hague Rules for the Control of Radio in Time of War (formulated by the same Commission of Jurists), the abuse of radio distress signals for other than their normal and legitimate purposes amounts to a violation of LOIAC.\textsuperscript{59} In a note adjoining the text, the Commission explained that the Article is designed to prevent the employment of signals and messages of distress as a ruse of war.\textsuperscript{60}

(iii) Article 6 of a Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Annexed to the 1980 Conventional Weapons Convention, refers to 'the rules of international law applicable in armed conflict relating to treachery and perfidy' in the context of the use of booby-traps (see \textit{supra}, Chapter 3, III, A, d).\textsuperscript{61}

\textsuperscript{53} See de Preux, \textit{supra} note 20, at 443.
\textsuperscript{54} See \textit{Law of War Workshop}, \textit{supra} note 27, at 7–31.
\textsuperscript{55} See Oeter, \textit{supra} note 46, at 203.
\textsuperscript{56} See F. A. Mann, \textit{The Legal Aspect of Money} 481 (5th edn, 1992).
\textsuperscript{58} See K. J. Madders, 'War, Use of Propaganda in', 4 \textit{EPLT} 1394, \textit{id}.
\textsuperscript{59} Hague Rules for the Control of Radio in Time of War, 1923, 32 \textit{AJIL}, Supp., 1, 2, 10 (1938).
\textsuperscript{60} Commission of Jurists, Commentary on the Hague Rules for the Control of Radio in Time of War, \textit{ibid}.
\textsuperscript{61} Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Annexed to Convention on Prohibitions or Restrictions on the
(iv) Article 8(2)(b) of the Rome Statute of the International Criminal Court brings the following acts within the definition of war crimes:

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army.\(^\text{62}\)

Article 8(2)(b)(xi) is identical to Hague Regulation 23(b), not even changing the original mention of a ‘hostile nation or army’ (which in current parlance means civilians or combatants of the adverse Party\(^\text{63}\)). Article 8(2)(b)(vii) is clearly derived from Hague Regulation 23(f).\(^\text{64}\) Yet, like Article 37 of Protocol I, it requires that the result would be killing or personal injury (except that the injury has to be serious, and capture is not mentioned). A reference to the flag, military insignia or uniform of the UN – but not of neutral States – has also been added.

II. Espionage

A. The definition of espionage

As noted (supra, I, A), Article 24 of the Hague Regulations does not impede ‘the employment of measures necessary for obtaining information about the enemy’. It ensues that a belligerent may resort to any intelligence-gathering method, including (in the modern age) the use of electronic devices, wire tapping, code breaking and aerial or satellite photography. Despite the advances in technology, there is no substitute – even in our era – for the employment of human resources on the ground behind enemy lines, namely, spies.

Espionage is defined in Article 29 of the Hague Regulations (in the language of the 1907 text):


\(^\text{64}\) See M. Cottier, ‘Article 8(2)(b)(vii)’, ibid., 202, 203.
A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.  

Article 27 of the 1923 Hague Rules of Air Warfare similarly reads:

Any person on board a belligerent or neutral aircraft is to be deemed a spy only if acting clandestinely or on false pretences he obtains or seeks to obtain, while in the air, information within belligerent jurisdiction or in the zone of operations of a belligerent with the intention of communicating it to the hostile party.

As freely conceded by the Commission of Jurists which drafted this provision, it merely offers a ‘verbal adaptation’ of Article 29 of the Hague Regulations. It has been argued that Article 27 of the Air Warfare Rules does not address ‘aerial observation’, but only ‘acts of personal espionage by individuals while aboard an aircraft’. However, such an interpretation of the text seems contrived.

The definition of espionage in Article 29 of the Hague Regulations has three cumulative ingredients: the act must (i) be committed in the zone of operations of a belligerent; (ii) consist of obtaining or delivering information (or dispatches) for the enemy; and (iii) be carried out clandestinely or under false pretences. A few comments about each of the three conditions follow:

(i) The term ‘zone of operations’ of a hostile army is not very satisfactory, inasmuch as spies can actually operate in the interior of the enemy’s territory. There is no need for limiting the zone of operations across the front line. What needs to be highlighted is that espionage can only be committed on the enemy’s side of that line. A person stationed on his own State’s side of the front line – say, clandestinely monitoring or deciphering enemy radio signals – is not a spy. A spy must be physically located in an area controlled by the enemy.

---

65 Hague Regulations, supra note 1, at 84–5.
66 Hague Rules of Air Warfare, supra note 57, at 212.
Espionage is confined to the collation or transmission of information or messages, for the benefit of the opposing belligerent, and it excludes acts of sabotage. Espionage may be committed in three ways: the spy may (a) gather information himself; (b) deliver information obtained by others; or (c) deliver a dispatch—irrespective of its contents, and even if it contains no information—through enemy territory (for instance, from or to a besieged area or a group of partisans).

Most significantly, an act of espionage must be carried out clandestinely or under false pretences. Espionage is linked to action under disguise, e.g., a combatant assuming the false identity of a civilian or that of a member of the enemy armed forces. A combatant may be sent behind enemy lines as a courier or on a reconnaissance mission. The mission would not be deemed espionage if carried out openly, without any attempt to hide the true identity of the person concerned as a combatant (other than the use of camouflage). In an explanatory note attached to Article 27 of the Hague Rules of Air Warfare, the Commission of Jurists stated that ‘reconnaissance work openly done behind the enemy lines by aircraft should not be treated as spying’.

B. The penal prosecution of spies

When a spy is captured by the enemy, he can be prosecuted and punished. The need for a trial (precluding summary execution) is underscored in Article 30 of the Hague Regulations:

A spy taken in the act shall not be punished without previous trial.

The question is what will be the gravamen of the penal prosecution of espionage. It is indisputable that espionage does not constitute a violation of LOIAC on the part of the State engaging in it. But what is the status of the person perpetrating the act of espionage on behalf of his country? It used to be maintained that, even though LOIAC permits the belligerent State to employ spies, the spy himself may be considered a war criminal. Yet, this is certainly not the law at the present time. The contemporary analysis of what has been called ‘the dialectics of espionage’ is different. Espionage is not a violation of LOIAC either by the State employing the

69 Commission of Jurists, supra note 67, at 28.
70 Hague Regulations, supra note 1, at 85.
spy or by the person thus employed. A spy is not a war criminal. Instead, given the clandestine nature of his activities, he is an unlawful combatant, and as such he is deprived of the status of a prisoner of war (supra, Chapter 2, II). In the words of the Dutch Special Court of Cassation in the Flesche case of 1949:

espionage ... is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime proper on the part of the individual concerned.

Thus, should a spy be captured, he may be prosecuted and punished, but only on the basis of the national criminal legislation of the belligerent State against whose interests he acted. As a rule, the charge will be espionage per se (assuming that espionage is an offence under the penal code of the prosecuting State). But if the spy owes allegiance (as a national or otherwise) to the prosecuting State, he is liable to be indicted for treason.

Article 30 refers to a ‘spy taken in the act’. What happens if a former spy is apprehended at a later stage? The situation is governed by Article 31:

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

This is an extraordinary stipulation accentuating the status of spies as unlawful combatants (rather than war criminals who can be prosecuted at any time). The rule is explicitly limited to combatants for whom espionage is like other dangerous missions: upon the conclusion of the mission, the danger is over. No similar dispensation exists for civilian spies. Light was shed on the point by the aforementioned Flesche case, in which a German civilian had engaged in espionage on behalf of Nazi Germany in the Netherlands. The man was captured on the eve of the Nazi invasion of Holland, in 1940, to be later released by the invading armies. When put on trial after the end of World War II, he relied on Article 31. However, this line of defence was rejected by the Dutch Special Court of Cassation:

Though Article 29 covers civilians also, Article 31 applies only to those in military service, as clearly appears from its text and as is expressly stated by several writers.

75 Flesche case (Holland, Special Court of Cassation, 1949), [1949] AD 266, 272.
76 See ibid. 77 Hague Regulations, supra note 1, at 85.
78 Flesche case, supra note 75, at 272.
Article 31 applies to all spies who are combatants, even if they had made use of enemy (or, for that matter, neutral or UN) uniforms and insignia. Ordinarily, such use would be deemed a war crime. Yet, spies – even in enemy uniform – remain merely unlawful combatants. The position is made clear in the above-cited Article 39(3) of Protocol I, whereby nothing in this provision – or, for that matter, in Article 37(1)(d) – ‘shall affect the existing generally recognized rules of international law applicable to espionage’. It follows that a spy wearing enemy uniform, having terminated his mission but captured subsequently, does not incur any criminal responsibility for his act of espionage.\(^79\)

The subject of espionage is also dealt with in Article 46 of Protocol I:

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.\(^80\)

In essence, the text reaffirms the traditional rules of espionage as laid down in the Hague Regulations.\(^81\) Still, there are some variations with respect to certain aspects of the law:

(i) The Protocol alludes only to members of the armed forces, whereas the Hague Regulations relate both to soldiers and to civilians as possible spies.\(^82\)

---

\(^79\) See de Preux, *supra* note 40, at 469.  
\(^81\) See de Preux, *supra* note 73, at 563.  
\(^82\) On civilians as spies, see K. Ipsen, ‘Combatants and Non-Combatants’, *Handbook* 65, 98–9.
(ii) In the Protocol, the coinage ‘territory controlled by an adverse Party’ replaces the more restrictive ‘zone of operations of a belligerent’. This is as it should be. Spies can act – and usually do – close to the cores of the decision-making process and the centres of population in the rear, rather than in the actual zone of military operations. Indeed, even legitimate reconnaissance missions – openly undertaken by combatants – may be carried out in the interior of the enemy country.  

(iii) The Protocol relates only to the gathering of information and does not refer to the separate issue of carrying messages, which has of course decreased in significance in the era of modern telecommunications.

(iv) The Protocol elucidates the meaning of ‘false pretences’ and ‘clandestine’ by specifying that a combatant cannot be considered a spy if he is wearing the uniform of his armed forces during the operation. Presumably, the word ‘uniform’ here applies to all fixed distinctive signs (see supra, Chapter 2, III) indicating that there is nothing clandestine about the activity in question.

(v) In occupied territories, a resident combatant cannot be treated as a spy unless he is caught in the act. In other words, responsibility for former acts of espionage will be extinguished – as far as a resident combatant is concerned – even if he does not rejoin the armed forces to which he belongs. As for non-resident combatants in occupied territories, they do have to rejoin their armed forces in order to benefit from the exemption. But it should be pointed out that the act of rejoining is feasible even within an occupied territory, e.g., when a long-range commando raid takes place.

III. Seizure and destruction of enemy property

The issues of seizure and destruction of enemy property have strenuous consequences in occupied territories, and are accordingly dealt with by multiple provisions of the 1899/1907 Hague Regulations and Geneva Convention (IV) of 1949. That must not divert attention from the poignant effects on property generated by the conduct of hostilities.

---

84 See de Preux, *supra* note 73, at 566.  
85 See *ibid.*, 570.
It is necessary to distinguish here between (i) pillage, (ii) booty of war, (iii) prize, and (iv) destruction or seizure of enemy property.

A. Pillage

The Hague Regulations of 1899/1907 proscribe pillage of towns and other places, even in assault (Article 28), and pillage in occupied territories (Article 47). The interdiction against pillage of a town or place, even when taken by storm, is replicated in the context of coastal attacks by naval units in Hague Convention (IX) (Article 7). ‘Pillaging a town or place, even when taken by assault’, is a war crime under Article 8(2)(b)(xvi) of the Rome Statute of the International Criminal Court. The 1954 Hague Cultural Property Convention bans pillage – as well as theft, misappropriation and any acts of vandalism – directed against cultural property (Article 4(3)).

Protection against pillage is granted to military wounded and sick by Geneva Conventions (I) (Article 15) and (II) (Article 18), which also forbid despoiling the dead. Pillage of civilian wounded and sick is equally disallowed by Geneva Convention (IV) (Article 16), which adds a more general prohibition against pillage (Article 33): both stipulations appear in Parts of the instrument dealing with the protection of civilian population anywhere (not necessarily in occupied territories).

Pillage means looting (or plundering) of enemy, public or private, property by individuals for private ends. The end is private – and the act constitutes pillage – even if the perpetrator does not take the property for himself, but hands it over to friends or relatives, or contributes it to a charitable institution. Pillage is usually committed by combatants, but the injunction embraces also civilians. As amply demonstrated by

88 Hague Regulations, supra note 1, at 84. 89 Ibid., 89.
91 Rome Statute, supra note 62, at 1007.
93 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, Laws of Armed Conflicts 373, 580–1.
94 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, Laws of Armed Conflicts 401, 409.
95 Geneva Convention (IV), supra note 87, at 506–7.
96 Ibid., 511.
97 Cf. A. A. Steinkamm, ‘Pillage’, 3 EPIL 1029, id.
Other methods and means of warfare 215

events following the overthrow of the Saddam Hussein regime in Iraq, in 2003, the looters may actually be enemy civilians.

B. **Booty of war**

In conformity with customary international law, title to any movable public property belonging to the enemy State and captured on the battlefield is acquired automatically by the belligerent State whose armed forces have seized it, irrespective of the military character of the property (not only weapons and ammunition, but also money and food stores). Even medical transports and supplies are liable to capture - on condition that the care of the wounded and sick is safeguarded - under Geneva Convention (I) (Articles 33 and 35).

Booty of war consists principally of governmental enemy property. Private enemy property is immune from capture on the battlefield, except for selected items: it is permissible to seize on the battlefield as booty of war weapons and ammunition, military equipment, military papers and the like, although they constitute private property.

Since the law regulating booty of war is basically uncodified in treaty form, the term ‘battlefield’ (which is commonly used) need not be taken literally. The Supreme Court of Israel held, in 1985, that the entire theatre of operations may be regarded as a battlefield for the purposes of the law of booty in land warfare.

In all cases of seizure of booty of war, it becomes the property of the captor State, as distinct from the unit or individual seizing it. If an individual soldier attempts to keep booty for himself (e.g., as a ‘war trophy’), the act would be deemed pillage (supra, A).

C. **Prize and contraband**

Governmental enemy property – like warships – can be seized as booty of war in maritime hostilities (as much as in land warfare), and title is transferred automatically. But the most striking aspect of sea warfare is that private enemy vessels and cargoes are subject to capture and

100 See Y. Dinstein, ‘Booty in Land Warfare’, 1 EPIL 432, id.
101 Geneva Convention (I), supra note 93, at 387.
103 H.C. 574/82, Al Naziy v. Minister of Defence et al., 39(3) Piskei Din 449, 471. (The Judgment is excerpted in English in 16 IVHR 321 (1986).)
104 Downey, supra note 102, at 500.
105 See W. Rabus, ‘Booty in Sea Warfare’, 1 EPIL 434, id.
condemnation as prize, following adjudication.\footnote{See D. H. N. Johnson, ‘Prize Law’, 3 EPIL 1122, 1122–3.} Prize differs from booty of war in two important aspects: (i) prize relates to private, as distinct from public, property; (ii) title to prize is transferred only after judicial proceedings.\footnote{See Rabus, supra note 105, at 434–5.} These proceedings are carried out by the domestic courts of the belligerent State that captured the prize.\footnote{See Johnson, supra note 106, at 1125.} An attempt to establish an international prize court in Hague Convention (XII) of 1907 failed, the Convention never coming into force.\footnote{Hague Convention (XII) Relative to the Creation of an International Prize Court, 1907, Laws of Armed Conflicts 825. See Introductory Note, id.} Like booty of war, prize belongs to the belligerent State and not to the individual or unit capturing it.

All private enemy vessels are subject to capture and condemnation as prize, including yachts, but excluding hospital ships and similar categories of protected vessels.\footnote{See San Remo Manual, supra note 48, at 205–8.} Problems arise only as regards determination of the enemy character of the vessel. The rules that have emerged are as follows: (i) when a vessel is flying the enemy flag, this is conclusive evidence of enemy character; (ii) when a vessel is flying a neutral flag, this is only \textit{prima facie} evidence of neutral character; (iii) if the commander of a belligerent warship suspects that a vessel flying a neutral flag is in fact an enemy vessel, he is entitled to exercise the right of visit and search (and if weather conditions render visit and search at sea hazardous, to divert the ship to port for that purpose).\footnote{See \textit{ibid.}, 187–91.} Enemy character of a vessel can be determined on the basis of several criteria, including registration, ownership and control.\footnote{See \textit{ibid.}, 193–4.}

Private enemy cargoes, if on board a private enemy merchant vessel, can always be captured as prize together with the vessel, regardless of destination.\footnote{See \textit{ibid.}, 195.} There is a rebuttable presumption that cargoes on board enemy vessels have enemy character, but this is a matter to be resolved by the prize court rather than by the naval commander at sea.\footnote{See \textit{ibid.}, 195.} Private enemy cargoes on board a neutral merchant vessel can also be captured and condemned as prize, outside neutral waters, but only in three alternative situations: if (i) the vessel is breaching a blockade (see supra, Chapter 4, V, F); (ii) the vessel resists visit and search; or (iii) the cargo constitutes contraband.\footnote{See \textit{ibid.}, 193–4.} ‘Contraband is defined as goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict’.\footnote{See \textit{ibid.}, 205.} The destination of the cargo to enemy-controlled territory is crucial for the definition of contraband. But when the cargo is destined there, it ‘is immaterial whether
the carriage of contraband is direct, involves transshipment, or requires overland transport.\textsuperscript{117}

Certain items obviously intended for military use (such as weapons and munitions) constitute ‘absolute contraband’.\textsuperscript{118} In contrast, some items (like medications) are ‘free goods’ which can never be considered contraband.\textsuperscript{119} A belligerent wishing to capture as contraband items not patently prone to military use must publish in advance specific contraband lists\textsuperscript{120} (usually known as ‘conditional contraband’\textsuperscript{121}).

Since contraband must be destined for territory controlled by the enemy, \textit{ex hypothesi} it does not encompass goods exported from enemy territory.\textsuperscript{122} Differently put, enemy exports (as distinct from imports) at sea can never be captured as contraband. Enemy exports at sea can still be captured and condemned as prize, but only if (i) they are carried by enemy merchant vessels; or (ii) they are carried by neutral merchant vessels that breach a blockade or resist visit and search.

Consonant with the Hague Rules of Air Warfare, enemy civil aircraft and their cargoes are subject to the same legal regime as private enemy vessels: they are subject to capture and condemnation as prize following adjudication.\textsuperscript{123} The San Remo Manual confirms this rule as customary law (with the exception of medical aircraft).\textsuperscript{124}

Neutral merchant vessels outside neutral waters are subject to visit and search by belligerent warships, with a view to verifying the neutral character of the ship and to checking the cargo for contraband, unless they are travelling under convoy of neutral warships.\textsuperscript{125} Neutral merchant vessels (and civilian aircraft), as well as neutral cargoes, are liable to capture and condemnation as prize if: (i) the vessels or aircraft carry, or the cargoes constitute, contraband; (ii) the vessels or aircraft breach a blockade; (iii) they are irregularly or fraudulently documented; (iv) they operate directly under enemy control; (v) they violate regulations within the immediate area of naval operations; or (vi) they transport enemy troops.\textsuperscript{126}

\textsuperscript{117} Annotated Supplement 383.
\textsuperscript{118} For a classical definition of ‘absolute contraband’, see Article 22 of the (unratified) London Declaration Concerning the Laws of Naval Warfare, 1909, \textit{Laws of Armed Conflicts} 843, 847–8.
\textsuperscript{119} See \textit{San Remo Manual}, supra note 48, at 217. \textsuperscript{120} See \textit{ibid.}, 216.
\textsuperscript{121} For a classical definition of ‘conditional contraband’, see Article 24 of the London Declaration, supra note 118, at 848.
\textsuperscript{122} See \textit{San Remo Manual}, supra note 48, at 216.
\textsuperscript{123} Hague Rules of Air Warfare, supra note 57, at 215–16 (Chapter VII).
\textsuperscript{124} \textit{San Remo Manual}, supra note 48, at 211.
D. Other destruction and seizure of enemy property

Other than in circumstances of booty of war and prize, enemy property is exempt from destruction and seizure unless this is required by military operations. Under Article 23(g) of the Hague Regulations, it is prohibited:

(g) To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.\(^{127}\)

The exception here is necessarily broad. Destruction of enemy property is an inevitable feature of warfare. Every assault and bombardment—and especially combat in built-up areas—causes much destruction. But wartime is no excuse for destruction of enemy property at random. The cardinal question is whether the destruction is required by ‘the necessities of war’. As highlighted by an American Military Tribunal in the \textit{Hostage} case of 1948 (in the course of the ‘Subsequent Proceedings’ at Nuremberg), destruction of enemy property ‘as an end in itself’ in wartime is a violation of international law.\(^{128}\) ‘There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces’.\(^{129}\) Such a ‘reasonable connection’, justifying the destruction of enemy property, may be established in a variety of circumstances: in attack (e.g., firing upon a building in which an enemy unit is taking cover), in defence (e.g., demolishing houses in the preparation of a line of fortifications), and even by the sheer movement of tanks and heavy equipment. In the absence of that ‘reasonable connection’, the destruction of enemy property would be deemed wanton and, as such, a breach of LOIAC.

A good modern example of wanton (hence, illicit) destruction of enemy property in wartime is the setting on fire by retreating Iraqi troops of hundreds of Kuwaiti oil wells, in 1991, without gaining any commensurate military advantage from the huge conflagration (see \textit{supra}, Chapter 7, IV). It should also be recalled that a ‘scorched earth’ strategy may be implemented by retreating troops only when the area affected belongs to the belligerent Party, and not to the enemy (see \textit{supra}, Chapter 5, VIII).

 Destruction of houses as a (legitimate) integral part of military operations must be distinguished from demolitions of residential buildings carried out as a post-combat punitive measure. Israel has resorted to such measures in its fight against terrorism in occupied territories. In support of the Israeli policy it has been maintained that if hand grenades are hurled

\(^{127}\) Hague Regulations, \textit{supra} note 1, at 83.


\(^{129}\) \textit{Ibid.}, 1253–4.
out of a house (or if terrorists use the premises to prepare an attack), that house becomes a military base, so there is no difference between immediate military reaction leading to its destruction and later demolition as a punitive measure.\textsuperscript{130} However, it is wrong to believe that, once used for combat purposes, a civilian object (like a residential building) is tainted permanently as a military objective. As long as combat is in progress, the destruction of property – even in occupied territories – is permissible, if rendered necessary by military operations.\textsuperscript{131} Yet, subsequent to the military operations, destruction of property is no longer compatible with modern LOIAC.\textsuperscript{132}

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,\textsuperscript{133} constitutes a grave breach of Geneva Convention (IV).\textsuperscript{134} As such, it is a crime under Article 2(d) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia,\textsuperscript{135} and a war crime pursuant to Article 8(2)(a)(iv) of the 1998 Rome Statute.\textsuperscript{136} In fact, both instruments create separate and independent crimes with respect to the same materia. The ICTY Statute, in listing prosecutable violations of the laws and customs of war, includes in Article 3(b) ‘wanton destruction of cities, towns or villages, or devastation not justified by military necessity’,\textsuperscript{137} and in Article 3(e) ‘plunder of public or private property’.\textsuperscript{138} Article 8(2)(b)(xiii) of the Rome Statute enumerates as a war crime ‘[d]estroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war’.\textsuperscript{139} Obviously, this is a reproduction of the language of Hague Article 23(g). Since Article 8(2)(b)(xiii) of the Rome Statute is ‘quite similar in nature’ to Article 8(2)(a)(iv),\textsuperscript{140} the difference between the two war crimes is not clear.

\textsuperscript{130} See M. Shamgar, ‘The Observance of International Law in the Administered Territories’, 1 \textit{IYHR} 262, 274 (1971).
\textsuperscript{131} See Article 53 of Geneva Convention (IV), \textit{supra} note 87, at 517.
\textsuperscript{133} The two adverbs, unlawfully and wantonly, are obviously a ‘surplusage’ (W. J. Fenrick, ‘Article 8(2)(a)(iv)’, \textit{Commentary on the Rome Statute of the International Criminal Court, supra} note 63, at 183, id.).
\textsuperscript{134} Geneva Convention (IV), \textit{supra} note 87, at 547 (Article 147).
\textsuperscript{136} Rome Statute, \textit{supra} note 62, at 1006.\textsuperscript{137} ICTY Statute, \textit{supra} note 135, at 1192.
\textsuperscript{138} \textit{Ibid.}, 1193.\textsuperscript{139} Rome Statute, \textit{supra} note 62, at 1007.
\textsuperscript{140} A. Zimmermann, ‘Article 8(2)(b)(xiii)’, \textit{Commentary on the Rome Statute of the International Criminal Court, supra} note 63, at 227, 228.
IV. Belligerent reprisals

A. The concept of belligerent reprisals

When LOIAC is breached by the enemy during hostilities, the aggrieved belligerent State would be interested less in any possible future remedy for the harm already done (e.g., financial reparation to be paid after the hostilities are over) – or even in the ultimate punishment of individuals accountable for war crimes (see infra, Chapter 9) – and more in ensuring that the enemy would not continue with the breach or renew it in the course of the armed conflict. The conundrum is how to deter the enemy from further breaches and impel compliance with LOIAC. A ‘classic’ tool – which has developed in customary international law, in order ‘to induce a law-breaking state to abide by the law in the future’ – is recourse to belligerent reprisals.\footnote{Oeter, supra note 46, at 204.}

Belligerent reprisals are not to be confused with armed reprisals in peacetime.\footnote{On the subject of armed reprisals in peacetime, see Y. Dinsein, War, Aggression and Self-Defence 194–203 (3rd edn, 2001).} A belligerent reprisal consists of action which would normally be contrary to the laws governing the conduct of armed conflict (the \textit{ius in bello}) but which is justified because it is taken by one party to an armed conflict against another party in response to the latter’s violation of the \textit{ius in bello}.\footnote{C. Greenwood, ‘The Twilight of the Law of Belligerent Reprisals’, 20 \textit{NYIL} 35, 38 (1989).} The underlying concept is that, in appropriate circumstances, the original breach of LOIAC by one belligerent State vindicates a counter-breath in response by the adversary – the counter-breath being purged of any trace of illegality – with a view not to retribution but to forestalling recurrence of the original breach.\footnote{The term ‘countermeasures’, popularized by the International Law Commission, ‘covers that part of the subject of reprisals not associated with armed conflict’, and therefore does not replace belligerent reprisals. \textit{Report of the International Law Commission}, 33rd \textit{Session} 325 (2001) (Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts).}

Empirically, the apprehension of a ‘tit for tat’ is the paramount means of deterrence against breaches of LOIAC. Many laws of warfare (usually formulated or accepted in peacetime, when the exigencies of war do not loom on the horizon) prove onerous once put to the test of an actual international armed conflict. If belligerent States refrain from contravening them, notwithstanding a perception that these norms tie their hands militarily and strategically, it is above all due to the knowledge that any deviation is likely to entail painful reciprocity.
Customary international law regulates belligerent reprisals by subjecting their exercise to five conditions:  

(i) Protests or other attempts to secure compliance of the enemy with LOIAC must be undertaken first (unless their fruitlessness ‘is apparent from the outset’).  

(ii) A warning must generally be issued before resort to belligerent reprisals.  

(iii) Belligerent reprisals must always be proportionate to the original breach of LOIAC.  

(iv) The decision to launch belligerent reprisals cannot be taken by an individual combatant, and must be left to higher authority.  

(v) Once the enemy desists from its breach of LOIAC, belligerent reprisals must be terminated.  

The main purpose of preliminary protests and warnings (the first two conditions) is to establish that the enemy’s breach of LOIAC is deliberate rather than ‘accidental’. If it remains impervious to those protests and warnings, the enemy shows that the breach is likely to be repeated. Since assessment of breaches and counter-breaches is not a simple matter, the fourth condition is introduced. It is designed to ensure deliberation on the part of higher echelons of the aggrieved State before a belligerent reprisal is carried out. The fifth condition highlights the nature of a belligerent reprisal as a deterrent measure. But the most significant condition is the third, relating to proportionality. Proportionality does not mean equivalence: it means that the response must not be excessive, although in practice a belligerent reprisal is usually somewhat harsher than the original breach.  

Belligerent reprisals need not be in kind. If State A bombs civilian objects in State B, State B is not bound to respond by bombing civilian objects in State A. Sometimes there is no direct counterpart in State A for the object struck in State B. It is also possible that State B lacks the technical capability of meting out to State A measure for measure in the same field. State B is therefore allowed to respond with a belligerent reprisal of a different kind, provided that proportionality is observed. Naturally, when a belligerent reprisal is not in kind, the degree of proportionality to the original breach may be harder to evaluate accurately.  

---

146 See F. Kalshoven, Belligerent Reprisals 340 (1971).  
148 See Annotated Supplement 339–40 n. 43.  
Generally, belligerent reprisals have to be carried out by the State which was the victim of the original breach, and be directed against the State responsible for that breach. But in the setting of coalition warfare, a breach of LOIAC by State A against State B may give rise to a belligerent reprisal by State C (an ally of State B) against State A – or perhaps even against State D (an ally of State A) – in view of the commonality of interests of the allies on either side of the aisle.\textsuperscript{150} Yet, belligerent reprisals must be confined to the relations between belligerent States. They must not be directed by or against neutrals.\textsuperscript{151}

There is a need to distinguish between three different classes of action labelled as belligerent reprisals:

(i) Genuine and legitimate belligerent reprisals designed to ensure that LOIAC (having been breached first by the enemy and now by the aggrieved State) be reinstated in the future. They are literally the exception that proves, and safeguards, the rule.

(ii) So-called belligerent reprisals, constituting merely ‘a pretext for justifying the illegitimate conduct’ of a State.\textsuperscript{152} These are not genuine exceptions to the rule, but violations thereof.

(iii) Extended reciprocal belligerent reprisals, which ultimately become entrenched in the practice of States (in one form or another). At the outset, these actions constitute genuine belligerent reprisals, but in time they are grafted onto the norms of LOIAC as new law. The upshot is that the exception to the rule becomes the rule. As an illustration, it is possible to refer to the practice of ‘target area’ bombings (see supra, Chapter 4, VI, C), which originally started in World War II in a spiral of belligerent reprisals and counter-reprisals (with constant escalation).\textsuperscript{153} Whatever the legal position was at the time, it is a matter of record that ‘target area’ bombing (subject to prescribed parameters) is currently compatible with Article 51(5)(a) of Protocol I.\textsuperscript{154}

\textit{B. Prohibitions of specific belligerent reprisals}

Not every belligerent reprisal may be unleashed, even if it meets the five conditions set out above. Certain belligerent reprisals are specifically


\textsuperscript{154} Protocol I, supra note 2, at 651.
dismissed by the Geneva Conventions. Article 46 of Geneva Convention (I) proclaims:

Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.\(^{155}\)

Article 47 of Geneva Convention (II) reiterates the same notion, appending shipwrecked persons to the list and supplanting buildings by vessels.\(^{156}\) Geneva Convention (III) sets forth in Article 13 (third Paragraph):

Measures of reprisal against prisoners of war are prohibited.\(^{157}\)

For its part, Geneva Convention (IV) states in Article 33 (third Paragraph):

Reprisals against protected persons and their property are prohibited.\(^{158}\)

Similarly, Article 4(4) of the Hague Cultural Property Convention lays down that High Contracting Parties shall refrain from any act directed by way of reprisals against cultural property.\(^{159}\)

The exclusions of specific belligerent reprisals are considerably extended in Protocol I, which interdicts them in seven different contexts:

(i) Article 20 bans reprisals against persons and objects protected in Part II (dealing with wounded, sick, shipwrecked, medical and religious personnel, medical units and transportation, etc.).\(^{160}\) The principal purpose of this provision was to cover persons and objects not protected from reprisals by Geneva Conventions (I) and (II), especially civilian wounded and sick as well as civilian medical objects.\(^{161}\)

(ii) Article 51(6) does not permit attacks against the civilian population or civilians by way of reprisals.\(^{162}\)

(iii) Article 52(1) states that civilian objects shall not be the object of reprisals.\(^{163}\)

\(^{155}\) Geneva Convention (I), supra note 93, at 391.

\(^{156}\) Geneva Convention (II), supra note 94, at 417.


\(^{158}\) Geneva Convention (IV), supra note 87, at 511.

\(^{159}\) Hague Cultural Property Convention, supra note 92, at 748.

\(^{160}\) Protocol I, supra note 2, at 637.

\(^{161}\) See M. Bothe, 'Article 20', New Rules 137, 140.

\(^{162}\) Protocol I, supra note 2, at 651.

\(^{163}\) Ibid., 652.
(iv) Article 53(c) forbids making historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples the object of reprisals.\textsuperscript{164}

(v) Article 54(4) protects objects indispensable to the survival of the civilian population from being made the object of reprisals.\textsuperscript{165}

(vi) Article 55(2) pronounces that attacks against the natural environment by way of reprisals are prohibited.\textsuperscript{166}

(vii) Article 56(4) denies the right of making works or installations containing dangerous forces (namely, dams, dykes and nuclear electrical generating stations) – even where they are military objectives – the object of reprisals.\textsuperscript{167}

Additionally, Article 3(2) of Protocol II, Annexed to the 1980 Conventional Weapons Convention, proscribes directing mines, booby-traps and other devices against civilians by way of reprisals.\textsuperscript{168}

These sweeping injunctions do not eliminate belligerent reprisals \textit{in toto}, but they are most comprehensive.\textsuperscript{169} Some belligerent reprisals are still untrammeled, but they are few in number. Above all, no specific treaty provision dispels the possibility of employing prohibited weapons against enemy combatants by way of belligerent reprisals.\textsuperscript{170} This is especially true where the belligerent reprisal is in kind, \textit{viz.} when enemy reliance on unlawful weapons prompts their counter-use as belligerent reprisal.

In the domain of prohibited weapons, the introduction of belligerent reprisals is not necessarily the harshest response to breaches. Thus, the text of the 1925 Geneva Gas Warfare Protocol drew a spate of formal reservations, whereby contracting Parties would cease altogether to be bound by their obligations towards any enemy whose armed forces (or whose allies) do not respect the Protocol.\textsuperscript{171} These reservations are far-reaching, going beyond the response generally authorized by the law of treaties in case of ‘material breach’.\textsuperscript{172} Their net result is that of rendering the Protocol ‘a no-first-use agreement, rather than a no-use

\textsuperscript{164} Ibid.  \textsuperscript{165} Ibid., 653.  \textsuperscript{166} Ibid.  \textsuperscript{167} Ibid., 654.

\textsuperscript{168} Protocol II, \textit{supra} note 61, at 186.


\textsuperscript{171} Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925, \textit{Laws of Armed Conflicts} 115, 121–7.

agreement. Proportionate belligerent reprisals (limited in duration) would prove more humane than a total abrogation of the aggrieved State’s obligations towards an enemy acting in breach of the Protocol. In many respects, the notion of curtailing the age-old freedom of belligerent reprisals is attractive in a modern setting. Reciprocity or mutual deterrence, forming the foundation of the LOIAC construct of belligerent reprisals, is utterly alien to the contemporary law of human rights. When individuals are directly vested by international law with human rights, these rights cannot possibly be abolished or suspended by dint of any misconduct on the part of the State of nationality. Consequently, the human right of a lawful combatant to the protection of his life when captured by the enemy (a human right existing independently of any right to the same effect devolving on the belligerent State in whose armed forces he serves) cannot be denied only because that State has acted in breach of LOIAC. If members of the armed forces of State A murder prisoners of war from State B, State B (as ordained in Geneva Convention (III)) is disallowed to resort to belligerent reprisals in kind against prisoners of war from State A. The same principle militates against the suffering of innocent civilians solely on account of infringements of LOIAC committed by combatants belonging to the same State of nationality. Belligerent reprisals against innocent civilians are ‘antithetical to the notion of individual responsibility so fundamental to human rights’.

In similar vein, the interest in preserving the natural environment (or outstanding historic monuments) is shared by the whole of mankind. The fact that one belligerent State has already caused damage to the natural environment cannot possibly justify compounding of the injury by the other side. Deterring the perpetration of any further damage to the natural environment is important, but there is a certain incongruity in any attempt to accomplish it by additional acts of destruction (belligerent reprisals in kind). These would be akin to the proverbial cutting off of one’s nose to spite one’s face.

178 See Kalshoven, supra note 146, at 43.
Nevertheless, it need not be concluded that the aggrieved State is barred altogether from setting in motion belligerent reprisals against an enemy acting in blatant disregard of LOIAC. The only stricture is that, should the aggrieved State mount belligerent reprisals, these must not detrimentally affect human rights, the natural environment, historic monuments, and the like. There is no reason why every inanimate civilian object must be shielded from belligerent reprisals.\textsuperscript{180} If the civilian population of State B is bombed on a massive scale by State A, why is it vital – as mandated by Protocol I – to shield all of State A’s civilian objects from belligerent reprisals by State B? The Protocol is premised on the unreasonable expectation that, when struck in contravention of LOIAC, the aggrieved State would turn the other cheek to its opponent. This sounds more like an exercise in theology than in the laws of war.

A Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held in 2000, in the \textit{Kupreski} case, that the prohibition of belligerent reprisals against civilians has emerged as customary international law subsequent to the adoption of Protocol I in 1977.\textsuperscript{181} However, this extravagant assertion is not particularly convincing.\textsuperscript{182} State practice has certainly not yet endorsed the Protocol’s provisions. It is well worth mentioning that, upon ratification of Protocol I in 1998, the United Kingdom made an explicit and detailed declaration–reservation, whereby – if an adverse Party carries out serious and deliberate attacks in violation of Articles 51 through 55 of the Protocol – the UK would regard itself as `entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those articles’ (subject to proportionality and to the issuance of a prior warning).\textsuperscript{183} It has been authoritatively observed that the UK declaration–reservation (which has not elicited any objections) ‘is an accurate formulation of the requirements international law traditionally sets for recourse to belligerent reprisals’\textsuperscript{184}

\begin{footnotesize}
\begin{footnotes}
\item[180] See Kalshoven and Zegveld, \textit{supra} note 23, at 144–5.
\item[184] Kalshoven and Zegveld, \textit{supra} note 23, at 146.
\end{footnotes}
\end{footnotesize}
C. The taking of hostages

A theme closely associated in the past with belligerent reprisals was the practice of holding civilians as hostages (sometimes called ‘reprisal prisoners’), ‘taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken’. As late as 1948, an American Military Tribunal in the *Hostage* case pronounced that ‘the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort’. The Judgment was criticized even at the time of its delivery. But whatever the legal position was during World War II, Article 34 of Geneva Convention (IV) declares that ‘[t]he taking of hostages is prohibited’, subject to no qualifications or exceptions. No doubt, this is customary international law today.

The rule against the ‘taking’ of hostages is broader than an interdiction of their execution. It follows that, despite suggestions to the contrary, the taking of hostages can never be excused even if ultimately they are not killed.

The taking of hostages constitutes a grave breach of Geneva Convention (IV). As such, it is specifically listed as a prosecutable crime (referring specifically to civilians) in Article 2(h) of the ICTY Statute, and a war crime (without an explicit reference to civilians) in Article 8(2)(a)(viii) of the Rome Statute. Although in practice the victims of hostage-taking in wartime are usually civilians, there is no reason to regard them as the sole beneficiaries of the norm. No hostages can be taken, whether civilians, combatants (especially, prisoners of war), or even neutrals.

---

188 Geneva Convention (IV), *supra* note 87, at 511.
190 Geneva Convention (IV), *supra* note 87, at 547 (Article 147).