

Military personnel not in uniform may resist an attack, so long as they are not wearing the enemy's uniform and do not kill or wound treacherously.<sup>156</sup> For example, military personnel not in uniform who resist an attack, and who do not purposefully seek to conceal their status as combatants, commit no violation of the law of war and remain entitled to the privileges of combatant status. The normal wearing of uniforms or other distinctive emblems, however, should resume as soon as practicable because such wear helps protect the civilian population from erroneous attack by helping to distinguish military forces from the civilian population.<sup>157</sup>

5.4.8.2 *AP I Obligation for Combatants to Distinguish Themselves During Attacks or Military Operations Preparatory to an Attack.* AP I provides that: "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."<sup>158</sup>

The AP I provision only partially describes the obligation under customary international law of combatants to distinguish themselves from the civilian population. Under customary international law, the obligation of combatants to distinguish themselves is a general obligation that the armed forces have as a group and is not limited to times when they are engaged in an attack or in a military operation preparatory to an attack.<sup>159</sup> Moreover, measures such as wearing insignia or other distinctive emblems may be of less practical significance during an attack. During an attack, combatants are likely to be distinguishable based on their activities more than any insignia or devices they are wearing.

## 5.5 DISCRIMINATION IN CONDUCTING ATTACKS

Under the principle of distinction, combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack.<sup>160</sup>

In planning and conducting attacks, decisions or determinations that a person or object is a military objective must be made in good faith based on the information available at the time,<sup>161</sup> and those who plan or decide upon an attack must take feasible precautions to verify that the targets to be attacked are military objectives and not protected by the law of war from being

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wearing nothing but a singlet when Italian bombers approached, and so clad (or unclad) he dashed to his aircraft and joined in the fight.").

<sup>156</sup> Refer to § 5.23 (Use of Enemy Flags, Insignia, and Military Uniforms); § 5.22 (Treachery or Perfidy Used to Kill or Wound).

<sup>157</sup> Refer to § 5.14.5 (Carrying Arms Openly and Wearing of Distinctive Emblems by the Armed Forces to Distinguish Themselves From the Civilian Population).

<sup>158</sup> AP I art. 44(3).

<sup>159</sup> Refer to § 4.6.1.1 (GPW 4A(2) Conditions Required on a Group Basis).

<sup>160</sup> Refer to § 2.5.2 (Discriminating in Conducting Attacks Against the Enemy).

<sup>161</sup> Refer to § 5.4.3.2 (Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks).

made the object of attack.<sup>162</sup>

5.5.1 Persons, Objects, and Locations That Are Not Protected From Being Made the Object of Attack. Combatants may make enemy combatants and other military objectives the object of attack.<sup>163</sup>

5.5.2 Persons, Objects, and Locations That Are Protected From Being Made the Object of Attack. Persons, objects, and locations that are not military objectives may not be made the object of attack. In particular, the following persons and objects may not be made the object of attack, unless that protection is specifically forfeited under the circumstances:

- Persons, such as
  - individual civilians and the civilian population;<sup>164</sup>
  - military medical and religious personnel, including military medical units;<sup>165</sup>
  - combatants placed *hors de combat*;<sup>166</sup> and
  - *parlementaires*;<sup>167</sup> and
- Objects and locations, provided they are not military objectives, such as
  - military medical transport, facilities, and equipment;<sup>168</sup>
  - cultural property;<sup>169</sup>
  - historic monuments, museums, scientific, artistic, educational and cultural institutions;<sup>170</sup>

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<sup>162</sup> Refer to § 5.5.3 (Feasible Precautions to Verify Whether the Objects of Attack Are Military Objectives).

<sup>163</sup> Refer to § 5.6 (Military Objectives).

<sup>164</sup> Refer to § 4.8.2 (Civilians – Conduct of Hostilities).

<sup>165</sup> Refer to § 4.10.1 (Military Medical and Religious Personnel - Conduct of Hostilities); § 7.8 (Respect and Protection of Categories of Medical and Religious Personnel); § 7.10 (Military Medical Units and Facilities).

<sup>166</sup> Refer to § 5.9 (Persons Placed *Hors de Combat*).

<sup>167</sup> Refer to § 12.5.4 (Rights of Inviolability of the *Parlementaire*).

<sup>168</sup> Refer to § 7.10 (Military Medical Units and Facilities).

<sup>169</sup> Refer to § 5.18 (Protection of Cultural Property During Hostilities).

<sup>170</sup> ROERICH PACT art. 1 (“The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents. The same respect and protection shall be due to the personnel of the institutions mentioned above. The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.”).

- places of worship;
- undefended villages, towns, or cities;<sup>171</sup>
- hospital and safety zones, and persons and objects within these zones;<sup>172</sup> and
- neutralized zones, and persons and objects within neutralized zones.<sup>173</sup>

**5.5.3 Feasible Precautions to Verify Whether the Objects of Attack Are Military Objectives.** In planning and conducting an attack, those who plan or decide upon an attack must take feasible precautions to verify that the targets to be attacked are military objectives<sup>174</sup> and not protected by the law of war from being made the object of attack.<sup>175</sup>

These measures help implement the principle of distinction in classifying persons or objects as military objectives.<sup>176</sup> Like other precautions in planning and conducting attacks,<sup>177</sup> these measures are also part of the implementation of the principle of proportionality.<sup>178</sup> These measures help reduce uncertainty in armed conflict,<sup>179</sup> and they reinforce military effectiveness because they help avoid attacks that would serve no military purpose.<sup>180</sup>

As discussed in § 5.2.3.2 (What Precautions Are Feasible), what precautions are feasible depends greatly on the context, including what time and other circumstances permit.<sup>181</sup> The

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<sup>171</sup> Refer to § 5.15 (Undefended Cities, Towns, and Villages).

<sup>172</sup> Refer to § 5.14.3.1 (Civilian Hospital and Safety Zones and Localities).

<sup>173</sup> Refer to § 5.14.3.3 (Neutralized Zones).

<sup>174</sup> Refer to § 5.6 (Military Objectives).

<sup>175</sup> Refer to § 5.5.2 (Persons, Objects, and Locations That Are Protected From Being Made the Object of Attack). Consider AP I art. 57(2) (“With respect to attacks, the following precautions shall be taken: (a) Those who plan or decide upon an attack shall: (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them ...”).

<sup>176</sup> Refer to § 5.4.3.2 (Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks).

<sup>177</sup> Refer to § 5.11 (Proportionality – Feasible Precautions in Planning and Conducting Attacks to Reduce the Risk of Harm to Protected Persons and Objects).

<sup>178</sup> Refer to § 5.10 (Proportionality in Conducting Attacks).

<sup>179</sup> Refer to § 1.4.2.2 (Nature of War – Limited and Unreliable Information – “Fog of War”).

<sup>180</sup> Refer to § 2.3 (Humanity); § 18.2.1 (Reinforcing Military Effectiveness).

<sup>181</sup> Refer to § 5.2.3.2 (What Precautions Are Feasible). See also NORWAY CHIEF OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT ¶¶2.5-2.6 (2013/1st English-language edition 2018) (“When assessing whether enough has been done to identify a target, account will be taken of such factors as the information that was or should have been available at the relevant time, tactical and operational considerations, available means, and the need to protect one’s own forces. Account must also be taken of the fact that such decisions are normally made under difficult and confusing circumstances.”).

specific verification measures may depend on how the attack is being conducted<sup>182</sup> and what type of target is being attacked.<sup>183</sup> For example, when troops are in contact with enemy forces during combat operations, they may need to react immediately based on their professional judgment developed through training and experience and in accordance with military doctrine. On the other hand, with more time and resources available in planning an attack during the deliberate targeting process, planners and analysts may need to gather more information and conduct a more extensive review of whether a potential target is a military objective.<sup>184</sup> In any event, the law of war, including the requirements discussed in this section, does not forestall commanders and other decision-makers from making decisions and taking actions at the speed of relevance, including in high-intensity conflict, based on their good faith assessment of the information that is available to them at the time, as explained in § 5.4.3.2 (Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks).<sup>185</sup>

Feasible precautions to verify that objectives to be attacked are military objectives may include, but are not limited to, the following:

- Reviewing the accuracy and reliability of the information supporting the assessment that a potential target is a military objective;
- Checking potential target locations against no-strike and sensitive site lists;<sup>186</sup>
- Reviewing previously approved targets at reasonable intervals as well as when warranted in light of fresh information and changing circumstances, *e.g.*, to ascertain whether enemy forces continue to use the object for military purposes or whether the object's destruction or neutralization continues to offer a definite military advantage;<sup>187</sup>

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<sup>182</sup> For example, NORWAY CHIEF OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT ¶11.28 (2013/1st English-language edition 2018) (“The precautions considered feasible in identifying a target in a given situation, whether in the air, at sea or on the ground, will vary according to the type of aircraft involved. For example, helicopters fly more slowly and at lower altitude, making it easier to see a target even in cloudy conditions, whereas fighters can maintain a safer distance from threats and may thus take longer to verify a target.”); 2004 UK MANUAL ¶5.32.2 (“The problem of verification is obviously different for the air or artillery commander drawing up target lists from a distance than it is for a tank troop commander who has enemy armoured vehicles in his sights. The former has more time to make up his mind; the latter is more easily able to verify the target.”).

<sup>183</sup> For example, 2013 GERMAN MANUAL ¶1154 (“Before an aircraft is attacked in the air, all feasible precautions must be taken to verify that it constitutes a military objective. Verification should use the best means available under the prevailing circumstances, having regard to the immediacy of any potential threat. Factors relevant to verification may include: – visual identification, – responses to oral warnings over radio, – infrared signature, – radar signature, – electronic signature, – identification modes and codes, – number and formation of aircraft, – altitude, speed, track, and profile and other flight characteristics or – pre-flight and in-flight air traffic control information.”).

<sup>184</sup> Compare § 5.10.2.2 (“Reasonable Military Commander” Standard for Proportionality Decisions and Judgments).

<sup>185</sup> Refer to § 5.4.3.2 (Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks); § 5.3 (Assessing Information Under the Law of War).

<sup>186</sup> Refer to § 5.11.1.1 (General Assessments of the Risks to Civilians and the Effectiveness of Efforts to Reduce the Risks to Civilians).

<sup>187</sup> For example, MG Joseph Martin, *News from the Front: Commander's Perspective: CJFLCC Operations in Iraq*, 5-6 (Oct. 26, 2017) (“In my opinion, deliberate targeting takes too long to deliver relevant effects in a partnered

- Gathering more information, such as visual identification of the target through intelligence, surveillance and reconnaissance platforms;<sup>188</sup>
- Taking steps when carrying out a planned attack to confirm that the person or object to be attacked, is, in fact, the intended target of the attack; and
- Issuing communications to elicit reactions that inform whether a person or object is a military objective, such as summons of vessels to stop;<sup>189</sup> directions given from intercepting aircraft;<sup>190</sup> warnings required before the cessation of protection of medical units, vessels, or facilities;<sup>191</sup> or some types of warnings before attacks that may affect the civilian population.<sup>192</sup>

## 5.6 MILITARY OBJECTIVES

*Military objectives* refers to persons and objects that may be made the object of attack. Certain classes of persons and objects are categorically recognized as military objectives. Apart from these classes that are categorically military objectives, other objects are assessed as to

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force combined arms maneuver fight. Intelligence becomes stale very quickly. Most of our CJFLCC [Combined Joint Force Land Component Command – Operation Inherent Resolve] targets were executed in seven days or less. If they weren’t struck in seven days, the target had to come back for re-approval to validate that the intelligence was still actionable. The board met five nights a week where we approved deliberate targets. That approval was based upon the enemy capabilities, and wasn’t driven by the forward line of own troops. We targeted capabilities such as vehicle-borne and suicide vehicle-borne improvised explosive devices (VBIED & SVBIED) and their production capability, command/control, and delivery, or things like the enemy’s indirect fire network, weapons caches, special military capabilities, and command and control facilities. We struck those targets in seven days or less. In most cases I approved a target on Monday night and it was serviced not later than Tuesday night, because that was the nature of the fight.”); 2004 UK MANUAL ¶5.32.3 (“It is important that target lists are constantly reviewed in the light of fresh information and changing circumstances. What was a military objective one day because, for example, of the presence of an enemy headquarters, may not be a military objective the next if that headquarters deploys somewhere else.”).

<sup>188</sup> For example, Michael N. Schmitt and Eric W. Widmar, “On Target”: *Precision and Balance in the Contemporary Law of Targeting*, 7 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 379, 401 (2014) (“For instance, the loiter capability and sophisticated sensor suite of unmanned aerial systems has significantly enhanced the capability of states fielding such systems to verify target status. Systems like the Multi-Spectral Targeting System (MTS) found aboard some drones include visible and infrared ranging capabilities that facilitate identification of the nature of a potential target, day or night. As noted, however, the requirement to use them is framed by the feasibility condition. In some cases, sufficient verification by other methodologies may render it operationally unwise to place advanced and sparse systems at risk. In others, higher priorities may make their use ill-advised operationally. For instance, if the capabilities of the MTS or the loiter capability of the Predator or Reaper drones are needed elsewhere on the battlefield, the attacker may resort to a less sophisticated method of target verification, such as a soldier equipped with binoculars or night vision goggles.”) (footnote omitted).

<sup>189</sup> Refer to § 13.5.2 (Attack of Enemy Merchant Vessels).

<sup>190</sup> Refer to § 14.8.3.2 (Forfeiture of Protection From Being Made the Object of Attack During Armed Conflict).

<sup>191</sup> Refer to § 7.10.3.2 (Due Warning Before Cessation of Protection); § 7.11.1 (Protection of Ground Medical Transports on the Same Basis as That of Medical Units); § 7.12.6.1 (Due Warning Before Cessation of Protection); § 7.17.1.2 (Due Warning Before Cessation of Protection); § 7.18.1 (Protection of Civilian Hospital Convoys on the Same Basis as That of Civilian Hospitals).

<sup>192</sup> Refer to § 5.11.5 (Providing Effective Advance Warning Before an Attack That May Affect the Civilian Population).