

JOINT SERVICES PUBLICATION 383 – THE MANUAL OF THE LAW OF ARMED CONFLICT AMENDMENT 4 (JULY 2011)

The text⁹⁹ of the Manual of the Law of Armed Conflict should be read in the light of the following amendments:

Insert/delete the following text as indicated.

CHAPTER 5

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1. In paragraph 5.2, remove the quotation marks from the passage in lines 2 to 5 and delete footnote 4 in its entirety.

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2. In paragraph 5.3.2, delete all text and insert:

‘A civilian is protected from direct attack and is to be protected against dangers arising from military operations. However, he has no right to participate directly in hostilities. If he does so, he loses his protection if and for such time as he takes a direct part in hostilities.’

Retain annotation to footnote 9 at the end of inserted text.

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3. In paragraph 5.3.4, line 5, insert ‘reasonably’ before ‘available’.
4. In footnote 11, delete all text and insert:

‘The UK declared on ratification of AP I, at paragraph (c), that ‘military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time’. The UK also declared in paragraph (h) that ‘[i]n the view of the UK the rule in the second sentence of paragraph 1 [of Article 50 – the rule of doubt], applies only in cases of substantial doubt still remaining after the assessment referred to at paragraph (c) above has been made, and not as overriding a commander’s duty to protect the safety of troops under his command

⁹⁹ All page and paragraph references refer equally to the Binder and OUP versions – pagination is identical. There is, however, some discrepancy in the Appendices.

or to preserve his military situation, in conformity with other provisions of the Protocol'. For the precautions to be taken in attacks, see paragraph 5.32.'

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5. In paragraph 5.4.2, delete the first sentence and insert:

'In case of doubt, whether an object which is normally used for civilian purposes is being used to make an effective contribution to military action, it will be presumed not to be so used.'

Delete footnote 15 and all text but retain annotation to footnote 16 at the end of inserted text.

6. In footnote 16, line 3, delete 'evidence' and insert 'intelligence or information'. In line 5 and 6, after 'intelligence', on each occasion, add 'or information'. At the end of the footnote, add ' 'Used' is not the same as 'occupied'. Use could occur, for example, when enemy troops take shelter from direct fire behind a house or school.'

7. Delete paragraph 5.4.3 and all text.
8. Delete footnote 17 and all text.
9. Delete paragraph 5.4.4.b and all text.
10. Delete footnote 18 and all text.

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11. In footnote 24, line 1, delete 'objects' and insert 'object'.

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12. In paragraph 5.7.1, lines 1-2, delete 'Members of the civilian population must also respect this rule.' Insert 'This rule has particular application to civilians who, depending on the circumstances, may well be the first to encounter downed air crew.' In line 8, delete the word 'identity' and insert 'status'.

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13. In footnote 35, delete 'Examples of treachery included calling out 'Do not fire, we are friends' and then firing at enemy troops who had lowered their guard, especially if coupled with the wearing of enemy uniforms or civilian clothing; or shamming disablement or death and then using arms.'

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14. In paragraph 5.9.2.c, delete ‘civilian, non-combatant status’ and insert ‘civilian or non-combatant status’.
15. In paragraph 5.10.a, delete ‘‘make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun’ and insert ‘make improper use of the distinctive emblems of the red cross, red crescent, red crystal or red lion and sun’. Delete closing quotation marks in line 3 after ‘by the’.
16. In footnote 39, delete ‘See also Geneva Convention (GC) I, Art 53 and GC II, Art 44’ and insert ‘See also Geneva Convention (GC) I, Art 53, GC II, Art 44 and Additional Protocol III (AP III) Art 2’.

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17. In footnote 49, line 5, delete ‘outrage’ and insert ‘outrages’.

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18. In paragraph 5.19.1, line 3, insert ‘where’ before ‘enemy troops’.
19. In paragraph 5.20.1, delete all text and replace with:

‘Civilians and the civilian population are protected from direct attack. In addition, the measures set out in this part of this chapter must be taken with a view to avoiding, and in any event to minimizing, the incidental effects of attacks on civilians and civilian property.’

Retain annotation to footnote 73 after ‘direct attack’.
20. In paragraph 5.20.2, line 1, delete ‘armed forces’ and insert ‘armed force’.
21. In paragraph 5.20.4, lines 5-7, delete ‘Some states have made statements of understanding on ratification that obligations in attack only apply to commanders at certain levels.’ Delete footnote 78 and all text.

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22. At the end of footnote 97, add ‘Attacks on military objectives that cause incidental loss or damage to civilians are not prohibited so long as the proportionality rule is complied with.’

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23. In paragraph 5.24.3, delete and all text and replace with:

‘In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.’

Retain annotation to footnote 102 after inserted text.

24. In paragraph 5.24.4, delete all text and replace with:

‘An attack on a military objective in a populated area may result in unavoidable incidental injury or loss to civilians or civilian objects. This will not render the attack unlawful if the distinction and discrimination rules are complied with.’

Retain annotation to footnote 103 after inserted text.

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25. In paragraph 5.26, line 2, insert ‘1954’ before ‘Hague Cultural Property Convention’.

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26. In footnote 137, add ‘The UK made a statement on ratification of AP I reserving the right to take reprisals in certain specified circumstances.’

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27. In paragraph 5.29.3, final line, insert ‘reasonably’ before ‘available’.

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28. In paragraph 5.30.2, lines 4-5, delete ‘if the risk of releasing dangerous forces is so great as to outweigh the military advantage’ and insert ‘if, taking into account all reasonably available information as to the risk that dangerous forces will be released, that party concludes that the civilian death, injury or loss that the attack may be expected to cause would be excessive in relation to the concrete and direct military advantage anticipated.’

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29. In paragraph 5.32, at the end of the paragraph, delete ‘Where there is a choice between different military objectives whose attack will yield the same military advantage’ and insert ‘Where a choice is possible between several military objectives for obtaining a similar military advantage’.

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30. In paragraph 5.32.2, lines 5-6, delete ‘has more time’ and insert ‘may have more time’.
31. In paragraph 5.32.4, line 1, delete ‘There is the obligation’ and insert ‘There is an obligation to take all feasible precautions’.

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32. In paragraph 5.32.4, line 8, delete ‘laser-guided bombs’ and insert ‘precision munitions’. Also delete ‘Cruise missiles’ and insert ‘Missiles with GPS or other precision technology’.
33. In paragraph 5.32.4, lines 16-17, delete ‘Artillery fire can cause a lot of incidental damage without any appreciable military advantage’ and insert ‘Similarly, when used against targets in an urban or populated environment, artillery may be expected to cause a lot of incidental damage which would need to be considered in relation to the anticipated military advantage.’

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34. In paragraph 5.32.10, line 4, insert ‘reasonably’ before ‘available’.

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35. In paragraph 5.33, line 1, insert ‘on a military objective’ after ‘An attack’.
36. In paragraph 5.33.3, line 5, delete ‘objects’ and insert ‘objectives’.
37. In paragraph 5.33.4, delete all text and replace with:

‘In deciding whether an attack would be proportionate, regard must also be had to the expected effects of the attack. The characteristics of the target may be a factor here. Thus if, for example, a precision bombing attack of a military fuel storage depot is planned but there is an expectation that the burning fuel will flow into a civilian residential area and cause injury to the civilian population which would be excessive in relation to the military advantage anticipated, that bombardment would be disproportionate and unlawful, owing to the excessive collateral damage.’

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38. In paragraph 5.34.3, line 3, delete ‘In those circumstances’ and insert ‘In the latter circumstances’.

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39. In paragraph 5.38.2, lines 2-3, delete ‘in contact’ and insert ‘engaged in hostilities’.

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40. In paragraph 5.40.1, delete the final sentence and insert ‘It is likely to be a very limited area geographically, and its purpose very narrowly defined.’

41. In paragraph 5.41.1, lines 7-8, delete ‘the distinctive red cross or red crescent emblem’. Insert ‘the distinctive red cross, red crescent or red crystal emblem’.

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42. In paragraph 5.44.1, line 1, delete ‘not’ and insert ‘only’. In line 2, delete ‘not’.

CHAPTER 6

Page 103

43. In paragraph 6.2.1, delete all text and replace with:

‘In deciding the legality of use of a specific weapon, therefore, it is necessary to balance:

- a. the effects of the weapon in its normal or expected use; and
- b. the military advantage to be gained from its use.

This balancing exercise should be completed by a comparison with the effects and military utility of existing weapons.’

Retain annotation to footnote 5 at the end of the inserted text.

44. In footnote 5, delete text in its entirety and insert:

‘ ‘The prohibition of unnecessary suffering constitutes acknowledgement that necessary suffering to combatants is lawful, and may include severe injury or loss of life. There is no agreed international definition for unnecessary suffering. A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect and the injury caused is considered by governments as disproportionate to the military necessity for it, that is, the military advantage to be gained from its use. This balancing test cannot be conducted in isolation. A weapon’s or munition’s effects must be weighed in light of comparable, lawful weapons or munitions

in use on the modern battlefield. A weapon is not unlawful merely because it may cause severe suffering or injury. The appropriate determination is whether a weapon's or munition's employment for its normal or expected use would be prohibited under some or all circumstances. The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to its military effectiveness.' Formulated by E. R. Cummings, W. A. Solf and H. Almond and reproduced in W. Hays Parks, Means and Methods of Warfare, Symposium issued in honour of Edward R. Cummings (2006), 38 GWILR 511 at note 25.'

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45. In footnote 6, delete 'para 5.29' and insert 'paras 5.28 and 5.29'.

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46. In paragraph 6.7.4, line 4, delete 'personnel' and insert 'personal'.

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47. In paragraph 6.12.6, delete all text and insert:

'The use of incendiary weapons in attacks directed at combatant personnel and others directly participating in hostilities is not specifically prohibited by Protocol III to the Conventional Weapons Convention nor by any other Treaty. Such use is, however, governed by the unnecessary suffering principle. It is UK policy that incendiary weapons should not be used in attacks directed at personnel. However, the use of incendiaries in attacks directed at objects, such as armoured vehicles, bunkers and built-up emplacements is permitted under the policy, even though personnel inside may be burnt. White and Red Phosphorous issued to British armed forces are designed to be used for battlefield obscuration, for illumination or for signaling purposes, and not for anti-personnel use. Such munitions, which have only incidental incendiary effects, do not come within the definition of 'incendiary weapon' in Article 1 of Protocol III to the Conventional Weapons Convention, and their use is not therefore affected by that treaty.'

48. In paragraph 6.13, delete the first sentence and insert:

'Parties to the Ottawa Convention 1997, including the United Kingdom, accept a prohibition on the use, development, production, acquisition, stockpiling, retention and transfer of anti-personnel landmines, and assisting, encouraging or inducing anyone to engage in any activity prohibited to a State Party under the Convention.'

Retain annotation to footnote 47 at the end of inserted text.

49. In footnote 49, line 1, delete ‘Anti-tank’ and insert ‘Anti-vehicle’. At the end of footnote, add: ‘See Amended Mines Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Mines Protocol).’

50. In footnote 50, delete all text and replace with: ‘Amended Mines Protocol, Art 3(5).’

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51. In paragraph 6.17.2, lines 1-2, after ‘use’, insert ‘or threaten to use’. In line 3, after ‘Nuclear Weapons 1968’, insert ‘(NPT)’. In lines 3-8, delete ‘The assurance does not apply in the case of an invasion or any other attack on the United Kingdom, its Overseas Territories, its armed forces, its allies, or on a state towards which it has a security commitment, carried out by a non-nuclear weapon state in association or alliance with a nuclear weapon state. An assurance in virtually identical terms’ and insert ‘In giving this assurance, the UK has emphasised the need for universal adherence to and compliance with the NPT, and noted that this assurance would not apply to any state in material breach of those non-proliferation obligations. The UK also noted that while there is currently no direct threat to the UK or its vital interests from states developing capabilities in other weapons of mass destruction, for example chemical and biological, the UK reserved the right to review this assurance if the future threat, development and proliferation of these weapons make it necessary. An assurance in similar terms’.

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52. In paragraph 6.17.2, line 10, after ‘Latin America’, insert, ‘Africa’. Delete footnote 86 and all text.

53. In paragraph 6.18.2, line 2, after ‘laser weapons’ insert footnote annotation ‘90 bis’. Insert new footnote 90 bis ‘For further details on laser weapons, see para 6.15.’

54. In paragraph 6.18.3, line 1, delete ‘temporarily incapacitate combatants’ and insert ‘achieve the desired military purpose by temporarily incapacitating combatants’

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55. After paragraph 6.21.2, add a new section:

‘E. CLUSTER MUNITIONS

6.22 Parties to the Oslo Convention 2008, including the United Kingdom, accept a prohibition on the use, development, production, acquisition, stockpiling,

retention and transfer of cluster munitions, and assisting, encouraging or inducing anyone to engage in any activity prohibited to a State Party under the Convention.¹⁰⁰ Under United Kingdom law, it is also prohibited to possess a cluster munition and while the 2010 Act does not create a specific offence of stockpiling cluster munitions, it creates instead an offence of retaining a prohibited munition in one's possession.¹⁰¹ Cluster munitions are defined as 'a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions'.¹⁰² Certain capabilities are excluded from the definition of cluster munitions, such as munitions or submunitions designed to dispense flares, smoke, pyrotechnics, chaff, and electrical or electronic effects. Munitions designed exclusively for an air defence role and munitions that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, have certain specified characteristics¹⁰³ are also excluded. Whilst members of the United Kingdom armed forces must not themselves use cluster munitions¹⁰⁴ or expressly request the use of cluster munitions in cases where the choice of munitions used is within their exclusive control,¹⁰⁵ they will not be committing an offence if their conduct took place in the course of, or for the purposes of, an international military operation or an international military co-operation activity with non-States Parties which deploy cluster munitions. There are specific definitions of international military operation and international military co-operation activity.¹⁰⁶

¹⁰⁰ The Convention on Cluster Munitions 2008 (Oslo Convention), Art 1. This Convention came into force on 1 Aug 10. The Cluster Munitions (Prohibitions) Act 2010 received Royal Assent on 25 Mar 10 and entered into force immediately.

¹⁰¹ Cluster Munitions (Prohibitions) Act 2010, s. 2(1)(e).

¹⁰² Oslo Convention, Art 2(2).

¹⁰³ Oslo Convention, Art 2(2)(c). Each munition contains fewer than ten explosive submunitions; each explosive submunition weighs more than four kilograms; each explosive submunition is designed to detect and engage a single target object; each explosive submunition is equipped with an electronic self-destruction mechanism; and each explosive submunition is equipped with an electronic self-deactivating feature.

¹⁰⁴ Oslo Convention, Art 21(4)(c) and Cluster Munitions (Prohibitions) Act 2010, s 2(1)(a).

¹⁰⁵ Oslo Convention, Art 21(4)(d).

¹⁰⁶ A military operation is defined as 'an international military operation' if (a) both members of Her Majesty's armed forces and members of the armed forces of one or more States other than the United Kingdom participate in the operation, (b) at least one of the other States is not a party to the Convention, and (c) the operation involves or might involve conduct by members of the armed forces of a State that is not a party to the Convention, or by other persons acting under the authority of such a State, which would be in contravention of the Convention if it were conduct by members of the armed forces of a State that is a party to the Convention or by other persons acting under the authority of such a State. 'International military co-operation activity' is defined as such if (a) it is an activity, other than a military operation, undertaken in pursuance of co-operation between the government of the United Kingdom and the government of one or more States other than the United Kingdom for any purpose related to (i) the defence of the United Kingdom or any of those States, or (ii) Her Majesty's armed forces or the armed forces of any of those States, (b) at least one of the other States is not a party to the Convention, and (c) the activity involves or might involve conduct by members of the armed forces of a State that is not a party to the Convention, or by other persons acting under the authority of such a State, which would be in contravention of the Convention if it were conduct by members of the armed forces of a State that is a party to the Convention or by other persons acting under the authority of such a State. See Cluster Munitions (Prohibitions) Act 2010, s 9(1)-(3), reflecting the Oslo Convention, Art 21(3).

CHAPTER 7

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56. In paragraph 7.3.1, line 2, delete ‘target’ and insert ‘object’.

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57. In paragraph 7.5.1, line 2, delete ‘repeats’ and insert ‘reflects’.

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58. In paragraph 7.15.1, lines 6-7, delete ‘otherwise’. After ‘hostilities’, insert ‘; if they were to do so, they would lose their protected status for so long as such participation lasts’. Retain annotation to footnote 38 at the end of inserted text.

59. In paragraph 7.15.1, at the end of the paragraph, after ‘attacked’, insert ‘(or such an attack is imminent). However, they may only act in a purely defensive manner and may not oppose the occupation or control of the unit by the enemy’. Retain annotation to footnote 39 at the end of inserted text.

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60. In footnote 47, at the end, insert ‘Under GC I, Art 22(3), the fact that small arms and ammunition taken from the wounded and sick and not yet handed to the proper service are to be found in the medical transport does not lead to loss of protection.’

61. In paragraph 7.22, line 1, after ‘assigned’, insert ‘exclusively’.

62. In footnote 50, delete ‘para 7.10’ and insert ‘paras 7.12 and 12.104’.

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63. In paragraph 7.23, line 3, delete ‘Additional Protocol I’ and insert ‘their Additional Protocols’. In line 4, delete ‘and the red lion and sun on a white ground’ and insert ‘the red crystal, and red lion and sun on a white ground’.

64. In footnote 54, line 2, after ‘Arts 4 and 5’ insert ‘; AP III, Art 2’.

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65. In paragraph 7.34, lines 2-3, delete ‘Service Discipline Acts’ and insert ‘Armed Forces Act 2006’. Retain annotation to footnote 80 after ‘2006’.

66. In footnote 80, delete all text and insert ‘AFA 2006, s 4.’