

Raids

This chapter covers the type of activity that might be usefully grouped under the heading ‘raids’. Special operations raids – ‘direct action’ according to the doctrine of most Western militaries – employ SOF in ‘hostile, denied, or politically sensitive environments’ to seize, destroy capture, exploit, recover, or damage designated targets (Joint Chiefs of Staff, 2014: GL7). These can range from very small-scale teams carrying out a high-risk ‘kill or capture’ type mission aimed at a very high-value target, or more likely, a small-scale offensive action like the 1941 raid on Alexandria Harbour involving six Italian frogmen, through to much larger demonstrations of power and authority like the 1970 Son Tay raid, which employed 56 US Army Special Forces soldiers, 98 airmen, and 28 aircraft. What they all have in common is their temporary character. Raiders – be they SOF or conventional forces – do not typically capture or hold territory. Once they achieve their purpose, they withdraw to a defended position before an adversary’s reaction force can respond and overwhelm them.¹

While a raid is a common military tactic, special operations raids are distinct from conventional raids ‘in the level of diplomatic or political risk, the operational techniques employed, and the degree of discriminate and precise use of force to achieve specific objectives’ (Joint Chiefs of Staff, 2014: II-5). That does not mean, of course, that the effects of this kind of activity are necessarily limited to minor tactical advantages.

As has already been noted in Chapter 1, the parameters that establish ethical conduct for SOF are ‘troublingly ill-defined’. The need for clarity is particularly pronounced for special operations raids in which reliance on

¹ There are exceptions in which a raiding party serves as the leading edge for a larger, follow-on force that will occupy the space that the raiders have secured. A notable example is the 1940 German paratrooper raid on Fort Eben-Emael in Belgium.

deception, surprise, speed, and violence raise complex ethical questions. As has also been stressed earlier in this volume, this is not a legal treatise. There are important legal differences between what is legally permitted in different types of international and/or non-international contexts. While some of the legal constants are straightforward enough, the subtleties will always require input from appropriate legal expertise. In this chapter, we illuminate and attempt to explicitly address the morally troubling aspects of this mission set. We begin our analysis with a focus on arguably the knottiest species of raid: ‘kill/capture’ raids, operations in which named individuals are found, fixed, and finished. According to the US Army Field Manual, the objective of war is ‘the destruction of the enemy’s ability to fight and will to fight’ (United States Army, 2011). Yet operations to hunt down and kill a specific person seem to elicit a puzzling degree of moral revulsion. How can we make sense of this?

When Is a Murder Not a Murder?

Although armed conflict invariably involves killing, soldiers using lethal force on behalf of their state in times of war is generally not regarded as murder. We accept that, because of the specific context, it is even sometimes commendable to kill in such situations. That does not mean, however, that all killing in war is justified or even excusable – it is still possible to commit a murder even in a war. That is just as true of SOF as it is of any other military. An example would be the deliberate targeting of a non-combatant or the execution of a prisoner of war (POW). Both of these would be considered murder *and* a war crime. But what about the so-called kill/capture missions at which SOF have become so adept? How is a kill/capture mission that targets a foreign leader, for example, morally any different from assassination? Is that also murder, and therefore wrong? What about a kill/capture raid that targets an enemy general? Is that also an assassination? If so, why is it supposedly better from a moral sense to kill your way through tens of thousands of enemy soldiers rather than just hunt down and kill their leader?

One good place to start with such questions is by looking at the War Convention. While related to the laws of war, it is something bigger than this and reflects a common understanding of what is right and wrong in war. As Michael Walzer explains it, the War Convention is ‘a set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgements of military conduct’ (Walzer, 2006). This commonly held idea

that in war it is possible to use deadly force in both a legitimate and illegitimate way is informed by our understanding of this War Convention. Are SOF covered by the same conventions as everybody else? They are indeed, but that doesn't mean that working out how they apply is always going to be easy.

**'A Curse on Him Who Smiteth His Neighbour in Secret'
(Deuteronomy: 27:24)**

Whilst the War Convention is a complicated, overlapping set of norms, customs, and codes, it is possible to see a great deal of it in positive international law, and even domestic law. For example, President Gerald Ford formally banned assassination as a tool of US policy in the 1970s in the embarrassing aftermath of the uncovering of various plots against international leaders considered hostile to the US.²

Michael Gross notes that 'for reasons that are often difficult to articulate, assassination evokes particular revulsion. Morally odious, it seems to violate a deep-seated and inviolable norm' (Gross, 2010: 101). But given that we are talking about war – a condition in which killing is commonplace – what is actually so wrong with assassination? Historically, long before Ford's prohibition, it is easy to chart a consistent unease associated with the use of 'underhanded' tactics such as this. Such qualms can be seen in the writings of Homer, Herodotus, and Thucydides, and are summed up well by Euripides when he says 'A brave man thinks it unworthy to kill his enemy by stealth; he meets him face to face . . . Do not praise the clever spear of one who steals victory' (Whetham, 2009). The Roman senate refused to countenance the assassination, or 'treacherous murder', even of someone who was waging an unprovoked war (Cicero, 1:40).

The philosopher Emmanuel Kant, in his pamphlet *Perpetual Peace*, explains this apparently pervasive attitude in very practical terms, arguing that some acts of hostility, such as the use of assassins, poisonings, breach of surrender, and the instigation of treason make a mutual confidence 'impossible during a future time of peace'. As such, they destroy the minimum level of trust required to achieve a stable peace at war's end (Kant, 2006: 521). We find the contemporary just war scholar Michael Walzer making a very similar, pragmatic argument (2002):

² The discussion of assassination and targeted killing is adapted from *Drones and Targeted Killing: Angels or Assassins?* (Whetham, 2013).

The killing of political leaders is ruled out in international law even (or especially) in wartime – and ruled out for good reason – because it is the political leaders of the enemy state with whom we will one day have to negotiate the peace.

This leads us to one of the strangest apparent paradoxes of the ethics of war and peace. It is one of the peculiarities of the War Convention that it might be acceptable to kill thousands in a conventional conflict, but it is apparently wrong to try to kill the leader who sends them to war against you. When thinking in terms of the capabilities of SOF, this is brought into sharp focus. Surely it would be vastly preferable, from both a practical and an ethical perspective, to limit the death and destruction as far as possible to those who are directly responsible for the conflict by actually taking the harm to those who created the situation in the first place – especially if those responsible are waging a war of aggression in which millions of lives are at stake?

Choosing not to act to stop such a person, or cabal of leaders, intent on mass murder when the means are within your grasp would itself appear to carry a moral burden. In the more extreme of cases, there may be a very real cost in allowing someone who is carrying out particularly heinous crimes to continue with their policies.

Although it should not need saying, nothing can take away the moral responsibility of the person who is actually doing the evil deed (Glover, 1990: 92–112). The additional deaths caused by a tyrant are his responsibility, not ours, even when we choose not to intervene, but instead watch while they do it. However, choosing not to prevent them when it is possible to do so must still carry some moral weight, surely (Whetham, 2013). Following his condemnation, Walzer quickly concedes that despite the general prohibition on assassinating political leaders, there may be exceptions:

There are obvious exceptions to this rule – no-one, no moral person, would have objected to an Allied effort to assassinate Hitler; we were in fact not prepared to negotiate with him – but ordinary leaders are immune (Walzer, 2000: 9).

And yet even the case for assassinating Hitler is inconclusive. Though few people in recorded history were more deserving of an assassin's bullet, the Allies had determined, for sound prudential reasons, that assassinating Hitler would likely have advanced Germany's war effort. Strategically incompetent, Hitler had become a liability to the Axis war machine in the later stages of the war. The Allies feared that his replacement might be

more competent at prosecuting the German war effort, thereby prolonging the war and its associated harms (BBC, 1998). However, what about if the Fuhrer's ambitions had been curtailed by a well-executed SOF mission during the 'phony war' of early 1940? Or slightly later, once the horrors of the Nazi war machine and its occupation of conquered states were better understood? Would that have been justifiable?

Are All Assassinations Equal?

Surely, just as not all killing is murder, perhaps not all assassinations are immoral. In some situations, why not just kill the tyrant? This was an argument put forward by many people following the invasion of Kuwait by Saddam Hussein's military forces in 1990. Senior political leaders in the USA made similar calls following Russia's invasion of Ukraine in 2022, although in this case, Senator Lindsey Graham was calling for someone on the inside to remove Putin (4 March 2022). Given the not too subtle warnings about the status of Russia's nuclear forces emanating from the Kremlin, the Senator's views were not widely echoed. But, although prudential calculations may make the question moot, in more general terms, the principle still needs to be tested. If you are talking about someone who has already demonstrated a disregard for the rules and international norms, and has a track record of demonstrable lies, then presumably that minimum level of trust that Kant is so concerned about is lacking in any event. Given sufficient provocation and an individual that can't be trusted anyway, and assuming that, unlike the nuclear-armed Russia, most other states would not be able to escalate beyond conventional hostilities, why not remove the problem with a SOF kill/capture raid?

When Is an Assassination, Not an Assassination?

There are, of course, certain legal grounds that could justify the killing of an enemy leader. While the popular name for this might still be 'assassination', in fact, the nature of the justification would mean that this was actually something slightly different – a targeted killing. While it might sound like legal sophistry, the distinction is important for both the law and the broader idea of the War Convention of which the law is but a part.

To provide some legal context, the current British Manual of the Law of Armed Conflict (Joint Doctrine and Concepts Centre, 2004) states at 5.13 that while there may be no specific law dealing with assassination, the

following rules would be applicable to help determine whether or not the killing of any given individual was lawful or not:

- a. attacks may not be directed against civilians [. . .]
- b. attacks must be limited to military objectives, including enemy combatants [. . .]
- c. only combatants have the right to participate directly in hostilities
- d. enemy combatants may not be killed by resort to perfidy [i.e. treachery – abuse of the rules of war to gain an advantage].

The next paragraph (5.14) also makes clear that one cannot legally put a bounty on an enemy's head or ask for them 'dead or alive', but simply setting out to kill an enemy combatant, whether they were specifically identified in advance or not, does not appear to pose a problem for the rules. If they were specifically identified and therefore a military operation was specifically aimed at them, then this might be a targeted killing in some senses, but it does not seem particularly extraordinary given the context – it would simply be a legitimate act within a war. As long as the target is not injured or otherwise *hors de combat* – a legal term referring to soldiers who are out of the fight due to, for example, grievous wounds, acute sickness, or surrender – such targeting can be done when and where you like (as long as the other rules of war are complied with, of course). If the person carries a military rank, gives orders to other military people, and directs military operations, then they are liable to be targeted at any time whilst hostilities are ongoing.

What about if the person is technically a civilian rather than a member of the military? A civilian, of course, as a non-combatant, is protected from direct attack and the dangers arising from military operations. They cannot therefore be deliberately targeted. This protection, however, is qualified – as a civilian, *they* must refrain from directly participating in hostilities if they wish to retain their protection. 'If he does so, he loses his immunity' (Joint Doctrine and Concepts Centre, 2014: 5.3.2), and at that point, all bets are off as they say, although from when, until when, how long for, and what exactly constitutes participation are all questions that still need to be answered.

What would count as directly participating in hostilities (DPH) for the purposes of this discussion? Would ceremonial responsibilities suffice? What about financial planning? The giving of advice? The supplying of weapons or war *materiel*? If any of these could be considered DPH, how much would be required to cross over the line? Unfortunately, while the ICRC Interpretive Guidance (2009) is certainly a very sound starting

place, DPH has no universally agreed definition or even threshold, which means that it is going to need to be determined on a case-by-case basis.

Clearly, if a person is actually directing military operations, is being looked to for instructions and guidance by military personnel, and is approving plans made by others before they are implemented, they are DPH whether or not they are otherwise a civilian. In which case, they have made themselves liable to attack through their actions. In popular language we might consider an attack on them specifically an assassination, or a targeted killing, but ethically it would simply be considered as a military act, no more or less legitimate than any other targeting decision. There may be prudent strategic reasons as to why the targeting and elimination of certain people is not considered a sensible idea (as discussed above), but there is no reason, legally or morally, as to why one should not do this if the target is directly part of the enemy war effort. If it is legitimately decided that 'person x is a member of a group that we recognize as combatants and against whom we are at war', then military action is permitted against that person at any time in the same way that actions against any member of the rest of that group can be justified at any time. For members of the class of combatant, or those who are designated into this category because of their ongoing and considerable DPH, the War Convention is quite clear: they 'are subject to attack at any time (unless they are wounded or captured)' (Walzer, 2000: 138).³ It is irrelevant whether that attack takes place via a SOF unit or via ordnance dropped from an aircraft at 20,000ft. As long as no treachery is involved and other norms are applied in the appropriate way (such as proportionality, military necessity, etc.), such an action would simply be a standard military operation.

So, what would be required for it to be considered a targeted killing? A targeted killing is a very different thing to acts of official assassination or extrajudicial killings. The latter can be defined as 'killings committed outside the judicial process by, or with the consent of, public officials, other than as necessary measures of law enforcement to protect life or as acts of armed conflict carried out in conformity with the rules of international humanitarian law' (Rodley, 1999: 182). Such killings might demonstrate a state policy to kill the enemies of that state 'not for operational or self-defence purposes, but as a means to punish opponents of the State'

³ Whether or not this classification is permanent is less applicable for the SOF mission being considered here but matters for more general military operations. See Whetham *Angels or Assassins* (2014).

(Guiora, 2004: 319). Thus, the death in London in 2006 of former KGB agent Alexander Litvinenko, poisoned by a lethal dose of Polonium 210, was an extrajudicial execution – an assassination – not a targeted killing that could be justified under the laws or norms of war (Harding, 2012). As an outspoken critic of the Russian government, Litvinenko joined the long list of dissidents, journalists, and oligarchs punished for stepping out of line and opposing Putin's interests. What they were not, was an ongoing threat to Russia itself – only to its corrupt leadership. Without a genuine and imminent threat to trigger an act of legitimate self-defence, a government using the military means at its disposal to eliminate people it dislikes is not practising targeted killing, it is simply murdering them.⁴

According to Solis, to satisfy the definition of targeted killing would require:

the intentional killing of a specific civilian . . . who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non-international armed conflict.⁵

Such a designation is not applicable to 'normal' military targets or against conventional enemy personnel because these would instead be straightforward examples of acts of war. What makes it distinct as a targeted killing is that it is more than simply a routine activity, but is special in the sense that it requires very high-level authorization. In this respect, the planning and authorization that is required for a SOF undertaking is likely to satisfy this part of the exceptional definition.⁶ While a low-level operator, improvised explosive device (IED)-planter, or 'dicker'⁷ might be considered to be DPH for the time that they are engaged in that specific activity, if they return to normal civilian activities before and afterwards, and this is an exceptional rather than regular activity for them, they should not be designated in the same way – in practice, this means that they cannot be targeted in the same continuous fashion, but rather, can only be engaged while they are actually doing the activity. It is highly unlikely that such

⁴ See Chapter 4 of Strawser's *Killing bin Laden* (2014) for an exploration of why revenge, *realpolitik*, or retribution are less convincing as moral justifications for killing.

⁵ See Gary Solis, *The Law of Armed Conflict* (2010: 538).

⁶ Safeguards of some kind are essential if Targeted Killing is not simply to become murder. See Whetham *Angels or Assassins* (2014) for some of the ways that justifications might be presented without compromising the security or effectiveness of operations, while at the same time making clear that an action was legitimate rather than simply an extrajudicial execution, without which, norms can become stretched and abused.

⁷ Possibly derived from the word 'indicator' – someone who warns of troop movements using a mobile phone, etc. although the word may have its origins in a slang term for lookout.

personnel would warrant the level of planning that a SOF raid would warrant, or indeed justify – what happens when SOF are misused in such a way is explored in Chapter 7.

Clearly, for someone like Hitler, that DPH would be continuous, but what of his opponent Winston Churchill? Or Vladimir Putin and his opponent, the Ukrainian President Volodymyr Zelensky as this book is being written? Would their direction of their respective country's militaries make them DPH at all times as if they were combatants, despite their civilian clothes and other civil functions? It is important to recognize that the determination of DPH is not based on whether you agree with the cause of the protagonist, just about the degree to which they are directly involved in the conduct of hostilities. One could confidently argue that in the case of Osama bin Laden, this requirement was easily satisfied.

Despite the claims of Noam Chomsky (2011) amongst others, targeting bin Laden was not a case of state-sanctioned murder or extrajudicial execution. Indeed, in terms of his involvement in hostilities, 'the man's moral culpability was bordering on the highest level of certainty as could ever be attained for any case of defensive harm' (Strawser, 2014: 51). He was not only intimately connected with planning the attacks in 2001 that killed nearly 3,000 people, as well as attacks on the USS Cole in 2000 (killing 17 service personnel), the US embassy bombings in East Africa in 1998 (nearly 300 civilians killed), as well as dozens of other attacks intentionally directed towards civilians. He was involved with recruiting and coercing suicide bombers, including children, and was actively raising funds to support al Qaeda's activities right up until his death (Strawser, 2014: 22).

Almost ten years after the attack of 9/11, during which he remained intimately involved in planning and leading a terrorist organization, Operation Neptune Spear was launched. As described in Chapter 1, it involved two helicopters, Army aviators, 23 SEALs, an interpreter, and a combat dog, raiding into Abbottabad in Pakistan. They were supported by an additional two helicopters with extra fuel and a backup force, bringing the total personnel to 79 special operations commandos (Strawser, 2014: 25). This was a large-scale, high-risk operation into the territory of a third-party state, prompted by intelligence that bin Laden was present in a compound across the border in the neighbouring state. There were many things that could have gone wrong, and indeed, some things did go wrong, with a landing malfunction in one of the Blackhawks leading to a crash landing and the loss of the SEAL team's initial surprise. There was a firefight as the team entered the compound, and in the darkness, they

fought their way to enter the building in which it was believed bin Laden was present. Available accounts suggest that there were no attempts to surrender, including by bin Laden himself, who was shot twice and killed. The whole raid took only 'a few short minutes' (Strawser, 2014: 27). His body was then flown out to the USS Carl Vinson in the Arabian Sea and, after religious funeral rites were provided, the body was buried at sea in order that his gravesite would not become a shrine for his followers.

The risk to the SOF team itself during this operation raises the question – if bin Laden's actions and DPH status had made him liable to be attacked at any time, why not just target him using a sniper or even a standoff missile? Would, could, this have been justified? We believe in this case, that would indeed have been a legitimate decision. The significant and well-founded belief in an ongoing threat from an infamous terrorist leader meant that action was justified, but due to being well-protected and constantly moving from safe house to safe house in contested or hostile territory, apprehending him may simply have been considered impossible. If an opportunity presents itself for a state to prevent ongoing acts of harm from such an individual by means of a drone strike or other similar method, if the evidence is extremely clear and if authorization is granted by somebody suitably high up in, or even above, the normal chain of command, as was clearly the case here, that would have been a legitimate targeted killing carried out in self-defence.

We don't know, nor are we likely to find out, if there was a serious plan for putting bin Laden on trial for his crimes. Clearly, seeking to arrest somebody during an armed conflict is rarely an easy thing to do. It might be even harder if you have to go into someone else's state (a third party) to find them. There is a credible argument that even if it had been possible to take bin Laden alive, that would not have been enough to prevent the ongoing harm that he was responsible for. His incarceration would likely have proved a rallying point for the organization, and it is likely that his fundraising potential would only have grown if he was being held; 'his operatives could point to his detention as a further example (in their view) of the injustice the West perpetrated upon Islam' (Strawser, 2014: 37). In any case, the lethal resistance put up by his compatriots in the compound, and the very reasonable fear of a suicide vest being worn by bin Laden mean that the use of lethal force against him in the moment was justified, in addition to his wider and general liability to lethal harm as a way of preventing his ongoing threat to innocent lives. In this situation, the killing of bin Laden 'was necessary as the best available means to thwart his unjust threat' (Strawser, 2014: 20).

Surrender?

What if the target tries to surrender? What if a member of the target's security detail tries to surrender? What obligations fall on the SOF in such a situation? Of course, while this is not a concern for the special operator who has called in an air strike or for the sniper looking down the scope at a target a mile away – one cannot surrender if one doesn't know there is anyone there to surrender to, even if one wants to. There is no credible claim that this was attempted by bin Laden either. However, the targets of SOF kill/capture raids routinely opt for the latter outcome and attempt to surrender. Are the raiders obliged to accept that surrender? In short, yes. It must be accepted unless certain *exceptional* factors pertain, noting that the set of valid justifications for disregarding an offer of surrender is small and disputable. As with so many ethical questions in this area, context is everything. One of the biggest concerns is how much additional danger must SOF accept in such a situation? How far can military necessity go in justifying action here?

Surrender is a dangerous transaction, both for the person surrendering and the person accepting the surrender. Care must always be exercised. For example, at the Battle of Goose Green in 1982, Argentine troops raised a white flag of surrender. As UK soldiers moved forward to accept the surrender, they came under fire from a neighbouring position and were killed. While this may have been caused by the confusion of the situation (see IHL database), rather than as a deliberate act, it demonstrates the inherent danger that the person is feigning surrender in order to get an advantage. This would be an act of perfidy, and is treated seriously in the laws of war (Coleman, 2013: 229). It must be considered, however, particularly where there is already doubt about an opponent's conduct – indeed, this is precisely why perfidy is such a serious allegation, as it undermines genuine surrender attempts. In the case of bin Laden, even if surrender had been offered, there was a very real fear of a suicide vest being detonated in addition to the chances of him using the opportunity to attack the SEALs – the presence of firearms in the room where he was killed demonstrated that the means were certainly available for him to do this. One of the prudent options that may be available is considering how the surrender may be taken without exposing the operator to such high risk – for example, rather than moving towards the person or people offering their surrender, insisting that they move out of cover and approach so that their surrender can be taken may be a way of reducing at least an element of the inherent risk.

In addition to the risk that surrender may be employed as a ruse to harm those accepting the surrender, taking and handling prisoners necessarily complicates the planned execution of the raid, thus increasing the likelihood of mission failure. As McRaven (1995: 1–25) observes, SOF succeed despite their numerical inferiority ‘when they are able to gain relative superiority through the use of a simple plan, carefully concealed, repeatedly and realistically rehearsed, and executed with surprise, speed, and purpose’. Taking prisoners adds steps to the timeline, increasing the time on target and the probability that a reaction force will arrive in time to cause trouble. Furthermore, it diminishes the firepower of the raiding party as shooters drop out of ‘the train’ to become prisoner handlers.

Returning to the bin Laden raid, if he had very clearly, credibly, and deliberately attempted to surrender, and that attempt was recognized and believed as such, and there was not an ongoing firefight, then at that point (not before), there would be an obligation to apprehend rather than kill. Since none of these factors obtained, the moral argument that the assault force acted appropriately is essentially unassailable.

Of course, the chances of each of those factors being independently verified, or that someone could be legitimately criticized for their exact belief at that time not being exactly correct, are slim. But the practical difficulties of holding someone to account in this type of situation should not be allowed to cloud the idea that once someone is genuinely *hors de combat* and have placed themselves in your protection, there is an obligation to attempt to provide that. Claims to military necessity are not sufficient to justify the murder of captives, or the execution of people whom it is simply inconvenient to protect.

Deception as a Disguise

McRaven’s ‘relative superiority’ is ephemeral. Once an adversary detects the presence of SOF on a target, the clock starts ticking. The raiders must complete their mission and extract from the target area before relative superiority becomes absolute inferiority at which point the risk of mission failure and even annihilation is real. One way to avoid this is speed on target. Another is to delay detection as long as possible. This is achieved through operational security, stealth, and deception. This section focuses on deception.

The utilization of deception is one of the tools in the arsenal of any competent military leader (Whetham, 2009: 1), and that understanding is

certainly not limited to contemporary military operations. In the early fifteenth century, the writer Christine de Pizan translated the advice of the Roman author Vegetius for her own medieval audience, including using one's spies disguised as labourers or pilgrims to detect and avoid ambushes (Whetham, 2009: 138). In 1384, the town of Ghent was retaken using soldiers disguised as carters, with their arms hidden beneath their frocks, who then seized the gate. In the same period, Mantes fell to Oliver de Mauny and his men when they were disguised as shepherds (Whetham, 2009: 212, 232).

Ruse de guerre is a form of legitimate deception that includes such things as the use of camouflage, decoys, mock operations, and the deliberate spreading of misinformation, all of which are intended to confuse and/or mislead an adversary. However, some types of deception are not merely frowned upon, they are actually prohibited according to the laws of war in use today: 'Dishonourable (treacherous) means, dishonourable expedients, and dishonourable conduct during armed conflict are forbidden.' The very foundation of the laws of war is the acceptance that 'the right of belligerents to adopt means of injuring the enemy is not unlimited' (Roberts & Guelff, 2000: 4, 5).

As we have seen, disguising oneself as a civilian is certainly not a modern subterfuge, but is it an acceptable form of deception? The reason this is such an important question is that civilians are protected by the norms and laws of war: 'The civilian population as such, as well as individual civilians, shall not be the object of attack' (Roberts & Guelff, 1995: 415). In return, those people have a duty to refrain from taking an active part, or directly participating, in any hostilities. As we have seen above, it is only if they DPH that they lose this protection. All parties to a conflict are required to make a distinction between those who are liable to attack and those who are not, and this type of deception can therefore be problematic. Clearly, pretending to be a civilian is therefore a kind of double camouflage in the sense that one is attempting to blend into the human terrain, and at the same time, that very terrain has the right not be deliberately attacked by a foe. 'Fighting in uniform is preferable because it best protects civilians from direct harm by allowing adversaries to distinguish between military and civilian targets' (Gross, 2015: 83) – abandoning a uniform might reduce the risk to the combatants, but it only does so by effectively increasing the risk to non-combatants.

Walzer gives us an account from the Second World War that highlights some of the challenges:

[A platoon of soldiers] passed a group of young men, French peasants, or so it seemed, digging potatoes. But these were not in fact peasants; they were members of the Resistance. As the Germans marched by, the 'peasants' dropped their shovels, picked up the guns hidden in the field, and opened fire. Fourteen of the soldiers were hit. Years later, their Captain was still indignant . . . 'what happened in that potato field was murder'. (Walzer, 2000: 176)

Was the Captain right? In this case, the deception is compounded by the fact that France had surrendered, meaning the Germans had a reason to believe that they were not at risk at this moment – from apparent civilians in a field, or from enemy soldiers because they had been told to stand down by their political leadership. This was the kind of incident that prompted Hitler's Commando Order, issued on 28 October 1942, denying quarter to any partisans or SOF (Walzer, 2000: 38).

Closely related to partisans, guerrilla tactics, at least according to Mao, are based on the idea of a military force having built sufficient support amongst a population that they are able to blend back into that population before and after making their attacks. They *belong* there because the people themselves have been mobilized. But, Walzer points out, rather than guerrillas being to civilians as fish are to the ocean, their actual relationship is closer to that of fish as to other fish (Walzer, 2000: 182). Gross argues that guerrilla fighters may be able to justify shedding their uniforms under certain circumstances, but this is only 'when it is otherwise impossible to fight unjust aggression or occupation' (2015: 83).

For SOF, donning civilian clothes might be a form of camouflage considered because it can make operating in hostile environments possible, whether or not they happen to be operating in support of a cause supported by the general population amongst whom they are operating. If they are blending in with the local population and its fighters as part of an assistance force, then this raises additional challenges (see Chapter 5 – Rebels). But sometimes the SOF unit will be operating among an occupied people. While their ultimate fate as a people may be connected with the ongoing military effort from outside the country, the SOF team is also not necessarily directly acting on their behalf, and they certainly do not have the consent, explicit or implicit, of the civilian population. As such, it is still a highly dangerous activity, and discovery is a very real possibility. The civilian population, with no knowledge or involvement in the military activity, are just as likely to inadvertently 'give up' a SOF unit by accident as they are to point fingers in a bid to avoid trouble with an occupying force, so this is not an easy form of camouflage to adopt.

Although the context of Walzer's example was specifically related to partisans operating in German occupied territory, rather than a SOF mission, were these actually murders rather than legitimate killings because of the manner in which they were conducted? If so, would that still be the case if they had been a SOF unit ambushing the German soldiers in occupied territory? What justification, if any, does a SOF unit or other group of fighters have for hiding in this way, when their disguise effectively includes the 'wearing of a coat' of legal protection that they are not necessarily permitted to don? Is such an action automatically a war crime, or are there situations under which it might be permitted? Are there historical precedents?

The norms of naval warfare in the Napoleonic period permitted (or at least accepted) the flying of false colours such as the flag of a neutral party to the conflict for example. This was a perfectly acceptable deception, up to a point. If an enemy frigate could be misled long enough to allow one's ship to close the distance, as long as the correct flag was run up the mast (and the false one removed) before the vessel opened fire, then that was a perfectly acceptable *ruse de guerre*. Any deception must be abandoned before opening fire, however. Firing on an enemy vessel while still flying its own friendly flag was and is a different matter crossing a line from permitted ruse to prohibited rule-breaking.⁸ Today, at sea and on land, one needs to do the equivalent of running up the appropriate flag, but that is going to be very different for a SOF unit operating behind enemy lines. On land, the Geneva Conventions require the wearing of a 'fixed distinctive sign visible at a distance' with combatants carrying 'their arms openly' when they are actually attacking (Roberts & Guelff, 1995: 218).⁹

Deception was at the very heart of the 1942 raid on Saint-Nazaire by the Allies, although in this case, more than just a Kriegsmarine ensign was required to carry off the deception. The 45,000-ton *Tirpitz* was the sister ship of the much-feared *Bismarck*, which had been sunk in May 1941. By early 1942, the *Tirpitz* was operational and causing the Allies significant challenges. Operating alongside the battle cruisers *Scharnhorst*, and *Gneisenau*, and the pocket battleships *Scheer* and *Lutzow*, she could have tilted the balance of the war by destroying the British merchant fleet in the North Sea (McRaven, 1995: 116). Worse, if the *Tirpitz* managed to break

⁸ Disguising oneself as enemy troops is taking this to another level of deception and is covered specifically in Chapter 4, while the use (and perfidious misuse) of protected symbols is covered in Chapter 3.

⁹ They are also to be commanded by a person responsible for their subordinates, and to conduct their operations in accordance with the laws and customs of war.

out into the Atlantic, either through the English Channel or by heading north around Scotland, the wider merchant fleet – Britain’s lifeline to the rest of the world – would be put at risk. The port of Saint-Nazaire was the only Atlantic seaboard facility capable of taking a ship of her size. Denying this safe harbour for maintenance and repair was therefore seen as absolutely essential.

For the attack on Saint-Nazaire, the obsolete destroyer *HMS Campbelltown* was cosmetically modified to resemble a German *Mowe*-class destroyer. Her four funnels ‘were reduced to two raked-back stacks’, and she was armour-plated around the bridge (McRaven, 1995: 120). This camouflage permitted the raiding force to get within two miles of the harbour before the defences responded. Once she came under fire, *Campbelltown*’s commander ordered the German ensign pulled down, and the white British ensign hoisted up. Her camouflage had enabled her to complete her one-way mission successfully as she was rammed into the Saint-Nazaire dry dock at a speed of 18 knots. The four-and-one-quarter tons of explosives packed into her exploded later that morning. This, combined with a coordinated commando assault laying delayed charges over the rest of the port rendered the dry dock unusable along with much of the rest of the port, for the rest of the war. While the primary objective had been achieved, the casualty list was significant. The raid involved 611 personnel of which 257 were commandos. Of these, 169 were killed, and 200 captured. Friendly fire in the panic caused when the delayed charges detonated also resulted in the deaths of many French civilians as well as Germans (McRaven, 1995: 142).

The attack on Saint-Nazaire passes muster as an ethical use of military deception. In this case, although there were civilian casualties, these were caused by the general confusion of the attack and the delayed charges going off after this. In addition to raising the Union Jack prior to returning fire, *Campbelltown* was disguised as an enemy man-of-war rather than a civilian vessel. Another Allied operation during the Second World War employed a deeper cover that may have crossed the line into an unethical use of deception. Well-away from the European theatre, the objective of Operation JAYWICK was to attack Japanese shipping in Singapore. The Australian and British team accomplished this by adopting a disguise as local fishermen. The ten sailors and four soldiers travelled some 4000 miles into enemy waters, and using time-delayed limpet mines, were responsible for the destruction or damage of over 30,000 tons of enemy shipping. Their ship – the *Krait* – was disguised as a fishing vessel, and carried a number of canoes as well as their ordnance and weapons from Exmouth,

Western Australia, through the Java Sea to their target and back. While part of the journey was conducted under a Japanese flag in an attempt to avoid scrutiny, the members of the unit also dyed their skin in order to enhance their appearance as local fishermen. The ship, combined with their individual disguises, was good enough to fool other civilian shipping and even a Japanese destroyer that passed within 100 yards as she traversed through the Lombok Strait on the way home.¹⁰

Due to the clandestine character of the operation, nothing about it was acknowledged by the Allies at the time. This had the unfortunate (but unintentional) effect of shifting the blame for the attack onto the civilian population of Singapore, leading to arrests, torture, and executions as reprisal for what was assumed to be sabotage (Australian National Maritime Museum, 2019). This is a considerable moral consideration when operating in occupied territory. Any occupied population are already likely to be treated with suspicion by the occupier. Apart from the injustice of the occupation itself, a good number of the people may have lost loved ones in any defence of the state, or are at least likely to have sympathies with the enemies of their occupier (Slim, 2007: 196). Any occupier will know and fear this. Conducting attacks while disguising oneself as such occupied people may well be sufficient to tip the balance into outright hostility directed towards all or parts of the civilian population by the occupier, from additional repression through to forms of individual or collective reprisal. Reprisals of this kind were and remain illegal, and commanders were tried for such actions in the aftermath of the Second World War. Nonetheless, while reprisals are clearly the moral responsibility of those carrying them out, the costs to the civilian population of effectively shifting the blame for an attack onto them is still, to some extent, predictable and does raise some difficult questions about the justification for such types of attack.

We see a similar moral dynamic in the 2006 war in Lebanon. 'Israeli officials contend that the reason for the high [civilian] fatality rate was not indiscriminate targeting by Israeli forces, but the Hezbollah military's allegedly routine practice of hiding among civilians and using them as "shields" in the fighting' (Human Rights Watch, 2008). That logic must work both ways though. The partisan attack from the potato field would have contributed to Nazi scepticism about the non-combatant status of other civilians, while Hezbollah operating from within the civilian population led to increased civilian casualties when the Israelis attempted to

¹⁰ Peter Djokovic. www.navy.gov.au/history/feature-histories/krait-and-operation-jaywick.

target the Hezbollah forces. Clandestine attacks by SOF units that appear to have come from a civilian population may well increase the burden of risk that the civilian population has to deal with.

What about situations in which the civilian population amongst whom the SOF unit is attempting to camouflage itself is in hostile territory? While they are most clearly non-combatants in the sense of their protected status from direct harm within the norms and laws of war, they may not be, as it were, 'friendly'. Does this change the moral calculation at all?

Operation Spring of Youth provides another historical case study of SOF employing civilian disguise, this time in hostile territory. In April 1973, Lt Col Ehud Barak, later to become Israeli Prime Minister, was landed in Beirut disguised as a young civilian woman along with the SOF unit that he commanded. The operation was planned in the aftermath of the massacre of Israeli athletes during the Munich Olympics the previous year, and was aimed at the elimination of three Fatah senior leaders linked to the attack. Deliberately aiming for such high-ranking people would most definitely have had a strategic goal as well, with a disproportionate outcome compared with the forces committed to the attack, fitting squarely into McRaven's typology.

Deception, combined with surprise, was a core element of the raid's success. Upon landing on the Lebanese beaches, they were met by Mossad agents in rented cars. This allowed them to pass through the civilian traffic, avoiding the scrutiny of the local security forces and police. The commandos, dressed in civilian clothes, only proceeded in small groups on foot once they were near their targets. As the assault on the PLO apartments unfolded, Barak remained outside in disguise to stand guard against possible counterattack, resulting in a heavy firefight with responding gendarmes and PLO reinforcements. Simultaneously, 14 commandos disguised as civilians were also storming a building housing the Popular Front for the Liberation of Palestine. The intent was to do this clandestinely, with suppressed weapons ('silencers'), and using the civilian clothing to camouflage the operation as far as possible (*Jerusalem Post*, 2013). However, despite their precautions, there was a significant firefight from their arrival at the heavily guarded building, which continued until the team were able to place a large (120kg) explosive charge and escape via air extraction (*Jerusalem Post*, 2013). The charge itself had been nearly halved so as to limit harm to civilians in the neighbouring buildings. The raid was seen as both a tactical and strategic success, resulting in the death of high-level PLO leaders and the destruction of the Popular Front for the Liberation of Palestine headquarters, as well as rocket and mine factories.

The Israeli Defence Force (IDF) suffered only two casualties in the operation. As an example of careful planning in order to minimize civilian casualties, there certainly appears to have been some good practice here, whatever one thinks of the overall legitimacy of the operation.

In a more recent example, consider the ‘little green men’, the Russian SOF who spearheaded the 2014 annexation of Crimea. We discuss this extraordinary case in detail in Chapter 6, but the subtle but effective deception employed by the Russian commandos warrants mention in this section as well. Although they wore uniforms and carried their weapons openly, they wore no insignia that identified them as Russian military. The deception confused and disoriented the Ukrainian government, muddled the international narrative, and delayed formation of a coherent response long enough for Putin to hand the world a *fait accompli* that is yet to be overturned. On the face of it, this would appear to be a textbook case of rule-breaking, but it is not quite that simple. While they were not wearing their usual Russian insignia and unit markings, they were still clearly identifiable as combatants and therefore not in violation of the Laws of Armed Conflict (LOAC). Specifically, wearing your own insignia as the ‘fixed distinctive sign’ is not required in order to satisfy the principle of distinction – the LOAC ‘mandates only that belligerents be distinguishable, it does not require that they advertise their nationality’ (Reeves & Wallace, 2015: 395).

Military personnel wearing non-standard uniform should still expect to be granted POW status if caught. Given the lack of any agreed international standard on what actually constitutes a uniform, anything that distinguishes a member from a non-member should suffice, even if that uniform was limited to items such as ‘a hat, or armband’, as long as it was recognizable at a distance (Parks, 2003: 516, 542). This is an important accommodation as it allows rebels to mount a just revolt against an unjust government.

According to both treaty law and state practice, wearing a partial uniform, or even civilian clothing, is not itself illegal, and only becomes so if it also involves perfidy (Parks, 2003: 513). If civilian clothing is worn with the intent to deceive, *and* ‘the deception is the proximate cause of the killing, wounding, or capture of the enemy, then this is likely to be considered as perfidy’ (Parks, 2003: 542). If one were to actually carry out an armed attack while still disguised as a civilian, this is likely to be regarded as perfidious (Roberts & Guelff, 1995: 409) and therefore absolutely prohibited. For SOF wishing to avoid allegations of perfidy, the most critical ‘uniform item’ is a weapon, openly carried.

Even if scrupulously avoiding perfidy, that does not mean that there is no risk attached to such a disguise. If combatants were to be found deliberately trying to blend into a civilian population when they were caught by a hostile power, such 'masquerading as civilians to mislead the enemy and avoid detection' might be considered enough for them to lose the privileges associated with their combatant status. For example, under customary international law, spies, saboteurs, or 'members of a State armed group who abuse their status', in this case by failing to comply with the principle of distinction, might be deprived of the privileges of being considered a POW (Dinstein, 2004: *supra* note 134, at 29). One of the consequences of this is that, unlike lawful combatants, such people may be prosecuted and punished for their actions, 'even if their actions do not constitute war crimes' (Dinstein, 2004: *supra* note 134, at 30).

Whilst this volume is focused upon the ethical context rather than specific legal analysis, the legal realities are shaped by the nature of the mission, the strategic and international political context. Therefore, what is considered lawful is likely to be heavily influenced by whether the state is at war or not. If one is wearing civilian clothes whilst undertaking a capture, spy, or information-gathering mission, then direct self-defence is likely to be the only lawful basis for using lethal force. As discussed above, while it is certainly not a typical mission for SOF, a deliberative operation involving a targeted killing where the aim is to kill an individual, is far more problematic if wearing civilian clothes and employing concealed weapons – this could easily amount to a war crime. If there is no context of declared hostilities, the killing is likely to be regarded as murder. It is essential that the legal basis for the operation is clearly understood by all personnel. In practical terms, whatever the subtleties of the legal context, if special operators dress up as civilians, then they can expect repercussions if caught. They might be denied POW status and could find themselves being tried as spies (Parks, 2003: 513). If they actually attack whilst still disguised as civilians, so as to conceal their combatant status and avail themselves of a legal protection that they do not warrant, they could well be tried and convicted of a war crime.

While wearing non-standard uniforms or civilian clothing should always be an exception rather than the norm, clearly there is ample historical precedent for SOF disguising themselves as civilians when a military necessity has been established. Its use has 'been limited to intelligence collection or Special Forces operations in denied areas. No valid military necessity exists for conventional military forces . . . to wear non-standard uniforms or civilian attire in international armed conflict' (Parks, 2003: 542). Parks

concludes that the principle of distinction should never be taken lightly, and that military convenience should never be confused for military necessity when it comes to the justification for wearing civilian attire by anyone. War is an inherently risky business, and that, on its own, does not warrant, in legal or ethical terms, the exception. 'That military personnel may be at greater risk in wearing a uniform is not a legitimate basis for wearing a non-standard uniform or civilian attire' (2003: 542). Given the moral burden that this choice involves, in terms of the additional risk that might be transferred onto the civilian population as a result of the action, this is most definitely not simply a default option for SOF in hostile territory, and the implications need to be carefully considered and thought through.

What about other kinds of disguise? In the UK, large country estates are often host to country pursuits of hunting, fishing, and shooting. To allow gamekeepers to kill crows and jackdaws to 'protect' the pheasants and partridges, the prized partridges are classed as livestock. But, because you aren't allowed to shoot livestock for sport, when pheasants and partridges are being sighted down the barrels of hunting rifles, the birds become reclassified as wildlife – for the duration of the shoot at least. Because one isn't permitted to round up wild animals at the end of the season, and trap them in enclosures, when the survivors are being collected up, they become livestock again.¹¹ What has this got to do with SOF, or even military personnel more generally? While not a disguise, exactly, it feels not a million miles away from what the US military call 'sheep dipping' where the legal status of combatants is manipulated according to what is being done (and where it is being done). The birds are either livestock or wildlife depending on what is most beneficial for the estate, and with SOF (or other) military personnel operating where they do not necessarily have permission, something very similar happens. The US military holds Title 10 authorities related to military deployments, while the CIA holds Title 50 authorities that allow for covert operations. Combining the two authorities by 'sheep dipping' active-duty military personnel allows for the best of both worlds. If the military forces are required somewhere they do not have Title 10 authorization to be, they are simply temporarily transferred to a unit that doesn't face the same restrictions.

¹¹ Of course, if a pheasant flies into a car during the roundup, and causes a crash, the estate is not legally liable, because, for this purpose, it becomes wildlife again. If it survives the crash and you use it to breed more pheasants, it becomes livestock again, enabling you to claim tax breaks and subsidies. <https://threadreaderapp.com/thread/1478262037864226819.html>.

While this may be a pragmatic way of navigating the complexities of a US legal framework, itself perhaps designed for a different age (Wall, 2011), in some ways, it also seems not a million miles from the Russian ‘little green men’ in Crimea in 2014 – deniable as regular military personnel, but only due to legal sophistry. Much like our other forms of deception, playing with or using the law to gain an advantage is nothing new of course. In the fourteenth century, Sir Walter Manny used just such a legal subterfuge to ride ahead of the messenger with the official war declaration in order to surprise and seize the town of Mortaigne from the French (Whetham, 2009: 250). Was it fair? Absolutely not – at the tactical level, there was absolutely no chance that the defenders of the town could have been expected to know that they were now at war. Was it effective? Absolutely. Was it permitted? According to the War Convention at the time, it was indeed, because although it might have been ‘sharp’ practice, there was no actual perfidy involved. In that way, manipulating legal authorities to permit military units to do something normally prohibited within their own rules, deliberately being opaque about uniforms in order to deceive or at least confuse an opponent’s understanding about one’s actions, or attacking from the cover of a legal misperception may all be considered to be ‘sailing close to the wind’, but may be close enough to the ethical line to be considered acceptable.

Operational Necessity

According to Rafi Eyal, a Major at the time of the Spring of Youth operation introduced above, one of the issues that arose from the mission, apparently discussed as part of the planning phase, was what would happen if they were identified on their way through the territory on the way to the targets? For operational reasons, but also, if Eyal’s account is to be believed, ethical ones, the desire was to carry out a ‘quiet’ operation. So what to do if the cars were intercepted or stopped by Lebanese police on the way in or out? Silencers were issued as part of their equipment, but ‘following a debate, it was agreed that tear gas, cable ties and tape for their mouths would be used instead’ (*Jerusalem Post*, 2013). Despite the urgency of the mission, contingency plans were made to deal with people who were not associated with the enemy. Would/could military necessity have justified the use of lethal force against police, had they ‘got in the way’ and compromised the mission? Clearly, once the noise of the battle had alerted the neighbourhood around the PLO apartment buildings, and armed reinforcements began to arrive from around the city, there was less

concern about a deliberative operation causing unnecessary harm as the situation at that point was one of immediate self-defence with the need to return incoming fire against a variety of actors even if only to provide cover. What about if the SOF had been stopped by the police – could they have been justified in killing them? Police are generally regarded as being civilians and have protected status unless they are taking part in military operations. Understanding the degree to which a police force is integrated into or alongside military forces will be a very important consideration here, requiring a clear understanding by all those taking part as one considers the status of all of the potential people that could be involved across the wide spectrum of possibilities. Common sense suggests that them being armed or not and their willingness to use force will also be of moral interest.

Under extraordinary circumstances, necessity *may* justify *certain* extreme actions. However, there is a difference between a situation unfolding in a genuinely unanticipated way, and choosing not to even explore the possible scenario outcomes. Deliberately choosing in advance to refrain from having the tools available to be able to act ethically, does not make the ethical problem simply go away. An action that is made necessary because you have chosen in advance to make it the case through deliberate consideration, feels a lot less justifiable than one that is generated through a genuine and unanticipated self-defence situation. Even if the situation does demand extreme measures, military necessity is still not a blank cheque that can be used to justify war crimes. Even extreme military necessity cannot override absolute principles such as never deliberately targeting non-combatants. It can only ever require us to do that which is legal in the first place (Whetham, 2009: 81). Just because something might be considered physically necessary, that is not sufficient to make it justified. 'If an act is prohibited by the law of Armed Conflict, it may not be done.' There are no exceptions (Whetham, 2009: 136).