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Perfidy in Non-International Armed Conflicts

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Introduction

Perfidy is a grave breach, or serious crime, under the law of war. It is generally defined as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”¹ Examples include using the white flag to lure an enemy into the open, or feigning incapacitation by wounds or sickness; the most egregious violations include using protected status, as a civilian or a medical professional, to treacherously kill or wound an enemy.

In the current and recent conflicts in Iraq, Afghanistan, Somalia and Pakistan, all of which are non-international armed conflicts of varying degrees of intensity, actions that would be described as perfidy if they had occurred in an international armed conflict are rampant. On January 19, 2011, for example, Iraqi insurgents used an ambulance bomb to attack an Iraqi police station in Diyala province, killing five and wounding seventy-six individuals, the majority of whom were civilians.² On the afternoon of July 5, 2011, a suicide bomber, disguised as a civilian, detonated a truckload of explosives near a municipal building in Taji, Iraq; as

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friends and neighbors, including young children, rushed to help the injured, a second suicide bomber attacked from among the crowd.³ In Afghanistan, on April 7, 2011, a suicide bomber used an ambulance to infiltrate a police checkpoint and then detonated his bomb, killing six.⁴ In Somalia, Al-Shabaab, an Al Qaeda–affiliated group fighting the fledgling Somali government, has trained women to be suicide bombers, so they can launch their attacks while appearing to be innocent civilian females, dressed in traditional Moslem garb.⁵ And Pakistani insurgents have employed similar asymmetric tactics. On May 13, 2011, just days after the death of Bin Laden, the Pakistani Taliban returned to the practice of launching suicide attacks from among the civilian populace.⁶

The question to be addressed is whether the war crime of perfidy exists in the law of war pertaining to non-international armed conflicts. Or phrased in another manner, is it appropriate to apply this term outside of international armed conflict, where the rules are defined by treaty and customary international law? The *Manual on the Law of Non-International Armed Conflict* suggests that at least some of the conduct defined as perfidy when occurring during an international armed conflict is also perfidious when occurring during non-international armed conflicts.⁷ What are its parameters and how many of the concepts from international armed conflict are to be incorporated into the law of non-international armed conflicts?

An answer to these questions requires an examination of the Additional Protocol I (AP I) definition of perfidy in international armed conflict and its antecedents, an analysis of the existing treaty law of non-international armed conflict (Additional Protocol II (AP II))⁸ and an extrapolation of the principles established in AP I for international armed conflicts into the law for non-international armed conflicts. Although many of the specific provisions of AP I were not included in AP II, Additional Protocol II includes the same general protections as AP I, which suggests that the more specific provisions of AP I that give form and substance to the general protections can be used to enforce compliance with those general protections in non-international armed conflict, as a matter of customary international law. As Bothe, Partsch and Solf suggest in their seminal work on the protocols, “The concept of general protection . . . is broad enough to cover protections which flow as necessary inferences from other provisions of Protocol II.”⁹ The basic principle of distinction and the protective principle of the law of armed conflict (also referred to as international humanitarian law) logically lead to the incorporation of the prohibition on perfidy, by inference, into the law applicable to non-international armed conflict. In addition, the near-universal condemnation of perfidious attacks and current State practice in those conflicts, the practice of some international criminal tribunals, the practices adopted by States fighting these conflicts and recent U.S. military commission cases provide substantial

support for application of a rule against perfidy in non-international armed conflicts in order to provide a sanction for the perfidious use of internationally recognized emblems and protected statuses.

Protection of the civilian populace is essential in these complex conflicts. As the U.S. Army and Marine Corps' *Counterinsurgency Manual* indicates, the protection of civilians is the paramount requirement of the State in a non-international armed conflict: "The cornerstone of any COIN [counterinsurgency] effort is establishing security for the civilian populace."¹⁰ The prosecution of perfidy, as a serious crime or grave breach under the law of war, is required to protect the civilian population and respect humanitarian efforts in this prevalent form of conflict, whether labeled "transnational" or "intra-State non-international armed conflict."

The law that applies to the conduct of armed forces in a non-international armed conflict is derived from treaty law and customary international law. However, the customary international law status of perfidy in non-international conflict is difficult to establish under the current U.S. view of customary international law.¹¹ There is little or no evidence of perfidy violations being prosecuted under international law in non-international armed conflicts, nor is there clear *opinio juris* by States on this matter. Emerging customary international law must be inferred, therefore, from the principles of the law of armed conflict supported by evidence provided by jurists, official statements, statutes, the works of eminent writers and evidence of State practice.¹²

Treaty Provisions

General Principles

Treaty provisions adopting perfidy as a crime in non-international armed conflict are nearly non-existent.¹³ The law of armed conflict provisions from which a rule against perfidy may be derived, however, are clearly enunciated in Additional Protocol II. The United States has signed AP II and three presidents have recommended it be ratified by the Senate under the U.S. advice and consent constitutional process.¹⁴ At a minimum, U.S. forces are bound not to act contrary to the purpose and intent of the treaty.¹⁵ President Reagan, in transmitting the treaty to the Senate for advice and consent, noted the importance of the humanitarian provisions of AP II, focusing on the provisions designed to protect those who are *hors de combat* from intentional killing:

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with

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legitimate military requirements. The agreement I am transmitting today is, with certain exceptions,¹⁶ a positive step toward this goal. Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters. . . . Protocol II to the 1949 Geneva Conventions is essentially an expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions with respect to non-international armed conflicts, including humane treatment and basic due process for detained persons, protection of the wounded, sick, and medical units, and protection of noncombatants from attack and deliberate starvation. If these fundamental rules were observed, many of the worst human tragedies of current internal armed conflicts could be avoided. . . . This Protocol makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore punishable as murder.¹⁷

In addition, various U.S. officials have signaled the intent of the United States government to comply with provisions of the treaty, including the protection of civilians and the prevention of intentional killing or serious bodily harm of those that are protected under the humanitarian provisions of the law of war.¹⁸ In his discussion of President Reagan's intent to ratify AP II, Judge Abraham Sofaer, the Department of State Legal Advisor in 1987, expressed the desire of the U.S. government to "guarantee that certain fundamental protections be observed," including "protection from intentional attack, hostage taking, and acts of terrorism [against] persons who take no active part in hostilities," "protection and appropriate care for the sick and wounded, and medical units which assist them" and "protection of the civilian population from military attack [and] acts of terror."¹⁹

Additional Protocol II contains several provisions that articulate general principles of the law of armed conflict that are relevant to the crime of perfidy. Article 4 provides for humane treatment for those no longer taking a direct part in hostilities; Article 7 protects the wounded and sick; and Articles 9 through 12 provide protection to medical personnel, units, transports, and functions, via the internationally recognized red cross, red crescent and red lion emblems.²⁰ Article 12 concludes that the emblems "shall not be used improperly." Article 13 provides that civilians "shall not be the object of attack . . . unless and for such time as they take a direct part in hostilities." Article 16 provides protection to cultural objects and places of worship. Relief societies, marked with the aforementioned emblems, are also allowed to "offer their services" to perform their traditional functions in relation to the victims of armed conflict under Article 18, so long as they provide services of an "exclusively humanitarian and impartial nature." All of these provisions provide for the general protections that are enforced through the prohibition of the grave breach of perfidy.

Origins of the Prohibition of Perfidy

The origins of the prohibition of perfidy are found in the early law of war treaties and treaties of the nineteenth and early twentieth centuries. In his 1810 *Treatise on the Law of War*, Van Bynkershoek wrote that he believed that fraud and deceit were lawful and essential stratagems of war: “For my part, I think that every species of deceit is lawful, perfidy only excepted. . . .”²¹ He decried as an example of perfidious conduct the offer of a Dutch sea captain of passage to the governor of the Canary Islands, whom, when the governor accepted, the captain made a prisoner for ransom. Van Bynkershoek likened this to an act of perfidy: “precisely the same as going to an enemy under the protected flag of truce, with an intention to seize upon the first favourable opportunity to take away his life.”²²

Francis Lieber, who gathered in his Lieber Code much of the law of nations from the same Napoleonic period, noted:

Art. 16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or revenge, nor of maiming or wounding except in fight. . . . It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Art. 65. The use of the enemy’s national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

Art. 101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

Art. 117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection [including flags of truce and hospital designation].²³

Finally, Lieber provided that these “rules of war” are appropriate for a civil war, without reference to the legitimacy of the “rebels,” as “humanity induces the adoption of rules of regular war toward the rebels, whether the adoption is partial or entire, [while] it does in no way whatever imply a partial or complete acknowledgement of their government.”²⁴ In its earliest form of codification, the law of war provided for the grave breach of perfidy, even in non-international armed conflict.

The 1907 Hague Regulations codified, in a broadly adopted treaty, the concept of perfidy.²⁵ Article 23(b) provided that it was “especially forbidden” to “kill or

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wound treacherously individuals belonging to the hostile nation or army” and Article 23(f) prohibited “improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.”²⁶ Although the Hague Regulations applied between States parties, the famous “Martens clause” in Article 2 arguably extends many of these rules to other forms of warfare in stating that “the inhabitants and the belligerents remain under the protections of and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

In Spaight’s 1911 seminal *War Rights on Land*, he noted the application of the rule against perfidy to a broad range of conduct. Quoting Hall, Oppenheim and Bluntschli, Spaight found that use of an enemy uniform, insignia or flag is permitted “up to the commencement of actual fighting.”²⁷ Spaight also provided numerous examples of strict and less strict interpretations of this provision from the U.S. Civil War, the Franco-Prussian War, the Crimean War and the Boer War.²⁸ As a clear case of “treacherous attempts to kill or wound,” he cited the use of civilian clothes by belligerent troops of the Japanese in the Russo-Japanese War.²⁹ And, as an example of the perfidious use of a protected emblem, Spaight cited both the “treacherous overt act—if, for instance, by making a sudden attempt [under a white flag], he kills the enemy commander”³⁰—and the “treacherous simulation of sickness or wounds” in the Russo-Japanese War.³¹ These examples, applied in international (Franco-Prussian and Crimean Wars) and non-international (Boer and U.S. Civil Wars) armed conflicts, validate the strength, breadth and application of the prohibition on perfidious conduct across the spectrum of conflict.

Application of the Rules against Perfidy

Skorzeny Case

As evidenced by documents and treatises antecedent to the Second World War, perfidy was a crime that included treacherous use of the enemy uniform. A significant case that arose during the prosecutions before the International Military Tribunals illuminated the difference between the ruse of infiltration using the enemy uniform, and the “improper use” of the enemy uniform to kill or wound in violation of Article 23(f) of the Hague Regulations. Colonel Otto Skorzeny, the celebrated German commando who had rescued Mussolini from Italian partisans, was prosecuted, along with nine of his soldiers, for the “improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the US.”³² The trial produced testimony that Skorzeny’s commandos, who were charged with seizing bridges and

road intersections in advance of the Battle of the Bulge, were instructed to use American uniforms to infiltrate the lines, but to avoid fighting in enemy uniforms. At trial, no evidence of U.S. soldiers being killed or wounded by Germans fighting in American uniforms was produced, so all the accused were acquitted.³³ Since the published report contains only the findings of the court, without explanation, the “Notes on the Case,” prepared by the War Crimes Commission, provide the only rationale for the decision. They explain the decision by noting the lack of treacherous killing or wounding, as well as citing the U.S. Rules of Land Warfare of October 1940, which permitted the use of enemy uniforms and insignia as a ruse, but prohibited their use during combat, requiring that they be discarded before opening fire upon the enemy.³⁴ While the prohibition on use of enemy uniforms in combat has survived, even into non-international armed conflict,³⁵ the modern grave breach of perfidy has not included the misuse of enemy uniforms.³⁶

Perfidy during the Cold War: Special Operations Forces

In a 2003 article, W. Hays Parks described numerous examples of the use of civilian clothing in special operations missions that ranged from clandestine direct action missions to special reconnaissance missions deep within enemy-held territory.³⁷ Several reported cases of soldiers wearing civilian clothes while on a mission to attack civilian objects arose from the conflict between Indonesia and Malaysia in the 1960s. A Malaysian case, *Krofán and Another*, arising from the international armed conflict between Malaysia and Indonesia over the status of Singapore (then a part of Malaysia) and other nearby territories, illustrates the use of civilian clothes as a violation of the law of war.³⁸ While the case turns on the issue of the lack of status of the Indonesian soldiers as prisoners of war due to their mission of sabotage, the Singapore court decried the tactic of wearing civilian clothes because of its tendency to endanger civilians: “Both [spies and saboteurs] seek to harm the enemy by clandestine means by carrying out their hostile operations in circumstances which render it difficult to distinguish them from civilians.”³⁹

Parks also cites several examples of Soviet Spetsnaz (Special Operations) Forces and Israeli commandos using civilian clothes to infiltrate and capture or kill enemy forces.⁴⁰ None of these cases resulted in charges of perfidy, however, as they rested on claims of “unlawful belligerency” and the crimes of espionage or sabotage under domestic statutes, rather than law of war violations. Parks cautioned military forces to avoid perfidy, which he said was synonymous with “treacherous wounding” under the Hague Regulations,⁴¹ and noted that the principle of distinction is “at the heart of the balance” between lawful military operations and perfidy. Finally, he concluded that the drafters of the 1977 Protocols decided to criminalize

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use of civilian clothing “in the most egregious circumstances, such as terrorism and treacherous use of civilian clothing.”⁴²

A Modern Definition of Perfidy: Additional Protocol I

While it may be difficult to trace the precise application of the “treacherous killing or wounding” provisions of Article 23 from the Hague Regulations to the present, Additional Protocol I, which unified the Hague and Geneva traditions of the law of war, specifically addresses the definition of perfidy in international armed conflict:

It is prohibited to kill, injure, or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.⁴³

Article 37 goes on to distinguish “ruses of war,” or acts “intended to mislead an adversary . . . which are not perfidious because they do not invite the confidence of an adversary with respect to protection under the law.” A distinction between these concepts is essential to understanding perfidy. As Oppenheim notes, “whenever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation to speak truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith.”⁴⁴

While the prohibitions on perfidy contained in AP I are broad, the grave breaches that are prohibited are narrowly defined. First, grave breaches are limited to those violations of the law of war that are “committed willfully” (incorporating a *mens rea* element) and cause “death or serious injury to body or health.”⁴⁵ And the specific provisions of perfidy that constitute grave breaches only include misuse of internationally protected emblems, outlined in Articles 37 and 38, that result in death or serious bodily harm.⁴⁶ So, while perfidy may be more broadly construed to include a number of “breaches of faith” on the international armed conflict battlefield, the violations of the law of war that are designated as “grave breaches,” with the requirement to “prosecute or extradite” perpetrators,⁴⁷ are few.

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So what elements of perfidy, as described in Protocol I, can be extrapolated to non-international armed conflict? The *Manual on the Law of Non-International Armed Conflict (NIAC Manual)* describes perfidy in non-international armed conflict rather broadly. It prohibits “[d]isplaying the white flag falsely, or pretending to surrender, be wounded, or otherwise have a protected status . . . if the intent in doing so is to kill or wound an adversary.”⁴⁸ How much of this definition fits the standard established by Bothe, Partsch and Solf: “The concept of general protection . . . is broad enough to cover protections which flow as necessary inferences from other provisions of Protocol II”?⁴⁹ In other words, do the general principles adopted in AP II support a customary international law application of the specific provisions that prohibit that same conduct in international armed conflict? Are the provisions of this proposed rule consistent with the protective principle and the principle of distinction? And how many of these rules have been adopted in practice?

The Principles of Additional Protocol II and Their Connection to Perfidy

The principle of distinction is clearly enunciated in Protocol II, the treaty governing non-international armed conflicts that cross certain thresholds, and customary international law. Article 13 provides that civilians are to be protected “against the dangers arising from military operations . . . unless and for such time as they take a direct part in hostilities.”⁵⁰ The principle of distinction (also characterized as “discrimination”) is also enshrined in treaty law applicable to non-international armed conflict in protocols of the Certain Conventional Weapons Convention.⁵¹ For example, Article 3(8) of the Amended Mines Protocol II, which by its provisions applies to Common Article 3 conflicts, requires distinction between military objectives and civilians or civilian objects.⁵² Finally, distinction is clearly recognized in customary international law as applying in non-international armed conflicts.⁵³ For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) noted in the *Kupreskic* case, “The protection of civilians in armed conflict, whether international or internal [non-international], is the bedrock of modern humanitarian law.”⁵⁴

Article 13 of AP II sets forth a general “protective principle”⁵⁵ to protect the civilian population and individual civilians from the dangers of military operations. As the International Committee of the Red Cross’s *Commentary* notes, the protection extended to civilians in Article 13 reflects the more detailed protections of Article 51 of Additional Protocol I⁵⁶—in particular the principle of distinction in Article 51(4), which defines “indiscriminate attacks” as those attacks which “are of a nature to strike military objectives (including combatants) and civilians or

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civilian objects without distinction.”⁵⁷ The *Commentary* goes on to explain that States are required to formulate rules that give form and substance to the principle of distinction:

This radical simplification does not reduce the degree of protection which was initially envisaged, for despite its brevity, Article 13 reflects the most fundamental rules. How to implement them is the responsibility of the parties, and this means that the safety measures they are obliged to take under the rule on protection will have to be developed so as to best suit each situation, the infrastructure available and the means at their disposal.⁵⁸

Other provisions of Additional Protocol II emphasize the principles that are reinforced by the prohibition on perfidy, thereby strengthening the argument that forbidding perfidy is an essential tool for States as “measures they are obliged to take” to emphasize these protective principles. The “fundamental guarantees” of Article 4 prohibit murder and other violence to life and health, as well as the giving of “order[s] that there shall be no survivors,”⁵⁹ a ban reflecting the “no quarter” provision of the Hague Regulations.⁶⁰ These prohibitions reinforce the requirement to protect the lives of those that are *hors de combat*, which is so fundamental to the basic guarantees in Common Article 3.⁶¹ Additional Protocol II emphasizes the importance of extending that protection principle to abolish the feigning of “protected person status” to gain an advantage on an enemy; failure to respect those prohibitions on perfidy will encourage enemy soldiers to ignore the protective principle and murder soldiers and civilians, alike, who are *hors de combat*, or no longer taking an active or direct part in hostilities.

Additional Protocol II also extends the protections outlined in AP I to distinctive emblems and medical personnel and units, key targets for protection that are shielded by enforcement of perfidy provisions. Article 12 of AP II clearly protects distinctive emblems, which should be “respected in all circumstances” and never “used improperly.” Both of these provisions require the rule against perfidy as an enforcement mechanism to be adopted by States. Finally, medical personnel are to be “respected and protected” under Article 9, and medical units and transports should be “respected and protected at all times and shall not be the object of attack,” under Article 11 of AP II. Without the rules against perfidy to guarantee their status and punish offenders, States lack the enforcement mechanism necessary to guarantee these key protective principles.

Capture as Perfidy?

Perfidy in the form of misuse of a protected emblem to *capture* an enemy in non-international armed conflict has not become customary international law. As the

commentary in the *NIAC Manual* points out, “The reference to capture does not appear in the original 1899 and 1907 Hague Regulations, Article 23(b), prohibition and is not binding on non-contracting Parties to Additional Protocol I.”⁶² In addition, as noted above, the grave breach provision of Article 85 of AP I applies only to acts causing “death or serious injury.” The International Committee of the Red Cross’s *Customary International Law Study* notes that “killing or wounding an adversary by resort to perfidy” is a serious crime, even in non-international armed conflict.⁶³ In the *Dusko Tadić* case, the ICTY noted that serious crimes, even in non-international armed conflict, not only must “constitute a breach of a rule protecting important values,” which the rule against perfidy certainly protects, but also “must involve grave consequences for the victim.”⁶⁴ Finally, Article 8.2(e)(ix) of the Statute of the International Criminal Court (ICC) only applies perfidy to non-international armed conflict in the case of killing and wounding of an adversary.⁶⁵

State practice supports the view that misuse of protected emblems that is not the proximate cause of death or serious injury is proscribed, even in non-international armed conflict, but it is not considered to be as serious as the crime of perfidy. An example can be found in the dramatic rescue operation conducted by Colombian military forces to free Colombian and U.S. hostages from the Revolutionary Armed Forces of Colombia (FARC).⁶⁶ The Colombia military infiltrated the radio net used by the guerrillas and fooled the FARC into believing that the Venezuelan government had provided “humanitarian airlift” to remove the hostages and several guerrillas who were guarding them to a more secure location. Despite the oversight of senior officials in the Colombian government, who instructed the members of the rescue team to avoid the misuse of protected emblems (and had them removed from the aircraft), one of the team members wore a shirt with the red cross emblem clearly visible. Though the Colombian military explained that the misuse of the emblem was unintended, it was roundly criticized in the press for this mistake. While the misuse of the emblem, if intentional, may have violated the prohibition on misuse in Article 12, AP II, the elements of the grave breach of perfidy require more than capture; they require “kill[ing] or wound[ing] treacherously,” in the words of the Hague Rules. In the end, cries of “perfidy” were muted, presumably because there is no consensus in the international community about the validity of characterizing the conduct as perfidious when the misuse of the emblem is used to capture, rather than kill.⁶⁷

Law Enforcement Tactics

States involved in non-international armed conflicts, particularly those characterized as “counterinsurgencies” by the government forces, often adopt law

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enforcement tactics, which can blur the distinction between government forces and the civilian populace. Members of civilian law enforcement agencies routinely wear civilian clothing and agents in some law enforcement agencies never wear uniforms.⁶⁸ A close working relationship between the military and civilian law enforcement can be a critical component in counterinsurgency operations.⁶⁹ This may include clandestine operations conducted in civilian clothing by law enforcement and military authorities, particularly with respect to surveillance and other intelligence collection operations. An informant or ordinary civilian may be reluctant to be seen speaking with uniformed law enforcement or military personnel, for example. There is no prohibition on “spying” by government forces in non-international armed conflict, as espionage is generally recognized as a domestic law violation, not a violation of international law,⁷⁰ and representatives of the host nation or supporting foreign forces cannot commit “espionage” against organized armed groups in an internal armed conflict. As Parks notes in his 2003 article, “A ‘double standard’ exists within the law of war for regular forces of a recognized government vis-à-vis unauthorized combatant acts by private individuals or non-State actors.” In non-international armed conflict, therefore, government forces (including both law enforcement agents and military personnel acting under the color of the law of the host nation) can often be expected to don civilian clothes when gathering information or providing support to civilian authorities. While this would not constitute perfidy, there is a fine line between representing the government in the performance of quasi-law enforcement functions and “feigning civilian status,” thereby putting civilians at risk, in an attempt to gain an advantage in attacking insurgent forces.

Feigning Civilian Status

The critical focus of perfidy, in the area of feigning civilian status, is on the principle of “distinction,” which protects civilians from combatants (including those classified as “unlawful combatants” and “unprivileged belligerents”) on the international and non-international battlefield. Feigning civilian status to gain advantage over an enemy in an attack is an act of perfidy that goes to the very heart of the protective principle and, as such, its designation as a crime in non-international armed conflicts. In *Tadić*, the very first ICTY case, the Tribunal recognized the importance of perfidy as a crime under customary international law:

State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy.

Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations (citation omitted).⁷¹

It is important to note that Additional Protocol I's deviation from this principle in Articles 1(4) and 44(3), which collectively expand the notion of international armed conflict to the traditional non-international armed conflicts of "national liberation" and allow members of organized armed groups to claim "combatant" status merely by carrying their arms openly, was critical to the U.S. rejection of the Protocol. In expressing the Reagan administration's concern regarding Protocol I, Judge Sofaer, the then Department of State Legal Adviser, decried the failure of Articles 1(4) and 44(3) to protect civilians, stating that these provisions, when taken together, allow terrorists in wars of "national liberation" to avoid being charged with perfidy when hiding among the civilian population until the moment of attack, even though thereby putting the civilian populace and the principle of distinction at risk.⁷² This deviation from the general prohibition of feigning civilian status to gain a military advantage only applies to international armed conflicts of "national liberation"; organized armed groups in non-international armed conflict are not permitted to launch attacks from the civilian populace.

Jawad and al-Nashiri Cases

Two U.S. military commission cases illustrate the current U.S. practice with respect to perfidy and the offense of launching an attack while feigning civilian status. Mohammed Jawad was a young Afghan who was alleged to have thrown a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. He was charged with three specifications of attempted murder in violation of the law of war and three specifications of intentionally inflicting serious bodily injury. The government alleged that Jawad was concealing the grenade while dressed in civilian clothes and that he launched his attack from a crowd of civilians in the streets of Kabul. In support of the charges, the government argued that by his conduct, "the accused unlawfully engaged in combat by fighting outside of responsible command, by fighting without wearing a distinctive emblem, by failing to carry his arms openly, and by flaunting the laws and customs of war by feigning to be a non-combatant."⁷³

The second case involves Abd al-Rahim Hussayn Muhammad al-Nashiri, alleged to be the bomber of *USS Cole* and the attempted bomber of *USS The Sullivans*, who has been charged with perfidy and attempted murder as follows:

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Charge I: Violation of 10 U.S.C. § 950t(17), Using Treachery or Perfidy

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI . . . , an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, invite the confidence and belief of one or more persons onboard USS COLE (DDG 67), including but not limited to then FN Raymond Mooney, USN, that two men dressed in civilian clothing, waving at the crewmembers onboard USS COLE (DDG 67), and operating a civilian boat, were entitled to protection under the law of war, and intending to betray that confidence and belief, did thereafter make use of that confidence and belief to detonate explosives hidden on said civilian boat alongside USS COLE (DDG 67), killing 17 Sailors of the United States Navy . . . and injuring one or more persons, all crewmembers onboard USS COLE (DDG 67). . . .

Charge III: Violation of 10 U.S.C. § 950t(28), Attempted Murder in Violation of the Law of War

Specification 1: In that Abd al Rahim Hussayn Muhammad al NASHIRI . . . did, . . . with the specific intent to commit Murder in Violation of the Law of War, attempt to intentionally and unlawfully kill one or more persons onboard USS THE SULLIVANS (DDG 68), in violation of the law of war, to wit: by committing an act of perfidy . . . and to effect the commission of Murder in Violation of the Law of War, the two suicide bombers dressed in civilian clothes. . . .⁷⁴

Both these cases illustrate the view of the United States that the wearing of civilian clothes to perfidiously gain an advantage over an opponent when launching an attack is a crime when it occurs during an international armed conflict. As of the date of this writing, only in the *Jawad* case has there been a ruling regarding the offense of perfidy. In that case, Judge Henley ruled that the government could attempt to prove at trial that the attempted murder of the U.S. service members was perfidious conduct that violated the law of war.⁷⁵

Government Forces in Non-International Armed Conflict

Foreign forces supporting the sovereign government and government forces in a non-international armed conflict have a hybrid mission, partly based on armed conflict and partly based on law enforcement concerns. The law of armed conflict is invoked because the normal domestic (law enforcement) authorities are overwhelmed by organized armed groups, who threaten the very existence of the State. In recommending some criteria for application of Common Article 3, Pictet noted that a key element in distinguishing “a genuine armed conflict from a mere act of banditry or an unorganized or short-lived insurrection” was whether the legal government “is obliged to have recourse to regular military forces against insurgents organized as military and in possession of a part of the national territory.”⁷⁶ But the

national security risks entailed in a non-international armed conflict do not require abandonment of societal norms intended to provide minimal protections to the populace. As Pictet notes in commenting on the minimum standards of Common Article 3:

It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages? However useful, therefore, the various conditions [of Common Article 3] may be, they are not indispensable, since no Government can object to respecting, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact respects daily, under its own laws, even when dealing with common criminals.⁷⁷

As the U.S. Army and Marine Corps' *Counterinsurgency Manual* indicates, COIN forces are constantly moving through the spectrum of conflict, at one moment involved in a pitched battle with organized armed groups and in the next (or in the next village) supporting host nation law enforcement personnel in conducting civil security operations, under the rubric of "stability operations."⁷⁸ But the *raison d'être* of COIN is the same for both aspects of the counterinsurgency fight, which is "efforts to secure the safety and support of the local populace."⁷⁹ Whether it is law enforcement efforts to "protect and serve" (as many local police forces demonstrate by the motto displayed on their police cars) or military forces intent on securing the "safety and support of the local populace"⁸⁰ by applying the law of armed conflict through the protective principle discussed above, both have the same objective. For example, most military forces operating in a COIN environment apply self-defense rules of engagement, which in application differ little from law enforcement rules for the use of force.⁸¹ Law enforcement agencies within the United States invariably conduct their "takedowns" of criminals in uniforms emblazoned with the logos of their agencies (the Federal Bureau of Investigation or Drug Enforcement Administration, for example). While such tactics protect the agents by preventing confusing law enforcement agents with criminal gangs and by asserting the lawful power of the government to conduct arrest, search or seizure, they also protect innocent civilian bystanders by isolating the activity from the civilian populace. The tactical distinctions between COIN operations in non-international armed conflicts conducted for law enforcement

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purposes and those operations conducted with a military purpose fade away when the commander's intent to avoid civilian casualties is factored into the equation.⁸²

U.S. Experience in Afghanistan

Twice in the last year, U.S. forces in Afghanistan have applied the protective principle and this approach to perfidy to actions by U.S. forces in the current non-international armed conflict in Afghanistan. The first instance involved the wearing of civilian clothes by members of the U.S. armed forces working in support of Afghan civil authorities, such as in the "Afghan Hands" program, where military members work outside of NATO facilities within the Afghan community performing duties that are not directly combat related. A U.S. Forces-Afghanistan (USFOR-A) position paper analyzed the impact of military personnel wearing civilian clothes and concluded, "The LOW [law of war] does not require U.S. military personnel to wear uniforms if they are not performing a combat-related operation or attempting to deceive the enemy for a military advantage (i.e., perfidy)."⁸³ The rationale for this approach, at least in part, was to "clearly and identifiably distinguish[] combatants from the civilian population," to avoid civilian exposure to combat operations and the "corresponding risk of harm."⁸⁴ The paper noted, "Winning the hearts and minds of the civilian population is a must in a counterinsurgency (COIN) fight and thus protection of the civilian population must be a priority."⁸⁵ The paper quoted from a 2003 paper by Major William Ferrell III: "[O]nce combatants begin distinguishing themselves as civilians, or failing to distinguish themselves from civilians to gain an advantage over the enemy, civilians will become suspect and ultimately targets."⁸⁶ The USFOR-A paper concludes that the wearing of civilian clothes in offensive operations is a potential law of war violation (perfidy) and counsels against such practice, as "this violates the basic principle of distinction."⁸⁷ In a related issue, the USFOR-A Staff Judge Advocate issued an "Information Paper" on May 12, 2011 on the carrying of weapons. The paper opens with the classic military "bottom line up front":

The rules governing how weapons are carried find their origin in the law of war, specifically the tenet of distinction. The standard for US military members, while in Afghanistan, is to carry their weapons openly. Service members in the CENTCOM Area of Operations (AOR) must wear their weapons openly at all times. *Service members may not conceal their weapons with a perfidious intent.*⁸⁸

The paper goes on to conclude, “A military member may not conceal his weapon with an intent to deceive people into believing he does not have a weapon or to make them believe he is a noncombatant [which the paper calls a “perfidious intent”].”⁸⁹ Current State practice, at least by U.S. forces in Afghanistan, reinforces the existence of the concept of perfidy in non-international armed conflict.

Conclusion

A colleague remarked after the Naval War College presentation on perfidy in non-international armed conflict that he “now understood [my] worldview—you believe that all the rules of international armed conflict should be followed, as a matter of law, in non-international armed conflict.” I respectfully disagree with that conclusion.⁹⁰ But there is much to be said for an approach that applies general protective principles derived from Additional Protocol II as Bothe, Partsch and Solf suggest in their comparison of Article 51 of AP I and Article 13 of AP II:

Article 13 of Protocol II restates the provisions of the first three paragraphs of Art. 51 of Protocol I. It declares that civilians shall enjoy general protection against the dangers arising from military operations. . . . The Article does not, however, explicitly provide protection against indiscriminate or disproportionate attacks, nor does it prohibit explicitly the use of civilians to shield military operations. Moreover, it omits any direct reference to a prohibition against direct attacks or disproportionate collateral damage with respect to civilian objects. . . . Some of the specific protection thus omitted may, however, be inferred from the general protection provided in para. 1, but the construction of balanced protection for civilians from the abbreviated Art. 13 places a heavy burden on the term “general protection.”⁹¹

They also suggest that the crime of perfidy can be extrapolated from the basic principles recognized in Common Article 3 and Additional Protocol I, which provide protection from harm for those that are *hors de combat* (fighters who have been wounded or surrendered on the battlefield), civilians who are not directly participating in hostilities, those who are providing basic humanitarian services on the battlefield (protected by the red cross, red crescent and red crystal emblems) and those who have displayed the white flag of surrender.

As evidenced by treatises, the *Customary International Humanitarian Law* study, the findings of international tribunals prosecuting war criminals and State practice, customary international law provides that perfidy is a violation of the law of war in non-international armed conflict. In her excellent work, *War Crimes in Internal Armed Conflicts*, Eve La Haye notes that the amount of State practice and *opinio juris* on the protective principle of distinction “fulfils the criteria of an

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extensive and virtually uniform practice, coupled with the belief that this principle is legally obligatory.”⁹² A.P.V. Rogers, in *Law on the Battlefield*, concludes that perfidy consists of conduct that results in killing or wounding an adversary through “treachery,” including “killing by feigning civilian status” or *hors de combat* status, or “improper use of the flag of truce, the red-cross or red-crescent emblems, or the flag or military insignia or uniform of the enemy.”⁹³ The ICC Statute makes “[k]illing or wounding treacherously a combatant adversary” an “other serious violation[] of the laws and customs applicable in armed conflicts not of an international character.”⁹⁴ And the jurisprudence, cited above, both domestic and international, supports this view of perfidy as a crime in non-international armed conflict.⁹⁵

Finally, State practice has developed not only to prohibit feigning of civilian status in non-international armed conflict, as evidenced by the *Jawad* and *al-Nashiri* cases, but also to affirmatively prevent violations of this provision by military forces supporting government efforts in non-international armed conflict.

Notes

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 37(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

2. John Leland, *Bomber Uses Ambulance to Hit Iraqi Police Headquarters*, NEW YORK TIMES, Jan. 20, 2011, at A10.

3. Yasir Ghazi & Tim Arango, *Explosion in Iraq Draws Victims for a Second Blast*, NEW YORK TIMES, July 6, 2011, at A10.

4. *Six Die as Afghan Ambulance Bomb Targets Police*, HINDUSTAN TIMES (Apr. 7, 2011), <http://www.hindustantimes.com/world-news/afghanistan/Six-die-as-Afghan-ambulance-bomb-targets-police/Article1-682425.aspx>.

5. See, e.g., Abdi Guled & Ibrahim Muhamed, *Suicide Bomber Kills 3 Somali Ministers*, REUTERS, Dec. 3, 2009, <http://www.reuters.com/article/2009/12/03/us-somalia-conflict-idUSTRE5B217Y20091203>.

6. See, e.g., Declan Walsh, *Pakistani Suicide Bombers Kill 80 as Taliban Seek Revenge for Bin Laden*, GUARDIAN (May 13, 2011), <http://www.guardian.co.uk/world/2011/may/13/suicide-bombing-revenge-osama>. See also Anwar Shakir, *UN Halts Aid Distribution After Female Suicide Bomber Kills 46 in Pakistan*, BLOOMBERG (Dec. 27, 2010), <http://www.bloomberg.com/news/2010-12-25/pakistan-blast-kills-38-people-edhi-ambulance-service-spokesman-reports.html>.

7. MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 2.3.6 (2006) [hereinafter NIAC MANUAL].

8. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

9. MICHAEL BOTHE, KARL J. PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 677 (1982).

10. Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, Counterinsurgency (2006), available at <http://www.scribd.com/doc/9137276/US-Army-Field-Manual-FM-324-Counterinsurgency> [hereinafter Counterinsurgency Manual].

11. See John B. Bellinger & William J. Haynes, *A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007). In criticizing the *Customary International Humanitarian Law* study's methodology, Bellinger and Haynes emphasized that a general and consistent practice of States, combined with evidence of compliance by States out of a sense of legal obligation, or *opinio juris*, was required for the development of customary international law. See also *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 43 (Feb. 20) ("State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.").

12. Statute of the International Court of Justice art. 38(1)(d), 33 U.N.T.S. 993.

13. See *infra* text accompanying note 65 for a discussion of the one treaty provision addressing perfidy in non-international armed conflict.

14. See Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Concluded at Geneva on June 10, 1977, S. Treaty Doc. No. 100-2 (1987) (Jan. 29, 1987) [hereinafter Message from the President]. See also Message from the President of the United States Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and, for Accession, the Hague Protocol, S. Treaty Doc. No. 106-1 (Jan. 6, 1999); White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy 3 (Mar. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/new-actions-guantanamo-bay-and-detainee-policy> (reaffirming President Obama's commitment to the ratification of AP II).

15. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

16. This caveat refers to the reservations or understandings proposed by President Reagan, the principal one being an extension of AP II to all Common Article 3 conflicts, thus expanding the scope of the Protocol. Message from the President, *supra* note 14, at viii.

17. *Id.* at iii.

18. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 425 (1987); Abraham Sofaer, *The Position of the United States on Current Law of War Agreements*, *supra*, at 460.

19. Sofaer, *supra* note 18, at 461.

20. Additional Protocol III adopts the red crystal emblem as the fourth internationally recognized emblem. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261 (2006).

21. CORNELIUS VAN BYNKERSHOEK, TREATISE ON THE LAW OF WAR 3 (1810).

22. *Id.* at 15.

23. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3

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(Dietrich Schindler & Jiri Toman eds., 4th ed. 2004), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

24. *Id.*, art. 152.

25. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Regulations].

26. *Id.*

27. J.M. SPAIGHT, WAR RIGHTS ON LAND 105 (1911).

28. *Id.* at 104–9.

29. *Id.* at 110.

30. *Id.* at 220.

31. *Id.* at 434.

32. Trial of Otto Skorzeny and Others, 9 Law Reports of Trials of War Criminals 90 (1949).

33. *Id.* at 91.

34. *Id.* at 93.

35. See NIAC MANUAL, *supra* note 7, at 42. However, at the Naval War College conference from which the articles in this volume derive, the authors of the *Manual*, when questioned, expressed uncertainty concerning the validity of this provision.

36. Compare Articles 37 and 39 of AP I, which prohibit perfidy and use of the “uniforms of adverse parties,” respectively, without making the latter a grave breach, with Article 85. The author is using the term “grave breach” to distinguish those offenses that must be criminally prohibited and prosecuted under the law of war from other violations, which the parties are obligated to take measures to suppress. See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; see also War Crimes Act, 18 U.S.C. § 2441 (1996) (making the enumerated grave breaches federal crimes and defining “grave breaches” of Common Article 3). Other “measures necessary” may include making such conduct criminal, administrative action, training or other corrective action, as appropriate.

37. W. Hays Parks, *Special Forces’ Wear of Non-standard Uniforms*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 493 (2003).

38. *Krofan v. Public Prosecutor*, 1 MALAYAN LAW JOURNAL 133 (1967), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/0711dbb7117f01a4c1256ae8003f8cde!OpenDocument>.

39. *Id.* See also *Mohamed Ali v. Public Prosecutor*, [1969] 1 A.C. 430, available at <http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/383128666c8ab799c1256a1e00366ad3!OpenDocument>. In a similar case to *Krofan*, the Judicial Committee of the Privy Council in its decision emphasized the importance of distinction: “International law, however, recognises the necessity of distinguishing between belligerents and peaceful inhabitants. ‘The separation of armies and peaceful inhabitants’ wrote Spaight in *War Rights on Land* at p. 37, ‘is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable.’”

40. Parks, *supra* note 37, at 557–59.

41. *Id.* at 521.

42. *Id.* at 523.

43. AP I, *supra* note 1, art. 37.

44. 2 LASSA F.L. OPPENHEIM, A TREATISE: DISPUTES, WAR AND NEUTRALITY 430 (H. Lauterpacht ed., 7th ed. 1952), quoted in Parks, *supra* note 37, at 521.

45. AP I, *supra* note 1, art. 85.

46. *Id.*

47. GC IV, *supra* note 36, art. 146.
48. NIAC MANUAL, *supra* note 7, at 43.
49. BOTHE, PARTSCH & SOLF, *supra* note 9, at 677.
50. AP II, *supra* note 8, art. 13.
51. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137.
52. Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices, May 3, 1996, S. Treaty Doc. No. 105-1 (1997). Similar treaty-based distinction requirements, specifically applicable in non-international armed conflict, can be found in the Incendiary Weapons Protocol (Protocol III) to the Conventional Weapons Convention and the Second Protocol to the 1954 Hague Cultural Property Convention. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons art. 2, Oct. 10, 1980, 1342 U.N.T.S. 171 & Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172, respectively.
53. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 26–28 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). The study provides persuasive evidence of the existence of a “protective principle” of distinction in non-international armed conflict in the commentary to Rule 7, which provides that “[t]he parties to the conflict must at all times distinguish between civilian objects and military objectives.” *Id.* at 25.
54. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 521 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), available at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.
55. BOTHE, PARTSCH & SOLF, *supra* note 9, at 676.
56. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4762 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987), available at <http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument> [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].
57. AP I, *supra* note 1, art. 51.
58. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, ¶ 4764.
59. AP II, *supra* note 8, art. 4.
60. Hague Regulations, *supra* note 25, art. 23(d).
61. See, e.g., GC IV, *supra* note 36, art. 3. Common Article 3 is given more form and substance in Articles 4–6 of AP II, but its basic intent, to protect “[p]ersons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause,” is the bedrock value of the law of war that extends into non-international armed conflict.
62. NIAC MANUAL, *supra* note 7, ¶ 2.3.6.2.
63. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 53, at 599.
64. Prosecutor v. Tadić, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-I, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [hereinafter *Tadić*].
65. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. *But see also* 10 U.S.C. § 950t(17) (2006):
USING TREACHERY OR PERFIDY.—Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be

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punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct. (emphasis added)

66. See generally Maureen Orth, *Operation Checkmate: Inside Colombia's Hostage War*, VANITY FAIR, Nov. 2008, available at <http://www.vanityfair.com/politics/features/2008/11/hostages200811>. Some of the information concerning this operation was obtained by the author directly from Colombian officials in briefings conducted in Colombia and the United States.

67. Compare *id.* (“the . . . soldier . . . was wearing a Red Cross bib, which was against the rules of the Geneva Conventions”), with John C. Dehn, *Permissible Perfidy?*, 6 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 627, 653 (2008) (“the most satisfactory explanation for the lack of any condemnation of this perfidious capture by the [International Committee of the Red Cross] might be that the scope of the perfidy prohibition applicable in non-international armed conflict is subject to question”). Even the FARC’s lawyer, Rodolfo Rios, deemed the operation “almost perfect,” despite this “transgression.” Orth, *supra* note 66.

68. For example, special agents of the Federal Bureau of Investigation do not wear uniforms except during arrests or tactical assaults. The U.S. Secret Service has a uniformed division, but its other agents wear civilian attire. Similarly, during the 1948–60 Malayan Emergency, British Colonial Special Branch officers wore civilian or *Min Yuen* clothing during efforts to locate guerrilla groups, often through mail drops, to persuade them to surrender, while so-called “pseudo-gangs,” attired in clothing like that of the Mau Mau, proved effective in a variety of ways during the non-international armed conflict in Kenya. FRANK KITSON, *BUNCH OF FIVE* 33–41, 168 (1977).

69. Counterinsurgency Manual, *supra* note 10, at 2-1 (“The integration of civilian and military efforts is crucial to successful COIN operations.”).

70. Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323, 327 (1951).

71. *Tadić*, *supra* note 64, ¶ 125.

72. Sofaer, *supra* note 18, at 467.

73. Government’s Response to the Defense Motion to Dismiss for Failure to State an Offense and for Lack of Subject Matter Jurisdiction under R.M.C. 907, at 6, *United States v. Jawad* (Military Commission Guantanamo Bay, Cuba, June 3, 2008), available at [http://www.mc.mil/Portals/0/pdfs/Jawad%20\(AE083%20-%20D007\)%20Gov%20Resp%20to%20Def%20Mot.pdf](http://www.mc.mil/Portals/0/pdfs/Jawad%20(AE083%20-%20D007)%20Gov%20Resp%20to%20Def%20Mot.pdf).

74. *United States v. Al-Nashiri*, Charge Sheet, available at [http://www.mc.mil/Portals/0/pdfs/Al%20Nashiri%20II%20\(Referred%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/Al%20Nashiri%20II%20(Referred%20Charges).pdf) (last visited Feb. 7, 2012).

75. *United States v. Jawad*, Ruling on Defense Motion to Dismiss (Sept. 24, 2008) (motion to dismiss on grounds of lack of subject matter jurisdiction), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow Mohammed Jawad hyperlink under “Cases”). Trial was never held in this case, however. Jawad was repatriated to Afghanistan, after charges were dismissed without prejudice, following a successful habeas corpus petition.

76. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49–50 (Jean S. Pictet ed., 1952).

77. *Id.* at 50. This comment, of course, raises the question of the applicability of human rights norms in non-international armed conflict, a fascinating topic that is beyond the scope of this paper.

78. Counterinsurgency Manual, *supra* note 10, at 1-1–1-19.

79. *Id.* at x.

80. *Id.*

81. Compare generally the discussion of “imminence,” under the Standing Rules of Engagement in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 73–102 (2011), with the discussion of “rules for use of force” in CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, DOMESTIC OPERATIONAL LAW HANDBOOK 175–91 (2011).

82. See, e.g., Headquarters, International Security Assistance Force, Tactical Directive (July 6, 2009), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf.

83. U.S. Forces–Afghanistan, Position Paper, US Military Forces’ Wear of Military Uniforms in Afghanistan 8 (Mar. 28, 2011) (on file with author).

84. *Id.* at 3.

85. *Id.*

86. William H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MILITARY LAW REVIEW 94, 121 (2003).

87. U.S. Forces–Afghanistan, Position Paper, *supra* note 83, at 5.

88. U.S. Forces–Afghanistan, Information Paper, Carrying of Weapons 1 (May 12, 2011) (emphasis added) (on file with author).

89. *Id.* at 2.

90. I would suggest, however, that the U.S. *policy* view is to apply the law of international armed conflict “during all armed conflicts, however such conflicts are characterized, and in all other military operations.” See Department of Defense, DoD Directive 2311.01E, DoD Law of War Program ¶ 4.1 (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>. “Law of War” is defined as “[t]hat part of international law that regulates the conduct of armed hostilities . . . [and] encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” *Id.*, ¶ 3.1. “It is DoD policy that . . . [t]he law of war obligations of the United States are observed and enforced by the DoD Components and DoD contractors assigned to or accompanying deployed Armed Forces.” *Id.*, ¶ 4.2.

91. BOTHE, PARTSCH & SOLF, *supra* note 9, at 676.

92. EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 67 (2008).

93. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 225 (2004) (citing the Hague Regulations, *supra* note 25, art. 23). There was discussion during the conference about whether “perfidy” or “treacherous wounding” includes improper use of enemy military emblems, insignia, flags or uniforms during combat in a non-international armed conflict. The authors of the *NIAC Manual*, Professors Schmitt, Garraway and Dinstein, acknowledged they were wrong in including this provision in the *Manual*. Compare Article 2.3.5 (“it is forbidden to make use of enemy military emblems, insignia, flags or uniforms during combat”), with 2.3.6 (“[d]isplaying the white flag falsely, or pretending to surrender, be wounded or otherwise have a protected status is forbidden if the intent in doing so is to kill or wound an adversary”) of the NIAC MANUAL, *supra* note 7, at 42–43.

94. Rome Statute, *supra* note 65, art. 8(2)(e)(ix).

95. See *supra* text accompanying notes 71–75.