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The International Legal Prohibition on Perfidy
and Its Scope in Non-International Armed
Conflicts

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ESSAY

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INTRODUCTION

Since the beginning of its conflict with al Qaeda, the United States has faced an enemy that relies on its ability to blend into the civilian population to mount attacks and sustain its war-fighting efforts.¹ Disguised as civilians, members of the group have gained proximity to valuable targets and conducted deadly attacks they could not have achieved if they wore their terrorist affiliations openly. In Iraq, Afghanistan, and elsewhere, other terrorist and insurgent groups also rely on similar tactics to inflict maximum damage.² Suicide bombers use civilian objects to attack civilian targets, including markets, mosques, and other public places.³ Combatants hide amongst the local population, cloaking

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¹ See Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 106, 112–13 (2014).

² See Richard B. Jackson, *Perfidy in Non-International Armed Conflicts*, 88 INT'L L. STUD. 237, 237–38 (2012).

³ See, e.g., Yasir Ghazi & Tim Arango, *Explosion in Iraq Draws Victims for a Second Blast*, N.Y. TIMES, July 5, 2011, at A10.

themselves in the legal protections afforded civilians.⁴ Facing these enemies in dense, urban environments, U.S. forces often have to work within and rely on their civilian surroundings to attack these combatants and to protect themselves.⁵

These battlefield realities raise questions about compliance with the law of armed conflict—particularly with the prohibition on perfidy and its application in these contexts. Article 37 of Additional Protocol I of the Geneva Conventions defines perfidy as any act “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.”⁶ Effectively, this provision prohibits parties to armed conflicts between states (i.e., international armed conflicts or “IACs”) from abusing legal protections afforded civilians and some combatants in order to harm the enemy.⁷ Examples of this crime include feigning surrender or injury to lure an enemy into an attack or feigning civilian status to gain and betray the confidence of the enemy.⁸

Though both customary international law and Additional Protocol I prohibit perfidy in IACs,⁹ whether and to what extent this prohibition applies within the context of non-international armed conflicts (NIACs) remains relatively unclear.¹⁰ NIACs, such as the United States’ conflict with al Qaeda, include conflicts between states and non-state actors or between non-state actors only.¹¹ To clarify the extent to which the perfidy prohibition applies in this conflict context, this article begins by presenting the legal and practical arguments for and against applying the prohibition on perfidy to NIACs and subsequently assesses the prohibition’s scope using the recent U.S. military commission case against the *U.S.S. Cole* bombers and the CIA’s involvement in

⁴ Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, 80 INT’L L. STUD. 43, 45–46 (2006).

⁵ See Watts, *supra* note 1, at 109–12. See also, e.g., Colin Freeman, *Fallujah: The City that has Never Stopped Rebelling*, TELEGRAPH, Jan. 8, 2014, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10558161/Fallujah-the-city-that-has-never-stopped-rebelling.html> (describing U.S. operations in Fallujah).

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 37, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

⁷ See Geneva Convention relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁸ Additional Protocol I, *supra* note 6, art. 37(1)(a)–(d).

⁹ Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 22–23 (asserting that the prohibition on perfidy is a part of customary international law).

¹⁰ John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World’s Reaction*, 6 J. INT’L CRIM. JUST. 627, 635 (2008).

¹¹ See Geneva Convention relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

a Mossad car bomb operation that killed a Hezbollah leader. From this analysis, it is clear that the international legal prohibition on perfidy extends to NIACs through customary international law and that a critical component of the crime is the attacker's abuse of law of war protections.

I. PERFIDY IN NON-INTERNATIONAL ARMED CONFLICTS

A. ARGUMENTS AGAINST THE APPLICATION OF PERFIDY TO NIACS

Whether all perfidious conduct prohibited in an IAC is, or should also be, prohibited in a NIAC is not readily apparent.¹² For example, while it is unlawful to perfidiously capture, wound, or kill an enemy in a state-on-state conflict, some scholars wonder whether it is only unlawful to perfidiously kill or wound the enemy in a conflict with non-state actors.¹³ This uncertainty is a result of both the practical realities of NIACs and the legal regime governing them. To determine whether the prohibition on perfidy applies in NIACs, it is first necessary to examine these sources of confusion.

Non-international armed conflicts are often marked by asymmetrical combatant capabilities, which may increase reliance on tactics that seem perfidious. To overcome the disparity in capabilities, smaller or more poorly resourced combatants may often feel the need to resort to tactics that toe the line between permissible "ruses of war" and prohibited perfidy. Unrestrained by institutionalized legal apparatuses or rigid discipline, some combatants may easily slip across that legal line to avoid direct conflict with the more powerful enemy and benefit from the element of surprise. To inflict damage on this nimbler, elusive, and unrestrained enemy, the larger, more capable combatant may feel the need to rely on cleverly concealed traps and tactics to target the enemy both on and away from the battlefield. Such acts, committed by both sides, have become familiar elements of conflicts in Afghanistan, Iraq, Palestine, Libya, and elsewhere.

NIACs are also characterized by a high degree of interaction between civilian and combatant elements, which can encourage exploitation of civilian status. In these conflicts, non-state groups seamlessly integrate themselves into civilian populations, often failing to distinguish themselves as combatants. Additionally, both sides may be focused on winning the hearts and minds of citizens. As a result of the tactics described above, the rampant failure to distinguish, and the nature of the objectives in NIAC, combatants often conduct operations in or near civilian centers, sometimes integrating civilian objects into military action or even abusing the protections of civilian status. These practical realities and their recent proliferation contribute to the

¹² Dehn, *supra* note 10, at 637–38.

¹³ Dehn, *supra* note 10, at 638; Watts, *supra* note 1, at 112 n.15.

confusion over whether some conduct considered perfidious in other contexts is necessary or acceptable in NIACs.

The legal regime governing NIACs adds to this uncertainty. No treaty explicitly applies the perfidy prohibition to all NIACs. Additional Protocol I, which contains the modern articulation of the prohibition, only applies to IACs and a small category of NIACs.¹⁴ Additional Protocol II, which sets the ground rules for NIACs, does not include the prohibition.¹⁵ In fact, the travaux of Additional Protocol II reveals that the perfidy prohibition was deliberately removed from the agreement.¹⁶ Additionally, state practice, which could help identify whether a prohibition on perfidy in NIACs is customary international law, is inconsistent.¹⁷ While some states have military manuals, national legislation, or public practices addressing perfidy, many others do not, and even those that do are not always clear on whether or how the perfidy prohibition applies to NIACs.¹⁸ These features of the legal regime obfuscate whether and to what extent perfidy is prohibited in NIACs.

B. EVIDENCE FOR THE PROHIBITION ON PERFIDY IN NIACS

Despite these features of non-international conflict and the legal regime governing it, persuasive legal and practical arguments indicate that the prohibition on perfidy does, in fact, extend to cover conduct in NIACs. First, precisely because perfidy is becoming more widespread in today's NIACs, ensuring "the ability of the law to provide maximum protection to innocent civilians during armed conflict," is increasingly important.¹⁹ Explicitly outlawing perfidious conduct provides particularly important incentives for combatants in NIACs. In this context, proper distinction is relatively infrequent and combatants often abuse the legal protections afforded citizens. Proscribing and punishing perfidy in these conflicts may push combatants to refrain from abuse of civilian status and encourage compliance with rules on combatant distinction.

Applying the prohibition to NIACs also provides additional legal protection for civilians. Ensuring the safety of civilians is particularly critical in these conflicts, both because of their frequent proximity to conflict and because of the strategic advantage their support brings. Without legal rules that at least ban perfidious killing and wounding, forces may be more likely to doubt the authenticity of

¹⁴ Additional Protocol I, *supra* note 6, art. 1.

¹⁵ Additional Protocol II, *supra* note 11.

¹⁶ Compare 2 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS 1974–1977, Draft Additional Protocol II, art. 21(1), *with* Additional Protocol II, *supra* note 11.

¹⁷ Dehn, *supra* note 10, at 635–37.

¹⁸ Dehn, *supra* note 10, at 635–37.

¹⁹ Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters' Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765, 766 (2012).

claims of civilian status. Consequently, forces are discouraged from honoring these claims. The result is an uptick in unnecessary violence against civilians and civilian objects that threatens a “spiral towards the wholesale abuse” of civilian populations and jeopardizes strategic success.²⁰

There are also legal arguments indicating that perfidious conduct, particularly perfidious killing or wounding, is prohibited in NIACs. The clearest indication that the ban on perfidy extends to NIACs is its inclusion in the Rome Statute. Article 8(2)(e)(ix) prohibits “[k]illing or wounding treacherously a combatant adversary” in non-international conflicts.²¹ The Rome Statute’s Elements of Crimes makes clear that treachery and perfidy are synonymous concepts and that the statute’s prohibition includes all deadly or injurious acts that would be perfidious under Additional Protocol I.²² However, the Statute’s articulation includes two important limitations on the prohibition as applied to NIACs that are not present in the Additional Protocol’s definition of perfidy in IACs. Only perfidious killing or wounding is unlawful (and not, for example, perfidious capture) and the potential victims are limited to “combatant adversaries.”

The International Committee of the Red Cross has also asserted that the prohibition on perfidy is “a norm of customary international law applicable in both international and non-international armed conflicts.”²³ In making its case, ICRC first addresses the prohibition’s exclusion from Additional Protocol II, claiming that elimination from the final draft was merely part of an effort to simplify the text and does not indicate that the prohibition does not apply in NIAC. The ICRC then catalogs military manuals, domestic legislation, official statements, and state practice that it claims are sufficient to indicate that perfidy is prohibited in NIACs under customary international law.

The United States appears to agree that customary international law proscribes perfidious conduct. Specifically, U.S. practice seems to indicate adherence to the prohibition out of a sense of legal obligation. The mere fact that a military commission charged Abd al-Rahim Hussayn Muhammad al Nashiri for perfidy, as discussed below, is a clear indication that the United States believes such conduct is prohibited in non-international armed conflicts.²⁴ In fact, as those

²⁰ Peter Margulies, *The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11*, 95 MARQ. L. REV. 1417, 1430 (2012). See also COMBAT STUDY INSTIT., U.S. DEP’T OF ARMY, 1 EYEWITNESS TO WAR: THE US ARMY IN OPERATION AL FAJR, AN ORAL HISTORY 56 (Kendall D. Gott ed., 2006) (recounting one US commander’s description of US forces regularly attacking ordinary civilian objects because of the distrust pervasive perfidy generated).

²¹ Rome Statute of the International Criminal Court, art. 8(2)(e)(ix), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

²² Dehn, *supra* note 10, at 636 (citing Int’l Criminal Court, Elements of Crimes, U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002)).

²³ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 221 (2005) [hereinafter ICRC CIL Study].

²⁴ U.S. DEP’T OF DEF., OFF. OF MIL. COMMISSIONS, CHARGE SHEET OF ABD AL RAHIM HUSSAYN AL NASHIRI 3–4 (Sept. 28, 2011), *available at*

charges indicate, U.S. domestic law makes perfidy a crime and indicates that the law of war prohibits its use in NIACs.²⁵ Additionally, the State Department Office of the Legal Adviser has openly indicated that the United States supports “the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy.”²⁶ Legal analysis from U.S. Judge Advocates corroborates this position.²⁷

In addition to applying to NIACs through customary law, the legal prohibition may also be extrapolated to the NIAC context from other provisions or sources of international law. For example, Article 13 of Additional Protocol II, which applies to NIACs, declares that civilians are to enjoy broad protections from the dangers of military operations, but does not contain the specific protections against disproportionate attacks, human shields, or perfidious conduct.²⁸ Yet some scholars plausibly suggest that these specific protections can be inferred from the broad protection afforded civilians in the article’s first paragraph, and that their exclusion from the final agreement does not foreclose their application.²⁹

Common Article 3, which applies to non-international conflicts, and Additional Protocol 1 of the Geneva Conventions contain similar protections for civilians and combatants who are *hors de combat*,³⁰ from which scholars suggest a prohibition on perfidy in NIACs may be extrapolated.³¹ Finally, some of the most well respected scholars in this area have confirmed that perfidy is prohibited in NIACs as well as IACs.³² Together, these sources indicate that protection of civilians is a bedrock principle of international law, that a prohibition on perfidy is a crucial outgrowth of that principle, and that such a prohibition extends to cover non-international armed conflicts.

II. AL-NASHIRI AND MUGHNIYAH: DEFINING THE SCOPE OF PERFIDY IN NIACs

Whether in IAC or NIAC, distinguishing between a permissible ruse and prohibited perfidy remains difficult because, as the Army Field Manual notes,

[http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(Referred%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(Referred%20Charges).pdf) [hereinafter Charge Sheet].

²⁵ 10 U.S.C. § 950t(17), (28) (2009).

²⁶ ICRC CIL Study, *supra* note 23, at 225.

²⁷ Jackson, *supra* note 2, at 252.

²⁸ Additional Protocol II, *supra* note 11, art. 13.

²⁹ MICHAEL BOTHE, KARL J. PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 676 (1982).

³⁰ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Additional Protocol I, *supra* note 6, art. 51.

³¹ Jackson, *supra* note 2, at 253.

³² 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).

“the line of demarcation between,” the two tactics is, “sometimes indistinct.”³³ Two recent cases demonstrate the difficulty of distinguishing between ruse and perfidy and provide a challenging opportunity to explore the line between them. The trial of Abd al-Rahim Hussayn Muhammad al Nashiri before a U.S. Military Commission for war crimes, including perfidy, and the CIA’s involvement in the car bombing that targeted and killed Hezbollah operations chief Imad Mughniyah provide examples of what is and is not perfidy in the context of a NIAC and bring into focus where the line between the two lies.

Al-Nashiri is charged with “using treachery or perfidy” to kill seventeen sailors aboard the *U.S.S. Cole*.³⁴ According to an assessment produced by the Joint Task Force Guantanamo, al-Nashiri joined al Qaeda in 1998 and began training with the group and taking orders directly from Osama Bin Laden.³⁵ At Bin Laden’s request, al-Nashiri directed two al Qaeda operatives to carry out a suicide bombing against a U.S. warship in the port of Aden, Yemen in 2000.³⁶ The bombers, “dressed in civilian clothing, waving at the crewmembers onboard the *U.S.S. Cole*, and operating a civilian boat” allegedly induced the men aboard the *Cole* to believe the attackers were “entitled to protection under the law of war” to gain proximity to the *Cole* and detonate the explosives hidden in their boat.³⁷ The prosecution alleges that these actions constitute perfidy in violation of the law of war.³⁸

The details of the Mughniyah bombing are less well established and come predominately from news accounts of the incident. Mughniyah, a longtime member of Hezbollah, was the group’s operations chief, and had, over the years, participated in attacks on US targets in Lebanon, the hijacking of TWA Flight 847, and other terrorist operations.³⁹ According to news reports, the CIA, in joint operation with Mossad, developed a targeted bomb designed to kill Mughniyah, on the theory that his involvement with militant groups fighting US forces in Iraq made him a lawful target.⁴⁰ In 2008, the bomb was planted in the spare tire on the back of a civilian SUV, and the SUV was parked along a street in Damascus.⁴¹ CIA operatives in Damascus tracked Mughniyah, and when he approached the SUV, the bomb detonated, killing Mughniyah

³³ DEP’T OF THE ARMY, DEP’T OF THE ARMY FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE 22 (1956).

³⁴ Charge Sheet, *supra* note 24, at 3.

³⁵ U.S. DEP’T OF DEF., JTF-GTMO DETAINEE ASSESSMENT 7 (2006), *available at* <http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri/documents/11>.

³⁶ *Id.* at 3.

³⁷ Charge Sheet, *supra* note 24, at 3.

³⁸ Charge Sheet, *supra* note 24, at 3.

³⁹ Adam Goldman & Ellen Nakashima, *CIA and Mossad Killed Senior Hezbollah Figure in Car Bombing*, WASH. POST (Jan. 30, 2015), http://www.washingtonpost.com/world/national-security/cia-and-mossad-killed-senior-hezbollah-figure-in-car-bombing/2015/01/30/ebb88682-968a-11e4-8005-1924cdc3e54a_story.html.

⁴⁰ *Id.*

⁴¹ *Id.*

instantly.⁴² Some international law scholars have objected to US involvement in the incident and claim that disguising the bomb in the civilian SUV amounts to perfidy.⁴³

These two incidents, in which the US is alternately the victim and perpetrator of alleged perfidy, are difficult to distinguish, but in attempting to do so, the line between ruse and perfidy becomes clearer.⁴⁴ In both instances, the weapon was disguised in or launched from an apparently civilian object, and in both instances, the allegedly perfidious conduct caused the death of the target. There is, however, a crucial difference between the al-Nashiri and Mughniyah examples. In the *Cole* bombing, the attackers took steps to invite the targets to do something (i.e. to refrain from stopping or attacking the incoming boat) because of their reliance on the law of war, rather than, as in Mughniyah bombing, simply taking advantage of an action the target was already undertaking (i.e. walking down the street after dinner). This distinction makes clear that using law of war protections in bad faith to invite one's adversary to act in a way that the adversary would not have acted, but for the promise of LOAC protections is prohibited perfidy. Mughniyah was not walking down the street *because* he believed the SUV was a civilian object. He was just walking down the street. On the other hand, the sailors aboard the *Cole* acted in forbearance precisely *because* they believed the boat to be a civilian object, protected by the law of war. For this reason, al-Nashiri committed perfidy, but the CIA did not.

Further consideration of common battlefield tactics supports this assertion. It cannot be that "whenever a soldier sees a civilian object, the rules of IHL entitle him to assume he will not be attacked from it."⁴⁵ Combatants often use civilian objects without violating the prohibition on perfidy. For example, if a sniper were to shoot and kill a target from atop a home or other building that the target would assume is civilian in nature, the sniper may have converted the civilian object to a military one that could lawfully be targeted, but he would not be guilty of perfidy. The principle becomes even clearer when the sniper example is overlaid with the facts of the Mughniyah bombing. Had a sniper, sitting atop a civilian building in Damascus, taken out Mughniyah, the sniper

⁴² *Id.*

⁴³ *Id.*; Rogier Bartels, *Killing with Military Equipment Disguised as Civilian Objects is Perfidy*, JUST SECURITY (Mar. 20, 2015, 9:25 AM), <http://justsecurity.org/21285/disguising-military-weapons-civilian-equipment-perfidy-or-be/>.

⁴⁴ Before conducting this analysis, it should be noted that there is debate regarding whether the United States was involved in an armed conflict such that the law of war applies to these incidents. However, there are colorable legal arguments that the United States or those it was supporting were in armed conflict with these groups and that the law of war applied. For the purpose of conducting its line-drawing analysis, this paper will assume those arguments are correct.

⁴⁵ Kevin Jon Heller, *No, Disguising Military Equipment as Civilian Objects to Help Kill Isn't Perfidy*, JUST SECURITY (Mar. 24, 2015, 9:00 AM), <http://justsecurity.org/21391/no-disguising-military-equipment-civilian-objects-kill-perfidy/>.

would not have committed perfidy. What difference does it make then that Mughniyah was taken out by a bomb sitting within a tire? The answer must be, “none.” Therefore, al Nashiri’s bombing of the *U.S.S. Cole* was perfidious, but the CIA’s bombing of Mughniyah was not.

CONCLUSION

In NIACs with enemies that regularly show disregard for the law of war, reluctance to extend its protections to them is understandable. The lack of a clear textual hook for the prohibition on perfidy is easy support for such sentiment. But it is clear from the practical realities of these conflicts and the international law of war generally, that the prohibition on perfidy does extend to cover such conflicts. The examples of the al-Nashiri and Mughniyah cases confirm this assertion and demonstrate that inducing the enemy to act in a way he would not have, but for the law of war, is the *sine qua non* of perfidy in this context.