

LAW-OF-WAR PERFIDY

SEAN WATTS*

Perfidy and treachery are among the gravest law-of-war violations. The betrayals of good faith associated with perfidy threaten more than the immediate, tactical positions of the attacker and victim. Perfidious betrayals inflict systemic harm on the law of war as a guarantee of minimally humane interaction. Even a single instance of perfidy can permanently compromise the possibility of humanitarian exchange between belligerents.

The remedies for perfidy reinforce the point. In personal, professional, and international relations, perfidy and treachery provoke draconian and irreversible reactions. Early professional military codes prescribed summary death for treacherous correspondence with enemies.¹ Earlier, medieval notions of honor and chivalry sanctioned unending blood feuds to avenge knights killed by treachery.² Thomas Jefferson, the acknowledged author of the American Declaration of Independence, cited English perfidy among the grievances justifying full-scale revolt, violent war, and permanent succession from the British monarchy.³

Admittedly, many historical uses of the term have been political rather than legal. Yet perfidy and treachery⁴ were still well established

* Associate Professor, Creighton University Law School; Judge Advocate, U.S. Army Reserve—Reserve Instructor, Department of Law, U.S. Military Academy at West Point. I am very grateful to Colonel (Retired) David Graham, Commander Paul Walker, U.S. Navy, and Professor Eric Talbot Jensen (LTC Retired), for especially helpful editorial comments.

¹ American Articles of War of 1775, Additional Articles, art. 1 (Nov. 7, 1775); Massachusetts Articles of War, art. 27 (Apr. 5, 1775); British Articles of War of 1765 § XIV, art. XIX; Articles of War of James II, art. VIII (1688).

² Geoffrey Parker, *Early Modern Europe*, in *THE LAWS OF WAR* 54 (Michael Howard, George J. Andreopoulos & Mark Shulman eds., 1994) [hereinafter Howard et al.]

³ Declaration of Independence (1776), available at http://avalon.law.yale.edu/18th_century/declare.asp. Jefferson and his co-signers' allegation of perfidy referred specifically to the conduct of mercenaries employed by the English. *Id.* The Declaration of Independence includes several references to the law of war of the period. *Id.*; see also JOHN FABIAN, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 15–27 (2012).

⁴ Law-of-war commentators have intermittently regarded perfidy and treachery as synonymous. Lieutenant Colonel Willard B. Cowles, *High Government Officials as War Criminals*, 39 AM. SOC. INT'L L. PROC. 54, 58 (1945) (asserting “The words ‘treachery’

legal concepts in the early customs and usages of war.⁵ Originally grounded in broad, customary notions of chivalry and honorable combat, the prohibition of perfidy proved an essential aspect of ordered hostilities. The prohibition of perfidy became much more than a general sanction of underhanded or dishonorable conduct. Law prohibiting perfidy proved an essential buttress to the law of war as a medium of exchange between combatants—a pledge of minimum respect and trust between belligerents even in the turmoil of war. Indeed, it may be difficult to conceive of an operative or effective war convention at all without effective rules against perfidy.

Despite its critical role in sustaining belligerents' faith in the law of war, the current legal formula for perfidy shows signs of weakness. Amid seismic shifts in the conduct, scale, participants, and means of warfare, States have codified progressively narrower conceptions of perfidy, ultimately incorporating discrete and narrow legal elements into the offense. Once a broadly expressed and widely understood principle for instructing combatants in honorable warfare, the perfidy prohibition now appears as a narrowly codified legal algorithm better suited to legal advisors and tribunals than to combatants. As evidence of this trend, this article identifies and explains three categories of perfidy: simple perfidy;

and 'perfidy' are essentially synonymous." See also discussion *infra* and accompanying notes 127–33.

⁵ CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 3 (The Law Book Exchange, Ltd. 2008) (1737). Van Bynkershoek's treatise, originally published in Latin, is thought to have been especially influential in the American Revolution. *Id.* at v. Although associated with an exceptionally permissive view of lawful conduct in combat, Van Bynkershoek specifically disapproved of perfidy. *Id.* He observed,

Nor ought *fraud* to be omitted in a definition of war, as it is perfectly indifferent whether stratagem or open force be used against an enemy. There is, I know, a great diversity of opinion upon this subject: *Grotius* quotes a variety of authorities on both sides of the question. For my part, I think that every species of deceit is lawful, perfidy only excepted; not that any thing may not lawfully be done against an enemy, but because, when a promise has been made to him, both parties are divested of the hostile character as far as regards that promise.

Id. at 3 (emphasis in original) (citation omitted); see also 2 ALBERICO GENTILI, DE IURE BELLI LIBRI TRES 175 (James Scott ed., John C. Rolfe trans., 1933) (1612) (It.) (noting military leaders were permitted to counter treachery with treachery); PIERINO BELLI, A TREATISE ON MILITARY MATTERS AND WARFARE 88 (James Brown Scott ed., Herbert C. Nutting, trans., 1936) (1563) (It.) (noting "faith must be kept with an enemy" and "deceptions that involve no treachery are allowable").

prohibited perfidy, and grave perfidy. More than doctrinal monikers, these categories reveal that the twentieth century's codification of the perfidy prohibition converted a popularly and intuitively understood label for betrayal of trust or confidence into a technically bound term of art, comparatively divested of much of its customary import and broad coverage.

While current expressions of perfidy perhaps facilitate criminal enforcement in courtrooms, much of the spirit and purpose of the customary prohibition appears to have been lost. Overall, the price of doctrinal clarity has been reduced attention and fidelity to good faith conduct of hostilities critical to humane combat and to sustaining the law-of-war as a trusted means of communication and interaction between belligerents. This article argues that through doctrinal narrowing States have created a perfidy prohibition inadequate to protect the law of war as a means of good faith and humanitarian exchange between combatants. An understanding of perfidy that is at once consistent with principled understandings of the law, protective of minimal concerns of humanity, and all the while preserves something of the law of war as a system of minimum good faith between adversaries is highly elusive. Giving effect to States' twentieth-century narrowing of the perfidy prohibition leaves critical, widely-accepted values of the law of war unvindicated. Only State consensus on a broader conception of prohibited perfidy and treachery will prevent erosion of enduring law-of-war values and the law of war itself.

To be certain, twentieth-century codifications and refinements of the law of war have loaned clarity and, by implication, legal legitimacy to conventions thought to have approached "the vanishing point" of law.⁶ But whether migration from broad principles to specific prohibitions to regulate warfare has produced an optimal result is uncertain. This article's consideration of law-of-war perfidy will perhaps also serve a starting point for a more deliberate consideration these competing methods of international law making and development.

⁶ Lauterpacht famously employed the phrase, "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 382 (1952).

I. Perfidy in Modern Armed Conflict

Despite revolutionary changes in the means and methods of warfare, perfidy persists in modern armed conflict. Respect for the law-of-war perfidy prohibition remains a crucial legal and even mass-market bellwether for honorable and privileged conduct by belligerents.⁷ Perfidy prohibitions feature consistently in the subject matter jurisdiction of criminal tribunals, international and domestic.⁸ Meanwhile, twenty-first century conflicts, pitting culturally, professionally, and even morally asymmetrical foes, have seen a rise in perfidious conduct. A brief account of instances of perfidy on the modern battlefield and pending enforcement efforts highlights the need for a more clearly and completely conceived notion of prohibited perfidy.

A. Perfidy in Action

A U.S. Department of Defense report to Congress observed that instances of perfidy in the 1991 Persian Gulf War were rare.⁹ However,

⁷ Neal A. Richardson & Spencer J. Crona, *Make Iraqis Pay for Acts of 'Perfidy,'* L.A. TIMES, Apr. 8, 2003, <http://articles.latimes.com/2003/apr/08/news/war-oerichardson8> (arguing that insurgent law-of-war violations, particularly perfidy, have received inadequate prosecutorial attention).

⁸ Statute of the International Criminal Court, arts. 8.2(b)(xi), 8.2(e)(ix), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Rome Statute] (identifying respectively “killing or wounding treacherously individuals belonging to the hostile nation or army” and “killing or wounding treacherously a combatant adversary” as war crimes within the ICC’s jurisdiction). The U.S. Military Commissions Act of 2009 includes “Using Treachery of Perfidy” among offenses chargeable against alien unlawful combatants at military commissions. 10 U.S.C. § 950t(17) (2013).

⁹ U.S. DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. O, at O-21 (1992), available at http://www.dod.mil/pubs/foi/operation_operation_and_plans/PersianGulfWar/404.

pdf. The report cites two examples in its discussion of perfidy. It first notes an incident that popular accounts had misidentified as perfidious:

Iraqi tanks entered Ras Al-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender per se. Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only upon clear indication of hostile intent, or some hostile act.

since that clash of symmetrically organized, if not symmetrically capable, conventional armed forces, battlefields have seen a dramatic upswing in episodes of perfidy and other forms of allegedly treacherous warfare.¹⁰ Dinstein observes, “One of the hallmarks of the hostilities in Iraq, in 2003, was that much of the fighting on the Iraqi side was conducted by ‘fedayeen’ who fought Coalition forces out of uniform.”¹¹ After U.S.-led forces displaced the Iraqi Baathist regime, insurgents routinely feigned civilian status in connection with hostilities throughout Iraq. Repeated incidents of perfidy greatly compromised U.S. forces’ trust that civilian persons and objects posed no threat.

A U.S. aviation commander describes routinely attacking planters, garbage piles, and vehicles outside Iraqi homes in response to enemy use of civilian cars and objects to house improvised explosive devices.¹² The commander relates, “[A]ny vehicle in the street was . . . destroyed. Any planter in the street was . . . destroyed by [aircraft] fire. Any garbage pile was . . . destroyed—anything Iraqis don’t normally have outside of their home.”¹³

Id. The report later cites incidents of Iraqi feigned surrender by means of displaying a white flag, raising hands and laying down weapons. When Coalition forces moved forward to accept the offer of surrender Iraqi forces fired from hidden positions. *Id.* The report concludes, however, that incidents of perfidy did not have a major effect on operations in the Persian Gulf War. *Id.*

¹⁰ Joshua Rozenberg, *The Perils of Perfidy in Wartime*, TELEGRAPH (London), Apr. 3, 2003 (describing an Iraqi suicide attack killing four U.S. soldiers).

¹¹ Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, 80 INT’L LEGAL STUD. 43 (2006); Richardson & Crona, *supra* note 7 (calling for prosecution of Iraqi perfidy against U.S. forces in 2003 invasion of Iraq). Richardson & Crona relate:

Fedayeen fighters waved a white flag and then opened fire on U.S. soldiers preparing to accept surrender. Still another was the recent operation in which an ostensibly pregnant woman lured three American soldiers to their deaths by pretending to be in distress at a checkpoint and then detonating concealed explosives. We now know that those incidents were not acts of ad hoc martyrdom but instead were deliberated and sanctioned at the highest levels of the Iraqi hierarchy.

Id.; see also Glenn Collins, *Allied Advances, Tougher Iraqi Resistance, and a Hunt in the Tigris*, N.Y. TIMES, Mar. 24, 2003, <http://www.nytimes.com/2003/03/24/world/overview-march-23-2003-allied-advances-tougher-iraqi-resistance-hunt-tigris.html>; Brian Knowlton, *Bush Tells of ‘Good Progress’ But Says War Has Just Begun*, INT’L HERALD TRIB. (New York), Mar. 24, 2003, <http://www.highbeam.com/doc/1P1-72794492.html>.

¹² COMBAT STUDY INST., 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).

¹³ *Id.*

Similarly, in the second battle for Fallujah, a rare instance when Iraqi and foreign insurgents committed to sustained, open battle with U.S. and Iraqi government forces, feigned civilian status appears to have been routine. A U.S. Army major observed,

[I]t was a very simple tactic they would use—they knew that we wouldn't shoot at them if they didn't have a weapon, if they were walking in the street. So a lot of times they would fire from one building, drop their weapon and run to another building, where another cache was. We kept finding these caches strategically located throughout the city. So they'd run from one to another without a weapon thinking that we wouldn't shoot at them because that was against our ROE [rules of engagement]. But at that point, we were 100 percent sure that everyone to our front was enemy, and we were coming through to kill everything we possibly could as we came through the city. When you have to call that off, it's kind of a difficult thing. . . . [S]omeone would walk right through your formation or around your formation, count your people, and probably come back and shoot at you later on.¹⁴

Recent acts reminiscent of prohibited perfidy have become a familiar feature of hostilities short of international armed conflict as well,¹⁵

¹⁴ *Id.* at 231.

¹⁵ Whether the perfidy prohibition operates identically, or at all, in non-international armed conflict (NIAC) remains subject to some debate. The most glaring evidence that States did not intend the prohibition to operate in NIAC is its omission from the 1977 Additional Protocol addressed to NIAC. See Protocol Additional to the Geneva Conventions of 13 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter 1977 Additional Protocol II]. Exclusion of perfidy as a NIAC law-of-war prohibition was clearly not an oversight or mistaken omission. The records of the 1974–77 Diplomatic Conference indicate States deliberately struck the prohibition. Compare 2 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 1974–1977, Draft Additional Protocol II, art. 21(1) [hereinafter OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE], with 1977 Additional Protocol II, *supra*. Notwithstanding, a number of commentaries suggest or conclude perfidy is equally prohibited in NIAC. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 222–23 (2005) [hereinafter ICRC CIL STUDY]; INST. OF INT'L HUMANITARIAN L., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT ¶ 2.3.6 (Michael N. Schmitt, Charles H. B. Garraway, & Yoram Dinstein eds., 2006)

including the Colombia¹⁶ and Gaza armed conflicts.¹⁷ And the attacks of September 11, 2001 that launched the U.S. Global War on Terrorism, had they taken place in an unequivocally international armed conflict, would unquestionably have constituted prohibited law-of-war perfidy.¹⁸ In fact, the U.S. congressional Authorization to Use Military Force referred to the 9/11 attacks as “acts of treacherous violence.”¹⁹ Even a U.S. operation in response to the September 11 attacks has seemingly skirted the line between perfidy and lawful ruse.²⁰

[hereinafter NIAC MANUAL]. *But see* 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, 634–38 (2008) (criticizing the ICRC assertions with respect to perfidy in NIAC as overstated). States recently included perfidy among war crimes in NIAC in the Rome Statute of the ICC Rome Statute, *supra* note 8, art. 8(2)(e)(ix). Note, however, that the Rome Statute excludes capture as an effect of attack sufficient to establish perfidy. *Id.*

¹⁶ Sibylla Brodzinsky & Caroline Davies, *Colombia Hostage Rescue: The Audacious Plot that Freed World’s Most Famous Captive*, GUARDIAN (London), July 5, 2008, www.guardian.co.uk/world/2008/jul/06/colombia (describing Colombian operatives posing as a humanitarian non-governmental organization to free hostages held by the FARC); Chris Kraul, *The Ultimate Fake-Out*, L.A. TIMES, July 4, 2008, articles.latimes.com/2008/jul/04/world/fg-hostagetictoc4 (describing Colombian use of a false humanitarian emblem to free hostages and resulting in capture of FARC fighters). *See generally* Dehn, *supra* note 15.

¹⁷ U.N. Human Rights Council, Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, ¶ 1106 (Sept. 25, 2009), *available at* [http://www2/pjicjr/prg/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf](http://www2.pjicjr/prg/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf) (finding violation of perfidy prohibition by feigning presence of ICRC delegation to secure enemy surrender).

¹⁸ *See* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 1–10 (2004) (describing use of civilian attire to gain access to and take control of civilian aircraft for purposes of fatal attacks); *see also* discussion *supra* note 15 (noting debating concerning the state of perfidy in the law of non-international armed conflict).

¹⁹ Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) [hereinafter AUMF]. Although Congress’s constitutional power includes the authority to “define and punish offenses against the law of nations,” it is unlikely the AUMF’s preamble is an exercise of this function. U.S. CONST. art. I, § 8, cl. 10. The AUMF use of the term “treacherous” is more likely political in this instance rather than legal. AUMF, *supra*.

²⁰ A May 2011, U.S. Central Intelligence Agency and special operations force’s operation against al-Qaeda leader Osama bin Laden reportedly gained intelligence, including DNA samples of the bin Laden family, by sending an operative posing as a medical worker administering vaccinations to bin Laden’s compound in Abbottabad, Pakistan. Mark Mazetti, *Vaccination Ruse Used in Pursuit of Bin Laden*, N.Y. TIMES, July 11, 2011, http://www.nytimes.com/2011/07/12/world/asia/12dna.html?_r=0.

B. Perfidy in Law-of-War Enforcement

Perfidy also appears as a component of modern law-of-war enforcement mechanisms.²¹ For example, the U.S. Department of Defense Office of Military Commissions is currently prosecuting the charge of “using treachery or perfidy” against several detainees. The specification of a perfidy charge against al-Nashiri reads:

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).²²

A second accused, Abd al Hadi al-Iraqi, is charged with “using treachery or perfidy” in connection with attacks carried out in Afghanistan and

²¹ Major Byron D. Greene, *Bridging the Gap that Exists for War Crimes of Perfidy*, ARMY LAW., Aug. 2010, at 45, 45; Major E. John Gregory, *Trying Unlawful Combatants at General Courts-Martial: Amending the UCMJ in Light of the Military Commissions Experience*, 203 MIL. L. REV. 150 (2010).

²² MC Form 458, Referred Charge Sheet, Abd al Rahim Hussayn Muhammad al-Nashiri, at 8 (Office of Military Comms, U.S. Dep’t of Def., 28 Sept. 2011), available at [http://www.mc.mil/Portals/0/pdfs/alNashiri/Al%20Nashiri%20\(AE001\)%20Referred%20Charge%20Sheet.pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri/Al%20Nashiri%20(AE001)%20Referred%20Charge%20Sheet.pdf). It will be interesting to learn whether Al-Nashiri’s military commission applies rules of treachery and perfidy which have been more lenient concerning feigned civilian status in preparation for attack. See, e.g., Matthew Morris, *‘Hiding Amongst a Crowd’ and the Illegality of Deceptive Lighting*, 54 NAVAL L. REV. 235, 236, 239–42 (2007) (citing INST. OF INT’L HUMANITARIAN L., SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA ¶¶ 110–11 (1994)).

Pakistan between 2003 and 2004.²³ Al Hadi's military commission charge sheet alleges he ordered or supported numerous fatal attacks employing car bombs disguised as innocent civilian vehicles. A representative specification of Al Hadi's charge sheet reads in relevant part:

In that Abd al Hadi al-Iraqi . . . did . . . invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives in said vehicle thereby attacking a bus carrying members of the German military, resulting in death and injury to at least one of those German military members.²⁴

A third U.S. military commission's charge sheet, working its way through the Office of the Military Commissions Prosecutor in early 2013, included a perfidy charge against Ali Musa Daqduq, a Hezbollah operative. Daqduq was to be charged, *inter alia*, with using U.S. and Iraqi uniforms in an attack on U.S. forces in Iraq.²⁵ The tentative charges against Daqduq focused on improper use of enemy uniforms,²⁶ but also included a specification of law-of-war perfidy based on the same attack.²⁷ Although the attack produced the requisite casualties for perfidy, his use of enemy uniforms or feigning friendly force status does not classically constitute resort to a law-of-war protected status as friendly forces do not enjoy law-of-war protection from their comrades. Accordingly, Daqduq's conduct seems more consistent with improper

²³ Military Commissions Form, MC 458, Charge Sheet, Abd al Hadi al-Iraqi, at 10 (Office of Military Comm'ns, U.S. Dep't of Def., 5 Feb. 2012) [hereinafter Hadi Charge Sheet], available at <http://www.mc.mil/Portals/0/pdfs/allIraqi/ChargingDocumentAbdalHadialIraqiFeb2014.pdf>.

²⁴ *Id.*

²⁵ Charlie Savage, *Prisoner in Iraq Tied to Hezbollah Faces U.S. Military Charges*, N.Y. TIMES, Feb. 23, 2012, http://www.nytimes.com/2012/02/24/world/middleeast/us-approves-military-tribunal-case-for-detainee.html?_r=0 (including a link to a .pdf copy of the eight-page draft charge sheet).

²⁶ MC Form 458, Charge Sheet, Ali Musa Daqduq al Musawi, at 3 (Office of Military Comm'ns, U.S. Dep't of Def., 3 Jan. 2012) (Charge I, Specifications 1–5), available at <http://www.documentcloud.org/documents/302052-daqduq-tribunal-chargesheet.html>.

²⁷ *Id.* at 4 (Charge III, the Specification).

use of enemy uniforms than with perfidy.²⁸ Whether the charge reflected a change in the official U.S. position is at present uncertain.²⁹ Still, the charge reflected prosecutors' intuitive, if not considered, attention to perfidy in contemporary armed conflict.

C. Perfidy in Cyber Warfare

The potential for perfidy to address what is distasteful about or dishonorable in modern warfare is not limited to recent or even purely physical hostilities. States increasingly regard cyberspace as a critical domain of warfare.³⁰ As with other emerging forms of warfare, perfidy appears at first blush to capture much of what is intuitively objectionable about cyber attacks. Most cyber attacks seem somehow underhanded and dishonest. Popular conceptions of how they work almost always envision deception or nefarious misrepresentation. Indeed, many forms of malicious code actually rely on betrayals of good faith to succeed, presenting themselves as innocuous updates or messages. The Trojan horse e-mail is representative, usually posing as an innocuous message to secure the recipient's trust. The Trojan horse then betrays this trust, unleashing harmful or destructive code into the target's system.

While cyber attacks appear in a variety of forms—many involving little if any overt deception or misrepresentation—the potential for misrepresentations, deceit, and resulting distrust abounds. More important, cyber hostilities illustrate clearly the potential for harm achieved by deception to undermine confidence in a vital mode of human interaction. Distrust dominates cyber dialogue to the point of distraction. It is clear the deception and betrayals occurring in cyberspace have greatly undermined public confidence in electronic communications as a mode of human interaction. Just as these betrayals have undermined confidence in cyber means as a trustworthy mode of human exchange,

²⁸ See discussion *supra* accompanying note 137.

²⁹ This uncertainty is likely to persist as Iraqi authorities recently released Daquq from custody permitting him to return to his native Lebanon. Matthew Levitt, *Malaki Government's Whitewashing of Hezbollah*, WKLY. STANDARD (Wash., D.C.), Nov. 20, 2012, http://www.weeklystandard.com/blogs/maliki-government-s-whitewashing-hezbollah_663733.html; Michael R. Gordon, *Against U.S. Wishes, Iraq Frees Man Accused of Killing US Soldiers*, N.Y. TIMES, Nov. 16, 2012, <http://www.nytimes.com/2012/11/17/world/middleeast/iraq-said-to-release-hezbollah-operative.html>.

³⁰ See, e.g., U.S. DEP'T OF DEF., STRATEGY FOR OPERATING IN CYBERSPACE 5 (2011) (resolving to treat cyberspace as operational domain).

the betrayals involved in bad faith resort to law-of-war protections threaten the viability of the law of war itself as a means of humanitarian exchange between belligerents.

How the law of war will regulate deception and violations of good faith in cyber warfare and other emerging forms of hostilities is sure to be critical to reviving confidence in humanitarian rules as reliable and trustworthy modes of human interaction, particularly during armed conflict. An account of how the current perfidy prohibition evolved offers both doctrinal clarity as well as a menu of law-making options for a perfidy prohibition better suited to the challenges of emerging warfare.

II. Law-of-War Perfidy Codified

The prohibition of perfidy can be called a dual-source rule, appearing in the law of war as both a specific prohibition and a general rule. Through the twentieth century, the States transformed a loosely defined perfidy rule that governed means and methods of warfare broadly into a discrete and technical bar of a narrow range of behavior activated only by strictly prescribed physical consequences to persons. Thus a complete understanding of perfidy requires familiarity with a host of specific law-of-war treaty provisions, general law-of-war principles, military customs and usage, as well as a working knowledge of law-of-war methodology and organization.

A. Perfidy and the Law-of-War Progression

The law of war has long operated within and through a series of legal bifurcations. To begin, international jurists have recognized private international law and public international law as distinct legal regimes.³¹ Public international law in turn has been comprised of laws of war and laws of peace.³² Within that bifurcation, the law of war itself is split into

³¹ See, e.g., GEORGE GRAFTON WILSON & GEORGE FOX TUCKER, INTERNATIONAL LAW 4 (6th ed. 1915).

³² See, e.g., CHARLES H. STOCKTON, OUTLINES OF INTERNATIONAL LAW (1914) (dividing Public International Law coverage into “Intercourse of States in Time of Peace” and War-Relations of Belligerents”). The emergence of international human rights law, especially if understood to operate in armed conflict, challenges the war-peace bifurcation of public international law.

a *jus ad bellum*, regulating States' resort to force,³³ and a *jus in bello*, regulating conduct during hostilities.³⁴ The *jus in bello* in turn has been split, conceptually if not literally, into rules applicable to targeting, formerly termed Hague Law, and rules for treatment of persons under control of an enemy belligerent, so-called Geneva Law.³⁵ Alongside this tree of bifurcations, one can overlay two somewhat separate sources of the law of war; like international law generally, law-of-war obligations exist in both treaty and customary form.³⁶

In addition to splitting the *sources* of regulation of war, States have bifurcated the *modes* of regulating conduct in war.³⁷ In many cases, States have developed specific, codified prohibitions to limit belligerents' use of the means and methods of war. At the same time, States have accepted restraints on the conduct of hostilities in the form of broadly conceived, general principles. Expressions of each mode of regulation, specific prohibition and general principle, can be found in either treaty or customary form.

³³ See generally YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (5th ed. 2011) (offering a particularly positivist analysis of modern *jus ad bellum* doctrine); STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* (2005) (providing a rich history of the legal nature and legal conceptions of war under international law).

³⁴ See generally 1 MARCO SASSÒLI, ANTOINE A. BOUVIER & ANNE QUINTIN, *HOW DOES LAW PROTECT IN WAR?* (3d ed. 2011) (offering a thorough and well-cited outline of the modern *jus in bello*); GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* (1983) (providing a sound and thorough historical account of the *jus in bello*).

³⁵ See Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 *TEMP. L. REV.* 787, 793–96 (2008) (explaining the twentieth-century evolution and eventual merger of the Hague and Geneva traditions of the law of war); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 *CORNELL L. REV.* 97, 108–09 (2004).

³⁶ See SASSÒLI ET AL., *supra* note 34, at 149–50, 152–54.

³⁷ A further bifurcation of law-of-war regulations is evident in the traditional sources of regulation. Like international law generally, law-of-war provisions take both customary and treaty forms. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 10–14 (2d ed. 2010). A number of sources have collected the major law-of-war treaties. *THE LAWS OF ARMED CONFLICTS: A COLLECTION CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Schindler & Toman]; ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* (3d ed. 2000). The International Committee of the Red Cross completed a 3-volume codification of the customary law of war in 2005. ICRC CIL STUDY *supra* note 15.

1. *Specific Prohibition*

The specific prohibitions of the *jus in bello* surface as both stand-alone treaties³⁸ and as protocols to preexisting treaty regimes.³⁹ Whatever their legal configuration, law-of-war rules that materialize as specific prohibitions share the usual advantages of codified law. In many cases, they reduce ambiguity.⁴⁰ A number of specific law-of-war prohibitions include consecutive or cumulative elements of application and descriptive instructions that greatly aid implementation.⁴¹ For

³⁸ The fielding and use of exploding projectiles, military balloons, poisonous gases, and cluster munitions each produced important new treaties to account for respective impacts on the conduct of hostilities and the victims of war. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *opened for signature* Nov. 29, 1868, 18 Martens Nouveau Recueil (ser. 1) 474 (entered into force Dec. 11, 1868) [hereinafter 1868 Saint Petersburg Declaration]; Hague IV, Declaration I, Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature, July 29, 1899, 32 Stat. 1839, 1 Bevans 270, 26 Martens Nouveau Recueil (ser. 2) 994; Geneva Protocol for the Prohibition on the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods in Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65; Convention on Cluster Munitions, May 30, 2008, 48 I.L.M. 357.

³⁹ Submarines, and, more recently, non-detectable fragments, anti-personnel mines, and blinding lasers have produced protocols to existing law-of-war treaties. *See* Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 173 L.N.T.S. 353; 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, Apr. 10, 1981, 1342 U.N.T.S. 137 [hereinafter 1980 Convention on Conventional Weapons]; Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), as amended on May 3, 1996, 2048 U.N.T.S. 133; Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, 2042 U.N.T.S. 171. Blinding lasers present an interesting case. States concluded the Blinding Lasers Convention prior to any acknowledged battlefield use or fielding of weapons meeting the treaty's definition of such weapons.

⁴⁰ International law, including the law of war, generally recognizes as sources of legal obligations both codified international instruments such as treaties, as well as the customary practice of States undertaken from a sense of obligation, whether codified or not. Statute of the International Court of Justice, art. 38(1)(a) & (b), June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 [hereinafter ICJ Statute].

⁴¹ *See, e.g.*, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 13, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter 1977 Additional Protocol I]. Medical units and hospitals have long enjoyed specific protection from attack. Protection ceases only if medical facilities are used for hostile purposes. The Additional Protocol rule specifies four acts not considered hostile and also prescribes fairly elaborate procedures for

example, Article 4 of the Third Geneva Convention of 1949 lists several criteria that militia and volunteer corps must satisfy for their members to enjoy prisoner of war status upon capture.⁴²

Resort to specific provisions is often viewed as a progressive development in humanitarian terms. The massively influential commentaries to the 1949 Geneva Conventions observe with respect to the Third Convention, “The time for declarations of principle is past; the 1929 Convention showed the advantages to be gained from detailed provisions.”⁴³ In practical terms, specific prohibitions ease incorporation into military doctrine. Instruction of military lawyers also seems an easier task when based on specific provisions. And converting specific law-of-war provisions into element-based offenses favored by criminal courts seems far easier than distilling general principles into chargeable crimes.⁴⁴ The task of military legal advisors is in some sense easier when specific law-of-war prohibitions are encountered as well. While specific prohibitions typically grant less operational flexibility, they offer comparatively stronger support to military lawyers advising against unlawful military plans than general principles.

To some extent, the international legislative process that generates specific prohibitions also enriches and refines the law of war. It is rare to find a specific prohibition derived solely from custom. Specific law-of-war prohibitions typically result from formidable diplomatic conferences attended by States’ official representatives. To an increasing degree, non-governmental organizations and other private humanitarian interests also participate in law-of-war treaty conferences voicing diverse interests and useful non-military perspectives.⁴⁵ Official statements and recorded

attacking misused medical facilities, including warnings and a period for rehabilitation.
Id.

⁴² Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention III].

⁴³ COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 10 (Jean Pictet ed., 1960).

⁴⁴ The subject matter jurisdiction of the International Criminal Court Statute includes a number of specific law-of-war prohibitions., ICC Rome Statute, *supra* note 8, art. 8. Elements of these prohibitions facilitate prosecution of war crimes. Int’l Criminal Court, Elements of Crimes, U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002), *reprinted in* KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2003).

⁴⁵ Zoe Pearson, *Non-Governmental Organizations and The International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT’L L.J. 243, 254 (2006) (relating at the Rome Statute Conference, NGO influence “was crucial to the

exchanges of States' views on contentious law-of-war issues produce valuable legislative histories, record accepted understandings of adopted text, and identify the outer limits of substantive consensus on discrete and emerging legal issues.

Finally, specific law-of-war prohibitions bolster legal legitimacy.⁴⁶ They provide States unequivocal opportunities to consent to or to reject international rules. Public international law, including the law of war, remains fundamentally a consent-based system of regulation.⁴⁷ Few sources of international law match ratification of a specific prohibition as an indication of consent to regulation and therefore regulatory legitimacy. Treaty ratification reflects more than approval of substantive rules. Ratification is evidence of a State's clear willingness to cede sovereignty and prerogative to the international legal system. Likewise, rejection of a specific prohibition, a proposed provision, or a prohibition accepted as part of a treaty is strong evidence of either a State's

outcome of particular statute provisions") (citing Marlies Glasius, *Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court*, in *GLOBAL CIVIL SOC'Y* 137 (2002)). The Rome Statute Diplomatic Conference was not the first to include NGOs and international organizations. The 1974–1977 diplomatic conferences that produced the Additional Protocols to the 1949 Geneva Conventions included scores of NGOs and even liberation movements including, the African National Congress, the Palestine Liberation Organization, the United Nations Children's Fund (UNICEF), and Amnesty International. 2 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 15, at 351–408.

⁴⁶ See Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AM. J. INT'L L.* 260, 261, 265 (1940) (citing Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 *AM. J. INT'L L.* 313, 333 (1908)). *But see* HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 5–6, 177 (Robert Tucker ed., 2d ed. 1966) (describing international law as essentially normative in character, as distinguished from rule-based).

⁴⁷ See Vienna Convention on the Law of Treaties, arts. 11–15, 17, May 23, 1969, 1155 *U.N.T.S.* 331 (regulating means of State consent to treaties) [hereinafter Vienna Convention]; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 *I.C.J.* 14, ¶ 269 (June 27); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4 (6th ed. 1995); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Groups in the Creation of International Humanitarian Law*, 37 *YALE J. INT'L L.* 107, 109 (2012) (describing established doctrine as “the sum total of obligations consented to by states”); Duncan Hollis, *Why Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 *BERKELEY J. INT'L L.* 137 (2005); Steven R. Ratner & Anne-Marie Slaughter, *Appraising Methods of International Law: A Prospectus for Readers*, 93 *AM. J. INT'L L.* 291, 293 (1999). *Contra* Andrew T. Guzman, *Against Consent*, 52 *VA. J. INT'L L.* 747 (2012) (arguing for moderation of the consent requirement in international law).

disagreement with substantive norms, or, more fundamentally, its reluctance to commit the issue to the international legal system at all.⁴⁸

2. *General Principles and Customs*

As an alternative mode of regulating hostilities, States have resorted to custom and general principles.⁴⁹ International custom and principles regulated warfare long before the advent of multilateral law-of-war treaties and conventions.⁵⁰ And after more than a century of international codification of specific prohibitions, law-of-war principles still perform critical regulatory functions in combat.⁵¹ Rather than address or prohibit specific means or methods of war, law-of-war principles regulate broadly, even generically.

Widely accepted law-of-war principles include military necessity, distinction, proportionality, and humanity.⁵² Each principle reflects, and

⁴⁸ A contingent of international lawyers has remained skeptical of the value of codification. In the heyday of positivist efforts, Oppenheim admitted that codification retards the “organic growth of the law through usage into custom.” LASSA OPPENHEIM, *INTERNATIONAL LAW* 40–41 (2d ed. 1912).

⁴⁹ This article uses the term “principles” to refer to core rules that form part of the international customary law applicable in armed conflict. I do not mean to refer to “general principles of law” as a more general source of international obligations and authority. See ICJ Statute, *supra* note 40, art. 38(a)(3); IAN BROWNLIE, *PUBLIC PRINCIPLES OF INTERNATIONAL LAW* 16–17 (7th ed. 2008). Brownlie and other prominent commentators identify “general principles of law recognized by civilized States” as a source of international law drawn primarily from municipal legal systems, in particular from private law. *Id.* at 17; 1 GERHARD VON GLAHN, *LAW AMONG NATIONS* 18 (7th ed. 1996); *INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 68 (Elihu Lauterpacht ed., 1970). Oppenheim, however, identifies a “*general International Law*” captured by treaty rather than custom. OPPENHEIM, *supra* note 48, at 23–24.

⁵⁰ Thomas Holland, a critical figure in late-nineteenth century efforts to codify the laws and customs of war, observed, “The evolution of customary rules, designed to lessen the sufferings resulting from warfare, was the earliest achievement of the nascent science of International Law.” THOMAS ERSKINE HOLLAND, *THE LAWS OF WAR ON LAND* (1908); see also HILAIRE MCCOUBREY & NIGEL WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 210–17 (1992) (recounting pre-twentieth century evolution of law-of-war principles and customs)

⁵¹ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, *OPERATIONAL LAW HANDBOOK* 10–14 (2013) (identifying four principles of the law of war, including military necessity/military objective, distinction/discrimination, proportionality, and humanity/unnecessary suffering).

⁵² Law-of-war commentators continue to debate the precise and even general nature of these values. Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium*, in *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* 185, 189

through application or enforcement, vindicates enduring human values judged important enough to survive the breakdown of order that accompanies armed conflict. In contrast to many specific prohibitions, law-of-war principles operate nearly universally, paying far less regard to technical legal elements, peculiarities of conflict classification,⁵³ or the legal status of affected persons.⁵⁴ Accordingly, general law-of-war principles are often well-suited to emerging military technology and tactics not anticipated or addressed by specific law-of-war prohibitions.

True to their mutable form, law-of-war principles remain in flux, frequently lack precise meaning and content, and are often subject to

(Michael N. Schmitt & Leslie C. Green, eds., 1998) (“The law of armed conflict (or international humanitarian law) is primarily concerned with preserving, as far as possible, certain core humanitarian values during hostilities.”).

⁵³ As a matter of material application, the law of war operates only in conditions of armed conflict. 1977 Additional Protocol I, *supra* note 41, art. 1; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention II]; 1949 Geneva Convention III, *supra* note 42, art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention IV]. States have not committed to a treaty-based definition of armed conflict. The most widely-accepted definition of this threshold describes armed conflict as, “protracted armed violence.” *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). In a well-documented study of the customary law of war, the International Committee of the Red Cross concluded that each of the four principles of the law of war operates in both international and non-international armed conflicts. ICRC CIL STUDY, *supra* note 15, at 3–5, 29–32, 46–49, 237–40. Similarly a manual dedicated to identifying law-of-war rules applicable in non-international armed conflict concludes that three principles apply to such conflicts. NIAC MANUAL, *supra* note 15, ¶ 1.2 (identifying “distinction, prohibition of necessary suffering, and humane treatment”). Omission of the principles of proportionality and military necessity appear to be judgments as to their inclusion in the principle of distinction rather than a conclusion that neither applies in non-international armed conflict. *Id.*

⁵⁴ Many specific prohibitions of the law of war operate under quite narrow circumstances or in favor of discrete classes of persons on the battlefield. For instance, most of the Geneva Conventions’ specific prohibitions concerning the treatment of interned persons operate only in favor of captives who meet rigorous qualification standards for the status of prisoner of war or civilians whose nationality qualifies them as protected persons. *See* 1949 Geneva Convention III, *supra* note 42, art. 4; 1949 Geneva Convention IV, *supra* note 53, art. 4.

dispute.⁵⁵ A small sampling of authoritative law-of-war sources finds mention of as few as two and as many as six principles.⁵⁶ Although on occasion codified by treaty, law-of-war principles generally take shape as diffuse custom or in the form of widely varied and uncodified State practice. Predictably then, regulation by principle has proved a relatively indeterminate but flexible method of restraining conduct in warfare, especially in comparison with regulation by specific prohibitions.

Although doctrinally separate, these two modes of law-of-war regulation, specific provision and general principle, have not been distinct in terms of coverage. Many specific law-of-war prohibitions find inspiration in, execute, or merely duplicate one or more law-of-war principles.⁵⁷ And conversely, it can often be said that law-of-war

⁵⁵ Theodor Meron, *Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 247 (1996) ("In international humanitarian law, change through the formation of custom might be faster, but less precise in content, than the adjustment of law through treaty making.").

⁵⁶ The U.S. Supreme Court has identified on three occasions three maxims of the law of war including, "humanity, moderation, and honor." *Williams v. Bruffy*, 96 U.S. 176, 191 (1877); *In re The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 667 (1862); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (quoting EMMERICH DE Vattel, 3 LE DROIT DE GENS OU PRINCIPES DE LA LOI NATURELLE, ch. 8, §§ 294–95 (1758)). U.S. NAVY/U.S. MARINE CORPS/U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, ¶ 5.3 (2007) (identifying Military Necessity, Distinction, Proportionality, and Unnecessary Suffering); U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT, JSP 383, ¶¶ 2.2–2.6 (2004) (identifying Military Necessity, Humanity, Distinction, and Proportionality) [hereinafter UK MANUAL]; OFFICE OF THE JUDGE ADVOCATE GENERAL, CANADIAN ARMED FORCES, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, B-GJ-005-104/FP-021 ¶ 202.1 (2001) [hereinafter CANADIAN MANUAL] (identifying Military Necessity, Humanity, and Chivalry); FED. MINISTRY OF DEF. OF FED. REPUBLIC OF GER., HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL (ZDv 15/2) ¶ 131 (1992) [hereinafter GERMAN IHL MANUAL] (identifying Military Necessity and Humanity); U.S. DEP'T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 3 (1956) [hereinafter FM 27-10] (identifying Necessity, Humanity, and Chivalry as basic principles). A draft manual intended to replace the U.S. Army's aging law-of-war manual includes five principles including: Military Necessity, Humanity, Discrimination, Proportionality, and Honor. U.S. DEP'T OF DEF., JOINT SERVICE LAW OF WAR MANUAL ¶¶ 2.002–2.006 (draft Dec. 2010) [hereinafter U.S. DRAFT MANUAL] (on file with author). A casebook published by the International Committee of the Red Cross identifies six principles of International Humanitarian Law including, humanity, necessity, proportionality, distinction, prohibition on causing unnecessary suffering, and independence of *jus in bello* from *jus ad bellum*. SASSÒLI ET AL., *supra* note 34, at 161–62.

⁵⁷ See, e.g., 1977 Additional Protocol I, *supra* note 41, art. 56. Article 56 prohibits targeting dams, dykes, and nuclear electrical generating stations where attack would release dangerous and cause severe loss to civilian populations. This specific prohibition clearly captures the principles of discrimination and proportionality. See INT'L COMM. OF

principles capture or represent aggregations of fairly specific, codified prohibitions.⁵⁸ While splitting the *jus in bello* between specific prohibitions and broad principles has offered States regulatory diversity and flexibility, the arrangement has rendered many of the precise contours of the law elusive. This is particularly true where one finds overlap between the two modes of regulation, as has been the case with perfidy for over a century.

THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 2152–58 (Yves Sandoz et al. eds., 1987). Emphasizing the prohibition's roots in principle, the United States has contested the customary nature of Article 56 because, in its view, the principles adequately vindicate the concern of the rule. See Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 427 (1987); Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 467–68 (1987) (judging Article 56 to be “militarily unacceptable”); see also Memorandum from Mr. W. Hays Parks, Chief, Int'l Law Branch, Office of The Judge Advocate Gen., U.S. Army, et al., to Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Sec'y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implication (9 May 1986), reprinted in INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234–35 (Major William J. Johnson ed., 2013) [hereinafter McNeill Memorandum] (declining to include 1977 Additional Protocol I, Article 56 among provisions reflective of custom or as supportable for inclusion as such).

⁵⁸ For example, States codified the widely recognized principle of discrimination in a 1977 Protocol to the 1949 Geneva Conventions. Article 48 of the Protocol states, “In order to ensure respect for and protection of the civilian population, and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” 1977 Additional Protocol I, *supra* note 41, art. 41. Article 51 further converts the principle of discrimination into specific prohibitions. A series of discrimination-inspired prohibitions includes attacks “not directed at a specific military objective . . . which employ a method or means of combat which cannot be directed at a specific objective or . . . employ a method or means of combat the effects of which cannot be limited.” *Id.* art. 51(4). Unlike the 1949 Conventions, ratification of Additional Protocol I is not universal. See *Treaties and States Parties to Such Treaties*, ICRC, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Apr. 28, 2014) (identifying 177 States Parties to AP I); Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965) (explaining inputs to customary law of war).

B. Early Codifications

Perfidy appeared as a codified and specific law-of-war prohibition in the mid-to-late nineteenth century. Nearly every comprehensive law-of-war instrument of the period included prohibitions on perfidy or treachery. While nineteenth century enthusiasm for positive law is evident in these early codes and treaties, expressions on the subject of perfidy remained vague. Early prohibitions seem to have reserved a great deal to the subjective prerogatives of the armed forces expected to honor them. Still, one finds in these early instruments the beginnings of a specific prohibition of perfidy.

1. U.S. *Liber Code*

Widely recognized as the first serious codification of the customs and usages of war and issued in the form of instructions to Union forces in the American Civil War, the U.S. *Lieber Code* included two expressions of customary military practice with respect to perfidy or treachery.⁵⁹ Articles 16 and 101 of the *Lieber Code* instructed:

Art. 16. Military necessity . . . admits of deception, but disclaims acts of perfidy

. . . .

⁵⁹ Adjutant Gen.'s Office, U.S. Dep't of War, Gen. Orders No. 100 (24 Apr. 1863) [hereinafter *Lieber Code*] (titled *Instructions for the Government of Armies of the United States in the Field*), reprinted in Schindler & Toman, *supra* note 37, at 3. Elihu Root, Francis Lieber, *Opening Address at American Society of International Law Meeting, April 24, 1913*, 7 AM. J. INT'L L. 453 (1913). The Code was the work of law professor Dr. Francis Lieber. A board of officers including Generals Hitchcock, Cadwalader, Harstuff, and Martindale, along with Lieber himself, reviewed the project. The Code likely included as many subjective evaluations of lawful conduct as it did objective codifications of practice or custom. See James F. Childress, *Francis Lieber's Instructions of the Laws of War: General Order No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34 (1976). Childress observes, "More than a collection of independent rules, this code had its rationale in its author's experiences of and systematic thought about war . . ." *Id.* at 34. Childress also notes, "In his effort to codify the 'common law of war,' Lieber did not merely attend to the practices of nations, although these were important." *Id.* at 40. See also Richard R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100 (Part I)*, 3 INT'L REV. RED CROSS 171 (1963); Richard R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100 (Part II)*, 3 INT'L REV. RED CROSS 234 (1963); Root, *supra*.

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 difficult to guard against them.⁶⁰

While undoubtedly important codifications, Lieber's formulations of perfidy present modern readers a number of interpretive dilemmas. First, the reference to clandestine attempts at injury is ambiguous even to those familiar with military customs of the period. In military usage, clandestine operations commonly refer to missions of concealed existence.⁶¹ Although the Code separately addresses the practices of spies⁶² and traitors⁶³ whose pursuits often involve clandestine acts, no accompanying article of the Code defines a clandestine attempt or employs the term. A treatise contemporary to the Code described prohibited assassinations as involving "the cover of a disguise," perhaps indicating the type of operation envisioned by Lieber.⁶⁴ Yet the same treatise describes spying as "a kind of clandestine practice . . . allowable by . . . rules."⁶⁵ Moreover, General Henry Halleck's international law treatise, known to have greatly influenced Lieber, observed, "The implements of war, which may be lawfully used against an enemy, are not confined to those which are openly employed to take human life . . . but also include *secret and concealed* means of destruction"⁶⁶ Secrecy has long been an acceptable, even imperative aspect of military operations.⁶⁷ Therefore, it is doubtful that Lieber's prohibition of clandestine injury intended that all secret or concealed operations would qualify under the article's prohibition of perfidy.

⁶⁰ Lieber Code, *supra* note 59, arts. 16, 101.

⁶¹ JOINT STAFF, U.S. DEP'T OF DEF., JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (15 July 2012) (citing JOINT STAFF, U.S. DEP'T OF DEF., JOINT PUB. 2-01.2 COUNTERINTELLIGENCE AND HUMAN INTELLIGENCE SUPPORT TO JOINT OPERATIONS (date unknown due to classification)); William Safire, *Covert Operation or Clandestine?*, N.Y. TIMES, Feb. 14, 2005, <http://www.nytimes.com/2005/02/13/arts/13iht-saf14.html>.

⁶² Lieber Code, *supra* note 59, art. 103.

⁶³ *Id.* arts. 90–91.

⁶⁴ 1 HENRY W. HALLECK, HALLECK'S INTERNATIONAL LAW 565 (Sherston Baker, ed., 3d ed. 1893) (1861).

⁶⁵ *Id.* at 571.

⁶⁶ *Id.* at 562 (emphasis added).

⁶⁷ Nina Stewart, *Commentary* in STRATEGIC DENIAL & DECEPTION: THE TWENTY-FIRST CENTURY CHALLENGE 36–38 (Roy Goodson & James J. Wirtz eds., 2002) (discussing maintenance of secrecy in strategic and tactical deception plans).

By comparison, it is likely that Lieber's reference to treachery or "treacherous attempts" was clearer to military practitioners of the time and operated with greater doctrinal force than did his treatment of clandestine operations.⁶⁸ The Code does not define treachery, or perfidy for that matter. Yet given the longstanding legal significance of perfidy and treachery, military leaders of the period would likely have held definite notions of each concept. In fact, military officers and commanders of the period carried out many legal functions without the assistance of military lawyers.⁶⁹ Court-martial practice of the period typically used line and staff officers appointed as *ad hoc* judge advocates, instead of members of the Judge Advocate Department.⁷⁰ Consequently, line officers and commanders had comparatively greater familiarity and facility with legal terms and general concepts of law than one finds today.⁷¹ It would not have been surprising for military commanders of the period to have held relatively firm understandings of

⁶⁸ Contemporaries of Lieber such as General Henry Halleck, a formidable jurist in his own right, regarded the Code as merely "principles of the law of war, or the general rules" Childress, *supra* note 59, at 36 (quoting Letter from General Henry Halleck, to General S.A. Hurlburt (June 22, 1863) (on file with Eldridge Papers, Huntington Library). General Halleck emphasized the importance of clarifying the Code through application "in actual and hypothetical cases." *Id.*

⁶⁹ Many preliminary legal matters associated with courts-martial did not require participation of a judge advocate. 1 COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 190 (2d ed., 1920 reprint).

⁷⁰ *Id.* at 183, 185. Winthrop observed,

While judge advocates are more commonly selected from officers of the line, it is by no means unusual to detail staff officers as such at remote posts or where the command is supplied with but a limited number of line officers. Under such circumstances, assistant surgeons especially have been thus employed.

Id. at 183.

⁷¹ Military commanders have long been the focal point of military justice procedures. Prior to 1920 amendments, the U.S. military justice system was administered almost entirely by commanders without appellate oversight and scant legal review. Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 *TUL. J. INT'L & COMP. L.* 419, 426 (2008). Summary court-martial procedures are still usually conducted exclusively by line officers without direct involvement of military lawyers. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1301(e)* (2012) [hereinafter 2012 MCM] ("The accused at a summary court-martial does not have the right to counsel."). *See also* *Middendorf v. Henry*, 425 U.S. 25 (1976) (denying right to counsel in summary courts-martial); GREGORY E. MAGGS & LISA M. SCHENCK, *MODERN MILITARY JUSTICE: CASES & MATERIALS* 50 (2012) (discussing the role of the commander in military justice).

what constituted treachery without the aid of a technical definition or formal legal advice.

It is also likely that the treachery article's open-ended phrasing was intended to convey room for subjective interpretation.⁷² Lieber's work is in fact styled as instructions to armed forces rather than a legal code or hornbook, reinforcing the understanding that he wrote for a lay audience. Lieber likely understood contemporary law-of-war custom to include a perfidy prohibition broad enough to cover a wide range of dishonorable belligerent activity. His separate treatment of permissible and impermissible deception supports the notion that Lieber comprehended a flexible, yet shared understanding of honorable and good faith conduct between warring parties. For example, his Code defines permissible deception to include only acts that do not "involve the breaking of good faith either positively pledged . . . or supposed by the modern law of war to exist."⁷³ Three negative examples clarify Lieber's notions of honorable combat:

Art. 63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

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. 117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such an act of bad faith may be good cause for refusing to respect such flags.⁷⁴

Thus, while undoubtedly an important starting point for later, more specific prohibitions on perfidy, the Lieber Code perfidy prohibitions

⁷² Study of Lieber's work apart from the Code suggests he intended his work to leave room for considerations of morality in the operation of the law of war. Childress, *supra* note 59, at 36.

⁷³ Lieber Code, *supra* note 59, art. 15.

⁷⁴ *Id.* arts. 63, 65, 117; *see also* Childress, *supra* note 59, at 50–51 (identifying Articles 63, 65, and 117 as indicative of the bounds of Lieber's conception of perfidy).

may more closely resemble codified general principles than specific prohibitions of perfidy.

Law-of-war commentary labels the entire Code in similarly general terms. A Lieber historian has argued the Code is misunderstood as purely a work of legal positivism. Childress argues Lieber's justifications for rules "resulted in part from his conviction that legal positivism in international law is inadequate."⁷⁵ He notes that Lieber understood and expressed in his Code a unity between law and morality.⁷⁶ Informed by then-prevailing notions of morality, Lieber's perfidy provisions might have appeared clearer and less vague to his military contemporaries.

Other influential military jurists of the period shared Lieber's roomy view of perfidy. In his widely respected treatise on international law, General Halleck expressed the distinction between honorable means of warfare and perfidy in moral rather than legal or technical terms. Halleck observed,

*Whenever we have expressly or tacitly engaged to speak the truth to an enemy, it would be perfidy in use to deceive his confidence in our sincerity. But if the occasion imposes upon us no moral obligation to disclose to him the truth, we are perfectly justifiable in leading him into error, either by words or actions . . . it is the breach of good faith, express or implied, which constitutes the perfidy, and gives to such acts the character of lies.*⁷⁷

2. 1874 Brussels Declaration and 1880 Oxford Manual

Inspired by the Lieber Code, a series of multilateral law-of-war instruments soon emerged, each addressing perfidy. Two un-adopted, though later influential efforts, the 1874 Brussels Declaration and the

⁷⁵ Childress, *supra* note 59, at 40. See also Burris Carnahan, *The Civil War Origins of the Modern Rules of War: Francis Lieber and Lincoln's General Order No. 100*, 39 N. KY. L. REV. 661, 673–74 (2012) (characterizing Lieber's work as positivist and empirical in methodology yet natural law-based in substance).

⁷⁶ Childress, *supra* note 59, at 36.

⁷⁷ 1 HALLECK, *supra* note 64, § 16 (emphasis added). Halleck cites to an impressive collection of early law-of-war treatises to support his expression of perfidy. *Id.*

1880 Oxford Manual, included specific provisions prohibiting perfidy and treachery in combat.⁷⁸ Although each was deeply influenced by its American predecessor, one finds in the Brussels Declaration and Oxford Manual evolutionary departures from Lieber's formula. The departures of each proved later to be persistent features of twentieth century perfidy rules. In particular, both the Declaration and Manual introduced a degree of specificity to the perfidy prohibition not found in the Lieber Code, marking an important preliminary move from general principle to specific prohibition. Where Lieber drafted an immensely open-textured perfidy rule, the authors of the Brussels Declaration and Oxford Manual were far more selective with their prohibitions.

The 1874 Brussels Declaration famously prefaced its enumerated prohibitions on means of injuring enemies with the following fundamental law-of-war principle:

The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.⁷⁹

The succeeding article then enumerates a series of specific prohibitions evidently intended to discharge the notion of limited warfare. Two enumerated prohibitions relate directly to perfidy and treachery. They are "murder by treachery of individuals belonging to the hostile nation or army" and "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."⁸⁰ Late nineteenth century readers may have appreciated the Declaration's preceding prohibitions on "employment of poison or poisoned weapons" and on "improper use of a flag of truce or . . . uniform of the enemy" as a corollaries to perfidy or treachery as well.⁸¹ These examples would have been clearer than

⁷⁸ Final Protocol, Signed at Brussels, Project of an International Declaration Concerning the Laws and Customs of War, art. 13(b), Aug. 27, 1874, reproduced in Schindler & Toman, *supra* note 37, at 21 [hereinafter Brussels Declaration]; INST. OF INT'L LAW, THE LAWS OF WAR ON LAND (OXFORD MANUAL) (Sept. 9, 1880), reproduced in Schindler & Toman, *supra* note 37, at 29 [hereinafter OXFORD MANUAL].

⁷⁹ Brussels Declaration, *supra* note 78, art. 12.

⁸⁰ *Id.* art. 13.

⁸¹ Grotius regarded killing by poison as contrary to custom though he included no specific reference to treachery or perfidy. HUGO GROTIUS, 2 DE JURE BELLI AC PACIS, bk. III, ch. IV, § 15, at 651 (Francis W. Kelsey trans., 1925) (1625). Ancient Asian codes of conduct in war did associate the use of poison with treachery. See W. S. Armour, *Customs of Warfare in Ancient India*, 8 THE GROTIUS SOCIETY: PROBLEMS OF PUBLIC

Lieber's work, offering somewhat greater specificity. Still, the Declaration's examples fall short of a technical definition of treachery. The Declaration's greatest contribution was its influence on succeeding efforts to codify the law of war.

Appearing just six years later, the 1880 Oxford Manual provided more deliberate treatment of perfidious conduct. In fact, perfidy appears in the Manual's opening section on General Principles. Clearly drawing on the Brussels Declaration, Article 4 of the Oxford Manual states,

The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain especially from all needless severity,⁸² as well as from all perfidious, unjust, or tyrannical acts.⁸³

Standing alone, the Manual's reference to perfidy offers little in terms of practical regulation and, like its predecessors, offers no technical definition. Perhaps, like the Lieber Code's intended U.S. audience, military commanders of the late-nineteenth century were adequately steeped in custom to identify perfidious acts without more. And perhaps States were unwilling to cede any further prerogative to the international legal system. The greatest significance of the provision may merely be its juxtaposition with one of the most fundamental and widely accepted expressions of law-of-war principles—the newly acknowledged international legal limit on resort to means of injuring enemies.

The Oxford Manual's more pragmatic and specific contributions to the prohibition of perfidy are found in a subsequent section addressing "Means of Injuring the Enemy." Here, the Manual enhances its general prohibition on perfidy with a series specific prohibitions related to honorable warfare. Indeed, the preamble to the section begins, "As the struggle must be *honourable* (Article 4)"⁸³ Four enumerated prohibitions follow, including "To make use of poison . . . ; [T]reachorous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning surrender; To attack an enemy

AND PRIVATE INTERNATIONAL LAW 71, 73 (1922). Armour remarks, "The discovery that [poisoned weapons] were not fitting for honourable warriors was a great one. 'They who without turning their back on their enemies are killed in battle . . . go to heaven if they do not use treacherous weapons.'" *Id.*

⁸² OXFORD MANUAL, *supra* note 78, art. 4.

⁸³ *Id.* pt. II (b), pml. (emphasis added).

while concealing the distinctive signs of an armed force . . . ,” and finally, a reproduction of the Brussels Declaration provision on misuse of enemy flags and uniforms and internationally protected emblems.⁸⁴

More than mere illustrations, the Oxford Manual’s specific prohibitions seem to mark an important evolution in perfidy doctrine. While the 1874 Brussels Declaration had previously enumerated treacherous murder and misuse of emblems, the Oxford Manual’s addition of assassination, feigning surrender, and conducting attack out of uniform as examples of prohibited conduct clarifies that understandings of perfidy, treachery, and honorable conduct in war are premised on an assumption of good faith between belligerents. The Oxford Manual makes plain what uncodified custom, the Lieber Code, and the Brussels Declaration did not; that humane and lawful warfare requires that enemies possess a modicum of trust in one another. At a minimum, enemies must be assured that honoring law-of-war rights and duties of humanity will not result in tactical or operational disadvantage.

The 1874 Brussels Declaration and Oxford Manual’s move from the general to the specific was not without cost. As with the Brussels Declaration, States were concerned that drafters had put too fine a point on some rules. Perceived legal innovations on the part of the Brussels Declaration drafters provoked reluctance and skepticism on the part of Great Britain especially, which did not participate in its drafting, signed nonetheless, but then led efforts to discourage ratification.⁸⁵ The British indictment is curious given the distinctly military character of the

⁸⁴ *Id.* art. 8.

⁸⁵ PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 108–09 (1908); 1 HALLECK, *supra* note 64, at 554. Updating General Halleck’s treatise, Sherston related the British representative’s assessment of the Brussels Declaration:

When the more important articles of the Project came to be examined and discussed, instead of mere rules for the guidance of military commanders based upon usage, upon which a general understanding could be show to be desirable in the interests of humanity, the articles were seen to contain or imply numerous innovations, for which no practical necessity was proved to exist, and the result of which would have been greatly to the advantage of Powers having large armies, constantly prepared for war, and systems of compulsory military service.

Id.

commission that produced the Declaration.⁸⁶ Defending the Declaration twenty-five years later, a Russian representative observed it was not “an international scientific code, but . . . a common basis for all the instructions which the Governments are to give to their armies and which shall be binding in time of war.”⁸⁷

Still, the Manual’s failure to attract widespread adoption does not appear to have been based on its treatment of perfidy or treachery. Nor does any other substantive rule expressed in the Oxford Manual appear to have been particularly objectionable. Rather, European militaries seem to have been fundamentally skeptical of committing the rules and customs they had previously entrusted to internal military codes and martial manuals, and above all to military sensibilities to international legal codification.⁸⁸ Following publication of the Oxford Manual, German Field Marshal von Moltke offered his support for the goal of “softening of manners” in war but remarked, humanity “would not be attained by means of a codification of the law of war.”⁸⁹ Lacking a third-

⁸⁶ “[A]mong 32 members of the Conference, 18 were military men, 10 were diplomats and 4 were legal experts and senior officials with no connection to the military and diplomatic professions.” Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering*, 299 INT’L REV. RED CROSS 98, 100 (1994) (quoting G. Rolin-Jaequemyns, *Chronique du Droit International 1871–1878*, VII REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 90–91 (1875)).

⁸⁷ THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 475 (James Brown Scott ed., 1920) [1899 HAGUE CONFERENCE PROCEEDINGS].

⁸⁸ Many European powers ratified the 1868 St. Petersburg Declaration during this period. 1868 Saint Petersburg Declaration, *supra* note 38, in Schindler & Toman, *supra* note 37, at 93 (listing signatories of 1868). However, unlike the Oxford Manual and the Brussels Declaration before it, the St. Petersburg Declaration did not regulate war in any comprehensive fashion. The 1868 Declaration addressed only the narrow issue of prohibiting certain projectiles. Yet the Declaration’s preamble did highlight overarching observations on humanity in war. In fact, some regard the 1868 Declaration’s true importance to lie in its preamble rather than its substantive provisions. Meyrowitz, *supra* note 86, at 99.

⁸⁹ BORDWELL, *supra* note 85, at 114–15 (quoting Letter from Count Helmut von Moltke, to Dr. Johan Bluntschli, in 13 REVUE DE DROIT INTERNATIONAL 80–82 (1881)). It is worth noting that codified law-of-war rules were not alone in attracting the ire of prominent military professionals. Law-of-war custom also inspired well-heeled resistance. The seminal Prussian strategist Carl von Clausewitz wryly observed, “War is an act of force to compel our enemy to do our will . . . [A]ttached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, know as international law and custom, but they scarcely weaken it.” CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret trans., eds., 1976) (1832).

party enforcement mechanism, von Moltke observed the Manual would do nothing to curb infractions in war.⁹⁰

All the same, despite their inchoate adoption, the 1874 Brussels Declaration and 1880 Oxford Manual reflect an important developmental moment in law-of-war treatment of perfidy. Separately, each confirms the perfidy prohibition's place as a central tenet of the law regulating the conduct of hostilities, as well as the prohibition's roots in traditions of honorable, even chivalrous, warfare. Together, they signal an early effort to evolve perfidy from generally prohibited conduct to a specific and technically proscribed method of warfare. These early and specific treatments would be mimicked to varying degrees by succeeding law-of-war instruments of the twentieth century.

C. The Hague Regulations

The first international assembly not convened to conclude a war in progress,⁹¹ the 1899 Hague Peace Conferences produced the first multilateral treaty to regulate the conduct of hostilities on land comprehensively.⁹² Inspired by the Conferences' success and mood, States soon reconvened a second round of meetings in 1907. The 1907 Hague Conferences produced a broader assortment of conventions. Yet with respect to the regulation of the conduct of hostilities on land, the 1907 Conferences largely reproduced the text of the 1899 Hague Convention II.⁹³ Thus the negotiations and preparatory work of the 1899 Conference provide the greatest insight to the formation of the Hague Conventions on the conduct of hostilities and their treatment of perfidy and treachery in particular.

⁹⁰ BORDWELL, *supra* note 85, at 114.

⁹¹ 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at v. The proceedings of the Conferences appeared much earlier in Dutch and French language summations. *Id.*

⁹² See 1899 Hague Convention (II) Respecting the Laws and Customs of War on Land with Annex of Regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention II]. Until the Hague Convention (II) of 1899 entered force, multilateral law-of-war treaties had either failed to secure ratification or addressed only very specific topics of the regulation of conduct of hostilities. ROBERTS & GUELF, *supra* note 37, at 67.

⁹³ Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention IV].

1. *Significance of Hague Regulations*

It is difficult to overstate the *symbolic* significance of the Hague Regulations to legal restraint in twentieth century combat. Much like the 1949 Geneva Conventions today, the Regulations were synonymous with the law of war during the early and mid-twentieth century.⁹⁴ Yet to say the Regulations profoundly or even meaningfully altered *actual* conduct in war may be giving them too much, or rather the wrong kind, of credit.⁹⁵ The Hague Convention's *si omnes* clause restricted its operation to armed conflicts between States Parties to the Convention, limiting the material application of its land warfare regulations.⁹⁶ However, the

⁹⁴ Adam Roberts, *Land Warfare from Hague to Nuremberg*, in Howard et al., *supra* note 2, at 134 (describing Nuremberg Tribunal's transformation of Hague Regulations into customary international law despite the Regulations' innovations and expansions of law-of-war custom).

⁹⁵ Telford Taylor, a U.S. prosecutor at the post-World War II Nuremberg International Military Tribunal observed, "Many of the provisions of the 1907 Hague Conventions regarding unlawful means of combat . . . were antiquarian. Others had been observed only partially during the First World War and almost completely disregarded during the Second World War . . ." Tami Davis Biddle, *Air Power*, in Howard et al., *supra* note 2, at 155. Geoffrey Best argues the Regulations' had minimal influence on military thinking prior to World War I. GEOFFREY BEST, *LAW AND WAR SINCE 1945*, at 46 (1997) (citing Gerald I. A. D. Draper, *Implementation of International Law in Armed Conflicts*, 48 INT'L AFF. 46, 55-56 (1972)). As for the Regulations' post-WWI performance, Best classifies them primarily as "opportunities to showcase how the enemy had treacherously reneged on only recent promises." BEST, *supra*, at 47.

⁹⁶ Article 2 of the 1907 Hague Conventions states, "The provisions contained in the Regulations referred to in Article 1 as well as in the present Convention do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention." See, e.g., A.W.G. Raath & H.A. Styrdom, *The Hague Conventions and the Anglo-Boer War*, 24 S. AFR. Y.B. INT'L L. 149 (1999) (noting British reliance on the 1899 Hague Second Convention *si omnes* clause to preclude operation of the Regulations in the Second Boer War). Raath and Styrdom note that in addition to the *si omnes* clause, racial prejudices and attitudes toward non-European fighters also limited the Regulations' influence on combat.

For example, in February 1900, Field Marshal Lord Wolseley, commander-in-chief at the British War Office, availed himself of the nebulous concept of 'civilised nations' to subvert the binding force of the laws and customs of war in the following terms:

I know the Boers of all classes to be most untruthful in all their dealings with us and even amongst themselves. They are very cunning, a characteristic common to all untruthful races To attempt to tie our hands in any way, no matter how small, by the 'Laws and Customs of War' proposed for *Civilized* nations at the

Convention's and its annexed Regulations' position as a symbolic inroad to sovereignty and as the bedrock of later international legal instruments is indisputable. The Hague Regulations attracted widespread ratification by developed States,⁹⁷ were nearly the exclusive treaty-based source of comprehensive land combat regulation during two World Wars,⁹⁸ and were ultimately determined to reflect custom in their entirety.⁹⁹ At the end of the Second World War, they formed the primary legal basis for war crimes convictions at the Nuremburg and Tokyo international military tribunals.¹⁰⁰

Peace Conference, would be in my opinion suicidal, for the Boers would not be bound by any such amenities.

Id. at 156 (citing War Office 32/850 Wolseley, to Parliamentary Under-Secretary (Feb. 14, 1900), *quoted in* S.B. SPIES, *METHODS OF BARBARISM: ROBERTS AND KITCHENER AND CIVILIANS IN THE BOER REPUBLICS, JANUARY 1900–MAY 1902*, at 311 (1978)).

⁹⁷ Schindler & Toman, *supra* note 37, at 85–86 (indicating original States signatory and those later acceding to Hague Convention IV and Regulations).

⁹⁸ The Geneva Conventions that operated during the First and Second World Wars respectively remained narrow and discrete regulations for the treatment of only the wounded with respect to the former conflict and the wounded and prisoners of war with respect to the latter. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, T.S. No. 464; Convention for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. Neither offered significant coverage of belligerent occupation, protection of civilians, or conduct of hostilities generally.

⁹⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 77 (July 8) [hereinafter ICJ Nuclear Weapon Opinion]; *see also* Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 86 (July 9); U.N. Secretary-General, *Report of the Secretary General on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia Since 1991*, U.N. Doc. S/25704 (May 3, 1993).

¹⁰⁰ I TRIAL OF THE MAJOR WAR CRIMINALS, 14 NOVEMBER 1945–1 OCTOBER 1946, NUREMBERG 254 (1947). The United Nations General Assembly has also expressed the view that the Hague Regulations reflect customary international law. G.A. Res. 95 (I), at 188, U.N. Doc. A/236 (Dec. 11, 1946). The conclusion that the Regulations reflected custom was, in fact, a finding of critical importance to the convictions at the International Military Tribunal (IMT) at Nuremberg. The base treaty of the Regulations prevented their operation during any armed conflict that involved a non-party to the Conventions. *See* 1899 Hague Convention II, *supra* note 92, art. 2. The Convention states, "The provisions contained in the Regulations . . . are only binding on the Contracting Powers, in case of war between two or more of them. These provisions shall cease to be binding from the time . . . a non-Contracting Power joins one of the belligerents." *Id.* Finding the Regulations to reflect custom permitted the IMT to apply their provisions to conduct during the Second World War notwithstanding the participation of States not party to the Regulations such as Bulgaria, Greece, Italy and Yugoslavia. Earlier, First World War

2. *Hague Regulations on Perfidy*

The Hague Regulations' treatments of perfidy and treachery are found in two adjacent articles addressing hostilities generally. First, Article 22 repeats the Brussels and Oxford instruments' fundamental principle concerning the limited means and methods of war. Article 22 states, "The right of belligerents to adopt means of injuring the enemy is not unlimited."¹⁰¹ Second, taking a cue from the Oxford Manual, Article 23 lists methods of war "especially forbidden" including "to employ poison . . . to kill or wound treacherously individuals belonging to the hostile nation or army," and "to make improper use of a flag of truce, of the national flag or the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention."¹⁰²

Considering the groundwork laid by the Lieber Code, the Brussels Declaration, and the Oxford Manual, the Hague Regulations' treatment of perfidy seems a relative retreat to generality.¹⁰³ While the Regulations retained their predecessors' references to poison and misuse of enemy and legally-protected emblems, the Hague drafters declined to adopt the Oxford Manual reference to "honourable"¹⁰⁴ warfare. Also missing are the Manual and the Lieber Code references to assassination and feigning surrender as examples of treachery.

The relative generality of the Regulations' treatment of perfidy is difficult to explain. By way of mandate, the Regulations' drafters enjoyed far greater liberty to legislate than two of their predecessors. Professor Lieber was charged merely to codify custom. Similarly, the preface of the Oxford Manual made clear the authors' choice not to innovate but merely to codify accepted ideas and customs.¹⁰⁵ By

belligerents rejected operation of the Regulations on the basis of opposing State Parties' allies' failure to ratify or accede. COLEMAN PHILLIPSON, *INTERNATIONAL LAW AND THE GREAT WAR* 175 (1915).

¹⁰¹ 1907 Hague Convention IV, *supra* note 93, art. 22.

¹⁰² *Id.* art. 23.

¹⁰³ In fact, it appears a sub-commission of the First Hague Conference produced the initial drafts of the Regulations almost entirely from the 1874 Brussels Declaration. *See* 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 415–16. The record of proceedings provides a helpful side-by-side reproduction of the texts of the Declaration and the Regulations. *Id.* at 564–78.

¹⁰⁴ *See supra* note 83 and accompanying text.

¹⁰⁵ The delegates considered the work of the Oxford Manual in discussions of other provisions of the Regulations, such as belligerent occupation. 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 510–11.

contrast, the Hague Regulations, like the Brussels Declaration before,¹⁰⁶ included the goal not only to codify custom but also to “revise the general laws and customs of war.”¹⁰⁷

Yet given a generously permissive drafting mandate, as well as the opportunity to reflect on and revisit their previous work from the First 1899 Conference, the authors of the 1907 Second Hague Conference made no change to their original treatment of perfidy and treachery, nor any substantive change to the work of preceding law-of-war instruments. Substitution of the phrase “To kill or wound treacherously” for the phrase “Murder by treachery” was the Regulations’ only modification to the perfidy and treachery provisions of the Brussels Declaration.¹⁰⁸

The best available explanation for this stasis or even regression is that international politics and delegates’ egos had a hand in the Regulations’ failure to advance or develop codification of the perfidy prohibition. The Record of Proceedings of the 1899 Hague Conference portrays a struggle of sorts between the representatives of Great Britain and Russia over the legacy of the 1874 Brussels Declaration. From diplomatic records, it seems British representatives were eager to preserve the effect of their decision decades earlier not to support the Declaration.¹⁰⁹ Reluctance to overreach custom or over-commit matters traditionally reserved to military prerogative to international law pervades the British representatives’ comments.

¹⁰⁶ Brussels Declaration, *supra* note 78, pmb1.

¹⁰⁷ 1907 Hague Convention IV, *supra* note 93, pmb1.; 1899 Hague Convention II, *supra* note 92, pmb1.

¹⁰⁸ A Danish delegate proposed the change in the meeting of a sub-commission, thinking “murder” to have been used incorrectly by the Brussels Declaration. 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 491. The subcommittee added reference to wounding later at the behest of a French delegate. *Id.* at 557.

¹⁰⁹ *See id.* at 416–17. At an early meeting of the commission responsible for rules of land warfare, General John Ardagh observed,

Without seeking to know the motives to which may be attributed the non-adoption of the Brussels Declaration, it is permissible to suppose that the same difficulties may arise at the conclusion of our labors at The Hague. In order to brush them aside and to escape the unfruitful results of the Brussels conference . . . we would better accept the Declaration only as a general basis for instructions to our troops on the laws and customs of war

Id. General Ardagh repeated his position later in the Conferences. *Id.* at 517.

Meanwhile Russian representatives, through the forceful and tireless efforts of their formidable delegate Fyodor Fyodorovich Martens, approached the 1899 Conference as a chance to give legal effect to former, failed efforts to codify the law-of-war.¹¹⁰ It is clear throughout the Record that Russia, through Martens, viewed the *jus in bello* proceedings of the 1899 Hague Conference simply as a second opportunity to win approval of the Brussels Declaration. A brilliant, persuasive diplomat and drafter, Martens ultimately managed both to establish the 1874 Declaration as the starting point for discussion of the regulation of land warfare at the Conference and also to preserve the majority of its substantive provisions in the various committee and plenary proceedings.¹¹¹

The immediate effect of Martens' efforts was the world's first comprehensive *jus in bello* treaty. The collateral effect for the perfidy prohibition, and perhaps other nascent law-of-war codifications, was a degree of doctrinal stagnation. One finds in the Hague Regulations not a perfidy prohibition revised and updated to reflect notions of modern sensibility in war, but rather a nearly rote reproduction of mid-to-late nineteenth century, embryonic Positivism. The Conferences included no effort to clarify the perfidy prohibition. No delegation proposed adding a more specific articulation, formulating a definition, or identifying additional examples or specific prohibitions of perfidious means or methods. In fact, evidence of skepticism toward such an effort can be found in at least one national report on the Conferences. The U.S. delegation to the 1899 Hague Conference argued, "the reproach of cruelty and perfidy, addressed against [poison gas] shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without scruple."¹¹²

One does find in the Record, however, confirmation that delegates regarded the Regulations' enumeration of examples of perfidy to be non-

¹¹⁰ See *id.* at 417, 505–07, 518.

¹¹¹ *Id.* at 383, 415. See Vladimir Pustogarov, *Fyodor Fyodorovich Martens (1845–1909): A Humanist of Modern Times*, 36 INT'L REV. RED CROSS 300 (1996).

¹¹² *Report of Captain Mahan to the United States Commission to the International Conference at the Hague, on Disarmament, etc., with Reference to Navies*, in 2 THE HAGUE PEACE CONFERENCES 37 (1909). Otherwise, the U.S. report on the 1899 Conferences made no comments on the Regulations treatment of prohibited perfidy and treachery. See *Report of Captain Crozier to the American Delegation to the First Hague Conference, Regarding the Work of the Second Subcommittee of the Second Committee of the Conference*, in 2 THE HAGUE PEACE CONFERENCES 45 (1909).

exhaustive. In particular, the Regulations' reference to methods "especially forbidden" made clear that other forms of treachery may have been prohibited as well (just not "especially").¹¹³ As an example, to be codified by treaty sixty years later, a French delegate to the Convention observed, "making [a person] prisoner by treachery is likewise prohibited."¹¹⁴

3. *Summary of Early Codifications*

Between the late-nineteenth and early-twentieth century, States attempted several codifications of the perfidy prohibition. In one sense, these early efforts reflected an evolution beyond un-codified custom and vague principle. In particular, a number of legal instruments included examples of perfidious conduct in hostilities. Overall, however, early codifications of perfidy seem to have been part of larger efforts directed at securing general commitments to instruct armies on law-of-war topics and principles rather than endeavors to advance or secure the doctrinal clarity needed to support individual criminal enforcement. No international or domestic instrument of the period offered a technical definition of perfidy or treachery. Application and enforcement of these early prohibitions of perfidy required deep familiarity with military professional custom, a developed sense of battlefield morality and ethics, a high degree of tolerance for subjective variation, and a strong dose of context.¹¹⁵

All the same, change was not far off. Legal academics and commentators soon saw fit to expand and clarify the Hague perfidy and treachery formulas. Shortly after the 1907 Hague Regulations' entry into force, the influential law-of-war commentator J. M. Spaight defined treachery as follows:

¹¹³ 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 557.

¹¹⁴ *Id.*

¹¹⁵ Law-of-war commentators have remarked on the apparent selectivity and subjective application of the early *jus in bello*. BEST, *supra* note 95, at 22 (1997); Michael Howard, *Constraints on Warfare*, in Howard et al., *supra* note 2, at 3. In many instances, the early law of war was reserved for peer competitors, a synallagmatic contract rather a universal code. BALTHAZAR AYALA, 2 THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE (John P. Bate trans., 1912) (1582) (excluding pirates, brigands, and rebels from the category of enemy and therefor from law-of-war protecting and general protection from breaches of good faith); Harold Selesky, *Colonial America*, in Howard et al., *supra* note 2, at 59.

It is the essence of treachery that the offender assumes a false character by which he deceives his enemy and thereby is able to effect a hostile act which, had he come under his true colours, he could not have done. He takes advantage of his enemy's reliance on his honour.¹¹⁶

Spaight's formulation, including his expression of forbearance and detrimental reliance on the part of the deceived victim, would prove highly influential. However, incorporation of Spaight's element-based definition into treaty form would not come for nearly six decades.

As a result, misunderstanding and error concerning perfidy reigned for a time at international tribunals, particularly at the Tokyo International Military Tribunal. Among charges against Japanese leadership was violation of the 1907 Hague Regulations Article 23(b) prohibition on treacherous attack. The prosecutor argued, "An attack without warning on another nation with which Japan was at peace constituted treachery of the worst type, and under the provisions of the Hague Convention the killing of any human being during such attack became murder."¹¹⁷

The prosecutor's error in conflating violations of the *jus ad bellum* and the *jus in bello* evaded even the Tribunal members. The judges found fault not in the prosecutor's application of the Hague Regulations to a strategic decision whether to resort to force at all but rather in the argument that the Pearl Harbor attack was a violation any particular confidence or trust.¹¹⁸ The Tribunal opined that, given preexisting tension in the Pacific, the United States should have been on notice of the possibility of Japanese invasion, thus vitiating illegal treachery.¹¹⁹ As Boister and Cryer state well, the entire Tribunal seems to have confused common notions of political betrayal with legal notions of treachery.¹²⁰

It seems early and mid-twentieth century treatments of perfidy remained expressions at the level of generality expected of a principle rather than specific prohibitions.

¹¹⁶ JAMES MOLONY SPAIGHT, *WAR RIGHTS ON LAND* 87 (1911).

¹¹⁷ NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* 171 (2008) (citing Transcript at 327).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 172.

D. 1977 Additional Protocol I

It is, in a sense, surprising that none of the four 1949 Geneva Conventions addresses perfidy directly—and that none of the Conventions' early predecessors does either. On closer consideration, however, the omission proves consistent with the Geneva Conventions' longstanding, exclusive focus on treatment of persons in enemy custody. For over a century, the Geneva tradition of regulating warfare restricted itself to prescribing treatment standards applicable to persons under the control of an enemy belligerent—so called victims of war.¹²¹ Thus, the Geneva Conventions left regulation of targeting and the conduct of hostilities, and therefore perfidy, almost entirely to treaties and instruments of the Hague tradition.

But beginning in 1956, the International Committee of the Red Cross (ICRC) proposed to address actual conditions of combat as part of the Committee's mission to develop the law of war generally.¹²² The ICRC and others noted the relative dormancy of the Hague tradition in developing and updating rules applicable to the use of weapons.¹²³ Additionally, radical changes in the nature of warfare, especially aerial bombardment and the range of persons participating in hostilities, bolstered calls to update the *jus in bello*.¹²⁴ In 1977, perfidy and rules for targeting operations finally found their way into the Geneva

¹²¹ Treaties identified with the Hague tradition did not reciprocate the Geneva tradition's forbearance. For instance, the 1899 and 1907 Hague Regulations include provisions concerning the treatment and capture of prisoners of war. 1899 Hague Convention II, *supra* note 92, ch. II; 1907 Hague Convention IV, *supra* note 93, ch. II. *See also* discussion *supra* text accompanying note 35.

¹²² The ICRC proposed its Draft Rules for the conduct of hostilities at its XIXth International Conference in New Delhi, India in 1957. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, 1956, in Schindler & Toman, *supra* note 37, at 339. The draft provoked little reaction from States, however a resolution at the following year's conference encouraged the ICRC "to pursue the development of International Humanitarian Law." *Id.* at xxix–xxx.

¹²³ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at xxix (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY]. The ICRC notes coordination and agreement with the Government of the Netherlands, in its capacity as depositary of the Hague Conventions, concerning its expansion into topics of hostilities. *Id.*

¹²⁴ *See* George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 1 (1991); Guy Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 120–22 (1986).

Conventions' lineage, namely, through Additional Protocol I (AP I) to the 1949 Geneva Conventions.¹²⁵

1. Additional Protocol I on Perfidy

At the time it entered force, AP I included the only treaty-based definition of perfidy. Article 37 states,

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 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, shall constitute perfidy.¹²⁶

The most noticeable change from the Hague Regulations' formula is semantic. The protocol substitutes the term perfidy for treachery. There is some evidence that commentators had previously regarded the terms as synonymous.¹²⁷ At least two national law-of-war manuals still use the terms interchangeably.¹²⁸ Yet some law-of-war scholars detect a substantive distinction between the two terms.¹²⁹ Of those who appreciate a legal distinction, most consider that treachery still describes a broader class of dishonorably deceptive acts than perfidy.¹³⁰ On the other hand, an ICRC commentary to AP I claims States abandoned

¹²⁵ See generally 1977 Additional Protocol I, *supra* note 41, pt. III, sec. I, pt. IV, sec. I.

¹²⁶ *Id.* art. 37, para. 1.

¹²⁷ Cowles, *supra* note 4, at 58. Colonel Cowles notes Spaight's earlier work on treachery, cited above, as equivalent to the expression of perfidy. *Id.* at 58 (citing SPAIGHT, *supra* note 116, at 87).

¹²⁸ UK MANUAL, *supra* note 56, ¶ 15.12.1 (noting "The definition of perfidy . . . may also be used as guidance as to the meaning of 'treachery' in internal armed conflicts,"); FM 27-10, *supra* note 56, ¶ 50.

¹²⁹ See Rain Liivoja, *Chivalry Without a Horse: Military Honor and the Modern Law of Armed Conflict*, in THE LAW OF ARMED CONFLICT: HISTORICAL AND CONTEMPORARY PERSPECTIVES 89 (Rain Liivoja & Andres Saumets eds, 2012) (suggesting that treachery involves moral obligations and "extra-legal concepts on what is proper and honourable in warfare"); Michael N. Schmitt, *State Sponsored Assassination in International Domestic Law*, 17 YALE J. INT'L L. 609, 617 (1992).

¹³⁰ Schmitt, *supra* note 129, at 617. Professor Schmitt observes, "Treachery, as construed by early scholars, is thus broader than the concept of perfidy; nevertheless, the same basic criteria that are used to distinguish lawful ruses from unlawful perfidies can be applied to determinations of treachery. *Id.*

“treachery” because the term was considered “too narrow.”¹³¹ A pair of commentators concurs with the ICRC, concluding that perfidy is the broader term, absorbing practices such as assassination not covered by treachery.¹³² Some considered treachery, especially the French “*trahison*,” to be an exclusively municipal term, inapplicable to behavior toward an international enemy.¹³³ As with so many facets of law-of-war perfidy, the question is probably best characterized as unsettled, at this point relegated to abstract semantics.

A second conspicuous change from the Hague formulation relates to the AP I consequences of perfidy. The Hague Regulations had only addressed wounding or killing by treachery, but AP I adds “capture” to killing and injury as effects sufficient to constitute prohibited perfidy.¹³⁴ State parties to AP I are now clearly prohibited from resorting to perfidy to accomplish captures. It is unclear whether capture now constitutes a sufficient effect to constitute perfidy under customary international law applicable to States not parties to AP I. Importantly, the Rome Statute of the International Criminal Court does *not* include capture among effects sufficient to establish the war crime of perfidy.¹³⁵ On the other hand, the ICRC has concluded that the addition of capture now reflects customary international law, binding on States not Parties to AP I.¹³⁶

Where the Hague Regulations presented killing and injury as “especially forbidden” examples of perfidy, AP I appears to forbid or prohibit *only* those deceptions and violations of confidence that result in killing, injury, or capture. Deceitful, even bad faith claims to law-of-war protection leveraged to produce some other form of military advantage, short of casualties or capture of persons do not fall within AP I

¹³¹ API COMMENTARY, *supra* note 123, ¶ 1491.

¹³² J. Nicholas Kendall, Note, *Israeli Counter-Terrorism: “Targeted Killings” Under International Law*, 80 N.C. L. REV. 1069, 1075 (2002); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 622 (1992).

¹³³ API COMMENTARY, *supra* note 123, ¶ 1488. The commentary notes the concern with limits on the term *trahison* originated at the 1874 Brussels Declaration Conference. *Id.* (citing XXIst International Conference of the Red Cross, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, Report Submitted by the International Committee of the Red Cross in May 1969).

¹³⁴ Concern with perfidious or treacherous capture was not new, however. Recall that a French delegate had declared his government’s understanding that Hague Regulations Article 23(b) also prohibited treacherous captures. 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 557.

¹³⁵ ICC Rome Statute, *supra* note 8, art. 8(2)(b)(xi), (e).

¹³⁶ ICRC CIL STUDY, *supra* note 15, at 225.

prohibited perfidy. Such acts may constitute “improper use” of insignia if conducted by resort to certain enumerated protected emblems such as UN emblems, uniforms of neutrals or enemies, or emblems of the Red Cross. But they are not regarded as prohibited perfidy by AP I.¹³⁷

A highly influential commentary on AP I confirms that damage to property—specially protected or civilian objects and even military objects—does not fall within the Protocol’s perfidy prohibition.¹³⁸ Therefore, AP I does not prohibit sabotage of military equipment or facilities by resort to otherwise perfidious means. Even sabotage resulting in immense military advantage secured by feigning a protected status does not qualify as prohibited perfidy under AP I. Such operations might run afoul of other rules, such as the rules against improper use of emblems, indiscriminate attack,¹³⁹ or the requirements of taking precautions in the attack.¹⁴⁰ Still, otherwise perfidious attacks that only damage objects are not within the Article 37 prohibition. The exclusion is especially curious given the Protocol’s extensive regime of protection of civilian objects.¹⁴¹

¹³⁷ 1977 Additional Protocol I, *supra* note 41, arts. 38–39. The Article 39(b) rule against using enemy uniforms is not accepted universally. While there is general consensus against using enemy uniforms while conducting attacks, the United States for instance, maintains enemy uniforms may be used to avoid detection during tactical movement or for information gathering. FM 27-10, *supra* note 56, ¶ 54 (observing, “In practice, it has been authorized to make use of national flags, insignia, and uniforms as a ruse.”). A draft U.S. military commission charge sheet perhaps calls into question the U.S. view, however. See *supra* text accompanying notes 26–27 (discussing Daquduq charge sheet). The United States did not include Article 37 among provisions it regards as either reflective of custom or supportable as custom through state practice in its most recent, though surely dated, official communication concerning AP I. McNeill Memorandum, *supra* note 57.

¹³⁸ MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 204 (1982). Bothe and Partsch served on the Additional Protocol diplomatic delegation of the Federal Republic of Germany. Solf, a lawyer with the U. S. Army, Office of the Judge Advocate General, served on the United States delegation to the conference.

¹³⁹ 1977 Additional Protocol I, *supra* note 41, arts. 48, 51.

¹⁴⁰ *Id.* art. 57.

¹⁴¹ See *id.* arts. 48, 52. One of the chief goals of convening the 1974–1977 Diplomatic Conferences was to extend and develop protections for civilians and civilian objects from the effects of military targeting and attack. See AP I COMMENTARY, *supra* note 123, ¶¶ 2000–15. United Nations General Assembly support for the Additional Protocols also emphasized civilian protection. See also G.A. Res. 2675 (XXV), U.N. Doc. A/RES/2675 (Dec. 9, 1970) (Basic Principles for the Protection of Civilian Populations in Armed Conflicts).

Further AP I narrowing of the scope of perfidy coverage is evident from academic analysis. Influential commentators interpret the Protocol's perfidy prohibition to include a proximity requirement. Bothe, Partsch, and Solf contend an act of perfidy "must be the proximate cause of the killing, injury or capture. A remote causal connection will not suffice."¹⁴² In other words, the physical consequences to a person must result immediately from the forbearance secured by feigned protected status. As a negative example, Bothe and his co-authors cite a lethal ambush arising from earlier, feigned injury as inadequate to establish prohibited perfidy.¹⁴³ Other important commentators concur, observing the deception and act of hostility must "constitute means of achieving one and the same object."¹⁴⁴ Only the unofficial ICRC commentary to AP I offers a contrary suggestion.¹⁴⁵

Inchoate effects are seemingly also not within AP I prohibited perfidy. Commentators have observed that the killing, wounding, or capture requirements of prohibited perfidy do not include failed attempts at these effects.¹⁴⁶ The majority view holds that effects must actually be achieved to fall within the prohibition. The ICRC commentary notes the point as well.¹⁴⁷ Perhaps formalistic in the extreme, the conclusion is easily implied from the text of both AP I and Hague expressions. Given the decades of experience and the opportunity at the AP I conference to address the point, States seem to have declined to include attempts in the perfidy prohibition, holding fast to, and only augmenting with capture, the required effects of killing and wounding. The ICRC commentary notes hopefully that general rules of treaty interpretation might counsel a reading that prohibits attempts.¹⁴⁸ More realistically, however, it is very

¹⁴² BOTHE ET AL., *supra* note 138, at 204.

¹⁴³ *Id.*

¹⁴⁴ Dieter Fleck, *Ruses and Prohibition of Perfidy*, 13 MIL. L. & L. WAR REV. 269, 282–83 (1974).

¹⁴⁵ AP I COMMENTARY, *supra* note 123, ¶ 1492. The commentary portrays a situation involving perfidious conduct that merely results in delaying an enemy attack rather than killing, wounding or capture. The commentary observes that while initially the act would not violate the AP I prohibition, people would undoubtedly be killed in later combat. The commentary seems to suggest later casualties might suffice to constitute prohibited perfidy, though controversy on the point is admitted. *Id.*

¹⁴⁶ Matthew Morris, "Hiding Amongst a Crowd" and the Illegality of Deceptive Lighting, 54 NAVAL L. REV. 235 (2007) (noting "some question whether an *unsuccessful* attempt to kill the enemy through the use of false surrender is banned").

¹⁴⁷ AP I COMMENTARY, *supra* note 123, ¶ 1492.

¹⁴⁸ *Id.* ¶ 1493 (citing Vienna Convention, *supra* note 47, art. 53). Prosecutors with the U.S. military commissions appear to have adopted this view. Charges against Abd al

likely that theories of liability employed by international criminal law mechanisms and domestic implementations of the perfidy prohibition would reach inchoate acts.¹⁴⁹

2. AP I's Required Elements for Perfidy

Lest one get the sense that AP I treatment of perfidy was entirely regressive, narrowing of the perfidy prohibition produced a degree of clarity lacking since the earliest codifications. The most valuable AP I refinement of perfidy was the addition of a definition of the term. Previous instruments had merely employed the term “treacherously” or simply referred to perfidy itself; many included illustrative examples or had identified conduct that was “especially forbidden.”¹⁵⁰ But as previously illustrated, preexisting treatments of perfidy and treachery left a great deal to subjective interpretation or familiarity with military custom.¹⁵¹

By contrast, the second clause of Article 37 of AP I identifies three essential elements of perfidy. The elements are (1) an invitation of confidence that an adversary is entitled to protection; (2) an acceptance in that the target of intended perfidy exercises forbearance or accords the claimed protection; and (3) finally a betrayal of that confidence in bad faith with physically harmful human consequences.

A legal contractual analogy clarifies the AP I elements of perfidy. As defined in AP I, prohibited perfidy involves an offer, acceptance, breach, and damages.¹⁵² The offer typically takes the form of an enemy invitation to accord protection. Like contract law, the offer may be verbal or implied by conditions surrounding the interaction such as by the attacker’s outward appearance. Acceptance is expressed as forbearance or by a grant of protection. That is, in recognition and acceptance of the

Hadi al-Iraqi include “Attempted Use of Treachery or Perfidy.” Hadi Charge Sheet, *supra* note 23, at 10.

¹⁴⁹ See ICC Rome Statute, *supra* note 15, art. 25(f) (outlining individual responsibility on the basis of attempts at crimes).

¹⁵⁰ See, e.g., 1907 Hague Convention IV, *supra* note 93, art. 23.

¹⁵¹ See *supra* discussion accompanying notes 69–72.

¹⁵² U.C.C. § 2-206 (1977). (describing elements of offer and acceptance in U.S. contract law). Thankfully, an understanding of perfidy requires no analysis of the concept of consideration in contracts. It seems the perfidy prohibition involves sufficient complexity as it is.

attacker's claimed protected status, the target refrains from attack. Rather than attack, the target affords the respect and protection owed to the law-of-war protected class falsely claimed by the attacker. Finally, breach occurs through that attacker's betrayal of the target's confidence that forbearance or protection was called for and produces damages in the form of killing, injury, or capture.

To clarify the contractual offer analogy, not every invitation of confidence lies within the scope of perfidy. To satisfy the AP I definition of perfidy, an invited confidence must be based on international legal protection derived from the law of war.¹⁵³ At the AP I Diplomatic Conference, States rejected in committee an ICRC proposal to apply the term "confidence" to include obligations of general international law and broader moral obligations.¹⁵⁴ The drafting committee determined that confidence "must be tied to something more precise and should not be tied to internal or domestic law."¹⁵⁵ Thus, for the purposes of perfidy, invitations of confidence or trust must match up with specific law-of-war protective provisions. For example, inviting an enemy to accord the protection owed to civilians,¹⁵⁶ the wounded and

¹⁵³ 6 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 98, 100; 15 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 381.

¹⁵⁴ 14 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 264. Speaking on a draft article on perfidy a U.S. delegate observed, "In the English text, . . . the word 'confidence' seemed to relate that notion to a feeling of legal or moral obligation. Experience showed that there was no uniform standard of morality in the world in general, and still less in time of war." *Id.*

¹⁵⁵ A report from the Third Committee noted,

The initial effort was directed toward finding an appropriate, general definition of perfidy. The key suggestion in this connexion [sic] came from [a] tripartite amendment, which proposed to define 'confidence' in terms of whether one was entitled to, or obliged to accord, protection under international law. The Committee agreed that confidence could not be an abstract confidence, but must be tied to something more precise and should not be tied to internal or domestic law. In the end, it was decided to refer to confidence in protection under 'international law applicable in armed conflicts', by which was meant the laws governing the conduct of armed conflict which were applicable to the conflict in question.

Id.

¹⁵⁶ See 1977 Additional Protocol I, *supra* note 41, arts. 48, 51 (stating "Parties to the conflict shall at all times distinguish between the civilian population and combatants . . .," and "[t]he civilian population as such, as well as individual civilians, shall not be the

sick,¹⁵⁷ or to a prisoner of war¹⁵⁸ satisfies the offer element of AP I perfidy. On the other hand, feigning the status of a military journalist or an assistant to military religious personnel would not qualify because neither status entitles one to specific protection under the law of war. Similarly, States declined explicitly to include deceptive use of enemy uniforms, insignia, and emblems from the AP I treatment of perfidy. Additional Protocol I, like the Hague Regulations, treats misuse of enemy uniforms, along with those of neutral States, separately from perfidy.¹⁵⁹

3. *Categories of Perfidy under AP I*

Perhaps the regrettable, though interpretively compelled, conclusion is that AP I identifies multiple versions or categories of perfidy. That is, Article 37 at once defines perfidy generally yet also identifies a specific, prohibited subclass of perfidy. A plain reading indicates that AP I prohibits only those acts of perfidy that result in killing, wounding, or capture. To be sure, the ICRC commentary to AP I strains against this understanding. Indeed, an overall sense of the ICRC's disappointment at the results of Article 37 runs throughout the commentary. Its overall treatment of Article 37 smacks of damage control. Indeed, the ICRC resorts to a wide range of international law arguments against the impression that AP I leaves a class of perfidy outside its prohibition—a class of permissible perfidy.¹⁶⁰

Yet one struggles to find in Article 37 the textual ambiguity that traditionally occasions resort to broader means of interpretation.¹⁶¹ A

object of attack"); 1949 Geneva Convention IV, *supra* note 53, art. 27 (stating protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof").

¹⁵⁷ See 1949 Geneva Convention I, *supra* note 53, art. 12 (stating, "wounded or sick, shall be respected and protected in all circumstances . . . [a]ny attempts on their lives, or violence to their persons, shall be strictly prohibited.").

¹⁵⁸ See *id.* art. 13 (stating, "Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited.").

¹⁵⁹ 1977 Additional Protocol I, *supra* note 41, art. 39(b).

¹⁶⁰ AP I COMMENTARY, *supra* note 123, ¶¶ 1493–95.

¹⁶¹ This is not to suggest that resort to teleological or functional interpretations or resort to a treaty's object and purpose are supplemental means of interpretation. Vienna Convention Article 31 appears to regard such ontological interpretive approaches as primary means of interpretation. Vienna Convention, *supra* note 47, art. 31(1); *see also*

report by the AP I committee responsible for addressing perfidy ultimately concluded Article 37 “does not prohibit perfidy, *per se*, but merely ‘to kill, injure or capture an adversary by resort to perfidy.’”¹⁶² Nor was it simply the case that the two-fold character of perfidy resulting from Article 37 escaped the attention of the delegates. An Indian delegate clearly highlighted the failure of Article 37 to prohibit perfidy *per se*.¹⁶³ He suggested unsuccessfully, “the principle should first be established that perfidy was unlawful, and that, consequently, ‘it is forbidden to kill, injure or capture an adversary by resort to perfidy.’”¹⁶⁴

Those yearning for a broader, arguably more humanitarian vision of prohibited perfidy might draw consolation from later provisions of AP I. In particular, Article 38 addresses specifically the misuse of important law-of-war protective emblems.¹⁶⁵ It does not include the requirements of killing, wounding, or capture found in prohibited perfidy, suggesting a broader prohibition. Yet States’ deliberate narrowing of prohibited perfidy by AP I is plain.

Luigi Sbolci, *Supplementary Means of Interpretation*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 147–49 (Enzo Cannizzaro ed., 2011) (elaborating supplemental means of treaty interpretation); MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 421–23 (2009) (outlining methods of treaty interpretation captured by Article 31 of the Vienna Convention). Yet an understanding of the object and purpose of the perfidy prohibition must surely be limited to the provision itself and not broader understandings of the object and purpose of restraints on warfare generally.

¹⁶² 15 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 382.

¹⁶³ 14 *id.* at 268.

¹⁶⁴ *Id.*

¹⁶⁵ Article 38 states,

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

1977 Additional Protocol I, *supra* note 41, art. 38.

4. AP I and Hague Regulations' Interplay over Perfidy

Despite its seemingly comprehensive treatment of the conduct of hostilities and targeting, it is important to recall that AP I does not regulate exclusively. In large part, the precise state of the codified perfidy prohibition may be a function of one's understanding of the relationship between AP I and the 1907 Hague Regulations. In general, AP I is understood to operate *alongside* rather than to displace or replace the Regulations. Judge Meron notes that, although AP I codifies a number of Hague rules, it "does not always state those rules fully, comprehensively or definitively."¹⁶⁶ The AP I preamble is worded somewhat ambiguously in this respect. The preamble recites the goal to "reaffirm and develop" existing law-of-war provisions, yet makes no reference to particular, pre-existing instruments.¹⁶⁷ Conference discussion and a vote at a plenary meeting of the AP I Diplomatic Conference clarify that a majority of States present included the Hague Regulations in the AP I mandate to reaffirm the preexisting law of war.¹⁶⁸ The ICRC commentary asserts as much as well.¹⁶⁹

Still, a coherent theory of the relationship between the two treaties remains elusive. The AP I omission of examples cited in previous law-of-war instruments is notable. The Protocol abandons treatment of poison, which had previously been thought to be a treacherous means of combat. Like the Hague Regulations, AP I also declines to address assassination as part of perfidy or treacherous conduct. Omissions have led commentators to conclude that AP I's transition from the term "treachery" to "perfidy" absorbed the omitted examples, especially assassination.¹⁷⁰ A prominent study on assassination, however, dismisses this view as unlikely and inconsistent with early practice concerning treachery.¹⁷¹ The ICRC commentary argues omission of previous examples was merely an effort to limit examples to those that attracted unanimous agreement.¹⁷²

¹⁶⁶ THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 271 (1998).

¹⁶⁷ 1977 Additional Protocol I, *supra* note 41, pmb1.

¹⁶⁸ 7 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 167–68.

¹⁶⁹ AP I COMMENTARY, *supra* note 123, ¶ 1488 ("[T]his Part does not aim to replace the Hague Regulations of 1907, but is concerned with developing them.").

¹⁷⁰ Kendall, *supra* note 132, at 1075; Zengel *supra* note 132, at 622.

¹⁷¹ Schmitt, *supra* note 129, at 617.

¹⁷² AP I COMMENTARY, *supra* note 123, ¶ 1503 (citing 15 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 382).

Overall, one finds inconsistent treatment of the provisions of the Hague Regulations in AP I. In some cases, States used AP I to restate Hague provisions. For instance, the AP I formulation prohibiting unnecessary suffering appears, in substance, nearly word-for-word from the Hague expression.¹⁷³ The Protocol also reproduces nearly verbatim the Brussels Declaration and Hague notions that means and methods of warfare are not unlimited.¹⁷⁴

In other cases, however, AP I alters or omits important Hague provisions. That AP I would reproduce Hague provisions in some places, yet, as with perfidy, alter them in others leaves a somewhat troubling interpretive dilemma. Sound statutory interpretation would counsel giving legal effect to these differences, suggesting that restated provisions should be regarded as replaced and that omitted references in restated rules should be regarded as continuing in force. The Hague Regulations' perfidy provisions are firmly in the former class and thus a strong interpretive case can be made for their obsolescence.

5. *Consequences of AP I's Narrowing of Perfidy*

Finally, AP I narrowing of the perfidy prohibition was not limited to substantive treatment. Additional Protocol I's enforcement and implementation measures also confirm a narrowing of the notion of prohibited perfidy. Part V, Section II of AP I addresses "Repression of Breaches" through a system of enforcement measures that builds on the

¹⁷³ 1977 Additional Protocol I, *supra* note 41, art. 35(2). Additional Protocol I states, "It is prohibited to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." *Id.* The 1907 Hague Regulations state in relevant part, "it is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering." 1907 Hague Convention IV, *supra* note 93, art. 23(e). Interestingly, the English translation of the 1899 Convention substitutes "of a nature to" in place of "calculated to." The 1907 English translation's alternation has suggested to some addition of a scienter element. *But see* M.G. Cowling, *The Relationship Between Military Necessity and the Principle of Superfluous Injury and Unnecessary Suffering in the Law of Armed Conflict*, 25 S. AFR. Y.B. INT'L L. 131, 140 (2000) (discerning no practical difference between operation of the 1899 and 1907 statements of unnecessary suffering); Meyrowitz, *supra* note 86, at 102. However, no meaningful change appears in the French version, which States chose as the official text of both Hague Conventions.

¹⁷⁴ *Id.* art. 35(1).

grave breaches regime introduced by the 1949 Geneva Conventions.¹⁷⁵ The Protocol includes perfidy among six acts that constitute grave breaches when “committed wilfully . . . and causing death or serious injury to body or health”¹⁷⁶

Unlike its five cohorts, perfidy is little affected by the grave breach death or serious injury requirement. Recall that AP I prohibited perfidy itself requires such consequences through Article 37. Instead, the grave breach provision’s narrowing effect on AP I perfidy comes from the particular form of confidence invited. Article 85 describes only “the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion or of other protective signs recognized by the Conventions or the Protocol.”¹⁷⁷ Thus only confidence invited with respect to a narrow collection of law-of-war protective emblems registers as a grave breach of AP I. Perfidious resort to civilian status or that of wounded and sick does not constitute a grave breach of AP I.

The practical consequences of these narrowed enforcement provisions are significant. Simple breaches, as opposed to grave breaches, of the perfidy prohibition carry no duty on the part of AP I State parties to enact domestic penal sanctions against perpetrators.¹⁷⁸ Nor do simple breaches of perfidy give rise under AP I and the Conventions’ grave breaches regime to a duty on the part of State parties to search for perpetrators.¹⁷⁹ Similarly, State parties are not required by AP I to prosecute or extradite perpetrators of simple breaches of the

¹⁷⁵ Geneva Convention I, *supra* note 53, arts. 49–51; Geneva Convention II, *supra* note 53, arts. 50–52; Geneva Convention III, *supra* note 53, arts. 129–31; Geneva Convention IV, *supra* note 53, arts. 146–48.

¹⁷⁶ 1977 Additional Protocol I, *supra* note 41, art. 85(3).

¹⁷⁷ *Id.* art. 85(3)(f).

¹⁷⁸ The obligation to enact penal sanctions for grave breaches appears identically in all four 1949 Geneva Conventions. Geneva Convention I, *supra* note 53, art. 49; Geneva Convention II, *supra* note 53, art. 50; Geneva Convention III, *supra* note 53, art. 129; Geneva Convention IV, *supra* note 53, art. 146. States Parties are not explicitly required by the grave breach system to enact penal sanctions for simple breaches. They are required merely “take measures necessary for suppression” of simple breaches. Geneva Convention I, *supra* note 53, art. 49; Geneva Convention II, *supra* note 53, art. 50; Geneva Convention III, *supra* note 53, art. 129; Geneva Convention IV, *supra* note 53, art. 146.

¹⁷⁹ The obligation to search for persons alleged to have committed grave breaches appears identically in all four 1949 Geneva Conventions. Geneva Convention I, *supra* note 53, art. 49; Geneva Convention II, *supra* note 53, art. 50; Geneva Convention III, *supra* note 53, art. 129; Geneva Convention IV, *supra* note 53, art. 146.

protocol under the principle of *aut dedere aut judicare*.¹⁸⁰ Perhaps most significantly, the system of universal jurisdiction, which is part of the grave breach regime, does not extend to simple breaches.¹⁸¹ Therefore all the traditional minimums for domestic criminal jurisdiction including nationality or territoriality seemingly apply to incidents of non-grave perfidy. Finally, prosecutions of simple breaches of perfidy cannot rely on the severely negative gravitas that attends grave breaches of the Geneva Conventions and their protocols.

Ultimately, it seems the best understanding of the codified, law-of-war perfidy prohibition of AP I appreciates three varieties of perfidy: simple perfidy; prohibited perfidy; and grave perfidy. Simple perfidy includes all acts, regardless of consequences, that falsely invite an enemy to accord law-of-war protection and then betray that confidence in bad faith. Prohibited perfidy includes only perfidious acts that proximately result in death, injury, or capture of the betrayed enemy. And grave perfidy constitutes prohibited perfidy against a person protected by one of the four 1949 Geneva Conventions by false resort only to the protected emblems of the Red Cross.

If the effect of prior law-of-war treaties had been to shift perfidy gradually from broad custom into a specific prohibition, it is clear that AP I finished the job. The AP I provision on perfidy is a sharp conversion of the perfidy prohibition from broad principle into an expression of a specific prohibition. Through AP I, States appear finally to have dealt with perfidy squarely as a specific prohibition rather than as a mere sensibility of honorable conduct in war. Compared with its forebears, the AP I perfidy prohibition relies to a far lesser extent on the readers' familiarity with military custom and subjective notions of chivalry. But with codification and specificity came a critical narrowing

¹⁸⁰ The obligation to bring to justice or extradite persons alleged to have committed grave breaches appears identically in all four Geneva Conventions. Geneva Convention I, *supra* note 53, arts. 49–51; Geneva Convention II, *supra* note 53, arts. 50–52; Geneva Convention III, *supra* note 53, arts. 129–31; Geneva Convention IV, *supra* note 53, arts. 146–48.

¹⁸¹ The grave breaches regime of the 1949 Geneva Conventions, and by extension AP I, is widely recognized as an example of universal jurisdiction. States may prosecute grave breaches without any of the traditional sources of international jurisdiction such as nationality, territoriality, or passive personality. Joshua Ruby, *An Evolutionary Theory of Universal Jurisdiction*, 14 UCLA J. INT'L L. & FOR. AFF. 567, 584 (2009) (citing Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 217 (1945)); Antonio Cassese, *Is the Bell Tolling for Universality—A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 591 (2003).

of the prohibition. Following States' twentieth century narrowing of the perfidy prohibition through law-of-war treaties, what remains of the customs and principles codified by AP I and its forebears? Do broader principles concerning perfidy and treachery in war persist to limit the conduct of war in meaningful and relevant ways?

III. Perfidy and the Principle of Chivalry

Along with occasional judicial notice¹⁸² and regular mention in military legal manuals,¹⁸³ treaty law makes clear that international custom and principles continue to operate in the modern law of war. Since the 1899 Hague Second Convention, nearly every significant law-of-war treaty has included, in either its preamble or operative sections, a version of the Martens Clause.¹⁸⁴ For example, the 1899 Hague Convention preamble states,

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. . . .¹⁸⁵

¹⁸² Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶¶ 190–91 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (identifying principle of distinction); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶¶ 109, 113 n.220, 157 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (describing customary duties of discrimination between combatants and civilians as well as military necessity); Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (discussing the principle of military objective/necessity); ICJ Nuclear Weapon Opinion, *supra* note 99, ¶ 78 (identifying principle of distinction); United States v. List (The "Hostage Case"), 11 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 OCTOBER 1946–APRIL 1949, at 759, 1253–54 (U.S. Gov't Print. Office 1950) (discussing the principle of military necessity).

¹⁸³ See *supra* note 56 and accompanying text.

¹⁸⁴ See, e.g., 1949 Geneva Convention I, *supra* note 53, art. 63; 1949 Geneva Convention II, *supra* note 53, art. 62; 1949 Geneva Convention III, *supra* note 53, art. 142; Geneva Convention IV, *supra* note 53, art. 158; 1977 Additional Protocol I, *supra* note 41, art. 1(2); 1980 Convention on Conventional Weapons, *supra* note 39, pmbl.

¹⁸⁵ 1899 Hague Convention II, *supra* note 92, pmbl.

Initially proposed by the influential Russian delegate Martens¹⁸⁶ to resolve debate over the rights of inhabitants of occupied territory to resist invading forces, the eponymous Martens Clause soon took on far greater significance.¹⁸⁷ The clause now stands both as a testament to the limits of States' agreement on codified rules and also as confirmation of their conviction that absence of treaty provisions does not give rise to lawlessness in war.

Although typically offered as an account of the continuing role of custom as a source of law-of-war obligations, the Martens Clause also illustrates the role of general law-of-war principles in regulating the conduct of hostilities.¹⁸⁸ The term "usages" calls to mind long-standing, law-of-war references to the "customs and usages" of war that predated major codifications.¹⁸⁹ Better yet, the clause's resort to "laws of humanity" tracks the widely acknowledged law-of-war principle of humanity.¹⁹⁰ The clause is perhaps the clearest indication that, despite their late nineteenth-century enthusiasm for codification, States envisioned a continuing role for unwritten custom and general law-of-war principles.

The law-of-war principle most frequently identified with a prohibition of perfidy and treachery is chivalry¹⁹¹ or as it is sometimes

¹⁸⁶ See *supra* notes 110–11 and accompanying text.

¹⁸⁷ 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 547–48.

¹⁸⁸ IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 29 (2009) (citing Antonio Cassese, *The Martens Clause: Half a Loaf or Simply a Pie in the Sky*, EUR. J. INT'L L. 187, 188 (2000)). Although he acknowledges critics, Henderson ultimately subscribes to an expansive view of the intended effect of the Martens Clause. Henderson notes the U.S. Military Tribunal at Nuremberg in the *Krupp* Case regarded the Clause "much more than a pious declaration." *Id.* (quoting *United States of America v. Krupp von Bohlen und Halbach*).

¹⁸⁹ See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 41 (2010) (citing UK MANUAL, *supra* note 56, at 7).

¹⁹⁰ *Williams v. Bruffy*, 96 U.S. 176, 191 (1877); *In re The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 667 (1862); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); UK MANUAL, *supra* note 56, ¶ 2.3; CANADIAN MANUAL, *supra* note 56, ¶ 202.1; GERMAN IHL MANUAL, *supra* note 56, ¶ 131; FM 27-10, *supra* note 56, ¶ 3; U.S. DRAFT MANUAL, *supra* note 56, ¶ 2.003.

¹⁹¹ BOTHE ET AL., *supra* note 138, at 202 (asserting perfidy is "derived from the principle of chivalry"); Davis Brown, *Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARV. INT'L L. J. 179, 203 (2006) (including perfidy in discussion of chivalry); see also CANADIAN MANUAL, *supra* note 56, ¶ 7 (stating, chivalry is reflected in specific prohibitions such as those against dishonourable or treacherous conduct and against misuse of enemy flags or flags of truce.").

expressed, honor. Chivalry is not unanimously recognized as a modern principle of the law of war. In fact, few modern sources include it at all. How or exactly when chivalry came to be omitted from mainstream articulations of the principles of the law of war is unclear.

The most notable proponents of a principle of chivalry are the Canadian Manual of the Law of Armed Conflict,¹⁹² a 1956 U.S. legal manual on land warfare,¹⁹³ and a draft law-of-war manual recently circulated among U.S. government agencies.¹⁹⁴ Still, support is less than emphatic. The Canadian Manual concedes the chivalry principle's ambiguity immediately after announcing it. It observes, "The concept of chivalry is difficult to define. It refers to the conduct of armed conflict in accordance with certain recognized formalities and courtesies."¹⁹⁵ The Canadian Manual identifies none of these formalities or courtesies explicitly. Some academic commentators also include chivalry as a modern principle of the law of war.¹⁹⁶ Professor Wingfield, for instance, defines chivalry as, "the principle which forbids perfidy or treachery in military operations, while still permitting legitimate ruses of war."¹⁹⁷

The concept of chivalry is more commonly associated with warfare of the Middle Ages.¹⁹⁸ Common notions of medieval warfare are bound up with romantic visions of courtesies scrupulously observed between

¹⁹² CANADIAN MANUAL, *supra* note 56, ¶ 202.7; U.S. DRAFT MANUAL, *supra* note 56, ch. II (citing honor among law-of-war basic principles). The Canadian Manual actually includes chivalry among three "primary concepts" reserving the term principles for three notions including: the Humanitarian Principle, the Principle of the Law of Geneva, and the Principle of the Law of War. CANADIAN MANUAL, *supra* note 56, ¶¶ 202–03.

¹⁹³ FM 27-10, *supra* note 56, ¶ 3. Though obviously dated, Field Manual 27-10 remains the U.S. Army's primary law-of-war manual. The manual includes no elaboration on the principle of chivalry beyond its initial enumeration among basic principles.

¹⁹⁴ U.S. DRAFT MANUAL, *supra* note 56, ¶ 2.006.

¹⁹⁵ CANADIAN MANUAL, *supra* note 56, ¶ 202.7.

¹⁹⁶ 2 LASSA OPPENHEIM, INTERNATIONAL LAW 226–27 (1944) (describing the principle of chivalry as introducing "a certain amount of fairness in offence and defence, and a certain mutual respect"); Peter J. Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) under Public International Law*, 57 A.F. L. REV. 209, 226 (2005) (citing LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 348 (2d ed. 2000)); Thomas C. Wingfield, *Chivalry and the Use of Force*, 32 U. TOL. L. REV. 111, 112 (2000) (citing Major Walter G. Sharp Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 31 (1992)); Gerald I. A. D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INT'L REV. RED CROSS 3 (1965).

¹⁹⁷ Wingfield, *supra* note 196, at 112.

¹⁹⁸ Robert C. Stacey, *The Age of Chivalry*, in Howard et al., *supra* note 2, at 29–31.

belligerents. Yet even in that period, instances of feigned retreat (although there is generally no recognized legal duty to spare retreating forces)¹⁹⁹ and other seemingly dishonorable acts are found in accounts of Norman battles against English forces in the eleventh century as well as Mongol tactics of the period.²⁰⁰ Worse, it was not at all unheard of for medieval combatants to resort to abject forms of perfidy. Accounts of outright perfidy include the English Tudors' desperate efforts to survive elimination by capturing the castle of Edward I at Conwy. Reduced to insufficient numbers to take the castle by force, the Tudors sent a carpenter who, when admitted to perform work, attacked the guards and opened the gates for a follow-on force.²⁰¹ Similarly, a historian recounts instances of knights entering a walled town, announcing themselves as allies, then slaughtering the defenders.²⁰²

The late Professor Colonel Gerald I. A. D. Draper counseled rejecting medieval chivalry as a source of the modern principle altogether. He observed chivalry of the age of Crusades is “not the area in which [a] positive contribution of chivalry to the story of restraints in warfare can properly be sought.”²⁰³ Rather than constitute a reliable or fundamental principle, chivalry seems often to have been merely an implied contract between an elite and homogenous class of combatants.

Thin enforcement of a chivalry principle extends to modern military practice as well. Research reveals no instances of international criminal enforcement of the principle. The nearest military criminal provision to chivalry may be a punitive article of the U.S. Uniform Code of Military Justice (UCMJ). General Article 134 of the UCMJ prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the

¹⁹⁹ *But see* Gabrielle Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 154–64 (2010). Blum argues for reconsideration of the principles of distinction and necessity to account for threat posed by enemy forces rather than mere status. *Id.*

²⁰⁰ JON LATIMER, *DECEPTION IN WAR* 10 (2001) (citing CHARLES OMAN, *A HISTORY OF THE ART OF WAR IN THE MIDDLE AGES* 162 (1978)). Latimer concedes, however, that other historians contest whether such retreats were in fact deliberate. *Id.* (citing HANS DELBRÜCK, *A HISTORY OF THE ART OF WAR WITHIN THE FRAMEWORK OF POLITICAL HISTORY* 159 (1982)).

²⁰¹ LATIMER *supra* note 200, at 13 (citing J. G. D. DAVIES, *OWEN GLYN DWR* 45–50 (1934)).

²⁰² Wingfield, *supra* note 196, at 131 (citing BARBARA TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY* 64 (Knopf 1993) (1978)).

²⁰³ Draper, *supra* note 196, at 17.

armed forces”²⁰⁴ Fifty-three enumerated examples of service discrediting conduct, from animal abuse to wearing unauthorized insignia, follow the general article. Article 134 also permits non-enumerated charges based on breaches of service customs.²⁰⁵ While some examples allude to notions of honorable service,²⁰⁶ none tracks or even approximates perfidy or law-of-war principles generally.

Even champions of the principle of chivalry concede its erosion as a recognized limit on warfare.²⁰⁷ In addition to suffering ambiguity, customary chivalry has at times rested on false assumptions of universality. Howard notes that “an assumption of common values” governing the conduct of hostilities marked the Grotian era—a period from the late seventeenth century to the Hague Conferences.²⁰⁸ Yet he argues the twentieth century World Wars marked the end of this era and especially its accompanying assumptions with respect to law-of-war custom and principles. The World Wars revealed that notions of acceptable conduct and especially of honor and chivalry were not universal, particularly in East Asia where honor was derived from “a totally different cultural tradition.”²⁰⁹

Although law-of-war principles have long been conceded to operate vaguely as noted above, notions of chivalry at this point may be so indeterminate as to be unenforceable. Chivalry seems ultimately to be found in the eye of the beholder rather than generally accepted laws of war.²¹⁰ And regardless whether one accepts chivalry as a present principle of the law of war or not, such an honor-bound tenet seems unlikely to operate effectively in combat pitting asymmetric or non-peer

²⁰⁴ 10 U.S.C. § 934 (2013).

²⁰⁵ 2012 MCM, *supra* note 71, pt. IV, ¶ 60.c.(2)(b). The manual explains breaches of customs of service as behavior inconsistent with “long established practices which by common usage have attained the force of law in the military or Community affected by them.” *Id.*

²⁰⁶ *Id.* ¶¶ 62, 69, 83, 89, 107 (enumerating Adultery, Wrongful Cohabitation, Fraternalization, Indecent Language, Straggling as punishable offenses).

²⁰⁷ Sharp observes, “Chivalrous conduct is a broad concept which has lost its effectiveness as an independent principle that governs the conduct of war.” Sharp, *supra* note 196, at 31.

²⁰⁸ Howard et al., *supra* note 2, at 7–8.

²⁰⁹ *Id.* at 8.

²¹⁰ See Roberts, *supra* note 124, at 115. Roberts observes, “Chivalry has proven to be an ineffective deterrent to proscribed conduct in modern warfare. . . . In short, chivalry is not generally recognized as a practical restraint on war” *Id.* at 115–16 (citing U.S. DEP’T OF ARMY, PAM. 27-161-22, INTERNATIONAL LAW 15 (1962) (obsolete)).

competitors as so many modern armed conflicts do.²¹¹ In response, some maintain the groundings of custom and principles of the law of war have shifted. Perhaps law-of-war principles no longer spring from contractual promissory exchanges but rather “informal conventions” that prescribe lawful behavior, drawn from “norms of human dignity and individual rights.”²¹² Under such a theory, the prospect that an enemy will not reciprocate adherence to law-of-war principles weakens the case for retaliatory abandonment of law. The theory is attractive with respect to the most widely accepted principles such as necessity, discrimination, proportionality, and humanity. However, the possibility a principle as debated and indeterminate as chivalry would continue to operate in the face of persistent enemy violations seems unlikely.

Ultimately, the case for an extant principle of chivalry that includes a prohibition on perfidy broader than that articulated by current treaty law seems doubtful. Claims to chivalry’s survival in the modern law of war seem more nostalgic than descriptive. Chivalry as a principle, and any conception of prohibited perfidy it included, would be unlikely to actually regulate the conduct of hostilities or form a reliable basis for law-of-war enforcement efforts such as criminal prosecution. Few military trial counsel, few international tribunal prosecutors, and few operational legal advisors would dare hitch their professional reputations to an analysis of perfidy that strayed so far from the codified perfidy prohibition.²¹³ Much like the Hague Regulations’ early twentieth-century track record has been described, a chivalry-based perfidy prohibition might constitute at most merely an “aid to vilification.”²¹⁴

²¹¹ For discussion of legal considerations in asymmetric warfare generally, see Wolff Heintschel von Heinegg, *Asymmetric Warfare: How to Respond?*, 87 INT’L L. STUD. 463 (2011); Michael N. Schmitt, *Asymmetric Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES (Wolff Heintschel von Heinegg, et al. eds., 2007); Robin Geiß, *Asymmetric Conflict Structures*, 88 INT’L REV. RED CROSS 757 (2006).

²¹² THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 446 (2008); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

²¹³ The U.S. military justice system offers the potential of charging war crimes at court-martial on the basis of law-of-war principles. Article 18 of the Uniform Code of Military Justice establishes general court-martial jurisdiction “to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” 10 U.S.C. § 818 (2013). To the author’s knowledge no U.S. court-martial has tried such a case to completion.

²¹⁴ BEST, *supra* note 95, at 47.

IV. Military Deception Short of Perfidy

A complete understanding of law-of-war perfidy finally requires an understanding of what perfidy is not. Since the 1880 Oxford Manual, reservations highlighting lawful military deception and ruses of war have closely followed codifications of the perfidy prohibition. States have clearly and consistently distinguished ruses and other acceptable forms of military deception from perfidy and treachery. As with perfidy, however, a clear conception of permissible ruses and deception is elusive.

What unifies ruses and what perhaps distinguishes them best from perfidy is resort to means unrelated to law-of-war protection. Lawful ruses do not seek to deceive adversaries with regard to duties or obligations under the law of war. In particular, ruses do not feign law-of-war protected status such as the *hors de combat* or civilian.²¹⁵ Ruses do not invite an enemy to place confidence—to rely detrimentally upon—an apparent claim to the protections of the law of war. Kalshoven usefully describes ruses as “those acts which the enemy would have had reason to expect, or in any event had no reason not to expect.”²¹⁶ Thus, the range of permissible ruses is in some sense tied to historic military practice and custom.

At the same time, the most successful deceptions seem to involve significant innovation and imagination.²¹⁷ Specific examples of permissible deception have included, “decoys, dummy artillery pieces, aircraft, or tanks; ambushes; mock operations; feigned attacks or retreats; communicating with non-existent units; simulating the noise of an advancing column; using small units to simulate large forces; allowing the enemy to intercept false documents; altering landmarks and road

²¹⁵ The term *hors de combat* describes classes of combatants who no longer take part in hostilities either voluntarily through surrender or by physical incapacitation from combat. See FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 69 (2001) (describing protection under Common Article 3 of the 1949 Geneva Conventions for persons *hors de combat*).

²¹⁶ FRITS KALSHOVEN, THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT 102 (1973).

²¹⁷ Harlan W. Jencks, *Strategic Deception in The Chinese Civil War*, in STRATEGIC MILITARY DECEPTION (Daniel & Herbig eds., 1982) (describing Chinese Communist use of large-scale decoys and simulated retreat in May 1947).

signs; and misinformation”²¹⁸ Military history is replete with such clever schemes of deception, often pivotal to tactical and even strategic outcomes.²¹⁹

Although its regular use appeared relatively late in the history of warfare, camouflage is widely and consistently touted as a lawful form of military deception.²²⁰ Additional Protocol I specifically includes “use of camouflage” among ruses not prohibited.²²¹ The idea behind camouflage, of course, is to make objects invisible, “to merge them with their surroundings.”²²² Effective camouflage frequently employs patterns that imitate an object’s background.²²³ More subtly, it has been suggested that camouflage is actually, “concealing the fact that you are

²¹⁸ SOLIS, *supra* note 189, at 427 (citing 1977 Additional Protocol I, *supra* note 41, art. 37); DINSTEIN, *supra* note 37, at 240; THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW ¶ 471 (Dieter Fleck ed., 2d ed. 2008).

²¹⁹ DAVID GLANTZ, SOVIET MILITARY DECEPTION IN THE SECOND WORLD WAR 2–4 (1989) (describing especially, the Soviet deception concept of *Maskirovka*); EPHRAIM KAM, SURPRISE ATTACK 7 (1988) (explaining psychological effects of surprise based on deception); CHARLES CRUICKSHANK, DECEPTION IN WORLD WAR II, at 206–14 (1979) (recounting dozens of military deception schemes from strategic to tactical levels).

²²⁰ GUY HARTCUP, CAMOUFLAGE: A HISTORY OF CONCEALMENT AND DECEPTION IN WAR 12 (1980). Hartcup adds, “The first troops to wear khaki were the Indian Guides, a paramilitary force raised by Col Sir Harry Lumsden in 1846.” *Id.* at 12 (citing P. Cadell, *Beginnings of Khaki*, 31 J. SOC. ARMY HIST. RES. (1953)). Camouflage historians surmise that military resistance to camouflage was rooted in notions of honor and manliness. Behrens notes that at the end of the nineteenth century camouflage was thought “unmanly or effeminate.” ROY BEHRENS, CAMOUPEDIA 8 (2009) (citing H.G. WELLS, WAR AND THE FUTURE: ITALY, FRANCE AND BRITAIN AT WAR IN 1917 (1917)). Behrens also surmises that early camouflage demonstrations too frequently embarrassed political and military decision makers generating resistance. *Id.* at 213. He observes, “Undoubtedly one of the reasons why military officers were resistant to camouflage is that during their inspections too often if made them look stupid.” *Id.* Behrens’s text includes a photograph of a well-camouflaged soldier at the feet of President Wilson and General John ‘Blackjack’ Pershing. *Id.*

²²¹ 1977 Additional Protocol I, *supra* note 41, art. 37(2).

²²² Salvador Dalí, *Total Camouflage for Total War*, in THE COLLECTED WRITINGS OF SALVADOR DALÍ (Haim Finklestein ed., 1998). Artists were involved in the development and employment of military camouflage since its inception. Biologists contributed widely to military understandings of camouflage and protective coloration as well. Abbott H. Thayer, *The Law Which Underlies Protective Coloration*, 13 THE AUK 477 (1896).

²²³ Roy R. Behrens, *Revisiting Abbott Thayer: Non-Scientific Reflections about Camouflage in Art, War and Zoology*, 364 PHIL. TRANS. ROYAL SOC. BIOLOGY 497, 500 (2009) (citing Gerald Thayer, *Camouflage in Nature and In War*, 10 BROOK. MUSEUM Q. 159 (1923)).

concealing.”²²⁴ Early efforts at camouflage appear to have employed natural materials immediately available to armed forces.²²⁵ Later, military units dedicated to camouflage operations emerged, employing paint and synthetic materials that resembled natural materials.²²⁶ Today, the wear of camouflage-patterned clothing is so-widely used by armed forces as to be in many contexts itself a distinctive and visible claim to combat status on the battlefield.

Although widely accepted and practiced as a means of military ruse, camouflage may be underappreciated as a source of close questions concerning perfidy. For instance, there is debate whether disguising military objectives as civilian objects constitutes lawful camouflage. One commentator observes, “it is a common practice, not prohibited by Geneva Protocol I, to disguise a military object to appear to be a civilian object.”²²⁷ Although the practice described might be more accurately labeled “mimicry,”²²⁸ than camouflage, this view was thought technically correct in a number of historical cases.

During the Second World War, industrial camouflage schemes went to extraordinary length to give aircraft factories and other military industrial complexes the appearance of civilian neighborhoods.²²⁹ The United States fabricated complete towns, including houses, streets, and trees, atop the roofs of the Boeing Corporation’s Seattle military aircraft assembly plants.²³⁰ Other U.S. industrial camouflage schemes included the addition of false church spires to critical factories.²³¹ In fact, U.S. industrial camouflage practice was advanced enough to inspire a manual on the topic jointly published by the Department of Agriculture and the

²²⁴ HARTCUP, *supra* note 220, at 7. Hartcup elaborates that military camouflage is more complex, involving “concealment, deception or misdirection, and screening.” *Id.*

²²⁵ U.S. ARMY CORPS OF ENG’RS, U.S. WAR DEP’T, ENG’R INSTR. MANUAL NO. 3: CAMOUFLAGE 3 (1917).

²²⁶ See ANN ELIAS, CAMOUFLAGE AUSTRALIA: ART, NATURE, SCIENCE AND WAR4 (2011). Elias observes, “It was in WWI, in France and later Britain, Germany and the US, that innovations in military camouflage developed, and when camouflage units and camouflage specialists were first made officially part of military organisations.” *Id.*

²²⁷ J. Ashley Roach, *Ruses and Perfidy: Deception during Armed Conflict*, 23 U. TOL. L. REV. 395, 400 (1991).

²²⁸ Thayer, *supra* note 222, at 477 (“Mimicry makes an animal appear to be some other thing, whereas [protective coloration] makes him cease to appear to exist at all.”).

²²⁹ BEHRENS, *supra* note 220, at 39, 120.

²³⁰ *Id.* at 39. The Douglas and Lockheed companies employed similar schemes at their aircraft manufacturing sites. *Id.* at 120.

²³¹ *Id.* United States aircraft manufacturers hired civilian camoufleurs to cover buildings with dummy civilian structures. *Id.*

Pratt Institute Art School.²³² The manual recommends camouflaging roofs of factories to resemble small homes and back yards.²³³

The United States was not alone in the practice of masking military objectives as civilian objects. The civil defense plan of Australia involved disguising munitions bunkers and bomber hangers to simulate domestic houses and public buildings.²³⁴ Australia even went a step further than masking civilian industrial sites. At the Bankstown military fighter and interceptor station outside Sydney, the Australian Air Force employed one of the most elaborate civilian mimicry efforts of the war.²³⁵ Under the guidance of the dogged proponent of camouflage William Dakin, the Australians configured the base to appear as a small rural town. Ann Elias relates the project:

The results exceeded Dakin's expectations. Out of plywood, hessian and linoflage, camouflage labourers built spectacular structures mimicking the types of domestic and commercial buildings commonly found in the Bankstown region in 1940. But hidden behind their innocent-looking facades, ones that blended so well with the Sydney environs, were fighter and bomber aircraft and munitions dumps. Aircraft hideouts masquerading as domestic houses, other buildings as a sawmill, an ironmonger's store with a with a quick release door in a simulated wall, a grandstand, an advertisement hoarding, a "hovel" to fit in the low socio-economic profile of the area.²³⁶

The Bankstown project is not merely remarkable for its elaborate and confident mimicry of "innocent-looking" objects. The Australians'

²³² KONRAD F. WITTMAN, *INDUSTRIAL CAMOUFLAGE MANUAL* (1942). Not to be outdone, the U.S. Department of War issued its own manual on camouflage of civilian installations. U.S. WAR DEP'T, *CIVILIAN DEFENSE: PROTECTIVE CONCEALMENT* (1942) (suggesting military industrial facilities mimic civilian buildings).

²³³ WITTMAN, *supra* note 232, at 51. In fairness, a large part of the manual's work is dedicated to topics other than mimicry of civilian structures, such as deceptive shading, dispersal of buildings, distortion of shadows, and concealment of transportation routes. *Id.* at 37, 45.

²³⁴ ELIAS, *supra* note 226, at xiv, 7.

²³⁵ *Id.* at 36 (quoting *Disguise and Concealment*, AIR INTELLIGENCE REPS. (National Archives of Australia, ser. C1707, item 36, at 1)).

²³⁶ ELIAS, *supra* note 226, at 36. Elias includes a convincing photo of a bomber hanger disguised as a single-family home. *Id.* at 34.

professed purpose for the Banskdown scheme was “for attack as well as defence, and for aggressive surprise. These roughly made large-scale buildings mimicking the vernacular architecture of Sydney concealed bomber and fighter planes ready to take to the air at short notice”²³⁷

Other Allied powers engaged in similar schemes. After their debacle at Dunkirk, the British disguised domestic pill-boxes and gun positions as “public lavatories, chicken houses, or romantic ruins”²³⁸ Yet discretion, or perhaps a stronger sensibility for potential treachery than their allies’, led the British to reject proposals to affix church false steeples on a high building at the Rolls-Royce factory at Derby in May 1939.²³⁹ An official disapproved, rightly concluding that the scheme would induce enemy bombardments of churches if discovered.²⁴⁰

To be sure, a critical aspect of perfidy is present in each of these camouflage schemes, namely, feigned resort to a protected law-of-war status, that of civilian object. But, permitting retroactive application of the AP I perfidy prohibition, none of the schemes would likely constitute prohibited perfidy. Most schemes failed to result in enemy casualties or capture directly. While the equipment produced by camouflaged industrial facilities might ultimately have produced enemy casualties, the majority view does not include such effects as sufficient to constitute perfidy. Only the Bankstown project was capable of combining its deception with any form of offensive action or attack. Still, the linkage between the hangars’ feigned civilian status and any enemy pilots being shot down by interceptors launched from the base was likely too remote or indirect for AP I prohibited perfidy.

Yet the traditional concerns of perfidy, the suspicion generated generally toward the feigned protected class especially, are surely apposite to each scheme. Despite widespread practice, the dangerous implications of such arrangements for civilians and civilian objects are clear. An enemy confronting feigned civilian objects might come to view with suspicion and soon with enmity the entire class of civilians. More dangerously, that enemy might view as suspect other or even all law-of-war classes of protection, launching a dangerous tit-for-tat spiral toward unrestrained war.

²³⁷ *Id.* at 37.

²³⁸ HARTCUP, *supra* note 220, at 81.

²³⁹ *Id.* at 54.

²⁴⁰ *Id.*

It seems highly unlikely that any State committed to honoring the object and purpose of restraints in war would adopt such schemes today. Still, only such purposive analyses or very broad conceptions of fairness and good faith in the conduct of warfare could be said to limit resort to civilian camouflage and mimicry for general military advantage. It is unclear from law-of-war doctrine and scholarship whether such a general duty existed at the time or whether such a duty exists today.

Applying by analogy the distinctions States have made so regularly between perfidy and legitimate military deception and ruses is equally difficult in modern warfare. Some examples are relatively straightforward. For instance, use of enemy signals has traditionally been regarded as an acceptable form of deception.²⁴¹ Use of false distress signals or signals reserved for medical aircraft is prohibited.²⁴² It seems clear then that vectors of cyber attack that mimic enemy cyber traffic for malicious or destructive purposes constitute lawful ruses. While masking malware as medical or distress cyber signals would not.

Applying the traditionally accepted use of camouflage to cyberspace, however, produces confounding analytical difficulty. At first blush, a number of cyber attack scenarios seem relevant to the camouflage distinction. In particular, logic bombs and other malware that lie dormant or hidden for later use seem in many respects to resemble use of camouflage or mimicry. These surreptitious cyber means appear to constitute important features of States' cyber arsenals.²⁴³ Logic bombs typically embed themselves in surrounding, legitimate code. Even if noticed, the code comprising the best logic bombs will seem innocuous to all but the keenest eyes and electronic scans. Thus the conclusion that logic bombs are a form of lawful camouflage is attractive.

On closer examination, however, difficulties arise. As related earlier, the least objectionable uses of camouflage involve matching an object or person's appearance with a natural environment. The use of naturally occurring foliage and other features of terrain is most common. It is in this sense that camouflage is understood as an effort to escape notice at all. Mimicry, on the other hand, though often conceived as a

²⁴¹ GERMAN IHL MANUAL, *supra* note 56, ¶ 471.

²⁴² U.S. DEP'T OF AIR FORCE, PAM. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS ¶ 8-4(b) (1976).

²⁴³ See Paul A. Walker, *Traditional Military Activities in Cyberspace: Preparing for "Netwar,"* 22 FLA. J. INT'L L. 333, 349–51 (2010) (describing hidden "force positioning" and latent "kill switches" in cyber space).

form of camouflage, does not involve escaping notice but rather deceiving the viewer as to the nature of the object or person perceived. The Second World War industrial camouflage schemes described previously are more likely forms of mimicry. They did not really escape the notice of enemy aircraft crews. They deceived aircrews as to their true military nature.

Upon reflection, cyber camouflage seems much more similar to civilian mimicry than to pure camouflage. Most fundamentally, cyberspace seems not to offer anything like a natural environment. Being an entirely human creation, all of cyberspace, including its pathways, the cables, satellites, nodes, and signals of networks, and its endpoints, the terminals, servers, memory, programs and processors constitute manmade objects for law-of-war purposes. More importantly, all of cyberspace constitutes an instrumentality—a means of accomplishing functionality or some desired end. In the overwhelming majority of cases, malware that seeks to go unnoticed cannot pose merely as part of a naturally occurring background. Rather, hidden malware such as a logic bomb or deeply embedded rootkit mimics the innocuous, usually civilian, objects or lines of code that surround it. Indeed, the goal of the malware designer is entirely for users and detection programs to perceive malware as a seamless part of legitimate background code.

As the preceding historical and current examples illustrate, the line between lawful ruse and prohibited perfidy remains blurred at best. If States' century-long effort at converting the perfidy prohibition from a broadly articulated principle to a specific prohibition was intended to produce doctrinal clarity, with respect to distinguishing ruse from perfidy, that effort has failed in significant respects. We are still left, it seems, in the place of the Lieber Code: guided more by broad sensibilities of what is right or moral than by what has been received by States as hard law.

V. The Future of Law-of-War Perfidy

Conversion of the perfidy prohibition from a general principle understood broadly by armed forces into a specific, technically-bound, law-of-war prohibition has undoubtedly conditioned modern military lawyers and international jurists to think of perfidy in far narrower terms than their predecessors. While codified examples and the AP I definition of perfidy in particular likely removed a degree of subjective slack, the

price of clarity has been a less effective guarantee of the sanctity of the law of war as a means of minimal humanitarian exchange between belligerents.

Although a conception of perfidy that appreciates the three categories of AP I perfidy does justice to States' legislative choices, the distinctions made by AP I between categories of perfidy undervalue the fact that all perfidy, whether simple, prohibited, or grave, threatens combatants' faith in the law of war. Commenting on AP I generally, Geoffrey Best observed, "it reads like the work of lawyers writing for lawyers"²⁴⁴ The narrowed perfidy prohibition is a case in point—of far greater utility and service to prosecutors and defense counsel than to the true end users and ideals of the law of war.

Again, fidelity to principled interpretation of existing law prevents accepting a vision of universally prohibited perfidy that accepts effects short of killing and injury. Including in prohibited perfidy situations that merely result in gains in military or tactical advantage strains both the literal, treaty-based expression of perfidy and marginalizes its plain twentieth century evolutionary path from broad principle to specific prohibition. At present, an approach that abandons or ignores States' deliberate legislative work does not offer the law or its beneficiaries any real favors. Yet as a matter of *lex ferenda*, there is work to be done in this area—a broadening, if you will, of the concept of what constitutes treacherous conduct in emerging forms of warfare.

If the difficulty of policing bad faith resort to law-of-war protection was limited to the semantics and wording of the perfidy prohibition, the task of rectifying its shortcomings might be manageable. However, a final structural aspect of the existing law of war renders the perfidy prohibition under-inclusive, particularly with respect to emerging forms of warfare.

In addition to doctrinal narrowing by AP I and conceptual difficulties surrounding analogies to accepted lawful forms of deception and mimicry, a number of important structural facets of the law of war limit

²⁴⁴ BEST, *supra* note 95, at 270. Adam Roberts echoes the thought observing, "Lawyers tend to think in terms of enforcement through legal processes after a violation, though implementation may take many other forms. Indeed, enforcement's most important aspect is implementation through education and training in well-organized armed forces." Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 1, 16 (1995).

the application and operation of the perfidy prohibition in modern conflict and military operations. First, law-of-war perfidy prohibitions are limited to conduct during armed conflict.²⁴⁵ Only when the relevant conditions of material application exist do law-of-war prohibitions, such as that against perfidy, operate as a matter of law. The most widely used test for establishing conditions of armed conflict requires “resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²⁴⁶ Attacks conducted in a purely criminal context or lacking a sufficient nexus to armed conflict, no matter how egregiously they might betray a victim’s confidence, do not provoke law-of-war perfidy prohibitions.

A second limit on the operation of law-of-war perfidy prohibitions in the cyber context is the threshold of attack. Classically, *jus in bello* constraints on the conduct of targeting operations only apply to parties’ actions during attacks.²⁴⁷ Law-of-war principles such as distinction and proportionality apply far less clearly, if at all, to actions short of attack such as reconnaissance or espionage. As the ICRC notes, perfidy is a rule peculiar to combat.²⁴⁸ Consequently, law-of-war perfidy only occurs during operations that qualify as attacks in a *de jure* sense. Although the discourse of emerging domains of conflict such as cyberspace uses the term “attack” to refer to any number of malicious efforts or unauthorized actions, “attack” remains a legal term of art in the law of war.²⁴⁹ Thus cyber-theft, cyber-espionage, cyber-exploitation, and mere disruptions of service, even if committed in connection with an armed conflict, fail to

²⁴⁵ 1977 Additional Protocol I, *supra* note 41, art. 1(4).

²⁴⁶ Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²⁴⁷ See Michael N. Schmitt, *Attack as a Term of Art in International Law: The Cyber Operations Context*, in CZOSSECK ET AL., 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT: PROCEEDINGS 283, 289–92 (2012) (advocating an understanding of attack in cyber warfare limited to destructive acts). *But see* INT’L COMM. OF THE RED CROSS, 31ST INT’L CONFERENCE OF THE RED CROSS AND RED CRESCENT, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, REPORT 311C/11/5.1.2 (Oct. 2011) (applying law-of-war limits on notions of military objectives to cyber operations seemingly short of attack resulting in destruction).

²⁴⁸ API COMMENTARY, *supra* note 123, ¶ 1484.

²⁴⁹ 1977 Additional Protocol I, *supra* note 41, art. 49; TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE r. 30 & r. 30 cmt. (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL], available at <http://www.ccdcoe.org/249.html> (collecting an international group of experts’ interpretation of how the existing law of war applies to cyber warfare); Walker, *supra* note 243, at 333 (2010).

rise to the level of attack at all and therefore do not implicate the prohibition of perfidy.²⁵⁰

A further structural feature of the law of war relating to protected classes reduces the potential for application of the perfidy prohibition to many contexts of conflict. A correct understanding of the elements of perfidy limits resort to the prohibition outside armed conflict by recalling that only feigned *law-of-war* protected status qualifies as perfidy.²⁵¹ Some law-of-war protected classes involve extensive prerequisites and qualification criteria.²⁵² Additionally, recall that law-of-war protected status is only available during armed conflict. Deceptive resort to a law-of-war protected status outside the context of an armed conflict would usually not have the desired effect or provoke the forbearance it would in the context of ongoing hostilities.

Reprising the cyber context, imagine malware posing as an electronic communication to a prisoner of war. The message is arguably a form of communication protected by the law of war.²⁵³ Thus in theory, by resorting to a law-of-war protected class, the message is an invitation to confidence, the sort required to establish perfidy. Yet the message would only constitute an effective deception in a situation where prisoner-of-war status is recognized. No State involved in a situation short of international armed conflict—the only hostilities where prisoner of war status is available—would be induced to confidence by the feigned message.

Whatever one's conception of the perfidy prohibition, the overwhelming majority of conflicts, even armed conflicts as understood by the law of war, do not implicate perfidy because they do not satisfy the structural thresholds of the law of war. Thus only attacks that occur in the context of or which constitute armed conflict themselves and implicate a law-of-war protected class engage the perfidy prohibition at all.

Still, in spirit, perfidy and treachery have always captured a great deal of what is so troubling about deceptive attacks. A battlefield on which civilian and other law-of-war protected classes are routinely

²⁵⁰ TALLINN MANUAL, *supra* note 249, r. 30 & r. 30 cmt.

²⁵¹ See discussion *supra* accompanying notes 153–59.

²⁵² See, e.g., 1949 Geneva Convention III, *supra* note 53, art. 4.

²⁵³ TALLINN MANUAL, *supra* note 249, r. 76 & r. 76 cmt.

feigned greatly depletes general confidence in the law of war. If the technical case for perfidy in such cases is sometimes weak, one wonders how long States will accept the fallout from that gap.

A number of commentators have called for a revised expression of the perfidy prohibition.²⁵⁴ A functionalist or teleological examination of perfidy may reconcile some of the practical ruptures between what is perfidy and what is actually prohibited. The inspiration for the perfidy rule appears to come from traditional martial principles of honor and chivalry. Conduct not consistent with the traditions of the profession of arms yet short of true perfidy may be proscribed by a broader principle. Indeed, for those maintaining a legal distinction between treachery and perfidy, the former remains a broader rule enforcing notions of honorable combat. These early sources were understood to prohibit assassination, bounties, rewards against enemies, and criminalizing enemy status.

By the mid-late twentieth century, however, the grounding of the perfidy prohibition seems to have evolved toward vindicating more humanitarian purposes. Rather than protect combatant victims from dishonorable or unfair attacks, the purpose of prohibiting perfidy grew to guard the protected classes whose identity the perfidious attacker betrays. More importantly perhaps, the perfidy prohibition serves humanity by guarding the integrity of the law of war as a whole. While one might still say that soldiers and combatants enjoy protection, it is, in a sense, a collateral form of protection. The true object of protection from perfidy is the class of persons that ordinarily or legitimately benefits from the rule of protection abused by the perfidious actor. Civilians, the wounded, and those offering surrender or truce enjoy more reliable protection when soldiers are confident that their forbearance in attacking these persons will not be betrayed or used against them. Perfidious conduct degrades the humanitarian protections of victims, objects, and emblems whose identities are abused.²⁵⁵ As the situations in Afghanistan and Iraq sadly confirmed, the battlefields on which civilian status is regularly feigned for purposes of attack becomes a profoundly dangerous place for all civilians and civilian objects.

²⁵⁴ Greene, *supra* note 21, at 45; Brown, *supra* note 191, at 204–05; Fleck, *supra* note 144, at 270 (remarking “Current international treaties deal with ruses of war in far too general terms which reflect the minor significance attached to the element of deception by the traditional ‘strategical’ school of thought.”).

²⁵⁵ BOTHE ET AL., *supra* note 138, at 202.

A final rationale for the perfidy prohibition is to preserve the possibility of a return to peace. To prevent the degradation of trust and the bad faith between warring parties that would impede negotiation of peace terms. An effective perfidy prohibition preserves the good faith upon which ceasefires, armistices, and conclusions of hostilities rely.²⁵⁶ To prove the point, it seems the most intractable, enduring armed conflicts have been those where belligerents have lacked reliable mediums of exchange and communication as the law of war surely is.

Thus perhaps reinvigoration of a principle of chivalry or honor is indeed in order. Or perhaps development of a broader concept of treachery, distinct from the post-AP I narrow and technical notions associated with perfidy, is appropriate. Suggestions to return to a law of war derived from purely moral principles reminiscent of early law-of-war theorists such as Halleck²⁵⁷ may even be persuasive.²⁵⁸ At present, a principled remedy to the shortcomings of prohibited perfidy exposed by very real prospect of cyber warfare seems to require a degree of methodological consensus that does not exist between States.²⁵⁹ Though addressing neither perfidy nor cyber warfare specifically, the thoughts of Professor Roberts clarify the doctrinal dilemma presented.

The experience of land war in two world wars must raise a question as to whether formal legal codification is necessarily superior to the notions of custom, honor, professional standards, and natural law which preceded it. Codification in treaty form has such compelling virtues—verbal clarity, equal standards, the securing of formal acceptance by states—that it is bound to remain a central aspect of the laws of war. On the other hand, it risks being too rigid in face of changing situations and technologies; and it can make rules seem like artificial external impositions, rather than a natural outgrowth of

²⁵⁶ See Childress, *supra* note 59, at 49–50 (relating Lieber’s concern that assassination, treachery and other violations of confidence between adversaries “make[] the return to peace unnecessarily difficult”).

²⁵⁷ See *supra* text accompanying note 77.

²⁵⁸ Ingrid Dettner, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049, 1054 (2007) (advocating a return to peremptory rules derived from natural law and ethics).

²⁵⁹ For instance, disagreement whether to regulate Internet-based communications plagued the recent International Telephone and Telegraph Union treaty conference provoked the United States to decline signature.

the interests and experiences of a state and its armed forces.²⁶⁰

VI. Conclusion

More frequently than the volume and content of academic commentary suggests, the extant law of war proves adequate to the challenge of preserving humanity in modern warfare. Law-of-war principles such as distinction, proportionality, military necessity, and humanity go far toward civilizing hostilities and safeguarding civilians from the effects of destructive military operations. Additionally, specific prohibitions of the law of war such as restraints on attacking medical facilities or objects indispensable to the survival of civilian populations operate clearly in warfare.

While modern warfare surely raises new challenges to the regulation of hostilities, the principles and values at stake seem familiar. Warfare remains a human behavioral realm far more than an abstract or mere spatial dimension.²⁶¹ Consistent with its utility in regulating human relationships generally, the law-of-war prohibition on perfidious betrayal has been vital to regulated violence. More than a mere rule, the perfidy prohibition is one of very few essential *structural* aspects of the law of war. The efficacy of nearly every other rule of war is compromised by violation of the perfidy prohibition. With the possible exception of deliberate indiscriminate attack, few law-of-war breaches signal contempt for humanity and respect in war as clearly as perfidy does.²⁶² The breaking of faith reflected in perfidy manages to alienate belligerents to a degree that not even the systematic violence of war itself matches.

Despite a century of international legislative attention and the apparent increasing frequency of perfidy in modern warfare, most criminal, military doctrinal, and even academic treatments of the subject merely restate codifications or offer no more than a vague sensibility of perfidy. Codification has undoubtedly weakened the perfidy prohibition in some respects. In its current form and particularly in emerging

²⁶⁰ Roberts, *supra* note 94, at 137.

²⁶¹ SUSAN BRENNER, CYBERTHREATS 9 (2009).

²⁶² See Louis René Beres, *Religious Extremism and International Legal Norms: Perfidy, Preemption, and Irrationality*, 39 CASE W. RES. J. INT'L L. 709 (2008) (explaining extremist rejection of international legal norms such as perfidy).

contexts of armed conflict such as cyberspace, the perfidy prohibition is unable to fully vindicate the values that perhaps it should. The records of positive codification include evidence that States may have reached the limits of consensus on international regulation of perfidy. Furthermore, there are indications States' appetites for regulating warfare through additional treaties or even specific prohibitions are meager.²⁶³ States appear content, for now, with a relatively high degree of legal indeterminacy with respect to regulating emerging forms of warfare. At the same time, claims to a complementary, broad-based perfidy prohibition derived from notions and principles of chivalry and honor are overstated. Such claims seem grounded in little more than nostalgia, hardly worthy of legal recognition.

Overall, something of the gravity of perfidy, appreciated so well in former custom and usage, appears to have been lost. Despite strong intuitive and logical valence, the legal relationship between emerging deception-based forms of warfare and positive prohibitions of perfidy is strained and in many ways deficient. The existing law-of-war perfidy prohibition appears under-inclusive and addresses insufficiently scenarios of attack that compromise good faith between combatants. States' expression of perfidy as a narrowly-crafted, specific prohibition rather than as a general principle has greatly compromised the capacity of this critical law-of-war limit to regulate emerging, unforeseen technical developments in armed conflict such as cyber warfare.

As some commentators have noted, if technicalities of the currently expressed prohibition of perfidy prevent its application to all battlefield betrayals of confidence, resort to a broader notion of treachery or even a principle of chivalry may both preserve a measure of moderation in combat for the individual combatant and guard the integrity of the law of war as a means of humane exchange in war.²⁶⁴ Support for such a general notion of chivalry may have been more apparent in previous law-of-war eras. The sixteenth century law-of-war jurist Ayala observed, "They of olden time always held that there was no grander or more

²⁶³ Sean Kanuck, *Sovereign Discourse on Cyber Conflict under International Law*, 88 TEX. L. REV. 1571 (2010) (noting lack of international consensus on information security recorded in U.N. Secretary-General, *Group of Government Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, P5, delivered to the General Assembly, U.N. Doc. A/60/202 (Aug. 5, 2005)).

²⁶⁴ CANADIAN MANUAL, *supra* note 56, ¶ 7 (stating, "The concept of chivalry makes armed conflict slightly less savage and more civilized for the individual combatant.").

sacred matter in human life than good faith”²⁶⁵ Yet presently, support for such a widely accepted and commonly shared notion of honesty and honor in combat appears wanting. States appear unwilling or unable to offer the refinements and understandings needed to operationalize a principle of chivalry.

At present, the more feasible course of action appears to be a refinement to the AP I specific prohibition. An investment of relatively little legislative energy would seem to remedy the shortcomings identified in this article. At a minimum, expanding the effects sufficient to include damage to objects would greatly deter bad faith resort to law-of-war protected status. More ambitiously, AP I perfidy might be amended to prohibit any bad faith resort to law-of-war protected status resulting in military advantage.

In the end, it is hoped this article’s account and analysis of the mismatch between the demands of modern warfare and the current state of law-of-war perfidy, as well as the need to bolster the law of war as reliable mode of humanitarian exchange, will attract States’ attention to this important humanitarian dilemma. If it does, debate will surely develop not only over expansion of the substantive reach of prohibited perfidy but also over the appropriate law making method for such an expansion. Whatever the outcome, reengaging States in the active formation of the law of war will surely better vindicate the historical and important law-of-war function of calibrating the balance military necessity and humanity than the current state of seeming inadequacy and neglect.

²⁶⁵ AYALA, *supra* note 115, at 55.