

Bridging the Gap That Exists for War Crimes of Perfidy

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*The condemnation of perfidy is an ancient precept of the laws and customs of war derived from the principle of chivalry. It has remained a cardinal principal in modern times, because perfidious abuse of protections under the law of armed conflict tends strongly to degrade the protections and restraints developed in the mutual interest of all Parties, their combatants and civilians.*¹

I. Introduction

Parties to an armed conflict can be destructive, cunning, and merciless in advancing their interests, but they may not act in bad faith. Their actions are guided by the collective wisdom of the bulk of nations, encapsulated within international conventions and norms governing the conduct of warfare. The rules of warfare demand respect and safeguard this respect through the condemnation of perfidy.

This article examines perfidy in international armed conflict and addresses a gap in how perfidy is criminalized. This gap threatens to weaken the protections afforded by the law of armed conflict because it allows some acts of perfidious conduct to go unpunished. As will be discussed, the international community should bridge the gap by treating all forms of perfidy as grave breaches. By doing so, the international community would bolster the purpose of the law of armed conflict—namely, to humanize warfare to the maximum extent possible.²

Part II of this article starts by differentiating between unlawful perfidy and lawful ruses and ends by traversing the sources of law prohibiting perfidy. Part III illustrates a gap that exists with respect to how perfidy is criminalized and discusses the debate over whether some types of perfidy are even prohibited. Part IV describes the magnitude of the problem raised by the gap in the criminalization of perfidious conduct and explains how the gap threatens to weaken the protections of the law of armed conflict. Part V argues for the need to bridge the gap by treating all types of perfidious conduct as grave breaches. Finally, Part VI concludes that bridging the gap by prosecuting all instances of perfidy as grave breaches is in the best interests of civilians and combatants.

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¹ MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 202 (1982).

² See ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 162 (2008).

II. Perfidy in International Armed Conflict

Although perfidious conduct raises concerns in all types of armed conflict,³ this article focuses on perfidious conduct that occurs during international armed conflict. Before describing the legal framework that prohibits perfidy in this setting, the distinction between unlawful perfidy and lawful ruses must be made.

A. Unlawful Perfidy Versus Lawful Ruses

The essence of perfidy has been described as the “deliberate claim to legal protection for hostile purposes.”⁴ This characteristic bad faith distinguishes acts of perfidy from ruses, which are still acts of deception but which do not hinge on an enemy’s compliance (by according an adversary certain protections) with the law of armed conflict.⁵ Therefore, an adversary may trick his enemy into believing he will attack from the south and then attack from the north,⁶ however, the adversary may not attack its enemy after indicating its intent to surrender under a flag of truce. The latter conduct would take advantage of the enemy’s requirement under the law of war to spare forces that surrender from further attack.⁷

³ See John C. Denn, *Permissible Perfidy?*, 6 J. INT’L CRIM. JUST. 627 (2008) (providing a thorough analysis of perfidy occurring in noninternational armed conflict). Denn describes the Colombian Government’s successful rescue of hostages from the *Fuerzas Armadas Revolucionarias de Colombia* in July 2008. He analyzes the ramifications to international humanitarian law caused by the Colombian Government’s perfidious use of the emblem of the Red Cross to trick the *Fuerzas Armadas Revolucionarias de Colombia* into allowing the Colombian Government to rescue the hostages.

⁴ COMMENTARY ON THE ADDITIONAL PROTOCOLS 435 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY].

⁵ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 37(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; see also Headquarters, U.S. War Dep’t, Gen. Orders No. 100 (Instructions for the Government of Armies of the United States in the Field) art. 15 (24 Apr. 1863) [hereinafter Lieber Code]; BOTHE ET AL., *supra* note 1, at 202–03; A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 36–37 (2d ed. 2004).

⁶ Additional examples of ruses include the use of camouflage, decoys, dummy artillery pieces, ambushes, mock operations, and feigned attacks or retreats, to name a few. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 427 (2010).

⁷ See AP I, *supra* note 5, art. 41(2)(b). Other examples of perfidious conduct include feigning sickness or injury, feigning civilian or other non-combatant status, or feigning neutral or United Nations status. See H. MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* 145–46 (1990).

B. Sources of Law

As described below, the rules applicable to international armed conflict that prohibit perfidy are found in historical references, international conventions, and national practices and legislation.

1. Historical References

The first codified source containing a prohibition against perfidy is the Lieber Code of 1863.⁸ Promulgated by President Lincoln, the Lieber Code was drafted by Professor Francis Lieber to catalogue the customs of war.⁹ In article 101, the Lieber Code states that “[t]he common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.”¹⁰ The Lieber Code was followed by the Brussels Declaration of 1874, which was commissioned by Czar Alexander II of Russia to examine the laws and customs of war.¹¹ The Brussels Declaration, in article 13(b), prohibits “murder by treachery of individuals belonging to the hostile nation or army.”¹² Although the parties to the agreement never officially ratified the Brussels Declaration, it served as a springboard for the adoption of the Oxford Manual of the Laws and Customs of War in 1880.¹³ Article 8(b) of the Oxford Manual prohibits the making of “treacherous attempts upon the life of an enemy”¹⁴

2. International Conventions

The first international convention to prohibit perfidy is the fourth Hague Convention of 1907 (Hague IV).¹⁵ The

⁸ See Lieber Code, *supra* note 5, art. 101.

⁹ D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 22–34 (1988).

¹⁰ See Lieber Code, *supra* note 5, art. 101.

¹¹ Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument> [hereinafter Brussels Declaration]. See also SCHINDLER & TOMAN, *supra* note 9, at 22–34.

¹² See Brussels Declaration, *supra* note 11, art. 13(b).

¹³ See The Laws of War on Land, Sept. 9, 1880, available at <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument> [hereinafter Oxford Manual]; see also SCHINDLER & TOMAN, *supra* note 9, at 22–34 (describing contribution of Brussels Declaration to formation of Oxford Manual).

¹⁴ See Oxford Manual, *supra* note 13, art. 8(b). The *Oxford Manual* provides as an example of “treacherous attempts upon the life of an enemy” the practice of keeping assassins in pay. Under this practice, the assassin would presumably appear as a civilian, whom the enemy would be obliged to accord protections in accordance with the law of armed conflict. Of course, the enemy’s adherence to the law of armed conflict would be met with unsuspected lethal force, making this a case of treachery resulting in death. See generally Lieber Code, *supra* note 5, art. 101.

¹⁵ Convention (IV) Respecting the Laws and Customs of War on Land art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].

regulations annexed to Hague IV, in article 23(b), forbid the “treacherous killing or wounding of individuals belonging to the hostile nation or army.”¹⁶ Roughly seventy years after the adoption of Hague IV, Additional Protocol I to the Geneva Conventions of 1949 came into existence and recognized a slightly different prohibition against perfidy.¹⁷ Specifically, article 37 of Additional Protocol I starts by defining perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence”¹⁸ The article then states that “[i]t is prohibited to kill, injure or capture an adversary by resort to perfidy.”¹⁹

The most recent law applicable to the majority of nations is the Rome Statute of the International Criminal Court.²⁰ Adopted in 1998, the Rome Statute contains two provisions on perfidy. Article 8(2)(b)(vii) criminalizes “[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury.”²¹ Article 8(2)(b)(xi) further prohibits “[k]illing or wounding treacherously individuals belonging to the hostile nation or enemy.”²²

3. National Practices and Legislation

Perfidy is also prohibited by numerous states in their field manuals applicable to armed forces.²³ The International Committee of the Red Cross (ICRC), in analyzing customary international law regarding perfidy, reviewed the field manuals of various nations and concluded that the prohibition against perfidy can be grouped into three general schemes. The most common prohibits killing or injuring the enemy by resort to perfidy.²⁴ Italy, Russia, the United Kingdom, and the United States follow this

¹⁶ *Id.* The words “treachery” and “perfidy” are considered to be synonymous, although “perfidy” is more commonly used today. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 171 (3d ed. 2008).

¹⁷ See API, *supra* note 5, art. 37.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

²¹ *Id.* art. 8(2)(b)(vii).

²² *Id.* art. 8(2)(b)(xi).

²³ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 223–25 (2005).

²⁴ *Id.*

approach.²⁵ The other main approach prohibits killing, injuring, or capturing the enemy by resort to perfidy.²⁶ The field manuals of Argentina, France, and Spain provide examples of this prohibition.²⁷ Finally, a small segment of states prohibit any hostile act carried out in a perfidious manner.²⁸ The armed forces of Benin, Canada, and Togo are bound by this prohibition.²⁹

The United States' stance on the prohibition against perfidy is best characterized as uneven. The War Crimes Act of 1996 identifies only perfidy as it is defined in article 23(b) of Hague IV (i.e., the treacherous killing or wounding of individuals belonging to the hostile nation or army) as a war crime.³⁰ However, the Military Commissions Act of 2009 makes perfidy that results in death, injury, or capture an offense triable by military commission.³¹

III. Surveying the Gap

Under the international law of armed conflict, perfidy is best described as a "harm-based" offense.³² In other words, perfidy is only prohibited when the acts used to bait the enemy into according protection under the rules of armed conflict result in some tangible harm to the enemy.³³ Generally, the law of armed conflict appears most concerned with perfidy resulting in death, injury, or capture, although a gap exists in the treatment of perfidy that results in capture. This gap extends to perfidy resulting in military advantage.³⁴

²⁵ *Id.* See also U.K. MINISTRY OF DEF., JOINT SERV. PUB. 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT para. 5.9.4 (2004); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 31 (18 July 1956) (C1 15 July 1976) [hereinafter FM 27-10].

²⁶ See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 223–25.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ 18 U.S.C. § 2441(c)(1) (2006) (defining as a war crime any grave breach of Geneva Conventions I–IV or "any protocol to such convention to which the United States is a party," which would exclude the definition of perfidy as described in AP I, article 37, because the United States is not a party to AP I). See also HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 4169 (illustrating that the United States has not ratified AP I).

³¹ Military Commissions Act of 2006, 10 U.S.C. § 948a, § 950v(b)(17) (2006) [hereinafter 2006 MCA].

³² See Denn, *supra* note 3, at 633; see also FRITZ KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 82 (1987) (explaining that "the betrayal of confidence does not constitute an offence [of perfidy] by itself: it only becomes so when it is linked to the act of killing, injuring, or capturing the adversary").

³³ See Denn, *supra* note 3, at 633.

³⁴ Admittedly, the term "military advantage" could be interpreted to include any act that benefits one party at the expense of another during the course of an international armed conflict. In that sense, the belligerent state's use of perfidy to kill, injure, or capture its adversary could be considered "perfidy resulting in military advantage." However, for purposes of this article, the term "military advantage" describes efforts by a belligerent to achieve a gain during international armed conflict that does not amount to death,

A. Different Degrees of Criminalization

The gap is most evident from the manner in which perfidy is criminalized. Under the repression of breaches scheme of the Geneva Conventions and Protocols, only perfidy resulting in death or injury is considered a grave breach.³⁵ Likewise, the Rome Statute defines perfidy as a war crime, but only when the perfidy results in death or injury.³⁶

The existence of this gap begs the question: Are there other grave breach offenses that encompass perfidious captures or perfidious gains of military advantage? Evidence suggests the drafters of the Geneva Conventions and Rome Statute did not intend to bridge the gap in the criminalization of perfidy by including the conduct under separate provisions. For example, the offense of unlawful confinement—which is conceptually closest to perfidious capture—is defined as a grave breach under the Geneva Conventions and as a war crime under the Rome Statute.³⁷ However, legal experts have interpreted this offense to apply to the procedures and conditions under which *protected persons* are confined during international armed conflict.³⁸ Therefore, even though an adversary who captures his enemy by resort to perfidy also arguably confines his enemy, the provisions prohibiting unlawful confinement would not prohibit the perfidious act.³⁹ The same reasoning applies to the offense of hostage taking.⁴⁰ Specifically, experts believe this grave breach offense requires a showing of threats by a perpetrator to kill, injure, or continue to detain a seized

injury, or capture. This would include, but is not necessarily be limited to, a belligerent's use of perfidy to collect information and move troops or military supplies without interference. See generally SOLIS, *supra* note 6, at 423.

³⁵ See AP I, *supra* note 5, art. 85(3)(f) ("The following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing *death or serious injury to body or health*: the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol." (emphasis added)).

³⁶ See Rome Statute, *supra* note 20, art. 8(b)(vii) and 8(b)(xi).

³⁷ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 287 [hereinafter GC IV]; Rome Statute, *supra* note 20, art. 2(a)(vii).

³⁸ See KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 112–18 (2003). A lawful combatant captured by the adversary is not considered a protected person as defined in the fourth Geneva Convention, article 4, because the combatant receives the protections of the Geneva Convention Relative to the Treatment of Prisoners of War. See GC IV, *supra* note 37, art. 4; see also Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(1), Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter GC III].

³⁹ Considering parties to an international armed conflict may lawfully intern prisoners of war, this proposition makes even more sense. See GC III, *supra* note 38, art. 21.

⁴⁰ See GC IV, *supra* note 37, art. 147; Rome Statute, *supra* note 20, art. 2(a)(viii).

person for purposes of compelling an entity to act or refrain from acting.⁴¹ Certainly, such threats and demands would not be present in every capture by resort to perfidy. As such, the offense of hostage taking would not prohibit every act of perfidy that results in capture.

Similarly, perfidy resulting in military advantage is not made a grave breach under separate provisions of the Geneva Conventions and Protocols. For example, article 38 of Additional Protocol I prohibits the improper use of emblems, signs, and signals protected by the Geneva Conventions and Additional Protocols.⁴² Although this prohibition conceivably encompasses many instances of perfidy resulting in military advantage,⁴³ the conduct prohibited in article 38 is not defined as a grave breach under the Geneva Conventions or as a war crime under the Rome Statute.⁴⁴

Consequently, the international community would most likely treat perfidious conduct resulting in capture or military advantage as a simple breach of the Geneva Conventions.⁴⁵ However, whether or not this conduct is even prohibited is subject to debate.

B. Framing the Debate

1. Arguments Why Perfidious Conduct That Falls in the Gap Is Not Prohibited

Because there is no international consensus on which types of perfidy are prohibited, some have argued that perfidious conduct that falls in the gap is not prohibited.⁴⁶ This argument proved persuasive during the drafting of the Rome Statute; several representatives to the convention doubted whether customary international law prohibited all

perfidious conduct resulting in military advantage.⁴⁷ The International Committee of the Red Cross (ICRC) reached a similar conclusion, suggesting that only perfidy resulting in death or injury constitutes a war crime.⁴⁸

Moreover, the Geneva Conventions and the Additional Protocols arguably preempted consideration of other types of perfidy as war crimes by defining specific acts of perfidy as grave breaches (i.e., perfidy that results only in death or serious injury).⁴⁹ This preemption argument is further supported by the Rome Statute, which generally follows the grave breach scheme with respect to criminalizing perfidy; again, only perfidy that results in death or serious injury is prohibited.⁵⁰ On the other hand, some have argued that by defining war crimes to include both grave breaches and other “serious violations of the laws and customs applicable to international armed conflict,”⁵¹ the Rome Statute “virtually wipes out” the distinction between grave and simple breaches.⁵² In other words, if the Rome Statute subsumes both grave and simple breaches, any conduct not criminalized by the Rome Statute might not be prohibited. Furthermore, because the majority of states have ratified the Rome Statute, perfidy as it is defined in the statute could be considered a verdict on its status under international law.⁵³ That is, the signatories to the Rome Statute would have defined perfidy that results in capture or military advantage as a war crime if the international community had believed that to be the case.

⁴¹ See DÖRMANN, *supra* note 38, at 124.

⁴² AP I, *supra* note 5, art. 38(1).

⁴³ In many cases, the improper use of a protected emblem, sign, or signal would probably be a lesser-included offense of perfidy resulting in military advantage. So, in a hypothetical prosecution for perfidy resulting in military advantage, the prosecutor would first have to prove misuse of a protected emblem, sign, or signal before establishing how the misuse resulted in a military advantage (and also that the belligerent intended to mislead the enemy into according protections under the law of armed conflict).

⁴⁴ In so far as the conduct involves purely a misuse of a protected emblem, sign, or signal. As previously discussed, when the misuse of a protected emblem, sign, or signal results in death or serious injury, the conduct becomes a grave breach as defined by Additional Protocol I and a war crime as defined by the Rome Statute. See AP I, *supra* note 5, art. 85(3)(f); Rome Statute, *supra* note 20, art. 8(2)(b)(vii).

⁴⁵ Although AP I does not specifically refer to lesser violations as “simple breaches,” it does reference a class of violations deemed “all other breaches” distinct from those violations deemed grave breaches. AP I, *supra* note 5, art. 86(1). For practical purposes, these lesser violations will be referred to as “simple breaches” in this article.

⁴⁶ See *supra* text accompanying notes 23–29.

⁴⁷ See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 195 (stating that “several delegations participating in the drafting of elements for the Rome Statute expressed some doubts as to whether improper use in order to shield, favor, protect, or impede military operations would be prohibited under customary international law”). Cf. DÖRMANN, *supra* note 38, at 206 (explaining that “not every misuse of the distinctive emblems of the Geneva Conventions amounts to a war crime, but only the *abusive* use”) (emphasis added).

⁴⁸ See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 225. The issue of what conduct constitutes a war crime is outside the scope of this article. However, it is sufficient to say there is no universally accepted definition of “war crime.” Compare FM 27-10, *supra* note 25, para. 178 (providing that every violation of the law of armed conflict is a war crime), with UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 24 (1948) (explaining that only *serious* violations of the laws or customs of war are war crimes). Given that at least one reference defines every violation of the law of armed conflict as a war crime, the issue becomes whether this also means those actions *not* deemed war crimes are prohibited by the law of armed conflict.

⁴⁹ See AP I, *supra* note 5, art. 85(3)(f); see also Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 229 (Dieter Fleck ed., 1999) (arguing that perfidy is prohibited only as it is defined by AP I, which would exclude military advantage gained by resort to perfidy).

⁵⁰ See Rome Statute, *supra* note 20, art. 8(2)(b)(vii) and 8(2)(b)(xi).

⁵¹ *Id.* art. 8(2)(a) and 8(2)(b).

⁵² See GREEN, *supra* note 16, at 327.

⁵³ See ICC—The States Parties to the Rome Statute, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Aug. 24, 2010) (showing that 113 countries are party to the Rome Statute of the International Criminal Court).

2. Arguments Why Perfidious Conduct That Falls in the Gap Is Prohibited

Despite arguments to the contrary, there are several overriding reasons why perfidious conduct that results in capture or military advantage is prohibited. First, defining some violations of the Geneva Conventions and Protocols as grave breaches does not establish a baseline of conduct that is prohibited (i.e., violations deemed grave breaches) and not prohibited (i.e., violations not deemed grave breaches). Rather, the grave breach scheme simply establishes a hierarchy of major and minor violations of the Geneva Conventions and Protocols.⁵⁴ This explains why international criminal tribunals have exercised jurisdiction over violations of the law of war that do not represent grave breaches.⁵⁵ For example, the International Criminal Tribunal for the Former Yugoslavia, which construed customary international law, exercised jurisdiction over grave breaches and violations of the customs of war.⁵⁶

Furthermore, the Rome Statute should not be interpreted to preclude prosecutions for acts of perfidy not addressed in the statute. First, the Rome Statute, in article 1, only exercises jurisdiction over persons for “the most serious crimes of international concern.”⁵⁷ This implies less serious crimes of international law exist that the International Criminal Court may choose not to prosecute. Additionally, evidence suggests the Rome Statute was never intended to be the last word on what should and should not be prohibited. For example, the principle of complementarity suggests the main responsibility for the prosecution of crimes rests with individual states and not the International Criminal Court.⁵⁸ The past practice of the United States, with respect to defining war crimes, also demonstrates the limits of the Rome Statute’s reach—although, notably, the United States never ratified the Rome Statute. Specifically, crimes defined by the Rome Statute did not limit what conduct was criminalized under the Military Commissions

Act;⁵⁹ under the Military Commissions Act, perfidy that results in death, injury, or capture is prohibited.⁶⁰

IV. Perfidy That Falls in the Gap: A Serious and Recurring Problem that Threatens to Weaken the Law of Armed Conflict

Perfidious conduct that results in capture or military advantage represents a serious problem for parties, combatants, and civilians involved in international armed conflict. In addition to the harm resulting from bad faith, perfidious conduct threatens to erode the protections provided by the law of armed conflict.

Capture by resort to perfidy could occur during any international armed conflict. For example, this type of perfidy was used in 1995 during the Kosovo War. In one instance, Bosnian Serb forces disguised in French uniforms, driving a U.N. armored personnel carrier, captured twelve French peacekeepers near a bridge in Sarajevo.⁶¹ According to reports, the French peacekeepers did not expect anything out of the ordinary until the point of capture.⁶² After the capture, Bosnian Serb forces held the French peacekeepers as hostages at a location where other hostages were handcuffed or chained to potential targets, effectively turning them into human shields.⁶³ Furthermore, as a result of the capture, Bosnian Serb forces gained control of an observation post that had been previously established by the United Nations at the site of the bridge.⁶⁴

⁵⁹ See 2006 MCA, *supra* note 31, § 950v(b)(17).

⁶⁰ *Id.* The United States’ approach to defining war crimes may have been influenced by the fact the United States is not a party to the Rome Statute. See HENCKAERTS & DOSWALD-BECK, *supra* note 23, at 4179. Also, the jurisdiction of the Military Commissions Act applies on a limited basis; specifically, only alien unprivileged enemy belligerents may be prosecuted under the Military Commissions Act. See 2006 MCA, *supra* note 31, § 948(b)(a).

⁶¹ See Roger Cohen, *2 French Killed as Sarajevo Battle Takes New Course*, N.Y. TIMES, May 29, 1995, at A1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* As discussed in Part III, the International Criminal Tribunal for the Former Yugoslavia asserted jurisdiction over grave breaches and other violations of the customs of war. See *supra* text accompanying notes 55–56. However, there have been no indictments issued against Bosnian Serb soldiers specifically directed to the perfidious capture of the French peacekeepers discussed in this paragraph. Instead, the only related indictments are those issued against Radovan Karadzic and Ratko Mladic for their roles in planning, ordering, and aiding the taking of several hundred U.N. military observers and peacekeepers, including the twelve French peacekeepers, as hostages. See *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, Third Amended Indictment, ¶ 87 (Feb. 27, 2009); *Prosecutor v. Mladic*, Case No. IT-95-5/18-PT, Third Amended Indictment, ¶ 87 (Feb. 27, 2009). Radovan Karadzic is currently on trial for war crimes, crimes against humanity, and genocide and is representing himself pro se. See, e.g., *Indicted Ex-Leader of Bosnian Serbs Calls Atrocities ‘Myths’*, N.Y. TIMES, Mar. 3, 2010, at A3. Mladic, on the other hand, is still on the run. Marliese Simons, *Trove of Data on Balkan Wars Found in Genocide Suspects Home*, N.Y. TIMES, July 11, 2010, at A14 (“On the run for more

⁵⁴ See GARY D. SOLIS & FRED L. BORCH, GENEVA CONVENTIONS 248 (2010) (explaining that “the import of . . . [the grave breach scheme] . . . is that some violations of the Conventions, while unlawful, are considered to be minor offenses that could not be punished to the same extent as grave breaches”).

⁵⁵ See S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993) (United Nations Security Council resolution establishing an International Tribunal for the Former Yugoslavia to prosecute grave breaches and other violations of international humanitarian law occurring in the area since 1991).

⁵⁶ See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 610 (May 7, 1997).

⁵⁷ See Rome Statute, *supra* note 20, art. 1 and pmb. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured.”) (emphasis added).

⁵⁸ See DÖRMANN, *supra* note 38, at xi (stating that, based on the principal of complementarity, the International Criminal Court would only assert its jurisdiction when a state is unwilling or unable to genuinely carry out the investigation or prosecution).

Perfidy used to achieve a military advantage poses an equally serious threat because of the frequency and potential consequences of the conduct. The types of perfidy that could be used to gain a military advantage are limited only by a belligerent's imagination. For example, by feigning *hors de combat* status,⁶⁵ a belligerent could trick an enemy into ceasing an attack and force the enemy to adjust its tactics or operations.⁶⁶ On top of the immediate advantage gained at the time of the perfidious act, the belligerent could acquire intelligence to facilitate an attack upon the enemy at a later time. Consequently, enemy deaths and injuries could flow directly from the belligerent's original perfidy.

Similar scenarios unfolded numerous times over the past decade in armed clashes between Israel and Palestinian terrorist organizations. Palestinian organizations reportedly used ambulances to transport terrorists, weaponry, explosives, and intelligence to points inside Israel.⁶⁷ This practice sometimes involved law-abiding ambulance drivers who were coerced by terrorists to infiltrate Israeli security checkpoints.⁶⁸ The terrorists, who knew that Israeli soldiers would grant access to ambulance drivers because of their medical status, set in motion devastating attacks against the Israeli civilian population.⁶⁹

The gap in conduct that is criminalized as perfidy could erode the law of armed conflict by tempting parties to act in bad faith. If only perfidious conduct that results in death or injury is criminalized, bad faith actors may be tempted to circumvent the law by engaging in perfidious conduct that does not involve death or injury.⁷⁰ By definition, such

than a decade, [Mladic] is reported to be in Serbia, moving among different hiding place").

⁶⁵ In accordance with AP I, a person is *hors de combat* if (1) he is in the power of an adverse Party; (2) he clearly expresses an intention to surrender; or (3) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and, therefore, is incapable of defending himself, provided that in any of these cases the individual abstains from any hostile act and does not attempt to escape. AP I, *supra* note 5, art. 41(2).

⁶⁶ See AP I COMMENTARY, *supra* note 4, at 435.

⁶⁷ See *The Palestinian Use of Ambulances and Medical Materials for Terror*, ISR. MINISTRY OF FOREIGN AFF. (Dec. 22, 2003), http://www.mfa.gov.il/MFA/MFArchive/2000_2009/2003/12/The+Palestinian+use+of+ambulances+and+medical+mate.htm [hereinafter Israel MFA Report].

⁶⁸ See Jason Koutsoukis, *Hamas Tried to Hijack Ambulances During Gaza War*, SYDNEY MORNING HERALD, Jan. 26, 2009, available at <http://www.smh.com.au/news/world/hamas-tried-to-hijack-ambulances-during-gaza-war/2009/01/25/1232818246374.html>.

⁶⁹ See Israel MFA Report, *supra* note 67 (describing a terrorist attack in which an ambulance driver dispatched a suicide bomber inside Israel who later killed one Israeli civilian and injured one hundred others).

⁷⁰ AP I COMMENTARY, *supra* note 4, at 432 (explaining "that a prohibition that is restricted to acts which have a definite result would give the Parties to the conflict a considerable number of possibilities to indulge in perfidious conduct which was not directly aimed at . . . [inflicting restricted acts upon] . . . the members of the armed forces of the adverse party, but at forcing them to submit to tactical or operational measures which will be to their

conduct still involves abuses of protections provided by the law of armed conflict. Faced with this perfidious conduct on a routine basis, an adversary may be less likely to grant protections if he believes the belligerent may misuse them at any time.⁷¹ Alternatively, an adversary may adopt restrictive measures designed to ferret out any misuse. For example, as a result of the Palestinian misuse of ambulances, Israeli guards were encouraged to conduct security checks of every ambulance in the wake of repeated Palestinian attacks.⁷² Significantly, in a situation where time is of the essence, such checks could mean the difference between life and death. Therefore, the idea that some forms of perfidy may be permissible threatens to erode the goals of the law of armed conflict—that is, to ensure parties act in good faith, end their conflicts quickly, and move on peacefully.⁷³

V. Bridge the Gap by Treating All Forms of Perfidy as Grave Breaches

In light of the serious consequences of perfidious conduct, the international community should insist all forms of perfidy, regardless of effects, are considered grave breaches. This approach has historical support, is consistent with precedent, and would ensure effective prosecution. Ultimately, this approach would bolster the purpose of the law of armed conflict.

A. History Supports Treating All Forms of Perfidy Equally

The historical roots that underpin the condemnation of perfidy suggest that bad faith—as opposed to the results of acting in bad faith—is the genesis of the prohibition. For example, when the seventh century Islamic caliph Abu Bakr opined, "Let there be no perfidy, no falsehood in treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly," his concern arguably applied to acting in good faith, as opposed to the results of acting in bad faith.⁷⁴ Likewise,

disadvantage").

⁷¹ See KOLB & HYDE, *supra* note 2, at 162 (arguing that if "any belligerent has reason to fear that at any moment there may be a misuse of the . . . [protections of the law of armed conflict] . . . he or she would no longer be ready to grant them").

⁷² See Israel MFA Report, *supra* note 67.

⁷³ See BOTHE ET AL., *supra* note 1, at 202 (stating "the prohibitions of perfidy are directly related to protection for the wounded and sick, *hors de combat* combatants, prisoners of war, and civilians"); see also FM 27-10, *supra* note 25, para. 50 (explaining that "perfidious conduct in war is forbidden because it destroys the basis for the restoration of peace short of the complete annihilation of one belligerent by the other"). See generally Denn, *supra* note 3, at 627 (arguing that "punishing perfidious captures criminally but less severely than deaths or injury better ensures compliance with the rule against bad faith military operations").

⁷⁴ See GREEN, *supra* note 16, at 22 (citing C. AD 634, ALIB HASAN AL MUTTAQUI, 4 BOOK OF KANSUL'UMMAN 472 (1979)).

by stating “military necessity . . . admits of deception, but disclaims acts of perfidy,” Professor Lieber focused on the acts, not the consequences, of perfidy.⁷⁵ Thus, if the prohibition against perfidy is true to its roots, all forms of perfidy should be treated equally, by criminalizing them as grave breaches.⁷⁶

B. On Par with Other Grave Breaches?

Some acts of perfidy may not seem that serious and, some may argue, do not rise to the level of a grave breach. However, several grave breach offenses already exist that encompass conduct similar in magnitude to perfidy that results in capture or military advantage. For example, article 147 of the fourth Geneva Convention makes the “unlawful transfer” of a protected person a grave breach.⁷⁷ Article 130 of the third Geneva Convention makes “willfully depriving a prisoner of war the rights of fair and regular trial” a grave breach.⁷⁸ Certainly, these offenses are significant, but they are no more significant than the perfidious conduct of a bad faith actor who abuses the protections of the law of armed conflict to gain valuable military advantages.⁷⁹ Moreover, as deceit offenses that are “so dangerous” and “so difficult to guard against,” perfidy that results in capture or military advantage seems a natural fit for the most serious criminal censure provided by the law of armed conflict.⁸⁰

⁷⁵ See Lieber Code, *supra* note 5, art. 16.

⁷⁶ While on the subject of historical support, it should be noted that a similar approach was advocated during the drafting of Additional Protocol I. Repeated requests were apparently made during both preliminary conferences and the final conference itself for a *per se* prohibition of perfidy instead of the limited prohibition that exists today. The best explanation for why the prohibition found in Additional Protocol I exists in its current form is that the drafters sought to develop, rather than replace, article 23(b) of the fourth Hague Convention. See AP I COMMENTARY, *supra* note 4, at 432.

⁷⁷ GC IV, *supra* note 37, art. 147. As in the case of unlawful confinement, this offense is concerned primarily with the unlawful transport of protected persons during the course of an international armed conflict. See DÖRMANN, *supra* note 38, at 106–12.

⁷⁸ GC III, *supra* note 38, art. 130. Some commentators believe this conduct was made a grave breach following an incident during World War II where the Gestapo summarily shot fifty British Royal Air Force prisoners of war. The British personnel tried to escape and received no due process in the wake of their capture. Furthermore, because it was not illegal under international law to attempt to escape, some believe any punishment should have been very light. See SOLIS & BORCH, *supra* note 54, at 163–64. Original intent notwithstanding, a deprivation involving much less serious consequences could still be considered a grave breach under a plain reading of the offense. For example, one could argue that by imposing the light punishment suggested by the commentators—just without the procedures of a fair and regular trial—the Gestapo would still have committed a grave breach.

⁷⁹ See *supra* text accompanying notes 61–69.

⁸⁰ See Lieber Code, *supra* note 5, art. 101. Although Professor Lieber was referring to clandestine or treacherous attempts to injure the enemy with these comments, his words carry equal weight in the context of clandestine or treacherous attempts to capture the enemy or achieve a military advantage at the enemy’s expense.

C. Assurances of Effective Prosecution

Some have contended that if the law of armed conflict is to be taken seriously, there must be a strong international response to any misuse of the protections afforded by the Geneva Conventions and their Protocol.⁸¹ In the international war crimes arena, the most serious criminal censure is reserved for grave breaches.⁸²

By treating all forms of perfidy as grave breaches, the international community would provide the best assurance that perfidious conduct is effectively prosecuted. Apart from the inherent seriousness that comes with the grave breach designation, the grave breach scheme is designed to ensure effective prosecution. The concern for meaningful prosecution of grave breaches explains the Geneva Conventions requirement that nations “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed . . . grave breaches.”⁸³ Nations are also obligated to “search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches,” and have the option to extradite persons alleged to have committed grave breaches to other states that are signatories to the Geneva Conventions.⁸⁴ In the end, effective prosecution of perfidy offers the best hope for deterring this bad faith conduct.

The strengths of the grave breach system also serve to underscore the pitfalls of maintaining the status quo as it relates to how perfidy is criminalized. For example, the only requirement concerning simple breaches the Geneva Convention imposes on nations is that they “take measures necessary for” their suppression.⁸⁵ Under this standard, a nation could administratively discipline a violator and comply with the Geneva Conventions.⁸⁶ Although states are at liberty to impose harsher forms of discipline,⁸⁷ the Geneva Conventions provide no guarantee that perfidious conduct resulting in capture or military advantage would be effectively prosecuted. For example, there is no analogous universal jurisdiction provision that applies to simple

⁸¹ See DÖRMANN, *supra* note 38, at ix (arguing that “a law which is not backed up by sanctions quickly loses its credibility”).

⁸² See generally SOLIS, *supra* note 6, at 301 (describing the hierarchy of violations occurring in armed conflict—from least serious to most serious—as crimes, war crimes, and grave breaches); see also SOLIS & BORCH, *supra* note 54, at 70 (explaining that grave breaches are the most serious violations of the law of armed conflict).

⁸³ See, e.g., GC IV, *supra* note 37, art. 146.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See SOLIS, *supra* note 6, at 303 (explaining that “administrative offenses do not have penal significance or trigger the mandatory actions that grave breach offenses require”).

⁸⁷ That is, under the rubric of taking measures necessary for the suppression of simple breaches. See, e.g., GC IV, *supra* note 37, art. 146.

breaches.⁸⁸ Consequently, a state with no ties to the armed conflict would have no basis to prosecute perfidious conduct resulting in capture or military advantage. This limitation is significant in light of the possibility some nations may choose to ignore perfidious conduct that falls in the gap. Finally, as long as the debate over whether some perfidious is even prohibited persists, there is no guarantee perfidy that results in capture or military advantage will ever be effectively prosecuted.⁸⁹ The international community can end this debate by treating every act of perfidy as a grave breach.

VI. Conclusion

Somewhere along the timeline between the genesis of the prohibition against perfidy and its current day status, the international community splintered, establishing a hierarchy of crimes of perfidy. What arguably started as a condemnation of any bad faith action, morphed into a condemnation of perfidy only when the conduct resulted in death, injury, or, in some cases, capture. Currently, the condemnation of perfidy arguably only applies when the perfidious conduct results in death or injury. The party who

has benefited the most from this transformation is the party who insists on acting in bad faith to achieve its military objectives. Stated differently, the international community does not bolster the Geneva Conventions when states turn their gaze from a capture achieved by the deliberate misuse of a protected emblem. Likewise, the military commander who realizes the enemy has gained valuable intelligence through the deliberate misuse of a flag of truce is likely to find little solace in the fact that some consider this an inconsequential misuse.

In light of this quandary, the most logical response would be to treat every form of perfidy as a grave breach. Ultimately, this would be in the best interest of states, combatants, and civilians. By equally criminalizing any hostile act committed under cover of legal protection, the international community would remain true to the intent of the condemnation of perfidy—namely, that any intentional misuse of the protections afforded by the law of armed conflict serve only to lengthen the duration of the conflict; worsen the condition of the sick, wounded, and imprisoned; and subject the civilian population to the devastation of war.⁹⁰

⁸⁸ See, e.g., GC III, *supra* note 38, art. 129 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such *grave breaches*, and shall bring such persons, regardless of their nationality, before its own courts.”) (emphasis added).

⁸⁹ See *supra* text accompanying notes 46–60.

⁹⁰ See *supra* text accompanying note 73.