Combatants Dressed as Civilians?

The Case of the Israeli *Mista'arvim* under International Law

Policy Paper 8E

Ido Rosenzweig

Are undercover military operations that involve combatants disguised in civilian clothes legal under international law? Can such operations be in line with international humanitarian law, and particularly the principle of distinction? Do they violate the prohibition of perfidy—that is, masquerading as innocent civilians deserving of protection under international law, in order to kill, wound, or capture an adversarial party? This policy paper provides an overview of the history of the Israeli undercover units known as Mista'arvim—elite units of Israeli soldiers who operate in

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To my wife Debbi, whose unwavering
support allows my creativity

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Abstract

Military operations involving soldiers wearing civilian clothes have always been employed by state security and military forces. Records of undercover military activity date back at least to World War II and such activity continues until the present. In the Israeli context, these units are called *Mista'arvim* since they dress up like local Arabs when they operate in the West Bank and the Gaza Strip, usually for counter-terrorism purposes.

Though commonplace, the employment of undercover units raises difficult questions with regard to law and ethics. In the context of armed conflict in particular, the lawfulness of using undercover forces has been questioned, as it might be perceived to be a violation of the prohibition of perfidy or other forms of treachery tantamount to war crimes.

Military operations can fall either under the law-enforcement or combat paradigms. Law-enforcement operations are subject to international human rights law (IHRL) and combat operations are subject to international humanitarian law (IHL, also known as the laws of armed conflict). Within IHL there are several differences between international armed conflict (mostly referred to as classic inter-state conflicts) and non-international armed conflicts (mostly known and referred to as situations of civil war). One of the main and relevant differences between international and non-international armed conflicts is the lack of combatant status in non-international armed conflicts. This means that there is no combatant immunity or prisoner of war (POW) status in such conflicts.

Undercover operations raise several issues under international law:

(1) **The failure to comport with the requirement that combatants wear uniforms or other distinctive signs** derived from the principle of distinction;

(2) **What is the legal framework of undercover combat operations**—Are they permitted ruses of war, prohibited perfidious or treacherous acts, or legitimate acts of espionage?

(3) **What are the implications of such operations?** Do they have an effect over the right to POW status, the requirement to open an investigation and the question of liability for the results?

The principle of distinction is one of the core principles of IHL, and **the requirement to operate while wearing a uniform or a distinctive sign** is generally considered one of the fundamental criteria for attaining combatant status. However, after examining the relevant sources such as the Geneva Conventions and their additional protocols, we have concluded that the mere operation of combatants without uniforms does not violate IHL. Nevertheless, since that requirement is also one of the basic conditions for conferring POW status upon combatants, the failure to wear a distinctive sign while conducting a military attack could result in the loss of the right to POW status in international armed conflicts, and thus the loss of combatant immunity. Furthermore, while the lack of a distinctive sign does not constitute a violation of IHL per se, it could serve as an element of an IHL violation, such as perfidy or treachery.

The prohibition of perfidy and treachery is based on the existence of trust between adversaries in armed conflict, and a breach of such trust, by means of, inter alia, feigning the status of a protected person (such as an uninvolved civilian) in order to kill, wound or capture a person. The rationale for such prohibition rests on three main and fundamental notions: distinction, chivalry, and reciprocity.

After analyzing the prohibitions and their elements, we have reached the following conclusions:

(a) **Customary nature of the prohibition** - Treacherous and perfidious killing or wounding, originating in article 23 of the 1907 Hague Regulations and article 37 of Additional Protocol I, are customary prohibitions under IHL and are applicable to all parties in international and non-international armed conflicts. The prohibition against capturing a person while resorting to perfidious ways, appears only in article 37 of Additional Protocol I and does not constitute a customary prohibition, and therefore, it applies only to states party to Additional Protocol I.

(b) **The mere use of undercover units does not constitute a violation of the prohibition of perfidy and treachery**. Only undercover operations aimed at the killing or wounding of an adversary are prohibited as perfidious and treacherous.
(c) The violation of the prohibition of perfidy and treachery becomes applicable **from the point that the undercover forces are de facto visible to the adversary** during the deployment to attack, and therefore trust can be established.
(d) Undercover operations aimed at the **gathering of information are not prohibited as perfidious or treacherous acts** and could be considered acts of espionage.

In **mixed situations of law-enforcement and combat operations**, such as during belligerent occupation, both law-enforcement and combat operations can take place. As the applicable law is different in each context, the correct choice of applicable law is of the utmost importance. In certain situations, the military government conducts "law and order" operations (law enforcement)—military actions to deal with moderate levels of violence, which are more akin to the challenge posed by crime-suppression activity and are governed by international human rights law. In other violent contexts in which a nexus to an ongoing or new armed conflict can be established, the occupying power may engage in combat action, which is governed by IHL.

In law-enforcement actions there is no positive restriction on the use of undercover units. The only relevant requirement is to conduct operations in accordance with the law, and especially to ensure that the use of force (and especially lethal force) takes place only as a last resort and under appropriate circumstances.

In order to identify what operations would constitute law-enforcement operations, we need to examine the entire situation and take into account all of its characteristics, including:

(1) The intensity of the hostilities, (2) the aim of the operation, (3) the identity of the target of the operation, (4) the proximity to the battlefield, (5) the location of the operation and (6) the identity of the operating force. It should be noted that these characteristics are not meant to serve as an exhaustive or cumulative list of conditions for the identification of an

operation as either law-enforcement or combat action. Such examination can provide the military authorities with an *ex ante* understanding of the applicable legal framework.

1. Implications

Conducting operations using undercover units may have several implications under international law:

1.1. POW Status

If undercover combatants are caught while operating undercover in an international armed conflict, they may lose their entitlement to POW status and the privileges that come with it–e.g., they may be put on trial for the mere participation in hostilities as well as any other violation committed by them under domestic and international law (such as the killing of an adversary). However, we have also concluded that if the combatants are caught after regaining distinction, their rights remain untouched and they can be tried only for violations and not for the mere participation in hostilities.

1.2. Investigations

The obligation to investigate alleged wrongdoings is different under IHRL and IHL—this difference is evident when considering the reasons to initiate an investigation. Under IHL, there is a clear requirement to investigate allegations and suspicions of grave breaches of IHL and war crimes. There is no obvious need to investigate conduct that does not result in damage to property or harm to civilians. Under IHRL, the obligation to investigate is broader and requires an investigation of any suspicion of gross violations of human rights–such as the use of lethal force. Therefore we suggest that in the wake of undercover operations resulting in death or injury (even of legitimate military targets) conducted either under the law-enforcement paradigm or the combat-action paradigm, an investigation should be initiated to examine possible violations of the law, including the law against perfidy/treachery.

1.3. Liability

When undercover units operate under law-enforcement or combat paradigms, the members of the undercover units are responsible for their actions. In both international and non-international armed conflicts, captured members of undercover units may be prosecuted for their direct participation in hostilities under the domestic law of the state that captured them. When operating under the combat-action paradigm, combatants are also prohibited from violating IHL, and especially from committing grave breaches and war crimes.

While treacherous and perfidious acts may constitute a war crime, it seems that without prejudice to the customary nature of the prohibition on capturing by means of perfidy, neither Additional Protocol I nor the Rome Statute of the International Criminal Court include it in the list of criminal prohibitions. It seems reasonable to conclude that even with regard to states party to API, violating the prohibition on capturing through treacherous means by undercover units would not amount to a war crime and therefore could be categorized, at most, as an "ordinary" violation of IHL or an "ordinary" crime.

The war crime of treachery has two elements: (a) **an objective element**—the act must objectively be of a nature to cause, or at least to induce, the confidence of an adversary; and (b) **a subjective element**—the act inviting confidence must be carried out intentionally in order to mislead the adversary into relying on the expected protection. Moreover, in order for the act to be considered a crime, a prescribed end result (death or injury) must ensue.

Because of the requirement that the act involve confidence building, both the objective and subjective elements can be met only when there is some contact (mainly visual) between the attacking forces and the adversary. Therefore, attacks from a great distance (such as sniper attacks) or surprise attacks (such as ambushes) would fail to fulfill this element of the crime.

There is no need for precise identification of the targeted adversary in order to raise suspicions of perfidy. Hence, if during deployment, the undercover unit takes advantage of the feigned status in order to intentionally cause the death or injury of an alternative adversary (a person other than the original target), the elements of the crime might be fulfilled. On the other hand, if the intent of the operation is not to cause physical harm to the

adversary, then the act most likely will not meet the definition of treachery under the Rome Statute.

2. Recommendations

(1) **Undercover operations should be conducted for purposes of information gathering or to capture persons**–an undercover combat operation aimed at the killing (or injuring) of an adversary could be considered as treacherous or perfidious and, therefore, should be avoided. While undercover operations for the destruction of military objectives are permissible as well, such operations can be conducted as long as no person is expected to be killed or injured as a direct result of such an operation.

(2) A ***Mista'arvim*** **unit must distinguish itself from the de facto visibility point—**IHL does not contain a positive requirement to wear a distinctive sign or uniform. However, in order to avoid perfidy or treachery violations, *Mista'arvim* units must carry their arms openly and wear distinctive signs from the first point of the deployment that is visible to the enemy. This does not mean that the units are prohibited from wearing camouflage or from acting in any other way in accordance to IHL rules.

(3) **In case of escalated law-enforcement operations, undercover units should be identified**—the tests for the legal paradigm movement from law enforcement to combat action are both vague and complicated to compute in the midst of the escalated operation. Once a law enforcement operation escalates into a possible combat action, in order to be certain that no treacherous killings occur, the operating forces should reveal distinctive identifying signs.

(4) **Conduct investigation in cases of death or injury**—whenever an undercover operation resulted in the death or injury of a person, such an outcome should serve as a sufficient basis for the opening of an investigation to examine the reasons for such a result. Such an investigation ought to be conducted in accordance with the relevant standards under international law (genuine, effective, impartial, prompt and transparent).

The fulfillment of these recommendations will help to ensure that the deployment of undercover units remains within the international law framework and to ensure respect for the special protections provided by international humanitarian law and to reduce the loss of life of uninvolved civilians during such operations.

Introduction

Undercover units and undercover operations have always been employed by state security and military forces. Records of undercover military activity date back (at least) to World War II and such activity continues until the present. Undercover operations are sometimes conducted in the context of law enforcement (such as undercover policemen infiltrating criminal organizations or as part of drug-related investigations), and at times of combat actions (such as saboteurs, attacking enemy units, etc.). Though commonplace, the employment of undercover units raises difficult questions with regard to law and ethics. In the context of armed conflict in particular, the legality of using undercover forces has been questioned, as it might be considered a violation of one of the most important principles of international humanitarian law (IHL, also known as "laws of armed conflict")—the principle of distinction. It may also be seen as a violation of the prohibition of perfidy or other forms of treachery.

To cover the diverse aspects of the various problems raised by the deployment of undercover forces and to discuss the legality of such operations, we will classify undercover operations according to the following three categories, based on the purpose or outcome of any given operation: **(1) operations that cause the death or injury of a person (either deliberately or incidentally); (2) operations intended to capture or detain a person; (3) operations not aimed at harming or capturing a person (for example, aimed at gathering information or damaging property).**

In the first chapter of this study, we provide an overview of the use of undercover units. This overview includes providing a working definition

* I wish to thank Ron Avital, Ady Niv, Hila Adler, Katja Knöchelmann, Yael Bar Hillel and Amichai Cohen for their comments and thoughts. I also wish to thank Yuval Shany for his guidance throughout the writing of this paper. The opinions expressed in this paper are my own and responsibility for any mistake is mine.

of "undercover units," general information about the different uses of undercover units throughout history up to the present, and relevant examples of such units' operations. In the second chapter, we discuss the legality under international law of undercover combat operations and focus on the question of perfidy and treachery. The third chapter focuses on the deployment of undercover units in situations including elements of both law-enforcement and armed conflict. An example of such a scenario is the use of undercover military forces in situations of belligerent occupation. In the fourth chapter, we analyze the legal implications of the employment of undercover units in the context of the right to prisoner-of-war (POW) status and the obligation to conduct an investigation and assume liability. In the fifth chapter we apply the analysis to selected case studies, and in the sixth chapter we conclude the discussion.

Chapter 1

Undercover Units

1. Working Definition

The term "undercover units" applies to many types of military units that are composed of combatants who do not wear the uniforms of the armed forces to which they belong. Such units sometimes wear their adversary's uniform or the uniform of groups entitled to special protection under international law (they wear the emblems of the Red Cross, Red Crescent, or Red Crystal, for example, or of the UN or another neutral party). One of the most common practices of undercover units is to wear civilian clothing and feign the status of uninvolved civilians who pose no threat to the adversary.

Due to the frequent deployment of undercover units disguised as civilians, and the particular risks such practices pose for the uninvolved civilian population, **our discussion focuses on units that disguise themselves as uninvolved civilians as part of their law-enforcement or combat operations**. More specifically, we focus on the practices of the Israel Defense Force's *Mista'arvim* units—the undercover units whose members disguise themselves as local Palestinians while operating in the occupied territories (also known as the West Bank and Gaza Strip).

2. History

Numerous states and armed groups throughout modern history have deployed undercover units during armed conflicts. Such deployment has been reported in a variety of operational contexts—during international and non-international armed conflicts, and even in situations where there was no armed conflict at all (as part of law-enforcement operations).

The record of undercover activity precedes World War II. For example, during the Russo-Japanese war (1904–1905), Japanese troops dressed in civilian clothing when they attacked Russian forces.[1]

During World War I, Lt. Col. Thomas E. Lawrence ("Lawrence of Arabia") wore white Arab robes when he fought alongside the Arab irregular forces.[2] Another early example dates from the British Mandate period in Palestine, between 1937 and 1939, when the Special Night Squads (Jewish troops recruited by the British local administration to fight Arab saboteurs) operated undercover.[3]

During World War II, several undercover operations were carried out by military units dressed in civilian clothes,[4] such as the operation discussed in *Ex Parte* Quirin (1942).[5] This case involved an eight-member German commando unit, which was transported to the east coast of the United States by submarine and planned to blow up US military and industrial facilities. Once they landed, the German commandos donned civilian clothing. All the members of the undercover unit were captured and tried by the US authorities. Of great importance was the ruling of the US Supreme Court, which branded the members of the undercover unit "unlawful combatants," denied them POW status, and considered their engagement in military operations while wearing civilian clothes to be a punishable violation of the laws of war.

Another famous case is the *Mohamed Ali* case in Singapore in 1965,[6] when two members of the Indonesian armed forces planted a bag containing

1 Richard B. Jackson, *Perfidy in Non-International Armed Conflicts*, 88 ILS (2012), 237, 242.

2 Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (2010), 224.

3 Geraint Hughes, *The Use of Undercover Military Units in Counter-Terrorist Operations: A Historical Analysis with Reference to Contemporary Anti-Terrorism*, 21:4 Small Wars & Insurgencies 561 (2010).

4 W. Hays Parks, *"Special Forces" Wear of Non-Standard Uniforms*, 4 Chi. J. Int'l L. 493, 548 (2003).

5 *Ex parte* Quirin, 317 U.S. 1 (1942).

6 Bin Haji Mohamed Ali and Another v. Public Prosecutor, Judicial Committee of the Privy Council (U.K.) 29 July 1968.

explosives in a civilian building, causing the deaths of three civilians. The two soldiers were later caught while wearing civilian clothes; they were tried and punished.

In April 1972, during the Vietnam War, the US military conducted an operation to rescue an American soldier and an airman ("the rescue of Bat 21"). As part of the operation, an American officer, Lt. Thomas R. Norris, disguised himself as a fisherman and used a *sampan* (a flat wooden boat) to travel, along with a local Vietnamese, inside heavily guarded enemy territory until the airman was found and rescued.[7]

One year later (1973), the Israeli Defense Forces (IDF) carried out operation "Spring of Youth" (*Aviv Neurim*)—an undercover operation in Beirut (Lebanon) against senior members of the Palestinian Liberation Organization (PLO). As part of this operation, members of elite IDF units arrived in Beirut by sea, wearing civilian clothing (some disguised as women). The raiding force attacked several PLO members and objectives, including two residential buildings in which three high-ranking PLO members were located; all of the intended targets were either killed or destroyed. The undercover unit also destroyed a building housing the headquarters of the Popular Front for the Liberation of Palestine (PFLP) and killed many of its members.[8]

The operation conducted against members of the Red Army Faction (RAF) in Germany in 1993 serves as an example of the use of undercover military forces in a law-enforcement situation: During an arrest operation executed by a plain-clothed GSG-9 unit, an RAF terrorist, Wolfgang Grams, and a member of the GSG-9 unit were shot dead; another RAF terrorist, Birgit Hogefeld, was captured.[9]

7 *See* Parks, *supra* 4, p. 557 (footnote 180).

8 Following the operation, Israel was condemned by the Security Council in Resolution 332 (1973) (S/RES/332 (1973)) for "the repeated military attack conducted by Israel against Lebanon and Israel's violation of Lebanon's territorial integrity and sovereignty in contravention of the Charter of the United Nations, of the Armistice Agreement between Israel and Lebanon and of the Council's cease-fire resolutions."

9 *See* Hughes, *supra* 3, p. 564.

Other examples of undercover units operating in civilian clothes include the operations conducted by French Barbouzes in Algeria (1961–1962);[10] operations by Indian undercover units intercepting Pakistani-trained terrorists in Kashmir (since 1995);[11] and the Turkish gendarmerie operating undercover against the Kurdistan Workers' Party (the PKK) in Kurdistan (1952).[12]

3. Contemporary Use of Undercover Units

The use of undercover operations continues to this day. In fact, the deployment of such units has become a very common mode of warfare in conflicts involving non-state actors. In such asymmetrical conflicts, the state party may be somewhat disadvantaged if it does not employ undercover forces, since the non-state party uses undercover forces—deliberately operating from within the civilian population and blending its forces among them.

For example, Solis refers to the press coverage of US operations in Afghanistan, in which wearing civilian clothing and growing beards was an integral part of the Special Forces' *modus operandi*.[13] On September 12, 2010, the spokesperson of the US Army Special Operation Command stated that "there is no longer a need for Special Forces soldiers to grow beards and wear indigenous clothing. Special Forces leaders authorized those practices during the early phases of the conflict, when our soldiers were operating in small units deep in enemy territory. Those operations and practices were enormously successful, producing a vastly changed operational environment."[14]

Similar practices also constituted an integral part of the US operations in Iraq. For example, in March 2008, several Iraqis were killed and more than a dozen were wounded in an operation conducted by US troops wearing civilian clothes in the al-Jamiya district in central Hilla (the operation was designed to capture a member of the local Mehdi militia).[15]

10 *Id*., p. 566.

11 *Id*.

12 *Id.*

13 *See* Solis, *supra* 2, p. 224.

14 Army Times, *SpecOps Soldiers Chafe at Grooming Order,* July 30, 2012.

15 Dean Yates*, U.S. Forces Clash with Gunmen in Iraq's Hilla*, Reuters, April 3, 2008.

4. Israel's Use of Undercover Units—*Mista'arvim*

Although the IDF has employed undercover forces since its establishment in 1948 (undercover forces were also used by the Jewish paramilitary organizations during the British Mandate), the IDF's systematic deployment of such units is a result of Israel's 1967 occupation of the West Bank and the Gaza Strip and its attempts to suppress Palestinian uprisings against the occupation. Special undercover units were created in response to the failure of regular IDF units to suppress Palestinian terrorism directed against Israeli civilians and to end guerilla-style armed attacks against IDF soldiers and military vehicles.

Throughout the years, three undercover units were formed by the Israeli security forces:

(1) **Duvdevan** (Hebrew for "cherry"). The first undercover unit, Duvdevan, was established in 1986 by the (then) OC Central Command, Maj. Gen. Ehud Barak, shortly before the outbreak of the First Intifada in 1987. Duvdevan's main objective was to identify, locate, capture, or kill terrorists in the West Bank. Duvdevan's operational scope grew following the Oslo Accords and the IDF's withdrawal from territories that were placed under Palestinian Authority control. Its main mission was to enter populated Palestinian areas to detain terrorists who were considered ticking time bombs and bring them to Israeli security agencies for interrogation. The unit also conducted reconnaissance operations to learn about the terrain in which future operations would take place. After the outbreak of the Second Intifada (October 2000), Duvdevan continued to operate in the West Bank. At the peak of its activity, Duvdevan conducted operations in the West Bank on a daily basis.

(2) **Shimshon** (Hebrew for "Samson"). In 1988, the (then) IDF OC Southern Command, Maj. Gen. Matan Vilna'i, established Shimshon, a unit designated to conduct undercover operations in the Gaza Strip. In 1994, Shimshon was dissolved and its combatants integrated into Duvdevan.

(3) **Yamas** (Hebrew acronym for "*Mista'arvim* Unit"). In 1991, an undercover unit of the Israeli Border Police[16] was established alongside the two IDF units described above. Yamas's *modus operandi* is very similar to that of the other two units: Yamas fighters disguise themselves as locals in order to capture and detain suspects. Generally, they disguise themselves en route to the suspect, but wear police baseball caps during operations in order to be identifiable and recognizable, especially by IDF soldiers who may be in the area.

(4) Due to the classified nature of these units, little information about their *modus operandi* or relevant statistics about their activities are available to the public. Nevertheless, through sporadic media publications and court decisions we have gathered several examples of the operations of these undercover units:

1. **Undercover Operation in Kabatiya (November 5, 1991)**[17]

On November 5, 1991, around 10 p.m., a small undercover unit was sent into Kabatiya (a village in the West Bank) for intelligence-gathering purposes. The soldiers were instructed to enter and leave the village undetected. However, they ran into a demonstration of Palestinian men holding sticks and flashlights. When the demonstrators identified the soldiers as such, the soldiers resorted to live fire to deter the demonstrators and had to be evacuated by an IDF rescue mission. One civilian was injured as a result of IDF fire.[18]

16 The Border Police, known by the Hebrew acronym *Magav*.

17 CA [Civil Appeal] 3569/03 Savaana v. Military Commander in the West Bank (November 4, 2010).

18 In its decision, the Court notes that there are doubts as to whether the plaintiff was the person who was injured by the soldiers' fire; nevertheless, both the IDF and the Palestinians agreed that a civilian was injured. The Court held that although the operation had begun as a "law enforcement operation" it escalated to a "combat action" situation.

2. **Undercover Operation in Jabalia (May 18, 1993)**[19]

On May 18, 1993, a Hamas rally was planned to take place in Jabalia (a village in the Gaza Strip) at a mosque next to a local orchard. The IDF had intelligence information that some 400 Hamas supporters would attend the rally, including several armed persons whom the IDF had long been after. Acting on this information, Yamas soldiers laid an ambush for the wanted militants. Several IDF vehicles approached from the other side of the mosque in order to disperse the rally and divert the wanted persons to the orchard. When the Yamas soldiers saw armed Palestinians running towards them, they started shooting in their direction. As a result, one uninvolved Palestinian civilian was killed and several other Palestinians were wounded (including a 13-year-old boy, who was seriously injured); several wanted persons were captured. Later it was discovered that the only shots fired in the incident were fired by IDF soldiers and that the weapons held by the Palestinians were fake.

3. **Undercover Action in Tulkarm (December 31, 2000)**[20]

On the morning of December 31, 2000, as Dr. Thabet Thabet backed out of his driveway, a car with undercover IDF soldiers appeared. Its occupants fired seven shots at Dr. Thabet and killed him.

Israel's official position was that Dr. Thabet was a commander of a Tanzim cell and instructed Tanzim fighters where to carry out attacks; thus, he was a legitimate target under international humanitarian law (as a civilian taking a direct part in hostilities).[21]

19 CAR [Civil Appeal Request] 3866/07 State of Israel v. Almakusi (March 21, 2012). For a further discussion of this case, *see* Ido Rosenzweig and Yuval Shany, *Supreme Court Rejects Combat Action Claim Involving Accidental Injury of Juvenile [CAR 3866/07]*, 39 IDI Terrorism and Democracy Newsletter (2012).

20 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, February 21, 2001.

21 Although the case was brought before the Israeli High Court of Justice by Dr. Thabet's wife, neither she nor the State (the respondents) provided any further details about the operation. *See* HCJ 474/02, Thabet v. Attorney General, January 30, 2011.

4. **Undercover Action in Ramallah (January 4, 2007)**[22]

On January 4, 2007, at around 3 p.m., the streets of Ramallah (West Bank) were crowded with people shopping for the weekend. An undercover unit entered a street adjacent to the vegetable market, in the city center, to arrest a wanted person.[23] The unit opened fire at the man; although wounded seriously he still managed to flee. As a result of the gunfire, the identity of the undercover unit was exposed and people began to pelt its members with stones, sticks, iron bars, and empty bottles. Several Palestinians also fired guns at them. Following the unit's exposure, several IDF jeeps, bulldozers, and two combat helicopters arrived at the scene to rescue the soldiers. Security forces, both on the ground and in combat helicopters, fired at the Palestinians attacking the undercover soldiers, killing four of them (only one was identified as a participant in the clashes).

5. **Operation Two Towers (June 20, 2007)**[24]

On June 20, 2007, at around 1 a.m., undercover IDF soldiers entered Kafr Dan (a small village in the West Bank outside of Jenin) in unmarked cars bearing Palestinian license plates. The undercover unit broke into several local houses and set ambushes in the vicinity of the private residence of the operation's main target, Ziad Malaisha (the head of the Palestinian Islamic Jihad Movement [PIJM] military wing in Jenin). Afterwards, several IDF-marked vehicles drove into the village to draw out local fighters to attack them. By doing so, they exposed the fighters to the Yamas ambush. The plan worked well: Malaisha and two of his fellow PIJM fighters, Ibrahim Abed and Ziad Zubekhi, became involved in a short fire fight. Both Malaisha and Abed were eventually killed by a missile shot from an IDF helicopter.

22 B'Tselem, *Void of Responsibility—Israel Military Policy not to Investigate Killings of Palestinians by Soldiers*, September 2010.

23 The report does not provide any further information about that person.

24 Uri Blau, *IDF Ignoring High Court on West Bank Assassinations*, Ha'aretz, November 26, 2008; Uri Blau, *IDF Confidential Documents: Chief of Staff and High Ranked Officers Authorized the Killings of Wanted and Innocent Persons*, Ha'aretz, November 28, 2008; Ido Rosenzweig and Yuval Shany, *New Information on the Use of Lethal Force during IDF Operation "Liquidation Sale*," 2 IDI Terrorism and Democracy Newsletter (2009).

Chapter 2

Operations of Undercover Units as Combat Actions

During armed conflict, military operations can fall either under the law-enforcement or combat paradigms. The analysis in this chapter focuses on combat operations.

The main legal framework governing armed conflicts is IHL, which mainly comprises the 1907 Hague Regulations,[25] the Geneva Conventions of 1949,[26] their Additional Protocols of 1977,[27] and customary

25 Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, October 18, 1907, 907, T.S. No. 539, 1 Bevans 63 1, 36 Stat. 2277 (hereinafter: the 1907 Hague Regulations).

26 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949 (hereinafter: the First Geneva Convention or GCI); Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, August 12, 1949 (hereinafter: the Second Geneva Convention or GCII); Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949 (hereinafter: the Third Geneva Convention or GCIII); Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949 (hereinafter: the Fourth Geneva Convention or GC IV).

27 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 (hereinafter: the First Additional Protocol or API); Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 (hereinafter: the Second Additional Protocol or APII). Although not all states are party to the additional protocols (as of January 2013, there are 172 state parties), significant provisions of these conventions are considered to reflect customary international law and therefore oblige even states that are not party to them (such as Israel). See on this issue the Israeli High Court of Justice judgment in HCJ 769/02, The Public Committee Against Torture v. Government of Israel (December 13, 2006) (inter alia) §§20–29 (hereinafter: *Targeted Killings* Case).

IHL.[28] IHL's rules are built around four core principles: **military necessity, distinction, proportionality**, and **humanity**.[29] There is universal consensus that these principles are applicable *mutatis mutandis* to both international and non-international armed conflicts.[30]

Undercover operations raise two main legal issues under IHL: (1) **the requirement that combatants wear uniforms** (derived from the principle of distinction), and (2) **the legal implications of conducting military operations while not in uniform** (that is, whether operating without uniforms constitutes treachery, perfidy, or espionage).

1. The Requirement to Wear Uniforms

1.1. Distinction

To understand the requirement to wear uniforms we need first to address the principle of distinction, which is one of the four basic principles of IHL and arguably the most important of them.[31] This principle applies both in international and non-international armed conflicts.[32]

28 Customary IHL is applicable to all states regardless of whether they have ratified the treaties containing the same or similar Rules. *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87: 857 IRRC 175–212 (2005).

29 UK Ministry of Defence, The Manual of the Law of Armed Conflict (2005), Chapter 2.

30 *Id*., Chapter 3; Dinstein, Schmitt & Garraway, The Manual on the Law of Non-International Armed Conflict 9 (2006) (hereinafter: San Remo Manual on NIAC). One of the main differences between the two types of conflict is the lack of Prisoner of War (POW) status in non-international armed conflicts (as a direct result of the absence of combat status in such conflicts). For the purposes of this paper there is no need to further elaborate on the exact definitions of international and non-international armed conflicts.

31 International Court of Justice (ICJ), *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, (hereinafter: *Nuclear Weapons* Case) §§78–79; Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, 2 volumes. Vol I: Rules. Vol II: Practice (2 parts) (2005) (hereinafter: ICRC CIHL Study), Chapter I.

32 Emily Crawford, The Treatment of Combatants and Insurgents under the Law of Armed Conflict 31 (2010); ICRC CIHL Study, *supra* 31, Rule 1.

The principle of distinction includes negative and positive aspects. The **negative aspect** requires the parties to the armed conflict to **refrain from directly attacking civilians** (unless the latter are taking a direct part in the hostilities) and civilian objects (unless being used for military purposes), and to directly attack only combatants and military targets.[33] The **positive aspect** requires the parties to the armed conflict to **take measures** to distinguish their own combatants (and military objects) from the civilian population (and civilian objects).[34]

These obligations must be implemented in many ways. Armed forces are required to distinguish between military and civilian targets in their zone of operations and are prohibited from employing indiscriminate means. To this end, while attacking (or preparing for an attack), a party to the conflict must take the necessary precautions to identify the nature of the target (whether it is a military or a civilian target). Moreover, the parties to the conflict are obliged to refrain from locating military objects close to the civilian population and from using civilians as human shields. They are also required to distance civilians from the vicinity of military objects.[35]

Nevertheless, it bears mention that the negative aspect of the principle of distinction does not prohibit attacks against military targets that are likely to cause incidental harm to the civilian population, as long as the anticipated harm is proportionate in nature.[36]

1.2. Taking a Direct Part in Hostilities

IHL provides for a strict distinction between combatants and civilians and confers only on combatants the right to participate in hostilities. As a result, while combatants are considered legitimate targets, they are also entitled to certain privileges, such as, but not limited to, POW status and combatant immunity (the latter exempts combatants from criminal or tort liability for

33 API, *supra* 27, Art. 51–52; Crawford, *supra* 32, p. 31; *Nuclear Weapons* Case, *supra* 31, §78.

34 API, *supra* 27, Art. 48; Crawford, *supra* 32, p. 31.

35 Crawford, *supra* 32, pp. 31–34.

36 API, *supra* 27, Art. 51, 57; Crawford, *supra* 32, pp. 34–35.

acts conducted in accordance with the laws of armed conflict).[37] Civilians, on the other hand, are entitled to special protection from the hostilities, but may not take a direct part in them.[38]

Although civilians have always contributed to the general war effort of parties to conflicts, as long as their contribution is considered indirect in nature (for example, the production and supply of weapons, equipment, food, and shelter) they are entitled to the same level of protection.[39] Civilians lose their protected status only when they directly contribute to the war effort. In recent years, this notion of Direct Participation in Hostilities (DPIH) has been at the center of IHL debates. A key reason for this is the growing incorporation of civilians in military operations, combat operations included.[40] This involvement of civilians in hostilities is particularly commonplace in the context of the operations of non-state organizations.

Article 51(3) of the First Additional Protocol stipulates that civilians enjoy such protection "unless and for such time as they take a direct part in hostilities." This notion of "direct participation in hostilities" is extensively discussed in the 2009 International Committee of the Red Cross (ICRC) document entitled, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law."[41] This interpretive guidance document was the result of a lengthy study, as well as debate among scholars and practitioners, and is meant to provide a general structure for the discussion of the topic (although some of the specific findings of the interpretive guidance document have been highly criticized by both

37 Crawford, *supra* 32, pp. 52–53; *see also* API, *supra* 27, Art. 43(2), which stipulates that "Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Art. 33 of GCIII) are combatants, that is to say, **they have the right to participate directly in hostilities**" [emphasis added].

38 API, *supra* 27, Art. 51(3); *Targeted Killings* Case, *supra* 27, §26; ICRC CIHL Study, *supra* 31, Rule 6.

39 Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 15 (2009).

40 *Id.*

41 *Id.*

scholars and practitioners).[42] According to the ICRC interpretive guidance, civilians are considered to be taking a direct part in hostilities if they meet the following conditions: (1) Threshold of Harm: it must be likely that their act will adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, inflict death, injury, or destruction on persons or objects protected against direct attack; (2) Direct Causation: There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part; and (3) Belligerent Nexus: the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.[43]

1.3. International Armed Conflict

One of the applications of the positive aspect of the principle of distinction is the requirement that combatants wear a distinctive sign or uniforms and carry their arms openly.[44] Such distinctive signs and practices help distinguish soldiers from the civilian population in a way that allows the

42 *See*, e.g., Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. Int'l L. & Pol. 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. Int'l L. & Pol. 697 (2010); Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L. & Pol. 741 (2010); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'l L. & Pol. 769 (2010).

43 Melzer, *supra* 39.

44 There is a general understanding that regular armed forces (namely state military forces) are expected to use uniforms and that militia forces are expected to wear a noticeable distinctive sign that distinguishes them from the civilian population. *See* Jean Pictet, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 52 (1960); Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 27–33 (2004); Toni Pfanner, *Military Uniforms and the Law of War*, 86: 853 IRRC 93:124 (2004).

enemy to identify them as combatants.[45] The fulfillment of this requirement is usually considered to be the precondition for receiving combatant status and the privileges that this entails—such as POW status in international armed conflicts[46] upon capture and combatant immunity.[47] Distinctive dress and conduct also enables the enemy to identify legitimate targets during armed conflicts and thus makes it possible for it to attack military targets.

Interestingly, the codified rules of IHL do not provide any positive obligation for regular armed forces to wear a distinctive sign (let alone uniforms).[48] Article 4(a) of the Third Geneva Convention (GCIII), which explicitly defines the conditions for the entitlement to POW status and is also taken to imply the requirements for attaining combatant status (at least with regard to members of armed forces and militias), merely identifies the consequences of the failure to respect the positive aspect of the principle of distinction.[49] Thus, members of armed groups who violate the conditions

45 Dinstein, *supra* 44, pp. 27, 38.

46 There is no right to POW status in non-international armed conflicts.

47 Dinstein, *supra* 44, p. 28; Crawford, *supra* 32, p. 52–53; Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy*, HPCR Occasional Paper Series, Program on Humanitarian Policy and Conflict Research, Harvard Univ., 12–13 (2005).

48 Pfanner, *supra* 44, p. 104. With regard to militias and volunteer groups, the demand derives from Article 1 of the 1907 Hague Regulations, *supra* 25 and GCIII, *supra* 26, Art. 4(A)(2), which are much clearer with regard to the use of a distinctive sign.

49 It could be claimed that the text of Article 4(a)(i) of GCIII excludes regular armed forces from the requirement of fulfilling the four criteria of Article 4(a)(ii) (including the need to wear a distinctive sign). Still, it is more generally accepted to refer to the conditions of Article 4(a) as twofold in nature—a requirement that applies at the general organizational level and at the individual level. In order for members of an armed group to attain POW status, the organization of which they are members must follow the requirements outlined in GCIII, *supra* 26, Article 4(a)(ii) (and, where applicable, the lower threshold of Article 43 of the API); *see* Dinstein, *supra* 44, p. 36. For that purpose, it is commonly agreed that a presumption exists that regular forces would meet the requirements set forth in Article 4(a)(ii) of GCIII (such requirements for regular forces are considered customary); John C. Yoo and James C. Ho, *International Law and the War on Terrorism*, 44 Va. J. Int'l L. 207 (2004). At the individual level, a member of the armed forces needs to also follow the

for POW status do not forfeit their combatant status but might lose their combatant immunity. While such persons still incur the obligations and "costs" associated with being a combatant (e.g., constituting a legitimate target), they do not enjoy the privileges derived from such status (immunity from prosecution for the mere participation in hostilities).[50]

For this reason, refraining from wearing uniforms could lead to the loss of the right to receive the privileges associated with combatant status, especially POW status and combatant immunity. According to the ICRC Customary IHL Study, the customary nature of the requirement to wear distinctive signs is relevant to combatants "while they are engaged in an attack or in a military operation preparatory to an attack."[51] This definition goes hand in hand with the wording of the initial clause of Article 44(3) of the First Additional Protocol.[52] It could be argued, therefore, that combatant immunity and entitlement to POW status can be lost only when "combat action" is undertaken without wearing a distinctive sign.[53] It is important to point out that soldiers not taking an active part in hostilities (e.g. while on vacation or during law-enforcement operations) are not expected to wear uniforms

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relevant requirements stipulated in Article 4(a), such as wearing a distinctive sign and carrying arms openly (at least, during attacks), in order to be entitled to POW status upon capture; *see* Solis, *supra* 2, pp. 187, 221; Pictet, Commentary: GCIII, *supra* 44, pp. 62–63. It should be noted that Article 44 of API allows in certain circumstances to also avoid using a distinctive sign, but this approach has been considered controversial and there is no state practice that supports it.

50 Dinstein, *supra* 44, pp. 29–30; Crawford, *supra* 32, pp. 53–55.

51 ICRC CIHL Study, *supra* 44, Rule 106; Solis, *supra* 2, p. 223; Pfanner, *supra* 44, p. 105.

52 However, it should be noted that the customary nature of this article is controversial and therefore not necessarily applicable to states not party to API and especially to persistent objectors such as Israel and USA; *see* Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA Pac. Basin L. J. 55, 103 (1984).

53 Solis, *supra* 2, p. 223; *Ex Parte* Quirin, *supra* 5; *see also* Osman Bin Haji Mohamed Ali and Another v. Public Prosecutor (1969) 1 AC 430, Privy Council (Malaysia) (hereinafter: *Mohamed Ali* Case), 144.

in order to maintain their legitimate status and privileges.[54] This conclusion is supported by state practice: a decisive factor in depriving combatants of POW status in national court cases is their capture without uniforms while conducting combat operations.[55]

The mere failure to wear a uniform does not qualify as a war crime or as a grave breach of the Geneva Conventions.[56] **If members of an armed force are captured while engaged in undercover combat operations (while wearing civilian clothes) they might lose combatant immunity.** Such combatants would then face one of the following consequences: (1) If caught gathering or attempting to gather information, they could be considered spies.[57] Consequently, they would lose the privilege of receiving POW status and may be prosecuted for the act of participation in hostilities and for any act of espionage in violation of domestic law that they might have committed.[58] (2) If they were engaged in an act of combat (which caused the death or injury of an enemy combatant, for example), these combatants could be put on trial for being saboteurs or for violating domestic-law prohibitions against causing unjustified harm to life or limb.[59] (3) Under circumstances in which engagement in combat operations, without using a distinctive sign, constitutes a violation of IHL—such as perfidy (see below)—the combatants in question may be prosecuted for IHL violations that could even amount to

54 Solis, *supra* 2, p. 188; Pfanner, *supra* 44, pp. 111–112; Dinstein, *supra* 44, p. 37.

55 *See Ex Parte* Quirin, *supra* 5; *Mohamed Ali* Case, *supra* 53.

56 Solis, *supra* 2, p. 221; Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters' Failure to Distinguish Themselves from Civilians*, Valparaiso University Law Review, 2011–2012, Emory Public Law Research Paper No. 11–169, p. 20; Parks, *supra* 4, p. 522.

57 API, Art. 46. ICRC CIHL Study, *supra* 31, Rule 107. It should be noted, however, that in accordance with Article 46(3) of API, if combatants managed to rejoin their forces prior to their capture, the right to POW status would not be revoked despite their acts of espionage.

58 Solis, *supra* 2, p. 224.

59 *Ex Parte* Quirin *et al*., *supra* 5.

war crimes.[60] In any event, the trial would have to be conducted in a manner respectful of the defendants' fundamental rights.[61]

1.4. Non-International Armed Conflict

Non-international armed conflicts pose a more complex legal setting for assessing the legality of deploying undercover units. To begin with, combatant status does not exist in non-international armed conflicts and, as a consequence, there are no combatants' privileges—such as the right to take part in hostilities (with regard to non-state forces) or POW status.[62] Non-state actors who take a direct part in hostilities lose their protection from direct attacks; in non-international armed conflicts they are considered legitimate targets, "for such time as they take a direct part in hostilities."[63]

Nevertheless, despite the lack of privileges for all non-state actors, including those complying with the principle of distinction (or any provision of IHL for that matter), the principle of distinction still applies to non-international armed conflicts.[64] Therefore, all parties to the conflict are required to fulfill both negative and positive aspects of the distinction principle.

Since there is no POW status at stake, and, moreover, because members of the non-state actor may be prosecuted by their own state merely for their (direct) participation in the conflict, there is no need to discuss questions of espionage and sabotage. On the other hand, non-state actors should conduct their operations in accordance with IHL. Such norms include, inter alia, the prohibition against treachery—a grave breach of IHL that is also applicable in non-international armed conflicts.[65]

60 Solis, *supra* 2, pp. 221–223.

61 API, *supra* 27; Article 75 is considered to reflect Customary IHL and is thus applicable to non-member states as well; *see also* ICRC CIHL Study, *supra* 31, Rule 100.

62 Crawford, *supra* 32, p. 78.

63 APII, *supra* 27, Art. 13; Melzer, *supra* 39.

64 Pfanner, *supra* 44, p. 121; ICRC CIHL Study, *supra* 31, Rule 1; Blank, *supra* 56, p. 6.

65 San Remo Manual on NIAC, *supra* 30, p. 43; Noam Lubell, Extraterritorial Use of Force against Non-State Actors 161 (2010); ICRC CIHL Study, *supra* 31, Rule 65; Jackson, *supra* 1.

1.5. Conclusion

The wearing of a distinctive sign is considered one of the fundamental criteria for attaining combatant status—whether when fighting as part of regular armed forces (which are usually expected to wear uniforms[66]) or as armed militias. It is also one of the basic conditions for conferring POW status upon combatants; failure to wear a distinctive sign while conducting a military attack could result in the loss of the right to POW status in international armed conflicts, and thus the loss of combatant immunity. **Lastly, while the lack of a distinctive sign does not constitute a violation of IHL per se, it could serve as an element of an IHL violation, such as perfidy or treachery.**[67]

This paper will now examine specific acts undertaken by undercover units during armed conflicts, examining in particular the circumstances under which failure to respect the principle of distinction may be deemed an act of perfidy or treachery.

PROBLEMATA

2. Perfidy and Treacherous Killing or Wounding

It seems that the most relevant norms covering specific acts of undercover units that violate the principle of distinction are the prohibitions of perfidy[68] and treachery.[69] Although the terms "perfidy" and "treachery" are usually used interchangeably,[70] there are several differences with regard to their scope of applicability (as discussed below).[71]

66 *See* API, *supra* 27, Art. 44(7); Pfanner, *supra* 44, p. 108.
67 Parks, *supra* 4, p. 513.
68 API, *supra* 27, Art. 37.
69 the 1907 Hague Art. 23(b), *supra* 25.
70 Solis, *supra* 2, p. 421.
71 Dinstein, *supra* 44, pp. 198–208.

The prohibition against perfidy and treachery under IHL applies to actions by one party inviting the confidence of adversaries and leading them to believe that that party is entitled to protection under the law applicable in armed conflict. Furthermore, perfidious or treacherous actions, by definition, are committed **with the intent to betray the adversary's confidence in order to cause his or her death, injury, or capture**.[72] Such actions include the feigning of intent to negotiate under a flag of truce or surrender, the feigning of incapacitation by wounds or sickness, and **the feigning of civilian non-combatant status**.[73] The (almost) inevitable result of resorting to such methods is the weakening of the entire system of IHL protections and, consequently, an increase in the risk to persons entitled to protection during hostilities (such as civilians, medical personnel, and those who are hors de combat).[74]

Before getting into the differences and nuances of perfidious and treacherous behaviors, it is important to understand the different rationales for the prohibitions against them under IHL:

(1) **Distinction.** As mentioned above, the notion underlying the principle of distinction (and perhaps IHL more generally) is to minimize harm from combat action to civilians and persons hors de combat. The use of treacherous measures runs contrary to the principle of distinction; taking advantage of the protections afforded by these rules negates the conditions of distinction and undermines the combatants' confidence in IHL itself. If combatants are unable to rely on IHL protections, the risk of harm to civilians and persons hors de combat increases dramatically.

(2) **Chivalry.** The notion of chivalry goes back to the times of knights and codes of honor that used to regulate the conduct of belligerents during armed conflicts.[75] According to the chivalry concept, there are certain

72 API, *supra* 27, Art. 37.

73 *Id.* The focus of the prohibition is not on the nationality of the feigned civilian, but rather on their non-combatant status.

74 John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction,* 6 JICJ 627 (2008), 652.

75 Solis, *supra* 2, p. 5–6; Rain Liivoja, *Chivalry without a Horse: Military Honour and the Modern Law of Armed Conflict*, in The Law of Armed Conflict: Historical and

limitations to the choice of means and methods of warfare by the parties to a conflict that conform to certain recognized formalities and courtesies.[76] These limitations include the prohibition against treacherous conduct, such as feigning protected status. Chivalric conduct is based on combatants' honor and on their desire to defeat their adversaries "fair and square." It is important to note that this ancient principle does not prevent the use of surprise military tactics, such as laying an ambush, that give one party a tactical advantage over its adversary.[77]

(3) **Reciprocity.** Although today the application of IHL is not subject to reciprocity,[78] reciprocity has traditionally been honored under IHL (much like other instruments of public international law).[79] Any rule that limited the means of operation by military forces had to be subject to reciprocity; without such an understanding no party would have complied with IHL. It is clear that parties to a conflict viewed the benefit of banning treacherous means of warfare (including preserving the principle of distinction, enhancing the assurance of combatants with regard to the battlefield, and maintaining the safety of protected persons) as exceeding the costs associated with limiting the military options at

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Contemporary Perspectives 75 (Rain Liivoja & Andres Saumets eds. 2012); US Army Operational Law Handbook 14 (Maj. Andrew Gillman, USAF & Maj. William Johnson eds., 2012).

76 ICRC CIHL Study, *supra* 31, Rule 65; US Army Operational Law Handbook, *supra* note 75, p. 14.

77 Some remnants of chivalry can be identified in the pride combatants feel in their unit and their willingness to bear some risk during military operations as part of their code of honor. *See* David Luban, *Risk Taking and Force Protection*, paper 654, Georgetown Law Faculty Publications and Other Works (2011).

78 *See* Common Article 2 of 1949 Geneva Conventions, *supra* 27.

79 Sean Watts, *Reciprocity and the Law of War*, 50:2 Harvard International Law Journal 365–434 (2009); Jeremy Sarkin, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application from at Least the Nineteenth Century*, Human Rights and International Legal Discourse, vol. 1, 2007, Hofstra Univ. Legal Studies Research Paper No. 08–24; *see also* Andrew T. Guzman, How International Law Works: A Rational Choice Theory 42–45 (2008).

their disposal. Such a cost-benefit analysis supported the drafting of the prohibitions against treacherous methods of operation in the past.

2.1. The Elements of Perfidy

The prohibition of perfidy and treachery set out in the Hague Regulations and API is limited to acts that lead to death, injury, and capture for parties to API.[80]

The definition of perfidy is based on three cumulative elements:[81]

(1) The invitation of an adversary's confidence;

(2) The existence of protection afforded by international law applicable in armed conflicts (an objective element);

(3) The **intent** to betray confidence (a subjective element) gained by the adversaries' perception of a party's protected status, in order to achieve the end result of killing, wounding, or capturing the adversary.

Article 37(1) of API lists several examples of what could be considered perfidy. This list includes "**the feigning of civilian, non-combatant status**." However, this is only one of the elements of perfidy. Unless the feigned status is used with the intent to betray the confidence of the adversary and to exploit that confidence, the act is not considered perfidious.[82] Therefore, actions that do not include these elements are not defined as perfidious under this particular article. Such actions can be considered as either legitimate or illegitimate ruses of war, or as prohibited actions under IHL (such as using civilians as human shields). Examples of measures not considered perfidious include situations where no confidence had been established (such as an ambush or the use of snipers), and where the intended result was not to kill, injure, or capture the adversary (an operation to destroy a military facility or infrastructure, for instance).[83]

80 Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., Commentary on the Additional Protocols 429–444 (1987) (hereinafter: APs Commentary).

81 *Id.*, Art. 37, 435, §1500; Dinstein, *supra* 44, p. 201.

82 Watkin, *supra* 47, p. 63.

83 William H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 Military Law Review 94, 118–119 (2003).

The same analysis might also apply to the other side of the coin—when the use of undercover operations is not meant to deceive the adversary into thinking that the operating forces are entitled to protection, but rather to simply deceive the adversary. In accordance with the wording of Article 37, however, the prohibition is of "acts inviting the confidence of the adversary" and not acts that are solely intended to gain such confidence, that is, the scope is set broadly rather than narrowly. For this reason, as long as the action could invite the adversary's confidence and is meant to kill, injure, or capture them, the act could amount to perfidy.[84]

It is important to note that IHL is designed to regulate the general operations of states and military forces as well as the conduct of individuals. Consequently, the prohibition on perfidy relates to the general operations of a unit or a military force, and not necessarily to the conduct of an individual combatant. This means that even if elements of perfidy are being practiced by an organization as a whole, with different persons practicing different elements, perfidy has still occurred. In other words, if combatant A feigns protected status (as an injured person or as an uninvolved civilian) in order to draw adversaries to a specific location and lower their guard, while a sniper (combatant B) has been ordered to target them there, then this operation constitutes perfidy under IHL, since all elements of perfidy can be demonstrated in the operation as a whole, with combatants A and B each performing a part.[85]

2.2. Deployment Preceding an Attack

One of the most important purposes of operating undercover is that it makes it possible to deploy towards the target, or the area of operation, without being detected, in order to maintain the element of surprise. This notion does not conform with the positive aspect of distinction—the requirement to distinguish between combatants and civilians, especially during combat

84 This situation raises questions of liability that are addressed later on in this paper.

85 The question of personal liability in such scenarios is more complicated. One could argue that in operations of this nature the liability rests with the commander who ordered the operation, since he or she is aware of all of the relevant elements. For a further discussion of the question of personal liability, *see* Chapter 6.

activity. Since we have already established that there is no positive obligation for combatants to wear uniforms, the inevitable question that arises is: Under what circumstances would an early stage of the operation involving the use of undercover forces be considered a perfidious operation?

The deployment question can be linked to Article 44(3) of API, which allows guerilla forces to maintain their combatant status and POW privileges while operating in civilian attire. However, even under this highly criticized and controversial provision,[86] a member of a guerilla force is required to carry arms openly: (a) during each military engagement, and (b) "**during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."** [Emphasis added]

The same article further stipulates that "Acts which comply with the requirements of this paragraph **shall not be considered as perfidious** within the meaning of Article 37, paragraph 1(c)"[87] (emphasis added). In light of the above, it is clear that the force's visibility during deployment is a relevant factor where perfidy is concerned. The analysis of the wording of Article 44(3)(b) relates to the deployment aspect of the prohibition on perfidy.[88] Although Article 44(3) refers to the conduct of non-state forces, the general principle can be applied (*mutatis mutandis*) to the question of whether undercover deployment constitutes perfidy for state forces as well.

The main questions involved in this issue relate to the force's visibility and to the time when it becomes visible during the operation. The commentary to Article 44(3)(b) demonstrates that these questions can be addressed in different ways. For example: Is there a requirement that the force know, or should know, that it is visible to the adversary? Does the requirement apply

86 Dinstein, *supra* 44, p. 46; Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants"*, 85:849 IRRC 46 (2003); the criticism of that provision goes back to its very drafting—for example, *see* VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 121–122 (1974–1977) (hereinafter: APs Official Records).

87 API, *supra* 27, Art. 44(3).

88 Ferrell III, *supra* 83, pp. 122–123.

only to visibility to the naked eye or to electronic and other advanced means?[89] The commentary acknowledges that no agreement has been reached as to the interpretation of the term "deployment," and therefore suggests that this term should be analyzed in accordance with each situation.[90] The two principal approaches to this question are: (1) visibility during any movement towards the point from which an attack is to be launched; and (2) visibility only during the final movements toward firing positions or the moments immediately before the attack.[91] While this question has not been settled completely, Ferrell concludes that "combatants must distinguish themselves earlier in an operation, rather than later, to protect the civilian population and prevent the dissolution of the principle of distinction."[92]

When comparing this notion to the prohibition on perfidy, we can see that the questions of visibility and deployment are very similar. There are several alternatives that can define the starting point of an operation: (1) once the undercover combatants begin moving towards the target (deployment

89 APs commentary, *supra* 80, pp. 519–542.

90 *Id*., p. 536. During the voting on Article 44(3), several comments were made by representatives of the delegations. For example, Mrs. Ruth Lapidoth (Israel) noted that "the term 'deployment' had already given rise to widely divergent interpretations … and the expression 'visible to the adversary' was equally unclear", APs Official Records, *supra* 86, p. 122; Mr. Di Bernardo (Italy) held that the term military deployment included "any movement of the military formation towards the place from which the attack was to be launched" *(id*., p. 123); Mr. Mahony (Australia) felt that the term "deployment" should be "interpreted as including 'a movement by a combatant to attack;'" moreover, "[t]he failure to use precise terms in the article would cause unnecessary confusion to the detriment of combatants and civilians alike" (*id*., p. 128); Mr. Freeland (United Kingdom) remarked that the term "deployment" must be interpreted "as meaning any movement towards a place from which an attack was to be launched" (*id*., p. 132). Not less interesting is the position presented by Mr. Armali of the Observer for the Palestinian Liberation Organization. Mr. Armali claimed that "the phrase 'during such time as he is visible to the adversary' must be interpreted as meaning 'visible to the naked eye.' … Similarly, the phrase 'while he is engaged in a military deployment preceding the launching of an attack' could only mean immediately before the attack, often coinciding with the actual beginning of the attack" (*id*., pp. 147–148); *see also* Ferrell, supra 83, p. 112.

91 Ferrell, *supra* 83, p. 112.

92 *Id*., p. 113.

de facto); (2) once the undercover combatants are visible (or can be visible) to the adversary (that is, visible deployment); and (3) once the undercover combatants are visible (or can be visible) to the intended targets of the attack (the actual attack).[93]

To effectively address this question, we need to return to the original purpose of the prohibition: to maintain and facilitate the protection of protected persons during armed conflict.[94] With this in mind, the most protective measure is the first alternative (deployment de facto)—which deems even the first undercover step aimed to kill, injure, or capture an adversary to be prohibited. It is questionable, however, whether it strikes an adequate balance between security needs (a military necessity) and humanitarian interests. Moreover, since—much like the requirement of Article 44(3)—this prohibition includes a visibility condition, it seems to us that the deployment de facto alternative is indeed too restrictive

When considering the second and third alternatives (visible deployment versus actual attack) in the context of perfidy, we also include the notion of the visibility of the undercover forces to the adversary. As was noted above with regard to Article 44(3), the visibility question is focused on two aspects: (a) timing—deployment towards the location of the attack or only at the final movement towards attack, and (b) means of detection—only by the naked eye or also by advanced technology.

With regard to the **timing** of the visibility, it could be argued that the deployment of an undercover force among civilians until the final movement towards the attack actually reduces the risk posed to the civilians. However, this argument can be easily countered by the rationale behind the prohibition: when undercover forces are using civilian attire to hide from the adversary, the ultimate consequences are the dilution of the protection to civilians and the complete destruction of the principle of distinction (as every civilian might be considered to be a legitimate subject of attack at any given time).[95] Moreover, over-emphasizing the actual **detection** of the undercover forces by

93 Dinstein, *supra* 44, p. 46.

94 Ferrell, *supra* 83, p. 121.

95 *Id.*

the targeted adversary (as portrayed in the third alternative) could render the prohibition on perfidy de facto ineffective, as the forces would then conduct their operations so as not to be visible to the **actual** target (such as coming from behind, sneak attacks, etc.).

Therefore, we believe that the **earlier** rather than the **later** approach is applicable to perfidy as well. Hence, **visible deployment is the most suitable alternative with regard to the timing of visibility**. This alternative also correlates with the understanding that the purpose of protecting civilians from perfidious behavior is relevant only when the adversary is in a position to see the undercover forces and positively identify them as civilians. This alternative carefully balances the prohibition on feigning a protected status on the one hand, and the requirement for status-based trust on the other.

With regard to the **means of detection**, as was mentioned in the discussion of the visibility requirement of Article 44(3), there are many possible interpretations. These means can range from the naked eye, simple mechanisms (such as binoculars), and advanced mechanisms (such as surveillance satellites). For example, with regard to the interpretation of the visibility clause in Article 44(3), PLO representative Mr. Armali concluded that the interpretation must be "visible to the naked eye."[96] However, since different forces have different technological capabilities, it seems impossible to arrive at an overarching conclusion with regard to the method of visibility; for example, the means available to Palestinian armed groups to view the IDF's undercover units, or to al-Qaeda to view US forces, cannot be compared with the those available to the IDF or to NATO-member states. For this reason, we believe that the solution to the **means of detection** question should be addressed on a case-by-case basis, in accordance with the adversary's known available means of detection.

2.3. Failed Attempts

Another question relates to failed attempts to commit prohibited perfidious or treacherous actions. The commentary to Article 37 firmly holds that "the

96 APs Official Records, *supra* 86, pp. 147–148.

attempted or unsuccessful act also falls under the scope of this provision."[97] This notion has been criticized on the grounds that without implementing the intent, or by conducting an unsuccessful attempt, the prohibited act has not been completed, and thus no violation has been committed.[98] It seems to us that while an unimplemented attempt does not meet the *actus reus* requirement of the violation, the answer to the "sort of grey area of perfidy" (as defined by Dinstein[99]) with regard to unsuccessful attempts is directly related to the deployment analysis; that is, if the attempt (to kill, injure, and where applicable, also to capture) has reached the "point of visibility," the act would be considered to have passed the bar of violation.

2.4. The Differences between Perfidy and Treachery

There are several differences between the prohibitions on perfidy and treachery. Article 23(b) of the 1907 Hague Regulations provides that it is prohibited "to kill or wound treacherously individuals belonging to the hostile nation or army," and Article 37 of Additional Protocol I states that "It is prohibited to kill, injure, or **capture** an adversary by resort to perfidy."[100]

Therefore, while the prohibition of perfidy (according to Article 37 of API) includes the prohibition of killing or wounding treacherously, it also adds the prohibition of perfidiously capturing the adversary. Interestingly enough, during the diplomatic conference in which negotiations over the Additional Protocols took place, and during its drafting between 1974 and 1977 in Geneva, there were no discussions on the decision to add a "capture" clause to the prohibition on treacherous or perfidious behavior.[101] In the

97 APs commentary, *supra* 80, p. 433, §1493.

98 Dinstein, *supra* 44, pp. 201–202; Dieter Fleck et al., The Handbook of Humanitarian Law in Armed Conflicts 472 (1999).

99 Dinstein, *supra* 44, 201–202.

100 Ruses of war, however, are not prohibited.

101 APs Official Records, *supra* 86; Article 37 of API was accepted by consensus. The same consensus applied to the decision to remove any such prohibitions from non-international armed conflicts regulated by Additional Protocol II.

same vein, the official ICRC commentary to the Additional Protocols fails to provide any reason for the addition.[102]

There are several possible explanations for this addition:

1. The drafters may have assumed that any operation intended to capture enemy combatants is most likely to result in death or injury and, for this reason, the prohibition against perfidious operations should also include operations that are expected to lead to such results.
2. The norms and principles protected by the prohibition of treacherous behavior—that is, the special statuses granted under IHL[103]—would be jeopardized to the same degree by allowing the alternative of capture.
3. Capture might be analogized to death and injury, in the sense that all such measures are aimed at neutralizing enemy forces.[104]

Still, if the use of treachery in capture operations is undesirable, why was capture not included in the prohibition stipulated in the Hague Regulations? One reason may be evolutionary developments in state practice: one of the goals of the Additional Protocol was to codify existing customary IHL law and common practice. It could be argued that whereas the prohibition against treacherous capture did not reflect universal consensus in 1907, seven decades later it had become globally accepted, as indicated by state practice. This possibility is supported by the ICRC customary IHL study that holds that the prohibition on capture is now considered part of customary IHL.[105]

In any event, for states not party to API, the only way in which the prohibition against treacherous means in capture operations would be applicable is if Article 37 of API is indeed reflective of customary international humanitarian law.

102 APs commentary, *supra* 80, pp. 429–444.

103 *Id.*

104 *See* Belgium's Teaching Manual for Soldiers, quoted in ICRC CIHL Study, *supra* 31, vol. 3, part 1, p. 1370, §862.

105 ICRC CIHL Study, *supra* 31, Rule 65; Cassese, *supra* 52, pp. 78–79.

2.5. The Customary Nature of Perfidy

Although not all states are party to API, many of its articles reflect customary IHL, which is just as applicable to states that are not party to the relevant conventions (such as Israel and the United States).[106] Rule 65 of the ICRC Customary IHL Study reflects the wording of Article 37 of API: "Killing, injuring, or capturing an adversary by resort to perfidy is prohibited" both in international armed conflict and non-international armed conflict.[107]

This position is rejected by the San Remo Manual on the Law of Non-International Armed Conflict, in which the authors, Dinstein, Schmitt, and Garraway, assert that the prohibition against treacherous capture is not customary in either international or non-international armed conflicts and is therefore applicable only to states party to API.[108] Nevertheless, they accept that the prohibition on killing and injuring in treacherous ways—as stated in the Hague Regulations and also in the Rome Statute—is applicable to non-international armed conflicts as well.[109] Unfortunately, much like the drafters of API who failed to provide an explanation for including capture under the scope of the prohibition, Dinstein, Schmitt, and Garraway do not provide any explanation for their position, apart from noting the fact that the prohibition against capturing treacherously is unique to API and that not all states are party to API.

It is interesting to note that the narrower definition of treachery under the 1907 Hague Regulations is used in the ICC Rome Statute with regard to both international and non-international armed conflicts.[110] Needless to say, neither

106 Unless such a state is a persistent objector to that custom; however, since no state has expressed its objection to the prohibition on perfidy, the question of persistent objector is moot. *See* Cassese, *supra* 52, pp. 78–79, and ICRC CIHL Study, *supra* 31, Rule 65.

107 ICRC CIHL Study, *supra* 31, Rule 65.

108 San Remo Manual on NIAC, *supra* 30, pp. 43–44; Lubell, *supra* 65, p. 161.

109 San Remo Manual on NIAC, *supra* 30, p. 44.

110 Articles 8(2)(b)(xi) and 8(2)(e)(xi) of the Rome Statute of the ICC. According to the ICRC CIHL Study, the differences can be explained by arguing that "killing, injuring, or capturing by resort to perfidy is illegal under customary international law but that only acts that result in serious bodily injury, namely killing or injuring, would constitute a war crime"—*see*

the Rome Statute's working papers nor its leading commentaries offer an explanation for this choice of wording. Nevertheless, this supports, to some extent, the conclusion that the prohibition of capturing as part of treacherous acts is not a customary prohibition; as a result of this conclusion, for the purpose of this article, we will continue to operate under the assumption that Article 37 of API does not reflect customary IHL (CIHL). In other words, it appears as if the prohibition of treacherous **capture** does not apply to states that are not party to the protocol. This notion is also supported by various military manuals.[111]

Nevertheless, even if we were to acknowledge that the prohibition of treacherous capture indeed constitutes CIHL, according to the above analysis it could be claimed that although capture may constitute a violation of IHL, it would probably not amount to a war crime under the Rome Statute or a grave breach of the Geneva Conventions.[112] This notion is supported by the CIHL commentators.[113]

2.6. Application in Non-International Armed Conflict

The attempt to explicitly add the prohibition of perfidy to Additional Protocol II (APII) failed. The overriding reason was the absence of combatant status in non-international armed conflicts and the frequent combination of combat action and law-enforcement actions in such conflicts.[114] There is thus reason to believe that such a prohibition does not apply in non-international armed conflicts. However, it must be remembered that in the International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadic* case, the appeals chamber determined that most customary IHL applies in both classifications of

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ICRC CIHL Study, *supra* 31, Rule 65; *see also* Sandesh Sivakumaran, The Law of Non-International Armed Conflict 419 (2012).

111 ICRC CIHL Study, *supra* 31, Rule 65.

112 Parks, *supra* 4, p. 522. *See* further discussion about criminal liability under Chapter 4.

113 ICRC CIHL Study, *supra* 31, Rule 65, Sivakumaran, *supra* 110, p. 419.

114 Rotem Giladi, *Out of Context: 'Undercover' Operations and IHL Advocacy in the Occupied Palestinian Territories*, 14:3 Journal of Conflict and Security Law 393, 424–425(2009).

conflict;[115] and includes the prohibition against perfidy.[116] Moreover, Rule 65 of the ICRC Customary IHL Study holds that the prohibition of perfidy has also been applied in practice to non-international armed conflict. However, when examining the examples of state practice and military manuals in the report, one can identify that the prohibition of perfidy appears mostly in the practice of states party to API, whereas the practice of states not party to that treaty refers to the prohibition on treachery.[117] As suggested above, this appears to reflect more accurately the general view of the commentators and other scholars on the matter.[118] This notion also goes hand in hand with the earliest documented prohibition of treachery, in the Lieber Code of the United States Civil War.[119]

2.7. Ruses of War

Article 37(2) of API helps crystallize the definition of perfidy: "Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations, and misinformation."[120]

IHL rules thus allow for some flexibility in their application. Military operations are not required to meet standards of chivalry to their fullest extent, and the forces are allowed to employ camouflage and certain "tricks" such as ambushes, decoys, sending misinformation, etc. What is prohibited is the exploitation of humanitarian protection as a ploy.

115 Prosecutor v. Tadic (Appeal Chamber), §§ 96–127 (October 2, 1995).

116 *Id.,* § 125.

117 ICRC CIHL Study, *supra* 31, Rule 65; *see also* Sivakumaran, *supra* 110, pp. 419–420.

118 San Remo Manual on NIAC, *supra* 30, p. 43; Jackson, *supra* 1.

119 Instructions for the Government of Armies of the United States in the Field (Lieber Code), Art. 101 (April 24, 1863); Jackson, *supra* 1, p. 255.

120 *See also* the 1907 Hague Regulations, *supra* 25, Art. 24.

Throughout history, ruses of war were permitted as long as they respected IHL (for example, undercover operations to destroy military objectives).[121] Nevertheless, we should emphasize that the definitions of perfidy and ruses of war are not binary in nature with regard to their legality: an illegitimate ruse of war does not necessarily constitute an illegal perfidious act and a non-perfidious ruse should not automatically be considered legal. For example, the use of camouflaged units or the conveying of misinformation in order to attack a purely civilian target would not be considered perfidious (although it may constitute a violation of other IHL rules). It seems clear that one of the main reasons for undercover operations is the belief that it would be safer for the attacking forces to approach the target while in the guise of uninvolved civilians, as part of general force-protection considerations.[122] As long as the undercover operation does not violate IHL—for example, it is designed to capture militants in a non-international armed conflict—such tactics can be understood as a ruse of war.

As noted earlier, the main rationale underlying the prohibition against perfidious or treacherous conduct is to maintain the principle of distinction and protection due to protected persons in times of conflict. The (almost) inevitable result of resorting to perfidious or treacherous methods is the undermining of the principle of distinction and, consequently, an increased risk to persons who should be protected during hostilities (such as civilians, medical personnel, or those hors de combat).[123]

121 Dinstein, *supra* 44, p. 201.

122 Parks, *supra* 4, pp. 499, 543–544 (Parks rejects that argument as legitimate); Israeli Supreme Court decision in CAR [Civil Appeal Request] 3866/07 State of Israel v. Almakusi (March 21, 2012). For a discussion of the case, *see* Ido Rosenzweig and Yuval Shany, *Supreme Court Rejects Combat Action Claim Involving Accidental Injury of Juvenile*, 39 IDI Terrorism and Democracy Newsletter (2012).

123 US Army Operational Law Handbook, *supra* 75, p. 14.

2.8. Application to Asymmetric Warfare

Asymmetric warfare provides a very "comfortable" ground for acts of perfidy. Since the so-called weaker side to the conflict (usually a non-state armed group or militia) operates from within the civilian population and without any positive distinction, any operation aimed at the killing, wounding, or capturing of members of the adversary under such conditions would probably fulfill all the elements of perfidy. An interesting question in this regard relates to the effect of such a *modus operandi* on the "strong side" of the conflict (usually a state's regular armed forces): one can argue that it is unrealistic to expect combatants to follow strict requirements of distinction while their opponents keep taking advantage of this very same behavior.[124] However, it should be emphasized that as reciprocity is not a condition for the applicability of IHL,[125] the armed forces cannot be excused from their obligation to follow IHL. Any such excuse could lead to a slippery slope towards the breakdown of the concept of distinction and the protections granted under IHL.[126]

2.9. Conclusion

Killing or wounding an adversary by resorting to perfidious or treacherous conduct is prohibited both in international and non-international armed conflict, both by international conventions and customary IHL. As a result, it is applicable also to state and non-state actors who are not parties to API. However, the prohibition of capture by resorting to perfidy is applicable only to international armed conflict where API is applicable.

3. Espionage

Another issue that relates to the use of undercover units is espionage. Espionage is defined both in the Hague Regulations and in API. Article 29 of the 1907 Hague Regulations defines a spy as follows: "A person can only

124 Ferrell, *supra* 88, p. 121.

125 ICRC CIHL Study, *supra* 31, Rule 140.

126 *Id.; see also* Nils Melzer, Targeted Killing in International Law 373 (2008).

be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies."

Article 46 of API notes that

> (1) ...any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.
> (2) A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

Therefore, it is clear that the act of espionage itself is not prohibited per se under international humanitarian law. Still, the outcome of resorting to espionage could be the loss of entitlement to POW status and to combatant immunity.[127] Hence, combatants not distinguishing themselves (for example, wearing civilian attire), who operate beyond enemy lines with the purpose of gathering or delivering information back home, risk the possibility of being considered to be spies.[128] Such spies may be subject to trial for espionage (under non-international law) as well as for participation in the conduct of hostilities.[129]

127 Solis, *supra* 2, p. 430; Richard Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 331 (1951).

128 ICRC CIHL Study, *supra* 31, Rule 107. Combatants who operate as spies regain the right to POW status if they manage to return to their forces following the act of espionage (the regained POW protection includes the espionage operations).

129 *Ex Parte* Quirin, *supra* 5.

The definition of espionage under IHL limits itself to acts committed during international armed conflict. Under IHL governing non-international armed conflicts, there is no prohibition on the use of espionage tactics to obtain information from the adversary.[130] (As already noted, espionage is not, per se, a violation under IHL even in international armed conflicts.) While the sanction for espionage under international armed conflict is the loss of POW status and combatant immunity, these privileges do not exist under IHL governing non-international armed conflicts; for this reason, the adversaries are subject to the applicable prohibitions under the relevant provisions of domestic law.

Thus, government-organized forces operating to obtain information from the adversary in non-international armed conflict, while wearing civilian clothes, appear to be violating neither international law nor domestic law.

4. Undercover Unit Operations under IHL

The main legal framework governing armed conflict is IHL. Consequently, all combat action operations must be examined first in accordance with this body of law.

The main characteristic of undercover units used by countries like Israel, is (naturally) the absence of a uniform or any other distinctive sign. While this characteristic alone does not constitute a violation of IHL, it may be one of the constitutive elements of IHL violations such as perfidy. In the following section, and in light of the analysis conducted above, we will focus on several types of undercover operations and the legal aspects they raise.

After reviewing different types of undercover combat operations, we can classify such operations into the following two categories: (1) operations for gathering intelligence and information; and (2) operations involving acts of violence (against persons or property). It should be noted that, in practice, there might be some overlap between the two categories—either regarding the operational aim (for example, gathering information and destroying a

130 Jackson, *supra* 1, p. 248.

military arsenal) or with regard to the end result of the operation (such as an operation that aims at gathering intelligence and, due to the circumstances on the ground, ends with killing a member of the adversary). However, this does not change the legal analysis of each category.

(1) **Operations aimed at gathering intelligence and information.** Such operations are executed by undercover members of armed forces, who are sent to areas considered to be under enemy control ("behind enemy lines"). Due to the nature of the operation, the acts undertaken by the forces would constitute espionage and the combatants taking part in such operations would be considered spies.

Article 46 of API defines a spy as a combatant who gathers or attempts to gather information while not in uniform (or bearing a distinctive sign) and when present in a territory under the adversary's control.[131] This definition, which follows the decision of the US court in *Ex Parte Quirin*,[132] has been recognized as customary IHL in the ICRC Customary Study (Rule 107).[133] Since the act of gathering (or attempting to gather) information is not considered a violation of IHL,[134] the only outcome for combatants caught is the loss of the right to POW status[135] and the loss of combatant immunity from criminal prosecution for taking part in hostilities. Nevertheless, this is true only in situations where combatants are captured "while engaging in espionage"; in other situations, combatants retain their right to POW status and cannot be criminally prosecuted for the espionage they have engaged

131 APs Commentary, *supra* 80, pp. 561–570. It bears mention that Article 29 of the 1907 Hague Regulations specifies that in order to be considered a spy, clandestine or false pretences are also required.

132 *Ex Parte* Quirin, *supra* 5.

133 ICRC CIHL Study, *supra* 31, Rule 107.

134 APs Commentary, *supra* 80, Art. 37, p. 440, §1513; Parks, *supra* 4, p. 525; *see also* Art. 24 of the 1907 Hague Regulations, *supra* 25. Also noteworthy is that the perfidious gathering of information does not constitute a violation of perfidy under API, *supra* 27, Art. 37; *see* Giladi, *supra* 114, p. 414.

135 This does not mean that combatants have no right to POW status, but rather that this decision is at the discretion of the detaining power.

in previously.[136] Therefore, if prior to their capture, combatants wear their uniforms or leave the territory under control of the adversary, they do not forfeit their right to POW status.

Since the outcome of espionage is loss of POW status, and the definition of espionage requires the operations to be conducted in enemy territory, IHL rules relating to espionage do not apply to situations of non-international armed conflicts where POW status does not apply (and in most cases, there is no enemy-state-controlled territory).

Should an undercover unit engaging in espionage find itself in a position where it has to use force against either objects or persons, it is not prohibited from doing so. Still, such use of force must be conducted in accordance with IHL—maintaining the negative aspect of distinction and ensuring that such an attack does not violate the principle of proportionality. This will be discussed in the following section.[137]

(2) **Operations involving acts of violence.** During armed conflict, all combat operations involving acts of violence must be conducted in accordance with IHL. Unlike law-enforcement operations, which allow for the use of lethal force only as a last resort and require that any deprivation of liberty be pursuant to due process,[138] IHL provides more liberal standards of conduct. It allows for the use of force against military objects[139] as long as such force conforms to the principles of necessity, distinction, and proportionality and allows for prolonged detention without trial of enemy combatants and civilians endangering security.[140]

136 API, *supra* 27, Art. 46; APs Commentary, *supra* 80, pp. 561–570.

137 For example, the *modus operandi* of the Magav undercover unit in such situations is to wear identifying caps in order to be distinguishable both to the adversary and to IDF forces (in order to avoid cross fire).

138 Human Rights Committee, General Comment no. 6: The Right to Life (Art. 6), U.N. Doc. HRI/GEN/1/Rev. 9 (Vol. I) at 7 (1982); Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Israel Law Review 40:2, 310, 343–345 (2007).

139 API, *supra* 27, Art. 52(2). This article is considered to reflect customary IHL and thus is applicable also to states not party to API; *see* ICRC CIHL Study, *supra* 31, Rule 8.

140 API, Art. 57. This article is considered to reflect customary IHL and thus is applicable also to states not party to API; *see* ICRC CIHL Study, *supra* 31, Rule 14.

The principle of proportionality prohibits an attack against a military object that may cause damage to the civilian population that would be "excessive in relation to the concrete and direct military advantage anticipated."[141] This principle applies in both international and non-international armed conflicts. Collateral harm must therefore be among the considerations taken into account by undercover units in order to avoid disproportionate action.

Within the framework of IHL there are two types of operations involving violence that are particularly relevant to the conduct of undercover units: (a) **operations aimed at the destruction of property** (such as the demolition of bridges, arsenals, etc.); and (b) **operations aimed at capturing, killing, or injuring persons**. In order to focus the discussion on the legality of employing undercover forces, we will assume that the relevant targets are prima facie legal under IHL (military objects, adversarial armed forces, or civilians taking a direct part in hostilities).[142]

(a) **Operations aimed at the destruction of property**. International humanitarian law does not restrict the proportionate destruction of military objectives per se.[143] Yet, when such an operation is conducted by an undercover unit during an international armed conflict, the combatants might be considered to be saboteurs or unprivileged (unlawful) combatants.[144] As a result, they would lose combatant immunity from prosecution for their participation in the hostilities and for any other violations committed under domestic law.[145] Since there is no combatant immunity in non-international armed conflicts, actions aimed at the destruction of property are prosecutable under domestic law regardless of the nature of the unit (uniformed or undercover).

141 API, *supra* 27, Art. 57.

142 Otherwise the operation would be considered illegal, and perhaps even a war crime, regardless of the question of undercover units.

143 API *supra* 27, Art. 52(2). It is also noteworthy that acts of sabotage or destruction of property do not constitute perfidy under Article 37 of API; *see* Giladi, *supra* 114, p. 414.

144 *Ex Parte* Quirin, *supra* 5.

145 Watkin, *supra* 47, p. 60; Baxter, *supra* 127, p. 338.

(b) **Operations aimed at capturing, killing, or injuring persons** (perfidy). Unlike espionage or the destruction of property—which are not specifically prohibited under IHL (and therefore the relevant implications are drawn from the failure to fulfill the positive aspect of distinction and wearing a distinctive sign)—operations aimed at capturing, killing, or injuring the adversary are regulated through the prohibition of perfidy discussed above.[146]

4.1. Conclusion

In order to analyze the legality of actions by undercover units that include violence we need to consider the nature of the action in question. If the action is intended to gather information or to cause damage to property, then although it is not prohibited under IHL, those captured may face prosecution for their actions under domestic law. If the action is intended for the purpose of capturing, wounding, or killing an adversary, we have to examine two questions: (1) intent—whether the action was committed (or attempted) while resorting to perfidy; and (2) applicable law: if the undercover operation is being conducted in a non-international armed conflict, or if it is being conducted in an international armed conflict but API is not applicable, then only wounding or killing an adversary could be considered an IHL violation.[147]

146 The applicability of the prohibition of capturing to a specific incident is conditional on the customary nature of that prohibition or the applicability of API to the situation.

147 A very interesting question relates to the situation of an undercover operation that is not conducted with the intent to resort to perfidy but ends in killing, wounding, or capturing an adversary. This question will be discussed in the Implications section, Chapter 4.

Chapter 3

Operations of Undercover Units in Mixed Actions

In situations of international and non-international armed conflicts, as well as during belligerent occupation, both law-enforcement and combat operations can take place. As the applicable law for each context is different, the correct application of law is of the utmost importance. International law prescribes that international human rights law be applied in law-enforcement situations, while IHL would serve as the *lex specialis* governing combat action. Some of the most important legal issues relating to the legality of undercover units under these two legal frameworks concern the duty to wear uniforms (and the relevant implications of the breach of that duty) and the obligation to protect the right to life of individuals belonging to the adversary.

During belligerent occupation, the occupying power has the obligation to maintain law and order in the occupied territory. Throughout the occupation, especially in a long-term occupation, the government of the occupied territory is a military government. Still, the military government may also be responsible for the civil affairs of that area. According to Article 43 of the 1907 Hague Regulations, the occupying power "shall take all the measures in his power to **restore, and ensure, as far as possible, public order and safety**, while respecting, unless absolutely prevented, the laws in force in the country."[148]

148 the Hague Regulations 1907, *supra* 25 (emphasis added). Interestingly, Dinstein points out that the phrase "public order and **safety**" appears in the non-binding English version of the regulations, while in the **binding** French text of the regulations the phrase appears as "l'ordre et la vie public"—"order and public **life**" (emphases added). *See* Yoram Dinstein, The International Law of Belligerent Occupation 89 (2009).

In certain situations, the military government conducts "law and order" operations (law enforcement)—military actions confronting moderate levels of violence—which are more akin to the challenge posed by crime-suppression activity and are governed by international human rights law. In other violent contexts in which a nexus to an ongoing or new armed conflict can be established, the occupying power may engage in combat action, which is governed by IHL (though human rights law may continue to apply in the background as *lex generalis)*.[149] What is more, both law-enforcement and combat action in belligerent occupation are performed by soldiers of the occupying power. As confusion is likely, the correct analysis of a situation is of considerable importance as it will have great implications for determining the law that governs the given operation and the rights and duties attached to either framework of action.

For example, from the beginning of the Israeli belligerent occupation of the West Bank and Gaza Strip in June 1967, the military administration in these areas conducted its activities under the law-enforcement paradigm. However, in October 2000, at the start of the Second Intifada, the situation on the ground escalated (and was recognized as an international armed conflict by the Israeli High Court of Justice[150]), and the IDF conducted combat actions alongside its regular law-enforcement operations. On April 4, 2011, the Israel Defense Forces' Military Advocate General (MAG) notified the Israeli High Court of Justice of a change in its investigation policy with respect to incidents occurring in the West Bank. According to the notification, a criminal investigation by the Military Police Investigations Department (MPID) would be automatically initiated for every incident involving the death of a Palestinian civilian as a result of an IDF operation in the West Bank. However, in cases **where the civilian in question died as a result of what was clearly combat action, the decision whether or not to open a criminal investigation would be made after the completion of an initial inquiry into the incident**. This policy change ended the "armed conflict" policy that had been adopted by the

149 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), International Court of Justice, July 9, 2004.

150 *See Targeted Killings* Case, *supra* 27.

IDF at the start of the Second Intifada in September 2000, according to which criminal investigations tended to be the exception rather than the rule.[151]

Critically, in law enforcement there is no positive restriction on the usage of undercover units per se.[152] The only relevant requirement is to conduct operations in accordance with the law, and especially to ensure that the use of force (and especially lethal force) takes place only as a last resort and in the appropriate circumstances (in conformance with the twin requirements of necessity and proportionality set forth in human rights law).

1. Classification of the Legal Framework

The tests for identifying the type of action are unclear and are usually examined on a case-by-case basis. For example, the Israeli Supreme Court has dealt with this dilemma in several instances in the context of tort claims (mainly in the occupied territories). It held that the main question is not *ratione personae* (that is, it does not matter whether the operation was conducted by police forces or by military forces), but rather the nature of the operation—if the risk imposed on the public order and the operating unit were at the level of the regular risk for police work, then the situation relates to law enforcement. However, not every risk to the soldiers turns the situation into a combat action. If the risk is at a level that police forces are expected to deal with, then the classification of the situation would remain law enforcement.

In order to identify what operations constitute law-enforcement operations we need to examine the entire situation and take into account all its characteristics, which include: (1) the intensity of the hostilities, (2) the aim of the operation, (3) the identity of the target of the operation, (4) the proximity to the battlefield, (5) the location of the operation, and (6) the identity of the

151 Ido Rosenzweig and Yuval Shany, *Military Advocate General Announces Change in Investigation Policy in the West Bank*, 28 IDI Terrorism and Democracy Newsletter (2011).

152 Melzer, *supra* 126, p. 373.

operating force. It should be noted that these characteristics are not meant to serve as an exhaustive or cumulative list of conditions for the identification of an operation as either law enforcement or combat action. They are also not of an absolute nature: one criterion may suggest that the nature of the operation is of one type while the application of other criteria might suggest otherwise. The purpose of this list is to serve as an analytic tool for the identification of the relevant type(s) of operation. Nevertheless, since the analytical question of classifying the operation is not at the heart of our discussion, we will not go any further into this analysis.

Chapter 4

Implications of Undercover Operations

Conducting operations with undercover units may have several implications under international law. In this chapter we will briefly discuss the structural implication of undercover operations on combatants' **POW status,** and two operational aspects—the **requirement to investigate** the conduct of the operation and **criminal liability** under international criminal law.

1. POW Status

One of combatants' most important privileges and rights in international armed conflicts is the right to POW status.[153] This protection includes immunity for all conduct that is part of armed conflict in accordance with IHL, but does not, of course, provide immunity for acts in violation of IHL.

The Third Geneva Convention and API do not set any limitations on the entitlement of members of a state's armed forces to POW status if they actively distinguish themselves by the positive aspect of distinction (by wearing uniforms, for example).[154] Combatants who are captured during combat operations while failing to distinguish themselves can be deprived of their protections and privileges, including their combatant immunity (some refer to such combatants as "unlawful combatants" or "unprivileged combatants").[155] In such cases, the detained combatants can be held liable for their mere participation in hostilities and for engaging in what would have been deemed legal for a combatant under IHL (such as the killing of an

153 Solis, *supra* 2, p. 187.

154 Dinstein, *supra* 44, p. 36; ICRC CIHL Study, *supra* 31, Rule 106.

155 Solis, *supra* 2, pp. 190, 221; *see also Ex Parte* Quirin, *supra* 5.

adversary).[156] If a combatant is captured while operating in civil attire, he or she could be deprived of their POW status and be tried for taking part in the hostilities and for any other relevant violation under the domestic law of the capturing forces.

But what if undercover combatants complete their mission and return to wearing uniforms before being captured? Solis holds that such combatants regain their entitlement to POW status.[157] He reaches this conclusion based on Article 85 of the Third Geneva Convention, which stipulates the following: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed **prior to capture** shall retain, even if convicted, the benefits of the present Convention" [emphasis added].

Therefore, although one of the conditions for obtaining POW status under Article 4 of the Third Geneva Convention is conducting operations in accordance with the laws and customs of war, the fact that combatants have failed to do so prior to capture does not mean that they permanently lose their entitlement to POW status and its privileges. This notion is similar to API's treatment of spies, where a combatant "shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs."[158]

Nevertheless, the right to POW status does not render POWs immune from prosecution for acts committed before their capture. As Article 85 mentions, a POW **can** be put on trial for acts committed prior to capture. The commentary to Article 85 explains that this refers to crimes against peace, war crimes, and crimes against humanity.[159]

156 Solis, *supra* 2, p. 211; Dinstein, *supra* 44, pp. 29–30; Crawford, *supra* 32, pp. 53–55.

157 Solis, *supra* 2, pp. 220–224.

158 API, *supra* 27, Art. 46, *see also* Art. 31 of the 1907 Hague Regulations, *supra* 25: "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage"; Baxter, *supra* 127, p. 331.

159 Interestingly, the commentary on Article 85 of the Third Geneva Convention includes "the wearing of civilian clothing by members of the armed forces for purposes of disguise" as an example of a war crime, *supra* 26.

The two reasons mentioned by Baxter for the logic of exempting spies not caught "red-handed" from legal responsibility seem to apply to operations by undercover units as well.[160] The first relates to the difficulty of proving the act after the undercover combatants have returned to their own forces. We believe that this reasoning is unconvincing, as it would apply equally to espionage and to any other violation that has to be investigated post factum. The second reason relates to the fact that the use of undercover units per se (that is, without their conducting any further act that might constitute a violation) is not an IHL violation, but rather a ruse of war. The measure of removing combatant immunity, according to Baxter, is therefore meant to serve as a deterrent during and prior to the undercover operation, hence eliminating the need for such sanctions after the completion of the undercover operation (as deterrence has no *ex post facto* effect.)[161]

Therefore, we conclude that if undercover combatants are caught while operating undercover they may lose their entitlement to POW status and the privileges that come with it. In other words, they may be put on trial for the mere participation in hostilities and any other violation committed by them under domestic and international law (such as the killing of an adversary). However, if the combatants are caught after regaining distinction, their rights remain untouched.

In non-international armed conflicts, no POW status or combatant privileges exist.[162] For this reason, in non-international armed conflict the discussion of the loss of POW status and combatant privileges is irrelevant.

2. Investigations

The obligation to investigate alleged wrongdoings under IHRL is different from that under IHL—this difference reveals itself via the reasons to initiate an investigation. Under IHL, there is a clear requirement to investigate

160 Baxter, *supra* 127, p. 331.

161 *Id.*

162 Crawford, *supra* 32, pp. 68–69; Solis, *supra* 2, p. 191.

allegations and suspicions of grave breaches and war crimes.[163] There are also those who believe that investigations are required in operations that caused death or serious harm to uninvolved civilians[164]—this becomes especially relevant in situations where forces have sufficient territorial control (within state territory or in an area under belligerent occupation).[165] There is no obvious need to investigate conduct that does not result in damage to property or harm to civilians.

Under IHRL, the obligation to investigate is broader and requires an investigation of any suspicion of gross violations of human rights. In a case where such a suspicion arises (e.g. the death of a civilian), IHRL requires that an investigation be conducted into the circumstances that led to the use of force in order to ensure that the use of force was, in fact, in accordance with the relevant restrictions.[166] In general, such investigations lead either to disciplinary measures or to criminal proceedings and the payment of compensation to victims or their families.

163 Michael Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 Harvard National Security Journal 31 (2011); Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia; Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess Any Non-international, Legal Or Other Proceedings Undertaken by Both the Government of Israel and the Palestinian Side, in the Light of General Assembly Resolution 64/254, Including the Independence, Effectiveness, Genuineness of These Investigations and Their Conformity with International Standards, Human Rights Council, session 15, agenda 17, p. 6 (hereinafter: Tomuschat Report).

164 Yuval Shany and Amichai Cohen, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, Yearbook of International Humanitarian Law 14 (2012); *see Targeted Killings* Case, *supra* 27; Professor Philip Alston, *Investigation and Prosecutions of Killings*, UN Special Rapporteur on Extrajudicial Executions Handbook (2010).

165 Al Skeini v. UK*, Grand Chamber*, July 7, 2011, no. 55721/07 ECHR 2011, §164.

166 Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?* 88:864 IRRC 881–904 (2006); Human Rights Committee, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26/05/2004). CCPR/C/21/Rev.1/Add.13; Shany and Cohen, *supra* 164; Tomuschat Report, *supra* 163, p. 7.

Therefore, we suggest that in the wake of undercover operations resulting in death or injury (even of legitimate military targets) conducted either under the law-enforcement paradigm or the combat-action paradigm, an investigation should be initiated to examine possible violations of the law, including the law against perfidy/treachery.

3. Liability

When undercover units operate under law-enforcement or combat paradigms, the members of the undercover units are responsible for their actions.

With regard to the operations conducted under the combat paradigm, undercover units are bound by IHL. Should they fail to comply with such obligations during an international armed conflict, combatants may lose their rights and privileges—provided that they were captured out of uniform. In both international and non-international armed conflicts, members of undercover units may be prosecuted for their direct participation in hostilities under the domestic law of the state that captured them (on charges such as espionage, sabotage, and murder).[167]

Of course, when operating under the combat-action paradigm, undercover units are also prohibited from violating IHL, and especially from committing grave breaches and war crimes (just as in the case of uniformed units). It should be noted, however, that not every violation of IHL constitutes a grave breach or a war crime; only violations that have been internationally criminalized constitute grave breaches.[168]

War crimes are defined in the list of grave breaches in the 1949 Geneva Conventions, API, and the Rome Statute.[169] Although there is no outright exhaustive list of war crimes that reflects customary law, it is common to view Article 8(2) of the Rome Statute of the ICC as a comprehensive list that may fill this purpose. There are two main sources that criminalize perfidy:

167 Dinstein, *supra* 44, pp. 29–30; Crawford, *supra* 32, pp. 53–55.

168 Antonio Cassese, International Criminal Law 84 (2008).

169 GCI Art. 50, GCII Art. 51, GCIII Art. 130, GCIV Art. 147, *supra* 26; API, *supra* 27, Art. 85.

Article 85(3)(f) of API and Articles 8(2)(b)(xi) and 8(2)(e)(xi) of the Rome Statute.[170]

Article 85(3)(f) of API defines 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**" as a grave breach.

Article 8(2)(b)(xi) of the Rome Statute defines "**killing or wounding treacherously individuals belonging to the hostile nation or army**" in international armed conflict as a war crime under the jurisdiction of the ICC; Article 8(2)(e)(ix) of the Rome Statute defines "**killing or wounding treacherously a combatant adversary**" in non-international armed conflict as a war crime under the jurisdiction of the ICC.[171]

It seems that, without prejudice to the customary nature of the prohibition on capturing by means of perfidy, neither API nor the Rome Statute include it in the list of criminal prohibitions.[172] Moreover, in many military manuals, the prohibition relates only to killing or injuring while resorting to perfidy.[173] Therefore, it seems reasonable to conclude that even with regard to states party to API, violating the prohibition on capturing through treacherous means by undercover units would not amount to a war crime and therefore could be categorized, at most, as an "ordinary" violation of IHL or an "ordinary" crime.[174]

170 API, *supra* 27, Art. 8(2)(b)(xi) prohibits the "killing or wounding treacherously individuals belonging to the hostile nation or army" in international armed conflict; Art. 8(2)(e)(ix) prohibits "[k]illing or wounding treacherously a combatant adversary."

171 Emphasis added. This does not establish that the ICC has jurisdiction over such alleged violations, but rather that in those cases where the ICC has jurisdiction over an armed conflict, it would have jurisdiction to conduct proceedings against alleged violators. The ICC's jurisdiction is subject to the Rome Statute, which limits the Court's jurisdiction to cases related to states party to the Rome Statute, situations referred to it by the Security Council, and in accordance with Article 12(3).

172 Knut Dormann, Elements of War Crimes 240 (2003).

173 ICRC CIHL Study, *supra* 31, Rule 65.

174 On the application of the grave breaches provisions to non-international armed conflict, *see* Lindsey Moir, *Grave Breaches and Internal Armed Conflicts*, 7 Journal of International Criminal Justice 763–787 (2009); Eve La Haye, War Crimes in Internal Armed Conflicts (2008).

Furthermore, in Article 85(3) of API, which lists grave breaches that entail criminal liability, only a narrow form of perfidy is included. Article 85(3)(f) of API narrows the criminal prohibition of perfidy to the use of protected signs and emblems.[175] It could be claimed that in accordance with API, even killing or wounding by undercover units disguised as civilians does not constitute a grave breach and therefore does not necessarily carry criminal liability.[176] Although it can be claimed that international law has not, in the past, criminalized violations of the principle of distinction in the form of feigning civilian (non-combatant) status,[177] the prohibition of treacherously killing or wounding under the Rome Statute includes such prohibitions and therefore raises the question of criminal liability.[178]

To complete this analysis we must examine the elements of the war crime of treacherous killing or wounding under the Rome Statute. According to Dormann, this war crime has two elements: (a) an objective element—the act must objectively be of a nature to cause, or at least to induce, the confidence of an adversary,[179] and (b) a subjective element—the act inviting confidence must be carried out **intentionally** in order to mislead the adversary into relying on the expected protection. Moreover, in order for the act to be considered a crime, a prescribed end result (death or injury) must ensue.[180]

With regard to the objective element, it is self-evident that undercover units wearing civilian clothes fulfill the requirement of feigning protected status, as civilians are protected under IHL.

175 *See also* Cassese, *supra* 168, pp. 90–91.

176 Parks, *supra* 4, p. 522, on non-standard units.

177 Giladi, *supra* 114, pp. 419–420; *see also* Dormann, *supra* 172, pp. 240–244.

178 Dormann, *supra* 172, p. 240: "The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict." This could definitely be construed as feigning to be an uninvolved civilian.

179 Dormann, *supra* 172, p. 243.

180 Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court: Part II—Finalized Draft Text of the Elements of Crimes, PCNICC/2000/1/Add.2.

With regard to the subjective element, there is a need to demonstrate special intent to cause death or injury to the adversary by misleading the adversary to believe and trust the feigned protection. According to Dormann, the prohibition of treachery requires a higher level of intent than the default standard of intent set out in the Rome Statute.[181] The *mens rea* (mental state, intention) of the combatants is stricter than regular intention and must be specifically aimed at the resultant death or injury in order to fulfill the subjective element.[182] Therefore, an operation intended to capture an adversary, sabotage property, or conduct espionage would not fulfill the subjective element (even if it resulted in the death of an adversary).

A problem that becomes relevant to the *mens rea* analysis is when the aim of the operation is not to cause death or injury, yet such results are nevertheless expected and, perhaps, even unavoidable. Should such behavior be considered intentional (*dolus eventualis*)?[183] The complete analysis of precisely when the level of expectation becomes an actual intent, and whether such intent meets the high threshold required for perfidy, is beyond the scope of this paper.

Both the objective and subjective elements can exist when there is contact (mainly visual) between the attacking forces and the adversary. Without this there could not be any anticipated act of confidence-building. This notion goes hand in hand with the elements of perfidy stipulated earlier.[184] Therefore, attacks from great distance (such as sniper attacks) or surprise attacks (such as ambushes) may fail to fulfill this element of the crime. Since there is a need for a direct causal link between the feigning of protected status and the end result, we can conclude that deployment for an attack would not constitute

181 Dormann, *supra* 172.

182 Albin Eser, *Individual Criminal Responsibility*, in The Rome Statute of the International Criminal Court: A Commentary 899 *(*Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002), 899. According to Eser, the scaling of the *mens rea* is as follows: negligence, wantonness, recklessness, intention, willful, purposeful, treacherous, specific intent.

183 Antonio Cassese et al., The Oxford Companion to International Criminal Justice 302 (2009).

184 *See* "Deployment Preceding an Attack," in Chapter 2.

perfidy (or even an attempt to commit perfidy) under the Rome Statute—at least until the undercover forces are actually visible to the adversary and thereby start the process of deception.

There is no need for a precise identification of the targeted adversary in order to raise suspicions of perfidy. Hence, if during the deployment the undercover unit takes advantage of the feigned status in order to intentionally cause the death or injury of an alternative adversary (a person different from the original target), the elements of the crime might be met. On the other hand, if the intent of the operation is not to cause physical harm to the adversary, then the act would probably not be viewed as containing all of the elements of the crime as set forth in Articles 8(2)(b)(xi) or 8(2)(e)(ix) of the Rome Statute.

Chapter 5

Analysis of Specific Situations

Test Cases

In this chapter we will apply the above analysis to test some real cases involving the operations of undercover units. The analysis will explore whether these operations were conducted under law-enforcement paradigms, combat-action paradigms, or as mixed operations. Then we will analyze the prima facie legality of these operations. It should be noted that the information about these operations is based on NGO and media reports, judicial proceedings, and formal statements by officials and an attempt has been made here to present a comprehensive and detailed picture of the relevant events. Nevertheless, due to the nature of these events, which in many cases include classified information, there might be relevant unrevealed information that could affect the analysis of these cases.

1. Undercover Unit Action in Ramallah (January 4, 2007)[185]

1.1. Background Information

On January 4, 2007, around 3 p.m., the streets of Ramallah (West Bank) were crowded with weekend shoppers. An undercover unit entered a street adjacent to the vegetable market, in the city center, to arrest a wanted person.[186]

185 B'Tselem, *Void of Responsibility—Israel Military Policy not to Investigate Killings of Palestinians by Soldiers*, September 2010.

186 The report does not provide any further information about that individual.

The unit opened fire at the man; although wounded seriously, he managed to flee. As a result of the gunfire, the identity of the undercover unit was exposed and people began to throw stones, sticks, iron bars, and empty bottles at them. Several people also fired guns at them. Following the exposure of the undercover unit, several army jeeps arrived at the scene, along with bulldozers and two combat helicopters, in order to rescue the undercover soldiers. Security forces, both on the ground and in the helicopters, fired at the Palestinians attacking the undercover soldiers, killing four of them (only one of them was identified as a participant in the clashes).

According to B'Tselem's analysis of the incident, the operation by undercover units, carried out in the afternoon in the city center in the midst of a civilian population, endangered bystanders who were completely unaware that they were in danger. Moreover, the fact that a rescue force arrived shortly after the undercover unit was exposed indicated that the planners anticipated such a possibility; they should also have anticipated the serious risk that civilians would be harmed in the process.[187]

In its response to B'Tselem's request to initiate a criminal investigation of the aforesaid operation, the IDF's office of the Military Advocate General replied:

The findings of the inquiry reveal that the use of force by IDF forces during the incident was in response to massive gunfire at them, and in response to the hurling of heavy, dangerous objects at them from various sources and by various people, which posed a real and present danger to the soldiers' lives. The findings of the inquiry (including the aspects relating to the scope of the involvement of "undercover" forces in the incident) did not raise a suspicion of the commission of criminal offenses by IDF soldiers who took actions as part of the incident (in this context, it should be made clear that the findings of the inquiry do not indicate a connection between the involvement of "undercover" forces in the action and the harm that was caused during its course to uninvolved persons).

The Judge Advocate General also does not believe that the use of "undercover" forces in the incident is contrary to Israel's obligations under

187 *Id.*

the laws of war of international law, or that these laws require that an order be given, as you request, to end completely the use of forces in disguise.[188]

1.2. Analysis

The purpose of the operation in question was to detain a wanted person in a territory under belligerent occupation (but not under day-to-day Israeli control), in which violence periodically occurs. Although it seems as if the operation a priori falls under the law-enforcement paradigm, the armed-conflict paradigm cannot be ruled out, since it is possible to establish a belligerent nexus to the ongoing armed conflict between Israel and the Palestinians (the Israeli Supreme Court qualified the conflict in 2006 as an international armed conflict[189]). One relevant parameter missing from the analysis is whether or not the wanted person was a civilian taking direct part in hostilities. Since we have previously established that under the law-enforcement paradigm there is no specific prohibition on the use of undercover units, we will examine the legality of this operation under IHL, assuming that an armed conflict and nexus thereto can be established, especially in light of the prohibitions of perfidy and treacherous behavior.

According to the law governing armed conflicts, the operation in question was a capture operation, in which perfidious behavior was resorted to—the feigning of civilian status while visible to the adversary. The fact that the mission failed and the wanted person managed to flee is irrelevant to the claim that the operation was illegal in accordance with Article 37 of the API. However, since Israel is not party to the API, and we have established that the prohibition on capture does not reflect customary international humanitarian law, it seems that Israel did not violate the prohibition of perfidy with respect to the attempted capture. Since we do not have complete information, though, it should be noted that had the operation been conducted with the purpose of killing the wanted person (or while ignoring the expected result of operating in a crowded market), then the operation would have been considered a

188 *Id.*

189 *Targeted Killings* Case, *supra* 27.

prohibited treacherous operation. As explained above, there is a need for actual intent to cause injury while resorting to treachery. In the case at hand, in accordance with the available information, it is unclear whether the injury caused was intentional. We do believe, however, that the seriousness of the alleged violation of treachery and the end result should have raised enough suspicion so as to justify conducting an investigation into the reasons that led to the use of force and to the injury of the wanted person. Such an investigation may lead, inter alia, to findings as to whether the operation was indeed a law-enforcement operation or a combat action; and, if the latter, whether it violated the prohibition of perfidious or treacherous conduct.

2. Operation Two Towers (June 20, 2007)[190]

2.1. Background Information

On March 28, 2007, a meeting was called by then OC Central Command Maj. Gen. Yair Naveh to discuss Operation Two Towers. According to Naveh, the objective of the mission was to arrest Palestinian militants; however, in case of a positive identification of one of the leaders of the Palestinian Islamic Jihad Movement (PIJM)—Walid Obeidi, Ziad Malaisha, or Adham Yunis—the force was given permission to shoot to kill if the situation so required.

On the night of June 19/20 of the same year, at around 1 a.m., undercover IDF and Border Police combatants entered Kafr Dan (a small village in the West Bank, outside Jenin) in unmarked cars carrying Palestinian license plates. The undercover unit broke into a few local houses and set ambushes in the vicinity of the private residence of the operation's main target—Ziad Malaisha. Afterwards, several IDF-marked vehicles drove into the village in order to draw out local fighters to attack them and so expose them to the ambush laid by the undercover unit. The plan worked well and Malaisha and two of his fellow PIJM fighters—Ibrahim Abed and Ziad Zubekhi—became involved in a brief fire fight. Both Malaisha and Abed were eventually killed

190 *Supra* 24.

by a missile fired by an IDF helicopter. According to the IDF, Malaisha and Abed were the first to open fire.

2.2. Analysis

Again, the legal framework is that of an operation conducted by IDF and Border Police forces in an area under belligerent occupation. The objective of the operation—to capture or kill—seems very controversial, perhaps illegal.

As the head of the military wing of PIJM in Jenin, Malaisha could definitely be considered a civilian taking direct part in hostilities (provided that the situation continues to qualify as an armed conflict). The question is whether he was taking a direct part in hostilities at the time of the operation. As an important operative of an organized armed group and a person who was usually on the front line of the fighting against the IDF, Malaisha ought to be considered as having assumed a continuous combat function. For this reason, he can definitely be classified as a civilian taking a direct part in hostilities even when staying at home—before he was drawn outside to fight against the IDF.[191]

As the aim of the operation was to capture or kill, and Malaisha died as a result of the operation, there is a need to conduct an investigation to determine whether the outcome was a result of resorting to perfidy (or treachery). At first glance, it may seem a resort to perfidy, since Malaisha was killed while the undercover unit was feigning civilian status with the intent to kill him. However, since the undercover units were conducting an ambush, it is likely that Malaisha did not see his attackers; therefore, it could be claimed that there was no attempt to take advantage of the fact that it was operating undercover. It must be noted, though, that during the deployment towards the village the undercover unit may have been visible to the adversary and did, indeed, take advantage of its civilian attire for the purpose of killing Malaisha. Interestingly enough, the IDF's report stated that, once Malaisha was aware

191 Melzer, *supra* 39, p. 33; Watkin, *supra* 42 (expanding the notion of a "continuous combat function").

of the IDF presence, he opened fire. The main question in this situation is that of visibility—at what point, in what seems to be a perfidious operation, were the undercover forces visible to the adversary? If the undercover unit was visible to the adversary during the deployment or during the operation itself, then we might conclude that this was a treacherous killing operation. Hence, an investigation should have been conducted in order to determine whether the force was visible to the adversary during the deployment or during the operation in such a way that would constitute a violation of the prohibition on perfidy and treachery.

It is important that we address the mission plan of March 28, 2007, as well. Any order dealing with capture or killing in the context of an undercover operation raises reasonable suspicion as to its legality, especially with regard to the intent of the undercover unit's commander. Therefore, the implementation of such an order could, under certain circumstances where the elements of perfidy were present, lead to reasonable suspicions of perfidy either by the actual operation of the unit or the commander's expectations that the undercover unit would have to kill an adversary while resorting to perfidy. Even with regard to states not party to the API, the order to "capture or kill" combines both legitimate and illegitimate modes of action and, in such a case, the latter can be justified only if it implies non-perfidious conduct.

Chapter 6
Conclusions

The use of undercover units has been common practice by states for many years, either under the law-enforcement paradigm or in combat operations. International law, both IHRL and IHL, does not prohibit such operations per se, and the relevant restrictions relate only to the methods under which such units operate. When operating under a law-enforcement paradigm, the undercover units must follow all IHRL restrictions—especially those relating to the use of lethal force only as a last resort and only under circumstances of self-defense or the immediate defense of the lives of others. When operating under the combat-action paradigm, the undercover unit must follow IHL provisions applicable to the relevant type of conflict (international or non-international armed conflict) and especially refrain from violating the prohibition of perfidy or treachery. Combatants operating undercover in the context of an international armed conflict also run the risk of losing their right to POW status and combatant immunity.

We have found that undercover units must be extremely careful in the conduct of hostilities in order to avoid resorting to wrongful acts. Although not all violations of IHL constitute grave breaches or war crimes, they ought to (at least) be subject to disciplinary measures and, when necessary, also to criminal procedures.

Furthermore, whenever an undercover operation results in the death or injury of a person, an investigation is required to examine the justification for the use of lethal force (law-enforcement paradigm), whether the person was indeed a legitimate target (armed-conflict paradigm), and if the unit conducted its operation while resorting to perfidy or treachery (where the API is applicable, this notion applies also to undercover operations that result in the capture of an adversary).

Israel's use of undercover units is directed mainly against Palestinian militants in the West Bank and the Gaza Strip. One of the *modi operandi* of these militants is to hide themselves within civilian populations and avoid distinguishing themselves from the civilian population in both law-enforcement and combat operations.

Nevertheless, Palestinian violations of the principle of distinction do not diminish Israel's obligation and responsibility to follow IHL, including the prohibition of perfidious or treacherous conduct. Therefore, Israel should try to use undercover operations only in law-enforcement situations; during armed conflict, it should avoid executing these operations in a perfidious way.

Chapter 7

Recommendations

The use of undercover operations for combat actions is not illegal per se. However, much like any other combat operation, undercover operations must be conducted in accordance with the relevant rules of IHL.

For that purpose we have written a few recommendations on the operational deployment of undercover units and especially the operations of the Israeli *Mista'arvim*—taking into account that the operations of the *Mista'arvim* are conducted within the framework of belligerent occupation and Israel's objection to joining the First Additional Protocol.

(1) **Undercover operations should be conducted for information gathering and capture of persons.** A combat undercover operation aimed at the killing (or injuring) of an adversary could be considered as treacherous or perfidious and therefore, should be avoided. While undercover operations for the destruction of military objectives are also permissible, such operations can be conducted as long as no person is expected to be directly killed or injured by such an operation.

(2) A ***Mista'arvim*** **unit must distinguish itself from the de facto visibility point.** IHL does not provide a positive requirement to wear distinctive signs or uniform, however, in order to avoid perfidy or treachery violations, *Mista'arvim* units must carry their arms openly and wear distinctive signs from the de facto visibility point of the deployment to attack. This does not mean that the units are prohibited from wearing camouflage or from acting in any other way in accordance with IHL rules.

(3) **In case of escalated law-enforcement operations, undercover units should be identified.** The tests for the legal paradigm movement from law enforcement to combat action are both vague and complicated to

calculate in the midst of an escalated operation. Therefore, in order to be certain that no treacherous killings result from such escalation and movement into the combat-action paradigm, the operating forces should reveal distinctive signs in order to be identified. This is in line with the existing known practice of the Israeli *Yamas* forces.

(4) **Conduct investigation in cases of death or injury.** Whenever an undercover operation resulted in the death or injury of a person, such an outcome should serve as sufficient basis for the opening of an investigation to examine the reasons for such a result. Such an investigation ought to be conducted in accordance with the relevant standards under international law (genuine, effective, impartial, prompt and transparent).

O divine art of subtlety and secrecy! Through you we learn to be invisible, through you inaudible, and hence we can hold the enemy's fate in our hands.

Sun Tzu, *The Art of War*, Chapter VI (9)

Are undercover military operations that involve combatants disguised in civilian clothes legal under international law? Can such operations be in line with international humanitarian law, and particularly the principle of distinction? Do they violate the prohibition of perfidy—that is, masquerading as innocent civilians deserving of protection under international law, in order to kill, wound, or capture an adversarial party?

This policy paper provides an overview of the history of the Israeli undercover units known as *Mista'arvim*—elite units of Israeli soldiers who operate in the West Bank and Gaza while disguised as local Arabs—and analyzes the legality and implications of the use of such units for law enforcement and combat operations under international law.

Written by Adv. Ido Rosenzweig, this Policy Paper asserts that undercover operations are not prohibited under international law per se, unless they violate principles of international law or constitute a war crime such as perfidy. In addition, it presents practical and operational conclusions and includes recommendations to guide Israel's military forces in the deployment of undercover units.

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