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ISRAELI PERFIDY IN THE DISPUTED OCCUPIED PALESTINIAN TERRITORIES (OPT)

Daniel Benoliel[†] and Yohai Edery^{††}

ABSTRACT

This article considers Israel's controversial capture of wanted Palestinians in the disputed Occupied Palestinian Territories ("OPT") by resort to perfidy while feigning civilian status. That is given that Israel's call of choice for perfidy revolves almost entirely around capture as opposed to injuring or killing which Israel justly rejects as unlawful. While the prohibition of perfidy is accepted as customary international law, its practical definition and application in the OPT remain unsettled.

The article first considers the differences between the conduct of hostilities and law enforcement paradigms governing the disputed OPT. In certain situations that arise in armed conflicts, it may not be entirely clear whether international humanitarian law ("IHL") rules on whether the conduct of hostilities, or on the use of force in law enforcement, should govern. This uncertainty, albeit inclined toward the conduct of hostilities, generally applies given the particularities of perfidious activity during belligerent occupation whereby local civilians and insurgents are often blended.

The article then cautiously considers a plausible constructed claim for persistent Israeli objection to otherwise unlawful perfidy. In such disrupted causation, it then follows by a detailed consideration of the theoretical and practical application of the principles of military necessity, distinction, proportionality, and unnecessary suffering in the disputed OPT.

The article ultimately suggests that Israel's military perfidious policy (as opposed to police perfidy) for capturing is debatable at best, and its appearances should be watchfully reevaluated in view of international humanitarian law henceforth.

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I. INTRODUCTION

Perfidy combat methods are integral to modern warfare stretching from U.S. operations in Iraq or Afghanistan to Israel's experience in the disputed Palestinian Occupied Territories ("OPT"), and elsewhere.¹ This article analyses the legality of Israel's perfidy methods

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¹ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 244 (2010) (Solis refers to U.S. operations in Afghanistan in which wearing civilian clothing and growing beards is a primary method used by US special forces); Geraint Hughes, *The Use of Undercover Military Units in Counter-Terrorist Operations: A Historical Analysis with Reference to Contemporary Anti-terrorism*, 21 *SMALL WARS & INSURGENCIAS* 561 (2010) (describing

with an emphasis on feigning civilian status by resort to capture wanted Palestinians in the disputed OPT.² This widely practiced counter-terrorism method is one of Israel's emblematic *modus operandi* since its early statehood.³ The method is used by Israeli security forces, predominantly the Israeli Defense Forces' ("IDF") elite forces operating undercover. These commando soldiers are specially trained to assimilate themselves amongst the Palestinian civilian population wearing civilian clothing, which amounts to feigning civilian, non-combatant status.⁴

the special units of the U.S. Army and the British Army that are feigning in the struggle against the Taliban forces in Afghanistan, and in the past in Northern Ireland). For post-WWII examples of perfidious activity by the United States, France, India, Indonesia, or Turkey, see *Ex parte Quirin*, 317 U.S. 1, 21-22 (1942) (German undercover soldiers planning to blow up US military and industrial facilities were captured and tried by the U.S. authorities); *Bin Haji Mohamed Ali and Another v. Public Prosecutor*, [1968] 1 A.C. 430 (PC) (U.K.) (retaining two members of the Indonesian armed forces which were caught and trialed wearing civilian clothes after they planted a bag containing explosives in a civilian building, causing the deaths of three civilians). See also Hughes, *supra*, at 254, 266 (discussing examples of Turkish, Indian, and French perfidious military actions). See also W. Hays Parks, "Special Forces" Wear of Non-Standard Uniforms, 4 CHL. J. INT'L L. 493, 548, 557 (2003) (discussing WWII additional examples of perfidious activity).

² The state of Israel sees these territories as "administered territories" and refers to them by the name "Judea and Samaria," while most of the international community uses the term "Occupied Palestinian Territories" ("OPT") and sees them as "occupied territories." See H CJ 69/81 *Abu Aita v. Regional Commander of the Judea and Samaria Area & Staff Officer in Charge of Matters of Customs*, 37(2) PD 197, 205, 215 (1981); Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967–1980: THE LEGAL ASPECTS* 1, 13 (Meir Shamgar ed., 1982); See also Dore Gold, *From "Occupied Territories" to "Disputed Territories"*, JERUSALEM CTR. PUB. AFF. (Jerusalem Letter/Viewpoints No. 470, Jan. 16, 2002), <http://www.jcpa.org/jl/vp470.htm>. (The focus shall be on the OPT including East Jerusalem, excluding to the Hamas governed Gaza Strip).

³ *Mista'arvim* (מסתערבים) is the present-day Hebrew term for feigning Arab Palestinian civilian status. The name is derived from the middle ages Arabized Hebrew "Musta'arabi," meaning during "those who live among the Arabs," borrowed from the Arabic "must'arib" (مستعرب), meaning "Arabized." See RICHARD HITCHCOCK, *MOZARABS IN MEDIEVAL AND EARLY MODERN SPAIN: IDENTITIES AND INFLUENCES* 1 (2016); FRANCIS E. PETERS, *THE MONOTHEISTS: JEWS, CHRISTIANS, AND MUSLIMS IN CONFLICT AND COMPETITION, VOLUME II: THE WORDS AND WILL OF GOD* 287 (2005); See also Israel Defense, Efraim Lapid, *Me'Hashahar" le-"Duvdevan" - Mista'arvim Mista'arim Bashetah*, [From 'Dawn' to 'Cherry' - *Mista'arvim Attack in the Field*], ISRAEL DEFENSE (Jul. 26, 2018) (Isr.), <https://www.israeldefense.co.il/he/node/35115>.

⁴ The diverse disguises include traditional Arab clothing, "uniforms" of the various masked Palestinian insurgency groups, and everyday civilian garb or women's dress. For transportation, they use cars belonging to residents of the OPT, bearing local license plates. See e.g., B'TSELEM, *ACTIVITY OF THE UNDERCOVER UNITS IN*

The IDF's perfidy elite units are known for having developed a plethora of combat methods to address varied security challenges. These include intelligence-gathering operations, unique ambush tactics, and capturing suspects of participation in hostile activity.⁵

International humanitarian law ("IHL") defines perfidy only when it is applied during the conduct of hostilities.⁶ Resort to perfidy is otherwise permissible in operations governed by the law enforcement paradigm.⁷ Adhering to military perfidy during hostilities, Article 37 to the Additional Protocol I of 8 June 1977 to the Geneva conventions of 12 August 1949 prohibits the killing, injuring, or capturing an adversary by resort to perfidy.⁸ It thus archetypally prohibits particular outcomes of perfidy as a method of warfare.⁹ More concretely, as shall be discussed, methods of perfidy while feigning civilian status with the intent to kill or injure are surely unlawful in IHL for both international and non-international armed conflicts. By the same token, capturing an adversary by resort to perfidy mainly by treacherously wearing civilian clothes during undercover operations, which is

THE OCCUPIED TERRITORIES 8 (May 1992), https://www.btselem.org/publications/summaries/199205_undercover_units.

⁵ See *Duvdevan Unit*, ISR. DEF. FORCES, <https://www.idf.il/en/minisites/duvdevan-unit/> (last visited Mar. 23, 2020); Jessica Purkiss, *Profiling Israel's Undercover Mista'arvim Unit*, PALESTINE MONITOR (FEB. 18, 2013), <http://palestinemonitor.org/details.php?id=zulupoa2711yj0bhgwj7r>; Agreement on Gaza Strip and Jericho Area, Isr.-PLO, May 4, 1994, 33 I.L.M. 622, at 32.

⁶ See NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 372 (Vaughan Lowe ed. 2008); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1484, at 430 (Yves Sandoz et al. eds., 1987), https://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987] ("Article 37 is concerned only with acts that take place in combat, as is clear from the scope of this Part, as well as this Section"). Giladi furthermore argues that the discussion of perfidy in the context of non-international armed conflict during the Diplomatic Conference upholds the opinion that the rule does not apply in law-enforcement operations. See Rotem Giladi, *Out of Context: "Undercover" Operations and IHL Advocacy in the Occupied Palestinian Territories*, 14 J. CONFLICT & SECURITY L. 393, 427 (2010).

⁷ See NILS MELZER, *supra* note 6, at 377.

⁸ Article 37 to the Additional Protocol I. See discussion *infra* Part I(B).

⁹ See COMMENTARY ON THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, ¶ 1490 at 432 ("It was not the prohibition of perfidy *per se* which was the prime consideration of Article 37, but only the prohibition of a particular category of acts of perfidy.").

also the focus of this paper, is more contestable.¹⁰ In the military operational flow of perfidious warfare focusing on feigning as civilian methods, it is understood that in the Additional Protocol I's plenary meeting the discussion was mainly concerned with subparagraph (c), which relates to the feigning of a civilian or noncombatant status, and as a result the involvedness of insurgents.¹¹ The IDF's undercover record adheres to the fact that Israel views perfidious killing or injuring as unlawful and rarely do undercover operations result in dead or injured.¹² As a result, this near-sighted focus on Israel's perfidious killing or injuring by human rights advocates could also explain the minute record of legal proceedings concerning Israel's perfidy policies.¹³

¹⁰ An "undercover" operation is a term borrowed from police vocabulary and is not a term of art in IHL or military jargon. See Giladi, *supra* note 6, at 396 n. 11 & sources herein (citing Michael Davis, *Code of Ethics*, in THE ENCYCLOPEDIA OF POLITICAL SCIENCE (William G. Bailey, ed., 2d ed. 1995) 83, 87–88; GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA (1988); RANDOLPH D. HICKS, UNDERCOVER OPERATIONS AND PERSUASION (1973)).

¹¹ See, in particular, Int'l Comm. of the Red Cross [ICRC], Off. Records of the Diplomatic Conf. on the Reaffirmation & Dev. of Int'l Humanitarian L. Applicable in Armed Conflicts, vol. XIV [O.R. XIV], ¶ 23 at 264, CDDH/III/SR.28 (Feb. 3–Apr. 18, 1975) [hereinafter ICRC, Off. Recs. on IHL Applicable in ACs]. Art. 37(1)(c) forbids: "the feigning of civilian, non-combatant status." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), art. 37(1)(c) (June 8, 1977). See also, COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, ¶ 1503 at 436–37.

¹² The few cases of perfidious activity by resort to killing or injuries in the OPT occurred during the first Palestinian uprising ("Intifada") between 1989–1991. Henceforth, the occasions of death or injury were reported they were mostly associated with collateral damage. See B'Tselem: *Stop Using Undercover Forces in Combat Actions*, B'TSELEM (Jan. 25, 2007), https://www.btselem.org/press_releases/20070125; HUMAN RTS. WATCH, A LICENSE TO KILL: ISRAELI UNDERCOVER OPERATIONS AGAINST "WANTED" AND MASKED PALESTINIANS (1993); B'TSELEM, ACTIVITY OF THE UNDERCOVER UNITS IN THE OCCUPIED TERRITORIES, *supra* note 4, at 27–52 (for numerous cases which occurred during the First Intifada); ELIA ZUREIK & ANITA VITULLO, TARGETING TO KILL: ISRAEL'S UNDERCOVER UNITS (Palestine Human Rights Information Center 1992); AL HAQ, WILLFUL KILLINGS: A SUSTAINED ISRAELI POLICY IN THE OCCUPIED TERRITORIES 21 (1992).

¹³ See LCrimA (Jer) 37000-06-17 The State of Israel v. Na'elwa, ¶ 17 (Jan. 30, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter *Na'elwa*]. For tort cases arising from perfidious activity, see CA 209/00 Maher Mohammad Shaban Hatat v. State of Israel-Ministry of Defense ¶ 5 (Jul. 1, 1997), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 1901/08 Hana Dababseh v. IDF Advocate General ¶ 1 (Jul. 15, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CA 3569/03 Rafiq Sabana v. IDF Commander in Judea and Samaria ¶ 2, Nevo Legal Database (Nov. 4, 2010) (by subscription, in Hebrew) (Isr.).

Israeli perfidy in the OPT unfolded mostly after the Six-Day War in 1967, upon Israel's belligerent occupation of the West Bank, East Jerusalem, and the Gaza Strip. Soon after, the Israeli Army and its intelligence establishment recognized the need to infiltrate, gather intelligence, and operate clandestinely amongst the Palestinian civilian population. Continuously, a few military elite units specializing in covert perfidy operations were established. The training of such combatants includes an intimate acquaintance with the traditions of the specific regions in which they operate, the local dialect and manner of speech, intimate understanding of the local family clans, as well as the topography. As of 1986, most perfidy is concentrated by the Cherry ("Duvdevan") commando unit.¹⁴ The unit gained more importance after the signing of the Israeli-Palestinian Oslo Interim Accords as of the Gaza-Jericho Agreement in 1994,¹⁵ and the Interim Agreement on the OPT and the Gaza Strip in 1995, underlying the transfer of power over certain Palestinian towns and villages to the newly created Palestinian Authority ("PA").¹⁶ The transfer was substantial, as the IDF was no longer allowed to maintain an overt military presence in many of these areas.¹⁷ During the Second Palestinian uprising ("Intifada") between 2000-2005, at the height of its activity, Israel started to use perfidy

See also Ido Rosenzweig, *Combatants Dressed as Civilians: The Case of the Israeli Mista'arvim under International Law*, ISR. DEMOCRACY INST. POL'Y PAPER 8E, (2014); Giladi, *supra* note 6, at 395.

¹⁴ The reasons for the establishment of the Duvdevan unit were explained by former IDF Chief of Staff, Ehud Barak, as follows: "I want a unit, with combatants that look like Arabs, talk like Arabs and ride a bike in the Nablus Casbah as if they were in Dizengoff street in Tel Aviv. People that can act in disguise and make contact without the need for large undisguised forces." *2014 Annual Report*, DUVDEVAN ASS'N 2 (2014).

¹⁵ Agreement on the Gaza Strip and the Jericho Area, *supra* note 5.

¹⁶ Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., art. V(3) at 33, Sept. 28, 1995, 36 I.L.M. 551 [hereinafter Oslo II], available at https://content.ecf.org.il/files/M00261_TheIsraeli-PalestinianInterimAgreement-EnglishText.pdf (titled "Areas B and C").

¹⁷ In the past, there was another active unit named "Shimshon" (Samson, in Hebrew). Shimshon was founded for the same reasons as Duvdevan unit, but while Duvdevan operated, and still operates, mainly in the OPT, Shimshon operated mainly in the Gaza Strip. The unit was founded in 1988 and was active 1996; following the Oslo Accords and transferring the control of most of the Gaza Strip to the Palestinian National Authority ("PNA"), the unit was dissolved and some of the combatants were reassigned to Duvdevan. See GUY AVIAD, LEKSIKON HĀMAS [HAMAS LEXICON] 205 (2008) (Isr.); SHLOMI TZIPORI, TSADEK MASV'ARAV [FEIGNED JUSTICE] 45 (2004) (Isr.).

tactics almost daily.¹⁸ Even to date, the IDF reports that Duvdevan executes, as in the case of last year alone, more than three-hundred perfidy operations, including the capture of many wanted persons, intelligence gathering, and weapon confiscations.¹⁹

This article's argument opts for an interpretative bent terming perfidy as a military action within the laws of war both in theory and per the OPT's actuality. That is while cautiously assessing Israel's default persistent objection to an otherwise binding customary international law forbidding all forms of perfidy, including for capture of wanted persons. This argument is sustained threefold. Part I, considers two underlying conflict of laws concerns over the legality of Israel's perfidy in the OPT while feigning civilian status. First, it addresses the need to define the laws that apply in the OPT, with a subsequent concern over the mixed applicability of the law of armed conflict and belligerent occupation law. Second is the inquiry of whether perfidy is defined within the law enforcement paradigm as opposed to the conduct of hostilities paradigm, and thus which of the two constitutes specialized law in theory and practice.

Part II discusses the capture of wanted persons by resort to perfidy while feigning civilian status within the boundaries of the law of armed conflict. Debating its unlawfulness, this Part also distinguishes perfidy from lawful ruses of war based on perfidy's three underlying rationales – namely chivalry, mutuality, and the principles of distinction. If Israel is able to use perfidious capture in the OPT, it would

¹⁸ Michal Danieli, *Ha-Musta'arvim: Yehidat Duvdevan [The Mista'arvim: Duvdevan Unit]*, MAKO (Jan. 7, 2011) (Isr.), <https://www.mako.co.il/pzm-units/special-units/Article-cd28197a7e5d031006.htm>; Yael Bniya, *Mishak HaTsellim: HaTsah LeOmon Shel Yehidat Mista'arvim "Duvdevan" [The Shadow Game: A Glimpse into "Duvdevan" Training Units]*, MAKO (Mar. 24, 2013) (Isr.), <https://www.mako.co.il/pzm-soldiers/Article-0005be874db9d31006.htm>.

¹⁹ Amit Melamed, *300 Mevot 'ayim Ve HaTsinaynot—Kakh Nar'atah HaShana Shel Yehidat Komandi, Galeria Mivkhadat [300 Operations and Excellence—This Is How the Year of the Commando Unit Looked, a Special Gallery]*, ISR. DEF. FORCES (Jan. 1, 2018) (Isr.) (available at IDF website). The second military feigning unit is the "Yamas" (Yehidat Mista'arvim) is an elite unit of feigning anti-terrorism combatants founded in 1991 by the Israel Border Police. The basic purpose of the unit is dealing with protestors and demonstrations. The Yamas works with a strong cooperation with the Israeli Security Agency ("ISI") (Shabak, in Hebrew) and the IDF. See *Yehidat Mista'arvim (Yamas) ["Mista'arvim Unit (Yamas)]*, Israel Police (Isr.), at: https://www.gov.il/he/departments/guides/border_police_units?chapterIndex=1; *Hhi Karov LYamas [The closest as possible to Yamas]*, ISRAEL DEFENSE (May 11, 2012) (Isr.), <https://www.israeldefense.co.il/he/content/%D7%94%D7%9B%D7%99-%D7%A7%D7%A8%D7%95%D7%91-%D7%A9%D7%90%D7%A4%D7%A9%D7%A8-%D7%9C%D7%99%D7%9E%D7%A1>.

need to be considered a persistent objector to the forbidding customary norm. This Part questions the applicability of the persistent objection doctrine in Israel's case, and does so while discussing Israel's unique blend of state practice in the backdrop of conflicting *opinio juris*, as the latter both formally rejects perfidy while at the same time publicly manifests it. Given the unlawfulness of perfidious capture, lastly, this Part considers the lawfulness of the rule of feigning civilian status before capturing by resort to lawful spying.

Part III then follows under the assumption that in principle, as in the contested case of Israel, perfidious capture may underlie persistent objection to the customary norm prohibiting it. In such case, there remains a need to assess the breadth of military perfidy within the boundaries of the law of armed conflict. This added consideration, in the natural flow of the principles of armed conflict, should account for the four main humanitarian principles of international humanitarian law—namely military necessity, distinction, proportionality, and the prevention of unnecessary suffering. The article ultimately concludes that Israel's capture of wanted Palestinians by resort to military perfidy (as opposed to police perfidy) while feigning civilian status is, at the most, debatably legal. That is, it is only valid with the condition that Israel's persistent objection to the customary norm prohibiting perfidy is sustained.

II. THE POSITIVE FRAMEWORK: CONFLICT OF LAWS

A. *General*

The legality of perfidy while feigning civilian status by Israel sets two underlying conflict of laws concerns. First is the need to define the laws that apply in the OPT where the bulk of the perfidy activity occurs. In view of belligerent occupation law, the main difficulty derives from the attempt to reconcile the notion whereby the belligerent Israeli occupation of parts of the OPT has possibly terminated with the seizure of control by the PA based on the Oslo Accords. A subsequent matter relates to the mixed applicability of the law of armed conflict and the law of belligerent occupation, especially given the substantive decrease in the Israeli-Palestinian armed conflict's intensity.

A second concern follows, relating to the inquiry of whether perfidy is defined within the law enforcement paradigm as opposed to the conduct of hostilities paradigm and the question which of the two constitutes specific law in theory and practice. As argued herein, the interpretative affinity should justly term perfidy as a military action

within the law of armed conflict. The legal challenge remains ever-present as the military commander is obliged to determine every military perfidy operation given its specific circumstances also beyond the principled classification.

There surely remains a broader complex of laws applicable in the OPT. These comprise of the law of armed conflict, belligerent occupation law, international human rights law, Israeli administrative law, and legislation enacted by the military commander subject to judicial review. International human rights law (“IHL”), indeed, is said to apply in principle in any territory under the authority of all state parties including in occupied territories.²⁰ Focusing on perfidy in international law, though, the base points discussed are the law of armed conflict during belligerent occupation, as follows.

B. Law of Armed Conflict during Belligerent Occupation

In assessing the OPT’s belligerent occupation status given perfidious activity, there are two core concerns. The first underlies an interpretative challenge relating to the geographical scope of the OPT’s belligerent. That is while reconciling Israel’s transfer of state powers to the PA in areas A and B thereof, but not Area C based on the Oslo Accords. In view of a conceivable conflict of laws with the conduct of hostilities’ paradigm, it is further required to consider the drastic decrease in intensity in the Israeli-Palestinian conflict in the West Bank including East Jerusalem. Such a decrease in an armed conflict’s intensity could be said to terminate the applicability of the Law of Armed Conflict thereof. In such a case, it would directly impose on the mixed applicability of the two bodies of law during hostilities.

1. Belligerent Occupation Geographic Discontinuity

Any belligerent occupation status is continuously grounded on the applicable post-WWII military tribunals and international court

²⁰ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶¶ 104-106 at 177-78 (July 9) [hereinafter the *Wall Case*]. See also YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 71 (2009) [hereinafter DINSTEIN, *BELLIGERENT OCCUPATION*]; EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 12-15, 74 (2d ed. 2012) [hereinafter BENVENISTI, *LAW OF OCCUPATION*]; YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION—CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 401-550 (2009); Orna Ben-NAFTALI & YUVAL SHANY, *INTERNATIONAL LAW BETWEEN PEACE AND WAR* 242-43 (2006) [hereinafter BEN-NAFTALI & SHANY].

decisions.²¹ For a start, the OPT's actual status in view of Israel itself is further gleaned from Israeli Supreme Court decisions affirming The Hague regulations of 1907 as customary law.²² Defining an occupation is complex, given that the 1949 Geneva Conventions do not term the notion of occupation. It is, however, defined in Article 42 of the Hague Regulations. Subsequent treaties, including the 1949 Geneva Conventions, have not altered this definition.²³ Be that as it may, the State of Israel remains at odds with the Fourth Geneva Convention of 1949 as conditioned in article 2(2), stating that the occupied territory being "of a High Contracting Party," is not comprehensively reflected in the OPT.²⁴ Instead, Israel continues to claim that the fact that the Hashemite Kingdom of Jordan was not a legal sovereign in the area, which theoretically releases Israel from the obligation to wholly apply the Convention. Israel, for its part, has unilaterally declared that it applies what it sporadically labels as the *humanitarian articles* of the convention. That is without specifying ex-ante which articles supposedly fall

²¹ International Military Tribunal (Nuremberg), 41 AM. J. INT'L L. 172, 248–249 (1947) (stating that the Hague Conventions at the time of Nazi aggression "represented an advance over existing international law at the time of their adoption. . . . [and] were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . ."); International Military Tribunal for the Far East (Tokyo), 15 I.L.R. 356, 365–66 (1948).

²² HCJ 1661/05 Gaza Coast Regional Council v. The Knesset of Israel, 59(2) PD 481, 559–58 (2005) (Isr.); HCJ 393/82 Jam'iat Iscan al-Ma'almoun al-Tha'auniya al-Mahduda al-Mauliya v. Military Commander of the West Bank, 37(4) PD 785, 793 (1983) (Isr.) [hereinafter *Jam'iat Iscan*]; Yaffa Zilbershats, Shlitat Tzahal Bee-Yehuda, Shomrom VeAzza: Tfisa Lohamtit O Kibush Kolonyali [*The IDF in the OPT and Gaza: Legitimate Belligerent Occupation or Prohibited Colonialism*], 20 BAR–ILAN L. STUD. 547, 551 (2004) (Isr.) (in Hebrew); Orna Ben-Naftali & Keren Michaeli, *Parshat Lekh Lekha: Bein Adam LeMa'kom [The Call of Abraham: Between Man and Makom (Place; God)]*, 9 HAMISHPAT 107, 110 (2004) (discussing HCJ 7015/02 Ajuri v. The IDF forces commander in the OPT 56(6) PD 352 (2002) (Isr.)).

²³ INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 11 (2015) [hereinafter ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS].

²⁴ See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 2(2) [hereinafter "Fourth Geneva Convention" or "GC IV"]. See also art. 2 at the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art 49, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter "First Geneva Convention" or "GC I"]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85 (1950) [hereinafter "Second Geneva Convention" or "GC II"]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (1950) [hereinafter "Third Geneva Convention" or "GC III"].

under this category.²⁵ The Israeli Supreme Court thus upheld that the Convention, as a whole, does not constitute customary international law. Hence without internal legislation imposing the convention onto the Israeli legal system, it is not deemed *in toto* binding international law.²⁶

The ICJ and other critics of Israel's stance surely stipulate that the convention fully applies in the OPT as it concerns the protection of civilians during times of war which, undoubtedly underlies the status of Palestinian civilians.²⁷ Aside from the intricacy over the law of belligerent occupation, the Israeli Supreme Court continues to broadly define the sporadic hostilities between Israel and the Palestinians in the OPT as an international armed conflict ("IAC").²⁸ Yet, as of the Oslo Interim Accords upon the establishment of the Palestinian Authority in 1995, the OPT is demarked in three areas, namely areas A, B, and C.²⁹ Area A—together with Area H1, which demarks the Arab part of the city of Hebron—delimits the main Palestinian urban areas under Palestinian civil and security control.³⁰ The Oslo accords further indicate Area B under Palestinian civil control and Israeli security control, while Area C remains under Israeli civil and security control.³¹

²⁵ Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 266 (1971).

²⁶ See, e.g., HCJ 7015/02 Ajuri v. The IDF forces commander in the OPT 56(6) PD 352, 364 (2002) (Isr.); *Jam'iat Iscan* 37(4) PD at ¶11; HCJ 698/80 Kawasma v. Minister of Defense 35(1) PD 617, 638 (1980) (Isr.); HCJ 3278/02 Hamoked: Center for the Defense of the Individual v. The IDF Commander in the West Bank 57(1) PD 385, 396 (2002) (Isr.); HCJ 2056/04 The Council of Beit Sourik Village v. The Government of Israel 58(5) PD 807, 827 (2004) (Isr.); HCJ 7957/04 Mara'abe v. The Prime Minister of Israel 60(2) 447, 492 (2005) (Isr.) [hereinafter *Mara'abe*].

²⁷ DAVID KRETZMER, *THE OCCUPATION OF JUSTICE, THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 32-34 (2002); *The Wall Case*, 2004 I.C.J. Rep. at 178-80, ¶¶ 108-111; BEN-NAFTALI & SHANY, *supra* note 20, at 140.

²⁸ HCJ 769/02 Public Committee Against Torture in Israel v. The Government of Israel 62(1) PD 507, ¶¶ 16-18 (2006) (Isr.) [hereinafter *Targeted Killings Case*]; HCJ 9594/03 B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories v. IDF Advocate General (Aug 21, 2011) Nevo Legal Database (by subscription, in Hebrew) (Isr.). In 2011, Chief Justice Beinisch expressed reservations over the IAC's applicability in the OPT, stating that the issue should be further examined. *Id.* ¶¶ 12-13.

²⁹ Additional Announcement by the Government at HCJ 769/02 Public Committee Against Torture in Israel v. The Government of Israel, ¶¶ 45-48 [hereinafter *Targeted Killings Additional Announcement*]; Yoel Zinger, *Israeli - Palestinian intermediate agreement on Palestinian self-governing in the OPT and Gaza Strip - Legal Aspects*, 27 MISHPATIM 605, 606, 610-11, 623-24 (1996).

³⁰ *Id.*

³¹ *Id.*

The issue concerning the application of the laws of belligerent occupation is more perplexing concerning territories under Palestinian control. The reason for this is that often perfidy activities take place in areas A or B, where Israel is not directly administering the regions given Palestinian jurisdiction.³²

The Israeli Supreme Court in the *Targeted Killings* case, on its part, holds that proper interpretation of the “effective control” test is learned from Article 42 of the Hague Regulation, which was annexed to The Hague Convention of 1907.³³ That is bearing in mind that neither the 1949 Geneva Conventions nor the 1907 Hague Regulations define or refer to the term “effective control.”³⁴ The Court held that Areas A and H1—and, in principle, Area B which comprises approximately forty percent of the OPT—are no longer under military occupation, and therefore the law of belligerent occupation ceases to apply, due to presiding Palestinian rule of law.³⁵ This is allegedly in accordance with the different interim Oslo agreements between Israel and the PA.³⁶ According to Israel’s interpretation of its effective control, or lack thereof, belligerent occupation exists only as long as the territory

³² The IDF has resumed military operations in areas A and B as of operation “Defensive Shield” in 2002. See Barak Ravid & Chaim Levinson, *Shin Bet Opposes Plan to Limit Israeli Army’s Operations in Palestinian Cities*, HAARETZ (Apr. 18, 2016), <https://www.haaretz.com/israel-news/.premium-shin-bet-opposes-plan-limiting-idf-operations-in-palestinian-cities-1.5434753>. In 2016, Prime Minister Netanyahu declared that this policy shall continue. See PM: *IDF to Keep Operating in West Bank Areas under Full PA Control*, TIMES OF ISRAEL (Apr. 21, 2016), <https://www.timesofisrael.com/pm-idf-to-keep-operating-in-west-bank-areas-under-full-pa-control/>.

³³ Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 205 C.T.S. 277 [hereinafter Hague Regulations of 1907] (“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”). The ICJ has twice considered the notion of occupation, relying exclusively on Article 42 of The Hague Regulations in determining that an occupation and the law of occupation of the entire OPT and in areas of the DRC resulting from Second Congo War, accordingly, applied in those areas. See *The Wall Case*, *supra* note 20, at ¶ 78; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶¶ 172–77.

³⁴ ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 11. In this regard, effective control is the main term substantiating the notion of “authority,” underlying the definition of occupation in Article 42 of the 1907 Hague Regulations. Hague Regulations *supra* note 33.

³⁵ *Targeted Killings Additional Announcement*, *supra* note 29, at ¶¶ 45–48 of the States additional notice to the Court.

³⁶ *Id.* at ¶¶ 46–47.

is under direct military control, and the lack of this direct military control would mean that the law of belligerent occupation no longer apply. Israel further claims that the status of the Hamas-held Gaza Strip cannot rely on an Israeli law-enforcement paradigm as of the 2005 “disengagement” from Gaza, which terminated Israel’s disputed occupation of that area.³⁷ In support of this view, Israel’s further explains that it had stopped enacting administrative military powers in Gaza, as these were lawfully transferred to the PA.

However, critics claim that the Israeli stance remains incompatible with the conventional interpretation of the notion of authority pursuant to Article 42. The ICRC notably considers an archetypal “functional approach” in some explicit and exceptional situations: when foreign forces, such a in the case of Israel and Gaza, withdraw their civil administrative control from occupied territory or parts of them, yet retain vital elements of military authority, then the law of occupation may continue to apply *mutatis mutandis*.³⁸ The functional approach warrants a more accurate definition of the law applicable to undetermined situations, whether an occupation has formally ended or not.³⁹

This underlies a situation in which the occupying power can impose its military authority, notwithstanding the particularities of its exact physical whereabouts.⁴⁰ This view echoes Oppenheim and von Glahn’s perception of belligerent occupation in modern warfare where

³⁷ For the debate on the legal status of Gaza, see COORDINATION OF GOV’T ACTIVITIES IN THE TERRITORIES—OPERATIONS & PALESTINIAN AFF. DEP’T, UNCLASSIFIED STATUS OF AUTHORIZATIONS FOR THE ENTRY OF PALESTINIANS INTO ISRAEL, FOR THEIR PASSAGE BETWEEN JUDEA AND SAMARIA AND THE GAZA STRIP AND FOR THEIR DEPARTURE ABROAD 2-16 (last updated Feb. 19, 2020), <https://www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/50en.pdf> [hereinafter COGAT, UNCLASSIFIED STATUS]; Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68, 70-72 (2008); Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement*, 8 Y.B. INT’L HUMANITARIAN L. 369 (2005); Nicholas Stephanopoulos, *Israel’s Legal Obligations to Gaza After the Pullout*, 31 YALE INT’L L. J. 524 (2006). For the Israeli Supreme Court’s view, see HCJ 9132/07 Jaber Al-Bassiouni v The Prime Minister (2008) (unpublished) (Isr.), <https://versa.cardozo.yu.edu/opinions/ahmed-v-prime-minister> (English translation); and CrimA 6659/06 A v The State of Israel (2008) (unpublished) (Isr.), <https://versa.cardozo.yu.edu/opinions/v-state-israel-1>.

³⁸ ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 12.

³⁹ *Id.*

⁴⁰ YORAM DINSTEIN, DINEI MILHAMA [LAWS OF WAR] 209-10 (1983) [hereinafter DINSTEIN, LAWS OF WAR].

there is no need for a general physical military presence,⁴¹ and neither is there a need for a specified physical military presence in towns and villages to establish a de facto belligerent occupation. Taken to the extreme, the argument goes, belligerent occupation is conceivable even by resort to air force power only.⁴²

Undoubtedly, Israel imposes its authority on areas A and B at will, as these areas are completely surrounded by Area C. The latter notably constitutes the majority of the OPT, which under the Oslo Interim Accords still remains under full Israeli control. That is while the IDF's perfidious activity regularly occurs throughout the OPT, mobility between the different areas, moreover, continues to depend on the IDF's sole discretion. Israel, to be sure, still controls the Palestinian civil registrar, the trafficking of goods in or out of the OPT, the right of passage for the local population including the entry of Palestinians into Israel, their passage between the OPT and the Gaza Strip and their travel abroad, etc.⁴³ The narration of whether the entire OPT remains occupied remains inconclusive, albeit leaning toward the ICJ's broader interpretation.⁴⁴

Given the standard interpretative view, whereby the entire OPT remains, in principle, under belligerent Israeli occupation, the occupying power is said to undertake numerous duties regarding the local population.⁴⁵ It must preserve public order, safety, and the rule of

41 LASSA F. L. OPPENHEIM, *INTERNATIONAL LAW* 435 (Hersch Lauterpacht, ed., 7th ed. 1952); GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 28-29 (1st ed. 1957).

42 VON GLAHN, *supra* note 41.

43 COGAT, *UNCLASSIFIED STATUS*, *supra* note 37, at 2-16.

44 *See* The Wall Case, 2004 I.C.J. ¶¶ 78, 89 at 167, 172. The European Union unanimously voted in favor the UN General Assembly Resolution on the Advisory Opinion and has, in later statements, maintained its position concerning the OPT's belligerent occupation. *See, e.g.*, European Parliament resolution of 5 July 2012 on EU policy on the West Bank and East Jerusalem (2012/2694 (RSP)), 2013 O.J. (C 349 E/82).

45 The main legal sources containing belligerent occupation laws are the Hague Regulations of 1899 and 1907: Convention (II) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. 43 [hereinafter Hague Regulations of 1899]; Hague Regulations of 1907, *supra* note 33. These regulations have since achieved customary status, as is evident in a number of military tribunal verdicts. *See e.g.*, International Military Tribunal (Nuremberg), *supra* note 21, at 248-249; The Wall Case, 2004 I.C.J. ¶¶ 78, 89 at 167, 172; GC IV in its entirety. The next update to the law of occupation was done in Protocol I Additional to the Geneva

law.⁴⁶ Article 43 of the Hague Regulations constituting this obligation is therefore twofold. The first obliges the occupied population to respect the rule of law in the occupied territory. The second—which is more related to perfidious activity—is the duty to maintain public order and safety, for example, by preventing disorder or by enforcing criminal law.⁴⁷ The occupant must thus deal with the immediate challenges associated with belligerent occupation, such as riots, looting, and anarchy.⁴⁸ The occupant must maintain public order and safety “as far as possible,” meaning the occupant does not have to actually maintain them, but must consistently make a substantive effort instead.⁴⁹ This aspect further constitutes the duty by the occupant to protect the local population from external security peril while safeguarding the latter from third party assaults, equivalent to protecting its own civil population.⁵⁰ Feigning civilian status, specifically, can be challenging in the context of these two elements constituting the obligation to maintain public safety and order. If the occupying power acting according to the law of armed conflict uses military perfidy tactics by feigning as civilians as part of actual combat against an invading military power, guerrilla, or rebel forces, it may be allowed to use resort to wide-ranging powers while trying to defeat its adversaries. In balance, however, to the degree that an occupying power is applying control over civilian population, its perfidy tactics may fall within the alternative law enforcement paradigm as it acts to maintain and police law and order.

2. Armed Conflict Termination Intricacy

The conflict of laws in the OPT between the conduct of hostilities and the law of armed conflict paradigms notably underlies a second

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

⁴⁶ Hague Regulations of 1907, *supra* note 33, at art. 43.

⁴⁷ Kenneth Watkin, *Maintaining Law and Order During Occupation: Breaking the Normative Chains*, 41 ISR. L. REV. 175, 200 (2008); ARAI-TAKAHASHI, *supra* note 20, at 99.

⁴⁸ ARAI-TAKAHASHI, *supra* note 20, at 128.

⁴⁹ See DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 20, at 91.

⁵⁰ See H CJ 168/91 Marcus v. Minister of Defense 45(1) PD 467, 470-71 (1991) (Isr.) (during the Gulf War, to illustrate, under fear of missiles carrying chemical warheads being fired at Israel by Iraq's Saddam Hussein the Israeli Supreme Court ordered the state to equip the civilian population in the OPT and the Gaza Strip with gas masks under belligerent occupation, similarly to the equipment of Israeli civilians); DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 20, at 93-94.

concern. It considers the drastic decrease in intensity in the Israeli-Palestinian conflict in the PA-held West Bank, including East Jerusalem, upon its implications on the applicability of the law of armed conflict in the OPT. Table A below depicts the decrease in the number of casualties in the Israeli-Palestinian international armed conflict between September 2001, upon the beginning of the Second Intifada, and 2018. The table nevertheless demonstrates the recurring and unstable cycles of violence.⁵¹

Table A: Number of Casualties in Hostilities in the OPT (including the Gaza Strip) between 2001-2018

Dates	Palestinian Civilian Casualties	Israeli Civilian Casualties*	Comments
2018	295	14	In March 2018, Hamas-led Palestinians in the Gaza Strip started a weekly violent demonstration campaign near the border with Israel. Demonstrations began after the United States moved its Embassy from Tel Aviv to Jerusalem and recognized Jerusalem as the Capital of the State of Israel.
2017	69	14	
2016	108	11	
2015	157	23	October 2015 marks the start

⁵¹ ISRAEL SECURITY AGENCY (ISA), HITPALGUT HARUGIM MI-TEROR FALASTINI BA-IMUT HA-NOKHEHI [REPORT ON ISRAELI CASUALTIES AS A RESULT OF PALESTINIAN TERROR BETWEEN 2000-2009], SHABAK (2009) (Isr.), https://www.shabak.gov.il/SiteCollectionImages/%D7%A1%D7%A7%D7%99%D7%A8%D7%95%D7%AA%20%D7%95%D7%A4%D7%A8%D7%A1%D7%95%D7%9E%D7%99%D7%9D/terror-portal/docs/kreport090310_he.pdf; THE MEIR AMIT INTELLIGENCE & TERRORISM INFO. CTR., PALESTINIAN VIOLENCE AND TERRORISM AGAINST ISRAEL, 2018: DATA, NATURE AND TRENDS (2018), <https://www.terrorism-info.org.il/en/palestinian-violence-terrorism-israel-2018-data-nature-trends-2/>; *Themes: Casualties*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. IN THE OCCUPIED PALESTINIAN TERRITORY, <https://www.ochaopt.org/theme/casualties> (last visited on March 25, 2019); Mx Fisher, *This Map Show Every Person Killed in the Israel-Palestine Conflict since 2000*, VOX (July 14, 2014, 3:10 PM), <https://www.vox.com/2014/7/14/5898581/chart-israel-palestine-conflict-deaths>.

			of the "Intifada of Knives," with mainly politically unaffiliated Palestinians stabbing Israelis with knives in the Occupied West Bank.
2014	2,273	84	The fifty-one-day operation "Protective Edge" took place between July-August 2014 against Hamas in the Gaza Strip.
2013	38	6	
2012	255	7	November 14, 2012, marks the beginning of the eight-day Israeli operation "Pillar of Defense" against Hamas in the Gaza Strip.
2011	118	12	
2010	82	9	
2009	1,398	9	January 2009 marks the beginning of operation "Cast Lead," which was the first Israeli military operation against Hamas in the Gaza Strip after Hamas formerly toppled the PA government's political control over the Gaza Strip.
2007-2008	849	36	
Oct. 2001-Feb. 2005 (2d Intifada)	3,223	1,089	Casualties were in the West bank and the Gaza Strip.
Sept. 2001	16	1	The month before the Second Intifada erupted.

* Including IDF soldiers not during combat.

Such a decrease in an armed conflict's intensity in the West Bank, including the disputed occupied Palestinian territory of East Jerusalem, could be said to terminate the applicability of the law of armed

conflict to perfidious activity thereof.⁵² In such a case, it would directly effect the mixed applicability of the two bodies of law during hostilities.

Assessing the time frame of armed conflict, such as the Israeli-Palestinian one in the OPT, sets numerous legal positive concerns. The first revolves around the lack of exhaustive direction in the 1949 Geneva Conventions on the issue of termination of armed conflicts.⁵³ That is, given the Geneva Conventions' replacement of the concept of "war" with "armed conflict," emphasizing that the application of IHL should be based on a factual assessment of the situation.⁵⁴ At a start, an IAC begins when two or more States resort to armed force against each other. As a factual matter, an IAC begins as "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2."⁵⁵ Additionally, an IAC still exists even if one of the Parties denies the existence of a state of war.⁵⁶

With regards to ending armed conflict,⁵⁷ there further exists no exact definition, given the importance of determining when the law of armed conflict is no longer applicable.⁵⁸ According to Article 6 of the Fourth Geneva Convention, the Convention applies until "general close of military operations," which has been archetypally described

⁵² See Amichai Cohen & Yuval Shany, *Sof Hasiksukh (Ha-hanush) - Hazarha le-shigrat Hakirut [End of Armed Conflict - Back to Routine Investigations of Deaths in the West Bank]*, ISR. DEMOCRACY INST. (Oct. 19, 2010) (Isr.), <https://www.idi.org.il/articles/8277>.

⁵³ GC IV, *supra* note 24, at art. 3(b).

⁵⁴ See INT'L COMM. OF THE RED CROSS, COMMENTARY OF 2016 TO THE FIRST GENEVA CONVENTION, art. 2, ¶ 193 (Mar. 22, 2016) (prior to the Geneva Conventions in 1949, States commonly insisted that IHL should only apply when a war was officially declared.). See generally Quincy Wright, Comment, *When Does War Exist?*, 26 AM. J. INT'L L. 362 (1932) (for a discussion concerning the pre-1949 Geneva Conventions.).

⁵⁵ Article 2 is named "Common Article 2," as it is present in each of the four Geneva Conventions [hereinafter Common Article 2 of 1949 GC I-IV].

⁵⁶ *Id.*

⁵⁷ *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) ("The Conventions use the term "active hostilities" instead of the terms "conflict" or "state of war" found elsewhere in the document is significant. It serves to distinguish the physical violence of war from the official beginning and end of a conflict, because fighting does not necessarily track formal timelines.").

⁵⁸ *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgement, ¶ 1694 (Nov. 16, 2012).

as the moment when the “last shot has been fired,” implying a *de minimis* level of violence.⁵⁹ The *Tadić* case clarifies that in an IAC, the law of armed conflict “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”⁶⁰

Five years later, in *Al-Bihani*,⁶¹ however, the fact that United States Court of Appeals for the D.C. Circuit emphasized that the Conventions use the term “active hostilities” instead of the terms “conflict” or “state of war” found therein is noteworthy. It obliges to differentiate the physical violence of war from the official beginning and end of a conflict, as fighting does not necessarily track formal timelines.⁶² The concept of “active hostilities” is thus narrower than “armed conflict,” and an IAC can remain even when active hostilities have ceased. In such a case, agreements between the parties to the conflict only add to the evidence on the end of the armed conflict. Thus, determining if the IAC ended requires an overall factual discretionary assessment based on all actions on the ground.⁶³ Second, international case law has so far not proven to be sufficiently in agreement on the issue of how to determine when IHL should apply to an IAC. This remains an ambiguous and impractical benchmark.⁶⁴

⁵⁹ COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, at 66.

⁶⁰ Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁶¹ *Al-Bihani*, 590 F.3d at 872.

⁶² *Id.* at 874.

⁶³ Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT’L REV. RED CROSS 163, 172 (2014).

⁶⁴ See, e.g., Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment (Trial Chamber), ¶ 1694 (Apr. 15, 2011) (“Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases.”); *Al-Bihani*, 590 F.3d at 872; Prosecutor v. Tadić, *supra* note 60, ¶ 70. See also ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 9.

Third, uncertainty lies because peace treaties are a decreasingly common State practice.⁶⁵ Such is the case also given the ongoing Israeli-Palestinian conflict.⁶⁶ The distinctions between peace treaties and ceasefires or armistices are moreover gradually blurred and are becoming rare. Conflicts thus frequently end with less formal instruments, such as armistices or unilateral or joint declarations, or end de facto.⁶⁷

Moreover, the leading scholarly view revolves around the basic proposition whereby IHL applicability ceases once the conditions that initially triggered its application no longer exist. This means that an IAC ends when the belligerent States are no longer tangled in an armed confrontation. In the OPT, more specifically, this probe remains inconclusive, namely because of both the Israeli belligerent occupation's discontinuous geographic scope and the sporadic and temporary hostilities by both Israel and Palestinian insurgents.⁶⁸

⁶⁵ ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 8; Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF*, 47 COLUM. HUMAN RTS. L. REV. 204, 236-41 (2015-2016).

⁶⁶ See, e.g., Kim Lavi & Udi Dekel, *Looking at the Gaza Strip: From Short Term to Long Term* (Tel Aviv U., Inst. For Nat'l Sec. Stud. Insight No. 1109, Nov. 20, 2018), <https://www.inss.org.il/publication/looking-gaza-strip-short-term-long-term/> (referring to Israel and Hamas concluding "neither wants . . . to appear as if it is conducting negotiations with the enemy"); *The Escalation in the Gaza Strip: Hamas Negotiates with Fire*, TEL AVIV U. INST. NAT'L SEC. STUD., <https://www.inss.org.il/the-escalation-in-the-gaza-strip-hamas-negotiates-with-fire/> (last visited Mar. 24, 2020) (on the preference of Hamas to negotiate limited interim agreements with Israel).

⁶⁷ See Joakim Kreutz, *How and When Armed Conflicts End: Introducing the UCDP Conflict Termination Dataset*, 47 J. PEACE RES. 243 (2010) (using the UCDP Conflict Termination dataset between 1946-2005 to show that conflicts do not exclusively end with decisive outcomes such as victory or peace agreement but more often under unclear circumstances where fighting simply ceases); Milanovic, *supra* note 63 at 168. See generally Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880 (1956); RICHARD BAXTER, *Armistices and Other Forms of Suspension of Hostilities*, in HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER 309 (Detlev F. Vagts et al. eds., Oxford U. Press, 2013) (1976).

⁶⁸ ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 9. The level of intensity in the fights between Israel and Palestinian armed organizations changed rapidly through the years. For a grasp of the fluctuation in violence see ISRAEL SECURITY AGENCY (ISA), Duhot Hodshiyim [*Monthly Reports*], SHABAK (Isr.), <https://www.shabak.gov.il/publications/Pages/monthlyreports.aspx>.

Consequently, the overall termination of hostilities is not always easily determined, even in the absence of ongoing military operations.⁶⁹ Ceasefire clauses or agreements *per se*, such as the Oslo Interim Agreements or other circumstantial truce arrangements between Israel and Palestinian insurgent groups, thus may be of limited relevant value for determining IHL applicability. It is instead the hostile circumstances *de facto*, perfidious or not, that will define the substance that any archetypal ceasefire or future peace agreement, such as the Oslo Accords, may prospectively entail, as these agreements are unproven in putting an end to the armed conflict with a degree of stability and permanence.⁷⁰

C. *Perfidy IHL Lex Specialis*

The application of the laws of belligerent occupation in the OPT or in Areas A, B, C—or combinations thereof, given Palestinian alternative effective control—is thus mainly parallel to the conceivable application of the laws and customs of war.

There seems to be a broad nonbinding consensus whereby the conflict between Israel and the Palestinians is by its nature an IAC. In applying Article 1(4) of the Additional Protocol I,⁷¹ this follows the International Criminal Tribunal for the former Yugoslavia (“ICTY”) stance defining an armed conflict between states or between states and armed organizations whenever sufficiently excessive use of force is witnessed.⁷² This poses a complicated situation. On the one hand, while acting to maintain public order and safety, the occupying power

⁶⁹ ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 8-9; Weizmann, *supra* note 65, at 233-34

⁷⁰ ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 9.

⁷¹ Additional Protocol I, *supra* note 45, at article 1(4). Israel claims this article is nonbinding, and adds that even if it were binding, Israel is a persistent objector to this custom. See Ruth Lapidot, Yuval Shany & Ido Rosenzweig, *Israel Ve-Shne Haprotokolm Harishonim le-Amanot Geneva [Israel and the Two Protocols Additional to the Geneva Conventions]*, ISR. DEMOCRACY INST. POL’Y PAPER NO. 92 25-26 (2011), https://www.idi.org.il/media/5085/pp_92.pdf.

⁷² Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995); *Targeted Killings Case*, at ¶ 21; Tracy Wilkinson, *Israeli Activists Urge Army to Probe Civilian Slayings*, L.A. TIMES (Dec. 31, 2001) <https://www.latimes.com/archives/la-xpm-2001-dec-31-mn-19266-story.html>.

must act as a police force,⁷³ which involves actions of limited force that are usually forbidden in armed conflict, such as the use of tear gas during civil riots used by police forces of the occupying power.⁷⁴

On the other hand, a complication arises whenever the local population opposes the occupying power violently, as in such cases when conduct that starts as a policing action can quickly turn into an action bearing a military nature. Such are situations in which disturbances of peace by the local population involve the resort to weaponry that endangers the lives of occupying power soldiers. In such scenarios, an occupying power may no longer act as a law enforcing police force. It then becomes eligible to use military force within the boundaries of the law of armed conflict.

This legal duality, whereby laws of war run alongside law enforcement police actions, may complicate efforts to define whether the action taken by the occupant is a military or a police action. This mixture certainly bears significant importance when determining the legality of any given forceful action, including perfidy bestowed upon the civil population during belligerent occupation.⁷⁵ A 2012 ICRC expert opinion report depicts two conflicting approaches toward the parallel application of the laws of war and the law enforcement paradigms, as follows. The first approach states that during a belligerent occupation, there cannot be a parallel application of laws. This “either/or” approach states that during a belligerent occupation the law enforcement paradigm should apply, and not the laws of war, based on Articles 5 and 68 of the Fourth Geneva Convention.⁷⁶ This approach certainly has been rejected by most of the experts, who claim that some of the articles regarding the law of armed conflict, such as Articles 49(2), 49(5), and 53 of the Fourth Geneva Convention, should apply during an occupation.⁷⁷ It has also been rejected due to the implications of the “either/or” approach, as the law enforcement paradigm is the permanent legal system during an occupation. As such, there can be no response to situations in which armed forces operating

⁷³ Watkin, *supra* note 47, at 177-79.

⁷⁴ DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 20, at 99.

⁷⁵ INT'L COMM. OF THE RED CROSS [ICRC], EXPERT MEETING REPORT: OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 114 (Mar. 2012) [hereinafter ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION].

⁷⁶ *Id.* at 112.

⁷⁷ *Id.*

within civil occupied population undertake forceful actions against the occupying power.⁷⁸ Most ICRC experts, therefore, lean toward a second approach. This approach is based on a parallel application of the laws of war and the law enforcement paradigms.⁷⁹ Accordingly, in many military occupations rebelling armed forces lead occupying forces to continually respond as a combatant force in attempt to overpower them while restoring law and order. In practice, though, a given violent confrontation can occur in certain occupied areas, while other areas remain peaceful. Under this approach upon its obscurities, the ICRC experts detailed three conducts which limit the application of the laws and customs of war, as opposed to categorically employing the law enforcement paradigm.⁸⁰

The first approach is based on a realistic fact-based examination grounded in a “situation-based” or a “sliding scale” approach. The choice between the laws of war or the law enforcement paradigms will accordingly depend on the gravity of the threat to the occupying power. When the threat possesses warlike characteristics led by armed groups in the occupied population or guerrilla organizations thereof, as well as situations in which the level of violence is excessive, the laws of war apply. Otherwise, when threats do not have martial characteristics, the law enforcement paradigm must be applied instead.⁸¹

A military unit during a belligerent occupation, to illustrate, may be sent to sojourn an illegal demonstration blocking a traffic route. The operating unit may adhere to reasonable use of force in the process. This, of course, remains a conventional law enforcement operation. If, however, the demonstrators move into throwing stones in a manner that threatens the police force or conceivably uses deadly Molotov cocktails, then the police force may respond with an equivalent use of force, such as utilizing rubber bullets or sponge grenades. Such operation, therefore, would no longer be strictly a law enforcement action, but would more likely be classified as a military operation.⁸² Upon the escalation in hostilities in the OPT at the start of the Second Intifada in October 2000, the Israeli Supreme Court further defined the situation as an IAC in the backdrop of its continuous application of the

⁷⁸ *Id.* at 113.

⁷⁹ *Id.*

⁸⁰ *Id.* at 113-15.

⁸¹ ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION, *supra* note 75, at 113-15.

⁸² *Id.* at 121-25.

law enforcement paradigm.⁸³ In case of escalated law-enforcement operations, undercover units should, therefore, be identified by revealing distinctive identifying signs no later than once a law enforcement operation escalates into combat action.⁸⁴ This is in order to be sure that no unlawful perfidious activity occurs.

The second related method is the “mixed model approach.” This model suggests a parallel application of the laws and customs of war, alongside human rights law, as part of the belligerent occupation laws. This approach promotes a parallel use of force against counter-occupation forces while preserving human rights and the safety of the civilian population.⁸⁵

The third approach, labeled the “Jump Theory,” suggests an archetypal leap between both legal systems, namely between the law enforcement and the law of armed conflict paradigms, according to the individual status of the person to whom the law is applied. If the person is either a combatant or a civilian taking an active part in hostilities, such as during a guerrilla war, the laws and customs of war apply. If, however, the subject matter is a “regular” civilian committing a criminal offense, the law enforcement paradigm shall apply.⁸⁶ As Kretzmer relatedly emphasizes, this is particularly challenging given that non-state parties to a conflict are liable to domestic prosecution regardless of whether they have acted under international law.⁸⁷ This legal asymmetry thus underlies a negative incentive for occupying powers to jump from a law-enforcement to armed conflict model, as in doing so they alter the rules of engagement without granting of combatant privilege and prisoner of war status.⁸⁸

Most ICRC experts in the 2012 report surely are in favor of adopting the parallel application approach, according to either one of the three models presented. It seems that this line is the most applicable to the frequent fluctuating reality also in the OPT, given the variable intensity of conflict between Israel and the Palestinian non-state actors

⁸³ See *Targeted Killings Case*, ¶¶ 16-17

⁸⁴ Rosenzweig, *supra* note 13, at 14.

⁸⁵ *Id.* at 14-15. The appliance of human right laws in parallel to the occupation laws will be discussed further in this paper.

⁸⁶ *Id.* at 14.

⁸⁷ See, e.g., David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISRAEL L. REV. 8, 36 (2009).

⁸⁸ *Id.* at 35-36.

opposing it. Accordingly, during military occupation, the law enforcement paradigm should apply, apart from when there are instants in time and space of sufficiently intense hostility. In the latter events, the laws and customs of war in principle, prevail as a *lex specialis*.

The conflict of law further surges as the long-lasting Israeli-Palestinian conflict underlies an archetypal *prolonged* belligerent occupation. Article 6 of the Fourth Geneva Convention states that the application of the Convention will conclude one year following the general close of military operations.⁸⁹ The occupying power shall remain bound, however, for the duration of the occupation, to the extent that it exercises the functions of government in such territory by numerous provisions of the Convention.⁹⁰ These treaty arrangements adhere to the laws of war, as the occupying power remains the new *de facto* legal sovereign in the territory during that period.⁹¹ As such, most actions undertaken by the occupant will *prima facie* fall within the law enforcement paradigm. Article 6 tries to restore the routine life of the population in the occupied territory. This is pursuant to the belief that the occupying power needs to end the conflict as quickly as possible and ensure that the daily lives of the local population get back on course. The main challenge which underlies this intention is the absence of an alternative regime which may leave the occupied population defenseless. That is especially with regard to the protections under the laws and customs of war.⁹² It should be noted that Article 3(3) of the Additional Protocol attempts to unravel this difficulty by extending the application of the Geneva Conventions to the entire occupation period until its end. It remains, however, unclear how to balance Article 3(3) with Article 6, as the latter is the core article regarding prolonged occupation.⁹³ Resolving the conflict of law in a territory under belligerent occupation requires added consideration of the classification of any operational activity. Such is the discussion touching upon the resort to perfidy including while feigning civilian status in the OPT.

⁸⁹ GC IV, *supra* note 24, art. 6.

⁹⁰ *Id.*

⁹¹ *Id.*; BENVENISTI, *supra* note 20, at 68-76, 244.

⁹² DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 20, at 282.

⁹³ *Id.* at 128-32.

D. Military and Law Enforcement Perfidy Classifications

The classification of military actions in resort to perfidy during a belligerent occupation, prolonged or not, inflicts lawlessness upon an occupying power. The classification challenge is needed both in principle and given hostility specificities. On the one hand, the occupant has a responsibility to maintain law and order and to ensure public order and public safety.⁹⁴ Such as, for example, while enforcing criminal law,⁹⁵ maintaining a system to supply food, and guaranteeing medical equipment and other essential goods to the occupied population.⁹⁶ In balance, however, the occupant has the right to resort to armed force in situations in which widespread violence erupts and contests the occupying power's authority.⁹⁷ The resort to perfidious combat methods during military operations by the use of armed force in the course of armed conflict in principle also constitutes an *attack*.⁹⁸ That is in view of its wide definition in Article 49 to Additional Protocol.⁹⁹

When a belligerent occupation is not calm and is characterized by cycles of forcefulness, there may be periods in which the intensity of the hostilities between the occupying power and the occupied population mandate the resort to significant use of force. So much so that, in responding to a degree hostilities that may rise to the level of an armed conflict, the military action would be governed by IHL.¹⁰⁰ Then again,

⁹⁴ Hague Regulations, *supra* note 33, at art. 43; GC IV, *supra* note 24, at art. 64; DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 20, at 67-70; Watkin, *supra* note 47, at 177-78; IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* 213 (1998).

⁹⁵ Yoram Dinstein, *International Law of Belligerent Occupation and Human Rights*, 8 *ISR. Y.B. HUM. RTS.* 104, 111 (1978).

⁹⁶ GC IV, *supra* note 24, at art. 23, 55.

⁹⁷ Watkin, *supra* note 47, at 179-80; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra Judicial Executions or Legitimate Means of Defense?*, 16 *EUR. J. INT'L L.* 171, 196 (2005).

⁹⁸ See COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, §§ 1880, 1882 (commentary to art. 49).

⁹⁹ *Id.*

¹⁰⁰ *Targeted Killings Case*, 62(1) PD at 519-21 (2006); Wilkinson, *supra* note 72; ICRC, *OCCUPATION AND OTHER FORMS OF ADMINISTRATION*, *supra* note 75, at 120-21. The United States also referenced the complexity of applying the laws of war in parallel to the law enforcement paradigm in an occupied territory, whereby the

there can be quieter periods in which most actions undertaken by the military are by nature police actions. That is notwithstanding that some police actions could remain counter-insurgency actions of a more “militaristic” nature.¹⁰¹ This dual police and military setting constructs uncertainty considering the categorization of certain actions taken by an occupying power security apparatus altogether. This classification is vital while determining the laws applicable to a given action and how the legality of the action will also be assessed *ex post*. Police actions in an occupied territory usually fall under the law enforcement paradigm. Conversely, military actions in an occupied area fall under IHL, since these actions require the use of massive and significant power. This is contrasted with police actions, the aim of which is to counter insurgents or any other action endangering the rule of the occupant.¹⁰²

Approaching the question of the legality of Israeli perfidy by feigning as Palestinian civilians, one must first examine if the activity nurses police or military characteristics. Feigning during police action in an occupied territory is allowed subject to certain restrictions. As an action falling within the law enforcement paradigm, this practice equivalently occurs as it would within the sovereign territory of the occupying state. Such cases, it should be noted, are reserved for extreme and special situations, such as the model war on organized

“counter insurgency (COIN) strategy should be multifaceted and flexible.” A turbulent occupation is referred to as “a shifting ‘mosaic war’ that is difficult for counterinsurgents to envision as a coherent whole” in U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL, ¶ 1-37 (Dec. 2006).

¹⁰¹ ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION, *supra* note 75, at 119-21; Watkin, *supra* note 47, at 190-91. For the OPT context, see THE MEIR AMIT INTELLIGENCE & TERRORISM INFO. CTR., *supra* note 51, at 33-39.

¹⁰² ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION, *supra* note 75, at 119-21; Watkin, *supra* note 47, at 190-91.

crime.¹⁰³ Resort to military perfidy while feigning civilian non-combatants, on the other hand, intended to kill, injure, or capture enemy combatants is strictly forbidden under international law.¹⁰⁴

The classification of the action as noted underlies a second legal challenge in an occupied territory. Often, military activities in occupied area begin as a police action but quickly turn into an action with military characteristics.¹⁰⁵ For this reason, it is not always possible to define a certain action in advance as a police action, and the action may continuously shift from the law enforcement paradigm to the laws of war, in a manner that reflects the complex nature of territory under belligerent occupation.¹⁰⁶

¹⁰³ CYRILLE FIJNAUT, *The Normalization of Undercover Policing in the West: Historical and Contemporary Perspectives*, in *THE CONTAINMENT OF ORGANIZED CRIME AND TERRORISM* 111, 112-30 (2016). With regard to Israel, the Israeli Police is in charge of handling internal security within Israel. It sometimes uses perfidy to attempt to eliminate organized crime. In addition, the Israel Police began to operate an undercover unit against Arab citizens of Israel in an attempt to deal with crime in the Arab sector, which sets a law enforcement challenge especially in the field of human intelligence gathering. The use of intervention was perceived as an extreme act of force and was highly criticized. *See also* Tal Wolowitz, *Yehidot E'ilit Ilahamo BePes'a Meurgan [Elite Police Units Will Fight Organized Crime]*, MAARIV NRG (May 30, 2007), <https://www.makorrishon.co.il/nrg/online/1/ART1/588/926.html>; Tomer Zarhin, *Hamistara Maf'ila Yehidot Mista'arvim Sodit Hadash Bekerev E'zrahi Israel [The Police Operate a New Secret Undercover Unit among Israeli Citizens]*, HAARETZ (Oct. 12, 2009), <https://www.haaretz.co.il/news/politics/1.1284850>; Liel Keizer, Yehonatan Lis & Jack Khoury, *Pniya La-Mistara Ve-Layu'amash Mazuz: Parki Et Yehidot Ha-Mista'arvim, 'O Hisfo Et Pe'luta [A Request to the Police and the Attorney General Mazuz: Dismantle the Undercover Unit, or Expose its Activities]*, HAARETZ (Oct. 14, 2009), <https://www.haaretz.co.il/news/politics/1.1285072>.

¹⁰⁴ Hague Regulations 1907, *supra* note 33, art. 23; Additional Protocol I, *supra* note 45, art. 37; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL LAW, VOL. I: RULES* (ICRC), 221-26 (2005) (regarding Rule 65 "Perfidy").

¹⁰⁵ CA 5964/92 Bani 'Odeh v. The State of Israel 56(4) PD 1, at ¶ 9-10 (2002) (Isr.) [hereinafter *Bani 'Odeh*]; CA 1071/96 Estate of Natzer v. The State of Israel 60(4) PD 337, at ¶ 12 (2006) (Isr.); CA 1354/97 Akasha v. The State of -Israel 59(3) PD 193, ¶ 17-22 (2005) (Isr.) (holding that in the circumstances of the demonstration—a military force was sent to disperse a demonstration which Israel itself claimed to have been a police action; however, the force sent to disperse the demonstration used a Tutu rifle firing live ammunition severely injuring one demonstrator—did not justify the use of such rifle and ordering the state to compensate the injured protester).

¹⁰⁶ ICRC, *OCCUPATION AND OTHER FORMS OF ADMINISTRATION*, *supra* note 75, at 128-29.

The Israeli Supreme Court, notably, has conceived this jurisprudential strain in two categories of court cases.¹⁰⁷ The first is tort law cases, in which Palestinians from the OPT sued the State of Israel for bodily and proprietary harm often inflicted by the IDF during perfidious capture. The Palestinian plaintiffs in this category of cases sought to define the resort to use of force by the IDF as a police activity. In context, hundreds of tort claims were filed by Palestinian residents of the OPT and the Gaza Strip against Israel, claiming that IDF soldiers acted illegally by resorting to excessive force, which resulted in the disproportionate killing or injuring of civilians. These bulk of claims were prevalent after the First Intifada between 1987-1991. The First Intifada, notably, was characterized by sizable civilian riots that included stone-throwing toward IDF armed forces. The IDF would respond with rubber and plastic bullets and non-lethal tear gas weaponry.¹⁰⁸ In response to these tort claims, the State argued for state immunity based on the Israeli Civil Torts (State Liability) Act of 1952.¹⁰⁹ This Act was said to exempt the state from a compensatory duty during the occurrence of standard military actions.¹¹⁰ During the First Intifada, the law lacked a clear definition of said military actions and Court was called into action.¹¹¹ In the landmark *Bani 'Odeh*, Chief Justice Aharon Barak offered numerous case-by-case criteria made to

¹⁰⁷ See *Bani 'Odeh*, *supra* note 105, at ¶ 5 (discussing the responsibility of the State to injuries of Palestinians during military/police operations in the occupied territories). See generally H CJ 9594/03 B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories v. IDF Advocate General (Aug 21, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter *B'Tselem Case*] (discussing the opening of investigations after the death of Palestinians in army/policing activities in the occupied territories).

¹⁰⁸ H CJ 8276/05 Adalah - The Legal Center for Arab Minority Rights in Israel v. Minister of Defense 62(1) PD 1, at ¶ 36 (2006) (Isr.) [hereinafter *Adalah Case*]; Assaf Jacob, *Hasinut Tahat Esh: Hasinut ha-Medina Beshel Nezek she-Nigram Ketotsa'a mi-"Pe'ula Milhamtit"* [Immunity Under Fire: State Immunity for Damage caused by "Combat Action"], 33(1) Mishpatim 107, 158-172, 178 (2003), at 158-172.

¹⁰⁹ The Civil Wrongs (Liability of the State) Act, 5712-1952, SH no. 109 p. 339 (Isr.).

¹¹⁰ *Bani 'Odeh*, *supra* note 105, at ¶¶ 4, 11; *Adalah Case*, *supra* note 108, at ¶ 3-6. See also Assaf Jacob, *supra* note 108, at 115-25 (for similar laws existing in many states).

¹¹¹ *Bani 'Odeh*, *supra* note 105, at ¶ 10.

classify particular actions as military ones under the law of armed conflict, thus granting state tort law immunity thereof.¹¹² Given perfidy activity at large, the Court classified perfidious activity in the OPT mainly as a military action falling under the conduct of hostilities paradigm.

The second category of cases revolves around the Israeli Military Advocate General (“MAG”)’s decision not to instruct the IDF’s Military Police Corps to open a police investigation into the deaths of Palestinians as a result of actions taken by IDF soldiers.¹¹³ The Palestinian plaintiffs argued for the application of the law enforcement paradigm, which demanded such police inquiry. The background for these petitions was the decision by the IDF’s Advocate General during the Second Intifada between 2003-2005 to merely conduct an operational debriefing into each death of a Palestinian civilian. That is as opposed to instructing the opening of a criminal investigation by the department, and is apart from cases in which the operational debriefing pointed to obvious illegality in the actions taken by the soldiers.¹¹⁴ In the latter cases, the IDF claimed that since these were matters of military action and, given that the persons killed were combatants or civilians directly participating in hostilities, there was no obligation to order military investigations.¹¹⁵ The petitioners claimed that an investigation must be ordered for any deaths resulting from a law enforcement action.¹¹⁶ Petitioners based their claims on the Israeli Military Justice Act of 1955,¹¹⁷ the right to life in the Israeli constitutional law, international human rights law, and the laws of belligerent occupation in view of IHL.¹¹⁸ Following these petitions, and the escalation in violence between Israel and the Palestinians at the end of 2005, the Advocate

¹¹² *Id.* at ¶¶ 10-12.

¹¹³ *B’Tselem Case*, *supra* note 107, ¶¶ 1-2.

¹¹⁴ Appeal to Grant a Decree Nisi in H CJ 9594/03 *B’Tselem v. Israeli Military Advocate General*, ¶¶ 13-15, 18-21 (2003), (Isr.), <https://law.acri.org.il/he/wp-content/uploads/2011/03/hit9594.pdf> [hereinafter *B’Tselem Appeal*].

¹¹⁵ *Id.* at ¶ 3.

¹¹⁶ *B’Tselem Appeal*, *supra* note 114, at ¶ 15.

¹¹⁷ Military Justice Act, 5715-1955, SH no. 189 p. 171 (Isr.).

¹¹⁸ *B’Tselem Appeal*, *supra* note 114, at ¶¶ 25-43.

General ordered a change in the regulations about opening investigations concerning the deaths of Palestinian civilians.¹¹⁹ The Israeli Supreme Court dismissed the petition on the merits.¹²⁰ Since this precedential decision, Israeli jurisprudence has followed the Court's view, whereby each action taken by the military in occupied territory must be observed in light of the role that military combatants undertake in any specific action, be it police or military, based on a balancing test in the application of the law.¹²¹ The Court explained that the actions undertaken by an occupying power lie on a spectrum, stretching between law enforcement and military acts. In both categories of cases, the Court was inclined to perceive such use of force as military actions and not police actions.¹²²

The first indication considers the purpose of the action. Its purpose needs to be examined and then classified as having police or military characteristics¹²³—that is, bearing in mind that police action can quickly turn into military action due to given circumstantial changes.¹²⁴ When occupying forces attempt to arrest a person that committed a minor traffic offense or an act of vandalism, it is deemed to be a law enforcement action. When, however, the occupying forces plan to arrest a senior leader of a terrorist organization on terrorism charges, it is indicative of the perfidy action being defined as a military action, since the captured person is perceived as a military threat, deeming the capture a military necessity.¹²⁵ The Court's indication was equally acknowledged by ICRC experts, agreeing that in the latter situations, the law enforcement paradigm is not applicable in principle while favoring the laws and customs of war as *lex specialis*.¹²⁶

The second indication upheld by the Court is the level and extent of military force used. Many feigning civilian actions involve the use

¹¹⁹ *B'Tselem Case*, *supra* note 107, at ¶1-2.

¹²⁰ *Id.* ¶¶ 6-8.

¹²¹ *Id.* at ¶¶ 11.

¹²² *Id.* at ¶ 10; for more examples *see* HCJ 3003/18 *Yesh Din - Volunteers from Human Rights v. IDF Chief of Staff* ¶ 15 (2018) (Isr.).

¹²³ *CrimA 3866/07 State of Israel v. Atef Naif Elmaqusy* ¶¶ 18-19 (Mar. 21, 2012), *Nevo Legal Database* (by subscription, in Hebrew) (Isr.) [hereinafter *Elmaqusy*].

¹²⁴ *Id.*

¹²⁵ *Id.* at ¶¶ 19, 25; ICRC, *OCCUPATION AND OTHER FORMS OF ADMINISTRATION*, *supra* note 75, at 128.

¹²⁶ ICRC, *OCCUPATION AND OTHER FORMS OF ADMINISTRATION*, *supra* note 75, at 124-128.

of integrated forces comprising small, well-trained, specialized units backed by other supporting units, especially intelligence and other reconnaissance units, alongside combatants wearing a uniform.¹²⁷ It should be noted that although international humanitarian law does not explicitly necessitate combatants of an occupying military to wear uniforms, as shall be later discussed, they are nonetheless obliged to distinguish themselves from civilians. Consequently, scholars mainly concur that the reluctance of a military force to wear uniform amounts to perfidy, which is prohibited under the laws of war.¹²⁸ This understanding is notwithstanding that an elite undercover unit typically consists of small and highly trained groups of soldiers.¹²⁹

The third indication is the duration of the forceful action. Feigning actions, notably, are often first characterized by a lengthy process of intelligence gathering through observation and surveillance atypical of regular police activity.¹³⁰ Most feigning actions, moreover, are based on the element of surprise, as the opponent does not realize that the presumed civilians are essentially disguised combatants. In order to maximize the surprise, consequently, the feigning actions tend to be short and swift. A recently publicized illustration has been the IDF's perfidious capture of Omar al-Kiswani, a student leader associated with Hamas in Birzeit University near the town of Ramallah in the OPT.¹³¹ After an extensive surveillance of al-Kiswani, a decision was made to arrest him with a feigning taskforce. A unit of five combatants, presumably dressed as students, captured him on campus while

¹²⁷ *Na'elwa*, *supra* note 30, ¶ 17; Giladi, *supra* note 6, at 396-98, 416-17; Hughes, *supra* note 1 (this article describes the U.S. and British Armies' special units specializing in feigning civilian status in their struggle against the Taliban forces in Afghanistan, and in the past in Northern Ireland, respectively); Rosenzweig, *supra* note 13, at 22-26.

¹²⁸ Hague Regulations of 1907, *supra* note 33, at art. 23(f); ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION, *supra* note 75, at 130; Rosenzweig, *supra* note 13, at 28.

¹²⁹ *Elmaqusy*, *supra* note 123, at ¶ 25; Giladi, *supra* note 6, at 398-408.

¹³⁰ *Elmaqusy*, *supra* note 123, sec. 24.

¹³¹ Alexander Fulbright, *In Daylight Campus Raid, Undercover Commandos Nab West Bank Student Leader*, TIMES OF ISR. (Mar. 7, 2018), <https://www.timesofisrael.com/in-daylight-campus-raid-undercover-commandos-nab-west-bank-student-leader/>; Mersiha Gadzo, *Birzeit Student Union President Omar Kiswani Arrested on Campus*, AL JAZEERA (Mar. 8, 2018), <https://www.aljazeera.com/news/middleeast/2018/03/president-birzeit-student-union-beaten-arrested-campus-180307192246881.html>.

drawing weapons. At the same time, a second identified group of soldiers confined the guards at the campus entrance. The capture itself lasted seconds, after weeks and possibly months of military intelligence gathering.¹³²

The fourth indication considers the place in which an action occurs. Most feigning activities take place in locations in which regular police access is limited. In context, oftentimes perfidy while feigning civilian status may be used to capture a suspect in places where such an arrest by a force wearing uniforms and carrying an arrest warrant would reasonably result in heavy casualties. Israel, to illustrate, recently arrested a Palestinian in the OPT suspected of multiple stabbings of Israeli citizens. Days after the event where the wanted Palestinian citizen was also injured, he was hospitalized in a civil hospital in the city of Hebron. It became reasonably apparent to the IDF that turning up with an arrest warrant and in uniform would provoke a violent riot funneled by incidental loss. Israel thus decided to resort to perfidious capture with the feigning force dressed like a Palestinian family arriving at the hospital accompanying a Palestinian woman in labor. It was equally apparent that soon after his release from hospital, the suspect might resume hostilities. The taskforce arrived at the room where the suspect was hospitalized, assaulted him by surprise with drawn weapons, pulled him out of his bed, and removed him quickly from the hospital, with guns drawn toward the suspect's cousin who attempted to stop them. That is until, ultimately the cousin was shot and killed.¹³³ Notwithstanding the particularities of this example, it remains the case whereby regular police forces carrying warrants may not always be relevant for the protection of the humanitarian interests involved, thus possibly justifying the resort to undercover elite military units instead.

¹³² Elior Levi & Yoav Ziton, *F'auda Be-Bir Zet: Mista'arvim Pashtu 'l Ha-Universita* ["Fauda" in Birzeit: Mista'arvim Raid the University], YNET (Mar. 7, 2018), <https://www.ynet.co.il/articles/0,7340,L-5149366,00.html> ; Oren Frisco, Lo Le-'etona'im. Universitat Bir-Zit: Ha-Mista'arvim Sh-hadru La-kampus [*No to Journalists, University of Birzeit: The Mista'arvim that Entered the Campus Disguised as Students*], SEVENTH EYE (Mar. 8, 2018), <https://www.the7eye.org.il/282490>.

¹³³ See e.g., *Elmaqusy*, *supra* note 123, at ¶ 24; Nir Dvory, *Mista'arvim Lokhdim Mevukash Be-Beit Holim Be-Hebron* [*Mista'arvim capture a Suspect in a Hospital in Hebron*], MAKO (Nov. 12, 2015), https://www.mako.co.il/news-military/security-q4_2015/Article-0678038a40af051004.htm. Feigning in sensitive places such as hospitals is not rare. See, e.g., CA (Nz) 1126/06 *The State of Israel, the Ministry of Defense v. Khaled*, ¶ 9 (Oct. 31, 2007), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

The fifth indication considered is the prevailing threat identified prior to any military activity. Feigning actions are typically authorized against senior members of Palestinian insurgent groups. This is because the operational efforts and interrelated dangers are high, which explains why the military avoids employing perfidy methods for capturing low ranking members. The Court related this consideration to the "sliding scale" model discussed above, and did so while emphasizing that events can unexpectedly intensify even when threats are deemed moderate and a police force remains in charge.¹³⁴ The court upheld that in relevant cases, such threat may even suffice to justify the application of IHL.¹³⁵

A sixth indication from the case law follows accordingly. That is, as a forceful activity could be deemed a military operation in consideration of the type and nature of the participants in hostilities against an occupying power. The employed proposition arguably upholds that local insurgent groups in occupied territories regularly expect the occupant's retaliation in adherence to the laws of war as a result of insurgent hostile actions. Such an expectation may lead an occupant to avoid treating the hostilities as individual criminal acts, but rather as a series of organized actions equivalent to the organization underlying armed conflicts.¹³⁶ The occupied civilian population on its part may further assume that the occupant is unable to administer such threats using police force. This inability to administer such threats further sustains an expectation concerning the use of a military force instead tactics subject to the law of armed conflict.

Local insurgents may well become aware that the military units using advanced operational procedures plan to bring them to justice or otherwise neutralize them. In the Palestinian context, this also explains why most insurgency leaders frequently use excessive safety precautions against the risk of being perfidiously captured by the IDF.¹³⁷ In balance, however, the rebuttal of the element of surprise by perfidiously captured persons questions the rationale of the treachery based

¹³⁴ *Bani 'Odeh*, *supra* note 105, at 10.

¹³⁵ *Elmaqusy*, *supra* note 123, at ¶ 18; *Bani 'Odeh*, *supra* note 105, at 7-9.

¹³⁶ ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION, *supra* note 75, at 128; Prosecutor v. Tadić, *supra* note 60, ¶ 70; Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj (Haradinaj et al.), IT-04-84-T, ¶ 49, Trial Chamber Judgement, (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3 2008).

¹³⁷ ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION, *supra* note 75, at 128.

on the intent to deceive a rival while establishing the elements of perfidy. Customary international law has nevertheless ignored this rationale in defining the formal elements of perfidy.¹³⁸

A final indication held by the Court refers to the nature and type of the belligerent occupation. The Israeli Supreme Court, in so doing, started by defining the belligerent Israeli occupation of the OPT as “turbulent,” as this occupation endured sporadic bursts of violence between the occupying force and Palestinian insurgents.¹³⁹ The 2012 ICRC expert opinion similarly distinguishes between different belligerent occupations according to the recurrence of violent episodes and their relative intensity. In the model of “silent” occupations without such cycles of violence, the tendency is to view the default law as the law enforcement paradigm. In turbulent occupations characterized by periods or sporadic outbreaks of violence, however, the tendency is to apply in parallel both the law enforcement paradigm and the laws and customs of war in actions intended to foil threats to the occupation.¹⁴⁰ Thus, the type and nature of a belligerent occupation may further reflect on the classification of a perfidious capture as either a military or a police activity.

In conclusion, during prolonged archetypal occupations, the actions taken by an occupant can be police or military conduct. The Israeli Supreme Court decisions adhered to the difficulty of classifying actions complying with the notion whereby each action be viewed individually in addition to considering the overall application of laws.¹⁴¹ In context, while not every perfidy action in the OPT is of a military nature, such actions should in principle be classified as such, and therefore subject to the laws and customs of war.¹⁴²

¹³⁸ See discussion in Part III.A, *infra*.

¹³⁹ *Mara'abe*, *supra* note 26, at ¶ 18.

¹⁴⁰ ICRC, OCCUPATION AND OTHER FORMS OF ADMINISTRATION, *supra* note 75, at 115; Giladi, *supra* note 6, at 429-31.

¹⁴¹ *Bani 'Odeh*, *supra* note 105, at ¶10-12 .

¹⁴² For an example in which a feigning action is deemed a military action, see *Elmaqusy*, *supra* note 123, ¶ 31.

III. MILITARY PERFDY IN THE LAW OF ARMED CONFLICT

A. *The Illegality of Perfidy in Feigning Civilian Status*

In IHL, perfidious feigning as civilians is defined by two closely related terms, namely perfidy and treachery. Both are illegal in principle. The use of perfidy is prohibited in Article 37 of the Additional Protocol I, which prohibits killing, injuring, or capturing an adversary by resort to perfidy.¹⁴³ Article 37(c) further states that “the feigning of civilian, non-combatant status” constitutes perfidious action.¹⁴⁴ A perfidious actor must first create an appreciation of trust in his or her adversary and then intently betray that said trust by resort to perfidious action.¹⁴⁵ Article 37 more specifically divides perfidy into three elements.¹⁴⁶ The first is inviting the adversary’s trust by falsely letting her believe that she is entitled to protection under the applicable law during the armed conflict.¹⁴⁷ The second suggests that there should be an objective standard of protection in such, given circumstances according to international law.¹⁴⁸ Third and finally, there should be an intent to deceive the adversary while causing her death, injury, or capture. The latter element is considered subjective based on the betrayer’s *mens rea*.¹⁴⁹ Examples of measures not considered to be perfidious include, in balance, situations where no confidence had been established, such as an ambush or the use of snipers while the intended result was not to kill, injure, or capture the adversary.¹⁵⁰

Military actions of feigning civilian status thus fit the definition of perfidy. The combatants in such cases pretend to be civilians in an attempt to blend into the civilian population by gaining their trust. When in the proximity of the target, they commit perfidy by betraying

¹⁴³ Additional Protocol I, *supra* note 45, art. 37.

¹⁴⁴ *Id.* at art. 37(c).

¹⁴⁵ HENCKAERTS & DOSWALD-BECK, *supra* note 104, at 221-26 (regarding Rule 65 “Perfidy”).

¹⁴⁶ COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, at ¶ 1500. And *see* discussion hereinafter.

¹⁴⁷ Additional Protocol I, *supra* note 45, art. 37; Rosenzweig, *supra* note 13, at 39.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ William H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 *MILITARY L. REV.* 94, 118–19 (2003). Rosenzweig, *supra* note 13, at 39.

his or her trust and the trust of those around in order to kill, injure or capture. Article 37 of the Additional Protocol I includes a number of examples of perfidy including subsection (c): feigning noncombatant civilian status. Subsection (c) incontestably expresses the method in which feigning combatants oftentimes operate in the OPT for the purpose of capturing as explained.¹⁵¹

Aside from the prohibition of the usage of perfidy, treachery is also outlawed in Article 23(b) of the Hague Regulations of 1907. This is, while narrowing the prevention to “*kill or wound treacherously individuals belonging to the hostile nation or army*” thereof.¹⁵² The definition therefore excludes “capturing” from the prohibited forms of unlawful treachery. Article 23(b), like the rest of the Hague Conventions, constitutes binding customary law *erga omnes*, including toward Israel given its inconsistent adherence to capture by resort to perfidy, which shall be discussed later.¹⁵³ Though perfidy prohibits feigning as civilians through capture, unlike the definition of treachery, the exclusion of capture by resort to perfidious activity arguably remains unlawful. That is based on binding customary international law for the following reasons.

First, there has been a unanimous consensus among all state parties who voted in support of Article 37, as witnessed in the official protocols of the diplomatic convention which endorsed the Additional Protocol I per IACs.¹⁵⁴ All state parties participating in the discussions regarding the Additional Protocol I agreed that the prohibition on capture by resort to perfidy is binding customary law. It should be noted, moreover, that state parties specifically refused to expand a consensual prohibition to non-international armed conflicts (“NIAC”).¹⁵⁵

Second, the drafters of the Additional Protocol I may have assumed that actions intended to capture an adversary by means of perfidy may culminate in death or injury. This is while realizing that perfidy’s operational nature directly or indirectly correctly includes capture,¹⁵⁶ so much so that killing, wounding, and capturing surely are

¹⁵¹ Additional Protocol I, *supra* note 45, art. 37(c).

¹⁵² Hague Regulations of 1907, *supra* note 33, at art. 23(b).

¹⁵³ *Id.*

¹⁵⁴ Rosenzweig, *supra* note 13, at 45-46; ICRC, Off. Recs. on IHL Applicable in ACs, XIV [O.R. XIV], *supra* note 11, at 121-22 (1974-1977).

¹⁵⁵ Rosenzweig, *supra* note 13, at 45.

¹⁵⁶ *Id.* at 46.

all interrelated methods that effectively neutralize an adversary.¹⁵⁷ This proposition should be assumed with caution, however, given that there remains a grey area of perfidy which is not unequivocally sanctioned *per se* as it lies amid perfidy and ruses of war.¹⁵⁸ This grey area, in fact, formulates a permanent theoretical and practical polemic.¹⁵⁹ This concern arises as any prohibition which is restricted to acts with explicit results generates a negative incentive for parties to circumvent them using a significant number of alternative conducts. In the case of perfidy, such a grey area might invoke the use of military practices resorting to perfidy which are not directly aimed at killing, injuring, or capturing adversaries. Instead, these military practices might be aimed at forcing adversaries to submit to other advantageous tactical or operational measures while unlawfully resorting to perfidy. This inner tension in the interpretation of Article 37 is manifested in the fact that the first sentence of Article 37 is devoted, essentially, to a defined list of combat practices including the acts of killing, injuring, or capturing with a resort to perfidy.¹⁶⁰ In balance, however, Article 37 has the advantage of giving a definition of perfidy with a general open-ended scope.¹⁶¹

To illustrate this interpretative encounter, raising the white flag for the sole purpose of deflecting or delaying an attack is presumably not a direct violation of the prohibition contained in the first sentence of Article 37. That is true even though it happens to be a separate violation of Article 23(f) of the Hague Regulations. On the other hand, raising the white flag for the sole purpose of delaying an attack might

¹⁵⁷ INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1370 §862 (Jean-Marie Henckaerts & Louise Doswald-Beck eds, Vol. II Practice Part 1, 2005) [hereinafter ICRC CIHL PRACTICE].

¹⁵⁸ COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, ¶ 1492 at 432-33. *But see id.* at ¶ 1507 (explaining that a combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself or herself virtually invisible against a natural or man-made background. He or she may however not feign a civilian status and hide amongst a crowd and “there is no double standard.”).

¹⁵⁹ *Id.*; INT'L COMM. OF THE RED CROSS, HANDBOOK ON INTERNATIONAL RULES GOVERNING MILITARY OPERATIONS § 6.9.7 at 203-06 (2013) [hereinafter ICRC, HANDBOOK ON MILITARY OPERATIONS]. *See also* J. Ashley Roach, *Ruses and Perfidy Deception during Armed Conflict*, 23 U. TOL. L. REV. 395, 398-400 (1992).

¹⁶⁰ COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, ¶ 1494 at 432-33..

¹⁶¹ *Id.*

cause adversaries to be killed, injured, or captured. In short, notwithstanding the realization that the drafters of Article 37 thoroughly incorporated capture in the prohibited results of perfidy, a vague causality between a perfidious act that has taken place and the consequences of combat may inflict on the ability to interpret the proper boundaries of forceful actions by resort to perfidy as a general concern.¹⁶²

Third, and finally, the ICRC Study on Customary IHL further incorporates capture in the list of forbidden results of perfidy while feigning as civilians. The study concludes in Rule 65 that “Killing, injuring or capturing an adversary by resort to perfidy is prohibited.”¹⁶³ According to the ICRC, this prohibition constitutes binding customary international law. To conclude, as the prohibition of capture is incorporated in the Additional Protocol I, it has (since its signing) plausibly become a customary prohibition, and as such obligates Israel to avoid using perfidy while feigning as civilians for capture purposes.

It should be emphasized that Israel’s military practice of perfidy while feigning civilian status does not presumably constitute the lawful use of ruses of war. Ruses of war include the use of camouflage, traps, mock operations, and misinformation, while they do not include perfidy.¹⁶⁴ Unlike perfidy, ruses of war involve misinformation, deceit, or other steps to misinform the enemy under conditions where there is no requirement to speak the truth.¹⁶⁵

¹⁶² MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICT: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 204 (1982) (“The causality between the perfidious act and the violating act [i.e. killing, injuring or capturing] must be stated in order to prove a breach of the prohibition.”); Hays Parks, *supra* note 1, at 522.

¹⁶³ INTERNATIONAL COMMITTEE OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 221 Rule 65 (Jean-Marie Henckaerts & Louise Doswald-Beck eds, Vol. I: Rules, 2009) [hereinafter ICRC, *CIHL RULES*]. *But see* the San Remo Manual, whereby the prohibition against treacherous capture has been regarded as not customary in either international or non-international armed conflicts and is therefore applicable only to states party to API. *INST’L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL CONFLICT WITH COMMENTARY* 43, 44 (2006).

¹⁶⁴ *See* COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, at 429.

¹⁶⁵ Hague Regulations of 1907, *supra* note 33, at art. 24; Ferrell, *supra* note 150, at 118–19; U.S. DEP’T OF THE ARMY, *FIELD MANUAL FOR THE LAW OF LAND WARFARE* §§ 48–50 (1956) (practice relating to Ruses of War).

The difference between a ruse and perfidy lies in numerous factors. First, a ruse implies the simulation of an unprohibited act. A person resorting to a ruse dissimulates one authorized act under the guise of another “while letting it be understood that he was attacking from the left when in fact he attacked from the right.”¹⁶⁶ As the ICRC opinion stated, there remains a distinct contrast between the ruse and perfidy. This contrast was most clearly expressed by juxtaposing the two rules, as it had been done in Article 37 to the Additional Protocol I.¹⁶⁷

Secondly, ruses, are furthermore inoffensive and indirect in contrast to perfidy. Article 37(2) of the Additional Protocol I, however, creates an exception to the law by allowing the parties of an armed conflict to use ruses of war. This occurs when they are not perfidious as long as they “do not invite the confidence of an adversary with respect to protection under that law.”¹⁶⁸

This does not mean that disguising a military object as a civilian object will certainly not be considered perfidy, which is prohibited under Article 37(1) of the Additional Protocol I.¹⁶⁹ It is likewise understandable why camouflage is a legal practice under Article 37(2), as nations have always camouflaged their combatants in practice.¹⁷⁰ This was also followed by the *opinio juris* of State parties to the enactment proceedings, whereby the legality of camouflage in Article 37(2) was upheld by one hundred and seventy-four states.¹⁷¹ This certification is further reflected in many military manuals, including the Israel's.¹⁷² The inquiry remaining is whether capturing an adversary by resorting to camouflage as a civilian is allowed pursuant to article 37(2) of the Additional Protocol I, or does such camouflage constitute perfidy? Two answers plausibly apply. First, formally, military perfidy while feigning as civilians is forbidden such by resort to camouflage, as a combatant exploits the specific humanitarian protection given to the

¹⁶⁶ ICRC, Off. Recs. on IHL Applicable in ACs, vol. XIV, *supra* note 11, at § 67 (1987) (opinion of the ICRC).

¹⁶⁷ *Id.*

¹⁶⁸ Additional Protocol I, *supra* note 45, at art. 37(2).

¹⁶⁹ Kevin Jon Heller, *Disguising A Military Object as A Civilian Object: Prohibited Perfidy or Permissible Ruse of War?*, 91 INT'L L. STUD. 517, 535 (2015).

¹⁷⁰ *Id.* at 521.

¹⁷¹ Ratification of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 1977 (June 8, 1977), <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>.

¹⁷² Heller, *supra* note 169, at 522.

would-be captured person. Such betrayal of the adversary, however, should not be considered a mere ruse of war. A method of war whereby combatant dresses as a civilian in a civilian area is a method that is not recognized as a ruse of war. That is, as perfidy specifically invites the confidence of an adversary with respect to protection under a specified legal rule. Such law forbids carrying out military action within a civilian population. This rule is based on Article 48 of the Additional Protocol I, and it is due to the significant difficulty of distinguishing between civilian and military targets in adherence to a specific made-to-measure rule. The latter upholds that perfidy, for its designated purposes as of Article 37(1)(c), assumes inviting the adversary to believe that he or she is safe in the presence of camouflaged combatants.¹⁷³

Secondly, in postulating perfidy as a special case of unlawful betrayal of an adversary, the customary prohibition established over the years drew from European traditions of chivalry and mutuality as well as from the principles of distinction.¹⁷⁴ At its origins, the chivalry code, originating in the Middle Ages, created ethical codes concerning how knights should duel with each other.¹⁷⁵ According to the chivalric code, there are certain limits to the means and methods of combat which accord with accepted customs.¹⁷⁶ These limits include the prohibition of treachery such as faking a protected status. Chivalry is based on the knights' sense of honor and their constructed will to defeat their adversaries in a fair and honest manner.¹⁷⁷ Today, military actions surely no longer need to meet the original standards of chivalry. The principle of chivalry does not prevent the usage of military

¹⁷³ *Id.* at 535.

¹⁷⁴ Rosenzweig, *supra* note 13, at 37-39; COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, ¶ 1498 at 434.

¹⁷⁵ Rain Liivoja, *Chivalry without a Horse: Military Honor and the Modern Law of Armed Conflict*, 15 ENDC PROCEEDINGS 75 (2012); G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 7 INT'L REV. RED CROSS 3, 6-7 (1965); COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, ¶ 1498 at 434.

¹⁷⁶ *Id.*

¹⁷⁷ SOLIS, *supra* note 1, at 5-6; INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, OPERATIONAL LAW HANDBOOK 14 (Maj. Andrew Gillman, et al. eds., 2012); Rosenzweig, *supra* note 13, at 37-38. As Draper adds, the knight always trusted the word of another knight regardless of whether he was an enemy, and there were rules for both attack and defense. Perfidy was infamous and could not be re-deemed by any act. See Draper *supra* note 175, at 20.

surprise tactics that give one side a tactical advantage over the other, such as ambushes, baits, the planting of false information, and more.¹⁷⁸ Chivalry prohibits the exploitation of the humanitarian protection granted to civilians.¹⁷⁹ Regarding the topic of perfidy, chivalry is surely breached by combatants feigning civilian status by dressing as civilians and getting close to the person that they intend to capture. Such behavior invites the adversary's trust funneled by the intention of betraying this trust later, and therefore undermines the first concept of chivalry.

The subsequent concept constituting the prohibition of perfidy is the notion of mutuality or reciprocity. The concept of mutuality dictates that all parties involved in an armed conflict act according to international humanitarian law.¹⁸⁰ That said, IHL today is in fact not subjected to the mutuality concept. To recall, if one party infringes the rules set by IHL, this does not exempt the other party from having to abide by those rules.¹⁸¹ The State of Israel, and notably the United States and the United Kingdom, have argued over the years that their war on terrorism is an asymmetrical war that requires the practice of unique war methods notwithstanding reciprocity.¹⁸² Critics surely reject this plight.¹⁸³ Indeed, an asymmetrical war offers contented grounds for developing various methods of war that refute the rules of IHL. This, in turn, makes it implausible to expect combatants to meet strict demands of distinction when their adversaries use that behavior to their advantage. Mutuality, however, is not a precondition for the application of international humanitarian law, and therefore a perfidious military force equally remains obliged in asymmetrical armed conflicts.

A counter-argument indubitably would accelerate a "slippery slope" dialectics toward the archetypal meltdown of the distinction principle fundamental to IHL. The notion of reciprocity, remarkably, is not included in Article 37 to the Additional Protocol I. The reason

¹⁷⁸ David Luban, *Risk Taking and Force Protection* 35-39 (Geo. Pub. L. & Legal Res. Paper No. 11-72, 2011), <https://scholarship.law.georgetown.edu/facpub/654/>.

¹⁷⁹ Liivoja, *supra* note 175, at 87.

¹⁸⁰ Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L. J. 366, 379-85 (2009); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 42-54 (2008).

¹⁸¹ See Common Article 2 of 1949 GC I-IV, *supra* note 55.

¹⁸² Ferrell, *supra* note 150, at 1.

¹⁸³ *Id.*; Rosenzweig, *supra* note 13, at 51.

being is that accepting unrestricted reciprocity would have abolished the concession achieved in Article 44 to the Additional Protocol I concerning combatants prisoners of war status.¹⁸⁴ The latter allows for certain conditions that an insurgent who cannot distinguish herself from the civilian population to maintain her status as a combatant merely by carrying her arms openly.¹⁸⁵ This affirmation has, to date, not been challenged by Palestinian insurgents acting perfidiously against their Israeli IDF adversaries.

Lastly, perfidy draws from the principles of distinction (discussed in extension in Part III(C)). More concretely lies the negative concept of the principle of distinction, whereby parties must avoid actions that can blur the distinction between civilians and combatants, such as wearing civilian clothing or using human shields. The purpose underlying the principle is to minimize the damage war inflicts on civilians. That is why when a combatant disguises herself as a civilian in order to surprise her adversary while misusing the protection granted to civilians in IHL, she breaches the principle of distinction and undermines the combatants' trust in IHL itself.¹⁸⁶

B. Military Perfidious Capture Persistent Objection

Israel's case for persistent objection over its otherwise prohibited perfidious activity is unsettled. To recall, a persistent objection is most suitably argued once a customary norm withstands a state's effort to refute it.¹⁸⁷ It is thus used, ideally, as a fallback argument given that law-abiding states wish to be seen as following customary law instead

¹⁸⁴ Additional Protocol I, *supra* note 45, art. 44, para. 3, reads: "Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37 paragraph 1(c)."

¹⁸⁵ COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, at ¶ 1506 at 438.

¹⁸⁶ Rosenzweig, *supra* note 13, at 37; Ferell, *supra* note 150, at 105.

¹⁸⁷ Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent in International Law*, 26 HARV. INT'L L. J. 468, 475-479 (1985); Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT'L & COMP. L. Q. 779, 791 (2010) [hereinafter *Dumberry, Incoherent and Ineffective*].

of trying to bypass it.¹⁸⁸ Be that as it may, the objection must be expressed either verbally or as contrary practice.¹⁸⁹ In case the objection is verbal, it must be clearly expressed and made known to other states and maintained persistently.¹⁹⁰ The line between a persistent objection and customary law defiance is likewise never clear.¹⁹¹ There are less than a handful of cases where international forums have dealt with these issues. In the frequently cited *Asylum* case (Colombia v. Peru) and *Anglo Norwegian Fisheries* case (United Kingdom v. Norway), the issue of the persistent objector doctrine was dealt with *Obiter Dictum*. Both cases were decided on different grounds and gave little

¹⁸⁸ Dumberry, *Incoherent and Ineffective*, *supra* note 187.

¹⁸⁹ See INTERNATIONAL LAW ASSOCIATION (ILA), COMMITTEE ON FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, FINAL REPORT: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW § 15(b) at 28 (2000) [hereinafter, ILA Customary Law study]; David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 965, 968 (1986).

¹⁹⁰ See International Law Commission, *Draft Conclusions on Identification of Customary International Law*, 2018 U.N.Y.B. INT'L L. COMM'N ii, Conclusion 15(2) (forthcoming), https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf; ILA Customary Law study, *supra* note 189, at § 15.

¹⁹¹ Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI J. INT'L L. 495, 498 (2005); Colson, *supra* note 189, at 958; See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, RECUEIL DES COURS VOL 178 119, 138 (1982).

guidance concerning the doctrine's definitions.¹⁹² The persistent objector norm is nevertheless largely accepted as current international law,¹⁹³ based on measurable judicial and arbitral support for it.¹⁹⁴

Schachter notably suggested the consideration of numerous factors in assessing an objection's legality.¹⁹⁵ These included the circumstances of the adoption of the new principle, the reasons for its importance to the majority of states, the grounds for dissent, and the relative position of the dissenting states.¹⁹⁶ Beginning with the circumstances of the objection, Israel continuously employed rigorous perfidious tactics already before the establishment of the State of Israel while still a *statu nascendi*. It has been used by its local paramilitary forces, and later by the IDF, endorsing two persistent objection settings. The first would have Israel argue that its state practice predated the customary norm forbidding capture by resort to perfidy. At the very least, a second setting upheld by the American Law Institute's third edition of its *Restatement of the Law* would have it that even

¹⁹² See *Colom. v. Peru (Asylum case)*, Judgment, 1950 I.C.J. Rep. 266 (Nov. 20); *U.K. v. Nor. (Fisheries case)*, Judgment, 1951 I.C.J. Rep. 116 (Dec. 18). For the only relevant human rights law case, see *Michael Domingues v. United States*, Case 12.285, Inter-Am. Ct. H.R., Report No. 62/07, (Oct. 22, 2002). Consequently, some scholars find little judicial support for the doctrine. See e.g., Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT'L & COMP. L. Q. 779, (2010) (arguing that given the scarcity of relevant case law judicial support for persistent objection remains weak).

¹⁹³ See e.g., OPPENHEIM'S INTERNATIONAL LAW, VOL. I: PEACE 29 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC, VOL. I 326 (1970); JAN HENDRIK WILLEM VERZIIL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, VOL. I 37 (1968). *But see* scholars who question the rule's existence, e.g., ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 233 (1973); Stein, *supra* note 187; Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 5-9 (1985).

¹⁹⁴ See e.g., *Colom. v. Peru*, 1950 I.C.J. Rep. at 266, 277-78; *U.K. v. Nor.*, 1951 I.C.J. Rep. at 116, 131; *U.K. v. Ice. (Fisheries Jurisdiction case)*, Judgment (Merits), 1974 I.C.J. Rep. 3, 10-11 (July 25, 1974); Christern, Becker, Fischbach, et al. cases, 10 R.I.A.A. 388, 397 (Germany-Venezuela Mixed Claims Commission 1903); *Roach and Pinkerton v. U.S.*, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, p. 168 (1986-1987).

¹⁹⁵ See OSCAR SCHACHTER, *supra* note 191, at 38-39. See also, JAMES A. GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW Part II. 6 & Part III.8 (Oxford University Press, 2016) (discussing timeliness circumstances and discussing extra-legal considerations).

¹⁹⁶ *Id.*

when a customary norm emerges before the statehood of a new state is confirmed, the State may title persistent objector status if it does so immediately upon its creation.¹⁹⁷

In Israel's case, the second scenario probably applies. Namely, the customary norm of capture by resort to perfidy was created at the earliest after 1977, the year the Additional Protocol I was announced and Article 37's inclusion of a prohibition of perfidious capture was consensually adopted. That is long after Israel may have begun its persistent objection. So much so, given that notably, no country made formal reservations concerning Israel's perfidious capture practices in the OPT. Perfidious capture surely has not been included in the Hague Regulation of 1899 and Article 23(b) of the Fourth Hague Convention respecting the Laws and Customs of War on Land, 1907, which originally only upheld treacherous killing or wounding as unlawful.¹⁹⁸

The application of the doctrine to Israel's stance over perfidious capture underlies another important consideration. It lies in the conflicting forms of expression constituting Israel's objection—that is, given a divergence between Israel's state practice in objecting the perfidious norm and its *opinio juris*, which plausibly supports it. There are, in essence, two forms of expression of a model objection. These are either a verbal expression or through adoption of a contrary practice. Israel's tentative objection, though, remains in a controversial position. On the one hand, Israel's perfidious state practice in the OPT is continuous, publicly known, and defiant of the customary norm opposing it. Physical action like in the Israeli case may thus underlie a state's objection, even though there is no need for States to adopt contrary practices.¹⁹⁹ On the other hand, Israel's *opinio juris* on the matter is remarkably conflicting. *Opinio juris* essentially means that states must act in compliance with the norm out of a sense of legal obligation. Assessing *opinio juris* includes the context, circumstances, and manner in which the state practice is carried out. In the ICJ *Lotus*

¹⁹⁷ See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 102 cmt. d (1987); see also J. Brock McClane, *How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?*, 13 ILSA J. INTL L. 1, 22 (1989); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 16 (1985) (upholding that nascent states should have the option to object to customary rule).

¹⁹⁸ Hague Regulations of 1899, *supra* note 45; Hague Regulations of 1907, *supra* note 33, art. 23(b).

¹⁹⁹ See ILA Customary Law study, *supra* note 89, § 15(b) at 28.

Case,²⁰⁰ cited approvingly by the *North Sea Continental Shelf* cases of 1969,²⁰¹ the Court held them as “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”²⁰² Simply put, the intent underlying the *opinio juris* to object persistently and the substance of the objection should be adequately considered.²⁰³ Evidence of objection by the objector state must, therefore, rebut a presumption of conscious acceptance of customary law, which Israel evidently did by its continuous perfidious capturing challenged by its contradicting following official statements.²⁰⁴

First among Israel’s statements in support of the customary norm prohibiting perfidy is included in the *travaux préparatoires* of the 1974-1977 Diplomatic Conference negotiating the Additional Protocols during its drafting between 1974 and 1977. These indicate that Article 37 notably was adopted by consensus. The consensus meant that Israel could have insisted on a vote to decide contrary to the approval of the draft article. Israel not only did not demand a vote, but instead considered it essential to append an *Explanation of the Vote* in support of the approved draft article.²⁰⁵ As a result, Israel never objected to the inclusion of *capture* in Article 37, but rather the opposite.

A second supportive Israeli statement is found in a 1986 IDF’s military manual on the *Conduct on the Battlefield According to the Laws of War*.²⁰⁶ The IDF’s military manual states that as a basic policy, the IDF [Israeli Defense Forces]: “prohibits the resort to perfidy

²⁰⁰ S.S. Lotus Case (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7).

²⁰¹ North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3 (Feb. 20).

²⁰² *Id.*, at ¶ 77 at 44.

²⁰³ Colson, *supra* note 189, at 962.

²⁰⁴ *Id.* at 958-59 (suggesting numerous settings for objectors to state their position including statements at time of signing acts of diplomatic conferences, statements explaining votes at international conferences). See discussion hereafter.

²⁰⁵ See ICRC, Off. Recs. on IHL Applicable in ACs, vol. I, *supra* note 11, at 311 (“With regard to Article 35 of draft additional Protocol I the delegation of Israel wishes to declare that Israel regards this article, and in particular its paragraph 1(C) as an essential and basic provision. It reaffirms the fundamental distinction made by customary international law between combatants and non-combatants.”).

²⁰⁶ See, Isr. Def. Forces, *Madrich ha-Lechima ba-Yabasha* [Conduct on the Battlefield According to the Laws of War] 8 (Agam-Mahad, 1986).

to kill, injure or capture an adversary.”²⁰⁷ Accordingly, Israel is once again committed to an unconditional prohibition of all sorts of perfidy. The third addition to Israel’s supporting *opinio juris* is found in the Israeli Supreme Court *Targeted Killings* case in 2006.²⁰⁸ Israel’s Supreme Court Chief Justice Barak states, albeit in *Obiter Dictum*:

In general, combatants and military objectives are legitimate targets for military attack. Their lives and bodies are endangered by combat. They can be killed and wounded. However, not every act of combat against them is permissible, and not every military means is permissible. Thus, for example, they can be shot and killed. However, “treacherous killing” and “perfidy” are forbidden.²⁰⁹

This statement remains unaccounted for in view of perfidious Israeli capture by later court proceedings henceforth. Fourth, dissenting to the ICJ’s jurisdiction in the *Wall* Advisory Opinion, Israel upheld that terrorist actions by Palestinian insurgents are “in breach of the principle of distinction, which requires differentiation between civilians and combatants. They are in breach of the rule against perfidy”²¹⁰ A fifth Israeli statement in support of the customary norm prohibiting perfidy trails. Israel further stated before the 2001 Sharm El-Sheikh Fact-Finding Committee, as part of Israeli-Palestinian peace negotiations, that the “targeting of individual enemy combatants is permitted” provided that “the attack is carried out by combatants, who distinguish themselves as such, or at least carry their weapons openly, and it is not

²⁰⁷ *Id.*; ICRC CIHL PRACTICE, *supra* note 157, at 1407 § 1157 ; DINSTEIN, LAWS OF WAR, *supra* note 40, at 266.

²⁰⁸ *Targeted Killings* Case, *supra* note 28, at ¶ 23

²⁰⁹ *Id.* The Court further based his conclusion on YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 200 (2016).

²¹⁰ Written Statement of the Government of Israel on Jurisdiction and Propriety to the International Court of Justice, Request for an Advisory Opinion from the 10th Emergency Special Session of the United Nations General Assembly on “the Legal Consequences Arising from the Construction of the Wall Being Built by Israel,” § 3.81 (Jan. 30, 2004), <https://www.icj-cij.org/files/case-related/131/1579.pdf>.

done perfidiously.”²¹¹ In so doing, Israel further referred to the ICRC’s Model Manual definition of Perfidy.²¹²

A difficulty arises though, as during the discussions regarding the Additional Protocol I, Israel’s representative to the committee, Ambassador Hess, informed the committee of Israel’s objection to subsection 1(4) as part of Israel’s overall objection to the Protocol’s scope of application to non-state entities. In view of Article 1(4), Ambassador Hess specifically rejected the expansion of the Protocol to conflicts between states and organizations fighting to realize their right to self-determination against colonial, foreign, or racist regimes.²¹³ The ambassador requested a separate vote for the said subsection. The committee chairman ordered a vote on the section as a whole however, and so Israel voted against Article 1, presenting four arguments to support its objection. According to the Israeli position at the mentioned committee, applying the articles of the Protocol to non-state actors without a special adjustment of the articles to the objective abilities of such organizations—and particularly to the lack of a legal system capable of meeting the Protocol’s demands regarding legal procedures—created an unwanted situation. This situation arguably meant that treaties that impose impractical demands on entities underlie no international responsibility. This is, as stated by Israel’s Ambassador Hess:

62. Thirdly, when drafting article 1, paragraph 4, it was pointed out by a number of delegations that since obligations were being placed on non-State entities it would be necessary carefully to rewrite the other articles of the Protocol in order to ensure the necessary changes to enable non-State entities to apply it.

63. However, the Conference refrained from doing so and was now faced with a Protocol with detailed regulations which obligated non-State entities but could not be applied by them. For example, there were detailed regulations as to courts, tribunals, legal systems and appeals but non-State entities by definition did not possess such organs. What remained

²¹¹ Government of Israel, Sharm El-Sheikh Fact-Finding Committee, Second Statement of the Government of Israel, §72 (Mar. 20, 2001), <https://mfa.gov.il/MFA/MFA-Archive/2001/Pages/Sharm%20el-Sheikh%20Fact-Finding%20Committee%20-%20Second%20St.aspx>.

²¹² ICRC, HANDBOOK ON MILITARY OPERATIONS, *supra* note 159, at 99 (2013) (defining “Perfidy”).

²¹³ ICRC, Off. Recs. on IHL Applicable in ACs, vol. VI, *supra* note 11, at 39-40.

were obligations without any international responsibility, a system which could not work.²¹⁴

Israel's objection to the application of relevant articles of the Additional Protocol I to non-state actors given the forceful Palestinian opposition to the OPT's belligerent occupation based on their proclaimed right to self-determination was, in fact, one of Israel's main objections to the Protocol.²¹⁵ An objection which formally, albeit indirectly, also overarched the issue of perfidy.²¹⁶

There plausibly remains a concern, albeit secondary, with Israel's interpretation of Article 37 of the Additional Protocol I as non-binding upon its application to conflicts with non-state entities. Israel indeed initially voted against Article 1(4), but then also maintained its objection to date.²¹⁷ Thus, although this is an article commonly viewed as reflecting customary law, it may stand to weaken Israel's *opinio juris* in support of the perfidy prohibition customary rule. In view of the Israeli-Palestinian conflict's longevity, funneled by the OPT's prolonged belligerent occupation, Israel's IDF depends on its undercover military apparatus as it repeatedly declares.

Should Israel's perfidious captures of wanted adversaries be possibly considered lawful, there would be a need for its continuous, concentrated, and widely publicized state practice to outweigh its conflicting *opinio juris*. This, however, is tentatively occurring. The ICRC study on Customary International Humanitarian Law thus supports such conclusion stating "When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*."²¹⁸ Moreover, unlike with Israel's well-established state practice, the ICRC study further concludes: "Opinio juris plays an important role, however, in certain situations where the practice is

²¹⁴ *Id.* at 42.

²¹⁵ See, e.g., Lapidot, Shany & Rosenzweig, *supra* note 71, at 26.

²¹⁶ *Id.*

²¹⁷ *Id.* at 11; *Targeted Killings Case*, ¶ 21 to Chief Justice Barak's decision. Considering the Israeli-Palestinian conflict during as of 2005 during the second Intifada an IAC, Court has bypassed the discussion over the applicability of article 1(4) of Additional Protocol I, *supra* note 45.

²¹⁸ ICRC CIHL RULES, *supra* note 163, at xlvi.

ambiguous, in order to decide whether or not that practice counts toward the formation of custom.”²¹⁹

To conclude, Israel’s perfidious capture occurs as customary law prohibits all forms of perfidy. In balance, however, Israel’s unique blend of state practice funneled by conflicting *opinio juris*, which both rejects perfidy while at the same time officially publicizes it, tentatively may sustain Israel’s objection.

C. Feigning as Spying

Prior to capturing civilian suspects *in situs*, combatants perfidiously feigning as civilians may constitute lawful spying activity. The resort to spying instead of military perfidy may turn significantly for Israel given its contested perfidy policy. It thus remains conceivable that combatants, while preparing for capturing their adversaries by resort to perfidy, would be comparable to spies collecting information. If such archetypal form of passive perfidy ends in the capture of these IDF instigators, they would not be charged with infringing the laws of war and should be considered spies captured while collecting information about their adversaries. Spying per se, certainly, is not prohibited under IHL.²²⁰ A spy is defined in Article 29 of the Second Hague Convention of 1899 based narrowly on conduct when “*acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party . . .*”²²¹ Simply put, a person can still be considered a spy when obtaining or attempting to obtain information from the adversary by using perfidious methods, and collecting this information for the purpose of passing it to the party that sent him. Article 46 of the Additional Protocol I, moreover, relates to the principles that form the basis of Articles 24 and 29 of the Hague Regulations, stating, amongst other things, that a member of the armed forces of a party to the conflict that is captured by the adversary while spying will not be entitled to a prisoner of war status. In such a case, he or she can be treated as a spy.²²² Article 46, to be sure, does not

²¹⁹ *Id.*

²²⁰ *See id.* at 523.

²²¹ Hague Regulations of 1899, *supra* note 45, at art. 29.

²²² Additional Protocol I, *supra* note 45, at art. 46(1) (“Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging

refer to civilians or noncombatants acting as spies, and thus remains irrelevant to law enforcement police perfidy. Police perfidy pursuant to the law enforcement paradigm is governed by Article 29 of the Second Hague Convention, which remains outside the scope of the inquiry concerning military perfidy.²²³

Military perfidious activity while feigning civilian status is thus a precondition for such spying eminence. In balance, to be sure, a member of the armed forces of a party to a conflict, collecting or trying to collect information for his or her side in the adversary's territories, incontestably shall not be considered practicing espionage if she wears a uniform during the activity.²²⁴ Articles 46(1) and (2), read together, support the custom that a combatant in enemy territories in civilian wear attempting to collect information regarding her adversary is not entitled to prisoner of war status and criminal immunity. As a result, said combatants should be tried and punished according to local laws for causing unjustified harm to life or body.²²⁵

Could such passive perfidious feigning remain nevertheless outside the boundaries of spying? The intent to deceive the adversary while causing his or her death, injury, or capture, and which amasses to perfidious activity is considered subjective based on the betrayer's *mens rea*.²²⁶ This could also incorporate indirect forms of perfidious activity, which amounts to spying. Such include the usage of perfidious combatants in combined forces, or perfidiously accompanying, coordinating, or backing the unlawful killing, injuring, or capturing of adversaries. The law is based on the objective notion of good faith and on the subjective notion of intention. The adversary's intention would be to create surprise precisely where security and confidence might normally be expected.²²⁷ In that sense, notwithstanding its origins in

in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.”).

²²³ Hague Regulations of 1899, *supra* note 45, at art. 29.

²²⁴ Additional Protocol I, *supra* note 45, at art. 46(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.”)

²²⁵ ICRC CIHL RULES, *supra* note 163, at 604 Rule 107; Rosenzweig, *supra* note 13, at 52.

²²⁶ Rosenzweig, *supra* note 13, at 69.

²²⁷ ICRC, Off. Recs. on IHL Applicable in ACs, vol. XIV, *supra* note 11, ¶ 68 at 255 (1987) (opinion of the ICRC).

the notion of chivalry, the modern understanding of perfidy mostly serves to safeguard the concept of distinction. Cloaking the distinction between combatants and civilians through military perfidy is thus exceedingly prejudicial to the chances of serious implementation of the rules of IHL, whereas lawful spying narrows down to the mere exception of information collection dynamics.

The term “spying” in Article 46(1) indeed includes the phrase “*gathers or attempts to gather information*” in subsection 46(2) and is the core term of Article 46. Article 46 is first and foremost relevant to spies, given a main component of being a spy is gathering or attempt to gather information.²²⁸ Article 44(3) of Additional Protocol I obligates combatants to distinguish themselves strictly while preparing to engage or engaging in a military operation. Combatants, in continuation, may enter the adverse territory in civilian wear, and so long as they do not gather or attempt to gather information and distinguish themselves as required in Article 44(3), they are not deemed spies. That is consistent with article 46, granted that the distinction principle in Article 44(3) is not infringed. The condition for defining feigning combatants as spies assumes that they were strictly involved in gathering information, which therefore does not apply whenever perfidious activity amounting to espionage preconditions capture. Thus, military feigning with the mere intent to capture, with no additional activity of information gathering, does not constitute spying activity in international law.

IV. PRINCIPLES OF MILITARY PERFIDY IN THE LAWS AND CUSTOMS OF WAR

Israel’s resort to perfidious capturing based on persistent objection is a *sine qua non* in plausibly legalizing this military activity. In accounting for the legality of its perfidious policy, in such case, there remains a need to assess the breadth of military perfidy within the boundaries of IHL. This added consideration, in the natural flow of the principles of armed conflicts, should account for the four main humanitarian principles of international humanitarian law, namely military necessity, distinction, proportionality, and the prevention of unnecessary suffering.²²⁹

²²⁸ See Ferrell, *supra* note 150.

²²⁹ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 48 at 246-47 (Jul. 8) [hereinafter *Nuclear Weapons Opinion*].

A. *Military Necessity*

Perfidious activity, as explained above, is deemed unlawful, including for the purpose of capturing. The principle of military necessity, on its part, only permits the resort to lawful war methods. Lawful military necessity defined in Article 51(5)(b) of the Additional Protocol I is governed by several constraints. Namely, an attack or action must be intended to help in the military defeat of the enemy; it must be an attack on a military objective; and the harm caused to civilians or civilian property must be proportional and not “excessive in relation to the concrete and direct military advantage anticipated.”²³⁰ Military necessity grounded in the meaning of “military objectives” thus permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by IHL.²³¹ This definition of military objectives forms one of the core pillars of IHL constituting binding customary law.²³²

Military necessity generally runs counter to humanitarian exigencies. The purpose of humanitarian law is consequently to strike a balance between military necessity and humanitarian constraints, thus underlying discretionary consideration of the archetypal “definite

²³⁰ Additional Protocol I, *supra* note 45, at art. 51(5)(b) (considers an attack indiscriminate as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”). *See also* Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. WESTERN INT’L L. J. 177, 181-84 (2007); CHRISTOPHER GREENWOOD, CUSTOMARY LAW STATUS OF THE 1977 GENEVA PROTOCOLS 104-06 (A.J.M. Delissen & G.J. Tanja eds., 1991); William J. Fenrick, *The Rule of Proportionality and Protocol in Conventional Warfare*, 98 MIL. L. REV. 91, 93 (1982).

²³¹ Additional Protocol I, *supra* note 45, at art. 52(2) (offers a well-accepted “military objective” definition, which is “[i]n so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”). *See also* Letter of Luis Moreno-Ocampo, Chief Prosecutor of the Int’l Crim. Ct., to Senders Concerning the Situation in Iraq 1, 5 (Feb. 9, 2006), http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

²³² Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 ILM 1257, ¶¶ 35, 42 at 1266, 1269 (Int’l Crim. Trib. for the Former Yugoslavia 2000) [hereinafter Final Report to Review NATO Bombing in Yugoslavia]; ICRC CIHL RULES, *supra* note 163, at 29-32.

military advantage” test.²³³ In the condition that perfidious activity of feigning civilian status is permitted, in view of a member state’s persistent objection, numerous challenges nevertheless remain.

First and foremost, perfidy for capturing often invokes a less harmful military necessity. The tension between military necessity and deceptive perfidious activity was first introduced in Article 15 to the Lieber Code of 1863, stating: “Military necessity admits . . . of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist.”²³⁴ Article 16 of the Lieber Code, followed by numerous Army field manuals, adds: “Military necessity . . . admits of deception, but disclaims acts of perfidy.”²³⁵ Hays Parks explains the military necessity limitation toward perfidious activity as “military convenience should not be mistaken for military necessity . . . Risk is an inherent part of military missions, and does not constitute military necessity for wear of civilian attire.”²³⁶

Yet if the principle of military necessity licenses a set of exceptional measures including the killing of enemy combatants, it would be arduous to disqualify the lesser harmful perfidious activity for capturing military necessity.²³⁷ Based on the interplay of the principles of military necessity and humanity, the ICRC’s 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities* determines that “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the

²³³ Forrest, *supra* note 230, at 184-85.

²³⁴ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, in THE LAWS OF ARMED CONFLICT 3, 6 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) (1863) [hereinafter *Lieber Code*]. See generally Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L. L. 213 (1998).

²³⁵ See, e.g., DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 30 (1999) (reflects the Joint Service Regulations for the German military, stating that “[i]n war, a belligerent may apply only that amount and kind of force necessary to defeat the enemy. Acts of war are only permissible if they are directed against military objects, if they are not likely to cause unnecessary suffering, and if they are not perfidious.”).

²³⁶ Hays Parks, *supra* note 1, at 543.

²³⁷ Cf. JENS DAVID OHLIN & LARRY MAY, NECESSITY IN INTERNATIONAL LAW 3 (2016).

prevailing circumstances.”²³⁸ It is therefore recognized that this balance of interests involves a complex assessment dependent on a wide range of operational and contextual factors. In some instances, this assessment should lead to the conclusion that means short of lethal force will be sufficient to achieve the aims of a given military operation.²³⁹ Utilizing means short of lethal force is even possible when violating prescribed IHL rules, and at least when state parties may persistently object to the customary status of prohibited perfidious feigning of civilian status.

If military necessity may be deemed lawful, moreover, scholars such as Hill-Cawthorne argue that lawful military operations, be they killing, injuring, or even capturing of a target under IHL, may nonetheless be unlawful under IHRL if less harmful means are sufficient to render the target as hors de combat.²⁴⁰ The importance of this proposition lies in the fact that in the case of perfidious capturing, the mere act of capturing could underlie this exact understanding. That is, when the alternative to perfidious capturing implies the killing of the adversary oftentimes funneled by incidental loss. The ICRC surely has observed the potential for superfluous violence and has attempted to introduce a “capture before kill” rule into IHL to offset this issue. Echoing the “Pictet Maxim,”²⁴¹ of Part IX of the ICRC’s Interpretive Guidance, it stipulates that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there is manifestly no necessity for the use of lethal force.”²⁴²

Another challenge of extenuating perfidious capturing as a military objective relates to the time frame for capture. A difficulty arises

²³⁸ NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, Recommendation IX at 17 (2009), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> [hereinafter NILS MELZER, INTERPRETIVE GUIDANCE ON DPH]; ICRC, CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 23, at 13.

²³⁹ *Id.*

²⁴⁰ Lawrence Hill-Cawthorne, *The Role of Necessity in International Humanitarian and Human Rights Law* 47 *ISR. L. REV.* 225, 232–34 (2014).

²⁴¹ JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75-76 (1985) (“If we can put a soldier out of action by capturing him, we should not wound him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.”).

²⁴² NILS MELZER, INTERPRETIVE GUIDANCE ON DPH, *supra* note 238, at 82.

when, in practice, perfidious capturing is done under the guise of surprise with the intention to capture wanted persons oftentimes before or after they engage in hostilities.²⁴³ The inquiry of choosing attack targets was initially discussed in the Israeli model *Targeted Killings Case*. The Israeli government in this instance was of the view that civilians directly participating in hostilities constitute a legitimate target for attack adding that the timeliness factor in Article 52(2) of the Additional Protocol I did not constitute binding customary law.²⁴⁴ The opinion reflected in the ICRC's Guidance on the Notion of Direct Participation in Hostilities rejected this view, as did the Israeli Supreme Court.²⁴⁵ The ICRC's stance is that targeting civilians participating in hostilities is lawful only when they actually participate in hostilities and not before nor after.²⁴⁶ The ICRC hence rejected standards such as "indirect causation"²⁴⁷ or "materially facilitating harm"²⁴⁸ as too wide, depriving large parts of the civilian population of their protection against direct attacks.²⁴⁹ The ICRC's stance was based on a literal reading of Article 51(3) to the Additional Protocol I, stating: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."²⁵⁰ Yet perfidious activity is arguably more accurately reflected in the Israeli Supreme Court's "revolving door" theory, whereby a wanted person may be further targeted for the brief duration of her preparation for deployment, execution of, and return from hostile acts against the occupying

²⁴³ See, e.g., Interview with Avi Issacharoff [Interviewed in Tel Aviv by Daniel Benoliel] (Mar. 2019) (on file with authors).

²⁴⁴ Targeted Killings Additional Announcement, *supra* note 29, at ¶¶ 152-156.

²⁴⁵ NILS MELZER, INTERPRETIVE GUIDANCE ON DPH, *supra* note 238, at 52; INTERNATIONAL COMMITTEE OF THE RED CROSS, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 30, 34 (Oct. 23-25, 2005).

²⁴⁶ Human Rts. Comm'n, Inquiry Rep. on the Question of the Violations of Human Rights in the Occupied Arab Territories, U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001); Ben-Naftali & Michaeli, *supra* note 22.

²⁴⁷ NILS MELZER, INTERPRETIVE GUIDANCE ON DPH, *supra* note 238, at 28-29.

²⁴⁸ *Id.* at 28, 34; INTERNATIONAL COMMITTEE OF THE RED CROSS, SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 27 (Oct. 25-26, 2004).

²⁴⁹ NILS MELZER, INTERPRETIVE GUIDANCE ON DPH, *supra* note 238, at 52; Targeted Killings Additional Announcement, *supra* note 29, at ¶¶ 15.

²⁵⁰ Additional Protocol I, *supra* note 45, at art. 52(2).

power.²⁵¹ This notion would ostensibly be strengthened if the wanted person repeatedly participates in hostilities, as opposed to a merely spontaneous, sporadic, or unorganized basis. In the former case, their participation ought to constitute legitimate military targets.²⁵²

Thus, if a perfidious activity is to be permitted in view of a member state's persistent objection to the rule forbidding perfidy, then the wider the scope of the wanted person's conduct by a greater frequency of involvement in the hostilities, its planning, and execution—the more necessary his or her capture may become.²⁵³ To conclude, complying with the military necessity principle where state parties constitute a persistent objection to perfidious capture means that such activity may be deemed lawful as lesser harm when considering capturing civilians that directly participate in hostilities.

B. Distinction

The principle of distinction, to recall, is a core principle among the humanitarian principles of the laws of war.²⁵⁴ In what may be a direct challenge to feigning civilian status for capture of wanted persons by resort to perfidious activity, the principle of distinction compels belligerents to take measures ensuring they are able to distinguish combatants from the civilian population.²⁵⁵ This inner tension between the principle of distinction and perfidy while feigning civilian status exists with regard to covert operations, as the required identification

²⁵¹ Israel's counter-terror policy defines them as persons considered dangerous terrorists suspected of serious crimes including grave assaults against Israeli civilians and IDF soldiers or the murder of "collaborators." See, e.g., B'TSELEM, *ACTIVITY OF THE UNDERCOVER UNITS IN THE OCCUPIED TERRITORIES*, *supra* note 4, at 5.

²⁵² Targeted Killings Additional Announcement, *supra* note 29, at ¶ 25. See also *Direct Participation in Hostilities Under International Humanitarian Law*, INT'L COMM. RED CROSS (2003); NILS MELZER, *INTERPRETIVE GUIDANCE ON DPH*, *supra* note 238, at 8; Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law* (HaMoked June 13, 2003).

²⁵³ See, e.g., Targeted Killings Additional Announcement, *supra* note 29, at ¶¶ 45-46.

²⁵⁴ Nuclear Weapons Opinion, 1996 I.C.J. 226, ¶¶ 78-79 at 257. The distinction principle is stated in the Additional Protocol I, *supra* note 45, at arts. 51(5) (Protection of the civilian population against indiscriminate attacks), art. 57(2)(a)(i), art. 57(2)(c) (Precautions in attack), art. 58 (Precautions against the effects of attacks).

²⁵⁵ See Additional Protocol I, *supra* note 45, at art. 48.

by means of fixed distinguishable signs observable at a distance or a distinctive uniform seems to be a *per se* contradiction to covert operations themselves. Special forces may operate without wearing a military uniform, and they will logically be disposed to avoid using another distinctive sign visible at a distance so not to endanger their operation.²⁵⁶ Yet neither the 1907 Hague Regulations nor the 1949 Geneva Conventions enclose any explicit provision imposing upon armed forces a precise obligation to wear a uniform.²⁵⁷ Article 44(7) of the Additional Protocol I merely refers to a “generally accepted practice” of state parties,²⁵⁸ indeed found in armies everywhere, without actually imposing this practice.²⁵⁹ IHL thus remains silent on the constituent elements of a military uniform.²⁶⁰ A sole obligation specifically juxtaposing perfidy to the duty to wear uniforms, moreover, refers to United Nations combatants.²⁶¹ State practice, therefore, determines what constitutes a military uniform.²⁶² Then, in balance, it remains clear that the wearing of civilian clothes is only illegal if it involves perfidy.²⁶³

Without this tension, States regularly implement the rule obligating their soldiers to distinguish themselves from the civilian population, usually by means of a distinctive sign—such as donning a military uniform or by carrying their weapons openly. The principle of distinction, moreover, upholds that parties to an armed conflict should

²⁵⁶ Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT’L. REV. RED CROSS 93, 108 (2004).

²⁵⁷ See *id.* at 104; see also Giladi, *supra* note 6, at 399-400.

²⁵⁸ Additional Protocol I, *supra* note 45, at art. 44(7) (“This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”).

²⁵⁹ See COMMENTARY TO THE ADDITIONAL PROTOCOLS 1987, *supra* note 6, ¶ 1723 at 542; see also Pfanner, *supra* note 256, at 104.

²⁶⁰ Pfanner, *supra* note 256, at 105.

²⁶¹ Additional Protocol I, *supra* note 45, at art. 37(1)(d) (offering an example of perfidy as “[t]he feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.”).

²⁶² See Pfanner, *supra* note 256, at 105 (explaining that IHL implicitly instructs the states parties to specify it in their national legislation and especially their military manuals).

²⁶³ See Pfanner, *supra* note 256, at 104; see also Giladi, *supra* note 6, at 399-400.

refrain from directly attacking civilian targets.²⁶⁴ The distinction principle is considered part of customary IHL and applies to any armed conflict.²⁶⁵ This principle, then, has two facets affecting the legality of military feigning of civilian status with intent to capture.

The first contest refers to the positive aspect requiring the parties to avoid actions that can blur the distinction between civilians and combatants, particularly by wearing civilian clothing. Article 48 of the Additional Protocol I requires that the parties to an armed conflict take measures to distinguish themselves as combatants.²⁶⁶ It underlies concerns over the existence and scope of duty for members of armed forces to wear a uniform. The term “fixed distinctive [emblem/sign] recognizable at a distance” in Article 1(2) of The Hague Regulations and Article 4(A)(2)(b) of the Third Geneva Convention recounts and clearly comprises of a uniform in a conventional military sense.²⁶⁷ The infrequent jurisprudence dealing with uniforms has highlighted the part the uniform plays as a distinctive sign. This distinction was emphasized in 1969 by a Malaysian Court in the *Osman case*,²⁶⁸ and in an Israeli military court which ruled in the *Kassem case*,²⁶⁹ in the same year that the wearing of spotted caps and green attires satisfied the prerequisite of distinction. That is due to the fact that these articles of clothing were not the normal clothing of the populations of the region

²⁶⁴ Additional Protocol I, *supra* note 45, at art. 51.

²⁶⁵ ICRC CIHL RULES, *supra* note 163, at 3 Rule 1.

²⁶⁶ Additional Protocol I, *supra* note 45, at art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to a conflict are required at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must conduct their operations only against military objectives.”). *See also* EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 3 (2010).

²⁶⁷ *See* GC III, art. 4(A)(2)(b); Hague Regulations of 1907, *supra* note 33, at art. 1(2).

²⁶⁸ *Osman v. Prosecutor* (1969) 1 L. Rep., vol. 1 (PC) appeal taken from the Federal Court (Malaysia), reprinted in *HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW* 773 (Marco Sassòli & Antoine A. Bouvier eds., 1999).

²⁶⁹ *Military Prosecutor v. Omar Mahmud Kassem and Others*, Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969, reprinted in *HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW* 806-11 (Marco Sassòli & Antoine A. Bouvier, 1999).

in which the Palestinian insurgents were operational. The main goal of the distinctive emblem ought to be no longer recognizing a specific unit within the military, but to distinguish combatants from the civilian population. Thus, removal of uniform or a failure by a member of armed forces to wear a distinctive sign or carry arms openly has certain legal consequences. These do not constitute a *per se* violation of IHL, however.²⁷⁰ It still remains plain that failure to distinguish combatants from civilians in accordance with the applicable requirements of IHL would fall within Article 37(1)(c) to Additional Protocol I. Wearing of civilian clothes consequently sums to feigning civilian, non-combatant status—that is, unless the person otherwise wears some article which serves as a distinguishing sign or at any rate carries his or her weaponry overtly.

Applying the subjective element of perfidy underlies additional case basis discretion. In itself, the feigning of civilian, non-combatant status is not enough to establish prohibited perfidy. The act enticing the self-reliance of the enemy needs to be intended. The wearing of civilian attire must therefore intentionally invite the confidence of the adversary to “lead him to believe” that he or she is legally protected.²⁷¹ Moreover, the acts alluring the self-assurance of the adversary by the wearing of civilian clothes ought to be carried out with “intent to betray” that confidence.²⁷² As the requirement is that an attack involves confidence building, both the objective and subjective elements of perfidy can be met only when there is some visual contact between the attacking forces and the adversary.²⁷³

As a result, surprise attacks such as perfidious ambushes, as well as attacks from a great distance, such as sniper attacks, ultimately fail to fulfill the positive element of distinction.²⁷⁴ A distinction would

²⁷⁰ There is just a rebuttable assumption that regular armed forces would wear uniform. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT*, *supra* note 209, at 221; Ferrell, *supra* note 149. Giladi adds that there is a minority view according to which failure to wear uniform is a violation of the laws of war punishable under international and not domestic law. Proponents of this view tend to rely on the pre-1949 US Supreme Court decision in *Ex parte Quirin*, *supra* note 1. Giladi, *supra* note 6, at 401.

²⁷¹ See Commentary on the Additional Protocols, *supra* note 6, at 435.

²⁷² *Id.*

²⁷³ Rosenzweig, *supra* note 13, at 13; Ferrell, *supra* note 150, at 118.

²⁷⁴ Pfanner, *supra* note 256, at 108; Rosenzweig, *supra* note 13, at 13; Ferrell, *supra* note 150, at 118.

only be achieved when perfidy is done sufficiently indirectly in space and/or time, as perfidious forces unveil themselves prior to the direct act of capturing. That is given the common rule whereby the protection of any attacking force is subordinate to protection of the civilian population underlying the principle of distinction.²⁷⁵

This indirectness inference hence touches upon a second core consideration. It concerns the period during which perfidious combatants are required to be self-distinct.²⁷⁶ Article 44(3), clause 1, to Additional Protocol I demands self-distinction from combatants “while they are engaged in an attack or in a military operation preparatory to an attack”.²⁷⁷ Though it may be a reasonable certainty that arms are carried openly throughout attacks, the toil lies with determining what “military operations preparatory to an attack” are. This assessment suggests that combatants may carry out some preparatory activities without the need to distinguish themselves.

As they intermingle with the civilian population for the purpose of preparing the specific attack, and once their presence amidst civilians postures any peril to the civilians, the obligation of self-distinction pertains. In the circumstances of the OPT, this means that Israeli combatants are not unavoidably obliged to distinguish themselves when moving about the OPT, even when on their way to an attack. As their preparatory movement to an attack brings them within the civilian population, they must carry their arms openly or use some form of a distinctive sign, unless they can show that their attendance pretenses no menace to civilians. Such is presumably in the case of Israeli security forces operating in the OPT given practically no contrasting evidence on behalf of otherwise vocal human rights activists.

Consequently, in the event where a member state adheres to perfidious activity while feigning civilian status for capture grounded in its persistent objection to the prohibition, the positive element of the principle of distinction is plausibly unlawful by direct and proximate attacks. They remain intricate and case-based in distant and or indirect perfidious attacks. In perspective, given the peremptory standard of the principle of distinction and especially its positive element, perfidious activity for capture may not clearly be considered distinctive even in the event that perfidious attacks occur against combatants or civilians directly participating in hostilities. The positive element of the

²⁷⁵ See, e.g., Hays Parks, *supra* note 1, at 543.

²⁷⁶ Giladi, *supra* note 6, at 421-22.

²⁷⁷ Additional Protocol I, *supra* note 45, at art. 44(3), cl. 1.

principle of distinction holds the hardest constraint against lawful perfidy while feigning civilian status even for capture solely. We infer that if when feigning, Israeli combatants arrive at a Palestinian town or village in local dress, hiding their true identity, intent, and weapons, this constitutes, in principle, a violation of the distinction principle.

In an evidently similar scenario, the Israeli Supreme Court ruled that lack of distinction while applying the laws of war is unlawful.²⁷⁸ The court specifically recognized the importance of distinguishing between civilians and combatants, rejecting the IDF's "early warning" military method by which the IDF used local Palestinians as active informants obliged to lead IDF combatants into urban areas suspected of concealing wanted Palestinian insurgents, while asking the civilian informants to turn themselves in or otherwise ensure buildings were empty.²⁷⁹ The court ruled that the said military method violated the distinction principle by endangering civilians and involving them in the conflict as human shields. The present rationale rejecting undercover forces using civilian clothes while hiding from their adversaries remains a dilution of the protection extended to civilians upon the destruction of the principle of distinction.²⁸⁰

Second is the negative aspect of distinction, prohibiting the parties in armed conflict from directly attacking civilians or civilian targets. Given the peremptory standard of the principle of distinction, perfidious activity for capturing may, therefore, be only considered distinctive in the event of perfidious attacks occurring against combatants or civilians directly participating in hostilities. This is based on the strict condition that a member state is regarded as a persistent objector to the unlawfulness of perfidy while limiting the scope of lawful objection to solely non-peremptory norms.²⁸¹ Perfidy that is persistently objected to may thus successfully overcome IHL norms which

²⁷⁸ See *Adalah Case*, *supra* note 108, at 81.

²⁷⁹ The Court rejected the argument that the deployment of an undercover force among civilians until the final movement toward the attack actually reduces the risk posed to the civilians. *See id.* at 81.

²⁸⁰ Rosenzweig, *supra* note 13, at 43.

²⁸¹ See *Michael Domingues v. United States*, Case 12.285, Inter-Am. Ct. H.R., Report No. 62/07, § 106 at 913 (Oct. 22, 2002). The Inter-American Commission on Human Rights rejected an attempted assertion of the persistent objector defense in *Domingues v. United States* (2002). The Inter-American Commission held that the prohibition against the juvenile death penalty to which the United States objected was not merely customary international law but a peremptory norm from which no derogation was permitted.

have not attained the status of peremptory norms.²⁸² In practice, whenever the use of military feigning of civilian status in order to capture Palestinian civilians not participating in hostilities is used, it plausibly infringes the distinction principle. Feigning actions against civilians in such cases may be considered legal at most only when it is based on police feigning under the law enforcement paradigm, given its limited operational intensity.²⁸³

Under the negative facet of the principle of distinction, perfidy thus remains undistinctive due to a person's status whenever he or she is a member of a regular State armed forces, as generally defined by domestic law. Perfidy further remains undistinctive due to the person's function when he or she is a member of irregular State forces or of a non-State armed group by virtue of the continuous combat function performed. Lastly, perfidy remains undistinctive based on the criterion of conduct when he or she is a civilian directly participating in hostilities all told. In balance, in view of the Israeli Supreme Court's above-mentioned "revolving door" theory, civilians could be further targeted for the brief duration of their preparation for, deployment in, execution of, and return from hostile acts against the occupying power. That is, if they repeatedly participate in hostilities, as opposed to a merely spontaneous, sporadic, or unorganized basis. In the former case, feigning civilian status for capturing civilians may also withstand the distinction principle.

Perfidious activity surely may not be directed at targets with primary humanitarian use such as civilian schools, hospitals or religious places of worship—these spaces are granted protected status.²⁸⁴ Oftentimes, dual usage is witnessed, as in the case of the Palestinians in the OPT and the Gaza Strip, where insurgents succumbed to using

²⁸² Lau, *supra* note 191, at 496.

²⁸³ In any event, the main use of police law enforcement feigning civilian status practices could be justified during an attempt to combat criminal activity and not against civilians who are not suspected or involved in delinquency. Police intervention is essentially less intense and relies on the foundations of local criminal and public laws in the backdrop of international human rights law.

²⁸⁴ Additional Protocol I, *supra* note 45, at art. 52(3). This article states that in a situation of doubt in regards to the usage of a certain target for military intentions, if, as a general rule, the type of target is dedicated to civilian purposes (schools, hospitals or cultural institutions), it should be presumed a civilian target. See also Stefan Oeter, *Methods and Means of Combat*, in *HANDBOOK HUMANITARIAN L.* 119, 158 (Dieter Fleck ed., 1995).

such facilities for military purposes.²⁸⁵ Military feigning in such locales may not inherently be considered a breach of the negative aspect of the distinction principle and would be evaluated on a case-by-case basis. Lastly, it remains an open question whether a member of the regular armed forces captured by an adverse party while abridging the requirement of distinction loses his or her right to be a prisoner of war. Such a forgoing of the POW status is not clearly stated in the 1907 Hague Regulations nor in the Third Geneva Convention. Additionally, Additional Protocol I foresees the forfeiting for spies,²⁸⁶ and Article 44(4) in particular for combatants²⁸⁷ fails to meet the requirement of distinction. However, the specific rule in Additional Protocol I is related to a unique condition, and the aim of this provision is to adjust combatants in circumstances of warfare in occupied territories and in conflicts entailed in Article 1(4) of the Protocol.²⁸⁸

C. Proportionality

The principle of proportionality during an attack in IHL is codified in Article 51(5)(b) of Additional Protocol I and repeated in Article 57.²⁸⁹ The principle upholds that a military attack expected to cause incidental loss may not be excessive in relation to the concrete and

²⁸⁵ See e.g., Yaakov Lappin, *IDF Shows Photos of Hamas Rocket Sites Dug into Hospital, Mosques*, JERUSALEM POST (Jul. 21, 2014), <https://www.jpost.com/operation-protective-edge/idf-shows-photos-of-alleged-hamas-rocket-sites-dug-into-hospital-mosques-368307>; *Operation Cast Lead Humanitarian Aspects*, ISR. MINISTRY OF FOREIGN AFF. 9-10, https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/CastLeadHumanitarianReport.pdf.

²⁸⁶ Additional Protocol I, *supra* note 45, at art. 46(1); *cf. id.* at art.47(1) (for situations with mercenaries).

²⁸⁷ Additional Protocol I, *supra* note 45, at art. 44(4) (“A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Geneva Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.”).

²⁸⁸ MICHAEL BOTHE, KARL JOSEPH PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 253 (1982); Pfanner, *supra* note 256, at 120.

²⁸⁹ Additional Protocol I, *supra* note 45, at art. 51(5)(b), 57(2)(a)(iii).

direct military advantage anticipated.²⁹⁰ This principle is surely extended to cover armed conflicts in mixed models within the context of belligerent occupations such as in the OPT. The committee reviewing the NATO bombings in Yugoslavia presented three secondary tests to determine whether a certain action was disproportional:²⁹¹ First, could a similar result be achieved by alternative less harmful means? Second, was there actual awareness of the predicted damages? Third, was the deviation from the principle of proportionality significant? All three concerns relate to the lawfulness of perfidious activity as follows.

At first glance, it seems that a military's feigning of civilian status deviates from the proportionality principle. According to the first test, a similar result could be accomplished by cooperation with PA security forces, as they coordinate their operations and intelligence with the IDF.²⁹² On numerous occasions, the IDF apparently relies on such cooperation meant to arrest wanted Palestinian persons. Another alternative is indeed found within Israeli administrative law relating to belligerent occupation. In certain conditions, Israeli law permits administrative arrests in the OPT while carrying visible weaponry and wearing uniforms.²⁹³ As a result, a prerequisite of any conceivably lawful military feigning activity for capture is that the military commander is able to exempt other less harmful alternatives.

²⁹⁰ *Id.* at art. 51(5)(b). See also DINSTEN, *THE CONDUCT OF HOSTILITIES*, *supra* note 206, at 12-13.

²⁹¹ First Report to Review NATO Bombing in Yugoslavia, *supra* note 232, at ¶ 48.

²⁹² See Tali Kroytoro, *Pesek Zman Be-Yeuda Ve-Shomron [Time Out in the Judea and Samaria Areas]*, 445 MA'ARACHOT 43, 44 (2012) (Isr.) (in Hebrew); NETANAL GOVHARI, *THE PARADOX OF ISRAELI-PALESTINIAN SECURITY: THREAT PERCEPTIONS AND NATIONAL SECURITY VIS-À-VIS THE OTHER IN ISRAELI SECURITY REASONING*, 27-42 (Int'l Ctr. for the Study of Radicalisation 2018); Adnan Abu Amer, *Despite Mounting Violence, IDF-PA Security Cooperation Unlikely to End*, AL-MONITOR (Oct. 7, 2015), <https://www.al-monitor.com/pulse/originals/2015/10/palestine-authority-israel-security-cooperation-negotiations.html>; Agencies, *Israeli-Palestinian Security Ties likely to Continue Despite US Aid Freeze*, TIMES OF ISR. (Feb. 1, 2019), <https://www.timesofisrael.com/israeli-palestinian-security-ties-likely-to-continue-despite-us-aid-freeze/>.

²⁹³ ORDER REGARDING SECURITY DIRECTIVES, [Consolidated Version] (Judea and Samaria) (No. 1651), art. 30 at 5902, 2009-5770, KM No. 234 (in Hebrew). One of the tools of the Israeli administration in the OPT is Administration detention which allows for the detention of a person without a trail. See *Statistics on Administrative Detention*, B'TSELEM, https://www.btselem.org/administrative_detention/statistics (last updated Aug. 10, 2020).

With regard to the second test accounting for actual awareness of the predicted damages, it should be noted that military perfidy impersonating civilians regularly occurs within complex civilian conditions, often uncovering unexpected outcomes. Such perfidious actions thus have the potential to harm innocent bystanders. The IDF's past experiences are oftentimes disconcerting.²⁹⁴ Notwithstanding the relatively minimal number of casualties in the OPT as a result of feigning, however, it remains doubtful if one can assume that a military commander with reasonable intelligence could anticipate the full scale of results including loss of civilian lives.²⁹⁵ It is clear that in situations in which the deviation from the proportionality principle is extreme, per the third test, this deviation can constitute an offense that justifies assigning personal criminal responsibility to the relevant parties and their commanding officers, as expressed in Article 8(2)(b)(4) of the Rome Statute, and as was decided by the committee reviewing the NATO bombing in Yugoslavia.²⁹⁶

Can we conclude that Israel acts in proportionality in its practice of perfidious capturing? The answer to this question remains uneven. In regards to cooperation with Palestinian Authority security agencies, conflicting and vague reports suggest that this cooperation is not continuous nor is it sufficiently reliable in preventing hostilities against the occupying power.²⁹⁷ Israel has repeatedly reported that the Palestinian forces did not act as agreed by either failing to arrest suspects

²⁹⁴ Rosenzweig, *supra* note 13, at 25-26 (for a discussion over examples of risks in view of perfidious activity).

²⁹⁵ Prosecutor v. Galić, Case No. IT-98-29 (5 December 2003) (Judgement), sec. IV.C (on the ex-ante reasonability of expectations of field commanders in assessing proportionality).

²⁹⁶ Rome Statute of the International Criminal Court, art. 8(2)(b)(iv) (generally stating that if a party infringes the proportionality principle while attacking, such action may be considered a war crime); United Nations Criminal Tribunal of the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at ¶¶ 21-23.

²⁹⁷ Nachum Barnea, *Haysh She-Khim'at Haya Ramatkal [The Man That Was Almost the Chief of Staff]*, YEDIOT ACHRONOT, (June 6, 2019), <https://www.yediot.co.il/articles/0,7340,L-5521482,00.html> (Isr.) (in Hebrew) (Major General Nitzan Alon, former Commander of the IDF's Judea and Samaria Division, referring to the fragile cooperation and the mutual mistrust between the Israeli and Palestinian security forces).

or by arresting them as a façade only for very short periods.²⁹⁸ On the Palestinian side, in balance, the Palestinian Authority tries to cooperate with Israel through discreet security channels, but simultaneously is witnessed to deviate local civil criticism toward the Israeli side by using inflammatory rhetoric.²⁹⁹ We can cautiously conclude that these cooperative solutions remain limited and cannot systematically be used to replace feigning civilian status capturing actions, with respect to effectiveness for Israeli objectives but divorced from the question of propriety under IHL.³⁰⁰ Equally importantly, there remains a severe practical limitation regarding the administrative arrests' alternative, whereby IDF soldiers arrest suspects while arriving in uniform and with visible weapons. Oftentimes, the arrival of IDF combatants in such conditions has led to shooting incidents, causing incidental loss to civilians and civilian infrastructure.³⁰¹ Both alternative methods

²⁹⁸ See Roni Shaked, *Hasifa: Meratze Hamas That Pikud A'arafat* [Expose: Hamas Murderers Under Arafat's Aegis], YEDIOT ACHRONOT (Oct. 10, 1997), (Isr.) (in Hebrew); Yonah Jeremy Bob & Frank G. Runyeon, *IDF Intel Officer Testifies in NY on PA's 'Revolving Door Policy' for Terrorists*, JERUSALEM POST (Jan. 16, 2015), <https://www.jpost.com/Israel-News/IDF-intel-officer-testifies-in-NY-on-PAs-revolving-door-policy-for-terrorists-387951>; TOBY GREENE, BLAIR, LABOR, AND PALESTINE: CONFLICTING VIEWS ON MIDDLE EAST PEACE AFTER 9/11 110-11 (2014).

²⁹⁹ Hillel Frisch, *The Triangle of Relations between Israel, Hamas-Gaza and the Palestinian Authority* 25-26 (Eur. Consortium for Pol. Res. 2017) Emily Mulder, *PA Under Renewed Criticism for Security Coordination with Israel*, MONDOWEISS (Apr. 18, 2016), <https://mondoweiss.net/2016/04/pa-under-renewed-criticism-for-security-coordination-with-israel>.

³⁰⁰ See Doron Matza, *Ha-Rasut Ha-Falastinit 'al Hevel Dak* [The Palestinian Authority on a Thin Line Forum for Regional Thinking], FORUM FOR REGIONAL THINKING (Oct. 14, 2015), <https://www.regthink.org/articles/-על-הרשות-הפלסטינית-על-הבול-דק> (Isr.) (in Hebrew).

³⁰¹ See, e.g., CA 3569/03 Savaana v. Military Commander in the West Bank (Nov. 4, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Elmaquy, *supra* note 123; *Israeli Forces Kill Palestinian Man in West Bank Clash*, REUTERS (Dec. 4, 2018, 5:36 AM), <https://www.reuters.com/article/us-israel-palestinians-violence/israeli-forces-kill-palestinian-man-in-west-bank-clash-palestinians-idUSKBN1O312D>; Yaniv Kubovich, Jack Houry & Hagar Shezaf, *Palestinian Policeman killed in clashes with IDF in Nablus*, HAARETZ (Oct. 6, 2019), <https://www.haaretz.com/israel-news/.premium-palestinian-killed-by-israeli-fire-in-jenin-clashes-erupt-as-idf-demolishes-house-1.8501331>; *E'kh Nirea Ma'atzar Leyli Ba-Yush* [How a Night Arrest in the West Bank Looks Like], ISR. DEF. FORCES, <https://www.idf.il/%D7%90%D7%AA%D7%A8%D7%99%D7%9D/%D7%97%D7%98%D7%99%D7%91%D7%AA-%D7%94%D7%A6%D7%A0%D7%97%D7%A0%D7%99%D7%9D/%D7%A6>

moreover may also lead to the escape of wanted persons while inflicting on the risk of recurrence of hostilities.³⁰²

D. Unnecessary Suffering

The prohibition on the use of means or methods of warfare that are “of a nature to cause superfluous injury or unnecessary suffering” is beyond what is necessary to render them hors de combat. It is one of the oldest principles of the laws of war expressed already in the Saint Petersburg Declaration of 1868, and is a rule of customary IHL applicable in all armed conflicts.³⁰³ Thus, harm that causes unnecessary suffering to those who are no longer taking part in hostilities is therefore illegal.³⁰⁴

Whereas the principle was developed only for means of warfare in the Saint Petersburg Declaration, the provisions in Article 35(2) of the 1977 Additional Protocol I also apply to methods of warfare. The terms “methods of warfare” include a broad assortment of rules contingent on the definition retained. Generally, “methods” define the way or manner weapons are used. However, the concept of the method of warfare also comprises any specific ways of conducting hostilities, whether in a tactical or strategic manner, to outweigh and weaken the adversary. Certain such prohibited methods relate to the protection of combatants, and notably the prohibition “to kill or wound treacherously individuals belonging to the hostile nation or army.”³⁰⁵

%D7%A0%D7%97%D7%A0%D7%99%D7%9D/%D7%90%D7%99%D7%9A-%D7%A0%D7%A8%D7%90%D7%94-%D7%9E%D7%A2%D7%A6%D7%A8/(Isr.) (in Hebrew).

³⁰² See, e.g., Benyamin Berger, *Mahsom Tapuh: Mevokash Falestini Nora Veniftsa Be'et Nisayon Briha* [Tapuach Barrier: Palestinian Wanted Man Shot while Trying to Escape Arrest], JDN (Mar. 8, 2015), <https://www.jdn.co.il/news/israel/533922/>; Elior Levy & Yoav Ziton, *Be-Mahalakh Ha-Layla: Falatini Neherag Be-'Imotim 'Im Tsahal Ba-Shomron* [During the Night: Palestinians Killed in Clashes with IDF in Samaria], YNET (Oct. 24, 2018), <https://www.ynet.co.il/articles/0,7340,L-5378455,00.html>.

³⁰³ St. Petersburg Declaration, *supra* note 153; Additional Protocol I, *supra* note 45, at art. 35(2) (states “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”). See Hague Regulations of 1907, *supra* note 33, at art. 23(e). This is also the view of the ICRC, in ICRC CIHL RULES, *supra* note 163, at 289 (Rule 85, and the opinion of the ICTY). See *Prosecutor v. Tadić*, *supra* note 60, at ¶ 127.

³⁰⁴ DINSTEIN, LAWS OF WAR, *supra* note 40, at 73-76; Nuclear Weapons Opinion, *supra* note 229, at ¶ 78.

³⁰⁵ See Hague Regulations of 1907, *supra* note 33, at art. 23(b).

Considering this principle, under the precondition that feigning civilian status for capturing may be covered by persistent objection to unlawful perfidy, military attacks should avoid perfidious actions when possible. That is, in protected areas with an emphasis on crowded civilian locales and other pertinent circumstances. Capturing through perfidy, in balance, does not inherently cause physical or mental damage beyond what is operationally necessary to neutralize individuals. In the Israeli case, it should be further noted that Israel views military feigning with the intent of killing or injuring as unlawful and has virtually no state practice of resorting to perfidy thereof.³⁰⁶

V. CONCLUSION

Perfidy activity in the OPT is predominantly a military activity. It thus falls within the boundaries of the law of armed conflict as the *lex specialis* therein. While cautiously endorsing Israel's persistent objection to an otherwise customary international law norm forbidding all forms of perfidy, the argument is threefold. At a start, two underlying conflict of law concerns should be considered over the legality of Israel's perfidy in the OPT while feigning civilian status. First, the laws that apply in the OPT are defined, followed by a subsequent concern over the mixed applicability of the law of armed conflict and belligerent occupation law. Second, perfidy is separately assessed within the law enforcement paradigm alongside the conduct of hostilities paradigm—that is, while considering the conditions, classifying which among them constitutes the *lex specialis* both in theory and practice.

Specifically, the legality of the capture of wanted persons by resorting to perfidy while feigning civilian status is assessed within the boundaries of the law of armed conflict. While so doing, unlawful perfidy is further distinguished from lawful ruses of war. This is based on perfidy's three underlying rationales, namely chivalry, mutuality, and the principles of distinction. Given the practice's unlawfulness, if Israel is to be eligible to exercise perfidious capture in the OPT, it would need to be considered a persistent objector to the forbidding customary norm. Israel's unique blend of state practice funneled by conflicting *opinio juris*, which both formally rejects perfidy while at the same time publicly manifesting it, complicates matters contesting Israel's principled claim altogether. Future perfidy appearances should henceforth be watchfully reevaluated in view of IHL. This notion is based on either the alternative that this activity is legalized as police-type

³⁰⁶ ICRC, Off. Recs. on IHL Applicable in ACs, *supra* note 11, at 404-05.

perfidy or otherwise by reconstructing Israel's persistent objection to the prohibiting norm based on future findings.

Should such persistent objection be constituted, there remains a need to assess the breadth of military perfidy within the boundaries of the law of armed conflict. This added consideration, in the natural flow of the principles of armed conflicts, should account for the four main humanitarian principles of IHL. Namely, military necessity, distinction, proportionality, and the prevention of unnecessary suffering. Ultimately, the lawfulness of Israel's capture of wanted Palestinians by resort to military perfidy (as opposed to police perfidy) while feigning civilian status is debatable at best, assuming Israel's persistent objection thereof is upheld.

