Toward Clarifying the Gap Between Prohibited Perfidy and Ruses:

A Role for the Principle of Good Faith?

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I. Introduction

The manipulation of truth goes hand in hand with armed conflict. Stratagems have been celebrated in fiction and non-fiction alike, often playing a decisive role in the outcome of the conflict. Perhaps most famously, the Greeks were said to have entered the city of Troy by constructing a wooden horse and hiding soldiers inside. After offering it as a gift from the gods and seemingly sailing away, the horse was brought into the city, soldiers exited the horse to allow the Greeks to enter the city and the war[1)].

Today, deceptive practices are reaching new levels of realism and complexity thanks to advances in technologies and techniques. Artificial Intelligence (AI) can be used to create hyper realistic "deep fakes", which deceivingly present someone doing or saying something that they have never done[2)]. AI systems

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1) History is full of similar examples. For a well-documented account of U.S. efforts in deception during World War II see, Rick Beyer and Elizabeth Sayles, *Ghost Army of World War Two: How One Top Secret Unit Deceived the Enemy with Inflatable Tanks, Sound Effects and Other Audacious Fakery*, Princeton Architectural Press, New York, 2015.

2) Eric Jensen and Summer Crockett, "'Deepfakes' and the Law of Armed Conflict: Are they

are also being manipulated by researchers into misreading a stop-sign for speed limit sign[3]. All the while, an increasingly interconnected global community appears to be struggling to keep pace with the constant strew of misinformation and purposefully misleading disinformation[4].

The paramount role that military deception has played throughout history, and the looming use of new technologies to enable even more potent methods of deception, warrant an examination of what is permitted in armed conflict under International Humanitarian Law (IHL). A perusal of the relevant treaty provisions applicable in international armed conflict (IAC) reveal a scant set of applicable rules. Most of the heavy lifting in relation to deception is undertaken by the notion of perfidy, roughly summated here as the deceptive abuse of protections under IHL to harm an adversary. Ruses, on the other hand, which do not rely on the use of protections under IHL, are explicitly permitted. As will be discussed in this article, the distinction between the two in practice has been subject to perpetual controversy.

Apart from the difficulty distinguishing prohibited scope of perfidy from ruses, the proscription itself is exceedingly narrow. Additional Protocol I to the Geneva Conventions (API) does not appear to prohibit the deceptive abuse of IHL protection to gain a military advantage insofar as it does not result in the death, injury, or capture of an adversary[5]. In so doing, it has been argued that

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Legal?", *Articles of War,* 2020, available at: https://lieber.westpoint.edu/deepfakes/ (last accessed: 18 November 2022).

3) Signal Samuel, "It's Disturbingly Easy to Trick AI into doing Something Deadly", *Vox*, 8 April 2019, available at: https://www.vox.com/future-perfect/2019/4/8/18297410/ai-tesla-self-driving-cars-adversarial-machine-learning (last accessed: 18 November 2022).

4) Rachel Xu, "You can't Handle the Truth: Misinformation and Humanitarian Action", *Humanitarian Law & Policy Blog*, 15 January 2021, available at: https://blogs.icrc.org/law-and-policy/2021/01/15/misinformation-humanitarian/ (last accessed: 18 November 2022).

5) Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 37(1): "It is prohibited to kill, injure or capture an

the current state of the law fails to fulfil its object and purpose, that is, to prevent the erosion of IHL by prohibiting malignant invocations of the protections contained therein[6].

The purpose of this article is to address these challenges. Firstly, it seeks to illustrate the conceptual and practical challenges in determining whether a deceptive act is perfidy or a ruse. Secondly, it seeks to address the purported shortcomings of Article 37(1) of API. To do so, it begins by laying down the legal framework governing deception in armed conflict to provide the reader with a holistic view of the relevant rules under IHL (Part II). It then explores the ongoing difficulty in distinguishing ruses and perfidy, the former being explicitly permitted under IHL (Part III). Finally, Part IV examines the legal space between prohibited deception and lawful ruses. It will be argued that there are variations of abuse invocations of IHL protections which fall in a grey area between these concepts as they are defined in API. It then goes on to examine such "grey" deception through the lens of "good faith" to begin delineating the legality of these ambiguous modes of deception.

It should be noted that the scope of this article is limited to deception in a narrow sense. In everyday parlance, deception may be defined as "the act of causing someone to accept as true or valid what is false or invalid"[7]. In the military context, the term has a more specific meaning. The U.S., for example, defines military deception acts which aim to "mislead adversary military decision makers as to friendly military capabilities, intentions, and operations, thereby causing the adversary to take specific actions (or inactions) that will

adversary by resort to perfidy …".

6) See, e.g. Major Byron D. Greene, "Bridging the Gap that Exists for War Crimes of Perfidy", *The Army Lawyer*, 2010, p. 49; Sean Watts, "Law-of-War Perfidy", *Military Law Review,* Vol. 219, 2014, p. 168.

7) "Deception." *Merriam-Webster Dictionary,* available at: https://www.merriam-webster.com/dictionary/deception?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last accessed: 29 November 2022).

contribute to the accomplishment of the friendly mission"[8].

Bearing these concepts in mind, this article examines the international rules applicable in armed conflict which govern deception that is primarily aimed at adverse military capabilities[9]. It is concerned with instances where the audience, and the bearers of the consequences, of deception belong to the military, either as ordinary combatants in the field or decision makers. The article should thus be understood as an overview of rules under IHL which protects the "truth" communicated between *belligerents*. It is not intended to comprehensively discuss the legal framework applicable to deceptive practices vis-à-vis categories of persons enjoying general or specific protections under IHL, such as civilians, medical and religious personnel, journalists, or humanitarian personnel, among others[10]. While some of the rules discussed in this article may well apply to the protection of such persons, a separate analysis is required for these other categories as additional rules may apply.

8) U.S., Joint Publication 3-58 (Joint Doctrine for Military Deception,), 31 May 1996, at I-1. A more recent publication provides a similar albeit more generalized definition, i.e. to "deliberately mislead adversary decision makers, creating conditions that will contribute to the accomplishment of the friendly mission". U.S., Joint Publication 3-13 (Information Operations), 27 November 2012 (Incorporating Change 1, 20 November 2014), at II-10.

9) Pontus Winther, "Military Influence Operations & IHL: Implications of New Technologies", *Humanitarian Law & Policy*, 27 October 2017, available at: https://blogs.icrc.org/law- and-policy/2017/10/27/military-influence-operations-ihl- implications-new-technologies/ (last accessed: 10 November 2022). Winther lays out an analytical framework which assists in determining potentially relevant international norms to an information operation including deception. To paraphrase, when determining whether deceptive act is lawful, one must analyze: a) the content of the deception; b) how the deception is communicated; c) the intended recipients of the deception; and d) what and who are the bearers of the foreseeable consequences of the deception. For the purposes of this paper, lawful military targets, namely combatants, are envisaged for elements c) and d).

10) These issues are to be addressed in subsequent publications.

II. The Legal Framework Applicable to Deception in Armed Conflict

An overview of the legal framework applicable to deception will reveal that the constraints are strikingly few and far between. At the core of these constraints is the notion of perfidy which, as will be explained, posits narrow proscriptions. At the same time, rather than maintain silence on all deceptive conduct that is not prohibited in relation to perfidy, IHL takes the rare step to explicitly clarify that ruses are permitted. This makes the distinction between perfidy and ruses a crucial element to clarifying the legal obligations when conducting military deception[11].

Apart from perfidy and ruses, it is important to note that the improper use of select emblems and other indicia are prohibited under Article 38 and 39 of API. These prohibitions may, but do not necessarily, overlap with perfidy. In addition to these treaty provisions governing deception, there is a customary rule requiring all belligerents to conduct their non-hostile communications in good faith. This rule, often overlooked in related discussions, also imposes constraints on deceptive acts in relation to negotiating and implementing agreements and arrangements, including for the purpose of realizing humanitarian outcomes enshrined under IHL. These concepts, and how they interact, will be addressed below.

11) While not within the scope of this paper, it is noteworthy that the acknowledgement of the legality of ruses under IHL may have an impact on the relationship between IHL and relevant international human rights obligations. See generally Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?*, Edward Elgar, Cheltenham, 2020.

A. Perfidy

Perfidy is defined in Article 37(1) of API:

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
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> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
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> (b) the feigning of an incapacitation by wounds or sickness;
>
> (c) the feigning of civilian, non-combatant status; and
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> (d) the 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.

As can be seen, the essential element of perfidy is the abuse of obligations and protections under IHL[12] to the detriment of the adversary. As the text of Article 37(1) indicates, perfidy covers instances where an adversary is tricked into taking a certain actions (or ommissions) because they are led to believe

12) Art. 37 of API is to be read in conjunction with Art. 2(b) of API, which defines "rules of international law applicable in armed conflict" as rules applicable to armed conflict in "international agreements" as well as other "generally recognized principles and rules of international law which are applicable in armed conflict". The commentary by the International Committee of the Red Cross (ICRC) specifies that this includes both IHL and the law of neutrality. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols* (*ICRC Commentary on API*), ICRC, Geneva, 1987, para. 131. Whether this would include other bodies of law which are now understood to apply in armed conflict in some capacity, such as human rights law, is a question that goes beyond the scope of this paper.

that they must accord protection under IHL. An example is a soldier refraining from attacking what is in reality a legitimate military objective, because they are deceived into affording it civilian protection. Perfidy also covers instances where an adversary's actions are manipulated by being led to believe that they themselves enjoy protection[13]. Examples include cases where surrenders are accepted and then betrayed, or falsely entering into a legally binding agreement to suspend hostilities for humanitarian purposes[14].

i. Perfidy and good faith

It is important to emphasize the close link between perfidy and the principle of "good faith"[15]. Fundamentally, perfidy is a betrayal of confidence or "legitimate expectations"; this notion is simplified here as the protection of actions, or omissions, taken on the basis of expectations of normal conduct of the opposing party, regardless of the true intentions or will of the latter[16]. In the

13) As indicated by the phrase "that he is entitled to … protection" in Art. 37(1) of API.

14) C.f. Rogier Bartels, "Killing with Military Equipment Disguised as Civilian Objects is Perfidy", *Just Security*, 20 March 2015. Bartels is skeptical as to whether the abuse of agreements between belligerents can amount to an abuse of the law applicable to armed conflict as required by perfidy. He notes that violating ceasefire agreements have not necessarily been understood to constitute violations of IHL. The travaux préparatoires appears to show that Bartels is correct. See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Vol. XI, CDDH/III/338, p. 426: "The Working Group rejected reference to international law in general out of concern that this phrase might include general matters as the Charter of the United Nations and such specific matters as bilateral, local arrangements". Care must be taken, however, as some bilateral agreements are intimately linked to, or even trigger, protections under IHL (See sub-part D below).

15) The French text is more indicative: "… [c]onstituent une perfidie les actes faisant appel, avec l'intention de la tromper, *à la bonne foi* d'un adversaire pour lui faire croire qu'il a le droit de recevoir ou l'obligation d'accorder la protection prévue par les règles du droit international applicable dans les conflits armés … (*emphasis added*)." See Robert Kolb, *Good Faith in International Law,* Hart, Oxford, 2017, p. 253.

16) This is a relatively crude explanation of the notion of "legitimate expectations" under good faith. For a more comprehensive appraisal see, Robert Kolb, *Bonne foi en droit international*

context of armed conflict, where "true intentions" are almost always hidden or distorted "good faith" nonetheless tries to ensure security regarding IHL protection. It strives to preserve the confidence of belligerents who are led to believe that what appears to be protected under IHL is indeed so. Another prevalent aspect of good faith in perfidy is the doctrine of "abuse of rights". The use of protections under IHL to harm the adversary amounts to a perverted misuse of such protections for hostile purposes which were never intended by the contracting parties[17].

The protection of good faith through perfidy serves to protect the functionality of IHL. As Kolb notes, the notion of "good faith" is central to the functionality of any legal order[18], and IHL is no exception[19]. The need to protect good faith in armed conflict has been stipulated since the 1863 Lieber Code, one of the earliest attempts at codifying the laws of war[20], and was prevalent in the thinking of States participating in the drafting of API[21]. If IHL protections are abused, belligerents will become weary of respecting IHL if doing so would be to their detriment[22]. Perfidy is meant to prevent such

public, Presses universitaires de France, Paris, 2000, pp. 143–153.

17) R. Kolb, *Good Faith,* above note 15, p. 253. A deeper examination into the abuse of rights doctrine will be conducted in Part IV.

18) The manifestation of good faith as pacta sunt servanda being a prime example.

19) R. Kolb, *Good Faith,* above note 15, p. 253.

20) Lieber Code, Art. 117: "It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such an act of bad faith may be good cause for refusing to respect such flags."

21) *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Volume XIV, Geneva, 1974–1977, CDDH/III/SR.28, para.1: "[Ireland] [S]ponsors of the amendment regarded perfidy as a particularly grave military crime, since many of the articles of the Geneva Conventions and the Protocols depended for their effectiveness on the extent to which combatants had the will to apply them. Thus anything that tended to sap that will was particularly wicked. Such resolve was dependent on the trust of each combatant in the honesty with which the other side would respect and apply the rules."

22) R. Kolb, *Good Faith,* above note 15, p. 253; Michael Bothe, Karl Joset Partsch, Waldemar A.

erosions of respect for IHL.

It is worth noting that the scope of perfidy under API is narrower than its preceding notion of "treachery". Derived from the principle of "chivalry", treachery, while left undefined in international conventions containing the term[23], was understood to mean a breach of good faith in general regardless of whether it related to legal protections[24]. In contrast, API explicitly refers only to good faith relating to legal protections applicable in armed conflict[25]. This is despite initial efforts by the International Committee of the Red Cross (ICRC) during the drafting of API to maintain a broad understanding of perfidy to include betrayal of confidence and moral obligations more generally[26]. Several States maintained that such a conception of perfidy was too ambiguous, opting to arrive at the definition that exists today with an explicit link to legal obligations[27].

Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (*Second Edition),* Martinus Nijhoff Publishers, 2013, p. 233, para. 2.1; B. Greene, above note 6, p. 50.

23) Lieber Code, Art. 16; Project of an International Declaration concerning the Laws and Customs of War, Brussels, (Brussels Declaration) 27 August 1874, Art. 13(b); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Regulations), 18 October 1907, Art. 23.

24) Michael N. Schmitt, "State-Sponsored Assassination in International and Domestic Law", *Yale Journal of International Law*, Vol. 17, 1992, pp. 615–616.

25) The question of whether "treachery" is now synonymous with "perfidy" is also a matter of controversy. S. Watts, above note 6, pp. 137–140, 151–152. The Statute of the International Criminal Court, for instance, uses the term "treacherously" instead of perfidy. Rome Statute of the International Criminal Court (Rome Statute), UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts. 8(2)(b)(xi) and 8(2)(e)(ix).

26) ICRC Draft Art. 19(1) on Perfidy in the *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Second Session, 3 May – 3 June, 1972, Volume I, p. 107: "It is forbidden to kill or injure by resort to perfidy. Unlawful acts betraying an enemy's confidence are deemed to constitute perfidy."

27) M. Bothe *et al.*, above note 22, p. 235, para. 2.4.2.

ii. The scope of prohibited perfidy

Despite the ambitious object and purpose of perfidy, abusing IHL protections is not per se prohibited under API. Rather, as the text of Article 37 clearly indicates, "… [i]t is prohibited to kill, injure or capture an adversary by resort to perfidy ..."[28]. Accordingly, perfidious deception that is not intended for the purpose of killing, injuring, or capturing appears lawful.

The travaux préparatoires suggest that not only must perfidy result in death, injury or capture, but that the deceptive conduct must be undertaken with the *intent* to betray the adversary for those purposes[29]. This appears to be reflected in the final text of API[30]. One of the reasons is the desire to allow the deceptive use of protections under IHL to save one's own life by feigning death or injury during battle[31]. Watts therefore classifies perfidy into the following categories:[32] simple perfidy[33], prohibited perfidy[34], and grave perfidy[35].

28) API, Art. 37(1). Note that in non-international armed conflict, it has been argued that the customary prohibition of perfidy is limited to killing and injuring. See generally, John C Dehn, "Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction", *Journal of International Criminal Justice*, Vol. 6, 2008.The ICRC takes a different view and insists that the prohibited scope of perfidy is the same under customary international law applicable to NIAC as that under API. Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. 1: Rules*, Cambridge University Press, Cambridge, 2005 (CIHL Study), Rule 65, p. 222–223.

29) CDDH/III/338, above note 14, p. 426.

30) API, Art. 37(1): "… Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy (emphasis added) …".

31) CDDH/III/338, above note 14, p. 426.

32) S. Watts, above note 6, pp. 149–150.

33) Perfidy that does not result in death, injury, or capture. Arguably, there is another sub-category of "benign" perfidy which may not even qualify as perfidy at all. See Part IV below.

34) Killing, injuring, or capturing with resort to perfidy.

35) The scope of perfidy as a grave breach is even more restrictive than "prohibited" perfidy under Art. 37(1) in that it requires death or *serious* injury, thereby omitting capture and non-serious injuries. Moreover, whereas Art. 37(1) covers the feigning of any protected status under IHL, the grave breaches regime only covers perfidy that relies on the use of the protected emblems and

According to Watts, API narrowed the scope of *prohibited* perfidy by introducing such consequences which, in his view, were not required by the Hague Regulations annexed to Convention IV[36]. Whatever stance one takes on the relationship between perfidy under API and treachery under its predecessors, most scholars criticize Article 37(1) of API for allowing abuses of IHL for purposes other than killing, injuring, or capturing. In their view, betraying good faith in relation to IHL will result in its erosion, whether or not it results in the enumerated consequences in API[37].

One aspect of this observation is that if parties to the armed conflict cede a military advantage to an adversary through being baited into believing they have obligations under IHL, they may stop or at least change their degree of respect for IHL out of military considerations. The destruction of military equipment, for instance, is not prohibited perfidy under API but could be disadvantageous enough to push a belligerent to fear protected categories of persons and objects under IHL.

Another aspect is more general, and perhaps even more crucial. Prohibiting abuses of IHL serves as a meta-rule to try to maintain a mutually shared narrative between belligerents that what appears to be protected is indeed protected under IHL. In good faith related terminology, it seeks to preserve "confidence" and "legitimate expectations" regarding IHL protections. The non-abuse of IHL protections is therefore essential to maintaining the integrity of IHL, so much so that some authors have argued that the prohibition of perfidy exists in non-international armed conflict as a necessary corollary to the principle of distinction[38]. However, neglecting to prohibit perfidy as such

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indicia such as the red cross, red crescent or lion and sun. API, Art. 85(3)(f).

36) S. Watts, above note 6, p. 140.

37) *Ibid*., p. 174; B. Greene, above note 6, pp. 49–50; Matthew J Greer, "Redefining Perfidy", *Georgetown Journal of International Law*, Vol. 47, 2015.

38) Richard B Jackson, "Perfidy in Non-International Armed Conflicts", *International Law*

and only prohibiting select consequences arising out of perfidy leaves open the possibility for parties to the armed conflict to abuse IHL. Given this limited scope of API, it is difficult for belligerents to remain confident that IHL protections are not being abused in armed conflict as doing so is not per se unlawful. That alone fails to protect the confidence and legitimate expectations of belligerents regarding IHL. Of course, if perfidy actually becomes routine, the situation is exacerbated, and an adversary becomes even less likely to respect protections[39].

B. Ruses

Ruses are acts which confuse the enemy without relying on IHL protections. Article 37(2) makes clear that ruses are explicitly permitted:[40]

> Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

As can be seen, ruses are distinct from perfidy in that they "do not invite the confidence of an adversary with respect to protection under the law", or otherwise violate IHL[41]. Examples of ruses include camouflage, decoys, mock

Studies, Vol. 88, p. 240.

39) B. Greene, above note 6, p. 50.

40) API, Art. 37(2).

41) Through, for instance, the improper use of protected emblems and indicia under Arts. 38 and 39 of API. See sub-part C.i. below.

operations and misinformation[42], among others[43]. As Kolb nicely puts it, "[w]ith perfidy, a belligerent betrays the adverse party about the law; with ruses of war, a belligerent betrays the adversary on a point of fact"[44]. Despite what appears to be conceptual clarity, the distinction leads to hard cases when applied in practice[45]. This will be elaborated in Part III.

C. Improper use of emblems and other indicia

Closely linked to perfidy is the prohibition of improper use of protected emblems and other indicia under Articles 38 and 39 of API. These rules require that the specified indicia are used only for the purposes assigned to them, and by those who are authorized to do so. In this sense, the prohibitions relating to such indicia are broader than perfidy. Moreover, unlike *prohibited* perfidy which must result in killing, injury, or capture, improper use as such is prohibited under Articles 38 and 39. It is possible, however, for such indicia to be used perfidiously, as a means to invite a belief that the adversary owes

42) API, Art. 37(2) specifically includes these examples in an attempt to clarify the notion and distinguish it from perfidy.

43) The ICRC study on CIHL cites military manuals stipulating numerous other examples: "surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; giving large strongpoints to a small force; constructing works, bridges, etc. which are not intended to be used; transmitting bogus signal messages, and sending bogus despatches and newspapers with a view to their being intercepted by the enemy; making use of the enemy's signals, watchwords, wireless code signs and tuning calls, and words of command; conducting a false military exercise on the wireless on a frequency easily interrupted while substantial troop movements are taking place on the ground; pretending to communicate with troops or reinforcements which do not exist; moving landmarks; constructing dummy airfields and aircraft; putting up dummy guns or dummy tanks; laying dummy mines; removing badges from uniforms; clothing the men of a single unit in the uniforms of several different units so that prisoners and dead may give the idea of a large force; and giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area, or to induce aircraft to land in a hostile area". CIHL Study, Rule 57, commentary on pp. 204–205.

44) R. Kolb, *Good Faith,* above note 15, p. 252.

45) See Part III.

protection under IHL. When such abusive use of the indicia results in killing, injury or capture, such conduct will also fall foul of Article 37(1) as well[46].

As the Geneva Conventions of 1949 and its Protocols, particularly API, contain a bundle of rules governing the use of these indicia, it is impossible to read Articles 38 and 39 in isolation. While it is not the purpose to provide a full account of these provisions, it is useful to highlight the main facets of the prohibitions contained therein.

i. The "distinctive emblems" and other indicia recognized by the Geneva Conventions and the Additional Protocols

Article 38 of API contains multiple proscriptions with subtle differences. It prohibits the *improper use* of the "distinctive emblems", the *deliberate misuse* of other internationally recognized protective emblems such as the flag of truce and the protective emblem of cultural property[47], and the *unauthorized use* of the distinctive emblem of the United Nations[48].

Without delving into a detailed discussion of all relevant provisions, it is important to clarify the protections afforded to the "distinctive emblems" of the red cross and red crescent as this may give rise to confusion. There are two distinct modalities as to the "use" of such emblems: protective and

46) If the abuse results in death or serious injury, such perfidious use of the protective emblems and indicia may amount to a "grave breach" under Art. 85(3)(f) of API.

47) The standard of "deliberate misuse" is naturally more stringent than "improper use" in the first clause of Art. 38(1) of API. During the drafting of the Article, Member States who were not party to The Hague Convention on Cultural Property were not prepared to posit norms outlawing the improper use of an emblem established under a convention to which they were not a party, but they did accept that they would avoid the deliberate misuse of such an emblem in any case. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1549.

48) Art. 38(2) was included to cover the unauthorized use of the distinctive emblem of the UN at its request. In armed conflict, specific authorization from a competent UN organ is required when using the emblem.

indicative. With respect to protective use, the emblems are a visible manifestation of protection under IHL. Crucially, the emblems do not confer protection; nor does the absence of the emblem denote a lack of protected status[49]. They are a tool to help communicate such protections. API and the Geneva Conventions carefully instruct belligerents on how to brandish the emblem, emphasizing in particular that the emblem must be comparatively large in proportion to the protected object, while laying out the conditions for its protective use[50]. Among other things the protective use of the emblems must be overseen and authorized by the party to the armed conflict concerned[51].

Indicative use denotes using the emblem to exhibit affiliation with the

49) ICRC, *Commentary on the First Geneva Convention* (*ICRC Updated Commentary on GCI*), 2nd ed., Cambridge University Press, 2016, para. 2579.

50) See Art. 18 of API in particular. See also Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, 2016, p. 152: "As a general rule, medical and religious personnel must wear an armlet displaying the distinctive emblem, and medical units and transports must fly distinctive tags or otherwise display the distinctive emblem [citing Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Arts. 40–43; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Arts. 42–43; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts. 20(2), 21 and 22(2)]". With respect to objects, Melzer continues "in order to be effective as a protective sign, the emblem must be comparatively large in proportion to the protected object and visible to the enemy even at a considerable distance. Where visible identification is not sufficient, for example owing to the means and methods of warfare employed, the belligerent parties may additionally or alternatively resort to other means of identification, such as distinctive light or radio signals or electronic means of identification [citing AP I, Art. 18(5) and (6), and Annex I, Chapter III]".

51) The same holds true for States party to Additional Protocol III. Protocol Additional (III) to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 2404 UNTS 261, 8 December 2005 (entered into force 14 January 2007) (AP III), Art. 2(3).

Movement of the Red Cross and Red Crescent National Societies[52]. Exceptionally, and only during peacetime, the indicative use of the emblem may also be used to identify ambulances and establishments offering free medical care, provided that this is with the express consent of a National Society and is in conformity with national legislation[53]. Crucially, indicative use does not imply specific protection under IHL beyond what is ordinarily afforded to civilians and civilian objects[54]. Thus, the indicative use of the emblem, particularly in armed conflict, must be distinguishable from the protective use. It is therefore required that the indicative use of the emblem is always of a small size and may not be displayed in a manner that mimics protective use such as on armlets or on rooftops[55].

One often confusing aspect of this dichotomy is that National Societies may use the emblems for protective use when they are acting as auxiliaries to States' armed forces. In accordance with Article 26 of GCI, members of National Societies may be serve as "medical personnel" provided that they carry out the same duties, are recognized and authorized by their governments to do so[56], and are subject to military laws and regulations[57]. In such an instance, they are placed on the "same footing" as military medical personnel and may therefore use the emblem for protective purposes[58]. Another important detail is that the ICRC and the International Federation of Red Cross and Red Crescent Societies are permitted to use the emblems[59]. While

52) N. Melzer, above note 50, pp. 152–153.

53) GCI, Art. 44.

54) *ICRC Commentary on API*, para. 1539.

55) GCI, Art. 44(2).

56) GCI, Art. 26(1). *ICRC Updated Commentary on GCI*, para. 2057. To be clear, while the Convention only mentions the "Red Cross" this cannot be understood to exclude other voluntary aid societies such as the Red Crescent national societies.

57) GCI, Art. 26.

58) GCI, Arts. 26 and 44.

59) GCI, Art. 44(3).

such use is usually indicative in nature, both Organizations may make protective use of the protective emblems during armed conflict when the nature of their work so requires[60].

ii. Improper use of emblems of nationality

The improper use of emblems of nationality under Article 39 of API contain other sets of rules that are potentially relevant to deception in armed conflict. The full provision is as follows:

> 1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
> 2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
> 3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

A comprehensive account of these rules falls outside the scope of this paper[61]. For the present purposes, it is sufficient to highlight the different standards applied between Articles 39(1) which covers indicia related to neutral or non-parties to the conflict and 39(2) which covers that related to

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60) *ICRC Updated Commentary on GCI*, para. 2687; N. Melzer, above note 50, pp. 152–153. In practice, the ICRC often uses its own emblem (the "roundel" which includes the red cross emblem) for protective purposes.

61) The standards for what constitute permitted use of these emblems and indicia are illuminated nicely in *ICRC Commentary on API,* paras. 1565–1571 and 1576–1579 for Art. 39(1) and (2) respectively.

the adverse party. As can be seen, paragraph 2 is less stringent, allowing parties to make use of such indicators insofar as they are not engaged in attacks, or otherwise using them to "shield, favour, protect or impede military operations". The current language is a result of a compromise between States who wished to limit the prohibition to when parties conduct attacks and those who wanted a more robust prohibition of misuse[62].

Perhaps the most salient aspect of Article 39 for the purposes of this article is paragraph 3 which appears to carve out naval warfare and espionage from the scope of prohibited perfidy under Article 37(1)(d)[63]. This reflects the understanding by the drafters of API that the rules governing indicia of nationality differ in the naval context[64]. More specifically, unlike warfare on land, it was unclear whether using the false flags of neutral or even adversaries was unlawful across the board in the naval context. While controversial to this day, there could be a customary rule permitting belligerents to use such false flags at sea so long as they stop doing so while engaging in attacks[65]. The carve out in Article 39(3) of API reflected the drafters desire to avoid settling this controversy regarding the content of naval warfare during the drafting of API[66]. The carve out for espionage was likewise a way to avoid modifying existing rules relating to spies, namely that a spy who is recaptured after escaping detention by the adversary cannot be punished for espionage[67]. To avoid creating conflicts with this longstanding rule in cases where a spy used

62) *ICRC Commentary on API*, paras. 1573–1574.

63) For reference, API, Art. 37(1)(d) refers to "the 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."

64) Mike Madden, "Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law", *Journal of Conflict & Security Law,* Vol. 17, No. 3, 2012, p. 446.

65) *Ibid.*

66) *ICRC Commentary on API*, para. 1582.

67) Hague Regulations, Art. 31.

the uniforms or other indicia of the adversary, the drafters opted to exempt espionage from the reach of Article 37(1)(d)[68].

D. Good Faith in Non-hostile Contact

Another issue which relates to deception is the requirement to deal in good faith in non-hostile contact with adversaries. Such a rule is said to exist as a matter of customary international humanitarian law (CIHL Rule 66). Treaty IHL contains a prescription to act in "military honor" but this is only in relation to capitulations[69]. In contrast, the customary rule in question covers broader range of subject matter that may be agreed upon between parties to armed conflict.

As a point of background, it is worth noting that part of the purpose of this rule is to carve out an exception to the rule that, particularly under domestic rules, contact with the adversary is prohibited in armed conflict. The ICRC's CIHL study Rule 66 stipulates that, at a minimum, commanders are allowed to contact adversaries through any means[70]. Such communication was traditionally carried out through parliamentarians[71], and practice indicates that such tasks have been assigned to organizations such as the ICRC as neutral intermediaries, or even components of other organizations including components in UN peace operations[72]. The second component to Rule 66 is that such non-hostile contact must be conducted in good faith. It is this latter aspect that is of particular relevance to the current discussion.

Non-hostile contact may be undertaken for a variety of reasons, most often categorized as either humanitarian purposes or related to attempts to restore

68) *ICRC Commentary on API*, paras. 1580–1581.

69) Hague Regulations, Art. 35.

70) CIHL Study, Rule 66, commentary on p. 228.

71) Note that there are specific rules protecting parliamentarians.

72) CIHL Study, Rule 66, commentary on p. 228.

peace. Such communication for restoring peace include local armistices for the purpose of realizing a general armistice, and armistices as a prelude to a peace treaty or a permanent cessation of hostilities[73]. Notably, acting contrary to agreements reached for such purposes has not always been regarded as a violation of treaty IHL per se[74]. While the Hague Regulations address armistices, they do not posit that a violation of such an agreement results in a violation of the laws and customs of war. Rather, Article 35 merely posits that a "serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once[75]."

Non-hostile contact may also be for the purpose of facilitating humanitarian activities. Often, such contact is linked to specific obligations under IHL with varying degrees of normativity. Several IHL provisions merely grant belligerents the discretion to conclude agreements[76]. Others urge[77] parties to conclude such agreements or call on them to endeavor to do so throughout the conflict[78]. In select instances, IHL obliges parties to conclude agreements and

73) See e.g. United States of America, Department of Defense Law of War Manual, June 15 (Updated December 2016), para. 12.1.2.2.

74) Such acts may of course violate international law more generally if, for instance, they result in the violation of a peace treaty.

75) Hague Regulations, Art. 35.

76) The discretion to conclude agreements relate, among other things, to entrusting impartial organizations to undertake tasks assigned to Protecting Powers (GCI, Art. 10; GCII, Art. 10; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 10); (GC IV, Art. 11); establishing hospital and safety zones and localities (GCI, Art. 23; GCIV, Art. 14); neutralized zones (GCIV, Art. 15); establishing non-defended localities (API, Art. 59(5)); the percentage of so called "retained personnel" to be detained (GCI Art. 31); placing neutral observers on military hospital ships (GCII, Art. 31); alternative systems for marking PoW camps (GCIII, Art. 23); determining minor details relating to PoW detention (e.g. GCIII, Arts. 60, 66, 67).

77) E.g. agreements relating to measures to protect objects containing dangerous forces (API, Art. 56(6)).

78) E.g. the arrangement of teams for the search and identification of dead on the battlefield (API,

arrangements as soon as circumstances permit[79].

Apart from these provisions that specifically mention agreements or arrangements, Common Articles 6/6/6/7 of the Geneva Conventions provide that High Contracting Parties may conclude any other special agreements on all matters which they find suitable to make a separate provision, under the condition that such agreements do not adversely impact the situation of persons protected under IHL[80]. Such agreements are legally binding, regardless of whether they are written, although only written agreements are governed by the Vienna Convention on the Law of Treaties (VCLT)[81]. With respect to non-international armed conflicts, Common Article 3 to the Geneva Conventions provides that "[p]arties to the conflict should endeavor to bring into force, by means of special agreements, all or part of the provisions" of the Geneva Conventions that apply exclusively to IACs[82]. Unlike special agreements under Article 6, the binding nature of Common Article 3

Art. 33(4)); means to provide additional protection for objects containing dangerous forces (API, Art. 56(6)); methods to identify hospital ships using the most modern methods available (GCII, Art. 43); arrangements for the accommodation in neutral countries of wounded and sick PoWs (GCIII Art. 109); The removal from besieged or encircled areas of vulnerable persons by land (GCIV, Art. 17).

79) Such subject matter includes, but is not limited to, armistices or ceasefires for the removal, exchange and transport of the wounded left on the battlefield (GCI, Art. 15(2)); arrangements for the removal or exchange of wounded and sick from besieged or encircled areas and access for medical and religious personal by sea (GCII, Art. 15(2)); Inquiry procedures at the request of a Party to the conflict (GCI, Art. 52; GCII, Art. 53; GCIII, Art. 132; GCIV, Art. 149); Relieving retained personnel (GCI, Arts. 28; GCIII, Art. 33); returning personal effects repatriated PoWs (GCIII, Art. 119); stipulating the conditions for sending individual parcels and collective relief to PoWs (GCIII, Arts. 72 and 108); Access to grave-sites and return of remains and personal effects (API, Art. 34(2)).

80) Common Articles 6/6/6/7 to the Geneva Conventions.

81) *ICRC Updated Commentary on GCI*, para. 963; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p.42, para. 4.21; Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, 23 May 1969 (entered into force, 27 January 1980).

82) Common Article 3 to the Geneva Conventions.

agreements is somewhat controversial[83].

A point of clarification is warranted with respect to the terms "special agreements" and "(local) arrangements" which are used throughout the relevant provisions. As mentioned, the former ought to be understood as being functionally equivalent to treaties[84]. They generally pertain to formal agreements concluded by plenipotentiaries or comparable persons between States[85]. "Local arrangements", on the other hand, cover more formal impromptu agreements reached by local commanders of the parties to the conflict, or third parties, with a limited temporal scope responding to specific humanitarian needs as they arise[86].

i. Violations of good faith

As was outlined above, IHL not only permits non-hostile contact among parties to armed conflict but may also require such contact in select instances, particularly with the aim of fostering humanitarian outcomes. The question then turns to what would constitute a violation of good faith and the legal consequences for such deceptive practices. To answer this question, one must firstly grasp what is required by good faith in this context[87].

Indeed, the notion of good faith in this context appears to be underdeveloped. The CIHL Study merely clarifies that good faith requires that both the negotiators as well as the agreements reached must be respected[88]. But an examination of the relevant literature indicates that good faith may play a

83) M. Sassòli, above note 81, p.42, para. 4.22.

84) *ICRC Updated Commentary on GCI*, para. 1517.

85) *Ibid.*

86) *Ibid.*

87) This is not the place to discuss at length the principle of good faith. Volumes have indeed been written on good faith. R. Kolb, *Bonne foi,* above note 16; Élisabeth Zoller, *La Bonne Foi en Droit International Public*, Éditions A. Pedone, Paris, 1977.

88) CIHL Study, Rule 66, commentary on pp. 227–228.

multifaceted role at different stages of the non-hostile contact between parties to the conflict.

a. Deception at the negotiation phase

Good faith plays a role in governing conduct at the negotiation phase. As mentioned, there are rules stipulating the inviolability of negotiators, including parliamentarians. Beyond these explicit rules, the principle of good faith has the potential to go further so as to ensure that non-hostile contact itself, even prior to any agreements being made, is not used for deceptive purposes. While there is no jurisprudence that directly relates to the negotiations of non-hostile contact in armed conflict, reference may be had to jurisprudence relating to good faith in other contexts. In the *Gulf of Maine* case, the International Court of Justice opined that the requirement under Article 6(1) of the 1958 Convention on the Continental Shelf that the boundary of the continental shelf between two or more States whose coasts are opposite of each other "shall be determined by agreement between them", denoted a duty to negotiate "with a genuine intention to achieve a positive result"[89].

Accordingly, negotiating under false pretenses to achieve an ulterior motive than what is advertised to the opposing party would likely fall foul to good faith. This would prohibit instances where parties to the conflict petition to negotiate for a specified purpose, only to use such negotiations as a pretext to gain a military advantage. For instance, negotiations for the purpose of distracting and adversary or buying time to reposition or re-supply friendly forces could fall foul of the obligation to negotiate in good faith.

89) International Court of Justice, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), Judgement, ICJ Report 1984, para. 87.

b. Deception at the implementation phase

After agreements are reached, its contents must be carried out in good faith[90]. For agreements that are akin to treaties, the VCLT applies, including Article 36 which stipulates that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"[91]. For agreements that do not fall under the ambit of the VCLT, for instance because they were not in writing, the same obligation to perform their contents in good faith should apply mutatis mutandis as a matter of customary law and good faith as a general principle of law[92].

Good faith thus requires the parties to fulfil their commitments reached in their non-hostile contact. This means, among other things, that agreements must be performed in accordance what was reasonable expected by the parties[93]. Moreover, agreements must be implemented in accordance with their spirit and not exclusively according to their letter[94]. In particular, parties to the conflict may not cling to the letter of an agreement in an abusive manner[95]. In a similar vein, it is prohibited to defeat the object and purpose of an agreement even if the conduct in question does not fall-foul to the black-

90) The same would hold true for unilateral declarations that trigger an obligation under international law. Under IHL, this could relate to the establishment of a "non-defended locality". API, Art. 59. It has also been confirmed that unilateral declarations may give rise to legal obligations under international law more generally. International Court of Justice, *Nuclear Tests (Australia v. France),* Judgement, 20 December 1974, ICJ Reports 1974, para. 46.

91) VCLT, Art. 36.

92) CIHL Study, Rule 66.

93) Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, Cambridge, 1953, p. 115.

94) *Ibid.*

95) See R. Kolb, *Good Faith,* above note 15, p. 63. He notes several examples such as fulfilling a promise to repatriate prisoners of war but only after killing them, promising not to shed blood if a garrison surrendered only to burn them alive, and concluding a 30 "day" ceasefire and attacking by night.

letter content of the agreement[96]. For example, a party that agrees to cease all aerial bombardments to allow for evacuations, only to then render unusable all routes for evacuations would not be fulfilling their commitments in good faith.

In sum, regardless of the formalities of an agreement between parties to an armed conflict, good faith requires parties to fulfil the content that can be reasonably expected by the parties[97]. As mentioned, securing the fulfillment such legitimate expectations creates confidence and faith among parties to an armed conflict[98].

c. Perfidy?

Crucially, the deceptive reliance on non-hostile agreements for the purpose of obtaining a military advantage may amount to violations of Article 37(1) of API if it results in capture, injury or death. Recall that the article defines perfidy as "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict".

Caution is required, however, when discussing perfidy in relation to agreements between parties to an armed conflict. The travaux préparatoise indicate that the drafters explicitly opted for the phrase "rule of international law applicable in armed conflict" over "international law" more generally, so as to exclude legally binding bilateral agreements between belligerents[99]. The question is whether this can be said with respect to all agreements.

The question hinges on whether bilateral agreements between belligerents

96) As is the case with treaty law. According to Kolb, the obligation not to defeat the object and purpose of a signed treaty pending ratification or entry into force continues to bind parties to the treaty after the treaty comes into force. R. Kolb, *Bonne foi,* above note 16, p. 283.

97) R. Kolb, *Good Faith,* above note 15, pp. 64–65.

98) *Ibid.*

99) CDDH/III/338, above note 14, p. 426.

falls outside of the "law applicable in armed conflict". Armistices, as mentioned, are generally not considered to be part of IHL. Other agreements, however, are clearly covered by IHL. One example of an explicit link between the content of an agreement and IHL is Article 60 which prohibits conduct that violates agreements between parties regarding non-defended localities[100]. Apart from such agreements that trigger protections under IHL, it should also be recalled that many of the non-hostile contact that is encouraged or demanded by IHL relates specifically to achieving humanitarian outcomes, such as the search, collection, and evacuations of protected persons such as the wounded and sick. An agreement between belligerents could be used to deceive an adverse party into believing that movements and activities covered by such agreements are being undertaken by, or for, such protected categories of persons. In such cases there is room to argue that the non-hostile contact was used to "invite" confidence regarding other IHL obligations and would therefore potentially violate Article 37(1) of API.

ii. Legal consequences

Excluding deception in non-hostile conduct that amounts to perfidy, there is a question as to whether violating good faith in such a context would be a violation of international law. There is the CIHL Rule 66, which is arguably sufficient to argue that such deception would amount to an internationally wrongful act[101]. It may, however, be worth examining other sources of law as well[102].

100) API, Art. 60(1): "It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement."

101) CIHL Study, Rule 66: "Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith."

102) Note that the findings of the 2005 CIHL study are not universally excepted by States and in some cases, especially with respect to specific rules, States have strongly refuted the findings. To

One approach could be to rely on good faith itself. Article 38 of the International Court of Justice (ICJ) Statute, which is understood to stipulate the formal sources of public international law includes "the general principles of law recognized by civilized nations"[103]. However, there is a question as to whether or not good faith as a general principle can be directly applied by a legal operator as a source of rights and obligations. International jurisprudence appears to answer this question in the negative[104]. On at least two occasions, the ICJ has opined that good faith, while constituting "one of the basic principles governing the creation and performance of legal obligations", is not "in itself a source of obligation where none would otherwise exist"[105]. Kolb argues that this view is too narrow and incoherent in light of the fact that the ICJ itself has accepted that the principle of good faith can be the foundation of norms and principles that can be applied directly. Recall the finding by the ICJ in the *Nuclear Test* case of 1974 where it opined that that an unilateral declaration by France was legally binding; such a finding was based on the binding nature of promises which is based on the principle of good faith[106]. In other words, the ICJ accepts that good faith can operate through principles and norms, but it cannot be applied directly[107]. Kolb highlights this discrepancy, stating that "if good faith can found new norms and principles,

the author's knowledge, however, there are no States that directly refute Rule 66.

103) Statute of the International Court of Justice (ICJ Statute), 33 UNTS 993, (entered into force 24 October 1945), Art. 38(c).

104) R. Kolb, *Good Faith,* above note 15, p. 30.

105) International Court of Justice, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, 10 December 1998, ICJ Reports 1998, para. 94; International Court of Justice, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, 11 June 1998, ICJ Reports 1998, para. 39.

106) R. Kolb, *Good Faith,* above note 15, p. 31. *Nuclear Tests*, above note 90, para. 46: "Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."

107) *Ibid.*

which can in turn be applied to specific cases, it is hard to exclude the normative reach of the principle itself …"[108].

Another avenue would be to rely on IHL treaties themselves. All States have an obligation, in accordance with Article 26 of the Vienna Convention on the Law of Treaties (VCLT), to perform every treaty binding upon them "in good faith" (pacta sunt servanda)[109]. At least for agreements that are linked to specific IHL provisions, it may be argued that deceptive practices in relation to such agreements would be a violation of these IHL treaty obligations.

III. Between Perfidy and Ruses

The conceptual distinction between perfidy and ruses appears straightforward on its face. Ruses "are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law"[110]. Recall Kolb's useful distinction that perfidy fundamentally relies on deception about the law while ruses deceive on a point of fact[111].

This distinction, however, becomes murky when applied in practice. Moreover, even if a distinction can be made between perfidy and ruses, the provisions of API are drafted in a way that leave a legal grey area between perfidy which is prohibited and ruses. Both of these observations will be discussed in turn.

A. Difficulty Distinguishing Perfidy from Ruses in Practice

The conceptual distinction between perfidy and ruses is strained in practice. Fundamentally, challenges arise due to the difficulty in determining whether

108) *Ibid.,* p. 30.
109) VCLT, Art. 26.
110) API, Art. 37(2).
111) R. Kolb, *Good Faith,* above note 15, p. 252.

an act of deception relied on a betrayal of confidence relating to IHL protections, or merely due to a point of fact such as whether or not a threat exists.

Take the example of a remotely detonated bomb placed in the spare tire of a parked SUV[112]. The use of a so-called car bomb relies on disguising an explosive laden vehicle, which by its use turns into a military objective[113], as a non-threatening vehicle. The vehicle appears to be a civilian object subject to protection under IHL but, legally speaking, such protection no longer exists. Whether this is perfidious depends on the extent to which the deceived party changes their behavior based on their mistaken belief that the object is protected under IHL. Scholars arguing that the attack would not constitute perfidy opined, correctly in the present author's view, that the actions that would make the victim vulnerable to the to the detonation would be an error of fact i.e. the lack of a threat[114]. Change the facts to one where the vehicle was approaching the victim and the calculus becomes less clear. The key difference with the previous example being that the victim recognizes the vehicle as distinct from the background because it is moving. Would the victim hesitate to react, including through using force, merely because they did not perceive the ostensibly civilian vehicle as harmless or because of its status under IHL?

112) A similar case sparked lively academic discussion regarding the notion of perfidy. For the facts of the incident see Amy Goldman and Ellen Nakashima, "CIA and Mossad killed senior Hezbollah figure in car bombing", *The Washington Post*, 30 January 2015. Opinions varied as to whether such an act, if committed during an armed conflict, would amount to perfidy. For those arguing the attack did not constitute perfidy see, for example, Ryan Goodman and Sarah Knuckey, "Did the U.S.-Israeli Killing of Mughniyah violate international law?", *Just Security*, 2 February 2015, available at: https://www.justsecurity.org/19613/us-israel-killing-mughniyah-international-law/ (last accessed: 10 November 2022); and Kevin Jon Heller, "Disguising a Military Object as a Civilian Object: Prohibited Perfidy or Permissible Ruse of War?", *U.S. Naval War College: International Law Studies,* Vol. 91, No. 517, 2015.

113) API, Art. 52(2).

114) R. Goodman and S. Knuckey, above note 112.

The little practice that exists indicates that such a situation could amount to perfidy but does not provide enough information to clarify the distinguishing factors[115].

i. Deducing subjective states from objective facts

Of course, one aspect that would help determine whether a deceptive act constituted perfidy or ruses would be the intent of the deceiving party. If it could be proven that an attacker intended to rely on IHL protection to deceive their adversaries, this would greatly mitigate the confusion between perfidy and ruses. In fact, the text of Article 37(1) of API indicates that such intent is a requisite element of perfidy[116]. But how would an adjudicator determine such a subjective state of mind absent direct proof?

To an extent, this could be answered by the manner in which the deception takes place. For example, deception abusing a perception of specifically protected indicia or mimicking objects or persons with special or enhanced protection may be a basis to deduce such intent[117]. Apart from that, however,

115) Abd-al-Hadi al-Iraqi was originally charged before a U.S. Military Commission for perfidy among other things: "[O]n or about 7 June 2003, at or near Kabul Afghanistan [the Defendant], in the context of and associated with hostilities, invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives in said vehicle thereby attacking a bus carrying members of the German military, resulting in death and injury to a tleast one of those German military members." Continuation of the Charges and Specifications in the case of United States of America v. Abd Al Hadi Al-Iraqi, MC Form 458, January 2007, p. 10, available at: https://int.nyt.com/data/documenttools/hadi-al-iraqi-referred-charge-sheet/b9002ec74e90a49e/full.pdf (last accessed: 15 November 2022). The merits were not adjudicated as he plead guilty, to lesser charges but still in relation to perfidy, in June 2022. Carol Rosenberg, "Commander of Afghan Insurgency Pleads Guilty at Guantánamo Bay", *The New York Times*, 13 June 2022.

116) Note that Art. 37(1) of API mentions "intent" to betray an adversary's confidence in relation to obligations under IHL.

117) K. Heller, above note 112, p. 535.

the challenge is daunting[118]. It is difficult to imagine that obtaining proof of such a subjective state would be attainable in most circumstances. Accordingly, whether IHL protection was being abused will turn on deducing intent from objective facts. Considering the object and purpose of the prohibition of perfidy[119], one could apply a standard whereby deception would be considered perfidious if the methods employed would foreseeably cause a reasonable commander to make decisions based on protections relating to IHL.

Complicating the application of such a standard, however, is there appears to be little consensus as to what conduct is objectively perfidious. Heller observes that State practice is incoherent and arbitrary when it comes to this question. Many acts which are prima facie intended to use facts to deceive adversaries, but nonetheless involves or amounts to manipulations or mimicry of protected *objects* under IHL, have been regarded as permissible ruses[120]. Camouflage, ambushes, and cover, for instance, are considered to be lawful tactics but rely on the adversary failing to identify the legitimate military targets amidst what they perceive, as a matter of fact, to be civilian objects[121]. That said, Heller notes that there appears to be "no support in either conventional or customary IHL for the idea that it is inherently perfidious to kill by disguising a military object as a civilian object"[122]. In contrast, Article 37(1)(c) of API specifically lists the feigning of "civilian, non-combatant status" as an example of perfidy.

Why then is it permissible to feign the status of a civilian *object* when the

118) George P Politakis, "Stratagems and the Prohibition of Perfidy with a Special Reference to the Laws of War at Sea", *Austrian Journal of Public and International Law*, Vol. 45, 1993, p. 270.

119) Such an approach was first introduced by Madden, albeit in a different context relating to damages resulting from perfidy. See generally, M. Madden, above note 64.

120) K. Heller, above note 112, pp. 521–535.

121) *Ibid.*

122) *Ibid*. See also Ashley J Roach, "Ruses and Perfidy: Deception during Armed Conflict", *University of Toledo Law Review,* Vol. 23, 1992, p. 400.

same conduct is unlawful when feigning the status of a civilian *person*[123] ? The answer is not obvious. In both instances, the deceiving party could rely on the fact that an adversary errs in a threat assessment, rather than make a determination as to their legal obligations[124]. However, only the feigning of civilian status would *unequivocally* constitute perfidy pursuant to Article 37(1)(c). The legality of using civilian objects in such a way remains unclear and, based on the above, has frequently been associated with lawful ruses.

One reason that could begin to reconcile this apparent inconsistency is that "civilian" is a status-based protection[125] while the protection of civilian objects is more dependant on the circumstances[126]. In other words, it is not necessarily the case that a civilian object is identified as such due to its appearance. A belligerent would also assess, inter alia, the purpose and use of the object at the given moment to determine its status under IHL in accordance with article 52(2) of API. Conversely, civilian status is supposed to be identifiable by appearance because, at least in theory, combatants will distinguish themselves in order to benefit from PoW status[127]. As such, mimicking civilian appearance has greater potential to evoke an adversary's "confidence" that the individual is

123) *Ibid.,* p. 523; K. Heller, above note 112, p. 524.

124) *Ibid.*, p. 529.

125) More accurately, "combatant" is a status-based notion denoting, inter alia, targetability. The other side of the coin is that non-combatant status i.e. civilians are not targetable. Civilian status is rigid and cannot be changed without some degree of integration into the armed forces of a State or militia or volunteer corps belonging to a Party to the armed conflict (The exception being levée en masse when civilians spontaneously take up arms to resist an invading occupying force). Even civilians who take a direct part in hostilities do not forfeit their status as such, but merely their protection from attacks as civilians for that specific time. API, Art. 51(3).

126) Functional, meaning a civilian object can become military objective depending on how it is used at a given time. API, Art. 52(2): "… In 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."

127) GCIII, Art. 4(A)(2) and API, Art. 44(3).

indeed afforded civilian status when compared to civilian objects as appearance is less equivocal for determining the legal status of the latter.

ii. Passive and active deception

One of the nuances regarding deception that helps to overcome, to a degree, the aforementioned confusion between perfidy and ruses are the notions of "passive" and "active" deception. Generally speaking, camouflage and the related tactics of ambush and cover may rely on what is known as "passive deception". This type of deception aims to "hide something that really exists"[128]. The point is to avoid detection. Camouflage and the related practices that rely on passive deception therefore skew toward ensuring that the adversary remains unaware of the existence of the military object or combatant. In such cases, deception leans heavily towards legal ruses unless there is evidence to the contrary[129].

"Active deception" is where adversaries are provided with false evidence of "intentions and capabilities that do not, in fact, exist"[130]. Within the context of the present discussion, this would mean that a military object or person is not necessarily augmented for the purpose of avoiding identification; rather it is for the purpose of inviting *mis*-identifications of a military target as a non-threatening object or person. Active deception with resort to disguises simulating civilian objects is likely better defined as "mimicry" rather than camouflage per se[131]. Given that the adversary is at least likely to identify the

128) Colonel Gary P Corn and Commander Peter P Pascucci, "The Law of Armed Conflict Implications of the Covered or Concealed Cyber Operations: Perfidy, Ruses and the Principle of Passive Distinction" in Eric Talbot Jensen and Ronald T.P Alcala (eds), *The Impact of Emerging Technologies on the Law of Armed Conflict, Lieber Studies Volume 2*, Oxford University Press, New York, 2019, p. 292.

129) *Ibid.*, p. 294.

130) *Ibid.*, p. 292.

131) S. Watts, above note 6, p. 163.

target, only to misidentify it, brings this type of deception closer to the purview of perfidy. The object is identifiable, but the true military nature of the target is hidden[132]. As such, active deception skews closer to perfidy than ruses as its objective is misidentification rather than mere concealment.

Such a distinction may help to explain why certain methods of camouflage which seek to avoid detection would be a ruse, even if conducted among civilian objects, whereas a person feigning civilian status would be acting perfidiously. In the latter case, the person is detected as an entity distinct from its background but is misidentified as a non-threatening civilian.

Where this dichotomy becomes less viable is in an area that is full of objects, such as forested, rural or urban setting, where the objective of mimicry could still be to "blend" into surroundings in order to avoid calling the attention of the adversary. The opposite is true in settings where identification is unavoidable, such as barren locations on land or domains on water, the sky or even outer space. For instance, using deceptive lighting or disguising a missile system as an intermodal shipping container[133] in the context of naval warfare could lean more heavily towards perfidious deception. The objective of such deception is not to shield the object from being spotted. Such a feat is not plausible on open water[134]. The point instead would be to cause a misidentification as a civilian object.

While this distinction helps to explain why camouflage may be considered a

132) S. Watts, above note 6, p. 167.

133) Such as the Club-K anti-ship missile system. See generally Robert Clarke, "The Club-K Anti-Ship Missile System: A Case Study in Perfidy and its Repression", *Human Rights Brief*, Vol. 20, Issue. 1, 2012.

134) This may not be the case with the advent of invisibility technologies. See Sephora Sultana and Hitoshi Nasu, "Invisible Soldiers: The Perfidy Implications of Invisibility Technology on the Battlefields of the Future", in Eric Talbot Jensen and Ronald T.P Alcala (eds), *The Impact of Emerging Technologies on the Law of Armed Conflict, Lieber Studies Volume 2,* Oxford University Press, New York, 2019.

lawful ruse, the same difficulty remains in determining whether IHL obligations are being abused in cases of active deception. Take the previous example of an individual feigning civilian status. Imagine that they are using their appearance as a civilian as a means to approach a military target which they would not be able to do if they were dressed as a combatant. In such a situation, it is not obvious whether they are relying on their perceived non-threatening nature *or* the fact that they are protected under IHL. Despite not being obvious, such conduct is considered perfidious. Thus the prohibition of feigning civilian status for persons is best understood as a categorical compromise or "legal fiction". Given the difficulty in determining perfidious intent, whether objectively or subjectively, Article 37(1)(c) effectively takes the uncertainty out of the equation.

IV. The Legal Space Between "Prohibited" Perfidy and Ruses

While the definition of perfidy appears relatively clear if Article 37(1) of API is read in isolation, the picture becomes more obscure when Article 37(2) is added to the mix. Based strictly on the latter, the notion of perfidy seems to exist whenever deception invites the confidence of an adversary regarding obligations under IHL[135]. Such deception is explicitly excluded from the category of permissive ruses. Reading Article 37(1), however, the definition of "perfidy" itself is limited by the requirement that there is an "intent" to betray the adversary, presumably requiring an intent to kill, injure, or capture[136].

135) API, Art. 37(2): "… Such ruses are … not perfidious because they do not invite the confidence of an adversary with respect to protection under that law …".

136) This seems to be what the drafters of API had envisaged when they included the intent requirement. See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (21 April – 11 June 1976), Vol. XV, Report of Committee III, Third Session, CDDH/236/Rev.1, p. 382, para. 16.

Consequently, while API only prohibits perfidy intended, and resulting, in death, injury, or capture, it leaves open the possibility for a range of deception falling between this prohibition and what are considered to be lawful ruses. Recall that Watts helpfully distinguishes between "prohibited perfidy"[137] and "simple perfidy"[138]. The former refers to perfidious deception that results in killing, injuring, or capture and is thus prohibited under Article 37(1) while the latter does not. There is at least one more sub-category of deception relying on protections under IHL, which the drafters of API appear to have intentionally excluded from prohibition of perfidy, and that is the feigning of protected status for ends that are not per se harmful to the enemy e.g. when a combatant mimics death or injury to save their own life[139]. This will be called "benign perfidy".

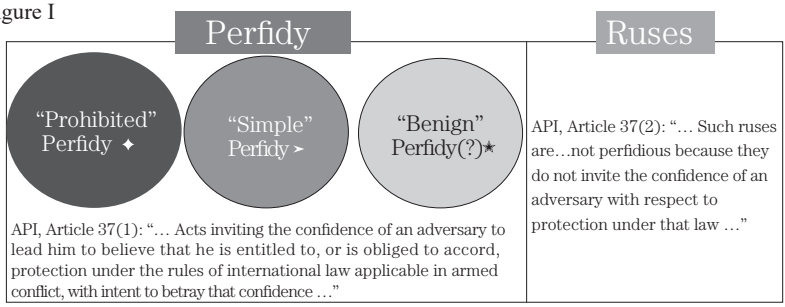
Taking these subcategories into account, Article 37(1) and (2) denotes the following taxonomy deceptive conduct: "prohibited perfidy" conducted with the intent to kill, injure or capture and which actually manifests consequences; permitted ruses, which do not involve the deceptive use of IHL protection; with "simple" and "benign" perfidy falling in a grey zone between these two ends of the spectrum (Figure I).

137) For the present purposes, "grave perfidy" is a sub-category of prohibited perfidy.

138) S. Watts, above note 6, pp. 149–150.

139) CDDH/III/338, above note 14, p. 426.

Figure I



✦ Inviting the confidence of an adversary in relation to IHL obligations to kill, injure, or capture as required by Article 37(1).
➢ Inviting the confidence of an adversary in relation to IHL obligations to cause harm apart from killing, injuring, or capturing as required by Article 37(1).
★ Inviting the confidence of an adversary in relation to IHL obligations that is not intended to, nor results, in harm towards the adversary. It is unclear whether this amounts to "perfidy" within the meaning of Article 37(1) given the lack of an "intent to betray". At the same time, benign perfidy would not fit the definition of a ruse because it does indeed invite the confidence of an adversary regarding IHL.

A complicating factor is that it is notoriously difficult to distinguish between the different categories of perfidy in practice. Take the hypothetical highlighted by the ICRC in is commentary to API where perfidy is used to delay an attack by an opposing force[140]. Such a tactic does not prima facie violate Article 37(1). However, as the ICRC notes, subsequent combat may result in killing, injury or capture, the results of which could very well be a product, at least in part, of the perfidious act[141]. The same holds true for simple perfidy which results in the destruction of an adversary's military military objectives, which may lead to killing, injuring, or capturing downstream.

Such instances are the basis, according to the ICRC, of a "permanent controversy" regarding the prohibited scope of perfidy[142]. The challenge is how to apply perfidy in armed conflict where cascades of causation are

140) *ICRC Commentary on API*, para. 1492.
141) *Ibid.*
142) *Ibid.*

common-place; one small factor leads to another, and another still, which may not result in a significant consequence. Fundamentally, the issue falls on how to measure causation. The text of API does little to clarify this point as it merely uses the term *resorted* hence the standard to be applied is open to interpretation. In this sense, much work is needed to clarify a common standard that is sufficiently rigorous and clear to make the prohibition more workable in practice.

A. Toward Clarifying Causation

An appropriate and clear standard of causation would help to mitigate the aforementioned permanent controversy. The most widely used standard is the so-called "but-for" test, which seeks to determine whether an outcome would have still occurred without the act (or omission) that is alleged to have caused the harmful result[143]. Madden argues that the but-for test is perhaps most appropriate for perfidy as it is demanding enough to reflect the gravity of an accusation of violating IHL[144].

Despite its apparent ubiquity, the but-for test is not a panacea [145]. Among the challenges associated with the standards is that it requires a judge to imagine what may have been had the act or omission in question not occurred. Moreover, the but-for test alone has the potential to be absurdly overinclusive[146].

143) Ilias Plakokefalos, "Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity", *The European Journal of International Law,* Vol. 26, No. 2, 2015, pp. 476–477.

144) As opposed to, say, the less stringent "materially contributed" test. M. Madden, above note 64, pp. 452–453.

145) I. Plakokefalos, above note 143, p. 478.

146) *Ibid*. In cases where numerous different causes of a harmful result can be identified (overdetermination), the but-for test can lead to absurd results. See Plakokefalos, footnote 35: "[T] wo hunters shoot at the same time at the victim who would have died by either of the shots. The but-for test holds that neither hunter caused the death since but-for his shot the victim

For instance, it would be possible to submit that but-for the accouchement of the perpetrator, the alleged violation caused by said person would never have occurred. Accordingly, the mother of the perpetrator would have also "caused" the violation[147]. The but-for test therefore does less to clarify the cascades of causality in relation to perfidy than one may think.

To overcome this, an additional level of assessment would need to be applied. Plakokefalos calls this the "scope of responsibility" test, ordinarily used when determining legal liability. Given the breadth of the but-for test, this second prong functions to delimit responsibility. It provides rationale for determining that an individual is *not* legally responsible for an act or omission notwithstanding them technically being the cause of a specific outcome[148]. Unlike purely factual tests such as the but-for test, this second prong includes other considerations such as policy objectives[149]. For instance, it may be deemed unfair to hold someone legally responsible for a result which they could not anticipate at the time they factually started the causal chain leading to said result. To account for this, standards such as "proximate cause" and "reasonable foreseeability" may be employed[150].

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would have died anyway by the shot of the other hunter." As such, alternatives such as the "necessary element of a sufficient set (NESS)" test has been proposed. The test holds that an act or omission caused a result, "if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result". See Richard W. Write, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Brush by Clarifying the Concepts", *Iowa Law Review,* Vol. 73, 1988, p. 1019.

147) The author is grateful to Professor Kazuya Yokohama of Shinshu University for providing this example.

148) For an overview see I. Plakokefalos, above note 143, pp. 486–490.

149) *Ibid.,* p. 478.

150) The notions of "proximate cause" and "reasonable foreseeability" are closely related. See, for example, International Criminal Court, *Prosecutor v. Al Mahdi,* Case No. ICC-01/12-01/15, 17 August 2017, Reparations Order, Trial Chamber VIII, 17 August 2017, para. 44: "… in assessing proximate cause, the Chamber will consider, *inter alia*, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm.".

Employing standards such as "reasonable foreseeability" suits the prohibition of perfidy well. It would assist in excluding instances where one feigns protected status to avoid death or capture, something which the drafters of API wished to exclude from the prohibition[151]. Even though it is reasonably foreseeable that they would rejoin the fight, the same foreseeability would likely not extend to *specific* acts of killing, injuring, or capturing at the time the perfidious act was committed. Secondly, reasonable foreseeability fits well with the aforementioned requirement in API that the deceiving party "intends" to betray the confidence of the adversary regarding IHL[152]. In order to intend to cause harm by abusing IHL, it must, at a minimum be foreseeable that such deception would result in said harm.

This is merely one starting point to clarifying the applicable standard. What is needed is a shared understanding among States which does not currently exist. In any event, Madden is correct when he writes that the standard should be capable of fulfilling the object and purpose of perfidy which, as will be recalled, is primarily to prevent the erosion of IHL[153].

B. Delineating the Legality of Deception Between "Prohibited Perfidy" and Ruses

If it is accepted that there is a grey area between prohibited perfidy and lawful ruses, the next question is how to delineate what is lawful deception falling between these two extremes. It is likely incorrect to state that all grey perfidy is prohibited. As mentioned, drafters of API explicitly opted to limit the scope

151) One authoritative commentary similarly argues that the prohibited consequences of perfidy must be a "proximate cause" of the perfidious deception; "remote" causation would be insufficient. M. Bothe *et al.*, above note 22, p. 235, para. 2.4.

152) API, Art. 37(1).

153) M. Madden, above note 64, p. 451.

of the prohibition to allow at least benign perfidy, i.e. perfidy for the sake of non-harmful ends such as to save ones own life or to avoid capture.

At the same time, it is difficult to unequivocally maintain that all perfidy not falling within Article 37(1) of API is permissible. As mentioned, Article 37(2) explicitly excludes all abusive deception of IHL from its permissive scope. If there was an explicit intention by the drafters to permit grey perfidy the clause excluding such perfidy from the scope of permissible ruses would not exist in its current form. There is no clear acknowledgement that other forms of perfidy which cause harm below the threshold of Article 37(1) should also be permissible[154]. Thirdly, it must be borne in mind that the predecessor to perfidy under API, "treachery" in the Hague Convention and its Regulations, arguably posits a broader prohibition than that contained in API in that, inter alia, specific consequences were not a necessary condition for the illegality of treacherous deception[155].

Finally, at a general level, it would be erroneous to assume that the absence of a specific prohibition automatically indicates that relevant conduct is lawful under IHL. In the absence of specific proscriptions, a tribunal may also be required to analyze general principles and rules of IHL[156]. Key among these is the so-called "Martens Clause", the most recent formulation of which is stipulated in API[157]. While the precise meaning and effect of the Clause remain

154) CDDH/III/338, above note 14, p. 426.

155) S. Watts, above note 6, pp. 151–152.

156) This is the approach taken by the ICJ in the *Nuclear Weapons Advisory Opinion*, 8 July 1996, para. 74.

157) API, Art.1(2): "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." One could also refer to the cardinal principle of distinction, which arguably includes "passive distinction" incumbent on belligerents to distinguish their combatants from civilians and other protected categories of persons and objects.

controversial[158], it, at a minimum, inhibits the conclusion that all conduct which is not prohibited under specific IHL rules is permissible[159]. In other words, the Martens Clause negates the full application in armed conflict of the *Lotus Principle*, which is often taken to mean that all that is not prohibited under international law is permitted[160].

On the basis that there is a grey zone between prohibited perfidy and lawful ruses, This section argues that good faith, as a general principle of international law[161], could be considered by an adjudicator when attempting to delimit the rules applicable to such legally ambiguous deception. It could do so in its capacity as a "gap filling" rule, a role traditionally given to general principles of

158) Perhaps the most robust, and controversial, invocation of the Martens Clause in practice can be found in the *Kupreskić* case where the International Criminal Tribunal for the Former-Yugoslavia suggested that the Martens Clause may have the effect of pulling marginally "lawful" repeated conduct into illegality. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kupreskić* et al., Case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, para. 526. See generally, Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", *European Journal of International Law,* Vol. 11, No. 1, 2000.

159) *ICRC Commentary on API*, para. 55.

160) Permanent Court of International Justice, *The Case of the S.S. "Lotus"* (France v. Turkey), Judgment No 9, PJIC Series A No 10, 7 September 1927, p. 18: "The rules of law binding upon States therefore emanate from their own free will … [r]estrictions upon the independence of States cannot therefore be presumed".

161) Recall that general principles of public international law are a source of public international law. ICJ Statute, Art. 38(1)(c). General principles can also form the basis for rights and obligations. The International Court of Justice, *The Corfu Channel Case* (United Kingdom of Great Britain and Norther Ireland v. Albania), Judgment, ICJ Reports 1949, p. 22. The ICJ opined that Albania had an obligation to notify and warn approaching vessels of minefields based not "certain general and well-recognized principles, namely: elementary considerations of humanity …"; See International Court of Justice, *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Judgement, ICJ Reports 1962, p. 26. where the general principle of "estoppel" was implicitly relied on by the Court; See generally, International Law Commission, *Yearbook of the International Law Commission 2001*, Doc No. A/CN.4/SER.A/2001/Add.1 (Part 2), Vol. II, Part two, p. 55: "International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order".

international law[162]. Granted, there may be challenges to utilizing good faith in this way[163]. An alternative would be to rely on good faith for interpretive purposes. The VCLT stipulates that treaties shall be interpreted with reference to any applicable "relevant rules of international law" which includes general principles of law[164]. Finally, for those who would deny the applicability of good faith to the current discussion, it is hoped that the following could at least assist in discussions regarding lex ferenda.

C. Good Faith and the Doctrine of Abuse of Rights

Good faith is a multifaceted principle with various functions, some of which have been addressed throughout this paper. The current section focuses of the notion of "abuse of rights", one of the manifestations of good faith[165].

An abuse of rights occurs when a right is exercised for purposes which were not envisaged when that right was bestowed, to the detriment of another party[166]. The consequence is that first and foremost, the right being abused is nullified and the abusing party can no longer claim those rights or protections

162) In this sense, general principles first and foremost serve to prevent cases of non-liquet ("it is not clear" in Latin). Arguably, the gap filling function of general principles extends beyond the courtroom. See, International Law Commission, "Third Report on General Principles by Marcelo Vázque-Bermúdez, Special Rapporteur", UN Doc. A/CN.4/753, 18 April 2022, paras. 44–61, 72.

163) Relying on good faith for this gap filling role would be difficult if one were to subscribe to the notion espoused by the International Court of Justice that good faith itself cannot be the basis for an obligation that does not exist. See *Case Concerning Border and Transborder Armed Actions,* above note 105, para. 94; International Court of Justice, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, 11 June 1998, ICJ Reports 1998, para. 39.

164) Izabela Skomerska-Muchowska, "Some Remarks on the Role of General Principles in the Interpretation and Application of International Customary and Treaty Law", *Polish Yearbook of International Law*, 2017, pp. 264–265.

165) R. Kolb, *Bonne foi,* above note 16, p. 440.

166) B. Cheng, above note 93, p. 122.

under the law[167]. An abuse of rights may also give rise to international responsibility, as can be seen in a handful of cases that implicitly rely on the notion[168].

While acknowledging the difficulty in pinpointing a precise definition of abuse of rights, Kolb has gone furthest in attempting to clarify the concept. He has identified four aspects: 1) intent to harm;[169] 2) misuse of power (i.e. using a power/right for a purpose other than what is intended);[170] 3) arbitrary, unreasonable, or *fraudulent* conduct (emphasis added);[171] and 4) disproportionate balancing of interests[172]. There is also the question of whether there is the requirement of damages addressed under sub-part 5).

1) Intent to Harm

An intent to harm through the exercise of a right appears as an important

167) *Ibid.*; *Prosecutor v. Kupreskić* et al., above note 158, para. 522 stating that a civilian forfeits its protection under IHL if it uses those protections in an abusive way.

168) One famous example is the *Trail Smelter* Arbitration, where an abuse of rights gave rise to international responsibility for trans-border environmental damage. *Trail Smelter Arbitration* (Canada v. United States), 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards, Vol. III, p. 1965. See also, the *North Atlantic Fisheries Case* of 1910, where the sovereign rights of Great Britain to legislate were found to have been abused to the detriment of rights granted to the United States to allow its residents to fish in specified areas pursuant to a bilateral treaty between the two States. Permanent Court of Arbitration, *The North Atlantic Fisheries Case*, (Great Britain v. United States of America), Award, 7 September 1910; Permanent Court of International Justice, *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), Merits, Judgment, 25 August 1925, para. 119.

169) R. Kolb, *Bonne foi,* above note 16, p. 464. The intention to harm element is helpful in distinguishing situations that were explicitly deemed lawful by the drafters of API, such as feigning protected status under IHL to save one's own life (i.e. benign perfidy) and simple perfidy which includes an element of harm. Considering this requirement, the former would not amount to an abuse of rights.

170) R. Kolb, *Bonne foi,* above note 16, pp. 464–465.

171) *Ibid.*, pp. 468–469.

172) *Ibid.*, pp. 466–467.

element in the various conceptions of abuse of rights[173]. Applied to perfidy, emphasis would be placed on the apparent purpose of the deceptive act. Perfidy that is not intended to cause damage to military objectives, or to otherwise gain a military advantage, but rather to save one's own life, for instance, would be excluded. Accordingly, this element would distinguish "simple perfidy" from "benign perfidy".

2) Misuse of power

One of the dominant aspects of abuse of rights is the notion of "misuse of power"[174]. Each right serves to fulfil a telos of other norms and ideals[175]. The notion of abuse of rights strives to ensure that rights are utilized for those purposes[176]. Under IHL, it is redundant to say that the protections afforded to qualifying categories of persons and objects exist to provide protection. It is difficult to argue that relying on IHL protections to harm adversaries and gain a military advantage is not a misuse of power.

3) Fraudulent conduct

A third aspect of the notion of abuse of rights relates to inter alia instances where a right is exercised in a fraudulent manner[177]. This is at the heart of perfidy. For example, this facet of abuse of rights would cover cases where combatants deceive adversaries into believing that they enjoy protections afforded to other categories of persons or objects. Additionally, this aspect would be relevant to instances where an adversary is deceived into believing that they are owed certain protections, such as through falsely accepting a

173) *Ibid.*, p. 464.
174) *Ibid.*
175) *Ibid.*, p. 465.
176) *Ibid.*
177) *Ibid.*, pp. 468–469.

surrender.

4) Disproportionate Balance of Interests

This facet of abuse of rights seeks to strike a balance between the enjoyment of rights by an individual entity and the community at large. An imbalance exists when a right is invoked by the abusive party in a way that injuriously impacts a more important general interest of the community[178].

This standard could apply, as the others do, to individual cases of perfidy to determine its legality on a case-by-case basis. What is relevant are rights afforded to the author of the deception such as protection from attack when hors de combat. The balancing test would have to determine whether the way in which that right was invoked was disproportionately harmful to the broader community. The test would likely examine the importance of the right that is being abused against e.g. the likelihood that it could deprive others of said protection after it is abused.

This balancing aspect of abuse of rights could also be applied at a macro level, focusing on the freedom or right of States to deceive their adversaries in armed conflict. At this level, the balance of interest test would challenge the notion that all perfidy that is not specifically addressed in Article 37(1) would be lawful. If one were to interpret the silence of API with respect to all other forms of perfidy as a "freedom" or "right" to conduct perfidious deception short of killing, injuring, and capturing[179], said freedom would have to be exercised in a way that does not disproportionately damage the interests of the broader community. Such interests would include the maintenance of IHL's integrity which is put at risk when protections falling under that body of law

178) *Ibid.*, p. 466 citing Hersch Lauterpacht, *The Function of Law in the International Community*, Oxford, 1933, p. 286.

179) As the *Lotus Principle* would suggest.

are abused. Consequently, the freedom to conduct perfidy would not be unlimited, rather the damage that the deception would pose to the integrity of IHL would have to be considered.

Granted, determining the appropriate balance between the freedom to conduct perfidy and the damage toward the community at large is not an easy task. Scholars who criticize the prohibited perfidy for failing to fulfill its object and purpose may argue that any military advantaged gained from simple perfidy should not be understood to outweigh the risk posed to IHL as a system. Others may take an alternative view. It could be argued, for instance, that States already completed this calculus when drafting API and determined that only killing, injury, or capture is sufficiently grave to erode respect for IHL in a way that outweighs the freedom to rely on deceptive abuses of IHL. Discussion is needed on this point among States to clarify how they view the balance today.

5) The Need for Damages?

An additional question is whether damages are required as a constitutive element of an abuse of rights. If damages are required, this would seem to suggest that perfidy which fails to manifest in damage, despite there being an intention to do so, would not amount to a violation of good faith.

Kolb points out, however, damages may be less a constitutive element of an abuse of rights and more a prerequisite for an abuse of rights to constitute an internationally wrongful act[180]. Likewise, the existence of damages in the case law may merely reflect the requirements for standing in international proceedings[181]. Thus, even if jurisprudence seems to suggest that damages are

180) R. Kolb, *Bonne foi,* above note 16, p. 470.

181) *Ibid.*

part and parcel to an abuse of rights[182], whether they are a necessary element remains an open question.

V. Concluding Remarks

The purpose of this paper was to provide an overview of the laws governing deception under IHL. It tried to illustrate that the notion of perfidy is central to the relatively sparce rules that exist. Moreover, the article highlighted the challenges in applying perfidy and potential shortcomings that prevent IHL from meaningfully governing deception.

Against this backdrop, invoking the general principle of good faith to clarify the ambiguities that currently exist could be a way forward. The notion of abuse of rights provides, to an extent, an initial framework for determining the legality of deception falling short of prohibited perfidy. There are still outstanding questions relating to the abuse of rights doctrine which must be clarified, as the notion itself remains elusive. For instance, it is unclear whether an abuse of rights requires damages, a relevant consideration when determining the legality of perfidious acts which fail to manifest their intended results. At a minimum, the application of good faith as a general principle of law should suggests that States likely do not have the freedom to deceptively abuse IHL in *all* cases that do not result in death, injury, or capture as required by API.

The biggest question that arises when relying on good faith is whether it is applicable to the question at hand. As mentioned, general principles of law usually undertake a gap filling role. Here, there is no "gap" in the form of non liquet. An adjudicator may simply apply API. One could also argue that

182) As in *Trail Smelter*, *North Atlantic Fisheries, and Certain German Interests in Polish Upper Silesia*. See above note 168.

applying the principle of good faith to broaden prohibited deception beyond what is contained in API goes beyond what States consented to[183]. This is indeed a valid criticism and a significant challenge to the approach laid out above.

The degree to which one could validly apply good faith despite API is likely rests on how the current state of applicable treaty law is understood. As this article attempted to show, there is a grey area between the explicit prohibition in Article 37(1) and the similarly explicit lawfulness of ruses in Article 37(2). Complicating matters is the difficulty in determining causation between a perfidious abuse of IHL and harm. Considering this lack of clarity, this article proposes to use the principle of good faith as a starting point to determine the legality of conduct falling between prohibited perfidy and ruses.

183) Similarly, one could argue that the standard adopted in Art. 37(1) of API constitutes lex specialis and, as a consequence, the more general standards of good faith would not apply. For a nuanced account of this principle see, Nancie Prud'homme, "Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?", *Israel Law Review,* Vol. 40, 2007.