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Disguising a Military Object as a Civilian Object: Prohibited Perfidy or Permissi- ble Ruse of War?

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I. INTRODUCTION

In early 2008, the head of Hezbollah’s international operations, Imad Mughniyah, walked through the parking lot of a restaurant in a leafy Damascus suburb. As he approached a parked SUV, a team of Mossad agents

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remotely detonated a bomb that they had placed in the SUV's spare tire. Mughniyah was killed instantly.¹

Six years later, the *Washington Post* published an article on the CIA's involvement in Mughniyah's death.² In that article, Mary Ellen O'Connell claimed that the Mossad agents had committed perfidy by killing him through the use of a bomb hidden inside a civilian vehicle. "It is a killing method used by terrorists and gangsters," she argued. "It violates one of the oldest battlefield rules."³

Is O'Connell correct? Article 37(1) of the Additional Protocol I (AP I)⁴ prohibits killing, injuring or capturing an adversary by resort to perfidy, but is it perfidious to kill an adversary by disguising a military object as a civilian object? Or is such disguise simply an effective ruse of war, which Article 37(2) specifically permits?

This essay argues that making a military object appear to be a civilian object—such as disguising a bomb as an SUV's spare tire—is a permissible ruse of war, not a prohibited act of perfidy, as long as the civilian object in question does not receive special protection under international humanitarian law (IHL). It nevertheless concludes that Mughniyah's killing was, in fact, perfidious, because outside of an active combat zone a remotely-detonated explosive device disguised as a civilian object must be located in the close vicinity of a military objective, which the SUV was not.

II. CONVENTIONAL INTERNATIONAL HUMANITARIAN LAW

Conventional IHL provides little textual guidance concerning whether it is perfidious to kill⁵ by disguising a military object as a civilian object. Two international conventions address perfidy: the Hague Regulations of 1907 and AP I. Article 23 of the Hague Regulations provides that "it is especially

1. Adam Goldman & Ellen Nakashima, *CIA and Mossad Killed Senior Hezbollah Figure in Car Bombing*, WASHINGTON POST (Jan. 30, 2015), https://www.washingtonpost.com/world/national-security/cia-and-mossad-killed-senior-hezbollah-figure-in-car-bombing/2015/01/30/ebb88682-968a-11e4-8005-1924ede3e54a_story.html.

2. The CIA had helped build the bomb and a CIA team monitored Mughniyah's movements in the minutes leading up to his death.

3. Goldman & Nakashima, *supra* note 1.

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

5. Injuring and capturing by use of perfidy are also prohibited by Article 37(1) of AP I. For sake of clarity, though, this essay will refer solely to killing.

forbidden” to “kill or wound treacherously individuals belonging to the hostile nation or army,”⁶ while Article 37(1) of AP I defines perfidy as killing, injuring, or capturing an adversary by resort to act “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.” Neither convention includes a definitive list of perfidious acts, although Article 37 provides a number of examples of perfidy, such as—most relevantly for purposes of this essay—“the feigning of civilian, non-combatant status.”⁷

It is generally accepted that the modern definition of perfidy encompasses three essential elements: (1) an act inviting an adversary to believe that IHL either entitles him to protection from attack or prohibits him from engaging in a particular attack; (2) the adversary’s acceptance of that invitation by exposing himself to attack or by not attacking; and (3) intentionally betraying the adversary’s confidence with harmful consequences.⁸ According to Rogier Bartels, all three elements are satisfied when an adversary is killed by a military object disguised as a civilian object. Here is what he says regarding Mughniyah’s killing:

The bomb was not just placed on the street or in a parking lot. It was “disguised” as a civilian object (because that is what effectively is done, when a bomb is planted in or mounted on a civilian car). The car thereby became a military object, but (purposely) no measures were taken to distinguish it as being military. Using a civilian vehicle “invites the belief” that this was indeed a civilian SUV. Seeing a regular civilian car, a combatant should be able to trust (be confident) that he is not going to be attacked from that car (or that it is not “going to attack” him by way of a shaped or targeted detonation). And, of course, a civilian vehicle was used on purpose, rather than a green vehicle with IDF or US army symbols on

6. Regulations Respecting the Laws and Customs of War on Land art. 23(b), annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations].

7. AP I, *supra* note 4, art. 37(1)(c).

8. Sean Watts, *Law-of-War Perfidy*, 219 MILITARY LAW REVIEW 106, 107–8 (2014). *See also* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1500 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter AP I COMMENTARY].

it, as surely [Mughniyah] would not obviously have walked up such an army vehicle belonging to the enemy.⁹

This is a serious argument, especially given that Article 37(1) specifically deems “feigning civilian, non-combatant status” a form of perfidy. It is also one with which other scholars agree.¹⁰ Conventional IHL, however, does not unequivocally support the idea that it is *always* perfidious to kill by disguising a military object as a civilian object. In particular, such a categorical rule is impossible to reconcile with conventional IHL’s distinction between perfidy and ruses,¹¹ because Article 37(2) of API specifically deems camouflage, a common method for disguising a military object as a civilian object, a permissible ruse of war:

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.

The point of camouflage is to make a military object, such as an artillery piece or a tank, appear to be a civilian object, whether natural, such as foliage, or artificial, such as a building. Effective camouflage lulls enemy soldiers into a false sense of security from attack, because it makes them believe—wrongly—that they are surrounded solely by civilian objects even when they are within the military object’s field of fire. An attack with a camouflaged weapon is thus far more likely to be successful than an attack with an uncamouflaged one.

9. Rogier Bartels, *Killing with Military Equipment Disguised as Civilian Objects is Perfidy*, JUST SECURITY (Mar. 20, 2015), <http://justsecurity.org/21285/disguising-military-weapons-civilian-equipment-perfidy-or-be/>.

10. See, e.g., Robert Clarke, *The Club-K Anti-Ship Missile System: A Case Study in Perfidy and its Repression*, 20 HUMAN RIGHTS BRIEF 22, 23 (2012) (arguing that it would be perfidy for a unmarked merchant vessel to launch an attack with concealed weaponry, because in such a situation “the vessel could maintain both a powerful armament and the pretense that it is legally protected, thus inviting the confidence of an adversary” that it was immune from attack).

11. See, e.g., Hague Regulations, *supra* note 6, art. 24 (“Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.”); AP I, *supra* note 4, art. 37(2) (“Ruses of war are not prohibited.”).

III. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

Conventional IHL, then, indicates that at least one form of disguising a military object as a civilian object—camouflage—is a permissible ruse of war, not a prohibited act of perfidy. As this section demonstrates, customary IHL is even more tolerant of such deceptive practices. Not only have States consistently used and affirmed the legality of camouflage, they have also consistently used and affirmed the legality of four other military practices that rely on the same kind of disguise: ambush, cover, booby-traps and landmines. Subject to the limitations discussed in the next section, therefore, all five practices must be considered non-perfidious ruses of war,¹² even if—as this section also argues—that conclusion is theoretically unsatisfying.

A. Camouflage

It is not surprising that Article 37(2) deems camouflage a permissible ruse of war, given that States have routinely camouflaged their soldiers and military objects since World War II.¹³ At sea, both Allied and Axis navies went to great lengths to “help ships blend with the surrounding environment,” such as through “dazzle painting, the use of flat colors, or extending camouflage netting when moored.”¹⁴ Similarly, on land, Allied and Axis armies “went to extraordinary length to give aircraft factories and other military industrial complexes the appearance of civilian neighborhoods.”¹⁵ Watts cites the United States as an example of those efforts:

The United States fabricated complete towns, including houses, streets, and trees, atop the roofs of the Boeing Corporation’s Seattle military aircraft assembly plants. Other U.S. industrial camouflage schemes included the addition of false church spires to critical factories. In fact, U.S. industrial camouflage practice was advanced enough to inspire a manual on the topic jointly published by the Department of Agriculture and the Pratt

12. Cf. Watts, *supra* note 8, at 161 (noting that “the range of permissible ruses is in some sense tied to historic military practice and custom”).

13. GUY HARTCUP, CAMOUFLAGE: A HISTORY OF CONCEALMENT AND DECEPTION IN WAR 12 (1980).

14. Matthew G. Morris, “*Hiding Amongst a Crowd*” and the Illegality of Deceptive Lighting, 54 NAVAL LAW REVIEW 235, 251 (2007).

15. Watts, *supra* note 8, at 163.

Institute Art School. The manual recommends camouflaging roofs of factories to resemble small homes and back yards.¹⁶

The Allies also used camouflage for offensive purposes. The Australian Air Force, for example, disguised its entire base at Bankstown, New South Wales, as a small country town “for attack as well as defence, and for aggressive surprise. These roughly made large-scale buildings mimicking the vernacular architecture of Sydney concealed bomber and fighter planes ready to take to the air at short notice.”¹⁷

States have also consistently affirmed the legality of camouflaging military objects and soldiers. The most obvious example, of course, is Article 37(2) itself; AP I has been ratified by 174 States. That approval is reflected in numerous State military manuals, including those issued by Argentina, Australia, Canada, Croatia, Ecuador, France, Hungary, Indonesia, Israel, Italy, Kenya, Madagascar, Netherlands, Nigeria, South Africa, Spain, Sweden, the UK and the United States.¹⁸

It is difficult to understand why the lethal use of camouflage does not qualify as perfidy. Using a camouflaged military object to kill seems to satisfy all three of perfidy’s essential elements. By making the military object appear to be a civilian object, camouflage seems to invite the adversary to believe that the object will not attack him and that he cannot attack it—element one. The enemy soldier thus exposes himself to attack by approaching the military object and not firing on it—element two. The attacker then deliberately takes advantage of the enemy soldier’s exposure and kills him—element three.

Using camouflage to disguise a military object as a civilian object clearly satisfies the second and third elements of perfidy—what Watts helpfully calls, analogizing to contract law, the “acceptance” and “breach” requirements.¹⁹ The permissibility of camouflage must mean, therefore, that disguising a military object as a civilian object does not satisfy the first element of perfidy—“offer”²⁰—because it does not “invit[e] the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to ac-

16. *Id.* at 163–64.

17. ANN ELIAS, CAMOUFLAGE AUSTRALIA: ART, NATURE, SCIENCE AND WAR 37 (2011).

18. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1246–55 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY STUDY II].

19. Watts, *supra* note 8, at 147.

20. *Id.*

cord, protection under the rules of international law applicable in armed conflict.”

But why not? After all, the principle of distinction in Article 48 of AP I does not distinguish between civilians and civilian objects,²¹ and Article 37(1)(c) generally prohibits as perfidious “the feigning of civilian, non-combatant status.” There is no question that a soldier commits an act of perfidy if he disguises himself as a member of the civilian population—by wearing civilian clothes, for example—and kills an adversary, because that soldier has deliberately taken advantage of his claim to protection against attack under Article 48. So why doesn’t an attacker commit perfidy if he uses a tank disguised to look like part of a civilian apartment building to kill an adversary? Hasn’t the attacker deliberately taken advantage of the fact that, having been tricked into seeing only a civilian object, the enemy soldier is led to believe that IHL prohibits him from attacking the apartment building and prohibits the attacker from using the apartment building to attack him?

The answer appears to be that States simply refuse to equate feigning civilian status with feigning civilian-object status. In other words, States evidently believe that, in terms of a claim to protection under IHL, there is a difference between using camouflage to make a soldier appear to be a civilian²² and using camouflage to make a tank appear to be a civilian apartment building: only the former invites the adversary to believe that “he is entitled to, or is obliged to accord, protection” under IHL to the civilian thing in question.

This interpretation is supported by perfidy scholarship. Almost without exception, IHL scholars draw a categorical distinction between using camouflage to feign civilian status and using it to feign civilian-object status. A.P.V. Rogers, for example, specifically distinguishes

the camouflaging of a tank so that the enemy pass by unaware of its existence and are then fired on at short and lethal range (a ruse) and (b) the

21. Article 48 reads, in full: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

22. In this context, “camouflage” refers to any attempt to make something military appear to be civilian. A soldier who dresses as a civilian is thus no less “camouflaged” than the tank painted to resemble a group of bushes.

soldier who feigns wounds so that he can fire at short and lethal range on an enemy soldier who comes to his assistance (perfidy).²³

According to Rogers, “[i]n the first case the tank crew do not feign protected status at all; in the second, the soldier lures the adversary into danger by pretending to have the protected status of someone *hors de combat*.”²⁴ Solis takes a similar position, claiming that

[t]he wearing of the ubiquitous camouflage field uniform is not perfidy. Although the camouflaged soldier hopes to kill, wound, or capture the enemy, his wearing of camouflage does not involve any assurance of protection under LOAC. A soldier may attempt to become invisible in the landscape, but not in a crowd.²⁵

Even the ICRC *Commentary* on AP I distinguishes between simulating civilian status and simulating civilian-object status. As it notes with regard to Article 37,

[a] combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign a civilian status and hide amongst a crowd. This is the crux of the rule [against perfidy].²⁶

Because States are the authors of both conventional and customary international law, they are entitled to adopt a definition of perfidy that is based on the civilian/civilian-object distinction. It is important to note, though, that the distinction is theoretically unsatisfying. As the wording of Article 37 indicates, the sight of a civilian thing²⁷ invites two different beliefs in an enemy soldier: the belief that he cannot attack the civilian thing (an obligation to accord protection) and the belief that the civilian thing will not attack him (an entitlement to protection). Insisting on the civilian/civilian-object distinction makes sense in terms of the second belief—entitlement to protection against attack—because conventional IHL does not obligate attackers to distinguish themselves (their combatants and mili-

23. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 37 (2d ed. 2004).

24. *Id.*

25. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 423 (2010).

26. API COMMENTARY, *supra* note 8, ¶ 1507.

27. I am using “thing” generically to refer to both civilian objects and civilians.

tary hardware) from civilian objects; pursuant to Article 44(3) of AP I, they must only “distinguish themselves from the *civilian population* while they are engaged in an attack or in a military operation preparatory to an attack.” But what about the second belief—the obligation to accord protection from attack? The civilian/civilian object distinction is irrelevant to that belief, because Article 48 prohibits combatants from directly attacking *both* civilian objects and civilian persons. In other words, it does not matter whether the use of camouflage leads an enemy soldier to believe that he is seeing a civilian object or a civilian person; in each case, the rules of IHL obligate him not to deliberately attack that civilian thing. So it seems that deliberately inviting that belief in order to kill the enemy soldier should be perfidious *regardless* of whether the camouflage involves a military object or a combatant.

B. Ambush

Ambush is another common military practice that involves disguising a military object as a civilian object. When a group of soldiers uses a civilian object to enable them to launch a surprise attack—hiding inside of a burned-out school bus or behind a hedgerow next to a road—that civilian object becomes a military object through its use.²⁸ The success of the ambush nevertheless depends upon enemy soldiers continuing to believe that the now-military-object is still a civilian one: the adversary will not be surprised by the attack if they suspect that the school bus contains soldiers or that there are soldiers crouching behind the hedgerow.²⁹

There is little question that an ambush is a permissible ruse of war, not a prohibited act of perfidy. Ambush is a “long-established military tactic” that has been used “consistently throughout history, from ancient to mod-

28. See AP I, *supra* note 4, art. 52(2) (noting that military objects are “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”).

29. There is obviously a deep affinity between ambush and camouflage. Indeed, it is possible to describe using a camouflaged military object to attack the adversary as a kind of ambush. See, e.g., Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS § 471 (Dieter Fleck ed., 1995) (noting that “[c]amouflaging one’s own defence positions and using them for ambushes” or “setting up surprise attacks from such camouflaged positions” is not perfidy). States and scholars, however, normally treat camouflage and ambush as separate military practices.

ern warfare.”³⁰ Indeed, the Trojan horse—the “classical example of ruse,” according to Fleck³¹—is best described as an ambush. States have also consistently affirmed the legality of using ambush during armed conflict. The U.S. *Law of War Manual*, for example, states categorically that “[t]he law of war does not prohibit the use of surprise to conduct attacks, such as the use of surprise in ambushes,” because there is “no requirement that an enemy combatant must be warned before being attacked. Rather, warning requirements only apply with respect to the civilian population.”³² Numerous other military manuals specifically deem an ambush a permissible ruse of war, including those issued by Australia, Belgium, Canada, Ecuador, Israel, Netherlands, New Zealand, Nigeria, South Africa, Spain, Switzerland and the UK.³³ As with the use of camouflage, States justify the legality of ambush by insisting—unpersuasively, for the reasons discussed above—that placing soldiers in or behind civilian objects in order to surprise the adversary “is not treacherous because it does not inspire the confidence of the adversary with respect to protection under the humanitarian law of war.”³⁴

Rogier Bartels has argued that the legality of ambush does not, in fact, contradict the idea that it is perfidious to disguise a military object as a civilian object. In his view, it is critical to distinguish between ambushes in urban areas and ambushes that are “laid somewhere in the field, making use of the natural surroundings to hide behind,”³⁵ because urban ambushes are perfidious while “classic” ambushes in the field are ruses of war. Israel draws a similar natural/artificial distinction with regard to whether the use of camouflage is perfidious, taking the position that “camouflaging a combatant to appear like objects in the natural surroundings . . . is permitted (such as painting the face black, adding leaves to helmet, and so forth),

30. MICHIKO PHIFER, A HANDBOOK OF MILITARY STRATEGY AND TACTICS 146 (2012).

31. Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, 13 MILITARY LAW & THE LAW OF WAR REVIEW 269, 273 (1974).

32. OFFICE OF GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 200 (2015).

33. CUSTOMARY STUDY II, *supra* note 18, at 1246–55.

34. *Id.* at 1250 (citing the Military Manual of the Netherlands).

35. See Kevin Jon Heller, *No, Disguising Military Equipment as Civilian Objects to Help Kill Isn't Perfidy*, JUST SECURITY (Mar. 24, 2015), <http://justsecurity.org/21391/no-disguising-military-equipment-civilian-objects-kill-perfidy/>.

while camouflaging a combatant to appear like objects in the human surroundings” is not.³⁶

Neither position is tenable. Both Bartels and Israel seem to assume that there is a salient legal difference between making a military object look like an artificial object, such as an apartment building or burned-out school bus, and making a military object look like a natural object, such as a group of bushes or a hedgerow. That distinction, however, finds no support in IHL, which clearly deems the natural environment no less a civilian object than man-made things. As the ICRC notes:

State practice considers civilian areas, towns, cities, villages, residential areas, dwellings, buildings and houses and schools, civilian means of transportation, hospitals, medical establishments and medical units, historic monuments, places of worship and cultural property, and the natural environment as *prima facie* civilian objects, provided, in the final analysis, they have not become military objectives.³⁷

That conclusion is amply supported by State practice and *opinio juris*. Article 2(4) of Protocol III to the Convention on Certain Conventional Weapons (CCCW), to which 112 States are party, provides that “[i]t is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.” Similarly, Australia’s law of armed conflict manual states categorically that “[t]he natural environment is not a legitimate object of attack. Destruction of the environment, not justified by military necessity, is punishable as a violation of international law.”³⁸ Other military manuals include similar statements, including those issued by Belgium and Italy, and a number of States treat the environment as a civilian object in their domestic war crimes legislation, including Burundi, Canada,

36. CUSTOMARY STUDY II, *supra* note 18, at 1249 (citing the Israeli Manual on the Laws of War). *Cf.* Watts, *supra* note 8, at 166–67 (stating that “the least objectionable uses of camouflage involve matching an object or person’s appearance with a natural environment”).

37. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 34 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY STUDY I].

38. COMMANDANT, AUSTRALIAN DEFENCE FORCE WARFARE CENTER, AFDP 37, LAW OF ARMED CONFLICT 5-7 (1996) [hereinafter AUSTRALIAN DEFENCE FORCE MANUAL].

Congo, Georgia, Germany, the Netherlands, New Zealand, Nicaragua, Spain and the UK.³⁹

Because the natural environment is no less a civilian object than the artificial environment, it cannot be argued that urban ambushes are acts of perfidy while ambushes in the field are permissible ruses of war. It is simply inconsistent with IHL's principle of distinction to argue that launching an ambush from inside a burned-out school bus invites the adversary to believe "that he is entitled to, or is obliged to accord, protection" under IHL, but launching an ambush from behind a hedgerow does not. Either both ambushes invite that confidence or neither does. And even Bartels acknowledges—rightly, given the above analysis—that "classic" ambushes in the field are legitimate.

In the context of ambush, then, the perfidy/ruse distinction turns not on whether the military object is disguised as a natural or artificial object, but on whether the attacker is simulating civilian status or civilian-object status. As with camouflage, the latter is a permissible ruse of war, while the former is a prohibited act of perfidy:

While combatants take up a defensive position they must carry arms openly when intending to open fire. This does not exclude the possibility of an ambush, but an ambush is subject to the same conditions as those which apply to uniformed troops. It is the natural or artificial environment which should camouflage the combatant engaged in the ambush, and not his civilian clothing, and he should carry his arms in the same way as a soldier of the regular army would in the same situation.⁴⁰

In other words, although soldiers can ambush the adversary by hiding inside a burned-out school bus or behind a hedgerow, they cannot ambush the adversary by dressing as civilians and hiding within a civilian population.

C. Cover

Cover is any "natural or manmade feature that protects an individual, vehicle, or unit from enemy observation, direct or indirect fire, and/or air at-

39. CUSTOMARY STUDY II, *supra* note 18, at 846–48.

40. API COMMENTARY, *supra* note 8, ¶ 1708.

tack.”⁴¹ Similar to ambush, taking cover provides a significant advantage⁴² to an attacking⁴³ soldier by disguising the fact that a civilian object—a window, a low wall, a tree, a ravine—has become a military object through its use. Because adversaries do not realize that the object used as cover conceals a soldier, they have no reason to protect themselves against attack.

If it is inherently perfidious to disguise a military object as a civilian object, any offensive use of cover would qualify as an act of perfidy. Yet soldiers have not only always used cover for offensive purposes during combat, the invention of projectile weapons—such as magazine rifles, machine guns and artillery—has made cover a practical necessity in modern conflict.⁴⁴

It is not surprising, then, that States have consistently affirmed the legality of using cover for offensive purposes. The UK military manual, for example, specifically deems “surprises” permissible ruses of war.⁴⁵ Other military manuals agree, including those issued by Belgium, Canada, New Zealand and the United States.⁴⁶ The only restriction on the use of cover involves the same civilian/civilian-object distinction discussed in the context of camouflage and ambush: it is perfidious to “shoot behind the cover of a wounded man” or any other non-combatant.⁴⁷

Once again, however, the customary position is theoretically problematic. After all, the effectiveness of cover depends on the fact that the adversary sees only a civilian object and thus assumes that IHL both prohibits him from directly attacking the object and prohibits his attacker from using the object to attack him. So why doesn’t an attacker who deliberately takes advantage of that belief in order to kill the adversary commit an act of perfidy?

41. INTERNATIONAL ENCYCLOPEDIA OF MILITARY HISTORY 342 (James C. Bradford ed., 2004).

42. *Id.*

43. Cover is obviously useful both for defense and offense. Headquarters, Department of the Army, FM 21-75, Combat Skills of the Soldier 1-2 (1984).

44. INTERNATIONAL ENCYCLOPEDIA OF MILITARY HISTORY, *supra* note 41, at 342.

45. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.17.2 (2004). “Surprise” is not the same as “ambush,” because the UK manual specifically distinguishes between the two.

46. CUSTOMARY STUDY II, *supra* note 18, at 1246–55. That may not seem like a particularly significant number of States. I would suggest, however, that most States do not specifically mention the use of cover because it would never occur to them that it could be perfidious for a soldier to shoot at the enemy from behind a pile of rubble in the middle of a firefight.

47. Fleck, *supra* note 31, at 284.

The centrality of cover in modern conflict suggests that States simply do not believe that the sight of a civilian object entitles an enemy soldier to assume that it will not be used to attack him. That belief seems justified. As Fleck explains, the practice of modern warfare has long since rendered any such assumption of safety from attack obsolete:

The traditional rule that hostilities must be confined to open combat . . . is still valid in principle, but is being increasingly eroded—if not completely thwarted—by the practice of employing sabotage squads and task forces in modern guerilla warfare. To combatants in modern armed conflicts, a complete lack of suspicion would be tantamount to impardonable recklessness. A soldier may claim protection on account of his good faith only in those exceptional cases where belligerent acts are prohibited in view of a special relationship between him and the adversary.⁴⁸

This argument, however, proves too little when an attacker uses cover to kill an enemy soldier. The attacker may not have invited the enemy soldier to believe that he was protected against attack. But by disguising the fact that the civilian object was a military object (through use), the attacker *did* invite the enemy soldier to believe that Article 48 of AP I obligated him not to attack the object. And the attacker then deliberately used the enemy soldier's acceptance of that invitation to kill the enemy soldier. The attacker's use of cover thus satisfies all three elements of perfidy.

As with camouflage, then, there is simply no satisfying theoretical explanation for why the lethal use of cover should not be considered perfidious. That use qualifies as a ruse of war for one reason, and for one reason only: States have insisted that using cover for offensive purposes is a legitimate military practice.

D. Booby-Traps

Of all the military practices considered in this article, the use of a booby-trap most directly involves disguising a military object as a civilian object. A booby-trap is a “device or material” that is “designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an ap-

48. *Id.* at 278.

parently safe act.”⁴⁹ Almost any object can be turned into a booby-trap, from personal items such as flashlights and framed photos to furniture, floorboards and doorways.⁵⁰ Booby-traps can be used for both offensive (causing casualties) and defensive (slowing movement) purposes,⁵¹ and are most effective as antipersonnel devices.⁵²

None of the core texts of conventional IHL—the Hague Regulations, the Geneva Conventions, or the Additional Protocols—specifically prohibit the use of booby traps.⁵³ Nor does the 1996 Amended Protocol II to the CCCW, which has 102 States parties; indeed, the Amended Protocol specifically permits State parties to use them, subject to certain limitations.⁵⁴ One important constraint concerns the nature of the booby-trap itself: they cannot be attached to or associated with “internationally recognized protective emblems, signs or signals” or objects such as “sick, wounded or dead persons,” children’s toys and other objects used for “the feeding, health, hygiene, clothing or education of children,” food and drink, and religious artifacts.⁵⁵ A second important limitation concerns how otherwise-lawful booby-traps can be used. If they are designated for a civilian-occupied area “in which combat between ground forces is not taking place or does not appear to be imminent,” they must either “be placed on or in the close vicinity of a military objective” or measures must be taken “to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.”⁵⁶

49. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as Amended on 3 May 1996) art. 2(4), May 3, 1996, 2048 U.N.T.S. 93 [hereinafter Amended Protocol II].

50. *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 50 (1973) (mentioning examples) [hereinafter UNNECESSARY SUFFERING REPORT].

51. Chief of the Defence Staff (Canada), B-GL-320-010/FP-002, Mines and Booby-Traps, Part 1, All Arms § 2-5-1 (1997).

52. UNNECESSARY SUFFERING REPORT, *supra* note 50, at 50.

53. *See, e.g.*, API COMMENTARY, *supra* note 8, ¶ 1519.

54. *See* Amended Protocol II, *supra* note 49, art. 3(2) (noting that States are responsible for the booby-traps they use). *See also* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 17 (2010) (noting that booby-traps “were [not] declared by the States Parties/drafters [of the CCCW] to cause unnecessary suffering or to be illegal as such. . . . [They] were regulated (and, in some cases, certain types prohibited) in order to provide increased protection for the civilian population”).

55. Amended Protocol II, *supra* note 49, art. 7(1).

56. *Id.*, art. 7(3).

Customary IHL also permits States to use booby-traps in certain situations.⁵⁷ As the ICRC has noted:

Both treaty practice and other State practice support the premise that booby-traps are prohibited if, by their nature or employment, their use violates the legal protection accorded to a protected person or object by another customary rule of international humanitarian law. . . . The list of booby-traps prohibited by Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons is found in the military manuals and legislation of some States party to these treaties. Other military manuals are more general in their description and stress that booby-traps associated with objects in normal civilian daily use are prohibited, and that booby-traps must not be used in association with protected persons, protected objects (such as medical supplies, gravesites and cultural or religious property) or internationally recognised protective emblems or signs (such as the red cross and red crescent).⁵⁸

States whose military manuals consider the careful use of booby-traps to be lawful include Argentina, Australia, Belgium, Cameroon, Canada, Cote d'Ivoire, Ecuador, Germany, Israel, Kenya, Netherlands, New Zealand, Russia, Spain, Ukraine, the UK and the United States.⁵⁹

The lawfulness of using booby-traps in certain situations is inconsistent with the idea that it is inherently perfidious to disguise a military object as a civilian object. At most we can say that *some specific* booby-traps are perfidious—namely, those that violate Amended Protocol II. All others are permissible ruses of war. Indeed, the ICRC *Commentary* on AP I adopts precisely that distinction with regard to Article 37(2). In the view of its authors, the CCCW, “which has taken up virtually all the proposals submitted during the Diplomatic Conference, provides for an interpretation of prohibited ruses within the meaning of this paragraph, in the field of delayed-action weapons.”⁶⁰

57. See, e.g., SOLIS, *supra* note 25, at 424 (“With restrictions, the use of booby-traps was lawful in 1939, and their use remains lawful today.”).

58. CUSTOMARY STUDY I, *supra* note 37, at 278–79.

59. CUSTOMARY STUDY II, *supra* note 18, at 1246–55.

60. AP I COMMENTARY, *supra* note 8, ¶ 1519. Cf. Switzerland’s Basic Military Manual (“It is forbidden to use booby-traps wherever they can be expected directly to endanger the physical integrity and the lives of civilians. They must not be set up in a perfidious manner, that is be attached or connected in some way to protective signs or signals, protected persons, animals, food or protected installations.”), quoted in CUSTOMARY STUDY II, *supra* note 18, at 1815.

It is worth noting that the civilian/civilian-object distinction is also critical in the context of booby-traps. As Kelly points out, although using a booby-trap that simulates a civilian object can be a permissible ruse of war, it is inherently perfidious for an attacker to place a booby-trap while disguised as a civilian:

Another factor in partisan warfare that raises questions in regard to assassination is the use of booby-traps, set for a particular person. For example, the doorbell to a district military or political leader's house may be wired to explosives, or his vehicle may be fixed to explode when he turns the ignition key. Using the traditional approach it would seem to follow that if the trap were set by a man in uniform it would not be an assassination, but that if set by a partisan it would be. This would be so regardless of the fact that the individual who did the killing is miles away when the bomb actually explodes.⁶¹

The ICRC *Commentary* to AP I takes the same position.⁶²

E. Landmines

A mine as “a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.”⁶³ Placing a landmine involves disguising a military object as a civilian object. The military object, the landmine, is hidden beneath the civilian object, whether artificial (such as a road) or natural (such as a field), thereby creating the illusion that the mined area contains only civilian objects. Enemy soldiers are thus lulled into a false sense of security from attack—a sense that is dispelled only when one of them steps onto the landmine and is killed.

As with booby-traps, conventional IHL carefully regulates but does not categorically prohibit the use of landmines. Two conventions are particularly important. The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their De-

61. Joseph B. Kelly, *Assassination in Wartime*, 30 *MILITARY LAW REVIEW* 101, 106–7 (1965).

62. AP I COMMENTARY, *supra* note 8, ¶ 1713 (noting, with regard to “booby-traps which are . . . used by regular forces,” that “it is only by wearing a distinguishing sign when placing these devices in position, that these combatants can be distinguished from the civilian population”).

63. Amended Protocol II, *supra* note 49, art. 2(1).

struction (Ottawa Convention),⁶⁴ which has 162 States parties, prohibits States from using landmines against military personnel; they can only use them to target military vehicles.⁶⁵ States that have not ratified the Ottawa Convention, but which have ratified the 1996 Amended Protocol II to the CCCW, are entitled to use landmines against both personnel and vehicles,⁶⁶ but they must design them to be detectable⁶⁷ and to avoid causing superfluous injury or unnecessary suffering,⁶⁸ must avoid directing them at the civilian population,⁶⁹ must avoid placing them indiscriminately⁷⁰ and must take all feasible precautions to prevent them from harming civilians.⁷¹

Customary IHL also permits States to use landmines, as long as they take “particular care . . . to minimise their indiscriminate effects.”⁷² Indeed, according to the ICRC, customary IHL does not even prohibit States from using landmines against military personnel, because “[a]bout a dozen non-party States have used anti-personnel mines in recent conflicts” and “several States, including China, Finland, India, South Korea, Pakistan, Russia and the United States, have not ratified the Ottawa Convention and maintain that they are still entitled to use anti-personnel landmines.”⁷³

The lawfulness of using landmines in a certain way, like the lawfulness of using booby-traps, further undermines the idea that it is inherently perfidious to disguise a military object as a civilian object. Some uses of landmines are likely perfidious, namely, those that violate Amended Protocol II. All other uses, however, must be considered permissible ruses of war.⁷⁴

64. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 17, 1997, 2056 U.N.T.S. 211.

65. *Id.*, art. 1(a).

66. Amended Protocol II, *supra* note 49, art. 3(2) (noting that States are responsible for the mines they use). *See also* OPERATIONAL LAW HANDBOOK, *supra* note 54, at 17.

67. Amended Protocol II, *supra* note 49, art. 4.

68. *Id.*, art. 3(3).

69. *Id.*, art. 3(7).

70. *Id.*, art. 3(8).

71. *Id.*, art. 3(10).

72. CUSTOMARY STUDY I, *supra* note 37, at 280 (Rule 81). *See also* CUSTOMARY STUDY II, *supra* note 18, at 1828–29 (noting that the military manuals issued by Canada, Israel, Russia and Spain do not absolutely prohibit use of landmines).

73. CUSTOMARY STUDY I, *supra* note 37, at 282.

74. *See* AP I COMMENTARY, *supra* note 8, ¶ 1519.

IV. LIMITATIONS ON THE GENERAL RULE

As the previous section indicates, there is 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. On the contrary, conventional and (particularly) customary IHL deem five military practices that involve such disguise permissible ruses of war, at least in some situations: camouflage, ambush, cover, booby-traps and landmines.

That does not mean, of course, that it is *never* perfidious to disguise a military object as a civilian object. One requirement for such disguise to qualify as a ruse of war is particularly obvious, given that Article 37(1)(c) specifically considers “the feigning of civilian, non-combatant status” an act of perfidy. Thus, the attacker who kills by using a military object disguised as a civilian object must still respect the principle of distinction with regard to the civilian population. That requirement takes two forms. For practices like camouflage, ambush and cover, the principle of distinction requires the attacker to ensure that he avoids using camouflage to simulate civilian status. In other words, although it is a permissible ruse of war to make a tank look like a building, to set up an ambush behind a hedgerow or to take cover behind a burned-out school bus, it is a prohibited act of perfidy to blend into a civilian population by wearing civilian clothes, to set up an ambush in a crowded school or to take cover behind a combatant who is *hors de combat*. For practices like booby-traps and landmines, by contrast, the principle of distinction requires the attacker to wear a uniform or other fixed and distinctive sign while placing the delayed-action weapon.

Moreover, even if an attacker complies with the principle of distinction with regard to persons, his right to disguise a military object as a civilian object is not unlimited. On the contrary, two other important restrictions apply: (1) a military object must never be disguised as a civilian object that receives special protection under IHL; and (2) outside of a zone of active or imminent combat, booby-traps and similar objects—objects that require physical placement—must be located in the close vicinity of a legitimate military objective.

A. Specially-Protected Objects

It is inherently perfidious to kill by making a military object—a thing, a vehicle, a building, etc.—appear to be a civilian object that receives special protection under IHL. According to the ICRC, such objects include ob-

jects displaying the Red Cross or Red Crescent; objects using United Nations emblems and signs; objects using other protected emblems, such as those identifying cultural property, civil defense, works containing dangerous forces, hospital and safety zones, and POW camps; and objects using the emblems of neutral States.⁷⁵ Similarly, the CCCW specially protects dead bodies, gravesites, medical facilities, children's toys and care equipment, food and drink, kitchen utensils, animals, and harmless portable objects.⁷⁶ In terms of the practices discussed in this article, therefore, acts of perfidy would include camouflaging a tank to blend into a church; setting up an ambush inside a hospital; taking cover behind a Red Cross ambulance; booby-trapping a stuffed animal; or employing landmines in a demilitarized zone.

B. *Combat Zones*

It is also possible to argue that outside of a zone of active or imminent combat, the lethal use of booby-traps is a permissible ruse of war only if the booby-traps are placed in the close vicinity of a legitimate military objective. As noted above, the use of booby-traps is significantly restricted "in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent." In such situations, it is not enough for a booby-trap to comply with Article 7(1) of the CCCW's Amended Protocol II. It must also either "be placed on or in the close vicinity of a military objective" or "measures [must be] taken to protect civilians from their effects, for example, [by] the posting of warning sentries, the issuing of warnings or the provision of fences."⁷⁷ The second option is obviously useless for an attacker who wants to use booby-traps for offensive purposes. In practice, then, that attacker will have to place the booby-trap in the vicinity of a legitimate military objective instead.

To be sure, Amended Protocol II is silent concerning whether violating the Protocol should be considered an act of perfidy. The ICRC *Commentary* to AP I, however, suggests that, in fact, it is perfidious to violate *any* of Amended Protocol II's restrictions on the use of booby-traps. With regard to what is now Article 7(1), for example, the *Commentary* explicitly states that "[t]o associate booby-traps at any category of persons or objects pro-

75. See CUSTOMARY STUDY I, *supra* note 37, at 224.

76. Amended Protocol II, *supra* note 49, art. 7.

77. *Id.*, art. 7(3).

tected by the Protocol would be to infringe [Article 37(1) of AP I], by inviting the adversary's confidence as regards the protection provided for in the Protocol, with the intention of killing or wounding him."⁷⁸ But the *Commentary* does not limit its discussion of perfidy to Article 7(1); it also says that, "moreover," because the drafters of the CCCW took up "virtually all the proposals submitted during the Diplomatic Conference" that led to AP I, Amended Protocol II "provides for an interpretation of prohibited ruses within the meaning of this paragraph, in the field of delayed-action weapons"⁷⁹—a much more categorical statement that would seem to apply to violations of Article 7(3), as well.

This interpretation of the relationship between Amended Protocol II and perfidy, it is worth noting, makes conceptual sense. In a zone of active or at least imminent combat, no soldier can reasonably assume that the enemy will place its booby-traps only in the "close vicinity" of military objectives; after all, as noted earlier, it is legitimate to use booby-traps for offensive purposes. Outside of such zones, by contrast, the situation is very different: the drafters of Amended Protocol II could easily have believed that soldiers, though not insulated from attack, were at least entitled to assume that the enemy would not place booby-traps in purely civilian areas. After all, doing so would dramatically increase the likelihood of innocent civilians being killed.⁸⁰

Is the "close vicinity" requirement a practically important limitation on the lethal use of military objects disguised as civilian objects? In a tradition-

78. API COMMENTARY, *supra* note 8, ¶ 1519

79. *Id.*

80. This argument raises an important question: wouldn't the same considerations apply to any military practice that involves disguising a military object as a civilian object? If soldiers outside an active or imminent combat zone are entitled to assume that booby-traps will not be placed in purely civilian areas, aren't they equally entitled to make the same assumption concerning, for example, ambushes? Must they always assume they can be ambushed anywhere at any time, even when they are not in a zone of active or imminent combat and are not near a military objective? Two responses are possible. First, because they are human directed, ambushes are far less likely to result in civilian casualties than booby-traps—and that is true even when the ambushes are launched from purely civilian areas outside a zone of active or imminent combat. Second, theory aside, States have simply not limited the use of ambush in the same way as they have limited the use of booby-traps. There is no ambush Protocol. So as much as we might be troubled by "peacetime" ambushes in purely civilian areas, it is difficult to conclude that States consider them (or the offensive use of camouflage) perfidious. As Watts has noted, when it comes to perfidy, "an approach that abandons or ignores States' deliberate legislative work does not offer the law or its beneficiaries any real favors." Watts, *supra* note 8, at 168.

al territory-based conflict, probably not: there will likely be a number of military objectives outside of active and imminent combat zones that can be booby-trapped, especially given that land constitutes a military objective insofar as its “total or partial destruction, capture or neutralization in the circumstances governing at the time offers a definite military advantage.”⁸¹ The situation might be quite different, though, in modern asymmetric conflicts between States and transnational terrorist groups. In many such conflicts, the terrorists will have little desire to control territory—and when they do desire to control it, that territory will often qualify as a zone of active or imminent combat. An attacker may thus have few military objectives outside of combat zones that can be effectively booby-trapped. Mughniyah’s killing is a case in point: it is difficult to see how the civilian SUV had become a military objective through its “nature, location, purpose or use.” To the contrary, the SUV was used simply because it provided a convenient location for a remotely-detonated explosive device.

V. CONCLUSION

Sean Watts has noted that despite more than a century of effort, “a coherent account of law-of-war perfidy remains elusive.”⁸² Whether it is perfidious to kill an adversary by disguising a military object as a civilian object is a case in point. The text of Article 37(1) of AP I suggests that such killings are in fact perfidious, because they all take advantage of a well-trained adversary’s reluctance to deliberately attack a civilian object. But Article 37(2) specifically deems camouflage—a common way to make a military object appear to be a civilian object—a permissible ruse of war, not a prohibited act of perfidy. Moreover, it is clear that, as a matter of customary international law, at least four other forms of civilian disguise are permissible ruses of war: ambush, cover, booby-traps and landmines. As a result, with the exception of civilian objects that are specially protected under IHL, it is impossible to argue that either conventional or customary IHL categorically prohibits using a military object disguised as a civilian object to kill.

All that said, it does indeed appear that Mossad committed perfidy by using a remotely-detonated explosive to kill Mughniyah. As discussed above, customary IHL likely deems violations of the CCCW’s Amended

81. CUSTOMARY STUDY II, *supra* note 18, at 32. An example is an area “through which an adversary is likely to move its forces.” *Id.* at 224–25 (citing the AUSTRALIAN DEFENCE FORCE MANUAL, *supra* note 38, at 5-5).

82. Watts, *supra* note 8, at 161.

Protocol II to be perfidious. The Mossad operation violated Amended Protocol II: Article 7(3) applies to remotely-detonated explosive devices as well as to booby-traps;⁸³ Mughniyah was killed in a Damascus suburb far away from any zone of active or imminent combat involving Hezbollah; and the explosive device was placed inside a civilian SUV, not in the “close vicinity” of a military objective. Mughniyah’s killing, therefore, was perfidious.

83. Article 7 of Amended Protocol II applies to “other devices,” as well as to booby-traps, and Article 2(5) defines “other devices” as “manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.”