ARTICLES

The Case for Attempted Perfidy: An "Attempt" to Enhance Deterrent Value

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I. INTRODUCTION

Mitigating the risk of deliberate attacks against civilians and other individuals protected by international humanitarian law is among the most fundamental objectives of international legal regulation of armed conflicts. This risk mitigation results from a mosaic of intersecting and complementary rules and principles. First among them, however, is the principle of distinction: the obligation to distinguish between lawful objects of attack and all other persons, places, and things. And central to this principle is the categorical prohibition against deliberately attacking civilians and other protected individuals (unless and for such time as they directly participate in hostilities).

Facilitating this protection necessitates combatants, and other members of organized armed groups, distinguish *themselves* from the civilian population– at a bare minimum when engaged in hostilities. The failure to do so inevitably increases the risk that civilians will be mistaken for the enemy and attacked. It is for this reason that, historically, the international legal privilege to participate in hostilities was dependent on more than simply fighting on behalf of a state; it required the belligerent operative to respect the laws and customs of war, operate under responsible command, and, most importantly here, wear a fixed distinctive symbol recognizable at a distance and carry arms openly. These requirements made it easier for an enemy to identify lawful targets. The tradeoff for assuming this increased risk of being attacked is what is known as combatant immunity. Derived from lawful combatant privilege, combatant immunity is an international law-based protection against being subjected to post-capture criminal sanction for pre-capture conduct that complied with the laws and customs of war.

But this incentive to distinguish oneself from civilians and other protected persons is insufficient alone to meaningfully contribute to the protective effect of distinction. First, it fails to address the non-international armed conflict context, as members of organized non-state armed groups have no claim to combatant immunity even if they comply with these conditions. Second, some experts assert that

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combatant immunity applies to members of state armed forces *even if* they fail to comply with these conditions. In both situations, the international humanitarian law violation of perfidy, which is generally synonymous with the war crime of treachery, is often considered a sufficient alternative to penalize feigning protected status, thereby deterring conduct that compromises the efficacy of distinction by incentivizing belligerent operatives to distinguish themselves from the civilian population.

While it is true that this war crime complements the incentive/deterrent equation inherent in the notion of combatant immunity, it is also insufficient. This is because of the *result* nature of perfidy. This complementary effect, however, can be enhanced by placing greater emphasis on the impermissibility of perfidious/treacherous *conduct*, which in turn can be achieved by recognizing an inchoate form of this violation of humanitarian law as unlawful.

II. BACKGROUND

No soldier would hope to become a prisoner of war for the simple reason that no soldier would ever want to be held in captivity by her enemy.[1] However, in the event of capture, being accorded prisoner of war status is actually beneficial, as it provides the captured soldier with a comprehensive "package" of legal rights and privileges.[2] This protective package is intended to ensure that a captive's deprivation of liberty is both non-punitive and as tolerable as possible under the circumstances.[3] These rights and privileges are provided by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention),[4] as supplemented by the 1977 Protocol I Additional to the Four Geneva Conventions of 1949 (Additional Protocol I).[5]

Examples of the benefits provided by this treaty range from the protection against any form of coercion to the obligation to repatriate the prisoner of war upon the termination of hostilities.[6] However, one of the most important "privileges" associated with prisoner of war status is combatant immunity, derived from what is known as "lawful combatant privilege."[7] This immunity protects the

1. *See* Sam Johnson, *I Spent Seven Years as a Vietnam POW. The 'Hanoi Hilton' is no Trump Hotel*, POLITICO (July 21, 2015), https://perma.cc/LP7Q-R9KA (discussing that United States soldiers taken captive during the Vietnam War suffering torturing while imprisoned).

2. ANDREW CLAPHAM, PAEOLA GAETA & MARCO SASSOLI, THE 1949 GENEVA CONVENTIONS: A COMMENTARY 910 (1st ed. 2015) (containing an excerpt from Sean Watts proposing that qualification for prisoner of war status, treatment standards, and immunity under the combatant privilege be decoupled).

3. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW Convention], https://perma.cc/D22Y-HFY2.

4. *See id.* at arts. 13 & 17.

5. *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

6. *See* GPW Convention, *supra* note 3, at arts. 13–16.

7. *See* Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RSRV. J. INT'L L. 227, 228 (2002) (outlining the privileges afforded to combatants under the Geneva Convention when captured by hostile forces). *But see* U.S. DEP'T OF DEF., LAW OF WAR MANUAL para. 4.1.2 (2015)

prisoner of war from being subjected to criminal sanction for pre-capture conduct that complied with the laws and customs of war, even if that conduct violated the domestic laws of the detaining power. It is an immunity derived from the international legal "privilege" to participate in hostilities.[8] Accordingly, once captured, the detaining power is prohibited from prosecuting the prisoner of war for her pre-capture conduct that inflicted death, injury, or other harm to the detaining power's forces or resources.[9]

The Third Geneva Convention does not expressly provide for combatant immunity.[10] Still, it does acknowledge it implicitly by operation of a combination of articles, most notably Articles 85, 87, and 99.[11] Article 87 states, "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts."[12] As States generally would not prosecute and punish one of its service members for conduct directed against an enemy that complied with international humanitarian law, prosecuting and punishing a prisoner of war for analogous conduct is prohibited.[13]

Article 99, in turn, provides, among other things, that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."[14] Because those members of the armed forces and associated armed groups qualifying for prisoner of war status are considered combatants, and thereby vested with the international legal privilege to participate in hostilities, it would violate Article 99 to prosecute a prisoner of war with this "privilege" for acts or omissions that complied with international humanitarian law.[15] This conclusion is reinforced by Article 85 of the Convention, which addresses punishment for

(revised Dec. 16) [hereinafter DoD LOWM] (noting persons who qualify for prisoner of war status under GPW Convention Articles 4A(4) and (5) may not be entitled to combatant immunity).

8. Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L. J. 1, 7–8 (2011) (explaining the rights given to combatants under the law of war, which embodies broader international law).

9. *See id*.; Protocol I, *supra* note 5, at art. 45 ("A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war. . .").

10. *See generally* GPW Convention, *supra* note 3, at arts. 85, 87, 99.

11. *See id*.

12. *See* GPW Convention, *supra* note 3, at art. 87.

13. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 2, ch. IX, r. 916(c) (2019) [hereinafter MCM]. The United States has codified its combatant immunity to protect service members operating within the bounds of international law. *Id*. In the Manual for Courts-Martial, there is a justification defense for duties "imposed by statute, regulation, or order. For example, the use of force by a law enforcement officer when reasonably necessary in the proper execution of a lawful apprehension is justified because the duty to apprehend is imposed by lawful authority. *Also, killing an enemy combatant in battle is justified*." *Id*.

14. *See* GPW Convention, *supra* note 3, at art. 99.

15. *Id*.

pre-capture offenses.[16] As noted in the 2020 International Committee of the Red Cross (ICRC) Commentary:

> The Detaining Power's authority to prosecute prisoners of war for acts committed prior to capture is also circumscribed by the so-called 'combatant's immunity' or 'combatant's privilege'. Prisoners of war who are combatants may not be prosecuted for lawful acts of war committed in the course of an armed conflict, even if their acts constitute a criminal offence under the domestic laws of the Detaining Power. Acts shielded by combatant immunity, such as the injuring or killing of enemy combatants and the destruction of enemy property, constitute criminal offences in most, if not all, domestic legal systems. Yet, by virtue of this immunity, combatants may not be prosecuted for such lawful acts of war upon capture by the adversary. Prisoners of war having committed unlawful acts that constitute international crimes, such as war crimes, on the other hand, remain subject to prosecution.[17]

But it would be a mistake to assume that these provisions of the Third Convention *establish* combatant immunity. Instead, this immunity is deeply rooted in customary international law and existed long before treaties established the prisoner-of-war qualification.[18] Captured members of armed forces fighting on behalf of States were historically subject to detention to prevent them from returning to hostilities, but not to punitive sanction, so long as their pre-capture conduct complied with the laws and customs of war.[19] It was the combination of their agency relationship to the State and their compliance with these international "rules of war" that vested them with "combatant's privilege" and its accordant international legal immunity.[20] While the Third Convention implicitly acknowledges that prisoners of war benefit from this immunity, which was subsequently affirmed explicitly in Additional Protocol I, neither treaty created this immunity.[21]

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16. *Id*. at art. 85.

17. *See* INT'L COMM. OF THE RED CROSS, *Commentary of 2020*, *reviewing* Geneva Convention Relative to the Treatment of Prisoners of War Commentary, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *2020 Commentary*], https://perma.cc/D22Y-HFY2.

18. G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 174–75 (1971). The idea of combatant immunity traces its roots to the medieval law of chivalry and the privileges that stemmed from open combat. *Id*. Thus, combat immunity formed from "knights, men-at-arms and mercenaries 'avowed' by a prince" and only later changed to "armed forces in the service of a territorial, secular state." *Id*. at 175.

19. *See* George C. Harris, *Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. L.A. INT'L & COMP. L. REV. 31, 40 (2003); *see also* Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003) ("[D]etention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies.").

20. Draper, *supra* note 18, at 175 ("The introduction of standing armies in the seventeenth, and the raising of conscript forces in the late eighteenth and early nineteenth centuries, did not extend, as a matter of the law of war, the classes of persons who had the right to participate in acts of warfare. If anything, the distinction between those who had the right to fight and those who had not became even sharper.").

21. Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NATL. SEC. L. & POL'Y 257, 273 (2008).

Combatant immunity is based on an interrelationship between customary international law, prisoner of war qualification and the definition of "combatant."[22] While the term "combatant" may carry pragmatic meaning as any "fighting" member of an organized, armed group, its legal meaning is more restrictive.[23] For many States, Article 44 of Additional Protocol I expressly defines combatant.[24] States not bound by the Additional Protocol I look to categories of prisoner of war qualification in the Third Convention as indicative of combatant qualification.[25] As reflected in the Additional Protocol I, combatant qualification is the basis for combatant immunity,[26] as the treaty expressly provides that those who meet the combatant definition are vested with international legal privilege to directly participate in hostilities. In other words, if you qualify as a combatant—which includes all members of the armed forces and associated forces who qualify as prisoners of war pursuant to the Third Convention—you are protected by combatant immunity.[27]

Article 4.A of the Third Convention provides the universally adopted criteria for prisoner of war qualification and, by implication, the protection of combatant immunity.[28] What is not universal, however, is the understanding of what satisfies the Article's qualification requirements. Article 4.A.1 provides that members of the armed forces qualify as prisoners of war.[29] But there is disagreement over whether this indicates a *per se* qualification for any captive who is a member of the enemy armed forces.[30] More specifically, there is debate whether members of armed forces are required to comply with the conditions for prisoner of war qualification enumerated in Article 4.A.2, which discusses when members of volunteer

22. *See* 1 CUSTOMARY INT'L HUMANITARIAN LAW 11 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY STUDY].

23. *See* Protocol I, *supra* note 5, at art. 44.

24. *Id*.

25. *Compare id*. ("Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war."), *with* DoD LOWM (Dec. 2016), *supra* note 7, at para. 4.5 (stating that members of the armed forces receive combatant status by virtue of their membership and referencing this statement to GPW art. 4A(1), which defines "prisoners of war" within the Geneva Convention).

26. Protocol I, *supra* note 5, at art. 44.

27. *Id*. at art. 43.

28. GPW Convention, *supra* note 3, at art. 4(A).

29. *Id*. at 4(A)(1).

30. *See* Major R. L. Braun, *Guerrilla Warfare Under International Law*, 1952 JAG J. 3, 7 (1952). The debate over prisoner of war qualifications stems all the way back to the 1949 convention. *Id*. While debating the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, several delegates though it was inappropriate to grant guerrillas in occupied territory the same protection entitled to armed forces. *Id*. This problem persists today. *See* Major Jim Sleesman, *Conducting Unconventional Warfare in Compliance with the Law of Armed Conflict*, 224 MIL. L. REV. 1101, 1127 (2016). During the armed conflict between the United States and ISIS, Kurdish YPG forces backed by the United States were forced to wrangle with the appropriate procedure to prosecute ISIS prisoners based on whether they qualified as a resistance movement protected under the rules of international armed conflict or a lesser procedure required for non-international armed conflict. *See id*. at 1128–30. The YPG dilemma exemplifies the significant procedural and substantive protections given to privileged and unprivileged guerrillas under the 1949 Geneve Conventions. *See id*. at 1139.

corps and resistance groups in occupied territory and forming a part of the armed forces also qualify as prisoners of war.[31] Under this sub-provision, individuals must be associated with a State involved in an international armed conflict.[32] And members of volunteer corps and resistance groups must also wear a fixed distinctive emblem recognizable from a distance at all times, carry arms openly, comply with the laws and customs of war, and operate under responsible command.[33]

That Article 4.A.1 includes no express enumeration of these qualification requirements for members of a State's armed forces leads to the assertion that failure to comply with these requirements has no relevance when assessing prisoner of war status for individuals within this category.[34] If membership alone establishes prisoner of war status, it will violate the Third Convention to deny that status to members of the armed forces,[35] even if it is clear the individual or the armed forces he or she was a part of failed to satisfy the requirements enumerated in Article 4.A.2. Many States and legal commentators take a different position that the 4.A.2 requirements are implicit in the term "armed forces", indicating prisoner of war qualification is contingent on membership in a State's armed forces *and* satisfaction of these requirements.[36] How the United States interprets the law is unclear. Both the Department of Defense Law of War Manual and Army Doctrinal Publication 6-27 suggest that membership in the armed forces alone is sufficient to qualify for combatant and prisoner of war status.[37] However, it was the failure of the Taliban armed forces to satisfy these four conditions that led President Bush to conclude they did not qualify for prisoner-of-war status,

31. *See* Sleesman, *supra* note 30, at 1140 (explaining the debate between the United States and other states regarding the distinction requirement necessary to grant somebody prisoner of war status as a resistance or guerilla force).

32. GPW Convention, *supra* note 3, at art. 4(A)(2).

33. *Id*.

34. *Id*. at art. 4(A)(1).

35. Protocol I, *supra* note 5, at art. 44.

36. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 9.3.2 (citing GPW art. 4(A) indicating when persons are entitled to POW status); U.S. DEP'T OF ARMY PUBLICATION DOCUMENT, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE, para. 3-17 (2019) [hereinafter ARMY FM 6-27] ("Members of the armed forces of a State party to a conflict . . . are entitled to POW status based on their membership in the armed forces."); United States v. Lindh, 212 F. Supp. 2d 541, 558 (E.D. Va. 2002) (stating a prisoner was not entitled to combatant status because "the Taliban lacked the command structure necessary to fulfill the first criterion [of GPW 4(A)(2)], as it is manifests that Taliban had no internal system of military command or discipline. . . . [T]he Taliban typically wore no distinctive sign that could be recognized by opposing combatants. . . . [And] although it appears that Lindh and his cohorts carried arms openly in satisfaction of the third criterion for lawful combatant status, it is equally apparent that members of the Taliban failed to observe the laws and customs of war.").

37. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 9.3.2; ARMY FM 6-27, *supra* note 43, at para. 3-17.

even when captured in the context of the international armed conflict between Afghanistan and the United States.[38] This same interpretation provided the basis for a federal district court to reject John Walker Lindh's assertion of combatant immunity when subjected to criminal trial for his activities as a member of the Taliban armed forces.[39]

If this were not complicated enough, for the vast majority of States bound to Additional Protocol I, it is Article 43 that defines combatant qualification.[40] Article 43, unlike the Third Convention, provides that the combatant need not comply with all of these requirements *at all times*.[41] However, it still requires the putative combatant to distinguish himself from civilians and other protected persons when engaging in or immediately preceding an attack; an obligation best understood as passive distinction.[42]

Compliance with these requirements—most notably the passive distinction requirement—is therefore considered by most States and experts as an essential condition for prisoner-of-war qualification and the legitimate claim to combatant status and the immunity it provides.[43] And for good reason: compliance with the obligation to carry arms openly and wear a visible distinctive emblem (perhaps not at all times but at a minimum during preparation for and execution of an actual engagement)—facilitates implementation of the distinction obligation to targeting and thereby enhances the protection of civilians and other protected persons from being made the intended objects of attack.[44] This is why compliance with these requirements was historically considered part of a *quid pro quo*: you facilitate your enemy's ability to select you for attack and limit your violence to only that permitted by international law, and, in exchange, you qualify for

38. Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, 34 Harv. Program on Humanitarian Pol'y and Conflict Rsch. (Winter 2005, No. 2) ("The controversial decision by the United Stated government to deny combatant status to the Taliban as a group brought this issue to the forefront. While the Taliban had a tenuous claim as the de jure government of Afghanistan[,] there was considerable reluctance to accept that the armed forces of a functioning state could be denied combatant status on a group basis.").

39. Lindh, 212 F. Supp. 2d at 558.

40. *See* Protocol I, *supra* note 5, at art. 43.

41. *See* G.I.A.D. Draper, *supra* note 18, at 196–97. A majority of members within a militia or volunteer group must resemble an army to be classified as combatants. *Id.* Thus, an individual is not classified as a combatant merely because they wear a distinctive emblem or carry arms openly. *Id.* at 197 ("An individual belonging to a group of that kind will, upon capture, be denied a prisoners or combatant status, whatever his individual behavior may have been."). But an individual's failure to abide by either the open carry or distinctive emblem requirement is irrelevant when the majority of their unit follows the Hague Regulations. *Id.* 196-97 ("If the members, generally, meet all the conditions all the time, and an individual fails to observe conditions (iv), (v), or (vi), then he does not lose his combatant status or, upon capture, his prisoner-of-war status.").

42. *See id.*; Protocol I, *supra* note 5, at art. 37(c).

43. *See* Protocol I, *supra* note 5, at art 43; *see also* JEAN PICTET ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 553-54 (ICRC 1987).

44. *See* CUSTOMARY STUDY, *supra* note 22, at 213.

combatant/prisoner of war status upon capture and the accordant privileges, most notably combatant immunity for your lawful pre-capture violence.[45]

In 1977, Additional Protocol I modified the qualification requirements for distinguishing combatants from civilians.[46] Specifically, Article 44 (3) modified (or for some experts clarified)[47] the requirement that prisoner of war/combatant status is contingent on carrying arms openly and wearing a distinctive emblem *at all times*.[48] Instead, in one of the more controversial provisions of the Protocol, the Article provides that,

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[49]

Whether viewed as a clarification or substantial change to the Third Convention, this provision was ostensibly a pragmatic response to the unrealistic expectation that irregular forces—especially those engaged in resistance operations in occupied territory—wear what is, in effect, a uniform at all times.[50] For some States, most notably the United States, this modification of the passive distinction obligation resulted in an unacceptable dilution of the protection for civilians by incentivizing conduct that blurred the line between combatant and civilian.[51] Nonetheless, even this more relaxed standard for prisoner of war/combatant qualification necessitates that the fighter distinguishes himself from the civilian population during those periods when hostile action against him is most likely, reinforcing the inference that compliance with these passive distinction

45. *See* Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L. J. 1, 8 (2011) ("However, a combatant's privileges comes with duties. Combatants must distinguish themselves from civilians, by, for example, identifying themselves upon capture.").

46. *See* Protocol I, *supra* note 5, at art. 44(3).

47. *See generally* Geoff Corn, *Prisoners of War in Occupied Territory*, LIEBER INST. WEST POINT: ARTICLES OF WAR (Mar. 3, 2022), https://perma.cc/UJ3H-7X2T.

48. Protocol I, *supra* note 5, at art. 44(3).

49. *Id.*

50. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 4.5.21; *see also* GEOFFREY CORN, VICTOR HANSEN, RICHARD JACKSON, M. CHRISTOPHER JENKS, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER, THE LAW OF ARMED CONFLICT AN OPERATIONAL APPROACH 146 (Wolters Kluwer, 2d. ed. 2019).

51. Message from Ronald Reagan, President of the United States, to the United States Senate (Jan. 29, 1987) (on file with the Reagan Library) (arguing API would make civilians less safe by allowing terrorists and irregular forces to conceal themselves amongst the innocent population).

requirements is central to implementation of the distinction obligation and protection of civilians during hostilities.[52]

Accordingly, for the majority of States, prisoner-of-war status and combatant immunity do not extend to captives who failed to comply with these requirements—which also implicitly include operating on behalf of a State (otherwise the prisoner-of-war qualification provisions would be inapplicable)—preceding and during engagements.[53] Thus, even assuming pre-capture conduct was not a war crime, there is no international legal bar to subjecting the captured "unprivileged" belligerent to domestic criminal sanction if he or she falls within the scope of the detaining power's criminal jurisdiction.[54] For example, the captive denied prisoner of war status could be prosecuted for murder or other offenses against persons or property resulting from participation in hostilities against the detaining power, even if the pre-capture conduct complied with the laws and customs of war. In contrast, a fellow captive who qualifies for prisoner of war status would be immune from such criminal prosecution for identical conduct.

Advocates for the strict textualist application of prisoner-of-war status argue that the U.S. approach unnecessarily conflates prisoner-of-war status with the potential consequences resulting from participating in hostilities.[55] According to this formalistic view, while prisoner-of-war status is conclusively dictated by the plain text of Article 4.A.1 and extends to any captive who was a member of an enemy armed force, that status need not be understood as immunizing the prisoner of war from being held accountable for "fighting out of uniform."[56] Instead, the proper approach is to determine *status* based on membership in the armed forces and impose *accountability* for conducting operations without wearing a uniform or without carrying arms openly by assessing whether the pre-capture conduct violated the laws and customs of war.[57]

This view might seem appealing. After all, the immunity afforded to combatants—or privileged belligerents—is not absolute. Instead, even a captive who qualifies for prisoner of war status is subject to criminal sanction for pre-capture conduct that violated the laws and customs of war conduct that exceeds the scope

52. *See* Protocol I, *supra* note 5, at art. 44(3)(a), (b).

53. *See id*.; DoD LOWM (Dec. 2016), *supra* note 7, at para. 4.6.1 (codifying President Reagan's concerns in military policy by requiring sufficient distinction between combatants and the civilian population).

54. *See* Ex parte Quirin, 317 U.S. 1, 30–31 (1942) ("By universal agreement and practice[,] the law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunal for acts which render their belligerency unlawful.").

55. *See* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 216–18 (2011).

56. *See id*. at 216 n.78 (highlighting the thoughts of a British delegate to the Geneva Convention who said illegitimate bearers of arms should "not expect full protection under rules of war to which they do not conform").

57. *See id*. at 216–18.

of combatant immunity.[58] But the appeal of this theory in relation to participating in hostilities without complying with even the modified passive distinction obligation of Additional Protocol I is logical only if doing so amounts to conduct that violates the laws of war.

But this is not the case. Despite dubious efforts of the United States to treat such conduct as a war crime subject to military commission jurisdiction, the great weight of authority rejects this view. As a result, members of the armed forces who fight out of uniform—in other words fail to comply with two "passive distinction" requirements of Article A.4.2—have not, by that *conduct* alone, committed any violation of international law providing the basis for criminal sanction. This is because there is no valid basis to treat such a failure to comply with these four requirements as a *conduct* offense. It may be true that such conduct is often loosely treated as falling within the scope of the international humanitarian law prohibition against perfidy. But perfidy is a *result* offense, and hence the *conduct* may be an essential *element* of a perfidy violation, but it is not itself the violation.

Linking non-compliance with prisoner-of-war qualification requirements to potential criminal sanction for wartime conduct—even if that conduct complies with the laws and customs of war—incentivizes individual and group conduct that facilitates an opponent's ability to implement the fundamental obligation to distinguish between a lawful object of deliberate attack and protected persons and things; the *quid pro quo* referenced above.[59] But the deterrent effect of this linkage is qualified by three considerations. First, for States that extend prisoner-of-war status to members of the armed forces without requiring compliance with these conditions, that status immunizes the prisoner of war from domestic criminal sanction so long as pre-capture *conduct* complied with the law of war.[60] Second, for the majority of States that would deny prisoner of war status to such a captive, domestic criminal jurisdiction might not extend to the pre-capture conduct.[61] Third, prisoner-of-war status and combatant immunity are simply inapplicable to members of non-state organized armed groups in the context of a non-international armed conflict—the most common type of armed conflict today.[62]

In all these situations, the international law war crime of treachery—also known as perfidy[63]—is often assumed to be an alternative source of deterrence

58. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para 4.4 ("Combatants have legal immunity from domestic law for acts done under military authority *and in accordance with the law of war*.") (emphasis added).

59. *See* Chang, *supra* note 45, at 7–9.

60. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para 4.4

61. For a general discussion on the expansion of extraterritorial criminal jurisdiction and concerns therewith, *see* Danielle Ireland Piper, *Extraterritorial Criminal Jurisdiction: Does The Long Arm of the Law Undermine the Rule of Law,* 13 MELB. J. INT'L L. 122 (2012).

62. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 5.22.1.

63. *See* ROME STATUE, ELEMENTS OF CRIMES, art. 8(2)(b)(xi) and (e)(ix)), Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, ICC-ASP/1/3, 112, 146 (Sept. 3-10, 2002) [hereinafter Rome Statute Elements].

for such pre-capture conduct. But how valid is this assumption? The answer to this question is in some ways uncertain, the result of both the meaning and nature of the crime of perfidy. Subjecting an individual to criminal responsibility for feigning civilian status in order to gain a tactical advantage against the enemy is obviously intended to deter such wartime conduct. But conduct is only part of the perfidy/treachery equation, even when that conduct is actuated by an intent to exploit the enemy's respect for international humanitarian law. This is because perfidy—or its International Criminal Court (ICC) analog titled "Treacherous Killing"[64]—is defined as a results crime. This means conviction requires proof that the defendant killed, injured, or (for Additional Protocol I States) captured an opponent as the result of the intentional exploitation of reliance by that opponent on the rules of international humanitarian law. Thus, perfidy requires far more than merely operating in a manner inconsistent with prisoner of war qualification. Indeed, that treacherous killing in the context of a non-international armed conflict is a crime within the jurisdiction of the ICC almost certainly confirms this, as prisoner-of-war status is wholly inapplicable in such armed conflicts.[65]

Thus, committing the international law crime of perfidy requires proof that the defendant did more than operate out of uniform; it requires proof this conduct was intended to gain a tactical advantage by exploiting the opponent's respect for the rule of distinction.[66] And, as just noted, even this is not enough; conviction requires proof of a harmful result, meaning failing to produce that result for any reason negates liability for the crime.[67] Finally, even where the prohibited result can be established, because of the paucity of examples of perfidy prosecutions, it is unclear how proximate to that result the defendant's intentional perfidious/treacherous *conduct* must have been to the inflicted harm.[68] Does perfidy require a direct causal link between the defendant's conduct and the harm? Or does a more attenuated contribution to such harm suffice? And may a defendant be guilty of perfidy as an accomplice? Or must the defendant commit the actus reus that produces the prohibited harm?

Ideally, the prohibition of perfidy enhances respect for international humanitarian law and the protection provided by the principle of distinction, but that effect is qualified at best.[69] Might this effect be enhanced by clarifying the nature of

64. *Id.* at art. 8(2)(e)(ix).

65. Although States at the diplomatic conference that adopted Additional Protocol II removed the perfidy provision from the final draft. *See* Sean Watts, *Law of War Perfidy*, 219 MIL. L. REV. 106, 111 n.15 (2014) [hereinafter Watts: Perfidy] (citing Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974-1977, Draft Additional Protocol II, art. 21(1)); *see also* Military Commission Act of 2009, 10 U.S.C. § 950(17) (2013) (including "Using Treachery or Perfidy" among offenses chargeable *against* alien enemy combatants, presumably in NIAC).

66. Watts: Perfidy, *supra* note 66, at 113 n.22; *see also, e.g.,* Ex parte Quirin, 317 U.S. 1 (1942).

67. Watts: Perfidy, *supra* note 66, at 147.

68. *See id.* at 146 (stating that perfidy "must be the proximate cause of the killing, injury[,] or capture," but the ICRC commentary to AP I provides a contrary suggestion).

69. *See id.* at 107 ("Law prohibiting perfidy proved an essential buttress to the law of war as a medium of exchange between combatants—a pledge of minimum respect and trust between belligerents

perfidy in a way that more effectively aligns the prohibition with the core harm inflicted by perfidious or treacherous conduct: abusing an enemy's respect for international humanitarian law to gain an invalid tactical advantage and thereby diluting the protective effect of distinction? As currently understood, the war crime of perfidy/treachery excludes from liability individuals who don't wear a uniform or carry arms openly *without* proof that conduct was intended to exploit enemy respect for the law.[70] This is illogical, as the gravamen of the offense is the abuse of trust and the implicit dilution of the protective effect of the distinction principle. While such conduct may often be *necessary* to prove this offense, it is not itself sufficient.

Because this war crime is defined in terms of a harmful result, it excludes from liability an individual whose *conduct* was intended to produce a harmful result but who failed to achieve that outcome.[71] Excluding perfidious/treacherous intent from the scope of criminal responsibility creates an illogical tolerance for such conduct and undermines the regulatory value of the prohibition. In short, the result requirement creates an inherent conflict between what international humanitarian law condemns—the result-based offense of treachery/perfidy—and the operational focus on advancing respect for international humanitarian law and enhancing the protection of civilian populations by deterring *conduct* that undermines confidence that civilian appearance matches reality.[72]

One solution to this problem is recognizing the value of an inchoate variant of perfidy/treachery.[73] Such recognition would allow for criminal accountability for such an attempt—even if the State were to extend prisoner-of-war protection to the defendant.[74] Furthermore, and perhaps more importantly, it would better align the essence of the offense—intentionally feigning protected status to gain an immediate tactical advantage by exploiting an enemy's respect for international humanitarian law—with an operational focus on conduct and not merely the result.[75]

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even in the turmoil of war. . . . [But] [d]espite its critical role . . . the current legal formula for perfidy shows signs of weakness.").

70. *See* Protocol I, *supra* note 5, at art. 37; *see also* General Order No. 100, Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), *reprinted in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (Lieber Code), Series III, vol. 3, art. 16 (GPO 1899) ("Military necessity . . . admits of deception, but disclaims acts of perfidy.").

71. Protocol I, *supra* note 5, at art. 37(1) ("It is prohibited to *kill, injure or capture* an adversary by resort to perfidy.") (emphasis added).

72. *See id*.; Watts: Perfidy, *supra* note 66, at 107.

73. *See, e.g*., Matthew J. Greer, *Redefining Perfidy*, 47 GEO. J. INT'L L. 241, 267–69 (2015) (proposing a new definition of perfidy that makes "[a]ctions taken with the intent to deceive and enemy" unlawful).

74. *See id*.

75. Recognizing an attempt variant of perfidy might also help bridge the divide between the two interpretations of POW/combatant qualification by negating the primary disincentive for granting POW status based exclusively on membership in the armed forces. *See id*. at 269 (arguing that including an attempt/intent elements within the definition of perfidy will reinforce the notion war should be resolved quickly and peacefully). By opening the door to the imposition of criminal responsibility for attempted

This is not to suggest that every time an enemy is captured "out of uniform" he or she has *ipso facto* committed the war crime of perfidy.[76] Such an outcome would be legally and pragmatically overbroad, especially in an era where hostilities between uniformed, "regular" armed forces are increasingly rare.[77] Accountability for alleged war crimes would focus not simply on the failure to distinguish oneself from the civilian population, but instead on the actor's specific intent to gain an illicit advantage to inflict immediate harm on the opponent who relied on this failure.[78] This would reinforce the true nature of the offense: the intent to gain an illicit advantage by exploiting the enemy's respect for the law.[79]

Recognizing and emphasizing an inchoate variant of perfidy will ideally reinforce the protection of civilians and other protected persons.[80] Each time the enemy *attempts* to inflict death or injury by feigning protected status, it dilutes the confidence the appearance of civilian status should convey.[81] Accordingly, the concurrence between unlawful specific intent and *conduct* actuated by that intent risks undermining respect for the principle of distinction, precisely what attempted perfidy/treachery would condemn. Ultimately, it seems illogical to tolerate intentionally perfidious/treacherous conduct simply because of a failure to produce the intended harmful result.[82] In short, from a regulatory perspective, perfidy should be emphasized in terms of prohibited conduct, not prohibited results.[83]

Accordingly, this article will attempt (no pun intended) to make the case for recognition of attempted perfidy, both as a limited extension of war crimes liability and, more importantly, as the foundation for increased emphasis on the

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perfidy, POW status would provide no immunity from sanction for perfidious *conduct* where the evidence established an intent to produce a harmful result. *See id.* ("The proposed definitions also flip the belligerent's calculus. Now, deceptive actions could be thought of as presumptively unlawful, rather than presumptively lawful."). While such prosecutions would, like perfidy itself, be undoubtedly rare, the recognition of the viability of this variant of the offense would better align the essence of perfidy with condemnation. *See id.* at 267–69.

76. *See generally* Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L REV. RED CROSS [IRRC] 93, 104 (Mar. 2004) ("While there is a practice to wear uniforms in armies, there is not an obligation in international humanitarian law to wear them. Wearing of civilian clothes is only illegal if it involves perfidy.").

77. Greer, *supra* note 74, at 266 ("[T]he current definition[of perfidy], and [its] reasoning, [was] developed with antiquated conceptions of what warfare is.").

78. *See id.* at 269 ("Whereas in current definitions, pretending to wave a flag of truce to allow your soldiers to escape is likely not perfidious (because it was not done with the intent to kill, wound, or capture the enemy), it would be unlawful under the proposed definition. Any abuse like this makes it less likely that the enemy will stop shooting the next time a flag of truce is raised.").

79. *Id.*

80. *See id.*

81. *Id.*

82. *Id.* at 267.

83. The criminal accountability aspect of placing an emphasis on attempted perfidy will concededly be less significant. As noted above, the crime of perfidy is rarely alleged or prosecuted. Nonetheless, there is no logical reason why, in the rare case where the evidence establishes a perfidious intent beyond a reasonable doubt, an individual should be exempted from accountability merely because of a failure to consummate the intended result. *See id.* Expanding the condemnation of perfidy to include an attempt variant would provide for criminal sanction in such rare cases. *See id.*

command obligation to prevent violations of the passive distinction obligation. First, it will review the two theories of prisoner-of-war qualification.[84] Second, it will illustrate the accountability impact of these two approaches. [85] Third, it will review the currently understood scope of the war crime of perfidy.[86] Fourth, it will explain how inchoate versions of that crime could be developed.[87] Fifth, it will analyze how these crimes would impact the prisoner-of-war debate.[88] Finally, it will analyze other potential positive impacts of recognizing such offenses.[89]

III. PRISONER OF WAR, COMBATANT, AND DISTINCTION: A COMPLEX WEB

A. Combatant Immunity and Passive Distinction

According to the 1977 Additional Protocol I to the Four Geneva Conventions of 1949 (AP I), distinction is the "Basic Rule" regulating the methods and means of warfare.[90] That characterization is justified by the fact that distinction lies at the very foundation of protecting civilians and other protected people and objects from the harmful consequences of hostilities.[91] This is achieved by restricting deliberate attacks to combatants, civilians who forfeit protection by taking a direct part in hostilities, and places and things that qualify as military objectives.[92] Thus, the only people lawfully subject to deliberate attack are members of the enemy armed forces, members of other organized armed groups who are party to the armed conflict, or civilians directly participating in hostilities.[93]

The efficacy of distinction depends first and foremost on good faith respect for this binary targeting equation: enemy personnel and civilians taking a direct part in hostilities may be attacked (unless they are *hors de combat*); all other persons may not.[94] But the efficacy of this "basic" rule of civilian protection is also contingent on the ability of belligerents to *functionally* distinguish between these two broad categories of individuals and to identify who is the enemy and who is not.[95]

It is relatively self-evident that the easiest way to complicate an opponent's ability to distinguish individuals lawfully subject to attack and protected civilians

84. *See infra* Section V.
85. *See infra* Section V.
86. *See infra* Section V.
87. *See infra* Section V.
88. *See infra* Section V.
89. *See infra* Section V.
90. Protocol I, *supra* note 5, at art. 48 (defining the "basic rule" as "the Parties to [a] conflict shall at all times distinguish between the civilian population and combatants . . .").
91. *See id*.; Watkin, *supra* note 38, at 8–9 ("Distinguishing between combatants and civilians has been . . . an important aspect of warfare and has long been recognized as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war.").
92. *See* Protocol I, *supra* note 5, at arts. 51(3), 57(2–5).
93. *See id*. at arts. 43, 51.
94. DoD LOWM (Dec. 2016), *supra* note 7, at paras. 5.7, 5.8, 5.9; Protocol I, *supra* note 5, at art. 41.
95. *See* Protocol I, *supra* note 5, at art. 48.

is to cloak combatants as civilians.[96] Doing so will not, of course, produce a legal immunity from attack; feigning civilian status does not alter the fundamental character of a combatant or any other belligerent operative.[97] However, it certainly complicates identifying who is belligerent and who is civilian. This, in turn, may result in *de facto* immunity from attack because when an opponent is not sure who may be attacked, the prudent course of action will often be to refrain from attack.[98] Equally troubling is the risk to actual civilians produced by such tactics, as it will likely result in dilution of the operational assumption that those who appear to be civilians are in fact civilians, inoffensive, and protected from attack.[99] Instead, each time an enemy belligerent engages in hostilities cloaked as a civilian, it increases the risk of mistaken attack decisions directed against actual civilians.[100]

Mitigating the risk of this dilution is an important function of linking the international legal privilege of engaging in hostilities to the four requirements enumerated in Article 4.A.2.[101] Tracing the evolution of this "uniform" and legal compliance requirement is complex and requires connecting the historical dots between the qualification for prisoner of war status upon capture, privileged belligerent status, and combatant immunity. However, the essence of the equation, as noted above, is quite simple: only belligerents who qualify for prisoner of war status upon capture may claim immunity from criminal sanction derived from the international legal privilege to participate in hostilities.[102] In other words, status as a combatant—which means an individual with the international legal privilege to engage in hostilities—is contingent on compliance with the requirements necessary to claim prisoner of war status upon capture.[103]

In 1899 when the Regulations Annexed to Hague Convention IV were first adopted, it is likely that most states—if not all—assumed that armed forces were

96. *See generally* Louis René Beres, *Human Shields and Perfidy: Addressing Illegal Conduct in Operations*, WAR ROOM – U.S. ARMY WAR COLL. (Apr. 17, 2019), https://perma.cc/2VZE-93HY (hypothesizing how an increased use of perfidy could complicate Israel's justified use of anticipatory self-defense).

97. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 2.6.2.2.

98. *See generally* Protocol I, *supra* note 5, at art. 57 ("[T]hose who plan or decide upon an attack shall . . . refrain from . . . any attack which may be expected to cause [excessive] incidental loss of civilian life, injury to civilians, damage to civilian objects. . .").

99. *See* Greer, *supra* note 74, at 269 ("Whereas in current definitions, pretending to wave a flag of truce to allow your soldiers to escape is likely not perfidious (because it was not done with the intent to kill, wound, or capture the enemy), it would be unlawful under the proposed definition. Any abuse like this makes it less likely that the enemy will stop shooting the next time a flag of truce is raised.").

100. *Id*.

101. *See* GPW Convention, *supra* note 3, at art. 4(A)(2) (giving prisoner of war status to "[m]embers of other militias and members of other volunteer corps" provided that such groups fulfill the obligations of command responsibility, fixed distinctive signs, open arms, and operations in accordance with the laws of war).

102. *Compare id*., *with* Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 GPW] (which indicated who qualified for prisoner of war status by direct reference to the definition of privileged belligerent in the 1907 Annexed Regulations of Hague IV).

103. *See* 1929 GPW, *supra* note 103.

ipso facto synonymous with uniformed and organized belligerents operating pursuant to state authority and under responsible command.[104] This explains why Article 1 of these Regulations provided that,

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."[105]

Like Article 4.A.1 of the Third Convention, the four requirements that indicate a privilege to engage in hostilities—to qualify as a "privileged" belligerent—are expressly applicable to militias and volunteer corps, not to "armies."[106] But the final reference to militias and volunteer corps incorporated into the army suggests that the notion of "armies" implied compliance with these same requirements.[107] Furthermore, it would be illogical that the rights and privileges of belligerency would be extended to militias and volunteer corps only on condition of compliance with these requirements, but armies—the primary entities expected to engage in hostilities—would be subjected to no analogous requirements.[108]

Accordingly, it is logical that the uniform, organization, discipline, and authority of responsible command were understood to fundamentally distinguish "privileged" belligerents from all other participants in hostilities—so-called "unprivileged" belligerents.[109] It is, therefore, unsurprising that the provision establishing when members of organizations not technically part of "armies" were vested with the international legal right to participate in hostilities was linked to these four requirements.[110] The first two requirements—wearing some recognizable, distinctive emblem and carrying arms openly—reflected the link between the claim

104. *See* Draper, *supra* note 18, at 180 ("The debates which had taken place at Brussels and at the two Hague Conferences highlighted the current issues surrounding the employment of irregular forces against regular units in warfare.").

105. Convention for the Pacific Settlement of International Disputes, annex, July 29, 1899, 32 Stat. 1779, T.S. 392, 1 Bevans 230 [hereinafter 1899 Hague IV]; Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, annex, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague IV].

106. *See* GPW Convention, *supra* note 3, at art. 4(A)(1).

107. *See id.*

108. *See id.*

109. *See* Rome Statute Elements, *supra* note 64, at art. 8(2)(b)(vii)-4.

110. *See* GPW Convention, *supra* note 3, at 4(A)(1).

to combatant immunity and conduct that facilitates an opponent's ability to distinguish belligerents from civilians.[111]

In 1899 when the Annexed Regulations were first adopted, and again in 1907 when updated, it is unlikely that facilitating distinction was a primary objective of this linkage.[112] Hostilities during that era were generally confined to confrontations between regular armed forces in areas posing a limited risk to the civilian population.[113] It is more likely that deterring civilians from taking up arms and participating in hostilities was the primary motivation for requiring compliance with these four conditions as a prerequisite for claiming the combatant's privilege.[114] However, as the evolution of warfare produced an ever-increasing risk to civilians resulting from the conduct of hostilities, the importance of the link between a uniform requirement and the protection of the civilian population grew exponentially.[115]

By the time the Third Geneva Convention Relative to the Treatment of Prisoners of War was revised following World War II, this uniform—or "passive distinction" requirement—was front and center in the definition of prisoner of war qualification.[116] Belligerents qualified as prisoners of war upon capture so long as they were members of state armed forces or other groups associated with the states that satisfied these same four requirements.[117] Individuals who accompanied the armed forces *without being members thereof* were also qualified for prisoner of war status.[118]

Unlike groups that formed part of the armed forces, prisoner of war qualification for this category was not contingent on compliance with the four requirements, but instead on authorization by the state to accompany the armed forces.[119] This category, along with *civilian* members of civil aircraft crews or the merchant marine, could be detained as prisoners of war for the duration of

111. *See* Ines Gillich, *Illegally Evading Attribution? Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law*, 48 VAND. J. TRANSNAT'L. L. 1191, 1214 (2015).

112. *See* Draper, *supra* note 18, at 180.

113. *See, e.g.*, *id.*

114. *See id.* (discussing that the participation and treatment of the franc-tireurs during the Franco-Prussian war of 1870 was considered during the Hague conventions).

115. Gillich, *supra* note 112 ("In additional to . . . functional considerations, modern IHL has further attached legal functions to a military uniform. Most importantly, a uniform serves to ensure that the principle of distinction between combatants and civilians is observed.").

116. Ziv Bohrer & Mark Osiel, *Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties v. Safeguarding Soldiers*, 46 VAND. J. TRANSNAT'L L. 747, 752 (2013); Geoffrey Corn & James A. Schoettler, Jr., *Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures*, 223 MIL L. R. 786, 826 (2015) ("AP I appears to recognize th[e] relationship between 'active and passive' distinction by including passive measures intended to enhance clarity in the targeting decision-making process be enhancing the attacking force's ability to implement active distinction.").

117. *See* GPW Convention, *supra* note 3, at art. 4(A)(1).

118. *Id.* at art. 4(A)(4).

119. *Id.* at arts. 4(A)(1) ("Members of the armed forces . . . as well as members of militias or volunteer corps forming part of such armed forces."), 4(A)(4) ("Persons who accompany the armed forces without actually being members thereof. . .").

hostilities.[120] However, unlike members of the armed forces or other organized groups associated with the armed forces, these individuals were not authorized to participate in hostilities precisely because they were civilians and *not* members of the armed forces.[121] Accordingly, their qualification was in no way contingent on compliance with the four requirements.

Finally, civilians who joined a *levee en masse*—a spontaneous taking up of arms to resist an invading army without time to organize—would qualify for prisoner of war status even if they participated in hostilities, *but only* if they carried arms openly and respected the laws and customs of war.[122] The treatment of these latter categories: civilians who accompany the armed forces without being members thereof; civilian members of civil aircraft crew or the merchant marine; and civilians who participate in a *levee en masse* reinforces the importance of the link between passive distinction and privileged belligerent qualification. In short, individuals anticipated to engage in hostilities would qualify as prisoners of war upon capture, but only if they distinguished themselves from the civilian population.

As noted earlier, like the Annexed Regulations, the Third Convention did not expressly impose the four qualification requirements on members of the armed forces, a treaty anomaly that has led to the assertion by some experts that membership in the armed forces alone results in prisoner-of-war qualification. However, the more common interpretation that seemed to provide the basis for the United States' denial of prisoner-of-war status to members of the Taliban captured during the initial phase of Operation Enduring Freedom is that the requirements expressly imposed on members of militias and other volunteer groups forming part of the armed forces apply, by implication, to members of the armed forces.[123] Accordingly, failure to comply with these requirements results in disqualification for prisoner of war status, even for members of the enemy armed forces.[124] This interpretation – based on the importance of "passive" distinction as an essential facilitator of civilian protection—was central to the U.S. decision to reject Additional Protocol I, a rejection that ties together the complex relationship between prisoner-of-war status and the legal privilege to engage in hostilities.[125]

B. Additional Protocol I and the Reality of Modern Warfare

Unlike the Third Convention, Article 43 of AP I expressly provides that members of the State's armed forces are combatants and that combatants are vested with combatant immunity.[126] Specifically, Article 43 provides that:

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120. *Id.* at art. 4(A)(5).

121. *See id.*

122. *Id.* at 4(A)(6).

123. DoD LOWM (Dec. 2016), *supra* note 7, at para. 4.4.1 (outlining some of the duties required by combatants to comply with the law of war).

124. *See id.*

125. *See* President Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions (Jan. 29, 1987), 1 PUB. PAPERS 88, 88 (1987) [hereinafter Reagan to the Senate] (stating that "Protocol I is fundamentally and irreconcilably flawed").

126. *See* Protocol I, *supra* note 5, at art. 43.

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.[127]

The definition of "armed forces" is obviously broad and includes all organized armed groups subordinate to a State involved in an international armed conflict, so long as the group is subject to responsible command and complies with international humanitarian law.[128] Any such individual is a combatant privileged to engage in hostilities.[129] As the associated ICRC Commentary notes:

> To summarize: 'the conditions which should all be met to participate directly in hostilities are the folloawing: a) subordination to a "Party to the conflict" which represents a collective entity which is, at least in part, a subject of international law; b) an organization of a military character; c) a responsible command exercising effective control over the members of the organization; d) respect for the rules of international law applicable in armed conflict. These four conditions should be fulfilled effectively and in combination in the field.[130]

Because international law does not permit civilians to participate in hostilities, Article 44 implicitly links qualification for prisoner of war qualification (with the exception of civilians who qualify as prisoners of war as the result of their function in support of the armed forces) with combatant status and privilege.[131] Again, as the Commentary notes,

> The provision under consideration here goes one step further in declaring that members of the armed forces have the status of combatants, with two exceptions: medical and religious personnel. In the Third Convention, which deals only with the protection of prisoners of war, and not with the conduct of hostilities, this combatant status is not explicitly affirmed, but it is implicitly

127. *Id*.

128. *See* CUSTOMARY STUDY, *supra* note 22, at 14.

129. *Id*. at 15.

130. Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, Commentary, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, 1987 INT'L COMM. RED CROSS ¶ 1483, 1681 (1987) [hereinafter 1987 Commentary on the Additional Protocols].

131. *See* GPW Convention, *supra* note 3, at art. 44.

> included in the recognition of prisoner-of-war status in the event of capture. The Hague Regulations expressed it more clearly in attributing the "rights and duties of war" to members of armies and similar bodies (Article 1). The Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces (with the above-mentioned exceptions) can participate directly in hostilities, i.e., attack and be attacked. . . All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of "quasi-combatants," which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. [132]

Transforming what was implicit in the Third Convention to an explicit rule eliminated any uncertainty as to the connection between membership in an organized armed group operating subordinate to State authority, prisoner of war qualification, and the "combatant's privilege."[133]

Article 44 also, however, expanded the definition of prisoner of war and combatant qualification as follows:

> 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1.[134]

132. *See* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1677.

133. *Compare id*., *with* GPW Convention, *supra* note 3, at art. 4 (failing to mention what requirements are placed on armed forces to qualify for prisoner of war status).

134. *See* Protocol I, *supra* note 5, at art. 44(3).

Thus, unlike the Third Convention, AP I diluted the passive distinction requirements for prisoner of war qualification and the accordant combatant's privilege by eliminating the requirement that qualification requires compliance with the "uniform" and "open carriage of weapons" *at all times*.[135]

It was this perceived dilution of the passive distinction requirement for prisoner of war—and hence combatant—qualification that resulted in one of the primary U.S. objections to Additional Protocol I.[136] Explicitly linking combatant status and privilege to prisoner of war qualification was uncontroversial. However, by expanding the scope of that qualification to belligerents who display their arms only prior to launching an attack, the Protocol exempted individuals from the Third Convention's more demanding passive distinction requirements as a condition for combatant immunity.[137] For the U.S., this expansion of prisoner-of-war status incentivized the increasingly common practice of belligerents cloaking themselves as civilians to gain a tactical advantage.[138] The risk to civilians resulting from such practices was assessed as too problematic to endorse this deviation from what the United States considered a long-established linkage between wearing a distinctive uniform at all times, prisoner of war qualification, and the combatant's privilege.[139] Instead of incentivizing the dilution of this linkage, the U.S. insisted it should be reinforced.[140]

The evolving nature of conflict obviously influenced those who objected to this modification of the passive distinction requirement.[141] By 1977 it was uncommon for regular armies to meet for combat in isolated areas utilizing weapons of limited destructive power.[142] Indeed, by 1977 inter-state armed conflicts had become increasingly (and thankfully) rare; most armed conflicts involved non-state organized armed groups engaged in hostilities against State armed forces.[143] These groups, often following classic Maoist insurgent doctrine, sought to

135. *See id.* at art. 48.

136. *See also* DoD LOWM (Dec. 2016), *supra* note 7, at para. 4.6.1.2., n.147 (citing Reagan to the Senate, *supra* note 126) ("Another provision [of AP I] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.").

137. *See* Protocol I, *supra* note 5, at art. 44(3).

138. *See* Reagan to the Senate, *supra* note 126, at 88.

139. *Id.*

140. *Id.*

141. Memorandum for the Sec'y of Def. from the Joint Chiefs of Staff Regarding Rev. of the 1977 First Additional Protocol to the Geneva Convention of 1949, at 36–37 (May 3, 1985) [hereinafter JCS AP I Review] https://perma.cc/X9HJ-EWDD ("Th[e] improved status for guerrillas may be of considerable military importance for countries that rely on a territorial defense concept. . . . Since it is very unlikely that the United States would ever rely on guerrilla warfare in defense of its own territory, there is little military advantage for the United States armed forces in recognizing improved status for guerrilla fighters. On the contrary, the United States armed forces are more likely to continue to meet guerrillas as adversaries than as allies in power projection situations.").

142. *See id.* (discussing the likelihood of continued guerrilla adversaries following Vietnam).

143. *See id.*

"swim" in the sea of the civilian population.[144] By extending the combatant privilege to members of such organized armed groups (an extension facilitated by the expansion of the definition of international armed conflict in Article 1 of AP I to include "internal" armed conflicts motivated by resistance to colonial domination, alien occupation, or a racist regime) and allowing them to claim combatant status and privilege even if they often appeared indistinguishable from civilians, the sense was that the law substantially increased the jeopardy to actual civilians resulting from the conduct of hostilities.[145]

In truth, the impact of this modification and its relevance to the importance of passive distinction was far more nuanced. Indeed, it was precisely because of the recognition that the nature of warfare had changed that proponents of this modification believed it was logical and necessary.[146] The key language in Article 44 is, "owing to the nature of the hostilities an armed combatant cannot so distinguish himself. . . ." [147] This indicates the drafters were not seeking to endorse widespread and pervasive discontinuance of the passive distinction requirement and its linkage to combatant status and immunity.[148] Instead, it was a more pragmatic recognition that it was unrealistic to expect *all* armed forces to satisfy that requirement *at all times* as required by Article 4 of the Third Convention as a condition for prisoner-of-war qualification.[149] In some situations—most notably related to organized resistance forces in occupied territory—such a requirement would, in effect, be suicidal.[150] Indeed, there is ample evidence of States that resisted this modification themselves employ unconventional forces in a manner that would seem to contradict the "at all times" requirement.[151]

What is far more significant for purposes of this article is not only that this modification was intentionally qualified to limited situations, but that even in those limited situations it still imposed a passive distinction obligation, "(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of

144. See MAO TSE-TUNG, ON GUERILLA WARFARE 8 (Brigadier General Samuel B. Griffith trans., Dep't of the Navy 1989) ("Mao has aptly compared to fish, and the people to the water in which they swim. If the political temperature right, the fish, however few in number, will proliferate. It is therefore the principal concern of all guerilla leaders to get the water to the right temperature and to keep it there.").

145. *See* Protocol I, *supra* note 5, at art. 1(4); JCS AP I Review, *supra* note 142, at 33 (discussing the problems associated with Articles 43 and 44 of AP I, including how the removal of the fixed insignia requirement for guerrillas will prevent "distinguish[ing] combatants from ordinary civilians").

146. *See* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 494, 520 (2003) (discussing the Working Group considerations around Article 44 of Additional Protocol I)

147. *See* Protocol I, *supra* note 5, at art. 44(3).

148. *See* Parks, *supra* note 147, at 520–21.

149. *See* GPW Convention, *supra* note 3, at art. 4; *see also* Protocol I, *supra* note 5, at art. 44.

150. Parks, *supra* note 147, at 521 ("Thus, commentaries by participants , , , confirm Additional Protocol I's acknowledge that, where warranted by military necessity, it may be permissible in international armed conflict for regular military forces to wear civilian clothing.").

151. *Id*. at 496–98 (explaining how U.S. special operators disguised themselves as Northern Alliance fighters during the invasion of Afghanistan in 2001).

an attack in which he is to participate."[152] In other words, even when the passive distinction obligation is relaxed "owing to the nature of hostilities," combatant qualification is still contingent on distinguishing oneself from civilians when that passive distinction is essential to enable your enemy to comply with *its* distinction obligation by recognizing who is subject to lawful attack.[153] Failing to comply with this "mandatory minimum" passive distinction requirement results in forfeiting combatant status and the accordant protection of combatant immunity.[154] As a result, the law provides a powerful incentive to facilitate the enemy's ability to identify who may be lawfully attacked and an equally powerful deterrent to diluting the protective effect of distinction by feigning civilian status at the most crucial moments.[155]

IV. JOHN WALKER LINDH: A CASE STUDY IN THE SCOPE AND LIMITS OF COMBATANT IMMUNITY

For States like the United States, compliance with the four requirements imposed upon associated militia or volunteer groups in the 1907 Annexed Regulations and Article 4.A.(2) of the Third Convention remains an essential condition for prisoner of war/combatant qualification.[156] For Additional Protocol I States, there are situations where these requirements are relaxed, but the mandatory minimum remains passive distinction during and preceding an engagement.[157] The U.S. federal district court decision on John Walker Lindh's motion to dismiss an indictment alleging violation of U.S. federal criminal law illustrates the importance of these requirements and their connection to combatant immunity.[158] Lindh was a U.S. citizen who joined the Taliban armed forces and was prosecuted for his role in the prisoner uprising in Afghanistan that resulted in the killing of Michael Spann, a Central Intelligence Agency operations officer.[159]

John Walker Lindh converted to Islam while living in the United States and then moved to Pakistan to study his new faith.[160] While there, Lindh decided to

152. *See* Protocol I, *supra* note 5, at art. 44.

153. *Id.*

154. *See* Protocol I, *supra* note 5, at art. 44(2).

155. *See* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1685.

156. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 5.4.8.2 ("The AP I provision only partially describes the obligation under customary international law of combatants to distinguish themselves from the civilian population. Under customary international law, the obligation of combatants to distinguish themselves is a general obligation that the armed forces have as a group and is not limited to times when they are engaged in an attack or in a military operation preparatory to an attack. Moreover, measures such as wearing insignia or other distinctive emblems may be of less practical significance during an attack. During an attack, combatants are likely to be distinguishable based on their activities more than any insignia or devices they are wearing.").

157. *See* Protocol I, *supra* note 5, at art. 44.

158. *See generally* United States v. Lindh, 227 F.2d 544 (E.D. Va. 2002) (rejecting a motion to dismiss based on combatant immunity).

159. Paula Zahn, *John Walker Lindh Profile: The Case of the Taliban American*, CNN People News (2001), https://perma.cc/V5AQ-J2JG.

160. *Id.*

travel to Afghanistan to join the ranks of the Taliban armed forces.[161] This occurred well before the terrorist attacks of September 11, 2001, and the subsequent U.S. intervention in Afghanistan to topple the Taliban regime.[162] Lindh was among a number of foreign nationals who had volunteered to join the Taliban to resist the efforts of the Northern Alliance to oust this fundamentalist regime.[163] Nonetheless, as a member of the Taliban armed forces, Lindh was among the many others captured as the U.S.-backed Northern Alliance defeated the Taliban.[164] After his capture, he was moved with other captives to an old fortress controlled by the Northern Alliance, Qala-i-Jangi near Mazār-e Sharāf.[165]

Three Central Intelligence Agency officers were at the fortress questioning detainees. One of those officers, Johnny "Mike" Spann, fell victim to these detainees when one of them detonated a grenade he had smuggled into the prison, and others seized weapons from their Northern Alliance guards and overwhelmed them.[166] This led to a day-long battle for control of the facility, which ultimately fell to the Taliban. Only after Northern Alliance reinforcements arrived was the uprising subdued. Lindh, who had been wounded during the fighting, was returned to the United States for federal criminal prosecution after interrogators realized he was a U.S. citizen. He was indicted for a number of federal crimes, including conspiracy to murder U.S. nationals and material support for terrorism.[167]

Like Manuel Antonio Noriega,[168] Lindh moved to dismiss the indictment based on an assertion of combatant immunity; like Noriega, the United States opposed this assertion.[169] Unlike Noriega, however, the issue in Lindh's case was not whether the armed conflict in which he was captured was international within the meaning of Common Article 2; President Bush had resolved that issue *vis a vis* the Taliban in a February 2002 memorandum by acknowledging as much.[170] Instead, the U.S. took the position that although Lindh had been a member of the Taliban armed forces fighting in the context of an international armed conflict, the failure of that organization to wear a distinctive uniform at all times and

161. *Id.*

162. *See* Anne R. Slifkin, *John Walker Lindh*, 101 S. ATL. Q. 2, 417 (2002).

163. Neil A. Lewis, *Lindh Pleads Guilty*, N.Y. TIMES (July 15, 2002), https://perma.cc/9GHD-FHXK.

164. *Id.*

165. Josh Tyrangiel, *The Taliban Next Door*, TIME, (Dec. 17, 2001), https://perma.cc/WA44-CMBK.

166. *Id.*

167. *See* Att'y. Gen. John Ashcroft, News Conference, Indictment of John Walker Lindh (Feb. 5, 2002), https://perma.cc/M8VJ-V7VP.

168. *See generally* United States v. Noriega, 117 F3d. 1206 (11th Cir. 1997).

169. *Id.*

170. Memorandum from President Bush to Vice President, Sec. of State, Sec, of Defense et. al., *Humane Treatment of al Qaeda and Taliban Detainees*, WHITE HOUSE (June 17, 2004), https://perma.cc/FK8J-A3KA (President George W. Bush declares that the United States will not be bound by the Geneva Convention's protections for prisoners of war).

respect the laws and customs of war indicated he was not qualified for prisoner of war status.[171]

In response, Lindh invoked the plain text of Article 4.A.1 of the Third Convention: that his qualification was based exclusively on his membership in the Taliban armed forces.[172] Accordingly, that asserted non-compliance with the four requirements of Article 4.A.(2) was irrelevant to assessing his prisoner of war status.[173] This would have been decisive to his effort to avoid domestic criminal liability for his conduct as there was no allegation that his alleged participation in the effort to break out of the detention facility violated the laws and customs of war. Indeed, that very conduct would be expected of a member of the U.S. armed forces captured by the enemy. In short, qualification as a prisoner of war should have led to immunity from domestic criminal sanction for his conduct in relation to the breakout effort (his U.S. citizenship would have imposed a different obstacle to claiming that status, but that issue was never addressed).

This situation required the district court to choose between the two competing interpretations of prisoner of war status—and the accordant immunity accompanying that status—pursuant to Article 4.A.(1): does the term "armed forces" imply a requirement to comply with the four qualification conditions expressed in Article 4.A.2? Or are those conditions inapplicable to members of the armed forces? The court answered the question in favor of the government.

When it denied Walker's motion to dismiss, the court first noted the foundation for the immunity granted to certain belligerents from criminal prosecution:

> Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. This doctrine has a long history, which is reflected in part in various early international conventions, statutes and documents. But more pertinent, indeed controlling, here is that the doctrine also finds expression in the Geneva Convention Relative to the Treatment of Prisoners of War. . . .[174]

The court then noted:

> Importantly, this lawful combatant immunity is not automatically available to anyone who takes up arms in a conflict. Rather, it is generally accepted that this immunity can be invoked only by members of regular or irregular armed

171. *See* Lewis, *supra* note 164.
172. *See* GPW Convention, *supra* note 3, at art. 4(A)(1).
173. *See id*. at art. 4(A)(2).
174. Lindh, 212 F. Supp. 2d at 553.

> forces who fight on behalf of a state *and comply with the requirements for lawful combatants*. Thus, it is well-established that the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. . . Thus, the question presented here is whether Lindh is a lawful combatant entitled to immunity under the GPW [Third Geneva Convention].[175]

By "lawful" combatant, it is clear the court was really addressing whether Lindh qualified as a privileged belligerent. Indeed, following the approach of AP I, the legal meaning of the term "combatant" necessarily indicates a lawful privilege to participate directly in hostilities.[176]

Nonetheless, the court's analysis of whether Lindh qualified as a prisoner of war with accordant combatant immunity focused on more than just his membership in the Taliban armed forces.[177] On that question, the court emphasized the necessity of compliance with the "four conditions":

> The GPW [Third Geneva Convention] sets forth four criteria an organization must meet for its members to qualify for lawful combatant status:
>
> i. the organization must be commanded by a person responsible for his subordinates;
>
> ii. the organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
>
> iii. the organization's members must carry arms openly; and
>
> iv. the organization's members must conduct their operations in accordance with the laws and customs of war. See GPW, art. 4(A)(2).[178]
>
> Nor are these four criteria unique to the Third Geneva Convention: they are also established under customary international law and were also included in the Hague Regulations of 1907. See Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Regulations). In the application of these criteria to the case at bar, it is

175. *Id*. at 554.

176. This conflation of "lawful combatant" and the privilege to participate in hostilities reveals why the very term "lawful combatant" is legally redundant: if someone qualifies as a combatant, they have lawful privilege to participate in hostilities. *See, e.g.,* DoD LOWM (Dec. 2016), *supra* note 7, at para. 4.3.2.4 (using the term "combatant" interchangeable with "lawful or privileged combatant"). Accordingly, a combatant is *ipso facto* a "lawful" participant in hostilities; all combatants qualify for prisoner of war status and a claim of combatant immunity. *See id.* However, that immunity is not absolute, and therefore they are subject to criminal liability for acts or omissions unrelated to the armed conflict or for acts or omissions that violate the laws and customs of war. *See* United States v. Noriega, 117 F3d. 1206 (1997) (addressing criminal liability for acts unrelated to the an international armed conflict). But the facts of the allegation against Lindh implicated neither of these exceptions. *See* Lindh, 212 F. Supp. at 553.

177. *See* Lindh, 227 F.2d at 557.

178. *Id*.; *see also* GPW Convention, *supra* note 3, at art. 4(A)(2).

> Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity, i.e., that the Taliban satisfies the four criteria required for lawful combatant status outlined by the GPW. On this point, Lindh has not carried his burden; indeed, he has made no persuasive showing at all on this point. For this reason alone, it follows that the President's decision denying Lindh lawful combatant immunity is correct. In any event, a review of the available record information leads to the same conclusion.[179]

The Lindh decision reinforces the *quid pro quo* integrated into the qualification for combatant immunity and its implicit enhancement to the protection of the civilian population: soldiers—even those who are members of armed forces—who hope to be treated as prisoners of war with the benefit of combatant immunity must take measures to facilitate the enemy's ability to distinguish them from civilians.[180] This, of course, is no guarantee the incentive structure will produce this ideal outcome; history is replete with examples of armed forces and associated militias ignoring the passive distinction requirement.[181] But at least the U.S. interpretation of the law reflected in the Noriega and Lindh decisions reinforces this incentive.

Lindh was ultimately convicted for violation of U.S. federal criminal law through the application of long-arm jurisdiction.[182] But Lindh's case is more instructive for the "what-ifs" than the "what happened." What if the district court had accepted Lindh's textual interpretation of the Third Convention? Lindh was, after all, an actual member of the Taliban armed forces—the armed forces of the State engaged in the international armed conflict with the United States. Had the court adopted his interpretation of the Third Convention, Lindh would have qualified as a prisoner of war with an accordant claim of combatant immunity from U.S. domestic criminal jurisdiction. Or what if United States criminal jurisdiction did not extend to Lindh's conduct? In either case, Lindh would have been immune to domestic criminal sanction even though the Taliban consistently failed to comply with the four Article 4.A.2 requirements or arguably even the modified Additional Protocol I requirements.

The situation of non-international armed conflicts is simpler but even more troubling from the perspective of incentivizing passive distinction. Prisoner of war status, as noted above, arises only in the context of an international armed conflict; it is unavailable to belligerents or "fighters" who are members of organized non-state armed groups in a non-international armed conflict.[183] Thus, such individuals have no claim to combatant status or combatant immunity.[184] No

179. *See* Lindh, 227 F.2d at 558.
180. *See*, *e.g.*, DoD LOWM (Dec. 2016), *supra* note 7, at para. 5.4.8.
181. *See* Watts: Perfidy, *supra* note 66, at 162.
182. Lindh, 227 F.2d at 545.
183. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 4.3.
184. *Id*.

matter how "distinct" such a belligerent makes himself through wearing a uniform or some other distinctive emblem, the linkage between prisoner-of-war status and combatant immunity dictates this conclusion.[185] Yet, ironically, it is the context of non-international armed conflicts where the dilution of the protective effect of distinction is most pervasive.[186]

It is tempting to imagine an extension of combatant status and privilege to non-international armed conflicts, contingent on non-state organized armed groups complying with an obligation to distinguish themselves from the civilian population, at least at a minimum in a way that complies with Article 44 of Additional Protocol I.[187] But it is unlikely states will endorse such an evolution of international law. This in no way, however, negates the fundamental distinction obligation applicable to these conflicts: belligerents—whether fighting on behalf of state security forces or non-state organized armed groups—are never released from the obligation to distinguish between permissible and impermissible objects of attack.[188]

All three of these situations reveal the limits of denial of combatant immunity as a deterrent to operating in a manner indistinguishable from civilians: the grant of prisoner of war status based solely on membership in a State's armed forces; the denial of prisoner of war status in an international armed conflict without applicability of domestic criminal jurisdiction over the pre-capture conduct; or the inapplicability of prisoner of war status for detained non-state organized armed group members in the context of a non-international armed conflict.[189] In all these situations, it is generally assumed that the international law war crime of perfidy or treachery fills this gap. Indeed, in all three of these situations the individual detainee—whether prisoner of war or unprivileged belligerent—would be subject to individual criminal responsibility for committing this war crime.[190] But as will be explained, treachery/perfidy is an incomplete solution to the potential of impunity for feigning civilian status.[191]

V. TREACHERY/PERFIDY: AN INCOMPLETE DETERRENT TO FEIGNING CIVILIAN STATUS

Treachery, or perfidy, is a war crime under international law—violative of both treaties and customary international law—and is within the jurisdiction of

185. *See id.*

186. *See, e.g.*, Sleesman, *supra* note 30, at 1129 (discussing the issues of determining the applicable internation law regarding the conflict between YPG forces and ISIS).

187. *See* Protocol I, *supra* note 5, at art. 44.

188. ARMY FM 6-27, *supra* note 36, at 1–2 ("Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense of that distinction for the rest of their lives. . . .").

189. *See generally* Protocol I, *supra* note 5, at art. 65.

190. *See* discussion *infra* Section V.

191. *See* discussion *infra* Section V.

the ICC.[192] These two terms refer to the same criminal misconduct.[193] As noted in the U.S. Department of Defense Law of War Manual,

> Acts of perfidy are acts that invite the confidence of enemy persons to lead them to believe that they are entitled to, or are obliged to accord, protection under the law of war, with intent to betray that confidence. The key element in perfidy is the false claim to protections under the law of war in order to secure a military advantage over the opponent. The claim must be to legal protections.[194]

Note that the Manual emphasizes the conduct of inviting confidence as the essence of perfidy, although as subsequently noted a violation of the prohibition requires an actual harmful result.[195] It is debatable whether the Manual accurately identifies the "key element" of this offense. The conduct of inviting confidence is obviously an essential element, but what transforms that conduct into a war crime is the criminal *mens rea* that actuates that conduct: the intent to betray that confidence by exploiting the enemy's compliance with international humanitarian law in order to gain a tactical advantage.[196]

Focusing on the concurrence between a criminal state of mind and the conduct that state of mind actuates will, as explained below, lend support for the logic of recognizing an inchoate variant of this war crime. Indeed, honing in on the concurrence of these two elements is wholly consistent with the definition of perfidy in Article 37 of Additional Protocol I, a treaty codification of customary international law.[197] Article 37 provides that,

> 1. 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:
>
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
>
> (b) the feigning of an incapacitation by wounds or sickness;
>
> (c) the feigning of civilian, non-combatant status; and

192. *See* CUSTOMARY STUDY, *supra* note 22, at 384.

193. *Compare Perfidy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A combatant's conduct that creates the impression that an adversary is entitled to, or is obliged to accord, protection under international law, when in fact the conduct is a ruse to gain an advantage. Acts of perfidy include feigning an intent to negotiate under a flag of truce, or feigning protected status by using signs, emblems, or uniforms of the United Nations or of a neutral country."), *with Treachery*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A deliberate and willful betrayal of trust and confidence.").

194. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 5.22.1.

195. *Id*.

196. *Compare id*., *with* Protocol I, *supra* note 5, at art. 37., *and* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1483.

197. *See* Protocol I, *supra* note 5, at art. 37.

> (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.[198]

The ICRC Commentary to Article 37 indicates that,

> [L]iterally speaking, perfidy means the breaking of faith, and the problem of bad faith may present itself in time of peace or in time of armed conflict with regard to the whole field of international relations, whether at a political level, implicating only those participating in the decision-making process, or at the level of the application of the rules."[199]

Feigning civilian status is perhaps the most common example of conduct that *may* be in violation of this prohibition. However, that conduct, even when actuated by the requisite intent to betray, is alone insufficient to qualify as perfidy.[200] This is because the prohibition is framed in terms of *result*, not *conduct*.[201]

An analogous approach was incorporated into the Elements of Crimes within the jurisdiction of the ICC, which states the "[w]ar crime of treacherously killing or wounding," is an offense enumerated to apply to both international and non-international armed conflicts. [202] The result requirement is explicit in the title of these offenses. Article 8(2)(e)(ix) enumerates the elements of this war crime as follows:

> Elements
>
> 1. The perpetrator invited the confidence or belief of one or more combatant adversaries that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
>
> 2. The perpetrator intended to betray that confidence or belief.
>
> 3. The perpetrator killed or injured such person or persons.
>
> 4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
>
> 5. Such person or persons belonged to an adverse party.
>
> 6. The conduct took place in the context of and was associated with an armed conflict not of an international character. [203]

Thus, an substantively identical enumeration characterizes what would be perfidy in the context of an international armed conflict as the war crime of treachery

198. *Id.*
199. *See* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1483.
200. *See* CUSTOMARY STUDY, *supra* note 22, at 384.
201. *Id.*
202. *See* Rome Statute Elements, *supra* note 64, at 8(2)(e)(ix).
203. *Id.*

in the context of a non-international armed conflict. Indeed, as the U.S. Department of Defense Law of War Manual notes, the terms perfidy and treachery are functionally interchangeable:

> 5.22.1.1 Perfidy and Treachery – Notes on Terminology. "Treachery" and "perfidy" have been used interchangeably. Article 23(b) of the Hague IV Regulations uses the word "treacherously," which was also used in Article 13(b) of the 1874 Brussels Declaration.[204]

It is equally clear that as a war crime, treacherously killing or wounding is a result crime: proof of conduct actuated by specific intent to betray is required but insufficient to prove the offense; harmful result is required for conviction.[205]

The symmetry between AP I, Article 37 and the ICC offense is in no way problematic. What is problematic, however, is how defining the offense as one of result instead of conduct dilutes its proscriptive and deterrent effect. Indeed, it seems odd that an *effort* to inflict death or injury on an opponent by intentionally inviting, "the confidence or belief of one or more combatant adversaries that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict"[206] eludes condemnation merely because that effort failed. Instead, it is the concurrence between that illicit intent and the *conduct* intended to produce that harmful result that is equally corrosive to the protective objectives of the distinction obligation. The soldier who fortuitously avoids being killed or injured by an enemy feigning civilian status to gain a tactical advantage is just as likely to question that status in the future as soldiers who observe a comrade killed or injured.[207] It is therefore unsurprising that the ICRC to Article 37 actually emphasizes this point, though the article it is discussing provides for a result-based prohibition:

> The inclusion of this example [feigning civilian status] brought Committee III to the heart of the problem. To reject it would have meant compromising the fundamental distinction between civilians and combatants, which forms the basis for the law of armed conflict. To accept it without restrictions would have meant destroying the compromise which had been achieved with regard to Article 44 '(Combatants and prisoners of war),'which in some circumstances allows a guerrilla combatant who cannot distinguish himself from the civilian population to retain his status as a combatant, by the sole fact of his carrying his arms openly (Article 44 – 'Combatants and prisoners of war,' paragraph 3, second sentence). The fact that under the terms of the definition of perfidy it is not sufficient to prove the feigning or the disguise of the combatant in civilian dress*, but that it is also necessary to prove the intention to*

204. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 5.22.1.1.
205. *See* CUSTOMARY STUDY, *supra* note 22, at 221.
206. *See* Protocol I, *supra* note 5, at art. 37(1).
207. *See* Greer, *supra* note 74, at 269.

> *mislead* in the sense given in the same definition, has not sufficed to allay the suspicion of those who advocated the cause of guerrillas.[208]

This result requirement is also arguably inconsistent with the general reaction to what is often characterized as perfidious/treacherous *conduct*. Most observers of feigning civilian status in an apparent intentional effort to gain tactical advantage during hostilities would likely condemn that conduct irrespective of whether it results in actual death or injury.[209] This approach seems better aligned with common sense and operational logic than the result-based prohibition itself.[210] The ostensible purpose of such a prohibition is to establish a clear line of impermissible *conduct* and deter such *conduct*, not simply to sanction the harmful impact inflicted resulting from that intentionally illicit conduct.[211] Restricting the proscriptive effect of the prohibition to actual harmful results dilutes this effect and, when coupled with the inapplicability of the prisoner of war/passive distinction *quid pro quo* negates what should be a vitally important basis for both condemning and sanctioning the use of such illicit tactics.[212]

Even where harmful result is established, there is still uncertainty as to how proximate to the conduct that result must have been. In other words, does the result element require proof of a direct causal connection between the conduct and the result? Or will a more attenuated causal relationship satisfy the requirement? While this has been a point of contention for experts who have addressed the war crime of perfidy, the weight of authority is that the causal connection must be quite proximate. For example, Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf took the position that there "must be the proximate cause of the killing, injury or capture. A remote causal connection will not suffice."[213] This suggests an expectation that the physical consequences to a person must result from the forbearance secured by feigned protected status.[214] As a negative example, Bothe and his co-authors cite a lethal ambush arising from earlier, feigned injury as inadequate to establish prohibited perfidy; the feigned injury may have been part of the overall ambush plan, but without proof of a direct causal connection between the feigning and the immediate death or injury caused by the ambush, perfidy could not be established.[215]

Such an approach seems consistent with what is referred to earlier as the "mandatory minimum" passive distinction requirement of Article 44 of the Protocol, as it results in a symmetry between when feigning civilian status would result in

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208. *See* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1506 (emphasis added).

209. *Cf.* John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction*, 6 J. INT'L CRIMINAL JUSTICE 627, 633 (2008).

210. *See id.* at 638–41.

211. *See id.*

212. *See id.*

213. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 204 (Nijhoff Classics in Int'l Law, 2d. ed. 2013) (1982).

214. *See id.*

215. *Id.* at 137.

both denial of combatant status and liability for the war crime of perfidy: when the feigning was immediately related to the infliction of harm.[216] With each step of attenuation from this direct causal relationship, it becomes increasingly difficult to distinguish conduct that could be consistent with combatant status from perfidy.

A direct causal relationship between the conduct and the harm is also useful to mitigate doubt as to an alleged war criminal's intent: the closer to infliction of harm the perfidious conduct becomes, the more likely it is that it was intended to betray confidence of the enemy.[217] But this also contributes to the logic of an inchoate variant of the crime. Why? Because, as will be explained below, it is the specific intent element that would be dispositive in differentiating between *conduct* that might be regarded as perfidious in nature and *conduct* that was actuated by an intent to betray an enemy's confidence to gain an immediate tactical advantage.[218] An intelligence operative captured in civilian clothing while gathering intelligence may be part of an ultimate kill chain, but that alone seems insufficient to prove an intent to betray enemy confidence in that appearance in order to inflict death or injury, especially if the forces acting on the intelligence complied with passive distinction requirements.[219] In contrast, an intent to betray confidence is a much stronger inference for an enemy operative apprehended in a military compound after infiltrating through the main gate by feigning civilian status armed with concealed weapons and obviously proximate to likely targets.[220]

Where an individual engages in conduct intending to betray an enemy's belief the individual is protected from attack pursuant to international humanitarian law as the result of objective *indicia* of protected status, all but the actual infliction of harm required to prove perfidy/treachery has been established. This should be enough to justify criminal sanction. In fact, the ICRC Commentary to Article 37 seems to reinforce this conduct-focused condemnation.[221] According to that Commentary, "[P]aragraph 1 explicitly prohibits a particular category of *acts* of perfidy, as well as giving a definition of *acts* of perfidy."[222] What exactly, however, is meant by "acts" of perfidy? While Article 37 actually enumerates specific acts of gaining unjustified confidence from an opponent as a result of the opponent's respect for international humanitarian law, an essential but insufficient predicate for establishing perfidy, what is actually prohibited is the result derived from those acts.[223] The Commentary acknowledges this, but also notes this undermines the goal of prohibiting perfidy:

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216. *See* Protocol I, *supra* note 5, at art. 44.

217. 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1506.

218. *See* discussion *infra* Section VI.A.

219. *See* Dehn, *supra* note 210, at 633 (explaining how Columbian intelligence operatives likely committed petrify because the intent of their deception was to deceive the enemy so they could rescue hostages and capture guerrilla commanders).

220. *Id*.

221. 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1490.

222. *Id*.

223. *See* Protocol I, *supra* note 5, at art. 37.

> Following the Hague Regulations (Article 23(b)), the prohibition only concerns the killing, injuring or capturing of an adversary by resort to perfidy. . .[224]

> According to the authors of this study, the prohibition of perfidy has its weak points. If only the fact of killing, injuring or capturing an adversary by resort to perfidy constitutes a perfidious act, the question arises what an unsuccessful attempt would be called. Moreover, it seems that a prohibition which is restricted to acts which have a definite result would give the Parties to the conflict a considerable number of possibilities to indulge in perfidious conduct which was not directly aimed at killing, injuring or capturing the members of the armed forces of the adverse party, but at forcing them to submit to tactical or operational measures which will be to their disadvantage (raising the white flag for the sole purpose of deflecting or delaying an attack is not a direct violation of the prohibition contained in the first sentence even though it is a violation of Article 23(f) of the Hague Regulations). . . It will be no easy matter to establish a causal relation between the perfidious act that has taken place and the consequences of combat. *The authors consider that it follows that there remains a sort of grey area of perfidy which is not explicitly sanctioned as such, in between perfidy and ruses of war*. This grey area forms a subject of permanent controversy in practice as well as in theory.[225]

This passage leaves no doubt that perfidy was at the time (and likely remains) largely defined by conduct, not a requisite result.[226] It also highlights the lack of logic inherent in the result-based definition. But what seems most inexplicable about this passage is the suggestion that perfidious conduct that does not support a causal connection to death or injury falls into a "grey area" between perfidy and ruses of war.[227] Ruses, unlike perfidy, are acts of permissible deception employed to gain a tactical advantage over the enemy.[228] The difference between a ruse and perfidy certainly cannot be whether the conduct produced a result; the difference is whether or not the deception sought to exploit the opponent's respect for the law of armed conflict.[229]

There certainly is a grey area, but it is not between perfidy and ruses; it is between perfidious conduct and the result of such conduct. And that is a grey area that needs to be filled. Interestingly, the Commentary above seems to provide the answer to filling this gap: attempted perfidy.

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224. *See* 1907 Hague IV, *supra* note 106, at art. 23(b).

225. *See* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1492 (emphasis added).

226. *See id.*

227. *Id.*

228. *See generally* Protocol I, *supra* note 5, at art. 37(2) (discussing the difference between permissible ruses and perfidious conduct).

229. *See* DoD LOWM (Dec. 2016), *supra* note 7, at para. 5.25.1.

VI. FILLING THE CONDEMNATION GAP

A captive who feigned civilian status to betray an enemy's respect for the protection afforded by that status—whether or not qualified as a combatant—has not committed the war crime of treachery/perfidy unless the conduct resulted in death or injury to the opponent.[230] If the individual is a prisoner of war, that status will immunize her from domestic criminal sanction for attempting to kill or injure.[231] If not, liability would depend on the jurisdictional reach of that domestic law.[232] No matter how compelling the evidence that the individual intended and attempted to inflict death or injury, confining perfidy to a result requirement would functionally immunize the captive for that pre-capture conduct.[233] Furthermore, even if there were compelling evidence that the captive engaged in that conduct pursuant to superior orders, the failure to fully carry out those orders would negate any command or accomplice liability for the superior who issued the orders.[234]

These accountability gaps can be filled by making the concurrence between perfidious intent and perfidious *conduct* the focal point of prohibition and condemnation. The way to reach that outcome is through an inchoate variant of perfidy/treachery.

In the realm of criminal law, to include international criminal law, the inchoate offense of attempt punishes individuals whose intentional efforts to complete a target offense move from preparation into the realm of perpetration, yet fail to result in a completed crime.[235] In some cases, the defendant commits the last act he believes is necessary to complete the target crime but is unsuccessful; for example, shooting to kill an intended victim but missing.[236] In other cases, the defendant stops short of completing the last act either by his own decision or because his effort is interrupted.[237] The reasons for terminating the effort to complete the target offense may be varied, to include encountering some circumstance that makes completing the offense more difficult than anticipated or a simple change of heart.[238] However, where evidence indicates the defendant progressed beyond preparation and actually initiated perpetration, terminating the conduct prior to producing the intended result is normally not a defense to the attempt.[239]

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230. *See, e.g.*, *id.* at para. 5.22.2 ("It is prohibited to use perfidy to kill or wound the enemy.").

231. *See 2020 Commentary*, *supra* note 17, at para. 20 ("For a combatant, the mere participation in hostilities is not subject to judicial prosecution; only those serious violations of humanitarian law known as war crimes are.").

232. *See id.*

233. *See* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1506.

234. *See id.*

235. *See* Rome Statute of the Int'l Criminal Court art. 25(3)(f), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

236. *See id.*

237. *See id.*

238. *See id.*

239. *See, e.g.*, People v. Hood, 462 P.2d 370 (Cal. 1969); People v. Quarles, 236 Cal. Rptr. 3d 49 (Cal. App. 1st Dist. 2018); *see also* Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know for Sure*, 13 OHIO ST. J. CRIM. L. 521 (2016).

Whether failed or incomplete, there are certain common elements of an attempt. First, the defendant must act with the specific intent—the conscious objective—of completing a target offense.[240] Second, if that offense is completed the attempt merges into that offense (in this sense all completed crimes begin with an attempt).[241] Third, the defendant's conduct must progress past mere preparation to commit the target offense to the initiation of perpetration.[242] For a failed attempt this last requirement is easily satisfied because the defendant committed the last act needed to complete the crime. Identifying when conduct crosses this line for an incomplete attempt is often much more difficult. However, in either situation what justifies condemnation is proof the defendant committed himself to completing the crime and took a substantial step towards that outcome.[243]

Applying the concept of attempt to the target crime of treachery/perfidy is both logical from a deterrent and accountability standpoint, but also complicated because of the challenge of identifying when conduct is sufficient to cross the line into the realm of attempt.[244] It is also important to note that imposing criminal liability for an inchoate version of a war crime is no great innovation. Indeed, this theory of criminal liability is embedded into the Rome Statute for the ICC. Specifically, Article 25 of the treaty establishes the basis for individual criminal responsibility as follows:

> Article 25 Individual criminal responsibility
>
> 1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
>
> 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . .
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this

240. Johnson, *supra* note 241, at 533.
241. *Id*. at 528.
242. *See id*. at 528–29.
243. *See id*.
244. *See* Watts: Perfidy, *supra* note 66, at 162–63 (outlining how even concepts common to warfare—like camouflage—do not easily fit into the definition of a permissible ruse).

> Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.[245]

This attempt provision is virtually identical to the attempt provision of the United States Model Penal Code—a comprehensive model criminal code published by the American Law Institute in 1962 (the "MPC"). [246] Since that date, this model code has provided the foundation for criminal code reform in approximately two-thirds of States in the United States. One of the most important features of the MPC was the attempt provision, Section 5.01.[247] Prior to this reform, most definitions of attempt involving an incomplete effort to commit a target offense focused on what the defendant had yet to do, not on what he had already done.[248] For example, the so-called "last act" test required a finding the defendant had initiated the "last act" necessary to commit the target offense.[249] Of course, for a failed attempt, that act is completed. But for the more complicated incomplete attempt, the MPC shifted the focus from what the defendant had yet to do to what he had already done. Specifically, Section 5.01 defined three distinct theories of attempt:

> **Section 5.01. Criminal Attempt**.
>
> (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
>
> (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.[250]

Each theory of attempt under the MPC necessitates a finding that the defendant acted with the purpose—the conscious objective—of committing the target offense.[251] Subsections 1(a) and 1(b) each address "failed" attempts—situations

245. *See* Rome Statute, *supra* note 237, at art. 25(3)(f).
246. MODEL PENAL CODE § 5.01 (AM. L. INST., Proposed Official Draft 1962) [hereinafter MPC].
247. *Id*.
248. *See generally* Gideon Yaffe, *Criminal Attempts*, 124 YALE L. J. 93 (2014).
249. *See id*. at 117–18.
250. *See* MPC, *supra* note 246, at § 5.01.
251. *See id*.

where the defendant has completed the last act necessary to complete the target offense but fails, either because of an erroneous assumption related to the existence of an attendant circumstance of the target offense (for example shooting a dead body believing it to be a living human being) or because some fact necessary to complete the offense is not satisfied (for example shooting at a victim intending to kill but missing or using a firearm that, unbeknown to the defendant, is not functional).[252]

It was subsection (1)(c) that was, however, most innovative. This subsection addresses incomplete attempts, meaning attempts where the defendant's act or omission fell short of the last act necessary to complete the target offense.[253] Until the promulgation of the MPC, different U.S. jurisdictions developed different "tests" to assess when a defendant committed an act that satisfied the attempt requirement.[254] These various tests sought to define for judges and juries the proverbial line of criminality. As noted, almost all of these tests focused on what the defendant had yet to do.[255]

The MPC took a fundamentally different approach. The critical focus for attempt liability for an incomplete attempt was not what the defendant had yet to do, but whether what the defendant already did strongly corroborated the inference that he intended to complete the crime had he not been interrupted.[256]

The Rome Statute is obviously not identical to the MPC. However, the substantial step language used in the Rome Statute encompasses all types of attempts included within the MPC.[257] Both types of attempts covered in subsections (1)(a) and (1)(b) of the MPC are encompassed by Article 25.3.(f), because both of those types of attempts arise only after the defendant has completed the last act necessary to complete the target offense.[258] In other words, the conduct that results in the failed attempt is the substantial step. Indeed, in such situations the fact that the defendant took a substantial step towards completing the target offense is self-evident. Accordingly, the only additional requirement for establishing attempt-based criminal liability would be proof the defendant acted with the purpose to commit a target offense within the jurisdiction of the ICC.

For the crime of perfidy—or treacherous killing or injury—the two types of attempts are clearly relevant. First, consider the example of a soldier who feigns civilian status intending to betray the enemy's respect for that appearance and sets off to launch an attack against an enemy. The soldier discovers the enemy where expected and, exploiting the enemy's assumption the soldier is a civilian, is able to surprise him with an attack. However, the attack fails when the soldier's

252. *See id*. at § 5.05.

253. *Id*. at § 5.01.

254. *See* Yaffe, *supra* note 250, at 117–18.

255. *See id*.

256. *See generally* MPC, *supra* note 248, at § 5.01, ed. note (stating the determination between preparation and attempt depends on "the actor having taken a 'substantial step' in a course of conduct planned to culminate in the commission of a crime").

257. *Compare* Rome Statute, *supra* note 237, at art. 25(3)(f), *with* MPC, *supra* note 248, at § 5.01(c).

258. *See* Rome Statute, *supra* note 237, at art. 25(3)(f).

rifle jams and he flees. In that situation, there is no result of death or injury, but there is also no question the soldier committed the last act towards completing the crime.[259] Hence it would qualify as an attempt under subsection (1)(b) of the MPC.[260] Committing that last act would also certainly qualify as a substantial step under Article 25 of the Rome Statute.[261]

Or consider the same hypothetical with a slight variation. In this example, the soldier goes to the location where he intends to launch the attack, but prior to doing so observes a far more robust enemy presence than he originally anticipated. As a result, he decides not to launch the attack. This "incomplete" attempt would also satisfy the substantial step requirement under subsection 1(c) of the MPC, and also under Article 25 of the Rome Statute.[262] As with the substantial step test in the MPC, the soldier took, "action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions."[263]

In the example of the soldier who decides not to go through with the attack, there is still some uncertainty as to whether he would have completed the attack but for the unanticipated circumstances. Yet such is the case with all incomplete attempts, which is why assessing whether the defendant took the requisite substantial step is more complicated than with a failed attempt. When treachery/perfidy is the target crime, this means the finding of the specific intent to betray will often necessitate a narrow interpretation of what qualifies as a substantial step.[264] This is because of undeniable reality that there may be many situations where the failure to distinguish oneself from the civilian population is not actuated by the requisite intent to betray enemy respect for international humanitarian law and thereby gain an illicit tactical advantage.[265]

Because of this, what qualifies as a substantial step to prove the act element of an alleged attempted treachery/perfidy should be narrowly construed. And Article 44 offers a logical standard for that construction.[266] Specifically, as noted earlier, Article 44 establishes what is in effect a mandatory minimum of passive distinction as a precondition to combatant entitlement.[267] That mandatory minimum is focused on the immediate engagement: the combatant must carry arms openly during all engagements and "during such time as he is visible to the

259. *See* MPC, *supra* note 248, at § 5.01(c), ed. note ("[L]iability depends upon the actor having taken a "substantial step" in a course of conduct planned to culminate in commission of a crime.").

260. *See id*.

261. *See* Rome Statute, *supra* note 237, at art. 25(f) ("Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.").

262. *Id*.

263. *Id*.

264. *See Perfidy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A combatant's conduct that creates the impression that an adversary is entitled to, or is obliged to accord, protection under international law, *when in fact the conduct is a ruse to gain an advantage*.") (emphasis added).

265. *See id*.

266. *See* Protocol I, *supra* note 5, at art. 44.

267. *Id*.

adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."[268]

An analogous standard for assessing a substantial step towards attempted perfidy/treachery is logical and workable: proof the defendant feigned protected status immediately prior to engaging an enemy or when in such proximity to the enemy prior to engagement that he or she is under enemy observation. In other words, for conduct to support an allegation of perfidy—especially when actual death or injury is not inflicted—the conduct must be within close enough proximity to the enemy that it supports only one rational inference: the failure to distinguish from civilians or other protected persons was the initiation of an engagement intended to exploit enemy respect for the apparent status.[269] This is obviously a high standard as there could be other situations where perfidious intent actuated combatant conduct that did not manifest in a harmful result. But this high standard is both intended and necessary in order to limit accountability for attempted perfidy to only the most compelling factual situations.

A perfidious attempt without death or injury also raises the issue of abandonment. More specifically, has the defendant committed a criminal attempt if he chooses to forego the last act towards completing the crime? Article 25 acknowledges abandonment as an impediment to attempt liability.[270] Specifically, the defendant "shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose."[271] This may suggest that any time a defendant abandons an effort to commit a target offense before committing the last act there is no basis for criminal liability, which would confine attempt liability to only failed attempts. However, like the substantial step test itself, the language of Article 25 mirrors that of the MPC, which introduced the special affirmative defense of abandonment.[272] This was done to provide individuals with an incentive to reverse a course of conduct towards committing a target offense *after* they initiated the attempt by taking a substantial step towards doing so.[273] Article 25 requires more than abandonment of the attempt; it requires that the evidence indicate the defendant "completely and voluntarily gave up the criminal purpose."[274]

This requirement also mirrors the MPC, which established a special affirmative defense for allegations of an incomplete attempt.[275] According to § 5.01(4) of the MPC, "it is an affirmative defense that [the defendant] abandoned his effort to

268. *Id*.
269. *Id*.
270. Rome Statute, *supra* note 237, at art. 25(f).
271. *Id*.
272. *Compare id*., *with* MPC, *supra* note 248, § 5.01(4) ("When an actor's conduct would. . . constitute an attempt . . . it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.").
273. *See* Rome Statute, *supra* note 237, at art. 25(f).
274. *Id*.
275. MPC, *supra* note 248, at § 5.01(4).

commit the crime. . . under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. . . renunciation of criminal purpose is not voluntary if it is motivated. . . by circumstances which increase the probability of detection. . . or which make more difficult the accomplishment of the criminal purpose."[276] This "complete and voluntary" renunciation of criminal purpose is explained in the Commentary to the MPC, which indicates that abandonment *does not* qualify as "complete and voluntary" when motivated by conditions that were not anticipated that make completing the crime more difficult or subject the defendant to a greater risk of apprehension.[277] For example, a defendant who triggers an alarm and then runs from the scene of an attempted burglary will have no abandonment defense. Only when a defendant's renunciation of criminal purpose is the result of a genuine self-induced change of heart will the defense of abandonment be valid.

It seems logical to assume that the general symmetry between the MPC and Article 25 indicates an analogous requirement for the "abandonment" immunity provided in Article 25. Thus, in the example of a soldier who abandons his attempt to inflict death or injury by engaging in perfidious conduct because the situation posed greater risk than originally anticipated, the abandonment does not indicate the defendant "completely and voluntarily gave up the criminal purpose."[278]

Of course, conduct alone is not sufficient to satisfy the burden of proving an attempted variant of treachery/perfidy. There must also be proof of concurrence between that conduct and the intent to betray confidence in the appearance of protected status in order to inflict death or injury—the essential *scienter* for proving either completed or attempted treachery/perfidy. When these two elements concur—perfidious conduct set in motion by the intent to exploit reliance on that conduct to inflict death or injury—liability aligns both a conduct and result aspect of the violation.[279] Because of this, proof of the requisite intent will be a critical aspect of distinguishing conduct that might suggest a perfidious intent with conduct that was intended to produce a perfidious result. That proof of such intent will become the focal point of liability assessment is not, however, remarkable. Indeed, this is the principal focus when proving any alleged incomplete attempt. And, as in most such cases, it will often be necessary to rely on circumstantial evidence to infer this requisite prohibited mental state. But this should not detract from the effort to place greater emphasis on the inchoate version of perfidy.

In some situations, the inference of this requisite intent would likely be relatively simple. For example, an enemy who feigns surrender and then at the last moment launches an attack on the capturing soldier. Few would question this qualifies as perfidy if the attack results in death or injury; if it fails to achieve that

276. *Id.*
277. *See id.*
278. *See id.*
279. *See* Rome Statute Elements, *supra* note 64, at 8(2)(e)(ix).

result the *conduct* should just as readily qualify as attempted perfidy.[280] Misuse of a protected emblem like the red cross, crescent, or diamond; or misuse of a flag of truce would provide equally compelling evidence of perfidious intent to support condemnation based on attempted perfidy.[281]

All of this points to a clear conclusion: once a defendant's perfidious *conduct* amounts to a substantial step towards inflicting death or injury on an enemy—meaning either the defendant committed the act needed to inflict the harm but failed to achieve that intended goal, or the defendant's perfidious conduct was sufficiently proximate to the infliction of harm that it would contradict the mandatory minimum passive distinction requirement of Additional Protocol I Article 44—the actus reus element of attempted treachery/perfidy is established.[282] At that point, the specific intent to betray the enemy's reliance on the appearance of protected status, and a finding that this intent actuated the perfidious conduct, justifies condemnation of the attempt. So applied, attempted perfidy ensures condemnation is fully aligned with the true nature of the breach of trust inherent in the notion of perfidy/treachery.

The ICRC Commentary to Article 37 is consistent with this conduct-based liability focus.[283] That Commentary explains that the definition of perfidy is, "based on three elements: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and to betray it on a specific point, the existence of the protection afforded by international law applicable in armed conflict (objective element)."[284]

Note that the asserted "basis" for the violation is focused principally on the concurrence of the *act* of inviting confidence and the *intent* to betray that confidence.[285] The Commentary then emphasizes the pernicious effect of perfidious *conduct* with no reference to the actual *result*:

> The central element of the definition of perfidy is the deliberate claim to legal protection for hostile purposes. The enemy attacks under cover of the protection accorded by humanitarian law of which he has usurped the signs. It is by inviting the other's confidence with the intention or the will to betray it that renders perfidy a particularly serious illegality, as compared with other violations of international law, and which constitutes for its perpetrator an aggravating circumstance. In doing so, he destroys the faith that the combatants are entitled to have in the rules of armed conflict, shows a lack of the minimum respect which even enemies should have for one another, and damages the dignity of those who bear arms. As a result of these consequences, perfidy destroys the necessary basis for reestablishing peace.[286]

280. *See* Watts: Perfidy, *supra* note 66, at 146, 153 (discussing the conduct-based foundation of perfidy).
281. *See* CUSTOMARY STUDY, *supra* note 22, 213; Protocol I, *supra* note 5, at art. 38.
282. *See* Protocol I, *supra* note 5, at art. 44 (defining combatant qualification).
283. *See* 1987 Commentary on the Additional Protocols, *supra* note 131, ¶ 1483.
284. *Id*. at ¶ 1500.
285. *See id*.
286. *Id*.

This discussion of the foundation for and corrosive effect of perfidy on the protection derived from the distinction obligation is aligned with widespread operational perception: it is the perfidious conduct that produces the erosion of the confidence in the appearance of protected status, not the harmful result. Thus, if as the Commentary asserts,[287] this is the basis for the definition of perfidy, then it is only logical to more consistently focus on attempted perfidy in lieu of the focus on the death or injury result requirement for a completed violation. Ultimately, as the Commentary notes, a key objective of the prohibition against perfidy was to enhance efficacy of the principle of distinction, and in so doing enhance the protection of the civilian population. This is why feigning "civilian or non-combatants status" is a specific example of perfidy.[288] Indeed, in contemporary armed conflicts this is probably the most common form of perfidious misconduct.

Yet identifying when wearing civilian garb is actuated by a specific intent to betray trust and inflict death or injury on an opponent is undoubtedly more complex than the feigned surrender or misuse of protected emblem. When death or injury is actually inflicted, that complexity is largely negated. However, proving an attempt—especially an incomplete attempt—will always be more complex than proving the completed crime. This complexity is related to Article 44's expansion of combatant qualification to individuals who "normally" wear civilian garb but display their weapons immediately prior to attack.[289] The permissibility of such conduct inevitably blurs the line between permissible wearing of civilian garb and an impermissible substantial step towards inflicting a perfidious result.[290]

But none of this negates the potential value of an attempt theory of liability. And, as noted, adopting a narrow definition of what qualifies as a substantial step will more closely align attempt liability with liability premised upon the actual completed offense of perfidy. Ultimately, a finding of attempted perfidy will turn on assessment of the totality of the circumstances and require the facts to rule out any plausible alternate explanation for the suspected or alleged perfidious conduct. For example, capturing a member of an enemy armed group in civilian clothing but unarmed – especially in a context strongly suggesting the enemy was merely seeking to avoid capture and internment as a prisoner - would *not* strongly corroborate a conclusion the defendant intended to engage in perfidy. In contrast, capturing such an enemy in civilian clothing, in proximity of friendly forces *and*

287. *Id.*

288. *See Iraq: Feigning Civilian Status Violates the Laws of War*, HUM. RTS. WATCH (Mar. 30, 2003) https://perma.cc/CY4M-7A97.

289. *See* Protocol I, *supra* note 5, at art. 44.

290. This complexity is exacerbated in the context of a non-international armed conflict because members of non-state organized armed groups have no "combatant immunity" incentive to distinguish themselves from the civilian population. And even in the context of an international armed conflict for States like the United States that reject Article 44's expanded definition of combatant, there will be instances where an enemy belligerent might be discovered out of uniform, for example if on leave from duty. In either context, the essence of the MPC substantial step approach will become critically significant: focusing on conduct to provide a strong inference of intent.

carrying a concealed weapon would support to a very different inference.[291] While an inference of intent to betray might not always be sufficient to condemn the conduct as perfidy - for example a downed pilot captured while trying to evade capture with a concealed pistol - it would provide a *prima facie* basis for such an accusation. Another important consideration would be whether the enemy organization routinely engaged in perfidious conduct; the more common the practice, the stronger the inference that steps towards what may be an act of perfidy were in fact a substantial step in that direction.

These considerations certainly create challenges when seeking to assess whether a captive committed the crime of attempted perfidy. However, the value of placing greater emphasis on the attempt variant of this war crime is not only relevant to criminal sanction; it also contributes to condemning and delegitimizing such *conduct* in the strategic information domain. Furthermore, condemnation reinforces the importance of the result-based prohibition itself, ideally deterring attempts to engage in perfidy and in so doing enhancing the protection of the civilian population.[292]

There is one final—and compelling—rational for recognizing the war crime of attempted perfidy: accountability of leadership. Imposing war crimes accountability on military commanders and others in positions of superior authority for crimes they ordered, knew of and took no action to prevent, or even should have known of and did nothing to prevent, is a critical component of the "responsible command" equation.[293] These theories of liability are closely aligned with traditional criminal law complicity theories but go a step farther, imposing individual liability for crimes committed by subordinates when a dereliction of duty to prevent such criminal misconduct is established.

Under any of these theories, however, complicity-based liability necessitates proof that the subordinate committed an actual crime. While the subordinate need not be tried or convicted, it is essential to prove the commission of a war crime by the subordinate in order to hold the commander responsible for that crime.[294] Restricting treachery or perfidy to an actual result crime means that even in a situation where there is uncontroverted evidence that a commander ordered subordinates to engage in a perfidious attack, the failure of the subordinates to inflict the requisite harmful result would immunize the commander from any criminal

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291. *See. e.g.*, Watts: Perfidy, *supra* note 66, at 165 (explaining that camouflaging of military positions during WWII was unlikely to be considered perfidy because it did not result in enemy casualties or captures—a concept that can be stretched when considering attempted perfidy to look at the totality of the circumstances and determining whether the enemy appears prepared to commit casualties or capture through its disguise).

292. Mike Madden, *Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law*, 17(3) J. CONFLICT & SEC. LAW, 439, 451 (2012) ("[P]rotections that are abused in armed conflicts will cease to be respected in armed conflicts.").

293. *See generally* Geoffrey Corn, *Contemplating the True Nature of the Notion of 'Responsibility' in Responsible Command*, 96 (895/895) INT'L REV. OF THE RED CROSS 901 (2015).

294. *See* Protocol I, *supra* note 5, at art. 86.2 (providing for command responsibility for subordinate war crimes); *see* CUSTOMARY STUDY, *supra* note 22, at 557-58.

responsibility for issuing that order.[295] In contrast, recognizing the attempt variant of the crime would subject the commander to liability for that attempt based on requisite evidence of his or her complicity.

It seems even more absurd to waive the wand of impunity for a commander who actually ordered subordinates to engage in perfidious attacks simply because those subordinates failed to inflict death or injury. Imposing accountability for attempted perfidy in this situation reinforces the responsibility of commanders to encourage the exact opposite conduct; to prevent subordinates from engaging in conduct that erodes the protective effect of the distinction obligation. Indeed, it should be expected that responsibility of command requires imposition of disciplinary sanction on subordinates who attempted such a perfidious attack irrespective of the success of failure to inflict death or injury. Yet without an attempt variant of this war crime, complicity liability would depend subordinate success in the effort to kill or injure the enemy, and there would arguably be no basis for the imposition of disciplinary sanction were the commander to learn of efforts to inflict such harm through perfidious conduct.

VII. CONCLUSION

This article began by discussing how combatant status and compliance with requirements to qualify for that status are the basis of combatant immunity or lawful combatant privilege. That immunity/privilege shields combatants from criminal sanction for their lawful pre-capture wartime acts. While not an absolute immunity, it is intended to incentivize conduct that complies with the laws and customs of war and deter contrary conduct. By linking claim to this privilege to distinguishing oneself from civilians and other protected persons, these qualification requirements complement the protective effect of the principle of distinction by facilitating an enemy's ability to distinguish between individuals subject to lawful attack and those protected from such attack.

This relationship between belligerent status and combatant immunity is deeply rooted in customary international law. While qualification for prisoner of war status pursuant to the Third Geneva Convention (with the exception of civilians who are not part of the armed forces) is generally understood as an indication of such qualification, Article 44 of Additional Protocol I suggests the Third Convention qualification provision is arguably under-inclusive. This is because Article 44, which specifically defines combatant qualification, includes members of armed forces who may not distinguish themselves "at all times" as required by the Third Convention. So long as such individuals comply with what is characterized herein as a "mandatory minimum"—distinguishing themselves immediately preceding an engagement and while deploying to the location of that engagement—the individual qualifies as a combatant.

295. *See generally* Jaime A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, 90 (870) INT'L REV. OF THE RED CROSS, 303 (2008).

While Article 44 was rejected by some States, most notably the United States, as an unjustified dilution of combatant qualification, even that modified standard demands the putative combatant distinguish himself from civilians during those times when combat engagement is likely.[296] Thus, whether viewed as a dangerous dilution of the passive distinction requirement or a pragmatic recognition that it is not realistic to expect passive distinction at all times, the minimum obligation is clear: combatant qualification demands conduct that enables the enemy to distinguish lawful targets from civilians and other protected persons during all engagements.

Deterring conduct that dilutes the protective effect of distinction is obviously central to this relationship between passive distinction, combatant status, and combatant immunity. But this deterrent effect is incomplete for a variety of reasons. First, there are some States and experts who believe prisoner of war status and combatant immunity extend to all members of the armed forces pursuant to the Third Convention irrespective of whether they comply with the passive distinction requirements expressly applicable to associated militia and resistance groups. Second, even when combatant status and its accordant immunity is inapplicable to a captured enemy, domestic criminal jurisdiction may not be broad enough to sanction pre-capture conduct. Finally, the combatant qualification incentive/deterrent equation is wholly inapplicable to members of non-state organized armed groups.

In all three of these situations, it is generally assumed that "feigning" civilian or protected status will nonetheless be subject to criminal sanction as perfidy, or, as defined by the Statute of the ICC as the war crime of treachery so long as there is resulting death or injury.[297] The definitions of both perfidy and the war crime of treachery are analogous. While feigning protected status with the intent to betray the enemy's respect for international humanitarian law are requisite elements under either definition, this illicit *conduct* is insufficient to prove a violation. This is because both perfidy and treachery are defined in terms of result: only when the intentional feigning results in harm to the enemy—death, injury, or for some States capture—will the violation be established.[298]

Accordingly, whether applied to a combatant as an act beyond the scope of combatant immunity, or to a so-called "unprivileged" belligerent, the result-based nature of this violation is an impediment to maximizing its deterrent and penal effect. This impediment can be mitigated by shifting the condemnation focus from *result* to *conduct*. The essence of perfidy—the misconduct that undermines humanitarian law protections by eroding confidence in the objective indicators that an individual is protected from being made the deliberate object of attack—should not be contingent on a harmful result. Instead, the illicit conduct intended

296. *See* Reagan to the Senate, *supra* note 126.

297. *See* Rome Statute, *supra* note 237, at art. 8(2)(b)(xi).

298. *Cf.* Watts: Perfidy, *supra* note 66, at 146-47 (explaining that "More realistically however, it is very likely that theories of liability employed by international criminal law mechanisms and domestic implementations of the perfidy prohibition would reach inchoate acts" nonetheless).

to bring about that result and coming close to doing so is equally corrosive to the protection of distinction. It may be true that perfidious conduct that results in death or injury of an opponent is more aggravated than conduct that does not, but this does not negate the harmful effect of that conduct.

It is illogical to allow impunity for perfidious or treacherous conduct because the actor was unsuccessful in producing the intended harmful result. It is even more illogical to allow such impunity for commanders or other superiors who order or encourage such conduct simply because the effort fails. Recognizing and placing greater emphasis on an attempt variant of this violation addresses this problem, and aligns the proscriptive and deterrent effect of perfidy with the full range of harm perfidious conduct produces. And from a regulatory perspective, this emphasis will enhance respect for the law by elevating the importance of conducting operations that avoid perfidious conduct no matter what the effect. Nor will the consequence of such misconduct be confined to international armed conflicts, but will instead provide a basis for condemnation of perfidious conduct in any armed conflict.

This recognition and emphasis is, of course, no panacea.[299] It will not prevent perfidious conduct, nor will it guarantee accountability. Like all aspects of the international humanitarian law, these outcomes depend on good faith respect for the law and responsible command. Nor will it always be easy to identify such an attempt. Establishing the essential *scienter* to establish such an attempt, the purpose to inflict harm, will often be as challenging. But this is the nature of all attempt liability; liability incorporated into the ICC's jurisdiction. When that intent is established, and the evidence demonstrates conduct set in motion by that intent that transgressed even the mandatory minimum passive distinction requirement of Additional Protocol I, condemnation seems completely justified.

It is time to shift the focus of the dialogue related to perfidy and treachery to where it should be: prohibiting and condemning the conduct that undermines the protection derived from objective indicators that a person is protected from deliberate attack. Attempted perfidy will contribute to this shift.

299. For broader criticism of the 20th century narrowing and legal refinement of the notion of perfidy see Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 106, 107–08 (2014).

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