

The Law of Armed Conflict

INTERNATIONAL HUMANITARIAN LAW IN WAR

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11 Ruses and Perfidy

11.0. Introduction

Treaties addressing modern weapons aside, there is little that is new in the law of armed conflict (LOAC). Discussions of “new paradigms” in warfare usually illustrate the speaker’s unawareness of history – allusions to the treachery of terrorists, for instance.

In the twelfth or thirteenth century B.C., in the Trojan War, the Greeks employed the legendary Trojan horse to defeat Troy. In the seventh century, the Islamic Caliph Abu Bakr ordered his forces, “Let there be no perfidy, no falsehood in treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly.”¹ The Lieber Code holds that, “Military necessity . . . admits of deception, but disclaims acts of perfidy . . .,”² yet perfidy persists.

In 1882, near El Obeid Egypt, the Egyptian government had grown weary of Muhammad Ahmad, a young Muslim who proclaimed himself the Mahdi, the Awaited One. Ahmad initiated a surprisingly effective rebellion against the government, and Cairo finally sent an army to capture or kill the Mahdi. The force was led by a retired British Indian army officer, General William Hicks. “To Cairo’s horrified astonishment, Hicks and most of his force was slaughtered at Shaykan . . . The Mahdi’s sharpshooters had feigned retreat, luring inward Hick’s army of 7,000 infantry, 1,000 cavalry, and 5,000 camels, together with its precious cannons and a horde of camp followers.”³

Does LOAC/IHL allow an armed force to “feign retreat” and then kill the pursuing enemy? May armed forces professing to comply with LOAC and IHL engage in such trickery? Yes, they may. This was an example of what is, in common Article 2 armed conflicts, a ruse. A ruse is not a LOAC violation.

11.1. Perfidy

Perfidy is a violation of LOAC and, according to Additional Protocol I, Article 85.3(f), in certain cases, a grave breach. It is described in Article 37 of Additional Protocol I as an act inviting the confidence of an adversary, leading him to believe he is protected under the

¹ C. AD 634, Alib Hasan al Muttaqui, *Book of Kanzul'ummal*, vol. 4 (1979), 472, cited in Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2d ed. (Manchester: Manchester University Press, 2000), 22.

² Instructions for the Government of Armies of the United States in the Field (Army General Orders 100 of 24 April 1863), (the Lieber Code), Art. 16.

³ Karl E. Meyer and Sharen B. Brysac, *Kingmakers: The Invention of the Modern Middle East* (New York: W.W. Norton, 2008), 39.

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¹² Id., at 434.

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rules of armed conflict,⁴ with an intent to betray that confidence, resulting in the killing, injuring, or capturing of the adversary.⁵ Perfidy, in other words, is **any attempt to gain the enemy's confidence by assuring his protection under the law of war, while intending to kill, wound, or capture him.** There is "a modicum of mutual trust which must exist even between enemies, if [LOAC] is to be fully complied with."⁶ Perfidy, which is prohibited in both international and non-international armed conflicts,⁷ is punishable under several provisions of the Rome Statute of the International Criminal Court. Those provisions include improper use of a flag of truce, or the uniform of the enemy (resulting in death or serious injury) and killing or wounding treacherously in international or non-international conflicts, usually interpreted as prohibiting assassination for hire.⁸

As the *Commentary* points out, the essential element of perfidy is the deliberate claim to legal protection for hostile purposes.⁹ It is a narrow crime, the definition of which is based on three elements: inviting the confidence of an enemy, a subjective intent to betray that confidence, and an actual betrayal involving the protection afforded by LOAC.¹⁰ "It should be underscored that the betrayal of confidence does not constitute an offence by itself: it only becomes so when it is linked to the act of killing, injuring or capturing the adversary."¹¹ If there is no intent to kill, wound, or capture the enemy, the act does not constitute perfidy. "The essential concept of perfidy is not difficult to grasp: a broken word, dishonesty, unfaithful breaking of promises, deliberate deception . . ."¹² Perfidy is prohibited to prevent the abuse, and consequent undermining, of the protection afforded by LOAC.¹³ The prohibition of perfidy covers attempted and unsuccessful acts¹⁴ and acts in internal armed conflicts, as well.¹⁵

The terms "perfidy" and "the somewhat old-fashioned word"¹⁶ "treachery" are often used interchangeably. There is a difference in the two terms, although so slight as to not bear extended consideration here. "The difference between perfidy and treachery is the difference between wrongful deception and betrayal In international law, treachery and perfidy are used interchangeably."¹⁷ The 1907 Hague Regulation IV, Article 23, for example, reads, "it is especially forbidden . . . To kill or wound treacherously individuals

⁴ Pietro Verri, *Dictionary of the International Law of Armed Conflict* (Geneva: ICRC, 1992), 84.

⁵ 1977 Protocol I, Additional to the Geneva Conventions of 12 August 1949, Art. 37. Hereafter: Additional Protocol I.

⁶ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (New York: Cambridge University Press, 2004), 198.

⁷ U.K. Ministry of Defense (MOD), *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 15.12.1. Also see *Prosecutor v. Tadić*, IJ-94-1. Decision Interlocutory Appeal on Jurisdiction (2 Oct. 1993), para. 125.

⁸ The Statute articles referred to are Articles 8(2)(b)(vii), 8(2)(b)(xi), and 8(2)(e)(ix), respectively. An intent to capture is not included in the statute's articles.

⁹ Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols* (Geneva: ICRC, 1987), 435.

¹⁰ *Id.*

¹¹ Frits Kalshoven, *Constraints on the Waging of War* (Dordrecht, The Netherlands: ICRC/Martinus Nijhoff, 1987), 82.

¹² *Id.*, at 434.

¹³ U.K. MOD, *The Manual of the Law of Armed Conflict*, *supra*, note 7, at para. 5.9.3.

¹⁴ Sandoz, *Commentary on the Additional Protocols*, *supra*, note 9, at 444.

¹⁵ U.K. MOD, *Manual of the Law of Armed Conflict*, *supra*, note 7, at para. 15.12.1.

¹⁶ Geoffrey Best, *War and Law Since 1945* (New York: Oxford University Press, 1994), 288.

¹⁷ Roy Gutman and David Rieff, eds., *Crimes of War* (New York: Norton, 1999), 271.

belonging to the hostile nation or army¹⁸ This provision is construed as prohibiting assassination of an enemy.¹⁹ Ultimately, however, the term “treachery” was considered too narrow, replaced in law of war discussions by “perfidy,”²⁰ illustrating the close relationship of the two terms.

Examples of perfidy are feigning an intent to negotiate under a flag of truce or surrender; feigning incapacitation by wounds or sickness to kill an enemy when his back is turned;²¹ feigning civilian, noncombatant status; or feigning protected status by use of signs, emblems, or uniforms of the UN or another neutral body.²²

In July 2008, Colombian soldiers, disguised as members of a nongovernmental international aid group, made a daring jungle rescue of fifteen hostages held by the Colombian rebel group, the Fuerzas Armadas Revolucionarias de Colombia (FARC). During this common Article 3 event, one of the rescuers wore a bib over his Kevlar vest with a large red cross on it.²³ In a common Article 2 conflict, presuming the disguised soldiers intended to kill, wound, or capture one or more of the FARC captors, that would have been an act of perfidy in violation of Additional Protocol I, Articles 37.1(d) and 38.1,²⁴ as well as being a grave breach under Article 85.3(f). (Two of the FARC captors were taken aboard the helicopter, along with the soon-to-be-freed captives, and the FARC captors were themselves made captives of the Colombian armed forces.) Because the rescue occurred in the course of a common Article 3 conflict, Additional Protocol I, relating to international armed conflicts, was not applicable. Additional Protocol II, applicable in non-international conflicts, in Article 12, makes the improper use of the emblem a violation, if not a grave breach, as does Article 6 of Additional Protocol III.²⁵ At the time of the incident, Colombia had ratified Additional Protocol II but not Additional Protocol III. (The International Committee for the Red Cross [ICRC] study of customary law concludes that the perfidy prohibition applies in both international and non-international armed conflicts, but its analysis of state practice does not strongly support that conclusion.²⁶) “Ultimately, the Colombian rescue operation might be argued to represent an exceedingly rare circumstance – one where a minor violation of IHL remedies a criminal violation . . .”²⁷ Sagely, perhaps, the ICRC chose to simply consider the humanitarian object of the act and look the other way as to the misuse of the emblem.

¹⁸ 1907 Hague Regulation IV, Art. 23(b).

¹⁹ Dept. of the Army, FM 27-10, *The Law of Land Warfare* (Washington: GPO, 1956), at para. 31.

²⁰ Sandoz, *Commentary on the Additional Protocols*, supra, note 9, at 432.

²¹ *Ibid.*, 438. Feigning death simply to save one’s life is not an act of perfidy because the purpose is not to raise up and betray the confidence of the enemy.

²² Additional Protocol I, Art. 39. It would not automatically be perfidy to use the UN uniform or symbol, however, where UN members intervene as combatants in an armed conflict.

²³ “Colombia: ICRC Underlines Importance of Respect for Red Cross Emblem,” available at: <http://www.icrc.org/web/eng/siteeng.nsf/htmlall/columbia-news-160708?opendocument>

²⁴ Additional Protocol I, Art. 38: “It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. . . .”

²⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem*. Art. 6.1: “. . . In particular, the High Contracting Parties shall take measures necessary for the prevention and repression, at all times, of any misuse of the distinctive emblems. . . .”

²⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge: Cambridge University Press, 2005), Rule 65, 221–3. Also see vol. II, *Practice*, 1369–77.

²⁷ Maj. John C. Dehn, “Permissible Perfidy,” 6–4 *J. of Int’l Crim. Justice* (Sept. 2008), 627, 651.

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In May 1982, in the Falkland Islands, the United Kingdom was wresting the Falkland Islands, a British possession, back from Argentine forces that had invaded and seized the islands the month before. At times the armed conflict between Britain and Argentina was fierce, nowhere more so than at Goose Green, a spit of land that controlled the Falklands' main airfield. The Argentines were fighting off hard-fought assaults on their positions near the airfield by 2 Para, of the British Parachute Regiment. Then the Brits saw a white flag at the enemy position. As British lieutenant Jim Barry moved forward to parlay and accept the apparent Argentine surrender he was shot dead. "The infuriated paras unleashed 66mm rockets, Carl Gustav rounds and machine-gun fire into the building. It was quickly ablaze. No enemy survivors emerged."²⁸

It is perfidy to fight in the enemy's uniform.²⁹ It is perfidious to falsely mark an historic building or monument to indicate protected status,³⁰ or to indicate that it is the property of a neutral state not a party to the conflict.³¹ It is perfidy to use a booby-trap³² in the form of an apparently harmless portable object, or to booby-trap wounded or dead bodies, children's toys, or religious objects.³³ It is perfidy for a *parlementaire* (one under a white flag who relays, for example, a surrender demand) to use the white flag as cover for the collection of information, or for the sole purpose of moving troops without interference.³⁴ It is perfidious to feign a cease-fire.³⁵ It would be perfidy for an aircraft to employ a false identification by use of a transponder³⁶ or to employ false markings indicating that it is a medical aircraft.³⁷ At sea, it is perfidious to launch an attack after sending distress signals or feigning distress by the crew taking to life rafts.³⁸

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

In the fall of 1939, Russia invaded its small neighbor, Finland, an act for which Russia was later expelled from the League of Nations. Russia, with hundreds of thousands of soldiers and thousands of tanks, anticipated a quick and easy victory over an opponent

²⁸ Max Hastings and Simon Jenkins, *The Battle for the Falklands* (New York: Norton, 1983), 247. There is evidence that Lt. Barry may have been killed by enemy troops who were unaware of their own white flag. Also, note that a white flag is a sign of a desire to communicate with the enemy. It does not necessarily indicate surrender, although that is often the outcome. See: 1907 Hague Regulation IV, Annex Regulations Respecting the Laws and Customs of War on Land, Article 32; and: Yves Sandoz, *Commentary on the Additional Protocols*, supra, note 9, at 457.

²⁹ Case No. 56, U.S. Military Court in Germany, *Trial of Otto Skorzeny and Others*, IX LRTWC (1947).

³⁰ 1923 Hague Draft Rules of Aerial Warfare, Arts. 25 and 26(6).

³¹ Additional Protocol I, Art. 37.

³² A booby-trap is "any device or material which is designed, constructed, or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act." Sandoz, *Commentary on the Additional Protocols*, supra, note 9, at 442.

³³ 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980 Optional Protocol II, Art. 6.1.

³⁴ Green, *Contemporary Law of Armed Conflict*, supra, note 1, at 92-3.

³⁵ Sandoz, *Commentary on the Additional Protocols*, supra, note 9, at 436 fn. 31.

³⁶ Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), para. 1019.

³⁷ Leslie C. Green, *Essays on the Modern Law of War*, 2d ed. (New York: Transnational, 1999), 589; and Additional Protocol I, Art. 18.

³⁸ 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, para. 111(b).

with no armor, no antitank guns, and a twelve-aircraft air force. They overlooked the Finnish soldier's tenacity, the lack of roads suitable for tracked vehicles, and the dense forests that broke large formations into small groups suitable for ambush. There was another thing: As the Finns retreated, they burned everything to the ground to deny its use to the invader, and they booby-trapped whatever remained. "Booby traps had been placed with such cunning and imagination that Pravda was moved to complain about the Finns' 'barbaric and filthy tricks.' Everything that moved seemed attached to a detonator; mines were left in haystacks, under outhouse seats, attached to cupboard doors and kitchen utensils, underneath dead chickens and abandoned sleds."³⁹

A booby-trap is any device or material designed, constructed, or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.⁴⁰ With restrictions, the use of booby-traps was lawful in 1939, and their use remains lawful today.⁴¹

In World War II, Nazi SS *Obergruppenführer* (lieutenant general) Reinhard Heydrich was Heinrich Himmler's deputy, and a leading proponent of the Final Solution. In 1942, he was based in Prague, and his title was *Deputy Reichsprotektor of Bohemia and Moravia*. Czechoslovakians simply referred to him as The Butcher of Prague. So broad were his powers and so wide his malevolent influence (and so effective his antespionage program), the British government decided that, despite the harsh Nazi retribution that was sure to follow, Heydrich had to be killed. Eight British-trained Free Czech agents were parachuted into Bohemia. On May 27, two of them, disguised as civilian workmen, intercepted Heydrich on his way to his office in an open Mercedes staff car and wounded him with a hand grenade. Eight days later, Heydrich died of septicemia that originated in his wound. As a result, the village of Lidice was razed, 198 male villagers murdered, 184 women sent to a death camp, and 98 children abducted and given to Nazi families. There were other reprisals, as well. The two Czech agents, and five others who assisted them, were betrayed to the Nazis by the eighth Czech agent. Four of the betrayed Czechs committed suicide just before capture, and three others died resisting capture.⁴²

As unlawful and terrible as the outcome was, the action of the Free Czech agents was perfidious. They attacked Heydrich, a uniformed combatant, while they wore civilian clothing and passed themselves off as noncombatants. Through their disguises as non-combatants they relied on being undiscovered and being protected by the law of war while intending to kill Heydrich. Despite the moral justness of targeting a monstrous enemy individual, the civilian disguises in which the Czechs fought constituted perfidy.

Other examples of perfidy are deliberately lying or misleading conduct involving a breach of faith where there is a moral obligation to speak the truth. It may initially seem odd that one may not lie to the enemy, but it is not lying that is prohibited, but lying or misleading the enemy with an intended breach of faith so as to cause the enemy to rely

³⁹ William R. Trotter, *The Winter War: The Russo-Finnish War of 1939-40* (London: Aurum, 1991), 68.

⁴⁰ Pietro Verri, *Dictionary of the International Law of Armed Conflict* (Geneva: ICRC, 1992), 27.

⁴¹ See Article 7, Protocol II (as amended on May 3, 1996), Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Prohibitions include booby-trapping the wounded or dead, children's toys, religious objects, or animals or employing booby-traps in cities, towns, or villages where fighting is not taking place. See Article 7 for the full range of booby-trap prohibitions and allowances.

⁴² Callum MacDonald, *The Killing of SS Obergruppenführer Reinhard Heydrich* (New York: Free Press, 1989); and: Charles Wighton, *Hitler's Most Evil Henchman* (London: Odhams Press, 1962). At war's end, the traitorous agent, Karel Čurda, was captured and tried by a Czech "revolutionary tribunal." He was hanged.

on the law of war to his detriment – his death, wounding, or capture. For example, it is perfidious to feign surrender so as to gain an advantage over the enemy, or to broadcast to the enemy that an armistice has been agreed on. “On the other hand, it is a perfectly proper ruse to summon a force to surrender on the ground that it is surrounded and thereby induce such surrender with a small force. Treacherous or perfidious conduct in war is forbidden because it destroys the basis for a restoration of peace . . .”⁴³

In contrast, feigning being wounded with the intent of surrendering when the enemy’s successful attack subsides is neither perfidy nor a ruse. It is not perfidy because it involves no intent to kill, wound, or capture, and it is not a ruse because, as we will see, it is not done in the interest of military operations for the purpose of misleading the enemy. “It is simply an expedient, used to . . . withdraw from combat definitively.”⁴⁴

During the first Gulf War (1991–1992), Iraqi troops reportedly dressed in civilian clothes and appeared to welcome approaching U.S. troops, then ambushed them.⁴⁵ Near the end of the war, in January 1992, at the opening of a mechanized battle, “Iraqi tanks entered Ras Al-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender per se.”⁴⁶ Still, if not perfidy it was an effort to deceive, which is no LOAC or IHL violation. It is a ruse.

11.1.1. *The Trial of Captain Jack*

On April 11, 1873, a group of four U.S. “Peace Commissioners,” appointed by the Secretary of the Interior and led by Army Brigadier General Edward R.S. Canby, met under a flag of truce with a group of six Modoc Indians near Tule Lake, California. Their purpose was to arrange terms by which hostilities between the United States and the Modoc band, consisting of only thirty-nine men, sixty-four women, and sixty children, might end.

The parley reached an impasse. The Modoc leader, Kientpoos, or “Captain Jack,” gave a signal, and hidden Modocs opened fire, killing one of the civilian Peace Commissioners and wounding the other two civilians. Captain Jack shot General Canby in the face, killing him.

On June 4, U.S. troops captured Captain Jack and the other Indians involved in the shootings. On July 4, at Fort Klamath, Oregon, the Indians, Captain Jack, Black Jim, John Schonchin, Boston Charley, Brancho, and Slolux, were tried before a military commission. The charges: The six Modoc Indians, “. . . in wanton violation of the sacred character of the flag of truce under the laws of war, willfully, feloniously, and with malice aforethought, [did] murder Brig. Gen. Canby” and the Reverend Dr. Eleasar Thomas, and assault with intent to kill Alfred B. Meacham and L.D. Dyar. Four days later, the six Modocs, who had no defense counsel, were found guilty and sentenced to death by hanging. On September 10 President Ulysses S. Grant approved the death sentences of four, including Captain Jack, and remitted the sentences of Brancho and Slolux to imprisonment for life. He also ordered that the remainder of Captain Jack’s band be held as prisoners of war, and they were sent to the Quaw Paw Agency in Indian Territory

⁴³ FM 27–10, *The Law of Land Warfare*, supra, note 19, at para. 50.

⁴⁴ Sandoz, *Commentary on the Additional Protocols*, supra, note 9, at 436.

⁴⁵ Gen. Sir Peter de la Billière, *Storm Command* (New York: Harper Collins, 1993), 250.

⁴⁶ Dept. of Defense, *Conduct of the Persian Gulf War* (Washington: GPO, 1992), Appendix O, at 621.

(Oklahoma). On October 3, Captain Jack and the three others convicted were hanged at Fort Klamath.⁴⁷

The Captain Jack trial is a diverting historical case, but it is more than that in terms of LOAC. One hundred thirty years ago, the United States effectively accorded a small band of rebellious Modoc Indians what amounted to statehood and belligerent status. The record of the military commission indicates that the United States considered Modoc fighters to be combatants who enjoyed the combatant's privilege, lawfully entitled to kill opposing U.S. soldiers in lawful combat. That view was necessary to the commission's jurisdiction for, even in 1873, military commissions had jurisdiction only over enemies charged with violations of the laws and customs of war. The captured followers of Captain Jack, moreover, were nominated "prisoners of war" by order of President Grant, who was well-familiar with that period's laws of war. Nor was Captain Jack's case a one-off, as indicated by the 1891 federal trial of the Sioux Indian, Plenty Horses. (Chapter 1, Cases and Materials.)

It is also of interest that Captain Jack and his five codefendants were convicted of murder while in violation of "the sacred character of the flag of truce." This was one of the first American trials that charged an enemy with an act of perfidy.

11.2. Ruses

Perfidy is not the same as ruses of war, which are allowed.⁴⁸ As the Lieber Code notes, "deception in war is admitted as a just and necessary means of hostility . . . consistent with honorable warfare."⁴⁹ Sometimes a ruse is the only course open to a weak combatant. The distinction between legitimate ruses and forbidden acts of perfidy is sometimes indistinct. "What primarily distinguishes perfidy from ordinary ruses of war is . . . [in perfidy there is] the exploitation of deliberately induced trust on the part of the adversary in order to injure, kill, or capture him. There must be a deliberate attempt to instill confidence with an 'intent to betray'."⁵⁰ A ruse, in contrast, is a "deceit employed in the interest of military operations for the purpose of misleading the enemy."⁵¹ Ruses are intended to confuse the enemy, to induce him to act recklessly – to make a mistake or to act imprudently. Ruses are permitted in both international and non-international armed conflicts.⁵²

British Major General Anthony Rogers nicely illustrates the difference between perfidy and ruses:

⁴⁷ This account is from: Col. Fred L. Borch and Robert F. Dorr, "Ambush in Oregon," *Army Times*, Oct. 8, 2007, 45; "The Canby Murderers," *NY Times*, June 10, 1873; and Don C. Fisher and John E. Doerr, "Outline of Events in the History of the Modoc War," *Crater Lake Nat'l Park Nature Notes* (Aug. 1937), available at: <http://www.nps.gov/archive/crla/notes/volo10-3e.htm>. For a comprehensive history of American Indian trials, see: Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Justice," 43 *Stanford L. Rev.* (1990), 13.

⁴⁸ 1907 Hague Regulation IV, Art. 24. "Ruses of war and the employment of measures necessary for obtaining information about the enemy . . . are considered permissible." Also, 1977 Additional Protocol I, Art. 37.2. "Ruses of war are not prohibited . . ."

⁴⁹ The Lieber code, *supra*, note 2, Art. 101.

⁵⁰ Fleck, *Handbook of Humanitarian Law*, *supra*, note 36, at para. 472.

⁵¹ Lassa Oppenheim and Hersch Lauterpacht, *International Law*, vol. II, *Disputes, War and Neutrality* (London: Longmans, Green, 1944) para. 163.

⁵² Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra*, note 26, Rule 57, at 204. The ICRC study is somewhat more conservative, saying, "no [State] practice was found suggesting ruses were prohibited in either type of conflict."

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(a) the camouflaging of a tank so that the enemy pass by unaware of its existence and are then fired on at short and lethal range (a ruse) and (b) the soldier who feigns wounds so that he can fire at short and lethal range on an enemy soldier who comes to his assistance (perfidy). In the first case the tank crew do not feign protected status at all; in the second, the soldier lures the adversary into danger by pretending to have the protected status of someone *hors de combat*.⁵³

Ruses such as camouflage; decoys; dummy artillery pieces, aircraft, or tanks; ambushes; mock operations; feigned attacks or retreats; communicating with non-existent units; simulating the noise of an advancing column; using small units to simulate large forces; allowing the enemy to intercept false documents; altering landmarks and road signs; and misinformation are not perfidious because they invite no confidence with respect to the protections of the law of war.⁵⁴ Victor Hugo, in his novel, *Les Misérables*, recounts how English troops, before the battle, pruned trees and bushes to create fields of fire – small windows through which they could fire on unsuspecting enemy soldiers who would soon advance into the British ambush. It was “an entirely legitimate stratagem of war,” Hugo correctly notes.⁵⁵ Similarly, in 1944, Field Marshal Erwin Rommel directed ruses, all of which were lawful, to confuse the Allies’ coming invasion of continental Europe: “Amongst the deceptions were, naturally, dummy minefields . . . dummy [artillery] batteries which, in fact, were later heavily bombed . . . Infantry and artillery commanders were ordered to be ready to light fires on dummy batteries and on dummy emplacements and entrenchments . . . to distract enemy gunfire from the beaches.”⁵⁶

SIDEBAR. Another World War II ruse involved General George S. Patton’s command of the First U.S. Army Group (FUSAG). Code named Fortitude South, FUSAG was based in England, across the English Channel from France’s Pas de Calais. In early 1944, the Pas de Calais was the obvious invasion route to Germany and to Nazi V-1 and V-2 rocket launch sites. The Germans discovered Patton’s presence in England and, acting on intercepted FUSAG radio traffic, stationed forces to oppose his anticipated landing at the Pas de Calais. “By April 1944 the secret decrypts of German message traffic, collectively known as Ultra, clearly showed that the Germans were convinced that the Allies fully intended to employ their best combat general to lead *Armeegruppe Patton*.”⁵⁷ FUSAG never existed, however. It was created, with bogus radio messages and vehicle traffic, solely to pin enemy forces to the area far north of the actual landing beaches at Normandy. General Eisenhower said that the enemy “was convinced that we intended to launch an amphibious attack against that fortress stronghold [at Calais] and as a result stubbornly refused to use those forces to reinforce the Normandy garrison. We employed every possible ruse to confirm him in his misconception. . . .”⁵⁸ Even after the Allied landings on June 6, 1944, Nazi forces remained immobilized at the Pas de Calais to repel the “real” landings by Patton’s FUSAG. It was a classic lawful ruse.

⁵³ A.V.P. Rogers, *Law on the Battlefield*, 2d ed. (Manchester: Juris Publishing, 2004), 37.

⁵⁴ Additional Protocol I, Art. 37.

⁵⁵ Victor Hugo, *Les Misérables*, Norman Denny, trans. (London: Penguin Classics, 1982), 292.

⁵⁶ Brig. Desmond Young, *Rommel, The Desert Fox* (New York: Harper & Brothers, 1950), 175.

⁵⁷ Carlo D’Este, *Patton: A Genius for War* (New York: Harper Collins, 1995), 593.

⁵⁸ General of the Army Dwight D. Eisenhower, *Crusade in Europe* (New York: Doubleday, 1948), 288.

Captured enemy equipment – tanks and aircraft, for example – may be used by the opposing side as long as their identification markings are replaced with the capturing state's markings before using them in combat. POWs should not volunteer false statements, but they are justified in giving false answers to questions that they are not obliged to answer correctly.⁵⁹ These examples do not exhaust the many opportunities to lawfully deceive the enemy.

Traditionally “it has been considered lawful to advance under the enemy flag or wearing enemy or even neutral uniform, so long as the correct insignia is worn during attack.”⁶⁰ In the same vein, one could traditionally proceed under a false flag but not fight under it. But 1977 Additional Protocol I, Article 39.2, ends the lawfulness of wearing the enemy's uniform and using false flags for states that have ratified Protocol I. In fact, the Protocol's restriction goes beyond simply forbidding the wearing of the enemy uniform in attacks: “It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.”⁶¹ The *Commentary* on the Protocols explains:

Traditionally the use of emblems of nationality of the enemy in combat was strictly prohibited by the laws of war. Lieber's code leaves no room for doubt... However, Article 23(f) of the Hague Regulations of 1907 merely prohibited their “improper use,” which left ample room for controversy. The famous Skorzeny case could only further stir up feelings about this issue... The experts themselves were divided on this question. Some preferred a pure and simple prohibition, believing the Hague formula had given rise to excessive misuse... The final wording is a compromise between those two positions...⁶²

The plain meaning of Protocol I's restriction evidences little compromise, however, and seems to impose a complete restriction on the wearing of the enemy uniform, and the use of false flags, in all situations directly related to military operations. For those states that have ratified Protocol I, one can think of few situations other than training exercises outside the combat zone, and escaping POWs, that would not be covered by its restrictions.

SIDEBAR. Ruses are not a relic of long-past wars. “During December 1990 the eyes of the world and the attention of its leaders focused on the Persian Gulf and Arabian Peninsula. For months, the United States had been building a strong naval and military presence throughout the region in response to Saddam Hussein's 2 August 1990 attack upon and occupation of Kuwait.”⁶³ Rear Admiral John B. LaPlante commanded the thirty-one-ship amphibious task force, and Marine Major General Harry W. Jenkins commanded a landing force of two Marine Expeditionary Brigades. General Norman Schwarzkopf, commander in chief of

⁵⁹ Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959), 320.

⁶⁰ Green, *Contemporary Law of Armed Conflict*, *supra*, note 1, at 146.

⁶¹ Additional Protocol I, Art. 39.2.

⁶² Sandoz, *Commentary on the Additional Protocols*, *supra*, note 9, at 466, citations omitted.

⁶³ Col. Gary J. Ohls, “Eastern Exit: Rescue ‘From the Sea,’” 61–4 *Naval War College Rev.* (Autumn 2008), 125, 127–8.

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Central Command, was the overall commander. He decided upon a ruse to pin down Iraqi forces that would otherwise be available to counterattack his planned "left hook" attack that he hoped would flank Iraqi lines.
Schwarzkopf directed LaPlante and Jenkins to prepare for a contested landing on the Kuwaiti coastline. Central Command provided opportunities to the American news media to observe and report on landing preparations. Their accounts were featured on television newscasts shortly before the Desert Storm ground attack was launched. The deception tied down five or six enemy divisions along the coastline. Only the highest level of command was aware that the amphibious landing was actually a ruse. Not even General Jenkins, the Marine commander, was told. Ultimately, there was no landing, but "as a deception, their operations constituted the most successful undertaking since the Second World War."⁶⁴

Additional Protocol I provides special protections for journalists, including identity cards.⁶⁵ In the conflict against the Irish Republican Army, British forces dressed in civilian clothes, with false identity cards, passed themselves off as journalists. This unwise practice, the kind of abuse spoken of in the *Commentary*, was soon discovered and stopped. It was considered to constitute perfidious conduct that endangered true journalists and their civilian status.⁶⁶

11.3. Perfidy Problems

British Professor Geoffrey Best notes that, "The distinction between perfidy and *ruses de guerre* is... as important as it is in some respects delicate, and misjudgments of it are easily made."⁶⁷

If a force raises a white flag, indicating a desire to parlay, but the real purpose is to delay an enemy attack, has the force committed an act of perfidy? No, because the intent of raising the flag was not to kill, injure, or capture the enemy. It is a violation of Hague Regulation IV, Article 23(f), but it is not perfidy. "On the other hand, [following such an incident] people will be killed, injured or captured in the course of combat. It will be no easy matter to establish a causal relation between the perfidious act that has taken place and the consequences of combat... This grey area forms a subject of permanent controversy in practice as well as in theory."⁶⁸

If the enemy loads ammunition in an ambulance marked with a red cross and transports the ammunition to frontline distribution points, has the enemy engaged in perfidy? The ammunition clearly is intended for the purpose of killing or wounding, but is the act of loading the ammo in the ambulance and moving it forward in itself perfidious? Is the ultimate deadly purpose of the ammunition divorced from the acts of loading and

⁶⁴ Id., at 128.
⁶⁵ Additional Protocol I, Art. 79.
⁶⁶ Green, *Essays on the Modern Law of War*, supra, note 37, at 239.
⁶⁷ Best, *War and Law Since 1945*, supra, note 16, at 291.
⁶⁸ Sandoz, *Commentary on the Additional Protocols*, supra, note 9, at 433.

transporting? Clearly, putting ammunition in an ambulance is a LOAC violation,⁶⁹ but is it perfidy?

Spies and others engaged in espionage, who do not lead the enemy to act in the belief that they are protected by the law of war, may nevertheless falsely pass themselves off as part of the enemy force. Although such acts are considered lawful⁷⁰ and do not involve perfidy, with equal legality spies may be tried and executed, if captured. If spying is not unlawful and it is not considered perfidy, how can spies be convicted and executed? Spies, although engaging in acts not considered unlawful, are considered unlawful combatants—civilians taking a direct part in hostilities, although being an unlawful combatant is not itself an LOAC violation.

The question is what will be the gravamen of the penal prosecution of espionage. It is indisputable that espionage does not constitute a violation of [LOAC] on the part of the State engaging in it. But what is the status of the person perpetrating the act of espionage...? A spy... is an unlawful combatant, and as such he is deprived of the status of prisoner of war... [H]e may be prosecuted and punished, but only on the basis of the national criminal legislation of the belligerent State against whose interests he acted. As a rule, the charge will be espionage... But if the spy owes allegiance... to the prosecuting State, he is liable to be indicted for treason.⁷¹

In naval warfare, as in land and aerial warfare, until 1977 Additional Protocol I, false flags were not considered contrary to LOAC. With regard to armed conflict at sea, despite Article 39.2's prohibition of the use of flags of adverse parties and Article 37's prohibition of perfidy, naval vessels are exempted.⁷² "[T]he rules of international humanitarian law applicable in warfare on land and those applicable in warfare at sea are not always identical."⁷³ Also, warships "have traditionally been conceded the right to disguise themselves—*inter alia*, by flying false neutral colours—except when going into action."⁷⁴ Before opening fire, the vessel's true flag must be displayed.⁷⁵

In 1914, during World War I, the German cruiser *Emden*, a successful German raider plying the Indian Ocean, entered the port of Penang while flying the false flag of Japan. Just before attacking the Russian cruiser *Shemtshug*, the *Emden* ran up her German navy colors and opened fire, sinking the *Shemtshug*. During World War II, under true colors, the allies successfully employed "Q ships" and the Germans used "raiders." These ships

⁶⁹ E.g., 1907 Hague Regulation IV, Art. 23(f); 1949 Geneva Convention I, Art. 44.

⁷⁰ 1907 Hague Convention IV, Art. 31, by implication.

⁷¹ Dinstein, *The Conduct of Hostilities*, supra, note 6, at 210–11. Footnotes omitted.

⁷² Sandoz, *Commentary on the Additional Protocols*, supra, note 9, at 470. "The final text [of Article 37]... removed espionage and the conduct of armed conflict at sea from the field of application of Article 37 (*Prohibition of perfidy*), paragraph 1(d)."

⁷³ Knut Dörmann, *Elements of War Crimes* (Cambridge: ICRC/Cambridge University Press, 2003), 16.

⁷⁴ Dept. of the Navy, *U.S. Commander's Handbook on the Law of Naval Operations* (NWP 1–14M) (Washington: GPO, 1995), at 12–1. "Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement." Also see: Dinstein, *The Conduct of Hostilities*, supra, note 6, at 206, citing A.R. Thomas and J.C. Duncan, eds., *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (Newport, RI: U.S. Naval War College, 1999), 511.

⁷⁵ Fleck, *Handbook of Humanitarian Law*, supra, note 36, at para. 1018.

were heavily gunned, disguised to appear as merchant ships and easy prey for enemy combatant ships and submarines. On contact, the Q ship's false sidings would be dropped to provide fields of fire for the now-revealed deck guns. This action was not considered perfidy.

During the war in Bosnia, in the former Yugoslavia, Srebrenica was a UN "safe haven" protected by 750 lightly armed Dutch peacekeepers. In July 1995, Bosnian Serb soldiers, wearing stolen UN uniforms and driving stolen UN vehicles, told a long column of Bosnian Muslim fighters and their families that they were UN peacekeepers there to monitor the Muslims' surrender, guaranteeing no harm would come to them. Without a shot, the Dutch peacekeepers ceded to the Serbs the southern half of the safe haven they were meant to defend, and acquiesced as Serbs arrested and led away the people in their charge. One Dutch lieutenant helped the Serbs control their captives.⁷⁶ At the order of General Ratko Mladić, orders were given to Serb units to kill all the Muslim men and older children. These orders were passed by oral instructions that avoided use of radios or cell phones.⁷⁷ In the worst atrocity committed in Europe since World War II, over a period of four days at least seven thousand Muslim men and boys taken in by the Serbs' perfidy were murdered by Serb firing squads.⁷⁸ The bodies were buried in mass graves. This was classic perfidy – gaining the opponent's confidence by assuring the protection of the law of war, then killing him.

After the conflict, in 2002, Momir Nikolić, a captain first class, Army of the Serbian Republic, during the Srebrenica massacre, was arrested and tried before the ICTY for offenses associated with Srebrenica. He was sentenced to twenty-seven years' confinement for crimes against humanity.⁷⁹

11.4. Summary

Ruses of war have been practiced since armies were first formed and, sometimes, have played vital roles in defeating the enemy. Unfortunately, perfidy also has a long, if less valorous, history. Although the two are easily defined, sometimes the line separating them can be indistinct, particularly in the confusion of combat. At other times unscrupulous commanders have knowingly stepped over the line. "Honest writing about IHL can never pretend that it is ever observed perfectly, even where circumstances are most favourable to its being so, and must always admit that the usual levels of observance range between the indifferent and the lamentable. . . . Yet the enterprise is not abandoned. The self-respect of civilization dares not let it be."⁸⁰

⁷⁶ John Grimond, "How Bosnian Serbs Executed 7,000 Muslims under the Eyes of the U.N. and the world," *NY Times*, Book Review, May 11, 1997, n.p. (reviewing David Rohde, *Endgame: The Betrayal and Fall of Srebrenica* (1997)).

⁷⁷ Marlise Simons, "Officers Say Bosnian Massacre Was Deliberate," *NY Times*, Oct. 12, 2003, A10.

⁷⁸ Nicholas Wood, "Bosnian Serbs Admit Responsibility for the Massacre of 7,000," *NY Times*, June 12, 2004, A2.

⁷⁹ *Prosecutor v. Momir Nikolić*, IT-02-60/1-T (2 Dec. 2003), para. 183. A co-actor, Dragan Obrenović, IT-02-60-T (10 Dec. 2003), para. 156, was sentenced to seventeen years' confinement for associated crimes. Vidoje Blagojević, IT-02-60-T (17 Jan. 2005), para. 861, was sentenced to eighteen years' confinement, and his coaccused, Dragan Jokić, para. 862, to nine years.

⁸⁰ Best, *War and Law Since 1945*, supra, note 16, at 290-1.

CASES AND MATERIALS

TRIAL OF OTTO SKORZENY AND OTHERS

General Military Government Court of the U.S. Zone of Germany
18th August to 9th September, 1947

Introduction. The commonly cited case involving perfidy, and there are few cases, is Skorzeny. (His trial by U.S. military commission is briefly described in Chapter 6, section 6.6.1.) In World War II, during the 1944 Ardennes Offensive, often referred to as the Battle of the Bulge, SS Obersturmbannführer (Lieutenant Colonel) Otto Skorzeny led an understrength Nazi brigade in operations behind U.S. lines. While planning the operation, "Skorzeny had been worried that any of his men captured while wearing U.S. uniforms might be treated as spies, but [he was advised] that the practice was within the rules as long as the men did not actually participate in combat."⁸¹ When his mission failed and some of his men were captured, eighteen who were captured in American uniforms were indeed executed as spies. Skorzeny escaped, but was arrested and brought to trial after the war, in 1947, along with nine coaccused. Today, much of the Skorzeny holding has been rendered moot by Additional Protocol I, Article 39.2, which restricts the wearing of the enemy's uniform in virtually any circumstance.

A. NOTES ON THE CASE

1. THE USE OF ENEMY UNIFORMS, INSIGNIA, ETC.

It is a generally recognized rule that the belligerents are allowed to employ ruses of war or stratagems during battles. A ruse of war is defined by Oppenheim-Lauterpacht (*International Law*, Vol. II, paragraph 163) as a "deceit employed in the interests of military operations for the purpose of misleading the enemy". When contemplating whether the wearing of enemy uniforms is or is not a legal ruse of war, one must distinguish between the use of enemy uniforms in actual fighting and such use during operations other than actual fighting.

On the use of enemy uniforms during actual fighting the law is clear. Lauterpacht says: "As regards the use of the national flag, the military insignia and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain of who is friend and who is foe". The Defence, quoting Lauterpacht, pleaded that the 150th Brigade [Skorzeny's unit] had instructions to reach their objectives under cover of darkness and in enemy uniforms, but as soon as they were detected, they were to discard their American uniforms and fight under their true colours.

On the use of enemy uniforms other than in actual fighting, the law is uncertain. Some writers hold the view that until the actual fighting starts the combatants may use enemy uniforms as a legitimate ruse of war, others think that the use of enemy uniforms is illegal even before the actual attack.

⁸¹ Donald M. Goldstein, Katherine V. Dillon, and J. Michael Wenger, *Nuts!: The Battle of the Bulge* (Washington: Brassey's, 1994), 85.

Lawrence (*International Law*, p. 445) says that the rule is generally accepted that "troops may be clothed in the uniform of the enemy in order to creep unrecognized or unmolested into his position, but during the actual conflict they must wear some distinctive badge to mark them off from the soldiers they assault."

J.A. Hall (*Treatise on International Law*, eighth edition, p. 537), holds it to be "perfectly legitimate to use the distinctive emblem of an enemy in order to escape from him or draw his forces into action".

Spaight (*War Rights on Land*, 1911, p. 105) disagrees with the views expressed above. He argues that there is little virtue in discarding the disguise after it has served its purpose, i.e. to deceive the enemy. "If it is improper to wear the enemy's uniform in a pitched battle it must surely be equally improper to deceive him by wearing it up to the first shot or clash of arms".

Lauterpacht observes (*International Law*, Vol. II, p. 335, note 1) that before the second World War "the number of writers who considered it illegal to make use of the enemy flag, ensigns and uniforms, even before the actual attack, was becoming larger."

Article 23 of the Annex of the Hague Convention, No. IV, 1907, says: "in addition to the prohibitions provided by special conventions it is especially forbidden . . . (f) to make improper use of a flag of truce, of the national flag, or of the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention". This does not carry the law on the point any further since it does not generally prohibit the use of enemy uniforms, but only the improper use, and as Professor Lauterpacht points out, it leaves the question what uses are proper and what are improper, open . . .

Paragraph 43 of the Field Manual published by the War Department, United States Army, on 1st October, 1940, under the title "Rules of Land Warfare", says: "National flags, insignias and uniforms as a ruse - in practice it has been authorised to make use of these as a ruse. The foregoing rule (Article 23 [of 1907 Hague Regulation IV]) does not prohibit such use, but does prohibit their improper use. It is certainly forbidden to make use of them during a combat. Before opening fire upon the enemy, they must be discarded". The American *Soldiers' Handbook*, which was quoted by Defence Counsel, says: "The use of the enemy flag, insignia and uniform is permitted under some circumstances. They are not to be used during actual fighting, and if used in order to approach the enemy without drawing fire, should be thrown away or removed as soon as fighting begins."

The procedure applicable in this case did not require that the Court make findings other than those of guilty or not guilty. Consequently no safe conclusion can be drawn from the acquittal of all accused, but if the two above-mentioned American publications contain correct statements of international law, as it stands today, they dispose of the whole case for the Prosecution, apart from the two instances of use of American uniforms during actual fighting.

Conclusion. *The military commission's (and Geneva's) expectation that soldiers, at the moment of combat, will initiate a sudden Clark Kent-like change from the enemy's uniform to their own has always seemed unrealistic; wardrobe is not on one's mind at such times. Nevertheless, until Article 39.2 of Additional Protocol I, that was the expectation. Now, Article 39.2 renders the Skorzeny case of mere historical interest. Today, if a combatant is captured in an enemy uniform with no showing that he engaged in combat while so dressed, it probably would be a violation of Additional Protocol I, and a minor LOAC violation. If captured while directly*

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*participating in hostilities in enemy uniform, however, the wearer has committed a war crime and forfeited POW status.*⁸²

What of States that have not ratified Additional Protocol I? They are, of course, not bound by Article 39.2's prohibition and may apply the traditional rule articulated in Skorzeny: wear the enemy uniform until the moment of combat, then revert to the combatant's true uniform.

MEDAL OF HONOR CITATION

THOMAS R. NORRIS

Introduction. Those familiar with the U.S.–Vietnam War may recognize Lieutenant Norris as the hero of events portrayed in the book and motion picture, “Bat-21.” In reading the Medal of Honor citation, note Lieutenant Norris’s disguise and consider its LOAC significance.

Rank and organization: Lieutenant, U.S. Navy, SEAL Advisor, Strategic Technical Directorate Assistance Team, Headquarters, U.S. Military Assistance Command.

Place and date: Quang Tri Province, Republic of Vietnam, 10 to 13 April 1972.

Entered service at: Silver Spring, Md.

Born: 14 January 1944, Jacksonville, Fla.

Citation: Lt. Norris completed an unprecedented ground rescue of two downed pilots deep within heavily controlled enemy territory in Quang Tri Province. Lt. Norris, on the night of 10 April, led a five-man patrol through 2,000 meters of heavily controlled enemy territory, located one of the downed pilots at daybreak, and returned to the Forward Operating Base (FOB). On 11 April, after a devastating mortar and rocket attack on the small FOB, Lt. Norris led a three-man team on two unsuccessful rescue attempts for the second pilot. On the afternoon of the 12th, a forward air controller located the pilot and notified Lt. Norris. Dressed in fisherman disguises and using a sampan, Lt. Norris and one Vietnamese traveled throughout that night and found the injured pilot at dawn. Covering the pilot with bamboo and vegetation, they began the return journey, successfully evading a North Vietnamese patrol. Approaching the FOB, they came under heavy machinegun fire. Lt. Norris called in an air strike which provided suppression fire and a smokescreen, allowing the rescue party to reach the FOB. By his outstanding display of decisive leadership, undaunted courage, and selfless dedication in the face of extreme danger, Lt. Norris enhanced the finest traditions of the U.S. Naval Service.

Conclusion. Did Lieutenant Norris’s wearing of civilian clothing while behind enemy lines constitute either a ruse or perfidy?

It was not perfidy because the wearing of noncombatant clothing by Lieutenant Norris was not an attempt to gain the enemy’s confidence by assuring the enemy’s protection under the law of war. Lieutenant Norris hoped to avoid the enemy completely, with no issue of confidence

⁸² W. Hays Parks, “Special Forces’ Wear of Non-Standard Uniforms,” 4–2 *Chicago J. of Int’l L.* (Fall, 2003), 545–6. As Colonel Parks notes, however, “state practice in international armed conflicts has tended not to treat wear of civilian attire, non-standard uniforms, and/or enemy uniforms by regular military forces as a war crime.” Emphasis supplied.

arising. Nor did he intend to kill, wound, or capture the enemy; to the contrary, he hoped to go undetected.

His civilian disguise was a lawful ruse, a deceit employed in the interest of military operations for the purpose of misleading the enemy. One doubts that the enemy would have seen it that way, had he been captured, however.

(Six months after this incident, Lieutenant Norris, on another rescue mission behind enemy lines, was badly wounded and, at first, left for dead as his patrol retreated to the sea. Another SEAL, Petty Officer Michael E. Thornton, noted that Norris was missing. Thornton returned to the still heavily contested scene of Norris's wounding and, under heavy fire, found Norris, threw him onto his shoulder, and carried him to the shoreline. For two hours, Thornton towed Lieutenant Norris out to sea until they were picked up by Navy surface craft searching for them. Petty Officer Thornton was awarded the Medal of Honor, the only such award for the rescue of another Medal of Honor holder.)

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