

Deceptive Lighting: Shining a Light on Gaps in the Legal Regime and Accountability for the Law of Armed Conflict at Sea

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I. INTRODUCTION

The United States' *Commander's Handbook on the Law of Naval Operations* notes that, "[r]uses of war are methods, resources, and techniques that can be used either to convey false information or deny information to opposing forces. They can include physical, technical, or administrative means, such as . . . deceptive lighting . . ." ¹ One commentator has alleged that the inclusion of deceptive lighting on the list of ruses is "legally and pragmatically incorrect" ² because it is a deception that, "instead of simply confusing or misleading the enemy, invites the enemy to think that the combatant enjoys some sort of protected status with regards to international law," ³ and therefore, "the use of deceptive lighting to engage in an attack is an act of perfidy." ⁴ While ruses are permitted in war, the use of unlawful deceptions constitutes perfidy and is therefore a prohibited war crime. ⁵ This commentator concludes that "[a]ccepting the use of deceptive lighting will only blur that line [between protected and

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1. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 1-14M, § 12.1.1 (2017) [hereinafter *COMMANDER'S HANDBOOK*].

2. Matthew Morris, "Hiding Amongst a Crowd" and the Illegality of Deceptive Lighting, 54 NAVAL L. REV. 235, 257 (2007).

3. *Id.*

4. *Id.*

5. *COMMANDER'S HANDBOOK*, *supra* note 1, at § 12.1.2.

unprotected vessels] further.”⁶ However, a second commentator has taken issue with the categorical assertion that using deceptive lighting is illegal concluding, “individual scenarios contemplating the use of deceptive lighting must be evaluated on a case-by-case basis in order to determine their conformity with [International Humanitarian Law’s] perfidy laws.”⁷

Both commentators’ engagement with this topic highlights the simple fact that while the general principles of armed conflict apply in both settings, the specific rules governing armed conflict at sea are different than those governing armed conflict on land.⁸ This is especially true regarding the laws surrounding perfidy at sea, where express provisions of international treaties denote the difference of the rule as applied at sea and on land.⁹ These broader differences are further complicated by the other legal regimes that are also meant to govern the maritime domain, such as the widely ratified Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) and the United Nations Convention on the Law of the Sea (UNCLOS).¹⁰ Noting the need to clarify the current

6. Morris, *supra* note 2, at 258.

7. Mike Madden, *Naval Chameleons? Re-Evaluating the Legality of Deceptive Lighting Under International Humanitarian Law*, 6 CAN. NAVAL REV., no. 4, 2011, at 8.

8. See J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AM. J. INT’L L. 64, 65 (2000) (“There is still no comprehensive treaty governing naval warfare.”); see also *id.* at 69 (“No treaty rules specifically make the general principles of the law of war on land applicable to war at sea. Nevertheless, there seems to be general agreement that such principles as the requirements of distinction, definition of military objectives, and precautions in attack should be applied . . .”).

9. Compare Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land (Hague, IV) art. 23, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV], and Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I], with Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 37, 39, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], and Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II].

10. Convention on the International Regulations for Preventing Collisions at Sea, *opened for signature* Oct. 20, 1972, 1050 U.N.T.S. 16 (entered into force Jul. 15, 1977) [hereinafter COLREGs]; United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; CRAIG H. ALLEN, INTERNATIONAL LAW FOR SEAGOING OFFICERS 301 (6th ed. 2014) (“Treaty drafters have largely avoided directly addressing the relationship between the centuries-old law of

custom regarding the Law of Armed Conflict (LOAC) at sea, naval warfare experts crafted the *San Remo Manual* as a modern restatement of customary international law applicable to armed conflicts at sea, including the intersection between some of these different legal regimes.¹¹ While the *San Remo Manual* helped clarify the modern rules of naval warfare,¹² it did not answer all the pertinent questions about the intersections of legal regimes.¹³ As the differences of opinion between the commentators noted above indicates—ambiguities remain. This is especially true in the application of international criminal law to naval warfare.¹⁴ These clashing legal regimes create difficult

naval warfare and the more recently codified peacetime law of the sea.”); Rüdiger Wolfrum, *Military Activities on the High Seas: What Are the Impacts of the U.N. Convention on the Law of the Sea?*, in 71 INTERNATIONAL LAW STUDIES: THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 501, 509–10, n. 6 (M. Schmitt & L. Green eds., 1998) (noting “the provisions of the Convention are not meant to regulate the law of naval warfare,” but concluding that, “the Third United Nations Conference on the Law of the Sea avoided issues relating to naval warfare does not preclude the Convention from having an impact thereon.”).

11. Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT’L L. 192, 193–94 (1995) (“The value of this document is that it has helped clarify the present state of customary law and, in the case of controversial issues such as exclusion zones, proposes a legal regime that is as consistent as possible with both recent state practice and related areas of law.”); Morris, *supra* note 2, at 240 (“[T]he San Remo Manual noted that the Geneva Conventions and Additional Protocol I had been concerned largely with land warfare and that naval warfare was considered only in a few particular instances—especially naval treatment of civilians and the shipwrecked.”).

12. Panagiotis Sergis, *War Crimes During Armed Conflicts at Sea*, in CRIMES AT SEA 523 (Hague Acad. Int’l L. ed., 2014) (“If it were not for the San Remo Manual, it would be easy to conclude that international humanitarian law regarding naval warfare had been frozen in the interwar period.”).

13. *Id.* at 534 (noting that even in light of the San Remo Manual, “[t]he equivocal status of the law of naval warfare is perfectly illustrated by the example of the ambiguities related to the application of the principle of distinction, in the context of naval warfare”).

14. *Id.* at 523 (“Despite the fact that individual criminal responsibility for serious violations of international humanitarian law is nowadays firmly established, especially after the ‘revolution’ of the 1990s with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and subsequently, the International Criminal Court (ICC), it is not the same with war crimes during armed conflict at sea. Someone interested in the case-law regarding such crimes has to go as far back as the Nuremberg trials in order to find a case regarding the conduct of hostilities at sea. The absence of criminal proceedings seems to go hand with hand with the fact that the legal regulation of naval warfare has hardly been a priority for the international community.”); Rome Statute of the International Criminal Court art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90

questions of what the appropriate rules are when discussing armed conflict at sea, especially when other bodies of law, and customary state practice all intersect clouding, rather than clarifying the appropriate rule.¹⁵ A deeper assessment is therefore needed to determine what the appropriate legal rule should be when these systems interact in disparate manners.¹⁶

In Part I, this paper will explore the background of the rules governing the lighting of ships, attempt to define deceptive lighting, and explain the current rules governing ruses and perfidy in the maritime domain. Part II assesses the implications of criminalizing the act of deceptive lighting and discusses the broader implications of the categorical criminalization of deceptive lighting. This section also concludes that prosecution of deceptive lighting is unlikely in part as a result of the conflicting legal regimes, and that such an act could only meet the definition of a war crime in very particularized scenarios. The paper ultimately concludes that while non-binding manuals have assisted in the development of LOAC in non-standard domains, these regimes are governed by particularized scenarios, rules, and histories that require specific treaty provisions to articulate discernable LOAC rules in these environments.

[hereinafter Rome Statute] (mentioning, in its entirety, naval forces in only one section, by including sea or marine forces as potential sources during armed conflict for the launch of a crime of aggression).

15. ALLEN, *supra* note 10, at 301–02 (noting that, although some provisions might envision derogations, “the LOS Convention has no general derogation clause to address questions regarding possible suspension of treaty obligations during a war or a declared national emergency. As a result, the question whether some or all of the LOS Convention can be suspended in time of armed conflict *cannot be authoritatively answered* by resort to the LOS Convention.” (emphasis added)).

16. These issues are further complicated based upon where in the ocean the clash might arise because the various maritime zones of the ocean are accompanied with different legal rights and duties tied to state sovereignty. See John Astley & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119 (1997). While this complexity further amplifies the need for clarification of the interactions between legal regimes, this article focuses on the clashes between these regimes that might occur solely on the high seas.

II. BACKGROUND

A. THE NAUTICAL RULES ARE INTENDED TO GOVERN ALL SHIPS AT SEA, INCLUDING WARSHIPS.

The Industrial Revolution brought about an increase of maritime traffic during the Eighteenth and Nineteenth Centuries, and the need for a system of rules designed to ensure ships avoided collision became apparent.¹⁷ This system of rules for preventing collisions developed based on “a hoary tradition of codes, naval practices, and court decisions, all animated by the goal of protecting vessels and their crews.”¹⁸ As early as the mid-1800s the lighting of ships was used as a method to avoid collisions at sea.¹⁹ These lights not only identified that another ship was present, but allowed mariners to identify the aspect of other ships at sea.²⁰ A series of national regulations continued to formalize the process for ensuring ships were lit at sea.²¹

While State practice developed to address the issue of at sea collisions, no internationally binding rules arose until the mid-20th Century.²² The international community formalized the rules for the lighting of ships in the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs),²³ which entered into force in 1977.²⁴ The purpose of the rules was to “maintain a high level of safety at sea.”²⁵ The

17. CRAIG H. ALLEN, FARWELL'S RULES OF THE NAUTICAL ROAD 3 (8th ed. 2005) (“The Industrial Revolution of the eighteenth and nineteenth centuries and the upsurge in international commerce that resulted provided the impetus for a number of national and multinational vessel safety initiatives.”); Philippe Boisson, *The History of Safety at Sea*, INT'L MAR. ORG. (1999), <https://web.archive.org/web/20200216144619/https://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSafetyatSea/Documents/P.%20Boisson%20History%20of%20safet%20at%20sea%20extract.htm> (“Around 1840, with the earliest steamships, a number of nations became concerned about what steps could be taken to avoid collisions and shipwrecks.”).

18. ALLEN, *supra* note 17, at 3.

19. *Id.* at 4.

20. *Id.*

21. *Id.*

22. *Id.*

23. U.S. DEP'T HOMELAND SEC., U.S. COAST GUARD, COMMANDANT INST. MANUAL 16672.2D, NAVIGATION RULES: INLAND–INTERNATIONAL (Aug. 2014) [hereinafter NAVIGATION RULES]; *see also* COLREGs, *supra* note 10, at r. 1.

24. *See generally* COLREGs, *supra* note 10.

25. *Id.* at pmb1.; Boisson, *supra* note 17 (“From the Fifties, there was an increase in the numbers of international bodies and various commissions which

rules continue to “apply to all vessels upon the high seas,”²⁶ and have been accepted by 161 countries accounting for “98.96% of the gross tonnage of the world’s merchant fleet.”²⁷ The wide acceptance and enforcement of the rules by States the world over, has led to the successful implementation of the rules by merchant mariners, private boaters, and navies.²⁸

Nearly one-third of the rules in the COLREGs relate to lights,²⁹ and the importance of proper displays of lights are evident to any mariner that has spent time at sea. In the United States, failure to comply with the rules can potentially result in criminal liability in instances where gross negligence is alleged.³⁰ When a vessel fails to comply with a required lighting configuration and a collision at sea results, it can also lead to civil liability.³¹ The primary reason for lighting a ship is to communicate to mariners the duties each vessel sighting another has, and the actions that each vessel must take in order to ensure that collision is avoided.³² Thus, failing to properly light a vessel can result in collisions, and “[p]roper vessel lights and day shapes play a vital role in situation recognition and collision avoidance. At night, lights give timely and effective notice of the proximity of another vessel before there is a serious risk of collision.”³³ While lights remain an “indispensable source of information,”³⁴ under the rules, a vessel’s lights at sea, “only reveal certain limited pieces of information about the vessel”³⁵ such as size, aspect, rate of turn, and the nature of the vessel’s work.³⁶ While the rules that require lighting govern the display of information that is critical to avoiding collision, they do not require that every ship identify themselves as falling into

had the task of reducing accidents at sea.”).

26. NAVIGATION RULES, *supra* note 10, at r. 1.

27. INT’L MAR. ORG. [IMO], *Status of IMO Treaties* 101 (Mar. 2, 2021), <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020.pdf> [hereinafter *Status of IMO Treaties*].

28. *See generally id.* (demonstrating the near ubiquitous usage of the rules).

29. ALLEN, *supra* note 17, at 484.

30. 46 U.S.C. § 2302 (2002).

31. ALLEN, *supra* note 17, at 492–93.

32. AUSTIN MELVIN KNIGHT, *KNIGHT’S MODERN SEAMANSHIP* 566 (John V. Noel ed., 18th ed., 1989) (“By observing the lights or shapes displayed by an approaching vessel, the mariner can determine which vessel has the responsibility to keep out of the way of the other.”).

33. ALLEN, *supra* note 17, at 484.

34. *Id.*

35. Madden, *supra* note 7, at 6.

36. *Id.*; *see also* NAVIGATION RULES, *supra* note 23, at pt. C.

specific vessel classifications that might be relevant in other maritime contexts.³⁷ Instead, the rules only require ships to identify under alternative lighting configurations when they are engaged in operations that will create situations making it more difficult to avoid collision.

Thus, not all types of work ships engage in require different lighting configurations under the rules.³⁸ Not mentioned or designated within the rules is a special lighting characteristic for warships.³⁹ A warship is defined in international law as a ship that meets four elements.⁴⁰ The ship must: 1) belong to the armed forces of a nation, 2) bear external markings distinguishing the ship as a warship, 3) be commanded by a commissioned officer, and 4) the crew of the ship must be subject to the discipline of the armed forces of the nation whose flag it flies.⁴¹ Warships are not required under either the UNCLOS or COLREGs legal regimes to identify as a warship by a specialized lighting configuration.⁴² Thus, warships fall into the other categories of lighting configuration available to them based on the nature of their work. For example, a warship will typically light itself as a power-driven vessel when making way at night, however a vessel engaged in flight operations would be considered a vessel restricted in its ability to maneuver and light itself accordingly under rule 27 of the COLREGs.⁴³ Therefore, the nature of a warship's work might change its lighting configuration, but regardless of its work, the ship would always maintain its classification as a warship based on UNCLOS. The classification of a warship as a "warship" does not stop based on a shift in the lights displayed (or not displayed) in the same way other work and lighting configurations might align.

While the COLREGs do not require a warship to identify

37. See, e.g., International Convention for the Safety of Life at Sea, app. at ch.V r.19.2.4.5, *opened for signature* Nov. 1, 1974, 1184 U.N.T.S. 3 (entered into force May 25, 1980) [hereinafter SOLAS].

38. See COLREGs, *supra* note 10, at annex I (listing lighting configurations only for those specified in the rules).

39. See COLREGs, *supra* note 10 (lacking a light configuration for warships).

40. See UNCLOS, *supra* note 10, art. 29.

41. *Id.*

42. See COLREGs, *supra* note 10 (making no mention of the lighting configuration for a warship); see also UNCLOS *supra* note 10 (defining a warship, but not requiring a lighting configuration as a part of the definition).

43. This statement is based on author's own experience at sea as a U.S. Coast Guard Officer. Cf. Madden, *supra* note 7, at 7 (describing a similar scenario with a tug-in-tow).

itself as a warship, nor require a warship to follow an alternative lighting configuration,⁴⁴ the rules are still intended to apply to warships.⁴⁵ Thus, warships can be held civilly liable for failure to follow the lighting requirements when collisions occur.⁴⁶ While this civil liability does not extend to situations where orders given by superior officers have statutory effects,⁴⁷ warships still often choose to ignore the rules for lighting configurations, and in fact are trained on methods to violate the rules.⁴⁸ While warships are not alone in sometimes finding ways to skirt the rules applicable under the COLREGs legal regime,⁴⁹

44. See COLREGs *supra* note 10; see also NAVIGATION RULES, *supra* note 23 at pt. C.

45. *Ocean S.S. Co. of Savannah v. United States*, 38 F.2d 782, 786 (2d Cir. 1930) (“It is thus apparent that the rules regulating lights were meant to apply to ships of war . . .”); ALLEN, *supra* note 17, at 492 (“In the United States the courts have held all vessels to a strict observance of the rules even in a time of war.”).

46. *The City of Rome*, 24 F.2d 729, 733 (S.D.N.Y. 1928) (“[I]t has been held that even in time of war the International Rules respecting lights govern was [sic] vessels . . . I cannot accept the view that submarines running on the surface through traffic lanes are immune from the usual requirements regarding lights. I know of no good reason why they should be. The purpose of the regulations is to avoid loss of life and property. The strict observance by mariners of these or similar regulations have long been demanded by seafaring people. The character of the submarine and its method of operation are such that there seems to me to be more reason for further regulation of their operations than for relieving them from the rules applying to other vessels.”) (citation omitted), *aff’d*, 38 F.2d at 786; *Watts v. United States*, 123 F. 105, 112 (S.D.N.Y. 1903) (“I must hold that as no provision of law existed in 1898 authorizing the suppression of lights upon war vessels navigating the high seas, no defence can be found in the Navy Regulations, in the orders given to the Columbia or in the exercise of the commander’s discretion.”). Although these cases were decided before the codification of the modern rules they provide context for understanding the rules as they exist today.

47. ALLEN, *supra* note 17, at 493 (“During World War II, Allied convoy orders had statutory force. For nations affected, the orders overrode all contrary provisions contained in the international rules in effect at the time. Vessels remained otherwise bound to comply with the remainder of their obligations, including all other duties of good seamanship, which were not affected by the convoy orders . . . It is clear from the cases, however, that the several accommodations made for naval vessels should not be construed as a license for unnecessarily departing from the rules.”).

48. See Madden, *supra* note 7, at 5 (discussing the Canadian Navy’s Readiness Assessments).

49. See Ian Shields, *Not Not-Under-Command*, CHIRP MAR. (Sept. 30, 2013), <https://www.chirpmaritime.org/not-not-under-command/> (observing that off the coast of a Caribbean island “a large percentage of the vessels drifting in this area, especially at night display Not Under Command lights” in a manner that “could, at best, be termed rank bad seamanship in the circumstances”). The article notes, “it is of concern when informal practices develop which are not in

they typically are alone in openly choosing and training to violate the regime.⁵⁰ The COLREGs regime only authorizes violations where compliance is otherwise not possible, and still calls for the “closest possible compliance” with the rules.⁵¹ In certain instances, a naval ship may be designated as incapable of applying the COLREGs, but these instances are not typically applied more broadly than beyond a ship’s inability to comply with the rules as a result of its construction, or requiring additional lights for missions consistent with a given mission specific to a naval vessel, such as an underway replenishment at sea.⁵²

compliance with regulations,” *id.* See also Allstairuk, Comment to *Not Under Command [CHIRP]*, OFFICERCADET.COM MERCH. NAVY CMTY. (Oct. 6, 2013, 5:45 PM), <https://www.officercadet.com/forum/discussion-and-news/industry-news-and-discussion/6143-not-under-command-chirp> (commenting on Shields, *supra*, in a different chat board). The commenter notes that the practice should not be common place: “Someone has wrote in enquiring why at a particular [C]aribbean island (although this happens all over the world) there are numerous vessels who are drifting but have turned on ‘Not Under Command’ lights. The CHIRP response amongst other things condones said behaviour [sic] and highlights the worrying concern that it has become an informal practice which is not in compliance with the regulations,” *id.* Another commenter stated “there are so many out there who use the NUC [Not Under Command] lights as a get out clause to leave to the other ship to move, even when in high traffic areas, which is dangerous!!” Silvertop, Comment to *Not Under Command [CHIRP]*, OFFICERCADET.COM MERCH. NAVY CMTY. (OCT. 7, 2013, 11:14 AM) <https://www.officercadet.com/forum/discussion-and-news/industry-news-and-discussion/6143-not-under-command-chirp>.

50. See Madden, *supra* note 7, at 5.

51. COLREGs, *supra* note 10, at pt. A, r. 1(e) (“Whenever the Government concerned shall have determined that a vessel of special construction or purpose cannot comply fully with the provisions of any of these Rules with respect to the number, position, range or arc of visibility of lights or shapes . . . such vessel shall comply with such other provisions in regard to the number, position, range or arc of visibility of lights or shapes . . . as her Government shall have determined to be the closest possible compliance with these Rules in respect to that vessel.”); ALLEN, *supra* note 17, at 492 (“[T]he obvious intention of the authorized exemptions is to recognize the inability of certain vessels to comply with the literal requirements, while requiring that the nature and spirit of the lighting requirements of the rules be maintained.”).

52. See, e.g., 32 C.F.R. § 706.1(a)–(b) (2018) (“[W]hen U.S. naval vessels are met in international waters, certain navigational lights . . . may vary from the requirements . . . as to number, position, range, or arc of visibility of lights . . . [t]hose differences are necessitated by reason of the special construction or purpose of the naval ships. An example is the aircraft carrier where the two masthead lights are considerably displaced from the center or keel line of the vessel when viewed from ahead. Certain other naval vessels cannot comply with the horizontal separation requirements for masthead lights, and the two masthead lights on even large naval vessels will thus appear to be crowded together when viewed from a distance Naval vessels may also be expected

The rules, despite their required application—even on warships—are openly ignored at times by navies when they do not properly light their ships.⁵³ The question then is: what are the implications for this open violation of a governing legal regime at times where another legal regime also directly applies, or is indirectly implicated by these intersecting regimes at sea?

B. THE LAW OF ARMED CONFLICT AT SEA.

1. The rules surrounding the principle of distinction, perfidy and ruses.

The Law of Armed conflict (LOAC) is that body of international law applicable to combatants during armed conflict.⁵⁴ The principles of LOAC serve to ensure that innocent civilians are not unduly impacted during times of armed conflict by parties participating in hostilities.⁵⁵ One of these principles meant to curb the cruelty of war is the principle of distinction. “The principle of distinction is one of the fundamental principles of the law of armed conflict (LOAC) and obligates all parties to a conflict to distinguish between combatants and civilians—

to display certain other lights. These lights include, but are not limited to, different colored rotating beacons, different colored fixed and rotary wing aircraft landing signal lights, red aircraft warning lights, and red or blue contour approach lights on replenishment-type ships.” (reserved and removed by 84 Fed. Reg. 530–01 (Jan. 31, 2019)).

53. See, e.g., *id.* at § 706.1(c). The practice of warships running without navigation lights will be discussed in detail below, but it should be noted the U.S. Federal Regulations have previously stated, “[d]uring peacetime naval maneuvers, naval ships, alone or in company, may also dispense with showing any lights, though efforts will be made to display lights on the approach of shipping.” *Id.*

54. Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765 (2012) (“LOAC [Law of Armed Conflict], otherwise known as international humanitarian law or the law of war, applies to situations of armed conflict and governs the conduct of hostilities and the protection of persons during conflict.”).

55. Matthew J. Greer, *Redefining Perfidy*, 47 GEO. J. INT’L L. 241, 243 (2015) (“The law of war is an effort to cabin the cruelty that often comes naturally to mankind.”); Mike Madden, *Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law*, 17 J. CONFLICT & SEC. L. 439, 448 (2012) (“The object and purpose of AP I, the Geneva Conventions and IHL generally, is humanitarian: this body of law seeks to minimize the suffering that armed conflict necessarily imposes on humanity through a variety of rules that regulate the conduct of hostilities.”).

between those who are fighting and those who are not.”⁵⁶ This principle arises out of the notion that not all methods and means of warfare are allowed during conflicts; rather, it is only the engagement of legitimate military targets that is permitted during attacks.⁵⁷ Targetable individuals are limited only to combatants, and not civilians.⁵⁸ This “guiding principle” thus requires that forces engaged in hostilities only target combatants.⁵⁹ But to fulfill the principle of distinction, it also requires that combatants distinguish themselves from civilians.⁶⁰ The protection of innocent civilians therefore requires the broadest application of the principle of distinction, and it requires combatants to differentiate themselves from civilians, as well as military objects from civilian objects.⁶¹ Failing to properly distinguish as a combatant, or choosing to purposely deceive the enemy into thinking one is not a combatant, violates the law of armed conflict, and constitutes a war crime.⁶² This illegal and treacherous action is known as perfidy.⁶³

56. Blank, *supra* note 54, at 765.

57. Greer, *supra* note 55, at 244 (“[D]istinction requires civilians to be treated differently than combatants. The idea behind distinction is that forces should only engage legitimate military targets.”).

58. *Id.* at 243–44.

59. Blank, *supra* note 54, at 766 (“The first critical step is to recognize that the principle of distinction mandates that we distinguish between and among civilians between those who are legitimate targets of attack and those who are innocent civilians deserving of every protection during the conduct of hostilities.”).

60. *Id.* (“The principle of distinction has two parts. It is not sufficient simply to distinguish between innocent civilians and legitimate targets in the targeting process. Persons who are fighting must also distinguish themselves from those who are not fighting so as to ensure and maximize the protection of innocent civilians.”); Raphael Bitton, *Rethinking the Law and Ethics of Undercover Warfare*, 2 INT’L COMP., POLICY & ETHICS L. REV. 593, 599–600 (2019) (“[T]he principle of distinction’ requires that only combatants and military objects be legitimate targets for any military use of force. For instance, soldiers, tanks and military bases are all legitimate targets while civilians or residential buildings are not. How this relates to the duty to wear uniforms seems clear. Unless combatants mark themselves as such, their adversaries seem unable to meet the requirement of distinction. If one cannot tell whether a person during an armed conflict is a combatant or a civilian, one cannot avoid targeting civilians.”).

61. Blank, *supra* note 54, at 770 (“[A]ll parties to any conflict are obligated to distinguish between combatants, or fighters, and civilians, and concomitantly, to distinguish themselves from civilians, and their own military objects from civilian objects.”) (emphasis added).

62. See Blank, *supra* note 54, at 783–85.

63. *Id.* at 785.

Perfidy can generally be described as “a prohibition against killing, injuring, and purportedly also capturing an enemy by feigning an IHL-protected status.”⁶⁴ Specific modern treaty prohibitions on perfidy state that “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”⁶⁵ Perfidy is thus closely tied to the principle of distinction because, “when fighters intentionally disguise themselves as civilians to lead soldiers on the opposing side to believe that they need not take defensive action to guard against attack, they commit perfidy.”⁶⁶ Because perfidy blurs the line between combatants and other protected parties, it has historically been deemed “treachery,”⁶⁷ and is today considered “among the gravest law-of-war violations.”⁶⁸

Perfidious acts have long been outlawed in armed conflict.⁶⁹ Modern treaties have continued to enumerate that perfidy is a

64. John C. Dehn, *Permissible Perfidy*, 6 J. INT'L CRIM. JU ST. 627, 628 (2008).

65. Additional Protocol I, *supra* note 9, art. 37.

66. Blank, *supra* note 54, at 786.

67. Madden, *supra* note 55, at 441 (“The synonymy, or ‘historic overlap’, between treachery and perfidy has generally been acknowledged by IHL scholars.”).

68. Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 106 (2014) (“The betrayals of good faith associated with perfidy threaten more than the immediate, tactical positions of the attacker and victim. Perfidious betrayals inflict systemic harm on the law of war as a guarantee of minimally humane interaction. Even a single instance of perfidy can permanently compromise the possibility of humanitarian exchange between belligerents.”); *see also* Bitton, *supra* note 60, at 598 (“[P]erfidious killing constitutes a severe war crime.”); Dehn, *supra* note 64, at 633 (“The required element of bad faith and resulting harm to an enemy adversary makes perfidy a more serious war crime than other improper uses of protected emblems, symbols or flags of truce or of neutral parties. Because it is specifically directed toward and results in harm to combatant adversaries, perfidy more seriously undermines the sense of honour among warriors that is essential to maintaining the rule of law on the battlefield.”); INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 435 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOL I] (“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.”) (emphasis added).

69. *See generally* Greer, *supra* note 55, at 245–49 (noting “[p]erfidy prohibitions have a long history” and highlighting the historical origins of the definition in practice).

war crime.⁷⁰ Most modern definitions of perfidy trace back to the Lieber Code, used by Union forces during the American Civil War, which forbade the use of treachery in killing.⁷¹ The prohibition against treacherous killing continued to arise in legal instruments governing the international law of armed conflict including non-binding instruments such as The Brussels Declaration,⁷² The Oxford Manual for the Laws of War on Land,⁷³ and the Oxford Manual for the Laws of Naval War,⁷⁴ as well as the binding Hague Convention of 1907 (Hague IV).⁷⁵ However, it was Additional Protocol I in 1977 that specifically incorporated the use of the word perfidy vice treachery.⁷⁶ Additional Protocol I contains the most comprehensive definition of perfidy in any of the legal instruments.⁷⁷ While other treaties mentioned perfidy or treachery, a specific definition of what made an action perfidious did not exist until Additional Protocol I.⁷⁸ Furthermore, the definition provided there closely resembles

70. *E.g.*, Rome Statute, *supra* note **Error! Bookmark not defined.**, art. 8(2)(b)(xi).

71. Byron D. Greene, *Bridging the Gap That Exists for War Crimes of Perfidy*, in *ARMY LAW* 45, 46 (2010) (“The first codified source containing a prohibition against perfidy is the Lieber Code of 1863.”); Blank, *supra* note 54, at 785 n.58 (“The prohibition of killing treacherously goes back to the Lieber Code.”); Watts, *supra* note 68, at 125 (“U.S. Lieber Code included two expressions of customary military practice with respect to perfidy or treachery.”); *see also* Francis Lieber, U.S. War Dep’t, Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100, art. 16, 101 (Apr. 24, 1863) [hereinafter Lieber Code].

72. Project of an International Declaration Concerning the Laws and Customs of War art. 13(b), (Aug. 27, 1874) [hereinafter Brussels Declaration].

73. Inst. Int’l Law, *Manual on The Laws of War on Land*, art. 8(b)(Sept. 9, 1880).

74. Inst. Int’l Law, *Manual on the Laws of Naval War*, art. 15 (Aug. 9, 1913).

75. Hague IV, *supra* note 9, art. 23.

76. Morris, *supra* note 2, at 240 (“The Protocol also explicitly shifts the term of discussion from treachery to perfidy.”) (emphasis removed); *see also* Additional Protocol I, *supra* note 9, art. 37.

77. *See* Blank, *supra* note 54, at 785; Madden, *supra* note 55, at 441 (“A more contemporary and detailed prohibition against perfidy can be found in Additional Protocol I to the Geneva Conventions.”); *see also* FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 94 (4th ed. 2011) (“While The Hague Regulations left the notion of ‘treachery’ undefined . . . Article 37(1) [of Additional Protocol I] seeks to define ‘perfidy’ in terms so concrete and precise as to permit its application in a legal setting.”).

78. *See* Madden, *supra* note 55, at 441 (“[Early prohibitions including the 1907 Hague Regulations] failed to meaningfully explain how one might *distinguish* between legal ruses of war and illegal acts of treachery.”).

the definition of perfidy based on customary international law.⁷⁹

The definition of perfidy provided for in Additional Protocol I contains essentially three elements.⁸⁰ To constitute perfidy: 1) an action must invite the confidence of an adversary 2) this confidence must be based on the “existence of the protection afforded by international law applicable in armed conflict” and 3) the individual must act with the intention of betraying that confidence.⁸¹ Central to all of these elements is “the deliberate claim to legal protection for hostile purposes.”⁸² Also included in Article 37 of Additional Protocol I is a list of actions that exemplify perfidy including “[t]he feigning of civilian, non-combatant status”⁸³ and “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.”⁸⁴ However, not all deceptions of this kind are outright prohibited in armed conflict. It is only “prohibited to kill, injure or capture an adversary by resort to perfidy.”⁸⁵

There is debate about whether the inclusion of capture in Additional Protocol I, instead of limiting the description to acts that result in killing or injury, is a proper reflection of customary international law.⁸⁶ Part of this is due to the fact that The Hague

79. Blank, *supra* note 54, at 785–86; Madden, *supra* note 55, at 442 (“[E]ven states that have not ratified treaties outlawing perfidious forms of combat are nonetheless subject to a prohibition against such conduct at customary international law.”); Morris, *supra* note 2, at 242 (“[W]e can see a theme [of perfidy] emerging that runs through customary international law and through the conventions and treaties Protocol I appears to be a relatively faithful codification of these customary practices.”).

80. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 435.

81. *Id.*; see also NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 171 (2008) (containing a more detailed summary of the elements of perfidy based on the Rome Statute of the International Criminal Court as constituting the following: “1. The perpetrator invited the confidence or belief of one or more persons 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”).

82. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 435.

83. Additional Protocol I, *supra* note 9, art. 37(1)(c).

84. *Id.* art. 37(1)(d).

85. *Id.* art. 37(1).

86. See Greene, *supra* note **Error! Bookmark not defined.**, at 46–47 (discussing a customary international law study’s results on perfidy as creating categories of perfidious conduct some of which are more widely accepted than

Convention did not mention capture among the treacherous acts.⁸⁷ A modern review of customary international law conducted by the International Committee of the Red Cross concluded that actions resulting in the killing, injury or capture of the enemy by resort to perfidy are all illegal actions, but only those actions that result in death or injury can be classified as war crimes.⁸⁸ This assessment is reflected in the Rome Statute for the International Criminal Court, which codifies as a war crime only the “killing or wounding treacherously individuals belonging to the hostile nation or army”⁸⁹ and does not mention capture.⁹⁰ Thus, under the current law “only perfidious acts leading to capture, injury or death are presently illegal, and only the latter two constitute war crimes.”⁹¹

Some have noted that this “gap” in perfidy law is even more far reaching because actions that erode confidence in the principle of distinction, by failing to properly delineate between combatant and civilian, that do not result in killing, injury, or capture, would not constitute the war crime of perfidy.⁹² This is because the language of the definition creates a harm-based offense where only conduct that actually results in harm forms a perfidious action.⁹³ The Commentary for Additional Protocol I concludes however that while the express prohibitions listed in Article 37 against, killing, injury, and capture result in some “weak points,” it should not be read as a limitation on those actions that constitute perfidy as “there is more to an

others).

87. See Hague IV, *supra* note 9, art. 23.

88. Int’l Comm. Red Cross, *Rules Rule 65. Perfidy*, CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule65 (last visited April 4, 2021) [hereinafter Customary IHL Survey].

89. Rome Statute, *supra* note **Error! Bookmark not defined.**, art. 8(2)(b)(xi).

90. See *id.* (making no reference to capture).

91. Madden, *supra* note 55, at 445.

92. Watts, *supra* note 68, at 144–45 (“Deceitful, even bad faith claims to law-of-war protection leveraged to produce some other form of military advantage, short of casualties or capture of persons do not fall within AP I prohibited perfidy. Such acts may constitute “improper use” of insignia if conducted by resort to certain enumerated protected emblems such as UN emblems, uniforms of neutrals or enemies, or emblems of the Red Cross. But they are not regarded as prohibited perfidy by AP I.”).

93. Greene, *supra* note **Error! Bookmark not defined.**, at 47 (“Under the international law of armed conflict, perfidy is best described as a ‘harm-based’ offense. In other words, perfidy is only prohibited when the acts used to bait the enemy into according protection under the rules of armed conflict result in some tangible harm to the enemy.”).

international treaty than the literal reading of all the words in the document may suggest; it represents one step forward in the ongoing evolution in relations between States.”⁹⁴ Yet, the treaty itself *does* limit perfidy to those actions resulting in death, injury or capture,⁹⁵ and custom regards as perfidious war crimes only those actions that result in injury or death.⁹⁶ This is played out in the Rome Statute for the International Criminal Court, which allows for prosecutions of war crimes only for treacherous killing and injury.⁹⁷ Thus, the limitations on perfidy persist because Article 37 of Additional Protocol I “does not prohibit perfidy *per se* but, rather, ‘to kill, injure or capture an adversary by resort to perfidy.’”⁹⁸ This was a necessary result of attempting to create a definition that could be applied in a legal setting.⁹⁹ Thus, while the principle of distinction would still apply broadly, the crime of perfidy is limited by its definition.¹⁰⁰

Acts of perfidy are also limited by the confidences they invoke. To constitute a perfidious act, the action must not invite the confidence of the enemy generally, but must be based on the belief that one is entitled to “protection under the rules of

94. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 432–33.

95. KALSHOVEN & ZEGVELD, *supra* note **Error! Bookmark not defined.**, at 94 (“Carrying out [acts inviting confidence with intent to betray it] is not enough to constitute a crime. Rather the acts are a qualifying element which, together with the material element: the actual killing, injuring or capturing of the adversary, constitutes the act of ‘perfidious killing.’”).

96. Customary IHL Survey, *supra* note **Error! Bookmark not defined.** (“[I]t can be argued that killing, injuring or capturing by resort to perfidy is illegal under customary international law but that only acts that result in serious bodily injury, namely killing or injuring, would constitute a war crime. This argument is also based on the consideration that the capture of an adversary by resort to perfidy nevertheless undermines a protection provided under international humanitarian law even though the consequences may not be grave enough for it to constitute a war crime.”).

97. Rome Statute, *supra* note **Error! Bookmark not defined.**, art. 8(2)(b)(xi).

98. KALSHOVEN & ZEGVELD, *supra* note **Error! Bookmark not defined.**, at 95 (quoting in part Additional Protocol I art. 37); COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 432 (“[I]t was not the prohibition of perfidy *per se* which was the prime consideration of Article 37, but only the prohibition of a particular category of acts of perfidy.”).

99. KALSHOVEN & ZEGVELD, *supra* note **Error! Bookmark not defined.**, at 94 (“While the Hague Regulations left the notion of ‘treachery’ undefined, the second sentence of Article 37(1) seeks to define ‘perfidy’ in terms so concrete and precise as to permit of its application in a legal setting . . .”).

100. *Id.* (“[The] limiting element in the definition of perfidy tends to convert the abstract term into a sufficiently concrete concept.”).

international law applicable in armed conflict.”¹⁰¹ Thus, only the misuse of the protections provided in the Law of Armed Conflict can be defined as perfidious based on the definition provided in Additional Protocol I.¹⁰² This is consistent with customary international law conceptions of perfidy as well.¹⁰³ The gap left open by this conception of the rule is that deceitful actions invoking confidences outside of those protections defined in the rules of armed conflict—based on status of combatants—are not considered perfidy; the confidence must be specifically tied to those protections afforded by the Law of Armed Conflict.¹⁰⁴

While other gaps exist in the current construction of the prohibition on perfidy based on the need for a workable legal definition,¹⁰⁵ the last major issue relevant here is the requirement of a causal link between the harm imposed and the deceitful action that occurs. The Commentary on Additional Protocol I highlighted the difficulty in grappling with this question, noting that in practice, “[i]t will be no easy matter to establish a causal relation between the perfidious act that has taken place and the consequences of combat.”¹⁰⁶ As perfidy is a

101. Additional Protocol I, *supra* note 9, art. 37(1); Blank, *supra* note 54, at 786 (“[Perfidy] must involve a deliberate attempt to benefit from the protections of LOAC by inducing the other side to believe that one is protected under LOAC.”); *see also* KALSHOVEN & ZEGVELD, *supra* note **Error! Bookmark not defined.**, at 94 (“[T]he definition of ‘perfidy’ does not simply refer to ‘confidence’ in a general sense: the confidence experienced by the adversary must specifically relate to a belief that they are entitled to ‘protection under the rules of international law applicable in armed conflict.’ A betrayal of confidence not related to this form of legal protection does not amount to perfidy in the sense of Article 37.”).

102. Watts, *supra* note 68, at 148 (“[N]ot every invitation of confidence lies within the scope of perfidy. To satisfy the AP I definition of perfidy, an invited confidence must be based on international legal protection derived from the law of war.”).

103. Customary IHL Survey, *supra* note **Error! Bookmark not defined.** (“The essence of perfidy is thus the invitation to obtain and then breach the adversary’s confidence, i.e., an abuse of good faith. This requirement of a specific intent to breach the adversary’s confidence sets perfidy apart from an improper use, making perfidy a more serious violation of international humanitarian law. Some military manuals translate this rule as follows: it is prohibited to commit a hostile act under the cover of a legal protection.”).

104. Watts, *supra* note 68, at 148 (“At the AP I Diplomatic Conference, States rejected in committee an ICRC proposal to apply the term ‘confidence’ to include obligations of general international law and broader moral obligations.”).

105. *See* Watts, *supra* note 68, at 145–46 (discussing why damage to property and inchoate offenses do not amount to perfidy under the definition provided in Additional Protocol I’s prohibition of perfidy).

106. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 433.

harm-based offense,¹⁰⁷ there must still be a link between the harm and the perfidious conduct. Yet, in war it is likely that any sort of perfidious conduct by one party might result in the death or injury of an adversary at a later time.¹⁰⁸ Nations have concluded that the fact an act of deception might later result in death or injury is not alone a reason to ban every action that evokes the confidence of the enemy.¹⁰⁹ Instead, only those actions invoking the confidence with the intent to deceive and harm are prohibited.¹¹⁰ Thus, this gap becomes more difficult to grapple with, and opens a question of how to assess when the link between perfidious conduct and harm is met.¹¹¹

This series of shortcomings with the prohibition on perfidy result in the potential for exploitation in a way that would still degrade the principle of distinction and erode protections for civilians. Yet, deception at large has never been outright banned in conflict. Instead, military practice has long authorized some deceptive tactics, further complicating when deception may be legal or illegal. While perfidy, “the deliberate claim to legal protection for hostile purposes” is illegal, other forms of deception are permissible in combat.¹¹²

Permissible forms of deception are known as ruses.¹¹³ Unlike perfidy, ruses are permitted in warfare.¹¹⁴ In practice,

107. Greene, *supra* note **Error! Bookmark not defined.**, at 47.

108. See KALSHOVEN & ZEGVELD, *supra* note **Error! Bookmark not defined.**, at 95; *see also* COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 433 (describing a situation where perfidious conduct later results in death during a subsequent attack).

109. Madden, *supra* note 55, at 449 (“Intuitively, tacticians, strategists and legal scholars will surely recognize that a line must be drawn between hostile acts that are sufficiently separated in time from perfidious practices as to be legal, and aggressive acts that follow so closely after perfidious conduct that they must be considered illegal.”).

110. *Id.*

111. See Greene, *supra* note **Error! Bookmark not defined.**, at 47 n.34 (discussing perfidy resulting in “military advantage”). See generally Madden, *supra* note 55 (recommending a causation approach to perfidy by incorporating a test similar to a common law tort of negligence’s “but for” test to determine causation).

112. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 435.

113. KALSHOVEN & ZEGVELD, *supra* note **Error! Bookmark not defined.**, at 95 (“The opposite of the prohibited act of perfidy was in 1899, as it is today, the permissible ruse of war.”).

114. Watts, *supra* note 68, at 161 (“Lawful ruses do not seek to deceive adversaries with regard to duties or obligations under the law of war. In particular, ruses do not feign law-of-war protected status such as the *hors de combat* or civilian. Ruses do not invite an enemy to place confidence—to rely detrimentally upon—an apparent claim to the protections of the law of war.”).

identifying which actions are permitted ruses and which actions are prohibited perfidy is complex; both categories involve deception of the adversary making it difficult to distinguish between the two concepts.¹¹⁵ Ruses have long been understood as permissible conduct during warfare.¹¹⁶ Where the 1907 Hague Regulations forbade perfidy, the regulations still noted that ruses of war were permitted during conflicts.¹¹⁷ This was also reflected in the 1977 Additional Protocol I. The second part of Article 37 authorizes deceptions that are ruses of war, defining the concept as “acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law.”¹¹⁸ This definition essentially expressly authorizes all other forms of deception except perfidious ones by noting that only those deceptions which trick the enemy into thinking they are to afford protections under the international law of armed conflict are illegal.¹¹⁹

The rule includes a list of acceptable ruses including “camouflage, decoys, mock operations and misinformation.”¹²⁰ The Commentary to Additional Protocol I highlights “the art of warfare is a matter, not only of force and of courage, but also of judgment and perspicacity. In addition, it is no stranger to cunning, skill, ingenuity, stratagems and artifices, in other

115. Greer, *supra* note 55, at 259 (“The line that separates . . . [ruses] from unlawful perfidy, however, is razor-thin.”); *id.* at 242 (“Perfidy and ruse are so closely related in fact, that it is often hard to determine what exactly separates one from the other. The gray area between them creates serious problems for combatants who must adhere to the law of war’s strictures.”); Madden, *supra* note 55, at 440 (“[M]uch of the LOAC relating to perfidy is vague . . .”).

116. Blank, *supra* note 54, at 786 (noting “[r]uses are legitimate tools of warfare” and have been considered such dating back to the Lieber Code).

117. Hague IV, *supra* note 9, art. 24.

118. Additional Protocol I, *supra* note 9, art. 37(2).

119. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 444 (“A ruse of war is not prohibited as long as there is no intention to deceive the adversary by inviting his confidence that the rules will be duly respected and that they will afford protection, provided that the adversary is entitled to have such confidence, and provided that the ruse does not infringe any rule of obligatory conduct.”); Morris, *supra* note 2, at 236 (“[Ruses of war are] those acts of deception that do not invite the adversary to believe that the laws of war afford or require particular behavior, but which are nonetheless sneaky behavior.”).

120. Additional Protocol I, *supra* note 9, art. 37(2).

words . . . the use of deception.”¹²¹ But the commentary is quick to note, “the ruse of war has many times served as a pretext for pure and simple violations of the rules in force. Obviously, this should be condemned extremely severely.”¹²² The rationale behind the authorization of ruses is obvious to tacticians, and it has been noted that an effective use of a ruse may result in “less loss of life than through the simple use of force.”¹²³ This is most obvious in the express authorization of camouflage. The Commentary notes a “combatant who takes part in an attack . . . can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign a civilian status and hide amongst a crowd.”¹²⁴ The hiding under the cloak of the environment is thus an authorized ruse, but hiding under the cloak of a civilian crowd constitutes perfidy.

2. Prosecution of Perfidy as a War Crime

The distinction between ruses and perfidy becomes important when assessing which actions in warfare are illegal, which actions constitute war crimes, and which actions are legal. Prosecutions of the crime of perfidy remain limited in the international context, and have at times even further complicated the understanding of treachery and perfidy beyond the gaps noted above.

Beginning with the international tribunals following World War II, the understanding of treachery was further confounded by the misstated notion that political betrayal at the outset of the war constituted treachery under the Hauge Regulations.¹²⁵ But this misstatement does not explain the rationale for why perfidy has been so limited in prosecution, especially since the rules surrounding perfidy in the 1977 Additional Protocol I and the Rome Statute, in force since 2002, have clarified this

121. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 439–40.

122. *Id.* at 440.

123. *Id.* at 441.

124. *Id.* at 438.

125. BOISTER & CRYER, *supra* note **Error! Bookmark not defined.**, at 171 (noting that the lawyers confused the argument in front of the tribunal in part to play to the American audience by categorizing the attack at Pearl Harbor as illegal. “As a matter of law . . . [the jurists] gave the argument too much time, conflating the common-or-garden meaning of treachery . . . and the legal meaning attached to it in the Hague Regulations.”); Watts, *supra* note 68, at 141 (“[T]he entire Tribunal seems to have confused common notions of political betrayal with legal notions of treachery.”).

misconception by providing more precise definitions with the intention of creating a workable legal concept for a courtroom.¹²⁶ The study on customary international law found that there was “no data” on the prosecution of perfidy in “International and Mixed Judicial and Quasi-judicial Bodies” save for a single brief mention in an appeal in the famous *Tadić Case*, which referred to a Nigerian case to support the assertion that customary law on the methods of warfare applied equally in non-international armed conflicts and international armed conflict.¹²⁷ Outside of this single mention, international case law has failed to address perfidy, and since Nuremberg, no charges have been brought for the war crime outside of national systems.¹²⁸ The gaps in the legal definition explain part of the problem,¹²⁹ and it has been noted (in assessments of current conflicts) that more broadly “much of the spirit and the purpose of the customary prohibition appears to have been lost.”¹³⁰ Thus, while the advancement of a more precise definition of perfidy has clarified the concept and provided a workable legal definition, the consequences are noticeable. The law of war, the principle of distinction, and, in fact, the prosecution of perfidy has actually suffered as a result of limiting the prohibition to a workable definition.

These gaps are even more evident when perfidious conduct is assessed in the naval context where history, express legal

126. KALSHOVEN & ZEGVELD, *supra* note **Error! Bookmark not defined.**, at 94.

127. CUSTOMARY IHL DATABASE, *supra* note **Error! Bookmark not defined.**, practice r.65 at A(x)-J(x).

128. *Id.*; see also Blank, *supra* note 54, at 784–90 (discussing that a failure to prosecute perfidious actions results in “[t]he absence of condemnation and accountability” and noting a variety of instances, including before international tribunals, where perfidious actions were documented, but not charged).

129. See generally Greene, *supra* note **Error! Bookmark not defined.** (arguing that some various perfidious actions potentially fall in “gaps” under the current legal regime unless a call to a broader interpretation of the ban is undertaken).

130. Watts, *supra* note 68, at 108 (“Overall, the price of doctrinal clarity has been reduced attention and fidelity to good faith conduct of hostilities critical to humane combat and to sustaining the law-of-war as a trusted means of communication and interaction between belligerents . . . through doctrinal narrowing States have created a perfidy prohibition inadequate to protect the law of war as a means of good faith and humanitarian exchange between combatants. An understanding of perfidy that is at once consistent with principled understandings of the law, protective of minimal concerns of humanity, and all the while preserves something of the law of war as a system of minimum good faith between adversaries is highly elusive. Giving effect to States’ twentieth-century narrowing of the perfidy prohibition leaves critical, widely-accepted values of the law of war unvindicated.”).

provisions in law of war treaties, and other legal regimes exacerbate the already present gaps in perfidy.

3. Perfidy and Ruse at Sea

The Commentary to Additional Protocol I specifically notes that the prohibition on perfidy “encompasses war at sea, even though this subject is not dealt with in the Protocol.”¹³¹ Yet, because it is not dealt with directly in the Protocol—or in other international treaties relating to the Law of Armed Conflict—questions remain on its application to naval warfare because all legal provisions regarding the law of war have largely ignored the application of the rules to the maritime context.¹³² Even the Commentary, after asserting the Article 37 prohibition on perfidy applies at sea, goes on to note that ruses are difficult to assess in totality because “the imagination of man is too inventive” and the list of permissible ruses in Article 37 “does not take into account the conditions of war at sea where, for example, use is still made of dummy ships, or warships camouflaged by artificial superstructures, but the legality of certain type of camouflage is controversial.”¹³³

Further complicating the application of LOAC at sea, some international treaties designate separate provisions for warfare at sea, thus differentiating the rules applicable in that domain from other, better understood, rules governing LOAC in standard land-based domains of warfare.¹³⁴ This is especially true of the rules surrounding perfidy, which create a specific exception to the prohibition on perfidy for vessels at sea.¹³⁵ Article 39 of Additional Protocol I prohibits the use of emblems and uniforms in conflict of neutral and adverse parties in conflict.¹³⁶ However, the article notes that neither the

131. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 435.

132. Tom Dannenbaum, *Encirclement, Deprivation, and Humanity: Revising the San Remo Manual Provisions on Blockade*, 97 INT'L L. STUD. SERIES. U.S. NAVAL WAR COLL. 307, 393 (2021) (“The lack of any comprehensive treaty on the law of armed conflict at sea remains a major gap in existing IHL.”); Sergis, *supra* note 12, at 523 (“[T]he legal regulation of naval warfare has hardly been a priority for the international community.”).

133. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 444.

134. *See, e.g.*, Geneva I & Geneva II, *supra* note 9 (the existence of two treaties for arguably similar protections across different domains speaks to the rule differentiation in LOAC based on domain).

135. Additional Protocol I, *supra* note 9, art. 39.

136. *Id.*

prohibition against emblems nor the prohibition against perfidy, “shall affect the existing generally recognized rules of international law applicable . . . to the use of flags in the conduct of armed conflict at sea.”¹³⁷ Thus, the gaps in the perfidy definition noted above, and the issues that arise with the distinction between ruse and perfidy, are even further complicated by the express exception regarding naval warfare. This permission in naval warfare to act, up until the time of attack, in a manner that would normally constitute perfidious conduct in another domain muddles the rationale behind the prohibition on perfidy to begin with—the principle of distinction. Because the conduct is authorized by custom, and expressly provided for in the treaty in limited circumstances, the issues surrounding perfidy are even more problematic in the maritime domain.¹³⁸

Nonetheless, the rule does not mean generally that “perfidy is not applicable in naval warfare However, it is true that when a warship during pursuit displays the enemy flag or a neutral flag, such conduct at sea is accepted, or at least tolerated . . . though it is not accepted that fire should be opened in these conditions.”¹³⁹ Because of the issues surrounding the adaptation of the rules in the naval context, even the commentary to Additional Protocol I noted these “led to complex rules which cannot be changed without a thorough study.”¹⁴⁰ Yet, despite these lingering questions no such review came until the mid-1990s and the writing of the *San Remo Manual*.

The *San Remo Manual* came into existence following the Falklands/Malvinas Conflict, the Iran/Iraq War, and the First Gulf War.¹⁴¹ These conflicts highlighted the “uncertainty as to the content of contemporary international law applicable to armed conflict at sea.”¹⁴² While land warfare has seen significant developments and affirmations in international treaties in the second half of the 20th Century, the same could not be said of

137. *Id.*

138. Madden, *supra* note 7, at 9 (noting that some potentially perfidious actions “may be so deeply entrenched within the collective consciousness of Canadian, American and other naval command elements that warships may routinely (but unknowingly) find themselves breaking aspects of IHL in both training and operational situations.”).

139. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 470.

140. *Id.*

141. Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, 35 INT’L REV. RED CROSS, 583, 585 (1995).

142. *Id.*

naval warfare.¹⁴³ No assessment of the rules had been conducted since the Oxford Manual on the Laws of Naval War.¹⁴⁴ The *San Remo Manual* essentially served as a “restatement of the law applicable to armed conflict at sea.”¹⁴⁵ The document is not binding, but serves as a statement on the current [circa early 1990s] customary international law applicable in naval warfare, with some progressive developments in a few areas.¹⁴⁶ Although it is not a treaty, and is not binding, it has helped clarify the law in this arena, and has been adopted into some national manuals for the law of armed conflict in naval warfare.¹⁴⁷

The successes of the *San Remo Manual* have been widely touted,¹⁴⁸ and attempts to restate the customary law of armed conflict in other domains have followed the model of the *San Remo Manual*.¹⁴⁹ Nonetheless, the manual, while a helpful guide

143. *Id.* at 583.

144. *See generally* Manual on the Laws of Naval War, *supra* note **Error! Bookmark not defined.**

145. Doswald-Beck, *supra* note 141, at 584.

146. *Id.* at 587.

147. *Id.*; Sergis, *supra* note 12, at 533 (“The Manual was met with widespread acceptance and has strongly influenced many national manuals on the law of armed conflict.”).

148. *See, e.g.,* Astley & Schmitt, *supra* note 16, at 120 n.2 (“For an introduction to the law of the sea and naval operations, the best source is the San Remo Manual on International Law Applicable to Armed Conflicts at Sea”); Roach, *supra* note 8, at 66–67 (“[T]he *San Remo Manual* sets forth the most recent, and the most comprehensive, enunciation of the international law applicable to armed conflicts at sea.”); Sergis, *supra* note 12, at 523 (“If it were not for the San Remo Manual, it would be easy to conclude that international humanitarian law regarding naval warfare had been frozen in the interwar period.”).

149. *See The Woomera Manual on the International Law of Military Space Operations: Mission Statement*, <https://law.adelaide.edu.au/woomera/system/files/docs/Woomera%20Manual.pdf> (“The success of the *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, the *Harvard Manual on International Law Applicable to Air and Missile Warfare*, and the *Tallinn Manual on International Law Applicable to Cyber Operations* (versions 1.0 and 2.0) demonstrate how international experts and associated engagement with governments can offer an authoritative and clear articulation of international law in new domains for government legal advisers, decision-makers, and operators. The Woomera Manual aims to replicate - with respect to outer space - the successes of these earlier manuals.”); *see also* Dale Stephens, *Military Space Operations and International Law*, JUST SECURITY (Mar. 2, 2020), <https://www.justsecurity.org/68815/military-space-operations-and-international-law/> (noting “International Operational Law Manuals such as the *San Remo Manual on Naval Warfare* . . . have all informed critical decision making by States in their respective fields”).

for states, is not binding, and is not law.¹⁵⁰ Further, despite efforts made by the statements in the manual, there remain open questions of the international law of armed conflict regarding naval warfare that linger into the 21st Century.¹⁵¹

One of these areas of lingering questions continues in the same vein as Additional Protocol I—its treatment of perfidy and ruses. The *San Remo Manual* states that:

“Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it 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, constitute perfidy. Perfidious acts include the launching of an attack while feigning: (a) exempt, civilian, neutral or protected United Nations status; (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.”¹⁵²

This definition facially appears broader than the Additional Protocol I definition because there is no requirement that the perfidious conduct result in injury, death or capture. But the wording of the provision—consistent with naval practice—allows for perfidious acts *up to the point* of attack. Therefore, allowing for conduct in the naval space that would constitute a war crime on land. Thus, this custom, based on the *San Remo Manual*, considers launching an attack while engaged in perfidy as illegal, but other perfidious actions up to the point of launch as legal.

The manual also contains a broad interpretation of ruses noting that “[r]uses of war are permitted” and only prohibiting by specific reference “launching an attack whilst flying a false flag, and at all times from actively simulating the status of [specifically protected vessels].”¹⁵³ These definitions demonstrate a level of knowledge of the naval domain lacking in

150. Sergis, *supra* note 12, at 534 (“[T]he San Remo Manual is a non-binding instrument and its impact on the planning and execution of naval operations remains to be proven.”).

151. *Id.*; see also Dannenbaum, *supra* note 132, at 311 (“There are questions that must be confronted as the new group of experts [revising the manual] contemplates how to articulate the principles and commentaries upon which legal advisers, scholars, and analysts will draw when evaluating naval conflicts in the coming years and decades.”).

152. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, § III, art. 111 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

153. *Id.* at § III, art. 110.

Additional Protocol I, but nonetheless leave open gaps in the application of the prohibition on perfidy.¹⁵⁴ For example, the rules articulated at the conference continued to apply the practice of flying false flags, which may or may not in fact be an accurate description of custom.¹⁵⁵

The rules in the *San Remo Manual* served to provide a more detailed conception of perfidy and ruse in the maritime domain than previous iterations were capable of; nonetheless, prosecution of perfidy crimes in the maritime domain has remained almost non-existent.¹⁵⁶ These gaps in perfidy law, exacerbated when applied to naval conflicts, are even more fraught where state practice complicates the issue further.

III. DECEPTIVE LIGHTING HIGHLIGHTS THE GAP THAT EXISTS WHEN THE LAW OF WAR, MARITIME LAW, AND INTERNATIONAL CRIMINAL LAW INTERSECT.

Knowing the rules requiring the lighting of vessels at sea and knowing the rules governing armed conflict generally, as well as armed conflict in the naval context, there is a scenario that highlights all of the gaps in the current legal structure—deceptive lighting. State practice in deceptive lighting makes clear that the issue needs to be properly addressed with an understanding of all the relevant legal regimes. Failure to properly address the common practice of deceptive lighting leads to dangerous results. First, improperly addressing whether or not this conduct is perfidious results in no clear rule regarding whether this practice amounts to perfidy. States legitimately ignorant of whether or not this practice is perfidious may

154. Madden, *supra* note 55, at 446–47 (“[T]he group of San Remo participants and advisors (which included distinguished legal scholars, naval officers and military legal officers from over 20 States) avoided answering the specific question of whether it remains permissible for warships to fly false flags when they concluded that ‘a total prohibition on *deception* in naval armed conflict [was] unachievable.”); *see also* Morris, *supra* note 2, at 253 (noting that the Additional Protocol drafters and commentators, “having scratched the surface of the peculiarities on twentieth-century naval combat[,] drafters . . . resisted any extensive attempt to delve further into the subject.”).

155. *See* Madden, *supra* note 55, at 446–47 (discussing whether this practice is in fact still custom); *see also* Morris, *supra* note 2, at 252–54 (arguing this practice may not be customary law anymore).

156. Sergis, *supra* note 12, at 523 (“Someone interested in the case-law regarding such crimes has to go as far back as the Nuremberg trials in order to find a case regarding the conduct of hostilities at sea.”).

therefore gain a military advantage. Some states willing to do so, may also be capable of taking advantage of the lack of a clearly defined rule in a way that may in fact be criminal. Second, as a result, the practice might degrade the principle of distinction. If in fact the practice is accepted in the naval context, it should be expressly articulated in the same manner that the flying of false flags up to the point of attack is authorized in treaty law. Otherwise, the lack of clarity allows states to take advantage of the prohibition on perfidy, and may result in other states broadly questioning claims of protected status. This in turn erodes confidence in the principle of distinction and subverts a general tenet of the laws of war.

A. WHAT IS DECEPTIVE LIGHTING?

Navies around the world engage in the practice of deceptive lighting.¹⁵⁷ But no clear definition of the practice is provided in national level naval manuals.¹⁵⁸ One service member described deceptive lighting as the practice “of changing the configuration of lights aboard a warship so that—to a casual or distant viewer—the ship appears to be something other than it really is.”¹⁵⁹ More precise definitions describe the practice as one wherein “a warship changes its normal lighting configuration” in order to “deceive an enemy regarding its location, identity, status and intentions.”¹⁶⁰ Thus, the practice exists commonly

157. See COMMANDER’S HANDBOOK, *supra* note **Error! Bookmark not defined.**, at § 12.1.1; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 13.82 n.96 (2004) (“Deception at sea has been a feature of naval history. Warships were entitled to disguise themselves if they so wished by, for instance, flying other colours. Aircraft, on the other hand, have never been entitled to bear false markings. The UK position is that ruses of war—disguising ships to appear to be different (for example by using different or no lights)—are permissible subject to the rules in this paragraph.”); ACADEMIA DE GUERRA NAVAL (ECUADOR), ASPECTOS IMPORTANTES DEL DERECHO INTERNACIONAL MARITIMO QUE DEBEN TENER PRESENTE LOS COMANDANTES DE LOS BUQUES § 12.1.1 (1989) (“Stratagems and ruses of war permitted during armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships”); see also Madden, *supra* note 7, at 5 (citing CANADIAN CHIEF OF THE MARITIME STAFF, MARITIME COMMAND COMBAT READINESS TRAINING REQUIREMENTS, CFCO 102(K), 246, 272 (2009)) (grading Canadian forces on their ability to engage in deceptive lighting).

158. Morris, *supra* note 2, at 236 n.7.

159. *Id.*

160. LAURIE BLANK & GREGORY NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 623 (2d ed. 2019).

enough to be documented in naval manuals, and service members are aware of what the general practice entails, even though no specific definition of the practice exists.

There are two important points regarding this type of deception at sea. The first is simply to restate that *all* ships on the high seas are obligated under treaty-based international law applicable to nearly 99% of the gross tonnage of the world's merchant fleet—and ratified by 161 countries—to comply with the vessel configurations for lighting at night.¹⁶¹ The second is stated simply—deception is authorized in war.¹⁶² Deceptive lighting would narrowly fall into the category of “visual deception tactics” at sea.¹⁶³ Visual deceptions have long been used in naval warfare,¹⁶⁴ and are considered to be legitimate “ruses of war” carried out in accordance with treaty and customary obligations.¹⁶⁵

Concerning though is that unlike other visual deceptions, which might imply the presence of a unit or group or the alteration of a superstructure to confuse the otherwise easy identification of a country's standard warship,¹⁶⁶ the practice of deceptive lighting could potentially go so far as to imply that a warship is to be afforded a different Law of Armed Conflict status than that of a combatant.¹⁶⁷ As a result, some have categorically dismissed deceptive lighting as *per se* unlawful.¹⁶⁸ Others have noted that in *certain circumstances* the act of

161. *Status of IMO Treaties*, *supra* note 27, at 101.

162. Additional Protocol I, *supra* note 9, art. 37(2).

163. Jonathan F. Solomon, *Maritime Deception and Concealment: Concepts for Defeating Wide-Area Oceanic Surveillance-Reconnaissance-Strike Networks*, 66 NAVAL WAR COLL. REV. 87, 92 (2013).

164. *Id.*

165. COMMENTARY ON ADDITIONAL PROTOCOL I, *supra* note 68, at 440.

166. *See id.* at 440–41.

167. Madden, *supra* note 7, at 6 (“Given that some lighting configurations obviously signal that a vessel is a non-combatant (and is therefore protected under IHL), it becomes possible to discern between perfidious and non-perfidious deceptive lighting. For instance, a warship that rigs and displays lights indicating that it is a vessel engaged in fishing would satisfy the definition of perfidy: the deceiving vessel would invite the confidence of the enemy by leading it to believe it is obliged to accord the deceiving vessel (as a purported ‘vessel engaged in fishing’) protection under IHL, with the intent to betray that confidence (by not actually being engaged in fishing).”).

168. Morris, *supra* note 2, at 248 (“The use of deceptive lighting in combat meets a prima facie case of perfidy under Protocol I: the type of behavior that would otherwise be termed treacherous. It meets the three requirements of the classic test for an act of perfidy, and if used in combat it would, and should be, prohibited.”).

deceptive lighting could be an unlawful act of perfidy or could result in criminal liability under the war crimes provisions of international criminal law.¹⁶⁹ Yet, neither of these scenarios reflects the simple fact that the warships of States actively do engage in deceptive lighting.

Sometimes deceptive lighting is merely used to run the ship with no navigation lights energized.¹⁷⁰ At other times, deceptive lighting is used simply to indicate a different size of vessel.¹⁷¹ But, these discussions are indicative of state practice. It has been argued that deceptive lighting is categorically not a part of customary international law,¹⁷² yet documented naval policies from around the world demonstrate that it is not only used in practice, but written into national guidelines on how to properly conduct warfare at sea.¹⁷³ Furthermore, at least some forms of deceptive lighting, such as the “darken ship” policies allowing warships to steam at night unlit, are so formalized into customary law surrounding armed conflict at sea that *energizing a warships lights* is historically considered to be an affirmative sign of surrender during naval engagements.¹⁷⁴ It was such an understood practice that warships would not have their lights energized that doing so amounted to surrender.¹⁷⁵ However, the practice of warships running without their navigation lights energized is directly contrary to admiralty case law on the practice,¹⁷⁶ treaty law,¹⁷⁷ and national legislation.¹⁷⁸ Yet, it

169. See Madden, *supra* note 7, at 8 (“[W]hen deceptive lighting suggests that a warship is a non-combatant vessel, the schemes will amount to perfidy. In such cases, naval commanders need not necessarily abandon the deceptive lighting plans – but they must ensure that they do not kill, injure, or capture any enemy forces while engaged in perfidious deceptive conduct if they wish to avoid criminal liability and/or illegal acts.”).

170. See Morris, *supra* note 2, at 245–46; see also 32 C.F.R. § 706.1(c).

171. See Madden, *supra* note 7, at 6–7 (discussing the *Arleigh Burke*-class destroyer’s lighting configuration).

172. Morris, *supra* note 2, at 254.

173. See *supra* note 157.

174. Trial of Helmuth Von Ruchteschell (1947) (British Military Court, Hamburg), reprinted in THE U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS VOLUME IX, (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf (describing in the case notes for a war crimes case from World War II the customary process of surrender at sea to include “by night, all the ship’s lights should be put on.”).

175. *Id.*

176. *The City of Rome*, 24 F.2d 729, 733 (S.D.N.Y. 1928); *Watts v. United States*, 123 F. 105, 112 (S.D.N.Y. 1903).

177. See COLREGs, *supra* note 10, at 20–22.

178. See, e.g., 33 U.S.C. §§ 1601–08 (2002).

remains inherently understood in the naval context that warships will not have their lights energized at night.

How then could such a practice amount to perfidy? Part of the issue when discussing deceptive lighting is that manuals do not define what the act looks like in practice. However, another large problem is that naval conflicts largely go unaddressed or unconsidered in treaties. This is true, for example, of the peaceful maritime legal regimes, like COLREGs or UNCLOS, as well as the armed conflict legal regimes, like Additional Protocol I—neither specifically address naval conflicts. This results in a gap in regulation. When gaps arise in the context of naval conflict, it is difficult to ascertain what the proper legal regime to apply should be.¹⁷⁹ This makes it even more complex than the gaps already articulated in the perfidy codification, where the proper application can be understood by resorting to the goal of the article—the principle of distinction. Here, because ascertaining the appropriate legal regime poses challenges, finding the proper goal to apply is also complicated. Should the goal of distinction apply or the goal of safe navigation at sea? How should the two regimes interact? This gap becomes obvious when the example of deceptive lighting is applied.

B. APPLYING THE RULES TO DECEPTIVE LIGHTING SCENARIOS.

Two scenarios might highlight the complexities described above regarding deceptive lighting. In the first, two warships are meeting at night, they are outside of visual range of each other, but are mutually detectable by radar. Each suspects that the other may be a warship, but neither is hoping to engage the other this night as they have different military objectives to reach. One energizes its lights to mimic a fishing vessel. The other energizes its lights to mimic a power-driven vessel. The “fishing vessel” energized its lights, not for the purpose of feigning to be a civilian, but rather hoping that the other vessel will “give way” by giving a wider berth in accordance with the COLREGs. Is this conduct perfidious? The prohibition on perfidious conduct is only supposed to apply to the application of statuses in armed

179. See Jane Gilliland Dalton, *A Comparison Between the San Remo Manual and the U.S. Navy's Commander's Handbook*, 36 ISR. Y.B. HUM. RTS. 71, 82–83 (2006) (discussing when the “other rules” clause of the San Remo manual may apply when determining which law comprises the *lex specialis* in the face of two competing legal regimes).

conflict.¹⁸⁰ Here, the vessels are trying to force the other's movements, not by belief in a protection afforded under the law of armed conflict, but by application of the "rules of the road" between mariners. The prohibition on perfidy is not supposed to apply to other applications of international law,¹⁸¹ yet the warship engaged in this behavior to maintain distance between the vessels by mimicking a "fishing vessel." However, no act of killing, injury or capture occurred, so the "harm-based offense" element would be lacking, even if a "military advantage" is made.

But, what if the "fishing vessel" energized its lights to push the warships apart, but only so that it could place the other warship into a firing range? Did it make use of a "protected status" or the "other applicable legal regime under international law" to do so? The question is complex because the warships did not maneuver in a certain way based on a protected status, but the conduct still "feels" of perfidy, especially when the *San Remo Manual* calls the act of a warship feigning of civilian status an act of perfidy.¹⁸² But, the manual does not specify that a civilian vessel is one "engaged in fishing," although it seems the implication would clearly be that a vessel engaged in fishing is likely civilian in nature.¹⁸³ So, the question becomes, is feigning "work" under the COLREGs the equivalent of feigning "status" under LOAC? Does the purpose behind the energizing of the lights matter? The interplay between the two regimes is complex, and exploitable in this scenario.

A second scenario also exposes the complications of playing between the two regimes. Like above, two warships are meeting at night, they are outside of visual range, but are detectable by

180. See Blank, *supra* note 54, at 786.

181. Watts, *supra* note 68, at 148 ("At the AP I Diplomatic Conference, States rejected in committee an ICRC proposal to apply the term 'confidence' to include obligations of general international law and broader moral obligations.").

182. See SAN REMO MANUAL, *supra* note 152, § III, art. 111.

183. The question is even further complicated because warships could be classified as "military objects" as opposed to "military combatants." This classification further complicates the topic because distinctions are made in IHL between feigning civilian status and feigning civilian object status. Kevin Jon Heller, *Disguising a Military Object as a Civilian Object: Prohibited Perfidy or Permissible Ruse of War*, 91 INT'L L. STUD. SERIES U.S. NAVAL WAR C. 517, 523 (2015) (discussing why hiding tanks in buildings is acceptable "camouflage" while the soldier in civilian clothes launching an attack is not, noting "[a]lmost without exception, IHL scholars draw a categorical distinction between using camouflage to feign civilian status and using it to feign civilian-object status").

radar. They are each running “darken ship.” Just upon reaching visual range, each, thinking the other to be a merchant vessel, decides to energize their lights as power driven vessels, so that collision might be avoided. As they approach it becomes apparent they are adversarial warships, and both ships open fire. Have they each just committed a war crime? Have they committed two war crimes? In naval warfare energizing a ship’s lights may indicate surrender.¹⁸⁴ Firing upon a party who has “surrendered” is a war crime.¹⁸⁵ “Surrendering,” only to subsequently fire upon an adversary, is also a war crime—in fact it is perfidy as noted above.¹⁸⁶ How should the COLREGs and the LOAC be rectified in these scenarios?

The second scenario, and in some regards the first, are unlikely to occur exactly as described above given the modern advances in naval technology.¹⁸⁷ But variations on them are possible, even in the environment of 21st Century naval warfare.¹⁸⁸ Complex naval conflict scenarios continue to arise in the 21st Century,¹⁸⁹ and while the *San Remo Manual* helped assess the law as a restatement, it did not address standing gaps

184. See U.N. WAR CRIMES COMMISSION, *supra* note 174.

185. *Id.*

186. Additional Protocol I, *supra* note 9, art. 37.

187. See Solomon, *supra* note 163, at 92–93.

188. It is easy to envision even more complex scenarios where a state has conscripted a variety of different vessels into naval service during war, making identification even more complicated than the scenarios described above.

189. See, e.g., Sam LaGrone, *Coast Guard Fires Single Warning Shot at Iranian Dhow*, U.S. NAVAL INST. NEWS (Aug. 27, 2014, 8:55 AM), <https://news.usni.org/2014/08/27/coast-guard-fires-single-warning-shot-iranian-dhow> (explaining that misidentification of a vessel at sea led to a kinetic situation even while UNCLOS was followed); see also, e.g., Idris Ali & Phil Stewart, *Trump Tells Navy to Destroy Iranian Gunboats if they ‘Harass’ American Ships*, REUTERS (Apr. 22, 2020, 7:28 AM), <https://www.reuters.com/article/us-usa-iran-military/trump-tells-navy-to-destroy-iranian-gunboats-if-they-harass-american-ships-idUSKCN2241UK> (quoting Donald Trump as calling for armed conflict over violations of the Navigation Rules in a tweet stating, “I have instructed the United States Navy to shoot down and destroy any and all Iranian gunboats if they harass our ships at sea.”); Uri Friedman, *The U.S.-Iran Conflict That Never Happened*, ATLANTIC (Jan. 20, 2016), <https://www.theatlantic.com/international/archive/2016/01/iran-sailors-obama-republicans/424371/>; Robin Wright & Ann Scott Tyson, *U.S. Expresses Alarm After Iranian Boats Threaten Three American Vessels*, WASH. POST (Jan. 8, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/01/07/AR2008010701297.html>; Sean Quirk, *Water Wars: Drill, Maybe, Drill*, LAWFARE (Oct. 7, 2019), <https://www.lawfareblog.com/water-wars-drill-maybe-drill> (discussing how drilling operations have led to harassment by warships in the South China Sea).

in the law, nor fully merge the law of armed conflict with other applicable legal regimes in the maritime domain.

Naval conflicts also suffer from a severe lack of accountability in international criminal law.¹⁹⁰ War crimes that occur at sea are only sparsely tried in national courts,¹⁹¹ and the international criminal legal system has not tried a case involving naval conflict since Nuremberg despite documented cases of war crimes.¹⁹² This is exacerbated when the crime of perfidy is involved, which itself suffers from a lack of accountability.¹⁹³ Even the Rome Statute only mentions naval conflict once, when defining that a crime of aggression can come from an attack on the sea forces of another state.¹⁹⁴ However, the jurisdiction of the ICC extends to crimes committed on the vessels registered to states party to the treaty.¹⁹⁵ Thus, the jurisdiction of the court should extend to try these crimes, but the practice surrounding the investigation and trial of war crimes committed at sea is lacking.

The current legal regime is not enough. The practice of deceptive lighting only highlights this issue, but many more examples of the issues arising out of conflicting legal regimes in the law of armed conflict at sea exist.¹⁹⁶ Until these state practices existing in the grey area between competing legal regimes are clarified, states will continue to operate within the ambiguities allowed—thus, without action, accountability is unlikely, and the principle of distinction erodes. It is important to deal directly with stakeholders, and experts in the maritime domain, to see the codification and application of these rules in the naval context moving forward.¹⁹⁷ The *San Remo Manual* is

190. Sergis, *supra* note 12, at 552–53 (“Undoubtedly, the current development of IHL regulating armed conflicts at sea and concomitantly its enforcement through ICL leaves much to be desired.”).

191. See CUSTOMARY IHL DATABASE, *supra* note **Error! Bookmark not defined.**; see also Watts, *supra* note 68, at 113 (discussing the charges in the al-Nashiri case involving the bombing of the USS Cole).

192. Sergis, *supra* note 12, at 523.

193. See Blank, *supra* note 54, at 767.

194. See Rome Statute, *supra* note **Error! Bookmark not defined.**, art. 8(2)(d).

195. *Id.* art. 12(2)(a).

196. See, e.g., Dannenbaum, *supra* note 132, at 385–94 (noting updates that need to be made to the *San Remo Manual* during future revisions in light of conflicting legal regimes and their application to naval conflict).

197. Eva Svoboda, *Influencing Behaviour in Armed Conflict—What is the Point?*, HUMANITARIAN L. & POL. BLOG (Mar. 12, 2020), <https://blogs.icrc.org/law-and-policy/2020/03/12/influencing-behaviour-armed->

a good first step, but the dynamics of warfare, including in the naval context, have changed dramatically in the last quarter century.¹⁹⁸ To reach an understanding of the dynamics of these legal regimes in the naval context requires a deliberate, conscious, systemic, and coherent approach that a single restatement of the rules cannot solve.¹⁹⁹ Instead, the gaps present in the regime should be acknowledged. State practice in the maritime arena, such as deceptive lighting, should be addressed as either illegal, prohibited in certain contexts, or openly allowed by custom, in order to clarify the existing rules and provide clear distinctions for navies around the globe.

IV. CONCLUSION

Perfidy at sea highlights the gaps at play not only in the perfidy definition, but also in the application of the Law of Armed Conflict across non-standard domains. The issues that arise from the interplay in non-standard domains between the relevant histories of conflict in these areas, the express exceptions to LOAC applicable in these contexts, the operational considerations in these domains, and other standardized legal regimes regulating conduct in these areas—further complicate the how LOAC is applied. Furthermore, where legal regimes interact, accountability gaps are higher. This is seen in the lack of enforcement for LOAC violations in the naval domain. Until properly addressed in legally binding formats, the rise of non-binding manuals in non-standard spaces, such as the *San Remo Manual* for Naval Conflict, have attempted to fill the gaps left when these domains are ignored. These manuals are beneficial to policy makers, tacticians, and legal advisors because they provide an expertise on the application of LOAC in non-standard domains. However, due to their non-binding nature, these manuals are incapable of providing accountability mechanisms for violations of LOAC in these spaces. Furthermore, not all state practices, such as deceptive lighting, are discussed in these manuals. More detailed and binding treaty law is needed for the application of LOAC in non-standard domains if any enforcement is to be obtained for violations of international criminal law in these contexts. These manuals serve as good

conflict/.

198. Dalton, *supra* note 179, at 74–75, 83.

199. Svoboda, *supra* note 197.

starting points for treaties in these areas, but a need exists to revisit and properly consider the application of LOAC in these domains.