

Rule 65. Perfidy

Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited.

Practice

Volume II, Chapter 18, Section I.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

This is a long-standing rule of customary international law already recognized in the Lieber Code, the Brussels Declaration and the Oxford Manual, and codified in the Hague Regulations.^[1] It is also set forth in Additional Protocol I.^[2] Under the Statute of the International Criminal Court, “killing or wounding treacherously individuals belonging to the hostile nation or army” constitutes a war crime in international armed conflicts.^[3]

The prohibition of perfidy is set forth in a large number of military manuals.^[4] Sweden’s IHL Manual considers that the prohibition of perfidy in Article 37 of Additional Protocol I is a codification of customary international law.^[5] Violation of this rule is an offence under the legislation of numerous States.^[6] The prohibition is also supported by official statements and other national practice.^[7]

Non-international armed conflicts

The prohibition of perfidy was included in the draft of Additional Protocol II by Committee III of the Diplomatic Conference leading to the adoption of the Additional Protocols but was deleted at the last moment as part of a package aimed at the adoption of a simplified text.^[8] Under the Statute of the International Criminal Court, “killing or wounding treacherously a combatant adversary” constitutes a war crime in non-international armed conflicts.^[9] In addition, this rule is contained in other instruments pertaining also to non-international armed conflicts.^[10]

Military manuals which are applicable in or have been applied in non-international armed conflicts prohibit resort to perfidy.^[11] Violations of this rule are an offence in any armed conflict under the legislation of numerous States.^[12] The rule is supported by official statements and other practice pertaining to non-international armed conflicts.^[13]

No official contrary practice was found with respect to either international or non-international armed conflicts. No party has claimed the right to resort to perfidy.

Definition of perfidy

Additional Protocol I defines perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence”.^[14] This definition is restated in the Elements of Crimes for the International Criminal Court.^[15] It is also contained in numerous military manuals.^[16] It is supported by other practice.^[17] This practice includes that of States not, or not at the time, party to Additional Protocol I.^[18] New Zealand’s Military Manual and Sweden’s IHL Manual point out that the definition of perfidy contained in Article 37 codifies customary international law.^[19] 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.^[20]

The above definition of perfidy was also included in the draft of Additional Protocol II submitted by the ICRC to the Diplomatic Conference leading to the adoption of the Additional Protocols but was deleted by Committee III.^[21] However, the Preparatory Committee for the Elements of Crimes for the International Criminal Court concluded that the elements of the crime of treacherously killing or wounding were identical in international and non-international armed conflicts.^[22]

Given that the definition of perfidy provides that the confidence of an adversary be based on a situation which requires protection under international humanitarian law, the following acts are considered perfidious if committed with the intent to betray the confidence of the adversary:

- simulation of being disabled by injuries or sickness because an enemy who is thus disabled is considered *hors de combat* and may not be attacked but must be collected and cared for (see Rules 47 and 109–110);^[23]
- simulation of surrender because an adversary who surrenders is considered *hors de combat* and may not be attacked but must be captured or released (see Rule 47);^[24]
- simulation of an intent to negotiate under a flag of truce because a person advancing under a flag of truce must be respected (see Rule 67);^[25]
- simulation of protected status by using the red cross or red crescent emblem because medical and religious personnel, units and transports displaying the distinctive emblems must be respected and protected (see Chapter 7);^[26]
- simulation of protected status by using United Nations emblems, signs or uniforms because peacekeeping personnel and humanitarian relief personnel using United

Nations emblems, signs or uniforms must be respected, as long as they are entitled to the protection given to civilians, and those emblems, signs or uniforms may not be used without authorization (see Rules 31, 33 and 60);^[27]

- simulation of protected status by using other protective emblems because the personnel using other protective emblems, including the distinctive emblem of cultural property, must be respected and such emblems may not be used improperly (see Rule 61);^[28]

- simulation of civilian status because civilians not taking a direct part in hostilities must be respected and may not be the object of attack (see Rules 1 and 6);^[29]

- the wearing of uniforms or the use of emblems of neutral States or other States not party to the conflict because uniforms or emblems of neutral States or of other States not party to the conflict may not be used (see Rule 63).^[30]

This definition is supported by the practice collected for each particular category and by the fact that the rules on which the protection is based apply to both international and non-international armed conflicts.

While the Hague Regulations prohibit “to kill or wound treacherously”, Additional Protocol I prohibits “to kill, injure or capture an adversary by resort to perfidy”.^[31] The Statute of the International Criminal Court uses the language of the Hague Regulations.^[32] Similarly, some military manuals prohibit killing or injuring by resort to perfidy, while others prohibit killing, injuring or capturing by resort to perfidy.^[33] The military manuals of States not party to Additional Protocol I generally do not mention capturing, with the exception of a manual used by Israel.^[34] Almost all national legislation making it an offence to violate this rule refers to killing or injuring only.^[35] The United States has asserted that it supports “the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy”.^[36] On the basis of this practice, it 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. It should also be stressed that the capture of an adversary is often accompanied by a threat to kill or injure and that a threat to commit an illegal act is generally considered to be illegal as well.

Treacherous attempt upon the life of an enemy

The Lieber Code provides that “the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them”.^[37] The Brussels Declaration prohibits “murder by treachery of individuals belonging to the hostile nation or army” and the Oxford Manual prohibits the making of “treacherous attempts upon the life of an enemy; as for example by keeping assassins in pay”.^[38] Under the Hague Regulations, it is prohibited “to kill or wound treacherously individuals belonging to the hostile nation or army”.^[39] The use of the term “individuals belonging to the hostile nation or army” clearly covers civilians as well as combatants.

The US Air Force Pamphlet states that Article 23(b) of the Hague Regulations has been construed as prohibiting “assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive’”, but it specifies that “obviously, it does not preclude lawful attacks by lawful combatants on individual soldiers or officers of the enemy”.^[40] Several other military manuals also prohibit assassination and the putting of a price on the head of an enemy.^[41] New Zealand's Military Manual defines assassination as “the killing or wounding of a selected individual behind the line of battle by enemy agents or unlawful combatants”.^[42] The prohibition of assassination is also supported by official statements.^[43]

^[1] Lieber Code, Article 101 (cited in Vol. II, Ch. 18, § 930); Brussels Declaration, Article 13(b) (*ibid.*, § 931); Oxford Manual, Article 8(b) (*ibid.*, § 932); Hague Regulations, Article 23(b) (*ibid.*, § 926).

^[2] Additional Protocol I, Article 37(1) (adopted by consensus) (*ibid.*, § 927).

^[3] ICC Statute, Article 8(2)(b)(xi) (*ibid.*, § 929).

^[4] See, e.g., the military manuals of Argentina (*ibid.*, §§ 856–857 and 937), Australia (*ibid.*, §§ 858–859 and 938–939), Belgium (*ibid.*, §§ 861 and 940), Benin (*ibid.*, § 863), Cameroon (*ibid.*, §§ 864 and 941), Canada (*ibid.*, §§ 866 and 942), Colombia (*ibid.*, § 867), Croatia (*ibid.*, §§ 868–869), Ecuador (*ibid.*, § 870), France (*ibid.*, §§ 871–873 and 943), Germany (*ibid.*, § 875), Hungary (*ibid.*, § 876), Indonesia (*ibid.*, § 944), Israel (*ibid.*, § 945), Italy (*ibid.*, § 947), Kenya (*ibid.*, § 948), Republic of Korea (*ibid.*, §§ 880–881), Netherlands (*ibid.*, §§ 883–885 and 949–950), New Zealand (*ibid.*, § 951), Nigeria (*ibid.*, §§ 886–887 and 952–953), Romania (*ibid.*, § 954), Russian Federation (*ibid.*, §§ 888 and 955), South Africa (*ibid.*, §§ 889–890), Spain (*ibid.*, §§ 891 and 956), Sweden (*ibid.*, §§ 893 and 957), Switzerland (*ibid.*, §§ 894 and 958), Togo (*ibid.*, § 895), United Kingdom (*ibid.*, §§ 896 and 959–960), United States (*ibid.*, §§ 898, 900–901 and 961–962) and Yugoslavia (*ibid.*, §§ 902 and 963).

^[5] Sweden, *IHL Manual* (*ibid.*, § 893).

^[6] See, e.g., the legislation of Australia (*ibid.*, § 964), Bosnia and Herzegovina (*ibid.*, § 965), Canada (*ibid.*, § 967), Congo (*ibid.*, § 968), Croatia (*ibid.*, § 969), Georgia (*ibid.*, § 970), Germany (*ibid.*, § 971), Ireland (*ibid.*, § 972), Italy (*ibid.*, § 973), Mali (*ibid.*, § 974), Netherlands (*ibid.*, § 975), New Zealand (*ibid.*, § 976), Norway (*ibid.*, § 977), Slovenia (*ibid.*, § 978), Sweden (*ibid.*, § 979), United Kingdom (*ibid.*, § 981), United States (*ibid.*, § 982) and Yugoslavia (*ibid.*, § 983); see also the draft legislation of Burundi (*ibid.*, § 966), El Salvador (*ibid.*, § 903) and Trinidad and Tobago (*ibid.*, § 980).

^[7] See, e.g., the statements of the United States (*ibid.*, §§ 917 and 988), the practice of the United States (*ibid.*, §§ 916 and 990) and the reported practice of Iraq (*ibid.*, §§ 912 and 985).

^[8] Draft Additional Protocol II, Article 21(1) (*ibid.*, § 928).

^[9] ICC Statute, Article 8(2)(e)(ix) (*ibid.*, § 929).

^[10] See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia, § 6 (*ibid.*, §§ 853 and 934); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, § 2.5 (*ibid.*, §§ 854 and 935); San Remo Manual, § 111 (*ibid.*, § 855); UNTAET Regulation 2000/15, Section 6(1)(e)(ix) (*ibid.*, § 936).

^[11] See, e.g., the military manuals of Australia (*ibid.*, §§ 858 and 939), Benin (*ibid.*, § 863), Canada (*ibid.*, § 866), Colombia (*ibid.*, § 867), Croatia (*ibid.*, §§ 868–869), Ecuador (*ibid.*, § 870), Germany (*ibid.*, § 875), Italy (*ibid.*, § 947), Kenya (*ibid.*, § 948), Republic of Korea (*ibid.*, § 881), Nigeria (*ibid.*, §§ 886 and 952–953),

South Africa (*ibid.*, §§ 889–890), Sweden (*ibid.*, § 893), Togo (*ibid.*, § 895) and Yugoslavia (*ibid.*, §§ 902 and 963).

[12] See, e.g., the legislation of Australia (*ibid.*, § 964), Bosnia and Herzegovina (*ibid.*, § 965), Canada (*ibid.*, § 967), Congo (*ibid.*, § 968), Croatia (*ibid.*, § 969), Georgia (*ibid.*, § 970), Germany (*ibid.*, § 971), Netherlands (*ibid.*, § 975), New Zealand (*ibid.*, § 976), Slovenia (*ibid.*, § 978), Sweden (*ibid.*, § 979), United Kingdom (*ibid.*, § 981) and Yugoslavia (*ibid.*, § 983); see also the legislation of Italy (*ibid.*, § 973), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Burundi (*ibid.*, § 966), El Salvador (*ibid.*, § 903) and Trinidad and Tobago (*ibid.*, § 980).

[13] See, e.g., the statements of Chile (*ibid.*, § 910), Peru (*ibid.*, § 913) and Yugoslavia (*ibid.*, § 918) and the reported practice of Colombia (*ibid.*, § 911) and the Philippines (*ibid.*, § 914).

[14] Additional Protocol I, Article 37(1) (adopted by consensus) (*ibid.*, § 847).

[15] Elements of Crimes for the ICC, Definition of killing or wounding treacherously individuals belonging to the hostile nation or army/a combatant adversary as a war crime (ICC Statute, Article 8(2)(b)(xi) and (e) (ix)).

[16] See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 18, § 857), Australia (*ibid.*, §§ 858–859), Belgium (*ibid.*, §§ 860–862), Cameroon (*ibid.*, § 864), Canada (*ibid.*, § 865), Croatia (*ibid.*, § 869), Ecuador (*ibid.*, § 870), France (*ibid.*, §§ 871 and 873), Germany (*ibid.*, §§ 874–875), Hungary (*ibid.*, § 876), Israel (*ibid.*, § 877), Kenya (*ibid.*, § 879), Netherlands (*ibid.*, § 883), New Zealand (*ibid.*, § 885), Spain (*ibid.*, § 892), Sweden (*ibid.*, § 893), United Kingdom (*ibid.*, § 897) and United States (*ibid.*, §§ 899 and 901).

[17] See, e.g., the statements of United States (*ibid.*, §§ 916–917) and the reported practice of Iraq (*ibid.*, § 912).

[18] See, e.g., the military manuals of France (*ibid.*, § 871), Israel (*ibid.*, § 877), Kenya (*ibid.*, § 879), United Kingdom (*ibid.*, § 897) and United States (*ibid.*, §§ 899 and 901), the statements of the United States (*ibid.*, §§ 916–917) and the reported practice of Iraq (*ibid.*, § 912).

[19] New Zealand, *Military Manual* (*ibid.*, § 885); Sweden, *IHL Manual* (*ibid.*, § 893).

[20] See, e.g., the military manuals of Benin (*ibid.*, § 863), Canada (*ibid.*, § 865) and Togo (*ibid.*, § 895).

[21] Draft Additional Protocol II, Article 21(1) (*ibid.*, § 848).

[22] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 476.

[23] See, e.g., the practice (cited in Vol. II, Ch. 18, §§ 1000–1044).

[24] See, e.g., the practice (*ibid.*, §§ 1045–1129).

[25] See, e.g., the practice (*ibid.*, §§ 1130–1218).

[26] See, e.g., the practice (*ibid.*, §§ 1219–1324).

[27] See, e.g., the practice (*ibid.*, §§ 1325–1397).

[28] See, e.g., the practice (*ibid.*, §§ 1398–1451).

[29] See, e.g., the practice (*ibid.*, §§ 1452–1505).

[30] See, e.g., the practice (*ibid.*, §§ 1506–1545).

[31] Hague Regulations, Article 23(b) (*ibid.*, § 926); Additional Protocol I, Article 37(1) (adopted by consensus) (*ibid.*, § 927).

[32] ICC Statute, Article 8(2)(b)(xi) and (e)(ix) (*ibid.*, § 929).

[33] The military manuals of Argentina (*ibid.*, § 937), Cameroon (*ibid.*, § 941), Canada (*ibid.*, § 942), France (*ibid.*, § 943), Israel (*ibid.*, § 945), Netherlands (*ibid.*, §§ 949–950), New Zealand (*ibid.*, § 951), Romania (*ibid.*, § 954) and Spain (*ibid.*, § 956) prohibit killing, injuring and capturing by resort to perfidy, whereas the military manuals of Belgium (*ibid.*, § 940), Indonesia (*ibid.*, § 944), Italy (*ibid.*, § 947), Kenya (*ibid.*, § 948), Nigeria (*ibid.*, § 952–953), Russian Federation (*ibid.*, § 955), Sweden (*ibid.*, § 957), Switzerland (*ibid.*, § 958), United Kingdom (*ibid.*, §§ 959–960), United States (*ibid.*, §§ 961–962) and Yugoslavia (*ibid.*, § 963) limit this prohibition to killing or injuring. The military manuals of Benin (*ibid.*, § 863), Canada (*ibid.*, § 865) and Togo (*ibid.*, § 895) formulate the prohibition as applicable to “hostile acts committed under the cover of a legal protection” and this would cover killing and injuring but also capturing and possibly other acts.

[34] See Israel, *Law of War Booklet* (*ibid.*, § 945).

[35] See, e.g., the legislation of Australia (*ibid.*, § 964), Bosnia and Herzegovina (*ibid.*, § 965), Canada (*ibid.*, § 967), Congo (*ibid.*, § 968), Croatia (*ibid.*, § 969), Georgia (*ibid.*, § 970), Germany (*ibid.*, § 971), Italy (*ibid.*, § 973), Mali (*ibid.*, § 974), New Zealand (*ibid.*, § 976), Slovenia (*ibid.*, § 978), Sweden (*ibid.*, § 979), United Kingdom (*ibid.*, § 981), United States (*ibid.*, § 982) and Yugoslavia (*ibid.*, § 983); see also the draft legislation of Burundi (*ibid.*, § 966) and Trinidad and Tobago (*ibid.*, § 980). The only exceptions are the legislation of Ireland (*ibid.*, § 972) and Norway (*ibid.*, § 977), which punish any breach of Additional Protocol I.

[36] United States, Remarks of the Deputy Legal Adviser of the Department of State (*ibid.*, § 988).

[37] Lieber Code, Article 101 (*ibid.*, § 930).

[38] Brussels Declaration, Article 13(b) (*ibid.*, § 931); Oxford Manual, Article 8 (*ibid.*, § 932).

[39] Hague Regulations, Article 23(b) (*ibid.*, § 926).

[40] United States, *Air Force Pamphlet* (*ibid.*, § 962).

[41] See, e.g., the military manuals of Australia (*ibid.*, § 938) (assassination of non-combatants, putting a price on the head of an enemy individual, any offer for an enemy “dead or alive”), Australia (*ibid.*, § 939) (assassination of a selected individual, proscription, outlawing, putting a price on the head of an enemy individual, any offer for an enemy “dead or alive”), Canada (*ibid.*, § 942) (assassination of selected non-combatants, putting a price on the head of an enemy individual or offering a bounty for an enemy “dead or alive”), Israel (*ibid.*, § 946) (attempt on the lives of enemy leaders (civilian or military), requesting the death of a specific person by dispatching an assassin or by offering an award for his liquidation), New Zealand (*ibid.*, § 951) (assassination, proscription, outlawing, putting a price on the head of an enemy individual, any offer for an enemy “dead or alive”), Switzerland (*ibid.*, § 958) (place a price on the head of an enemy military or civil leader), United Kingdom (*ibid.*, § 959) (assassination, proscription, outlawing, putting a price on the head of an enemy individual, any offer for an enemy “dead or alive”) and Yugoslavia (*ibid.*, § 963) (putting a price on someone’s head, whether State or military commander or any other person).

[42] New Zealand, *Military Manual* (*ibid.*, § 951).

[43] See, e.g., United States, Presidential Executive Order 12333 (*ibid.*, § 987) and Memorandum of Law of the Department of the Army: Executive Order 12333 and Assassination (*ibid.*, § 989).