Perhaps all war is based on deception, but throughout history, the law of war has limited the use of certain deceptive tactics. Developed long ago with a focus on honor among belligerents, the law of war’s prohibition of perfidy has failed to adapt to modern warfare. Moreover, its lack of focus on external actors, i.e., non-combatants, allows deceptive action even where it plainly contravenes the fundamental principles of the law of war. This Note redefines perfidy using the core aims of the law of war: distinction, proportionality, and military necessity. The hope is that an updated perfidy definition will provide greater guidance to battlefield operators, lessen war’s death and destruction, and ultimately help bring about swift and peaceful ends to armed conflicts.

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I. Introduction

War is nasty, cruel, and chaotic. Yet for centuries, the international community has attempted to use law to regulate conduct in battle. Despite war’s inevitable brutality and destruction, some tactics are simply declared a bridge too far. One of those tactics is perfidy.

Perfidy, broadly speaking, is unlawful deceptive action. It is closely related to ruses, or lawful deceptive action. 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. Perfidy and ruse have various definitions embodied in international agreements and state military documents. None of those definitions, however, provides useful guidance for battlefield operators in the 21st Century. Not only do the current definitions fail to demarcate the line between perfidy and ruse, but they fail to comport with basic law of war principles.

The current definitions of perfidy and ruse developed when war looked very different from how it looks today. When battles were fought hand-to-hand or on horseback, honor among combatants was the primary concern. As warfare modernized, and became less personal, perfidy and ruse definitions have become outmoded. The definitions struggle to maintain the humanity that inheres in the law of war. Raising a white flag of surrender only to lure the enemy close and kill him is perfidious but raising the same white flag to allow an escape when he stops shooting may be a lawful ruse. It is dishonorable to kill the enemy this way, but it is a sly maneuver to escape. This fine distinction is archaic and impracticable. New definitions are needed to clearly draw the line between what deceptive conduct is permissible and what is unlawful and to fulfill the law of war’s basic aims.

This Note proposes new definitions for perfidy and ruse based not on historic notions of honor among combatants, but on higher order principles of the law of war. The proposed definitions aim to protect
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non-combatants and avoid needless chaos and destruction. They rest on the ideas that civilians should be spared, destruction must be proportionate to the ultimate goal, and that armed conflicts should be brought to swift and peaceful ends.

Section II of this Note introduces the law of war generally and lays out the foundational principles upon which it rests. Section III traces the development of the perfidy/ruse distinction and establishes the current framework. Section IV provides examples of conduct that embody perfidy and ruse, and examples that blur the line between the two. That Section also develops critiques of existing definitions by showing how pliable the factual scenarios are. Section V further expands on the inadequacies of the existing framework and proposes new definitions for perfidy and ruse. To illustrate the new definitions, Section V.C applies them to unique issues in 21st century warfare. Finally, Section VI offers some implications and concludes.

II. THE LAW OF WAR

A brief survey of the law of war provides a foundation for understanding the development of perfidy and ruse, and what sort of rules the international community has set for armed conflicts. This Section discusses the fundamental principles undergirding the law of war and places perfidy and ruse within that framework.

A. General Principles

The law of war is an effort to cabin the cruelty that often comes naturally to mankind.\(^1\) It endeavors to govern brutal conflicts with reason, rather than impulse. Closely related to the field of international humanitarian law, the law of war is ultimately concerned with minimizing the inevitable suffering that war creates. In so doing, several key principles buttress this body of law.

First is the concept of distinction. Encapsulated in many legal instruments,\(^2\) distinction requires civilians to be treated differently

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than combatants. The idea behind distinction is that forces should only engage legitimate military targets. Therefore, indiscriminate attacks against civilians and their property violate the law of war. Reason prevails when civilians and combatants are distinguished because innocent lives of those not participating in the hostilities are spared.

Second is the concept of proportionality. Proportionality prohibits any incidental destruction of civilian life or property that is excessive in relation to the gained military advantage.\(^3\) This concept recognizes that some non-military destruction will occur in any war, but attempts to limit the extent of that destruction. Proportionality demonstrates the triumph of reason over impulse because “scorched earth” tactics may well be effective, but they cause needless suffering by those not party to the conflict. Armed forces are thus encouraged to minimize collateral damage and make sure any military gains clearly outweigh the incidental losses to civilians.

Finally, the law of war contains the concept of military necessity. Military necessity requires armed forces to undertake only those actions that are necessary to accomplish legitimate military objectives.\(^4\) Again, this concept recognizes that destruction is inevitable in war, but attempts to limit that destruction to military personnel and materiel. It is not necessary, for example, to destroy civilian water treatment facilities, thereby exposing noncombatants to dehydration and disease.\(^5\) That sort of destruction causes needless suffering, and military necessity seeks to avoid it.\(^6\)

Taken together, the ideas of distinction, proportionality, and military necessity can be distilled into one basic, underlying theme: armed

3. See Additional Protocol I, supra note 2, art. 51(5)(b) (“Launching “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated,” is prohibited.”).

4. See id. art. 52(2) (“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).


6. See Additional Protocol I, supra note 2, art. 54(2) (“It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.”).
conflicts should be ended as peacefully as possible, with the least amount of damage and suffering. As Carl von Clausewitz observed, it may well be a fallacy to think that humankind can wage war and limit death and destruction at the same time. Nevertheless, the law of war’s valiant efforts to minimize destruction and spare innocent lives are accepted internationally and they bind armed forces across the globe.

B. Placing Perfidy in the Law of War Framework

In fulfilling the principles discussed supra, the law of war consists of two main categories: \textit{jus ad bellum} and \textit{jus in bello}. \textit{Jus ad bellum} deals with the justifications for war in the first instance, i.e., whether waging war under the circumstances is just. \textit{Jus in bello}, on the other hand, governs conduct in war. Perfidy and ruse fall under the \textit{jus in bello} umbrella.

\textit{Jus in bello} is further divided into subcategories with rules governing weapons, humanitarian interests, and tactics. Rules on weapons regulate specific types of arms like landmines or chemical weapons. Rules on humanitarian interests protect individuals in wartime. Rules on methods concern what may be a legitimate target of war, i.e., what strategies, tactics, and practices of war are lawful.

Perfidy and ruse are tactics or practices that are controlled by \textit{jus in bello} rules on methods. Regulating perfidy and ruse is a reasoned decision by the international community to set “ground rules” for deception in wartime. As this Note will demonstrate, however, the current treatment with respect to perfidy and ruse fails to adequately support the basic aims of the law of war discussed in Section II.A. supra because it does not adequately account for the humanitarian interests that the law of war also seeks to protect.

III. DEFINING PERFIDY AND RUSE: WHERE WE ARE AND HOW WE GOT HERE

Perfidy prohibitions have a long history. Their roots trace back to medieval times where chivalrous conduct in war was only part of a...

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7. See Detter, supra note 1, at 155 (discussing Carl von Clausewitz, Vom Kriege, bk. 1, ch. 1(1832)).
9. Id.
10. Id.
11. See Detter, supra note 1, at 159-60.
12. Id. at 160.
13. Id. at 161.
14. Id. at 160.
15. For a compiled table of historic perfidy and ruse definitions, see the Appendix.
broader system of honor, loyalty, and trust among knights.\textsuperscript{16} By avoiding perfidious acts, knights could wage successful war and still preserve their immortal souls.\textsuperscript{17} Early law of war scholars also recognized that even in brutal conflict, some tactics were off-limits. Hugo Grotius distinguished between permissible and impermissible ruses by examining the specific significance that custom and tradition attributed to certain actions.\textsuperscript{18} He said that deceptive maneuvers must be chosen so “that no harm results, or, at least, only such harm as is admissible irrespective of the deception practised.”\textsuperscript{19} Grotius marked a theoretical drift away from the prevailing “Thomas Aquinas” view of war tactics whereby the legality of warring acts was determined by the justness of the cause. No longer would any act perpetrated by the “just” party in a conflict be presumptively legal.\textsuperscript{20}

Scholars continued struggling to define the perfidy/ruse distinction more precisely through the 16th and 17th centuries. Balthazar Ayala offered as the rule a general duty to avoid treachery.\textsuperscript{21} For Ayala, the basis for treachery was whether a reasonable defender would see an action as permissible “trickery” or an impermissible “fraud” or “snare.”\textsuperscript{22} Later, Alberico Gentili expanded the treachery concept to include actors who encouraged violations of their enemies’ reasonable trust that the enemies were safe.\textsuperscript{23} As the theory developed, scholars purportedly moved away from “honor-based” or chivalric justifications for the perfidy/ruse distinction. The earliest prohibitions of perfidious action focused on the deceptive actor—first, all acts by the just party were permissible, then, only those that would preserve the actor’s immortal soul. Prohibitions then drifted toward a more external focus—looking to the effect of deceptive action on enemy combatants. In the mid-19th century, there was a renewed effort to find exactly where the line should be drawn, but ultimately the definitions this effort produced fail to account for perfidy’s effects on non-combatants and fail to comport with the fundamental principles of the law of war.

\textsuperscript{17} Id.
\textsuperscript{19} Id.
\textsuperscript{20} See Wingfield, \textit{supra} note 16, at 132.
\textsuperscript{21} Id. at 131 (discussing Balthazar Ayala, \textit{Three Books on the Law of War and the Duties Connected with War and Military Discipline} 84 (John P. Bate trans., Carnegie Inst. 1912)).
\textsuperscript{22} Id.
\textsuperscript{23} Id. (discussing Alberico Gentili, \textit{De iure belli libri tres} 168 (John C. Rolfe trans., 1933) (1877)).
A. Early Definitions

The Lieber Code was one of the first attempts at a comprehensive definition of perfidy.\textsuperscript{24} Article 101 of the Code defines what we would today call perfidy:

While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, 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.\textsuperscript{25}

This definition accepts outright that some deception and trickery in war is lawful, even necessary and just. But the Code goes on to provide reasons why some other acts are prohibited. “Clandestine or treacherous” actions are especially dangerous and difficult to guard against and are therefore prohibited by the common law of war (customary international law). This reasoning builds on Grotius’ and Gentili’s ideas that perfidy must be prohibited to minimize harm and avoid breaching the enemy’s confidence. Dangerous acts unnecessarily increase the risk of harm so combatants should avoid them. Also, because it is difficult for enemies to guard against them, “clandestine or treacherous” acts risk betraying the enemies’ reasonable trust in safety. The Lieber Code uses both a historic, “honor-based” rationale, and encapsulates the external focus of 16th and 17th century perfidy prohibitions, as well as the more modern concept of avoiding unnecessary harm. Ultimately though, the Lieber Code begs the question of what exactly qualifies as a “clandestine or treacherous attempt[] to injure an enemy.”\textsuperscript{26}

Later in the Code, Professor Lieber gives some examples of unlawful perfidious conduct. Using the enemy’s uniforms, flags, or emblems of nationality in battle is prohibited\textsuperscript{27} as is abusing a flag of truce.\textsuperscript{28} The Code also provides that the violation of armistice conditions is perfidious.\textsuperscript{29} This ad hoc, “I know it when I see it” approach to perfidy

\textsuperscript{24} President Lincoln promulgated General Order No. 100, enacting Professor Francis Lieber’s comprehensive code of conduct for United States armed forces in the Civil War. U.S. War Dep’t, Gen. Orders No. 100 (Instructions for the Government of Armies of the United States in the Field) (Apr. 24, 1863) [hereinafter Lieber Code].

\textsuperscript{25} Id. art. 101.

\textsuperscript{26} Id.

\textsuperscript{27} Id. art. 65.

\textsuperscript{28} Id. art. 114.

\textsuperscript{29} Id. § VIII.
illustrates just how hard it is to create a comprehensive definition. Nevertheless, the Lieber Code was an influential first step in creating the boundaries of modern perfidy.

Another important step in defining perfidy came by way of the Brussels Declaration\(^{30}\) in 1874. Fifteen European states met to try to codify the existing laws of war. While not a binding convention, the Brussels Declaration took another stab at finding the line between perfidy and ruse. Following a similar approach to the Lieber Code, the Brussels Declaration recognizes that ruses of war are permissible,\(^{31}\) but that “[t]he laws of war do not recognize . . . an unlimited power in the adoption of means of injuring the enemy.”\(^{32}\) Besides (unhelpfully) establishing that some deception is lawful and other deception not, the Declaration stops short of precisely defining what makes an action lawful or unlawful.

Like the Lieber Code, the Brussels Declaration presents specific examples of actions that are “especially forbidden,” including: using poison; “murder by treachery”; and “making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy . . . [or of] the distinctive badges of the Geneva Convention.”\(^{33}\) Without explanation of terms like “treachery” or “improper use” however, the Brussels Declaration fails to delineate meaningfully between lawful ruse and unlawful perfidy. Its examples nevertheless helped inform the next attempt at finding the perfidy/ruse line in the Oxford Manual.

The Oxford Manual’s\(^{34}\) definition of perfidy suffers the same defects as the Lieber Code and the Brussels Declaration. Article 8 forbids “treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender.”\(^{35}\) The Manual declines to say what a treacherous attempt might be, but it does offer a few specific examples of perfidious conduct. Attacking the enemy “while concealing the distinctive signs of an armed force” and, as in the Brussels Declaration, “improper use” of the enemy’s flag, a flag of

\(^{30}\) Project of an International Declaration Concerning the Laws and Customs of War art. 14, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219 [hereinafter Brussels Declaration].

\(^{31}\) Id.

\(^{32}\) Id. art. 12.

\(^{33}\) Id. art. 13.


\(^{35}\) INST. OF INT’L LAW, THE LAWS OF WAR ON LAND art. 8 (1880).
truce, and symbols protected by the Geneva Convention are prohibited.\textsuperscript{36} The Manual provides more robust examples of perfidy, but still relies on the concept of “treachery,” making its definition completely circular.

The Lieber Code, Brussels Declaration, and Oxford Manual represent early attempts to codify the law of war and with it, the distinction between perfidy and ruse. All three accept that some deception is acceptable and probably inevitable but struggle to determine the point at which deception becomes unlawful. There is an undercurrent of the historic “honor-based” restrictions on war tactics in the use of terms like “treachery,” but these terms do not make the distinction between perfidy and ruse any clearer. As different definitions were advanced, writers moved from general prohibitions to forbidding specific acts. Listing specific acts is useful because certain unlawful acts are covered but insufficient because not all are. Modern definitions attempt to provide more generalized guidance so the perfidy/ruse line can be applied to new and ever-changing scenarios.

B. Modern Definitions

Modern definitions of perfidy and ruse take two primary forms: international agreements (treaties) and military regulations promulgated by individual states. The international agreements attempt to provide generally applicable definitions while state military manuals focus more on specific conduct. None of the existing definitions, however, fully and clearly draw the line between lawful and unlawful conduct.

1. International Agreements

One of the first perfidy prohibitions on which the international community agreed was born of the 1907 Hague Convention on land warfare.\textsuperscript{37} The codification of perfidy and ruse in the 1907 Convention closely tracks the definitions from the Brussels Declaration and the Oxford Manual. Article 24 states that ruses of war are permissible

\textsuperscript{36} Id.

\textsuperscript{37} The 1907 Convention was ratified by thirty-seven states including several military super-powers (the United States, United Kingdom, Russian Federation, Germany, Japan, France, and China). The 1907 Convention revised and reaffirmed the customary international legal rules set out at the First Hague Peace Conference in 1899.
(without defining ruse of war), and Article 22 recognizes that belligerent conduct has limits (though the limits are left hazy). Again, the 1907 Convention offers some examples of prohibited conduct like killing or wounding enemies “treacherously” and making “improper use” of a flag of truce, the enemy’s uniform, or distinctive badges of the Geneva Convention. Because it lacked any comprehensive definition, the 1907 Convention did little to clarify the perfidy/ruse distinction. The 1907 Convention was important however, because the international community agreed on a codified definition—even if that definition left much to be desired. It also informed the next major effort at drawing the perfidy/ruse line, Additional Protocol I to the Geneva Conventions in 1949.

Additional Protocol I offers the most current and comprehensive definition of perfidy. Article 37(1) contains a robust treatment of perfidy:

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that his is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

a) The feigning of an intent to negotiate under a flag of truce or of a surrender;

b) The feigning of an incapacitation by wounds or sickness;

c) The feigning of civilian, non-combatant status; and

d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

Additional Protocol I expands on historical definitions to provide a generalized rule: combatants engage in unlawful perfidy if they invite and betray an enemy’s confidence with respect to protected status

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39. Id. art. 22.

40. Id. arts. 23(b), (f). Distinctive badges or emblems include those used by medical personnel like the Red Cross and religious personnel like chaplains. See, e.g., Additional Protocol I, supra note 2, arts. 8, 18, 22, 23.

41. Additional Protocol I, supra note 2, art. 37(1).
under international law. To illustrate the rule, the Protocol provides several examples of perfidious conduct that put meat on the bones of examples used in historic definitions. For example, instead of prohibiting “improper” use of a flag of truce like the 1907 Hague Convention, Additional Protocol I prohibits feigning an intent to negotiate under a flag of truce with the intent to kill, injure, or capture an enemy. While this richer definition of perfidy is an improvement, it has large gaps and is difficult to apply in practice because of the inherent ambiguity in prohibiting the “resort to perfidy.” Moreover, it fails to extend the external focus to people that the law of war is supremely concerned with protecting—civilians.

The Rome Statute of the International Criminal Court complements Additional Protocol I by making it a war crime to commit a grave breach of the Geneva Conventions (like willful killing, torture, or destruction of property without military necessity). Additionally, the Rome Statute makes it a war crime to commit a serious violation of the laws and customs applicable in international armed conflict, including what appear to be some perfidious acts. Specifically, treacherously killing or wounding combatant adversaries or individuals belonging to hostile nations or armies; making improper use of a flag of truce; and intentionally directing attacks against buildings, material, medical units and personnel using the distinctive emblems of the Geneva Conventions are war crimes. This is the most recent international legal treatment of perfidy and it muddies the waters. Additional Protocol I for the first time presented a robust definition of perfidy, but the Rome Statute harkens back to earlier, weaker definitions by using imprecise language like “treacherous” and “improper.” With the picture so complicated at the international level, new definitions are needed.

2. State Definitions

States give their troops detailed guidelines governing conduct in battle, including what sorts of conduct are perfidious. These state

42. See infra Sections IV & V.
44. Id. art. 8(2)(b).
45. Id. art. 8(2)(b)(ix).
46. Id. art. 8(2)(b)(vi).
47. Id. art. 8(2)(b)(vii).
48. Id. art. 8(2)(b)(xxiv).
definitions, however, do little to help sketch a central principle. In their military manuals, states either focus on listing specific permissible or impermissible acts or skirt the issue altogether with a conclusory statement like “[r]uses of war are legitimate so long as they do not involve treachery or perfidy . . . .”

The United States discusses the perfidy/ruse distinction in manuals for each military branch. The U.S. Air Force Pamphlet takes a negative approach by defining perfidy as what it is not. The Pamphlet mentions the 1907 Hague Convention and states that “ruses of war not constituting perfidy are lawful.” Somewhat unhelpfully, the Pamphlet goes on to provide guidelines by listing examples of lawful conduct like feigning attacks or retreats; using aircraft decoys or camouflage; and conducting “switched raids” where an aircraft sets a course, ostensibly for a particular target, but diverts to strike another target. The U.S. Naval Handbook similarly punts on a precise perfidy definition. The Naval Handbook states that ruses are permitted so long as they “do not violate rules of international law applicable to armed conflict.”

Other states have struggled to distinguish perfidy and ruse as well. Some states simply point to the definition from Additional Protocol I. Others distill existing definitions into a cloudy rule, prohibiting the commission of a hostile act under the cover of a legal protection.


51. Id. §§ 8-3(b), 8-4(a), 8-4(b).


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Others still follow the U.S. approach and give examples of lawful conduct. 56 State definitions of perfidy are problematic for many of the same reasons international definitions are—they are circular, vague, or take the “I know it when I see it” approach. A new comprehensive definition is needed at the international level to provide uniformity and clarity to combatants operating in the fog of war. A more precise definition would allow states to issue clear directives to their combatants and would ultimately better serve the fundamental principles of the law of war. 57

IV. WHAT DO UNLAWFUL PERFIDY AND LAWFUL RUSE ACTUALLY LOOK LIKE?

Exploring examples of perfidy and ruse makes clear that existing definitions are lacking. This Section presents hypothetical and historical examples of both perfidy and ruse and tries to explain why each fits into its category. This Section also offers examples of some acts that blur the line between perfidy and ruse and applies existing definitions to them.

A. Perfidy in Practice

Some conduct is perfidious no matter what definition applies. Perfidious actions generally offend the notion of “honor among combatants” or seem fundamentally unfair, even in war. The following examples from Additional Protocol I and history help us understand more fully why some deception is forbidden.

1. Additional Protocol I Examples

Additional Protocol I lists four examples of perfidious conduct: feigning intent to negotiate under a flag of truce or surrender; feigning an incapacitation by wounds or sickness; feigning of civilian, non-combatant status; and feigning of protected status by use of signs, emblems, or uniforms of the United Nations or other states not parties to the conflict. 58 At first blush, each of these seems straightforward, but a more thorough examination shows that these situations are often complex and messy. Moreover, when examined against the backdrop


57. See supra Section II.

58. Additional Protocol I, supra note 2, art. 37(1).
of historic definitions and rationales, these examples fail to uphold the basic aims of the law of war.

The first example, raising a flag of truce, indicates to the enemy that a combatant intends to lay down his arms and negotiate peace. It makes sense that a flag of truce is universally understood to be a protected symbol—it furthers a fundamental goal of the law of war by giving combatants means to end their conflict quickly and move on peacefully. Using a flag of truce to draw in the enemy under auspices of peace, with the intent to kill, wound, or capture him offends those basic goals. But drawing in an unsuspecting enemy with a flag of truce just to slaughter him is an easy case. Under the Additional Protocol I definition, intent to kill, wound, or capture the enemy is required. So if a combatant raises a flag of truce to stop the enemy’s advance, giving the combatant time to escape, she has engaged in a successful ruse and is not acting perfidiously. In the latter scenario, however, the flag of truce has been abused just the same. Going forward, the enemy is less likely to cease firing when the flag is raised because he has been had. The distinction drawn in Additional Protocol I makes sense if the goal is chivalry or respect between combatants because the injury is to the combatant’s honor when he resorts to the deception to kill her enemy. But if the law of war is concerned, at bottom, with ending conflicts quickly and peacefully, allowing a similar abuse that does not result in a dead, wounded, or captured enemy does not serve the basic goals of the perfidy prohibition at all.

Additional Protocol I’s second example, feigning incapacitation by wounds or sickness, presents a slightly different problem. Under Additional Protocol I, a combatant must not pretend to be wounded to lure her enemy close so she can kill, wound, or capture him. One can easily imagine a slightly different scenario. Perhaps a combatant faces certain death at the hands of her enemy. To avoid her untimely end, she fakes being dead so the enemy passes her by. This action is probably not perfidious under Additional Protocol I because she did not fake death to kill, wound, or capture the enemy. But what if the combatant fakes death so she can live to fight another day? What if, immediately after the enemy retreats (thinking everyone is dead), the combatant leaps up and rejoins the battle elsewhere? What if she then kills the

60. Additional Protocol I, supra note 2, art. 37(1).
61. Id.
62. See id.
enemy whom she had deceived? Maybe then, if the Additional Protocol I definition lacks a temporal limitation, the action is perfidious. Even assuming some “immediacy” requirement for the intent to kill or capture, this prohibition provides inadequate protection to non-combatants. Whether the combatant immediately returns to the battlefield or merely escapes with her life to fight later, there is a similar abuse of protected status. At the next battle, an enemy who has been fooled will be less likely to be merciful and will ensure that all combatants are dead. Understood in terms of chivalry, the Additional Protocol I prohibition again makes sense. It is dishonorable to fake death to kill an enemy. But the actions permitted here undermine the basic goal of minimizing suffering in armed conflict by making it more likely that combatants will take a “scorched earth” approach to battle, leaving no survivors, lest they be put at risk by enemies faking death to escape.  

Additional Protocol I’s third example, the prohibition on feigning civilian or non-combatant status, also exists only if the combatant intends to kill, injure, or capture her enemy. It is dishonorable to fight while assuming the protection of non-combatant status. Feigning civilian status, though, suffers the same problems as the prohibitions on feigning incapacitation and feigning intent to negotiate under a flag of truce. Like feigning incapacitation, this prohibition has temporal issues. If a combatant pretends to be a civilian to escape and later rejoins the battle, the action is likely not perfidious even though the end result (killing, wounding, or capturing the enemy at a later time) is the same. So like abusing the flag of truce, it is less likely that the enemy will distinguish between combatants and civilians in the future regardless of whether the deceiver intends to kill the enemy or just escape. Thus, the prohibition on feigning civilian status is insufficiently broad and fails to embody the law of war’s basic goal of protecting non-combatants.

Additional Protocol I includes one final example of perfidy. It is unlawful to feign protected status by use of signs, emblems, or uniforms of the United Nations or other states not parties to the conflict. Additional Protocol I definition. It would be unlawful to kill, wound, or capture the enemy when wearing a U.N. peacekeeper uniform. It


64. Additional Protocol I, supra note 2, art. 37(1).
seems, though, that it would be permissible to pass through an unfriendly checkpoint while wearing the peacekeeper uniform, only to throw it off just before battle. Similarly, in naval warfare, it is permissible to fly the flag of another country (even a non-party to a conflict) but it is impermissible to launch an attack while doing so. So a ship could fly a neutral state’s flag right up until the point she lets her cannons fly. The reason for allowing this questionable action seems to be that it is dishonorable to fight under neutral or protected colors (the corollary being that so long as those colors are discarded before actual fighting begins, there is no dishonor because the enemy will know who he is fighting). Allowing combatants to act so dubiously contradicts the basic goals of the law of war. It only serves to make combatants more skeptical of (and less likely to distinguish) protected symbols. Those who rightfully assume the protected status that such symbols afford are put at extreme risk—a situation the law of war exists to eliminate.

2. Historical Examples

Actual examples of perfidious conduct give texture and meaning to the concept of perfidy. Two are presented here: Iraqi actions during the Gulf Wars and Operation Greif by the Nazis during the Battle of the Bulge.

During the 1991 Persian Gulf War, there were incidents of Iraqis feigning surrender and then attacking Coalition forces. In one instance, Iraqi soldiers waved a white flag and laid down their weapons. When a Coalition patrol advanced to accept their surrender, other Iraqi forces hidden in surrounding buildings opened fire. In the same battle, an Iraqi officer held his hands in the air as if to surrender and approached Coalition forces. Coalition forces allowed him to get close, but the officer drew a pistol from his boot and started firing. He was killed in the subsequent volley. Later during the hostilities in Iraq in 2003, much of the fighting was done by “fedayeen” who did not wear uniforms. Insurgents frequently feigned civilian status to deceive U.S. forces. In one operation, a supposedly pregnant woman pretended to

65. Id. art. 39.
67. Id.
68. Id. at O-22.
be in distress at a checkpoint. When three U.S. soldiers came to her aid, she detonated concealed explosives, killing them all.\(^70\) In other instances, Iraqi fighters would exploit their lack of uniforms to travel about a city.\(^71\) Fighters would hide weapons caches throughout Fallujah, for instance. They would open fire in one building, walk outside weaponless, and open fire from another building.\(^72\)

These actions had predictable consequences. After repeated instances of perfidy, Coalition forces were more skeptical and cautious.\(^73\) They no longer trusted that civilian people and objects posed no threat.\(^74\) U.S. planes would regularly attack garbage piles, planters, and civilian vehicles because insurgents had used those objects to house improvised explosive devices.\(^75\) A U.S. Army major described the general feeling among U.S. forces: “at that point, we were 100 percent sure that everyone to our front was enemy, and we were coming through to kill everything we possibly could . . . .”\(^76\) This reaction illustrates the negative consequences when one side resorts to perfidy. The opposition is less likely to distinguish between combatants and non-combatants, and there is greater overall destruction. The principles upon which the law of war is based are thus undermined by perfidiousness.

Another historical example exposes the gaps in current perfidy definitions. Before the Battle of the Bulge during World War II, Hitler tapped his most trusted commando leader, Otto Skorzeny, to lead the 150th SS Panzer Brigade.\(^77\) Skorzeny organized a special unit of English-speaking German soldiers and supplied them with U.S. uniforms, rations, and weapons allegedly taken from Red Cross stores and U.S. prisoners of war.\(^78\) The original goal of the unit, called Operation Greif, was to pierce U.S. lines and secure bridges along the Maas River. Due to Nazi operational failures, the 150th SS Panzer Bridge aban-

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71. See Watts, *supra* note 69, at 111.
72. Id.
74. Watts, *supra* note 69, at 110.
75. Id.
76. Id. (quoting COMBAT STUDY INST., U.S. DEP’T OF THE ARMY, 1 EYEWITNESS TO WAR: THE US ARMY IN OPERATION AL FAJR, AN ORAL HISTORY 231 (Kendall D. Gott ed., 2006)).
78. See id. at 2-4.
doned its initial mission, but its soldiers were seen in combat areas wearing U.S. uniforms and there was some testimony that German soldiers wearing American uniforms had fired on and killed American forces. After the war, Skorzeny was tried for war crimes at Dachau. The tribunal ultimately found that there was not enough evidence that the 150th SS Panzer Brigade had engaged in combat while wearing U.S. uniforms.

The Skorzeny case illustrates the Additional Protocol I approach to perfidy. In so doing, it exposes that definition’s weakness. Skorzeny and his soldiers were not guilty of perfidy because they did not engage in combat (or at least that could not be proven) so they lacked the necessary intent to kill, wound, or capture their enemies. But they were successful in penetrating U.S. lines while wearing American uniforms and their actions took a significant psychological toll on American troops. U.S. forces began to see phantom commandos and paratroopers everywhere. Just knowing that the enemy is operating behind an army’s lines, while wearing that army’s uniform, reaps confusion and panic beyond the “normal” chaos of war. And yet, Skorzeny’s actions were lawful. Sanctioning this conduct promotes chaos and makes it less likely conflicts will end quickly and peacefully. This definition of perfidy, then, fails to embody the bedrock principles of the law of war.

B. Ruse in Practice

Just as the factual scenarios around perfidy can be easily manipulated, so too can those with ruses. Ruses, however, have long been accepted as appropriate war tactics. The volume and variety of ruses is seemingly boundless. All those tactics share some common characteristics: they are aimed at “inducing the enemy to compromise his position...to expose himself to danger,” or to act recklessly; they do not hinge on the enemy’s compliance with international law; and,
circularly, are not perfidious. Generally though, combatants have had wide latitude to engage in deceitful conduct. The following hypothetical and historical examples show why this leeway results in sub-optimal compliance with the law of war.

1. Traditionally Accepted Practices

Several deceptive practices are universally accepted as lawful ruses. Lawful ruses include using camouflage, conducting mock operations, using misinformation, and spying. The line that separates these actions from unlawful perfidy, however, is razor-thin.

Camouflage is, in some ways, a hallmark ruse. Camouflage is intended to make troops and materiel blend into their surroundings such that the enemy will be fooled into thinking they are not actually there. The idea of camouflage is eminently sensible when thinking about, say, an individual combatant in the jungle. That combatant need not advertise her presence to the enemy and stick out like a sore thumb. She can wear colors and textures and patterns that imitate her background. Even though this deception might lure the enemy close, and even though the combatant intends to kill the enemy, the ruse is lawful because it promotes the higher-order goals of the law of war. If combatants had to identify themselves readily in combat, surely greater death and destruction would result. Camouflage, then, perhaps encourages less suffering. At the very least, using camouflage in this manner directly promotes military objectives and is not subject to the same issues of discrimination described supra. After all, one cannot fail to distinguish between two things if he does not know they are there.

But camouflage is not only used by individual combatants. When militaries disguise materiel or installations, whether the camouflage is perfidious or merely a ruse is a closer question. For example, if one army camouflages a forward operating base as brushy overgrowth, it would be permissible. But what if it were disguised as a civilian home? A church? A Red Cross station? Using camouflage this way looks perfidious because the army abuses protected status and makes it less likely that protected status will be respected in the future (i.e., combatants...
will destroy more civilian homes and churches if they suspect those homes and churches are being used by the enemy). But under the Additional Protocol I definition, camouflaging as civilian or protected objects seem to be permissible.92 Those installations would be camouflaged so they would not be attacked and destroyed, thus the camouflaging lacks the requisite intent to kill, wound, or capture. Or if an army camouflages an arms factory as a less valuable military target like a garment factory, it would seemingly be a ruse, even if the continued existence of the arms factory resulted in more enemy deaths.93 The lesson, then, is that camouflage is not always easily identified as a ruse.

Conducting mock operations also toes the perfidy/ruse line. Mock operations can have many different purposes and some of them look perfidious. Imagine that troops are marshaled at one end of a mountain pass and the army in no way intends to send these troops into battle. Those troops could be used to trick the enemy into thinking that an attack will come through the pass, when in reality, additional troops will be attacking from a different location. That trickery seems like a classic mock operation. But to add a complication, what if the troops were marshaled to bait the enemy into attacking them there? Maybe troops are lying in wait to slaughter the enemy as they advance through the pass. In that case, the trickery has an intent to kill, wound, or capture the enemy and looks more perfidious.

Misinformation is permitted, but some misleading information is potentially problematic. An army could send out false locations, leading the enemy away from their actual position. This would be a lawful ruse—the army lacked intent to kill, wound, or capture the enemy. If the misinformation is meant to draw the enemy into a trap, however, it looks more like perfidy. Some extreme examples highlight how misinformation might be abused. For example, armistice agreements are generally inviolable.94 So while a combatant could send out false information about his location, equipment, or date of looming attack, he cannot say that an armistice has been reached when one has not.95

92. See Roach, supra note 89, at 400. But see Watts, supra note 69, at 165 (noting that these camouflage schemes have a critical aspect of perfidy—feigning protected status).

93. This appears to fit squarely within the Additional Protocol I definition of perfidy. Disguising the arms factory is intended to mislead the enemy with the intent to kill them. See Additional Protocol I, supra note 2, art. 37(1).

94. See Watts, supra note 69, at 172.

95. Under Additional Protocol I, this would be perfidious if the combatant intended to kill, wound, or capture the enemy based on the misinformation. See Additional Protocol I, supra note 2, art. 37(1). But if the false armistice notice were broadcast to allow the combatant time to escape, it
Likewise, feigning distress using internationally recognized signals like SOS and MAYDAY is prohibited.\textsuperscript{96} Some misinformation is therefore perfidious. Definitions that provide misinformation as an example of a lawful ruse\textsuperscript{97} inadequately differentiate between protected and unprotected deception.

Spying, too, could be a lawful ruse tactic or unlawful perfidy depending on its purpose. Spying, in a strict sense, involves infiltrating the enemy to gather intelligence. For intelligence gathering purposes, spying is a lawful ruse.\textsuperscript{98} If the disguised infiltration gathers intelligence that directly leads to the death of the enemy or is used to set up an ambush to kill the enemy, then the distinction is murkier. On the other hand, if the intelligence is used to avoid an ambush, spying looks like a lawful ruse. Existing perfidy definitions seem to accept that if spying is accompanied by the intent to kill, wound, or capture the enemy, it is unlawful.\textsuperscript{99} Spying, then, is not a classic ruse at all. Ruse definitions that count it as such seem to contradict Additional Protocol I’s perfidy definition. It is just not clear under the existing framework that spying fits neatly into the ruse category.

Even classic examples of perfidy embodied in existing legal definitions are not always clearly lawful. The factual pliability of each scenario shows that a more nuanced definition is needed to guide combatant behavior. Examining some historical ruses will help elucidate what really separates ruses from perfidy.

2. Historical Examples

History is rife with examples of ruses. From the mythological Trojan Horse to the American Revolution and D-Day landings during World War II, ruses have been deployed to gain an advantage in battle.

Perhaps the earliest, and most classic, example of a ruse is the Trojan Horse. According to the familiar tale, the Greeks had been badly damaged by a decade-long siege of Troy.\textsuperscript{100} They built a giant wooden horse as a purported peace offering and filled its belly with hidden
soldiers. The Trojans wheeled the horse into Troy as a trophy, but at night the Greek soldiers snuck out, swung open the city gates allowing the Greek army to destroy it. A closer reading of this tale, however, makes the Trojan Horse look perfidious. The Greek army used the decoy to sneak into Troy with the intent of slaughtering their enemy. This seems to fit the current definition of perfidy—the Greeks intended to betray the Trojans’ confidence so they could kill them. The Greeks certainly gained a tactical advantage, but with a modern understanding of perfidy and ruse, it is not clear that the Trojan Horse is a lawful measure.

In more modern times, militiamen engaged in a ruse at the Battle of Cowpens during the American Revolution. General Dan Morgan made clever use of trained sharpshooters mixed among a ragtag group of farmers and militiamen. Morgan put a line of sharpshooters at the front of his formation, who drove back an initial frontal assault by the British. The sharpshooters then retreated behind a hill. When the British advanced again, only untrained militiamen were left. The militiamen fired two shots and quickly turned and ran. The British were invigorated by the Americans’ retreat and charged ahead. Waiting for them, though, were all of Morgan’s soldiers, including the sharpshooters. Morgan’s men caught the British off-guard and quickly overwhelmed them, killing or capturing hundreds of British soldiers. Morgan’s tactics look like brilliant military strategy, but the actions could just as easily be described as treacherous, making them unlawful perfidy, at least under the Lieber Code or 1907 Convention definitions. Evaluating this conduct under the Additional Protocol I definition, however, reveals that it is indeed a permissible ruse. Though Morgan’s men intended to betray the confidence of the British troops, and to kill them, they did not do so under color of protection by international law. Moreover, Morgan’s tactics do not seem to promote any sort of chaos or indiscriminate killing beyond that expected in “normal” warfare. The Battle of Cowpens is a useful data point, then in plotting the perfidy/ruse line because of the purely militaristic nature of the deceit.

Another famous ruse example adds to the contours of a potential definition. Before the D-Day landings during World War II, Allied
forces engaged in an elaborate scheme, codenamed Operation Fortitude, to fool the Nazis into thinking the invasion would be in Pas-de-Calais and not Normandy.\(^{105}\) General George S. Patton built an entire “ghost army” of jeeps, tanks, and trucks made from cloth and plywood.\(^{106}\) Harbors contained a fake Navy and soldiers moved the props around at night to add greater credibility to the plan.\(^{107}\) The fake operation so successfully fooled the Nazis that they kept two armored divisions and nineteen infantry divisions in Pas-de-Calais and was likely crucial to the success of the Normandy invasion.\(^{108}\) Operation Fortitude is a classic mock operation ruse. The Allies faked an entire army; they did not fake civilian objects. The purpose was to distract the Nazis, buy time for planning the real D-Day invasion, and ensure that the Nazis would be caught by surprise on June 6, 1944. The ghost army was not intended to lure the Nazis to England where they would be killed, rather it was one army distracting another to more effectively carry out a military operation. The operation was simply done under the guise of a military installation. The purpose and effect of Operation Fortitude, therefore, makes it a classic ruse under any definition.

\[C. \textit{Blurring the Line Further}\]

Action that blurs the line between perfidy and ruse is often daring, dramatic, and attracts much attention in its aftermath. Scrutiny of two concrete actions, the 2008 Colombian hostage rescue mission and the rescue of American hostages from Tehran in 1980, shows how difficult it is to distinguish between the two.

The decades-long armed conflict between the Colombian government and the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia or FARC) bore one of the most titillating military operations in history. In 2002, FARC kidnapped Ingrid Betancourt during her campaign for Colombia’s presidency.\(^{109}\) Six years later, the Colombian government authorized an audacious


\(^{107}\) See Soniak, supra note 106.

\(^{108}\) See Ward, supra note 105.

rescue plan. The plan was to convince FARC to move its hostages with the help of an international humanitarian NGO so their release could be negotiated.\textsuperscript{110} Colombian military forces posed as journalists and members of a fictitious NGO, complete with two white helicopters and fake logo.\textsuperscript{111} At least one soldier wore a tabard with an emblem that closely resembled the Red Cross.\textsuperscript{112} The Colombian forces swooped in under cover of the fake NGO, rescued the hostages, and captured two guerilla fighters.\textsuperscript{113}

Under the Additional Protocol I definition, the entire Colombian operation was a permissible ruse up until the point that two FARC guerillas were captured.\textsuperscript{114} Capturing the guerillas under these circumstances is just the sort of perfidy that nearly any definition seeks to prohibit. But allowing this sort of action without killing, wounding, or capturing the enemy undermines the purpose of having the distinction in the first place. Colombian forces abused the protected status afforded to NGOs. Even if theirs was fictional, the negative consequences for all other non-combatant NGOs are obvious. Protected status was used to allow Colombian forces to penetrate FARC defenses so FARC will be more skeptical of and less likely to provide protection to persons with NGO status in the future. Extrapolating to other armed conflicts, if NGO status is abused in this way it will cease to be protected at all. If combatants can always be fooled this way, even if they are not killed, wounded, or captured, they will be less likely to distinguish other combatants from non-combatants. Without distinction, armed conflicts will reap even more chaos and non-combatants will be significantly more at risk. These are precisely the effects that the law of war seeks to avoid.\textsuperscript{115}

The same concerns apply when a country’s intelligence forces engage in the deceptive conduct.\textsuperscript{116} Popularized in the film \textit{Argo}, the

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 630.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.} at 631.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{See} Additional Protocol I, \textit{supra} note 2, art. 37(1) (prohibiting betraying an enemy’s confidence with the intent to capture him); \textit{see also} Dehn, \textit{supra} note 109, at 642-43 (applying Additional Protocol I to this situation).
\item \textsuperscript{115} \textit{See} \textit{supra} Section II.
\item \textsuperscript{116} This scenario, like the Colombian hostage rescue is not properly categorized as an international armed conflict. While the exact contours of the law of war’s application is beyond the scope of this Note, binding states to the perfidy prohibition at all times best serves the law of war’s ultimate goals. It does not matter if the action was taken by an intelligence service during an international hostage crisis or by an independent sovereign fighting internal guerilla forces, the
\end{itemize}
United States’ hostage rescue operation in Tehran, Iran, in 1980 was a gripping mission. The Central Intelligence Agency (CIA) exfiltrated six Americans who had been hiding out with Canadian diplomats after Iranian militants seized the U.S. embassy. The CIA sent two agents to Tehran, pretending to be civilian movie producers. Complete with a script, phony studio materials, advertisements, and fake Canadian passports, the CIA successfully convinced the Iranians that the Americans were part of a Canadian movie crew looking to film on location in Iran. Posing as filmmakers, the CIA was able to fly out from under the Revolutionary Guards’ noses and return the Americans safely.

The Argo operation is a real-life Hollywood drama and with the happy ending, it certainly makes for a good story. Like the Colombian rescue, though, it is extremely dangerous for protected persons near armed conflicts. The Argo operation had no intent to kill, wound, or capture any Revolutionary Guard and the U.S. did not engage in any combat so under existing perfidy definitions, the action was lawful. However, using civilian status as protection to affect state action creates extreme risks for civilian populations in the future. Having been tricked by agents feigning civilian status, enemy forces will be less likely to respect protected status and chaos will reign.

Any new definitions of perfidy and ruse must also contend with the rapidly changing nature of modern warfare. Technological advancements make possible deceptive action that the world has never seen. Perfidy and ruse must have sufficient flexibility to deal with new and changing circumstances while still upholding fundamental law of war principles.

IV. DEVELOPING AND APPLYING NEW DEFINITIONS

New definitions of perfidy and ruse are needed to clearly demarcate what types of deceitful conduct are permissible and what types are impermissible under international law. The existing doctrine developed based on antiquated notions of what warfare was like and its inadequacy has been further exposed by battle in the 21st Century. The

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118. Id.
new definitions proposed in this Section build on fundamental law of war principles to provide clearer structure in today’s combat.

A. The Inadequacy of Existing Definitions

Existing definitions fail to adequately distinguish between perfidy and ruse. Lacking an adequate distinction, international law fails to give combatants sufficient direction to structure their conduct on the battlefield. Moreover, the current definitions, and their reasoning, were developed with antiquated conceptions of what warfare is. They are especially unequipped to deal with modern issues like cyber-warfare, drones, and non-traditional fighting forces.

When scholars like Grotius, Ayala, and Gentili laid the foundations of the modern law of war, combat was vastly different than it is today. Indeed, war was a much more personal affair. Knights charged at each other on horseback carrying eighteen-foot lances and they swung battleaxes in hand-to-hand fighting. Even up through the American Revolution, where armies lined up to march toward each other from opposite sides of a field, war looked nothing like it does today. During the Civil War, when the Lieber Code was created, much of the fighting was savage and personal. In these wars, perhaps creating a perfidy/ruse distinction that rests upon the honor of the combatants makes sense. When combatants can see the whites of their enemy’s eyes, it is morally proper to require some quantum of respect between them. When the combat is more distant, however, other concerns—namely, those that undergird the law of war generally—should be of chief importance.

The perfidy/ruse distinction is stuck in this antiquated concept of war. The “honor-based” justifications are still central to the current definitions. Definitions that speak of “inviting the enemy’s confidence” illustrate a concern for trust among combatants—not a concern for non-combatants who are at risk now more than ever. For example, requiring intent to kill, wound, or capture the enemy ensures that a combatant will not personally fall victim to his enemy’s trickery; but that definition permits deceitful action that could result in concrete

119. Wingfield, supra note 16, at 121.
120. DETTER, supra note 1, at 155 (discussing CARL VON CLAUSEWITZ, VOM KRIEGE, bk. 1, ch. 1(1832)).
121. See Watts, supra note 69, at 132.
122. See Additional Protocol I, supra note 2, art. 37(1).
harm to protected non-combatants in the future. Allowing that sort of deceitful action is antithetical to the broader goals of regulating armed conflict. New definitions must be based on something other than the archaic honor rationale.

New definitions must also be flexible enough to apply coherently to unique modern warfare situations like cyberwar, drones, and non-traditional enemies. Today, people, information, money, and materiel move around the globe faster than ever before. Technology advances daily, allowing for increasingly complex deceitful conduct that presents difficult legal questions. Grotius, Lieber, and the Additional Protocol I drafters did not have to contend with cyberwarfare. They did not have to worry about drone strikes or the possibility that autonomous missile-delivery systems could be miniaturized and disguised as birds, or insects, or children’s kites. Those scholars dealt with “traditional” fighting forces who wore uniforms and were organized into regiments—not with terrorists and insurgents who are loosely banded together and wear civilian clothes. These new problems call for a new solution.

B. Proposed Definitions

Discarding the “honor-based” rationales creates space in which new definitions can be created. To arrive at the proposed definitions below, I attempted to synthesize the themes from existing perfidy and ruses definitions, examine different factual scenarios and tactics, and build on fundamental law of war principles. My proposed definition of perfidy is as follows:

**Perfidy:** Actions taken with the intent to deceive an enemy constitute unlawful perfidy if the actions create an increased risk of harm to non-combatants; promote disproportionate chaos or destruction; or inhibit the swift and peaceful resolution of the conflict.

**Ruse:** Actions taken with the intent to deceive an enemy that do not constitute perfidy.

The bedrock rationale of the proposed definition is three pillars of the law of war: distinction, proportionality, and ending conflicts quickly and peacefully while minimizing civilian destruction. Together, these

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123. See supra Section III.
124. See discussion supra Section III.C.
principles are aimed at avoiding chaos and humanizing war as much as possible.\textsuperscript{125}

First is the concept of distinction. The law of war requires combatants to distinguish between people directly participating in the hostilities (combatants) and non-combatant civilians.\textsuperscript{126} The distinction pillar recognizes that wars are between states, not citizens. As such, non-combatant civilians should be protected from war’s ferocious death and destruction. The proposed perfidy definition embodies distinction by prohibiting deceptive actions that create a risk of undue harm to non-combatants. So, for example, under the proposed definitions feigning civilian status is perfidious regardless of the actor’s intent. It is perfidious because even if the actor pretends to be a civilian to escape, rather than to kill her enemy, the risk to other civilians is just the same. It weakens their protection because combatants will have greater difficulty distinguishing in the future.\textsuperscript{127} The proposed definition expands non-combatant protection to better fulfill the goal of the law of war of sparing innocents.

Proportionality is the next law of war pillar upon which the new definitions are based. Proportionality acknowledges that war does damage, but attempts to cabin that damage to only that which is necessary to bring about an end to the conflict.\textsuperscript{128} Proportionality is primarily a chaos-avoidance measure. If combatants were permitted to engage in all-out annihilation of their enemy and its country, the devastation would be unthinkable. The law of war is premised on preventing the chaos that would result from that sort of conduct. Current perfidy and ruse distinctions do not seem to deal with proportionality as a chaos-avoidance measure at all. Those definitions permit actions like use of the enemy’s uniforms in Operation Greif that are nearly certain to wreak havoc and panic. The proposed definition explicitly prohibits actions that promote chaos and destruction beyond

\footnotesize{\textsuperscript{125} Greene, supra note 59, at 45.}

\footnotesize{\textsuperscript{126} See Additional Protocol I, supra note 2, art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”); Rome Statute, supra note 43, art. 8(2)(b)(i) (criminalizing attacks against civilian populations).}

\footnotesize{\textsuperscript{127} See supra Section III.A.}

\footnotesize{\textsuperscript{128} See Rome Statute, supra note 43, art. 8(2)(b)(iv) (criminalizing attacks that cause incidental loss of civilian life or objects, or that cause severe damage to the natural environment and the attacks are clearly excessive in relation to the concrete military objective anticipated); Additional Protocol I, supra note 2, art. 51(4) (prohibiting “indiscriminate” attacks).}
that which is incident to an armed conflict. For example, Operation Greif would be unlawful under the proposed definition. Even though the Germans did not engage in combat while wearing American uniforms, that action sowed the seeds of chaos—when combatants cannot tell who is friend and who is enemy—they are much more like to suffer a severe psychological toll. The resulting confusion that could very well lead to friendly-fire and many additional casualties goes beyond the generic “fog of war.”

The final law of war pillar encapsulated in the proposed definitions is the notion that armed conflicts should be resolved quickly and peacefully. The proposed perfidy definition explicitly prohibits deceptive actions that make that goal more difficult. Whereas in current definitions, pretending to wave a flag of truce to allow your soldiers to escape is likely not perfidious (because it was not done with intent to kill, wound, or capture the enemy),\textsuperscript{129} it would be unlawful under the proposed definition. Any abuse like this makes it less likely that the enemy will stop shooting the next time a flag of truce is raised. Lack of respect for efforts to end armed conflicts means they will be prolonged with much additional suffering. That situation is precisely what the law of war intends to avoid, so it is appropriate to use the perfidy definition for those ends.

The proposed definitions also flip a belligerent’s calculus. Now, deceptive action could be thought of as presumptively unlawful, rather than presumptively lawful. Eliminating ill-defined terms like “treacherous” and narrow categories of prohibited conduct gives the new definitions the necessary flexibility to deal with as-yet-unseen deceptive tactics. But, by relying on the law of war’s general principles, the new definitions grow from a conceptual framework already familiar to combatants. Thus, their internal decision-making processes, i.e., whether to take an action based on its legality, will remain the same when contemplating deceptive action.

To be sure, removing the existing qualification that deceptive action must be taken with intent to kill, wound, or capture the enemy significantly broadens perfidy’s scope. A broader definition, however, is required to uphold the aims of the law of war. Perhaps actions taken with the intent to kill, wound, or capture marginally increase the risks of the negative consequences discussed compared to actions taken without such intent. Nevertheless, the risks to protected persons espe-

\textsuperscript{129}. See supra Section III.A.i.
cially are still present in actions without that intent.\textsuperscript{130} Ensuring that protected people actually enjoy protection and ending conflicts quickly and peacefully are of paramount importance, so a broader definition is warranted.

Circularity is inevitable in creating new definitions because of the factual pliability of different tactical scenarios.\textsuperscript{131} Ruse, then, is here defined as the other side of the perfidy coin. Ruses generally do have one important hallmark: they are directed at, and exist only among, combatants. The expanded definition of perfidy above will encompass some historically accepted ruses. For example, Operation Fortitude before D-Day would be a permissible ruse. That action was appropriately directed only toward the opposing Nazi armed forces. No harm was intended beyond the enemy forces, and that harm—losing a battle—is a necessary evil of armed conflict. Because the ruse involved fake military installations and not, say, a fake civilian city disguising a military operation, civilian populations were not put at risk and no protected status was abused. Additionally, a ruse leading the enemy to think an army is attacking in one place, when it is actually attacking in another, does not risk the sort of confusion that could descend into chaos (all war inevitably involves some measure of confusion, here it is a question of degree). Ruses that have these characteristics are still permissible under the proposed definitions.

C. Application to Warfare in the 21st Century and Beyond

Applying the new proposed definitions to 21st Century war issues will test their efficacy. Cyber-warfare, drones, and armed conflicts with non-traditional enemies are unique issues with which any new definitions of perfidy and ruse must contend. The definitions proposed here make it easier for actors to delineate between perfidious and permissible conduct in each of these areas.

Using computer systems to incapacitate the enemy is now a common tactic.\textsuperscript{132} Computer systems, especially those used by militaries, are “designed to be highly reliable and resistant to attempts to subvert them for malicious purposes.”\textsuperscript{133} Because of their reliability and resis-

\textsuperscript{130} See supra Section IV.
\textsuperscript{131} See supra Section IV.
\textsuperscript{132} See Neil C. Rowe, *Perfidy in Cyberwarfare*, in *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century* 494 (Fritz Allhoff et al. eds., 2013). Rowe defines cyber perfidy as the feigning of civilian computer software, hardware, or data as a step towards doing harm to an adversary.
\textsuperscript{133} Id. at 395.
tance to attack, successful cyber-attacks cannot be direct—they must impersonate a legitimate user to gain access to the system.\footnote{134 See id.}

Cyber-warfare thus presents unique difficulties in demarcating between perfidy and ruse. First, while successful cyber-attacks almost always involve impersonating civilian software, hardware, or data, it does not necessarily pose the same risks as feigning civilian status in other contexts, i.e., the enemy discovering the cyber-attack will not lead it to shoot civilians. Second, cyber-attacks can be extremely limited and targeted at military computer systems. For example, malware could be used to shut down an enemy’s communication or radar systems. Here cyber-attacks present little risk to non-combatants because the enemy is still able to distinguish between persons engaging in combat and non-parties.

On the other hand, combatants could easily use cyber-attacks for purposes that seem more perfidious. For example, a virus could be used to infect the computer systems of a civilian nuclear power plant, causing uncontrollable acceleration of centrifuges and mass destruction.\footnote{135 See id. at 394, 399.} In that case, the cyber-attack looks perfidious under the Additional Protocol I definition because it is intended to kill the enemy.\footnote{136 See Additional Protocol I, supra note 2, art. 37(1).}

Another example presents a closer question. What if a combatant used a cyber-attack to tamper with a water treatment plant’s operating systems? The combatant’s ultimate goal in that scenario is not to kill, wound, or capture his enemy but will result in added suffering when the population—civilian and military—loses access to clean water. Cyber-attacks that cause suffering beyond that of normal armed conflict, even if they have military purposes, seem perfidious but are not under existing definitions. A final example best illustrates how the line is blurred. Imagine a combatant uses a cyber-attack to infiltrate a developed nation enemy’s email systems and sends messages that create extreme confusion (i.e., false intelligence, conflicting orders from the chain of command, etc.). In response, the enemy could shut down email in the entire country causing direct harm to civilian non-combatants for whom email is a vital means of communication and the loss of which would severely hamper their ability to lead normal lives. Under existing definitions, it is not clear whether this cyber-attack is lawful or not.\footnote{137 See Rowe, supra note 132, at 397. Rowe suggests international agreements are necessary to control cyber perfidy. He recommends those agreements incorporate three main ideas:}
While cyber-warfare does involve feigning “civilian computer status,” it does not necessarily pose the kinds of risks to civilian populations that, say, a combatant feigning civilian status to infiltrate enemy lines does. Combatants are not more likely to detain or shoot civilians because the combatant’s computer was hacked, so there is no undue risk of harm to non-combatants. Cyber-warfare is also unlikely to make it more difficult to bring about a speedy, peaceful end to the armed conflict. Only by shutting down communications would cyber warfare make it practically harder to end a conflict but there would be no abuse of a protected symbol like a flag of truce.

The proposed perfidy allows for a coherent resolution to the problems cyber-warfare creates. For example, cyber-warfare may indeed create chaos disproportionate to that which inheres in a normal armed conflict. For example, a virus could be directed at disabling a region’s water supply. This would constitute cyber-perfidy because people would lose access to a basic necessity and pandemonium would ensue. If the virus were directed at a military installation’s electric supply however, it would constitute a lawful ruse because the action would be directed at a military target and is not intended to harm civilians. In that more limited application, there is a lesser risk of disproportionate chaos because disruption of military utilities and logistics is an expected evil of war.

Much of drone warfare would also be permissible under the new definitions. Under existing definitions a strong argument can be made that strikes are perfidious. Drones deceive the enemy (who probably do not know they are there) and are used to kill them. Reexamination under the new definitions undergirded by core law of war principles leads to a different conclusion. Drone strikes do not pose undue risks to civilians because they are in no more danger from combatants with them than without them. They do not make it harder to distinguish combatants and non-combatants. Drones do not wreak chaos beyond normal armed conflict. They certainly cause much destruction and suffering, but the destruction and suffering is similar to that of an airstrike by a clearly identified jet. Finally, drones do not make it harder international cooperation in detection of cyber perfidy, a policy on attribution of attacks by attackers, and a policy mandating selection of non-perfidious methods for attacks.

138. See Rowe, supra note 132.

139. This discussion assumes current drone technology. One can imagine a closer call if a drone were disguised as a bird or a civilian object. In that case, if the drone use presents an undue risk to non-combatants (by making it more likely their property will be seized and they will be tossed in a detention camp, for example) then it crosses the line into perfidy.
to bring an end to the conflict. Instead, drone strikes—when directed at military targets—would be categorized as lawful ruses.

Armed conflicts with non-traditional enemies present a host of issues on which more scholarship is needed. The proposed definitions do provide a framework for analyzing these issues as they arise. Under these definitions, many insurgent fighting tactics are perfidious. Combatants wearing civilian clothing (undue risk to non-combatants), roadside improvised explosive devices (promoting disproportionate chaos and destruction), and feigning surrender while strapped with a suicide bomb (chaos and an impediment to ending the conflict) are all unlawful. What should be explored is whether the perfidy standards should be relaxed for the armies fighting these terrorists and insurgents. Preliminarily, I would argue that they should not. To uphold the fundamental law of war principles embodied in the proposed definitions, actors must strictly adhere to them even when faced with enemies who do not.

The means and methods of war will continue to develop rapidly. Current perfidy and ruse definitions do not provide adequate direction for modern warriors. The proposed definitions, however, allow for meaningful resolution of current problems and have the necessary flexibility to deal with yet unforeseen action.

VI. Conclusion

At some level, war is unavoidably chaotic. The law of war, however, exists to alleviate that chaos and end armed conflicts peacefully. Current definitions of perfidy and ruse fail to serve the essential purposes of the law of war by providing inadequate protection to non-combatants and means used to end conflicts and by failing to prohibit actions that lead to unnecessary brutality and suffering.

This Note proposes new definitions of perfidy and ruse built upon three fundamental law of war principles: distinction, proportionality, and the notion that conflicts should end as quickly and peacefully as possible. In so doing, the definitions discard historic chivalric, “honor-based” rationales for distinguishing between lawful and unlawful deceptive conduct. Whereas existing definitions are largely “results-based” in that they are concerned with the effects of the deceptive conduct on the battlefield (i.e., killing, wounding, or capturing the enemy), the proposed definitions take a wider, external, and more purposive approach. The proposed definitions focus not only on combatants, but also on the broader community that is affected in armed conflict.

The proposed definitions substantially broaden what qualifies as perfidious conduct. A broader definition of perfidy will likely have
some counterintuitive results. For example, the 2008 Colombian hostage rescue and the *Argo* mission to rescue CIA hostages from Tehran would both be unlawful, even though the results of those acts were positive. Despite their results, those actions had negative consequences for future armed conflicts, namely making combatants more suspicious of civilians and NGOs and less likely to respect their protected statuses. A broader perfidy definition will discourage deceptive practices that put protected persons at risk, thereby strengthening their protection.

The line between perfidy and ruse is a difficult one to draw because “[a]ll warfare is based on deception.” Nevertheless, the line exists and new definitions are needed to guide combatants in 21st Century battle. The hope with these proposed definitions is that non-combatants will enjoy greater protection, needless chaos and brutality will be avoided, and armed conflicts can be brought to an end quickly and peacefully.

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### APPENDIX: TABLE 1—HISTORIC, CURRENT, AND PROPOSED DEFINITIONS OF PERFIDY

<table>
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<tr>
<th>Source</th>
<th>Definition(s)</th>
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<tr>
<td>Lieber Code</td>
<td>While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, 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.</td>
</tr>
<tr>
<td>Brussels Declaration of 1874</td>
<td>The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy. According to this principle are especially ‘forbidden’: . . . (b) Murder by treachery of individuals belonging to the hostile nation or army; (c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion; . . . (f) Making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;</td>
</tr>
<tr>
<td>Oxford Manual</td>
<td>It is forbidden: . . . (b) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender; (c) To attack an enemy while concealing the distinctive signs of an armed force; (d) To make improper use of the national flag, military insignia or uniform of the enemy, of the flag of truce and of the protective signs prescribed by the ‘Geneva Convention’</td>
</tr>
<tr>
<td>1907 Hague Convention</td>
<td>[I]t is especially forbidden . . . (b) To kill or wound treacherously individuals belonging to the hostile nation or army; (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion; . . . (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention</td>
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| Additional Protocol I         | It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that his is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:  
(a) The feigning of an intent to negotiate under a flag of truce or of a surrender;  
(b) The feigning of an incapacitation by wounds or sickness;  
(c) The feigning of civilian, non-combatant status; and  
(d) The feigning of protected status by the use of signs emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict. |
| Rome Statute of the           | Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention [are war crimes]: . . .  
(b)(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; . . .  
(b)(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; . . .  
(b)(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army |
| United States Air Force       | Ruses of war not constituting perfidy are lawful.                                                                                                                                 |
| Pamphlet                      |                                                                                                                                                                                                                                                                 |
| United States Naval           | Ruses are permitted so long as they “do not violate rules of international law applicable to armed conflict.                                                                                                                                 |
| Handbook                      |                                                                                                                                                                                                                                                                 |
**Source Definition(s)**

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<td>United States Manual on Military Commissions</td>
<td>Ruses of war are legitimate so long as they do not involve treachery or perfidy. They are, however, forbidden if they contravene any generally accepted rule.</td>
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</tbody>
</table>
| Proposed Definitions                             | **Perfidy:** Actions taken with the intent to deceive an enemy constitute unlawful perfidy if the actions create an increased risk of harm to non-combatants; promote disproportionate chaos or destruction; or inhibit the swift and peaceful resolution of the conflict.  
**Ruse:** Actions taken with the intent to deceive an enemy that do not constitute perfidy. |