

# Israel – Hamas 2024 Symposium – Israeli Hostage Rescue Mission and Perfidy

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July 12, 2024

by

Todd Huntley

| Jul 12, 2024



On 8 June, Israel rescued four hostages being held by Hamas in the Nuseirat neighborhood of central Gaza. According to reports, an Israeli police counter-terrorism unit, the Yamam conducted the daytime operation, supported by Israel Defense Forces (IDF) and intelligence units. While the mission rescued all four of the hostages, the commander of the rescue force was killed. Hamas fighters, as well as Palestinian civilians, including women and children, were killed during the extraction. Palestinian officials put the death toll at 274 with another 698 injured while Israeli officials have said that fewer than 100 people were killed. The Gaza Ministry of Health does not distinguish between civilian and Hamas deaths.

Both the high death toll and the means and methods employed by the Israeli forces have raised alarm. The UN Secretary General and EU High Representative for Foreign Affairs and Security Policy both condemned the high number of civilian deaths. A UN spokesperson stated that Hamas could be charged with war crimes for holding hostages in civilian areas

but also questioned whether the Israeli operation complied with the law of war principles of distinction, proportionality, and precautions. Kenneth Roth, the former Executive Director of Human Rights Watch, called for the International Criminal Court to investigate the operation to determine whether it was necessary given ongoing ceasefire discussions, as well as whether Israel was discriminate in its attack and took all feasible precautions. He did note that Hamas's abduction and detention of civilian hostages was a war crime.

Others in the media—and on social media—have also weighed in on the alleged use of civilian clothing by Israeli forces, claiming that Israel violated the international humanitarian law (IHL) prohibition against perfidy. Kenneth Roth tweeted “[t]he Israeli hostage raid seemed to in part to [sic] use a soldier (or more) dressed as a civilian. That is the war crime of perfidy when it results in death or injury, because it endangers civilians. That’s why soldiers wear uniforms in combat.” Ben Saul, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism posted “Israel’s rescue of four hostages in Gaza: (1) may have been illegally launched in anticipation that civilian casualties would be excessive, and (2) reportedly involved the additional war crime of perfidy – disguising some forces as protected civilians.”

A statement issued by a group of UN experts erroneously claimed, that “[a]cquiring civilian disguise to conduct a military operation constitutes perfidy, which is strictly prohibited under international humanitarian law and tantamount to a war crime.” They went further, condemning “Israeli forces for treacherously hiding in a humanitarian aid truck coming from the US-built pier, which was intended to facilitate humanitarian assistance.” It now appears that the operation was in no way connected to the U.S.-built pier.

Unfortunately, much commentary on the mission has failed to gather the facts and fully analyze the prohibition of perfidy as it applies to this Israeli operation. Granted, it is a difficult task given the secrecy of the operation and lack of public facts. Nonetheless, blanket declarations of illegality only sow confusion and augment distrust. Analysis and conclusions must always be carefully grounded in facts and law. Caution counsels withholding accusations of war crimes until there are sufficient facts known to render an informed opinion.

Now, almost a month after the operation, although much is still publicly unknown, a few more facts have come to light. In this post I hope to provide a more detailed discussion of perfidy in IHL and examine this recent operation in light of the law. I will limit the discussion to the wear of civilian clothes by combatants and not discuss the misuse of recognized emblems or emblems of nationality as there are no allegations of such use. I will also not examine the accusations of Israel's disproportionate use of force or failure to take precautions during the operation, although these allegations are perhaps even more serious than those of perfidy.

## **Perfidy and the Law of Armed Conflict**

Both custom and law have long addressed treachery in armed conflicts, with the terms “treachery” and “perfidy” generally used interchangeably. What began as a broad customary rule based on the principle of chivalry has been significantly narrowed by both treaty and State practice. A detailed discussion of the development of the prohibition against perfidy and its application in both international and non-international armed conflicts can be found in Professor Sean Watts’s *Law of War Perfidy* wherein he describes the development of the current prohibition of perfidy which is narrower, more technical, and “lawyerly” than the principle from which it evolved.

While there were earlier attempts at defining the prohibition of treachery, the 1907 Hague Convention respecting the Laws and Customs of War on Land (Hague IV), was the first broadly accepted *jus in bello* treaty to include a specific prohibition on the use of treachery. Article 23 of Hague IV prohibits several means of warfare that had previously been considered as acts of treachery forbidden under the laws and customs of armed conflict. These included prohibitions on: the use of poison; the improper use of a flag of truce, national flag, military insignia and uniform of the enemy; and the distinctive badges of the Geneva Convention. Article 23(b) also prohibited the treacherous killing or wounding of individuals belonging to the hostile nation or army but provided no examples of which acts fell under this prohibition.

The 1977 Additional Protocol I (AP I) to the Geneva Conventions provided clarification even while, in some aspects, it narrowed what acts were to be prohibited. AP I also substituted the term perfidy for treachery and set forth the first definition of perfidy in an international treaty. Article 37 of AP I prohibits the use of perfidy to “kill, injure, or capture an adversary” and defines it as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” Article 37 lists several examples of perfidious acts, including the misuse of “a flag of truce or of a surrender,” “the feigning of an incapacitation by wounds or sickness,” and the misuse of protected “signs, emblems or uniforms of the [UN]” or States not party to the conflict. The feigning of civilian, non-combatant status was also included as an example, making it clear that presenting oneself as a civilian and intending to rely upon that protected status to kill or injure the enemy, was a violation of the prohibition against perfidy.

In one aspect, AP I expanded on Hague IV in that it included perfidious acts intended to capture an adversary and not just those intended to kill or injure. While many view this expansion as reflective of customary international law, some States, including the United States and Israel, do not. The International Committee of the Red Cross (ICRC) does view the prohibition against capture via perfidy as being part of customary international law and cites to several national military manuals in support of their position. On the other hand, the Rome Statute of the International Criminal Court does not include capture as an act that would constitute a war crime if accomplished via perfidy. As Professor Michael Schmitt also points out, the experts who drafted the Tallinn Manual and the Harvard Air and Missile

Warfare Manual “only agreed that perfidy was unlawful under customary law when used to wound or kill the enemy.” Accordingly, the better view is that the prohibition on perfidy resulting in capture only applies to those States that are parties to AP I.

Although there is consensus that the use of perfidy to kill or injure the enemy is now part of the customary international law of armed conflict, there is disagreement as to how far this prohibition extends as well as to when it applies. In addition to the issue of capture, discussed above, whether the prohibition applies in both international and non-international armed conflicts remains a source of disagreement. Article 8(2)(e)(ix) of the Rome Statute of the International Criminal Court includes “[k]illing or wounding treacherously a combatant adversary” during a non-international armed conflict (NIAC) as a war crime. Similarly, The Manual on the Law of Non-International Armed Conflict also considers the prohibition on perfidy as applicable to NIACs, albeit only to perfidious killing or wounding. The U.S. Department of Defense Law of War Manual specifically applies the prohibition on perfidious killing or wounding only to international armed conflict (IAC) but the military manuals of many other States take the position that the prohibition on perfidy applies in NIACs. Further, although a prohibition of perfidy was included in early discussions of the 1977 Additional Protocol Relating to the Protection of Victims of Non-international Armed Conflicts (AP II), it was deliberately removed. Still, the better view is that the wearing of civilian clothing and feigning of civilian status in order to kill or injure the enemy is part of the customary IHL applicable to both IACs and NIACs.

Despite the apparently clear examples provided in Article 37, the application of the rule to operations is anything but clear. While the wear of civilian clothing would be a component of “feigning of civilian, non-combatant status,” the law requires more. As Professor Watts notes, “perfidious attacks that only damage objects” and the use of perfidy in operations that result in a military advantage but do not result in killing or wounding are not prohibited. Professor Geoff Corn in The Case for Attempted Perfidy: An “Attempt” to Enhance Deterrent Value points out that in its current state, the law of perfidy does not cover acts intended to result in killing or wounding, but that do not succeed. That is, “attempted” perfidy, is not a crime. Additionally, acts not intended to result in death or injury that do in fact cause death or injury would not be a violation. For example, soldiers dressed in civilian clothes and driving a civilian car accidentally hit and kill a pedestrian in an area of ongoing armed conflict.

An ICRC *Commentary* on AP I acknowledges that there is a “grey area” between that which is prohibited and that which is permitted. The ICRC maintains that although Article 37 prohibits only a certain category of perfidy, a broader prohibition of perfidy is found in customary norms and that any limitations should “be resolved in the context of the Protocol as a whole, with the aid of the general principles of law and without at all giving the impression that there is such a concept as permitted perfidy.” Under this view, customary norms would prohibit attempted or unsuccessful acts as well as a broader range of actions involving the use of a protected status under IHL, done with an intent other than to kill or injure the enemy. The *Commentary* then goes on to acknowledge that the limitation on the

prohibition of feigning civilian or non-combatant status was necessary to achieve the compromise of recognizing combatants who only carry their arms openly in [Article 44](#) of AP I and the specific recognition that fighting out of uniform, but when carrying arms openly, would not be prohibited under Article 37. This broader view is also reflected in [several national military manuals](#), the majority of which, however, are parties to AP I.

Despite the language in the ICRC *Commentary*, it is clear that the States negotiating AP I intended the prohibition on perfidy, particularly as it pertains to the feigning of civilian status, to be quite narrow and that this narrow view was, in their view, reflective of customary international law. The acknowledgement in the ICRC *Commentary* that the prohibition in Article 37 of AP I is limited by the framework defined by Article 23(b) of Hague IV is a recognition that the drafters were intentionally limiting the prohibition on the wear of civilian clothes. The *Commentary's* broader reading of the prohibition ignores the fact that the drafters of AP I clearly included wider prohibitions on the use of recognized emblems and emblems of nationality in [Articles 38 and 39](#). In fact, the ICRC *Commentary* to Article 39 discusses the debate over this issue during the drafting and the compromise that was finally reached, that is, the use of “enemy flags, military insignia and uniform” are prohibited “while engaging in attacks or in order to shield, favour, protect, or impede military operations.” Clearly, if the prohibition of wearing civilian clothing in Article 37 was meant to be as broad as the *Commentary* argues, the same language found in Article 39 could have been applied. While I agree that the limited nature of the Article 37 prohibition does not fully protect civilians in armed conflict and would likely lead to the further degradation of those protections, that is not what was agreed upon.

Finally, the wear of civilian clothing by a combatant alone does not violate the prohibition against perfidy. To determine whether wear of civilian clothing constitutes perfidy, one must know and analyze the facts. As Hay Parks notes in his article [Special Forces' Wear of Non-Standard Uniforms](#), “wearing a partial uniform, or even civilian clothing, is illegal only if it involves perfidy” and that is the feigning of civilian status with the intent to deceive the enemy into believing the attackers are entitled to protection under IHL, and the deception is the proximate cause of the killing or wounding of the enemy.

## **State Practice**

Military and paramilitary forces have long worn civilian clothing in both times of peace and conflict to conduct intelligence and other activities. These might include: recruiting and meeting with local sources; reconnaissance and surveillance; infiltration and exfiltration; and operational preparation, which includes locating and renting safe houses, establishing caches, and buying local vehicles. In [Special Forces' Wear of Non-Standard Uniforms](#), Hays Parks cites to more than 50 examples of State practice in his examination of the legality of special operations forces' wear of both non-standard uniforms and civilian clothing. He concludes that, with the exception of two notable cases, “state practice in international armed

conflict has tended not to treat wear of civilian attire, non-standard uniforms, and/or enemy uniforms by regular military forces as a war crime” rather, those caught “in civilian attire or enemy uniforms have been treated as spies.”

During the Cold War, both the Soviet Union and the United States developed plans for special operations forces to conduct both intelligence and sabotage missions in occupied territory while dressed in civilian clothing. One particular example in the Parks article stands out. In 1972, a U.S. Navy SEAL dressed as a local fisherman and in a small fishing boat, traveled behind enemy lines to rescue a downed U.S. Air Force pilot. On their return, they came under heavy enemy fire and called in an air strike on enemy positions. The SEAL was later awarded the Medal of Honor for this mission.

There are, of course, many other notable examples. U.S. and other NATO special operations forces wore civilian clothing in their hunt for Bosnian war criminals. In one operation, British SAS forces reportedly posed as Red Cross officials while in another, U.S. special operators planned on having a member dressed in a gorilla suit to distract the target and his bodyguards. In 1979, U.S. special operators wearing civilian clothing were inserted into Iran to gather intelligence and obtain local vehicles for the failed rescue of the hostages held at the U.S. Embassy in Tehran. Later, in Iraq in 2005, two British special operations forces shot and killed an Iraqi police officer after being stopped at a checkpoint while they were conducting surveillance in civilian clothing. They were captured by Iraqi police and later rescued by members of their unit.

Israel itself has used military forces in civilian clothes for past operations. In 1973, Israeli special operators wearing civilian clothes infiltrated Beirut and killed several Palestine Liberation Organization (PLO) members. The team leader, Ehud Barak, who later became Prime Minister, and several of the other team members were dressed as women. In 1988, another Israeli special operations team wearing non-standard uniforms infiltrated Tunis and killed a PLO military commander. In the 1976 hostage rescue operation at the Entebbe Airport, some of the Israeli special operations forces wore Ugandan military uniforms and drove a civilian vehicle similar to the one in which the Ugandan President was known to travel. Several Ugandan military members as well as the terrorists (or hostage takers) were killed in the operation.

One might argue that the examples cited above, as well as the others in the Parks article, show the exception rather than the rule. The failure to punish the use of civilian clothing during military operations could be accounted for by reasons other than its underlying legality or illegality. Additionally, many of the examples predate Additional Protocol I entering into force while, again, others may have occurred outside the context of an armed conflict, meaning that the perfidy prohibition did not apply. However, the experiences of the Second World War and the Cold War must have been on the minds of State representatives drafting AP I. The result is the Article 37 narrowing of what perfidious acts were to be prohibited.

## The Facts of the Case

The facts surrounding the 8 June Israeli rescue operation are sparse. Several media reports are based on witness interviews and statements from the IDF. The IDF has also released several videos and at least one taken by a Palestinian is available. But it is still extremely difficult to provide a full, detailed analysis as to whether the operation violated IHL. Below is what has been reported in the media to date.

Planning for the operation apparently began in early May, after Israeli intelligence had identified two buildings in Nuseirat, central Gaza, where it was believed the hostages were being held. Several Israeli intelligence officers wearing local, civilian clothing were deployed to the area to gather further intelligence and corroborate information gathered from other sources. As the intelligence was solidified, they determined that the female hostage was being held in the apartment belonging to a Palestinian family and the three male hostages were being held in the apartment of another family in the same area.

At the beginning of June, another intelligence team was deployed to Nuseirat. This team, again dressed in local civilian clothing, included several women, one of whom appeared as if she was pregnant. A few days before the operation, most of the intelligence personnel were pulled out, leaving only a small team to ensure the hostages weren't moved to another location.

On the morning of 8 June, two teams from an Israeli police counter-terrorism team entered Gaza in the back of two civilian Palestinian trucks and made their way to Nuseirat. Reportedly, at least one truck was driven by a female in local civilian clothing. The mission was supposedly conducted during the day to surprise Hamas fighters who would have expected such a mission to be conducted at night. Israeli intelligence monitored the area around the buildings using air and other technical assets. They reported nothing suspicious in the streets around the buildings.

The two teams entered the buildings simultaneously. The team rescuing the female hostage surprised the guards, killed them, and took the hostage to a waiting helicopter that flew back to Israel. A short video released by Israeli police shows part of the rescue, however, it's unclear how this rescue team was dressed as their images have been blurred out. From what little can be seen, it does not appear they are in uniform, however, they are carrying weapons and at least some of them look to be wearing military style load bearing equipment.

The other team encountered resistance, with a firefight breaking out between the Hamas guards and the rescuers in the apartment building. Some reports claim that as many as 30 Hamas fighters were in the apartment where the male hostages were held. During this exchange of fire, a member of the Israeli force was wounded and later died. After freeing the three hostages, the rescue force continued to take fire from small arms and rocket-propelled grenades. The vehicle they intended to use to drive to the evacuation helicopters was

damaged. During this extraction, Israeli aircraft bombed the surrounding area and a follow-on IDF unit responded to extract the rescue team and hostages. It appears that the majority of the Palestinians were killed and injured while the second rescue team and the male hostages were being extracted.

Israeli officials have not indicated whether the forces involved in the operation were in uniform or civilian clothes. One witness reported seeing men dressed in Hamas military uniforms with weapons using ladders to climb the building. He stated that he believed they were Israeli military. This appears to be the team that was entering the building where the male hostages were being held as the apartment was on the third floor. Other witnesses described the men as Israeli special operations forces wearing civilian clothing. In a video released by Israeli police, personnel in uniform are seen entering the apartment and rescuing the three male hostages. It is not clear whether this was the first team to enter the apartment or if they were a follow-on force sent to reinforce the original rescue team. There is also a video that supposedly shows one of the trucks used by the rescue forces. The video depicts that truck preceded and followed by Israeli military vehicles, but it is possible that this video was taken after the operation had begun.

Given the contradictory reports and lack of specific, publicly available information, it is impossible to give a certain answer as to whether the operation violated IHL. We can say with some certainty that the intelligence personnel who infiltrated the area around the apartment buildings some weeks and days prior to the operation were dressed in civilian clothes to blend in with the local population. It is also clear that the assault forces infiltrated Gaza and the neighborhood where the buildings were located in civilian vehicles with drivers in civilian clothing. Finally, it also seems clear that the follow-on IDF personnel sent to help extract the male hostages and their rescue team were in military uniforms and supported by marked, military vehicles, including tanks and armored personnel carriers. It also appears, and would be expected, that the initial forces to enter the buildings where the hostages were held were carrying weapons and wearing some type of military equipment. What is still unclear is how exactly these personnel were dressed.

### **What Law Applies?**

Hostage rescue operations are typically conducted as law enforcement operations. IHL would not apply to such operations conducted outside of an armed conflict. This is not the case in the Nuseirat operation. Although the operation was conducted by Israeli police forces, it was part of the broader armed conflict between Israel and Hamas in Gaza and the hostage takers were part of a non-State armed group. Additionally, the operation was facilitated and supported by the IDF. As Professor Michael Schmitt notes, “[a]lthough traditional law enforcement operations conducted in occupied territory . . . are broadly subject to international human rights law and applicable domestic law, international humanitarian law (IHL) governs operations mounted with a nexus to the armed conflict.”



The next question to be answered is whether the conflict between Israel and Hamas in Gaza is an IAC or a NIAC. The ICRC as well as some scholars view the conflict as an IAC, based on a view that Israel is an occupying power, or as a concurrent IAC and NIAC. The latter position is based on the view that the conflict between Israel and Hamas is non-international but, because the conflict is taking place on the territory of Gaza, there is an IAC between Israel and Palestine or the Palestinian Authority. While there are some differences in the prohibition of perfidy between IACs and NIACs, its application to the Nuseirat operation is almost identical. Given that Israel is not a party to AP I or to Hague Convention IV, customary IHL on perfidy is the applicable body of law.

### **Perfidy or Not?**

The wear of civilian clothing is only unlawful if it is perfidious, that is, only civilian clothing worn with the intent to deceive the enemy into believing the attackers are entitled to protection under IHL when that deception is the proximate cause of the killing or wounding of the enemy is prohibited as perfidy.

Whether the Israeli operation violated this prohibition, would be determined by whether the civilian clothing was worn in order to make the Hamas guards believe that the Israeli forces were entitled to protection under IHL and the subsequent killing or injuring of the Hamas guards was a result of this feigned protected status. Of course, if the Israeli forces were not wearing civilian clothing, the perfidy analysis would end there.

It is safe to infer that the overall purpose of the operation was to rescue the hostages and not to simply kill the Hamas guards. This is based on the intelligence preparation in the area leading up to the operation, the manner in which the operation was conducted, and the types of forces used for the operation. A strict application of the perfidy prohibition might stop here, e.g., the Israeli forces' feigning of civilian status was intended to gain a tactical advantage in order to rescue the hostages and was not done for the purpose of killing or wounding the Hamas guards, even though that was a likely consequence. However, I believe this line of analysis is misguided. The Israeli forces certainly expected to use deadly force at some point in the operation and were authorized to do so. The important question is whether they relied upon their feigned protected status to gain an immediate tactical advantage to kill or injure the enemy by deceiving them as if they were protected under IHL.

Military, intelligence, and police forces wear civilian clothing to reduce the likelihood of detection during clandestine missions and missions that require surprise. Surprise and speed are critical to the success of hostage rescue missions. Had the Israeli forces been discovered prior to their entry into the apartments, both the guards and other Hamas forces would have been alerted and responded with force, as they did when the Israeli forces and male hostages were leaving the objective. The primary target of the Israelis' purported deception was not the guards who were ultimately killed, but the local population and Hamas fighters who were on the infiltration route and immediately outside of the apartment buildings.

The intent of the deception was not to kill them. Israel had far simpler means available to accomplish that. Rather, the intent of the deception was to pass by these fighters undetected and gain access to the ultimate objectives. In this, they were successful. There are no reports of the Israeli forces killing or injuring anyone during the initial intelligence gathering phase, while on their way to the objective, or outside the buildings as they entered them. Thus, in this initial part of the operation, the Israeli forces did not rely upon their feigned civilian status to kill or injure any Hamas forces.

It is important to recall that no military operation is a single event. Intelligence must be collected and analyzed, operational preparations must be made, forces must travel to the objective and, once the mission is completed, either return to their base or move to another objective. In the 8 June rescue operation, the key component was the assault on the apartments where the hostages were being held. It was during this assault that the first Hamas fighters were killed. Based on the videos and witness statements described above, it appears that at least some of the Israeli forces were wearing civilian clothes, but were also wearing military equipment and carrying weapons. In fact, despite their civilian clothes, witnesses described them as being Israeli soldiers.

When the rescue team used explosives or kicked in the door, they were no longer intending to use their civilian clothing to deceive the guards. And at that point, the guards would not be under any impression that the entering Israeli forces were entitled to protection under IHL. As mentioned above, the key elements to a successful hostage rescue mission are surprise and speed. Once the door was breached, the element of surprise was lost and it would have been evident to the guards that, whoever was entering was not a protected civilian. Even if the guards had seen the supporting Israeli forces, those units were wearing military equipment and carrying weapons, so were not holding themselves out as protected civilians.

As Professor Schmitt asked in a [previous post](#) on *Articles of War*, when does the prohibition on wearing civilian clothes kick in? Article 44 of AP I requires combatants “to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to attack.” Further, in order to retain combatant status, a combatant is required to carry arms openly during a military engagement and “during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” These requirements are not determinative of perfidy as a violation would only result in loss of prisoner of war status. However, compliance with these requirements is specifically considered not to be perfidious.

## **Conclusion**

Whether broader operations, other than those intended to kill or wound the enemy, should be prohibited under a wider application of perfidy will likely depend on one’s beliefs in the purpose of IHL. Those that see IHL’s purpose as facilitating mission accomplishment while reducing the harmful effects on civilians view the narrow perfidy prohibition as striking the

right balance. It allows for operations to be conducted by personnel dressed as civilians when military necessity requires, limited only by the prohibition against killing or wounding while so dressed. Those that see IHL's primary purpose to be the protection of civilians during armed conflict will likely view the current prohibition as under inclusive as any wear of civilian clothing by combatants will erode trust and may lead to greater civilian casualties.

Both Professor Watts in *Law of War of Perfidy* and Professor Corn in *The Case for Attempted Perfidy: An "Attempt" to Enhance Deterrent Value* explain how the feigning of civilian status and failure to distinguish forces from the civilian population places those populations at risk by undermining the foundational principle of distinction, even if those acts do not result in the killing or wounding of the enemy. This appears to many as splitting hairs, however this narrow prohibition of perfidy reflects State practice and the compromises reached in the drafting of AP I.

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*Todd Huntley is the Director of the National Security Law Program at Georgetown University Law Center.*

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