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Illegally Evading Attribution? Russia's Use of Unmarked Troops in Crimea and International Hu- manitarian Law

Ines Gillich*

ABSTRACT

The Crimean Crisis of February and March 2014 poses several questions to International Law. This Article explores one of them: Does the use of unmarked troops, soldiers in uniforms but without nationality insignia, in Crimea violate principles of International Humanitarian Law (IHL)?

This Article first provides a brief summary of Crimea's history and the facts of the 2014 Crimean Crisis. It will be argued that IHL is applicable to the events in Crimea in February and March 2014 since the unmarked soldiers are attributable to Russia—either as Russian nationals or through Russia's exercise of control over them—and that there was no valid consent given justifying an “intervention by invitation.” The Article will argue that the principle of distinction under IHL is not violated since it requires only that combatants should be distinguishable from the civilian population but does not require a link between the combatant and a particular party to the conflict. Furthermore, it will be demonstrated that IHL regarding military uniforms leaves states a broad area of discretion as to the appearance of a military uniform and does not oblige combatants to visibly disclose their nationality by wearing emblems or insignia. This Article will also argue that the use of unmarked soldiers in the case at hand does not amount to illegal perfidy under IHL but—absent clear legal provisions and noticeable examples from state practice—must be regarded as a lawful ruse of war. Lastly, the final Part will consider whether it is wise to amend the current legal rules in order to prohibit the use of unmarked soldiers in similar situations arising in future armed conflicts and will spell out a recommendation.

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I. INTRODUCTION

The *Crimean Crisis* of February and March 2014, which eventually culminated—under the sharp protest of western states—in the incorporation of Crimea into the Federal Republic of Russia, marked for Ukraine a key event in the course of its still young history as a sovereign state. It also confronted the international community of states with barely foreseeable challenges to fundamental principles of international law, such as the sanctity of the principle of sovereignty and territorial integrity. The events that occurred in Crimea in February and March 2014 also pose questions to fundamental principles of the laws of war or International Humanitarian Law (IHL). This Article will analyze one of them: it explores the question of whether the use of *unmarked troops*, meaning uniformed military troops without nationality insignia, in circumstances like those arisen in Crimea, violates IHL.

Beginning in late February 2014, unmarked military personnel suddenly appeared in Crimea and, alongside Crimean “self-defense” forces, subsequently took control over key strategic and military facilities in the peninsula. The unexpected appearance of these unmarked soldiers—referred to by some commentators as the “*little*

*green men scenario*¹—left both the Ukrainian authorities and western states puzzled about the affiliation of these troops. Without any doubt, these unmarked soldiers played a critical role in Crimea's fate.

In order to address this problem, this Article first gives a brief overview of the background of the 2014 Crimean Crisis within its broader historical and political context (Part II). The following legal analysis (Part III) then begins with a classification of the nature of the conflict in Crimea for the purposes of finding the applicable legal framework. It will be established that an international armed conflict between Ukraine on the one side and Ukrainian rebels and Russia on the other side exists. It will be argued that the unmarked soldiers are attributable to Russia for the purposes of internationalizing the conflict because those soldiers are Russian special forces and, alternatively, Russia exercises control over them. Furthermore, there is no valid consent given by the Crimean local authorities and the Ukrainian President to an intervention by invitation, which would prevent the conflict from becoming internationalized. The legal analysis then goes on to identify whether substantive norms of the law of international armed conflicts are violated by the use of unmarked soldiers (Part IV). The analysis focuses on central principles of IHL governing the conduct of the parties to an armed conflict: the principle of distinction between combatants and civilians, the rules regarding military uniforms, and the prohibition of perfidy as contrasted to lawful ruses of war. The legal analysis will conclude that none of these principles are violated in the case at hand. This is because the current framework of IHL provides only vague standards and does not clearly prohibit the use of unmarked soldiers. The final Part will discuss whether this legal gap should be filled by amending the current rules of IHL (Part V).

II. THE 2014 CRIMEAN CRISIS

The Crimean Peninsula, which is connected with the southern part of the Ukrainian mainland by a narrow strip of land (Isthmus of Perekop), occupies a strategically important location on the northern coast of the Black Sea. On its eastern border, it is separated from the Russian region of Kuban by the Strait of Kerch. Today, Crimea is populated by an ethnic Russian majority and a minority of ethnic

1. *Breedlove: Hybrid Warfare in NATO Nations Opens Door to Invoke Article 5*, SPUTNIK INT'L (Sept. 16, 2014) [hereinafter *Breedlove*], http://en.ria.ru/military_news/20140916/192977784/Breedlove-Hybrid-Warfare-in-NATO-Nations-Opens-Door-to-Invoke.html [<http://perma.cc/NZ52-C5TM>] (archived Sept. 18, 2015) (quoting NATO Supreme Allied Commander Europe General Philip M. Breedlove).

Ukrainians and Crimean Tatars. Throughout its history, Crimea has always been of geostrategic interest to various outside forces.²

In 1783, Crimea became part of the Russian Empire and, with the end of the Russian Empire in 1917, a sovereign state until 1921 when it was incorporated into the Soviet Union as the Crimean Autonomous Soviet Socialist Republic. In 1945, after its liberation by the Red Army from German occupation during WWII, Crimea became an administrative region of Russia (the *Crimean Oblast*).³ In 1954, to the surprise of many political commentators, Nikita Khrushchev, Premier of the Soviet Union, gave the Crimean Oblast to the Ukrainian Soviet Socialist Republic.⁴

With the formal dissolution of the Soviet Union in 1991, Ukraine gained sovereignty. Crimea remained part of Ukraine but was granted significant autonomy, including the right to have its own constitution and legislature. In 1999, the "Partition Treaty on the Status and Conditions of the Black Sea Fleet" between Ukraine and Russia entered into force.⁵ Under this treaty, the Black Sea Fleet, which was located in the Crimean peninsula at the time, was partitioned between Russia (81.7 percent) and Ukraine (18.3 percent), with Russia maintaining the right to use the Port of Sevastopol in Ukraine for twenty years until 2017. The treaty also granted Russia the right to station up to 25,000 troops and naval personnel, twenty-four artillery systems, 132 armored vehicles, and twenty-two military planes on its bases in Crimea.⁶

2. See PAUL R. MAGOCSI, *A HISTORY OF UKRAINE: THE LAND AND ITS PEOPLES* 182 (2nd ed. 2010) (providing a background on the history of Ukraine and Crimea, where in, ancient times, Crimea's southern region (then referred to as the Tauric Peninsula) was colonized by the Greek and Roman Empires. Later, Crimea was dominated by the Byzantine and then by the Ottoman Empire. The modern name "Crimea" derives from the Crimean Tatars' language, a Turkic ethnic group that emerged during the Crimean Khanate under the Ottoman Empire, meaning "fortress").

3. Under Russian authority, the entire population of Crimean Tatars and a large number of Greeks and Armenians living in Crimea were deported to Central Asia, leaving a vast majority of ethnic Russians in Crimea. The Tatars were not allowed to return to Crimea until the end of Soviet Union. Cf. GRETA LYNN UEHLING, *BEYOND MEMORY: THE CRIMEAN TATARS' DEPORTATION AND RETURN* (2004) (describing measures taken by the Soviet authorities against Crimean Tatars).

4. The reasons for this move are subject to speculation. See ROBERT H. DONALDSON, JOSEPH L. NOGEE & VIDYA NADKARNI, *THE FOREIGN POLICY OF RUSSIA* 174 (5th ed. 2014) (explaining that Khrushchev maintained close ties with Crimea).

5. Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, Russ.-Ukr., May 28, 1997, Rossiiskaia gazeta (entered into force July 12, 1999). This treaty was extended for twenty-five years by the Russian-Ukrainian Naval Base for Natural Gas Treaty, Russ.-Ukr., Apr. 21, 2010, Rossiiskaia gazeta. On 28 March 2014, Russia denounced this treaty.

6. See, e.g., HUM. RTS. WATCH, *Questions and Answers: Russia, Ukraine, and International Humanitarian and Human Rights Law*, (Mar. 22, 2014) [hereinafter HUM. RTS. WATCH, *Q&A Russia, Ukraine*], <http://www.hrw.org/news/2014/03/21/>

In late 2013, after Ukrainian President Yanukovich declined to sign a trade and cooperation agreement with the European Union, massive and violent demonstrations began in Kiev and quickly spread out to other parts of Ukraine. On February 21, 2014, Yanukovich fled Kiev. One day later, he was removed from office, and an interim government was installed.⁷ Russia claimed the new government as illegitimate.⁸

As from February 27, 2014, Russian-speaking armed personnel in uniforms without insignia and nationality emblems suddenly appeared in Crimea.⁹ These troops gradually seized control over key military and governmental buildings as well as other strategic facilities and raised Russian flags.¹⁰ They also surrounded Ukrainian military bases hindering Ukrainian soldiers from leaving their stations.¹¹ While these unmarked men mainly referred to themselves as "Crimean self-defense forces," they occasionally answered to journalists that they were Russian special forces.¹² According to Human Rights Watch, at least parts of these units were Russian personnel.¹³

questions-and-answers-russia-ukraine-and-international-humanitarian-and-human-right-0 [https://perma.cc/ETQ3-6YVK] (archived Sept. 20, 2015) ("As of 2013, approximately 13,000 Russian naval personnel were based in Crimea.").

7. See International Crisis Group, *Ukraine: Running out of Time*, Europe Report, No. 231 at 1 (May 14, 2014), <http://www.crisisgroup.org/~media/Files/europe/ukraine/231-ukraine-running-out-of-time.pdf> [http://perma.cc/4S2G-KKSJ] (archived Oct. 10, 2015).

8. See MINISTRY OF FOREIGN AFF. OF THE RUSS. FED'N., 361-24-02-2014, STATEMENT BY THE RUSSIAN MINISTRY OF FOREIGN AFFAIRS REGARDING THE EVENTS IN UKRAINE (Feb. 24, 2014), http://www.mid.ru/brp_4.nsf/0/86DDB7AF9CD146C844257C8A003C57D2 [http://perma.cc/Y3QE-5T65] (archived Sept. 20, 2015) ("We are deeply concerned about the actions in the Ukrainian Verkhovna Rada in terms of their legitimacy.").

9. See Allison Smale & Steven Erlanger, *Ukraine Mobilizes Reserve Troops, Threatening War*, N.Y. TIMES (Mar. 1, 2014), http://www.nytimes.com/2014/03/02/world/europe/ukraine.html?_r=1 [http://perma.cc/B955-79XE] (archived Sept. 20, 2015).

10. See *id.*

11. See generally HUM. RTS. WATCH, *Q&A Russia, Ukraine, supra* note 6 ("Russian armed personnel and pro-Russian militias in Crimea have prevented Ukrainian armed forces from leaving their bases.").

12. Masha Lipman, *Putin's Crisis Spreads*, NEW YORKER (Mar. 8, 2014), <http://www.newyorker.com/news/news-desk/putins-crisis-spreads> [http://perma.cc/C33S-GPSW] (archived Sept. 20, 2015). See generally Will Englund, *Ukraine's Ousted President Surfaces in Russia, Says He Is Still Head of State*, WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/world/gunmens-seizure-of-parliament-building-stokes-tensions-in-ukraines-crimea/2014/02/27/2539871c-9f83-11e3-9ba6-800d1192d08b_story.html [https://perma.cc/3WQQ-VL99] (archived Sept. 19, 2015) (reporting that Russia began military preparedness drills involving 150,000 troops).

13. See HUM. RTS. WATCH, *Q&A Russia, Ukraine, supra* note 6; Jacob W. Kipp & Roger McDermott, *Putin's Smart Defense: Wars, Rumors of War, and Generations of Wars (Part One)*, EURASIA DAILY MONITOR (June 10, 2014), http://www.jamestown.org/programs/edm/single?tx_ttnews%5btt_news%5d=42480&tx_ttnews%5bbackPid%5d=

They were spotted using military equipment registered for the Russian Black Sea Fleet in Crimea.¹⁴

The following events then came thick and fast. In a UN Security Council meeting on March 1, 2014, the representative of Russia asserted that the Prime Minister of Crimea, supported by Mr. Yanukovich, had requested the Russian President for assistance to restore peace in Crimea.¹⁵ On the same day, the Russian Federation Council, approving a request from President Vladimir Putin, authorized the use of armed force in Ukraine.¹⁶ Within the next few days, the number of Russian naval personnel stationed at the Black Sea Fleet was increased.¹⁷ On March 3, 2014, the Council of the European Union condemned what happened as a clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression committed by the Russian armed forces as well as the authorization given by the Russian Federation Council for the use of the armed force on the territory of Ukraine. "The E.U. called on Russia to immediately withdraw its armed forces to the areas of their permanent stationing, in accordance with the [Black Sea Fleet Agreement]."¹⁸

In a live address on Russian television on March 4, 2014, Russian President Putin denied that the unmarked soldiers in Crimea were Russian forces and qualified them as "pro-Russian local self-defense forces."¹⁹ Similarly, the Russian Minister of Defense dis-

756&no_cache=1#.VBzNtUtV64h [http://perma.cc/5HU9-EM57] (archived Sept. 20, 2015).

14. See generally HUM. RTS. WATCH, *Q&A Russia, Ukraine*, *supra* note 6 (reporting that many journalists have seen forces with equipment and vehicles that Ukrainian forces are not known to own); Smale & Erlanger, *supra* note 9 (stating that Russian troops had no identifying insignia but had military vehicles registered with Russian license plates).

15. See Kathy Lally, Will Englund & William Booth, *Russian Parliament Approves Use of Troops in Ukraine*, WASH. POST (Mar. 1, 2014) [hereinafter Lally, *Russian parliament*], http://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7_story.html [https://perma.cc/T6GU-AGQN] (archived Sept. 20, 2015).

16. See *id.* (explaining that Russia justified this step with the need to protect Russian citizens and military based in Crimea).

17. See *Warning Shots End OSCE Crimea Entry Bid*, AL JAZEERA (Mar. 8 2014), <http://www.aljazeera.com/news/europe/2014/03/warning-shots-end-osce-crimea-entry-bid-20143815135639790.html> [http://perma.cc/J7HA-ZNNV] (archived Sept. 17, 2015) (reporting that the Ukrainian Government, as of March 2014, believes the number of Russian troops in Kiev have amounted to 30,000, whereas the U.S. Department of Defense equates the number to be closer to 20,000).

18. EUR. UNION, *EU Sanctions Against Russia Over Ukraine Crisis*, EUROPA.EU, http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm (last visited Nov. 21, 2014) [http://perma.cc/E3XQ-YUFY] (archived Sept. 20, 2015).

19. Shaun Walker, *Russian Takeover of Crimea Will Not Descend into War, Says Vladimir Putin*, GUARDIAN (Mar. 4, 2014), <http://www.theguardian.com/world/2014/mar/04/ukraine-crisis-russian-troops-crimea-john-kerry-kiev> [http://perma.cc/6294-2TGN] (archived Oct. 11, 2015); see also European Council Conclusions on Ukraine, Brussels European Council (Mar. 3, 2014), <http://www.consilium.europa.eu/uedocs/>

missed reports about the presence of Russian troops in Crimea as “nonsense” and added that he had no idea how modern Russian military equipment and armored vehicles with Russian military license plates had ended up in Crimea.²⁰ However, on April 17, in his annual televised question-and-answer session with the Russian nation, Putin admitted that the troops in unmarked uniforms had been Russian soldiers.²¹

In a referendum held in Crimea on March 16, 2014, that was organized by the local authorities but opposed by the Ukrainian government, a vast majority (97 percent, according to figures provided by the Crimean authorities) of the Crimean population voted in favor of secession from Ukraine.²² Two days later, Russian President Putin and the Crimean authorities signed the “Agreement on the accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation.”²³ Russian military units, now openly acting in Crimea, took over the

cms_data/docs/pressdata/EN/foraff/141291.pdf [http://perma.cc/SZD2-FJWH] (archived Sept. 20, 2015) (rejecting Russia’s denial about the presence of Russian troops in Crimea); U.S. DEPT OF STATE, PRESIDENT PUTIN’S FICTION: 10 FALSE CLAIMS ABOUT UKRAINE (Mar. 5, 2014), <http://www.state.gov/r/pa/prs/ps/2014/03/222988.htm> [http://perma.cc/ZC89-AAVF] (archived Sept. 20, 2015) (listing Putin’s ten “false claims” about Ukraine: “Strong evidence suggests that members of Russian security services are at the heart of the highly organized anti-Ukraine forces in Crimea. While these units wear uniforms without insignia, they drive vehicles with Russian military license plates and freely identify themselves as Russian security forces when asked by the international media and the Ukrainian military. Moreover, these individuals are armed with weapons not generally available to civilians.”).

20. Lipman, *supra* note 12.

21. See *Putin Says No Russian Troops in East Ukraine*, AL JAZEERA (Apr. 17, 2014), <http://www.aljazeera.com/news/europe/2014/04/putin-says-no-russian-troops-east-ukraine-2014417132436806530.html> [http://perma.cc/8KBS-7TJM] (archived Sept. 17, 2015) (“He did admit, for the first time, that the troops in unmarked uniforms who had captured Ukraine’s Crimean Peninsula before its annexation last month by Moscow were Russian soldiers.”); Vladimir Ischenkov, *Putin Admits Russian Soldiers Sent to Crimea*, STUFF.CO.NZ (Apr. 18, 2014), <http://www.stuff.co.nz/world/europe/9956314/Putin-admits-Russian-soldiers-sent-to-Crimea> (subscription required) [http://perma.cc/CMC6-5HPJ] (archived Sept. 20, 2015) (“Putin said they were Russian servicemen who ‘stood behind the back of Crimea’s self-defence forces’ ‘They acted politely, but resolutely and professionally.’”).

22. See Press Release, OCSE, OSCE Chair Says Crimean Referendum in Its Current Form Is Illegal and Calls for Alternative Ways to Address the Crimean Issue (Mar. 11, 2004), <http://www.osce.org/cio/116313> [http://perma.cc/LR3W-EF2P] (archived Sept. 20, 2015) (qualifying the referendum as illegal and therefore refusing to send an observer mission).

23. The Kremlin, *Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed* (Mar. 18, 2014), <http://eng.kremlin.ru/news/6890> [http://perma.cc/Y7CY-BHNR] (archived Sept. 20, 2015). See generally International Crisis Group, *Ukraine Running Out of Time*, Europe Report No. 231 (14 May 2014) [http://www.crisisgroup.org/~media/Files/europe/ukraine/231-ukraine-running-out-of-time.pdf](http://www.crisisgroup.org/~/media/Files/europe/ukraine/231-ukraine-running-out-of-time.pdf) [http://perma.cc/53CH-EMV5] (archived Nov. 14, 2015) (providing a summary of the events following the annexation).

remaining Ukrainian military bases and forced the Ukrainian troops to leave the peninsula.²⁴

Despite vigorous international protest against Russia's actions,²⁵ Ukraine and the international community in the end found themselves as bystanders in a chain of events, by which—within just a short period of time—hardly reversible facts on the ground were created.

III. APPLICATION OF IHL TO CRIMEA 2014

As long as wars exist, there have been efforts to contain the methods of warfare in legally binding norms. The modern law of war evolved in the nineteenth century with the first codifications in the Lieber Code.²⁶ Today, the legal sources of IHL can be found in international treaty law, most prominently in the Four Geneva Conventions of 1949, as well as in international customary law. IHL is applicable in situations of an international or noninternational armed conflict and sets out legally binding rules and standards of conduct for all parties to the conflict. A party who violates these norms com-

24. See David M. Herszenhorn, Patrick Reeve & Noah Sneider, *Russian Forces Take Over One of the Last Ukrainian Bases in Crimea*, N.Y. TIMES (Mar. 23, 2014), http://www.nytimes.com/2014/03/23/world/europe/ukraine.html?_r=0 [<https://perma.cc/8769-XFXK?type=source>] (archived Sept. 20, 2015).

25. See, e.g., Press Release, European Commission, The Brussels G7 Summit Declaration (June 5, 2014), http://europa.eu/rapid/press-release_MEMO-14-402_en.htm [<http://perma.cc/3GZZ-H625>] (archived Sept. 20, 2015) (noting the “unacceptable interference in Ukraine’s sovereign affairs by the Russian Federation [and] . . . condemning the Russian Federation’s continuing violation of the sovereignty and territorial integrity of Ukraine Russia’s illegal annexation of Crimea . . .”); Press Release, NATO, Wales Summit Declaration (Sept. 5, 2014), http://www.nato.int/cps/en/natohq/official_texts_112964.htm?selectedLocale=en. [<http://perma.cc/2YNT-YEP9>] (archived Sept. 20, 2015) (“We condemn in the strongest terms Russia’s escalating and illegal military intervention in Ukraine and demand that Russia stop and withdraw its forces . . . This violation of Ukraine’s sovereignty and territorial integrity is a serious breach of international law . . . We do not and will not recognise Russia’s illegal and illegitimate ‘annexation’ of Crimea.”); see also G.A. Res. 68/262 Territorial Integrity of Ukraine (Mar. 27, 2014) (vote 100 in favor, 11 against, 58 abstentions); Press Release, General Assembly, General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region, U.N. Press Release GA/11493 (Mar. 27, 2014), <http://www.un.org/News/Press/docs/2014/ga11493.doc.htm> [<http://perma.cc/PC39-X7QQ>] (archived Oct. 11, 2015).

26. See Francia Lieber, *Lieber Instructions 1863: Instructions for the Government of Armies of the United States in the Field*, in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3, 3–20 (Dietrich Schindler & Jiri Toman eds., 2004) [hereinafter Lieber Code]. The Lieber Code has had a great influence on later codifications of the law of war. See generally RICHARD SHELLY HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR 1 (1983).

mits an international wrongful act leading to international legal responsibility.²⁷

The events in Crimea in 2014 raise a number of fundamental legal questions, which have been addressed elsewhere.²⁸ The following analysis will only focus on the question of whether the use of unmarked soldiers by Russia violates IHL.²⁹ First, the application of IHL to the conflict in Crimea at the time of the first appearance of unmarked soldiers in late February 2014 will be examined. The application of IHL requires the existence of an “armed conflict,” either noninternational or international in nature. The correct delineation

27. See Shane Darcy, *What Future for the Doctrine of Belligerent Reprisals?*, 2002 Y.B. INT'L HUMANITARIAN L. 107 (arguing states that are violated may take reprisals against the wrongdoer and defining “belligerent reprisals” as “prima facie unlawful acts taken against a party to an armed conflict that is violating the law for the purpose of coercing that party to cease its unlawful conduct”).

28. See, e.g., Chris Borgen, *Can Crimea Secede by Referendum?*, OPINIO JURIS (Mar. 6, 2014, 3:27 PM), <http://opiniojuris.org/2014/03/06/can-crimea-secede-referendum> [<http://perma.cc/4M7J-7JSN>] (archived Sept. 18, 2015) (arguing, with reference to the ICJ's Advisory Opinion on Kosovo's declaration of independence, that Crimea has no right to secede); Simon Chesterman, *Crimean War 2.0: Ukraine and International Law*, STRAITS TIMES (Mar. 14, 2014), <http://ssrn.com/abstract=2408872> [<http://perma.cc/5KYY-3QG7>] (archived Oct. 11, 2015) (qualifying Russia's deployment of additional military forces beyond the limits set forth in the Black Sea Fleet Agreement as an armed intervention and analyzing the legality of the Crimean referendum under Ukrainian constitutional law); cf. Anne Peters, *Das Völkerrecht der Gebietsreferenden: Das Beispiel der Ukraine 1991-2014* [*The International Law of Territorial Referendums: The Example of Ukraine 1991-2014*], 64 OSTEUROPA 5, 101 (2014), <http://ssrn.com/abstract=2476935> [<http://perma.cc/EFK7-DT9F>] (archived Sept. 20, 2015) (describing the international law of territorial referendums with reference to the Crimean Crisis in 2014); Robert W. McGee, *The Crimean Secession: A Comment on Chesterman's 'Crimean War 2.0: Ukraine and International Law'* (Apr. 7, 2014), <http://ssrn.com/abstract=2422035> [<http://perma.cc/R32B-URHX>] (archived Sept. 20, 2015) (discussing a right of secession); Shane Reeves, *To Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened the Door for an Invasion of the Ukraine*, 23 MICH. STATE INT'L L.R. 199 (Apr. 29, 2014) (discussing grounds for humanitarian intervention in Crimea).

29. So far, this legal problem has only been addressed in press articles but has not been subjected to a comprehensive legal analysis. See e.g., Ewen MacAskill, *Russian Troops Removing ID Markings 'Gross Violation'*, GUARDIAN (Mar. 6, 2014), <http://www.theguardian.com/news/defence-and-security-blog/2014/mar/06/ukraine-gross-violation-russian-troops> [<http://perma.cc/XA9B-Q28F>] (archived Sept. 20, 2015) (quoting an analyst who qualifies the deployment of Russian soldiers without identifying markings as a violation of international law); Alberto Riva, *Russia's Use Of Unmarked Troops In Simferopol, Crimea: Shady, But Not Illegal*, INT'L BUS. TIMES (Mar. 4, 2014), <http://www.ibtimes.com/russias-use-unmarked-troops-simferopol-crimea-shady-not-illegal-1559425> [<http://perma.cc/7HER-HUJ4>] (archived Sept. 20, 2015) (quoting analysts who view the deployment of soldiers without marks as not illegal under international law); David B. Rivkin Jr. & Lee A. Casey, *Russia's Actions in Ukraine Clearly Violate the Rules of War*, WASH. POST (May 5, 2014), http://www.washingtonpost.com/opinions/russias-actions-in-ukraine-clearly-violate-the-geneva-conventions/2014/05/06/74c8fcde-d22f-11e3-937f-d3026234b51c_story.html [<https://perma.cc/D4JB-T88T>] (archived Sept. 20, 2015) (arguing that Russia's military operations in Ukraine violate the 1949 Geneva Conventions).

between an international and noninternational armed conflict is important, because the protection offered by IHL differs depending on the nature of the conflict.³⁰ Next, this Part investigates whether the use of unmarked troops, taking into account the specific circumstances of the case, constitutes a substantial breach of IHL. Several principles of IHL will be consulted, including the principle of distinction between civilians and combatants, as well as the rules regarding military uniforms and emblems and the prohibition of perfidy (as contrasted to lawful ruses of war). The final Part discusses the pros and cons of an amendment to the current legal framework in order to close existing legal gaps and concludes with a recommendation.

A. *Applicable IHL for Russia and Ukraine*

As the present analysis focuses on the events that took place in Crimea in late February and early March 2014 concerning the first appearance of the unmarked soldiers, the crucial question is whether at this time IHL has (already) become applicable to the situation in Crimea.³¹

IHL rests on two pillars: first, international treaties, most prominently the Four Geneva Conventions (GC) of 1949 and their Additional Protocols (AP).³² Treaty rules are only binding on the states

30. Cf. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III] (regarding the treatment of Prisoners of War).

31. See Remy Jorritsma, *Ukraine Insta-Symposium: Certain (Para-)Military Activities in the Crimea*, OPINIO JURIS BLOG (Mar. 9, 2014, 5:56 AM), <http://opiniojuris.org/2014/03/09/ukraine-insta-symposium-certain-para-military-activities-crimea-legal-consequences-application-international-humanitarian-law> [http://perma.cc/7JEX-LW96] (archived Oct. 11, 2015) (arguing that IHL has become applicable due to a state of occupation following the complete takeover of Crimea by Russian forces after authorization by the Russian Federal Council); see also Convention IV respecting the Laws and Customs of War on Land, Annex, art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force Jan. 26, 1910) ("Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.").

32. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter GC II]; GC III, *supra* note 30; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 07, 1978) [hereinafter AP II]; Protocol Additional to the Geneva Conven-

that have ratified these treaties. Russia has ratified the major IHL treaties,³³ including the Four Geneva Conventions of 1949³⁴ and the first two Additional Protocols of 1977³⁵. Ukraine, too, is a Party to the Four Geneva Conventions and their first two Additional Protocols.³⁶ By ratification of these treaties, both states, therefore, are under an international legal obligation not to violate the rules set forth therein.

Second, both states are bound by customary IHL, which is formed of a general practice of states who recognize this practice as law (*opinio iuris*).³⁷ The behavior of states participating in an armed conflict has always been subject to certain customary rules and principles, based on the practices of armies around the world. Even though many customary rules of war are today codified in treaties, customary IHL still remains of crucial importance to fill gaps left by treaty law. Reference to these customary rules, where applicable, will be made in the present analysis.

B. Internationalization of Armed Conflict in Crimea

IHL distinguishes international armed conflicts, which usually, but not always, refers to an inter-state conflict,³⁸ from armed conflicts of a noninternational character. Common Article 2 of the 1949 Geneva Conventions provides for the application of IHL regarding international armed conflicts by stating:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting

tions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 261 (entered into force Jan. 14, 2007) [hereinafter AP III].

33. See *Treaties and State Parties to Such Treaties, Russian Federation*, INT'L COMMITTEE OF THE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=RU [<https://perma.cc/7WBK-X5RE>] (archived Sept. 20, 2015) (reviewing the status of Russia's ratification of IHL treaties).

34. GC I–IV, *supra* note 32 (ratified May 10, 1954).

35. AP I and II, *supra* note 32 (ratified Sept. 29, 1989).

36. GC I–IV, *supra* note 32 (ratified Aug. 03, 1954); AP I and II, *supra* note 32 (ratified Jan. 25, 1990).

37. See Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945) (“The Court . . . shall apply . . . international custom, as evidence of a general practice accepted as law.”). See generally ANTONIO CASSESE, *INTERNATIONAL LAW* 157 (2nd ed. 2005) (commenting on the elements of custom). Cf. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOL. 1 RULES* (2005), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [<https://perma.cc/3K9M-84EK>] (archived Sept. 20, 2015) (providing a compilation of the customary rules of war).

38. See AP I, *supra* note 32, art. 1 ¶ 4 (extending the definition of international armed conflict to include “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination”).

Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.³⁹

The ICRC commentary explains:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.⁴⁰

Article 1(4) of AP I expands the scope of an international armed conflict to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes."⁴¹

Noninternational armed conflicts, in contrast, as the International Tribunal for the Former Yugoslavia (ICTY) explains, exist in situations of "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."⁴²

Article 1(1) of AP II requires for such a conflict that the armed groups fighting against the government are organized according to a responsible command structure and that they exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. Article 3(1) of AP II, however, excludes conflicts, in which "the government, by all legitimate means, [takes measures] to maintain or re-establish law and order . . . or to defend the national unity and territorial integrity."⁴³

The nature of the conflict can change, depending on the factual situation and the actors involved. This means that a noninternational armed conflict can become internationalized if a foreign state military intervenes in the conflict without the consent of the government of the host state.⁴⁴ Until the end of February 2014, the conflict in

39. GC I–IV, *supra* note 32, art. 2.

40. Int'l Comm. of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949, Volume I 32, 20–21 (Jean Pictet ed., 1952).

41. AP I, *supra* note 32, art. 1 ¶ 4.

42. The Prosecutor v. Tadic, Case No. IT-94-1-I, ¶ 70 (Oct. 2, 1995); *see also* GC I–IV, *supra* note 32, art. 3.

43. AP II, *supra* note 32, art. 1 ¶1, art. 3 ¶1.

44. The term "internationalized conflict" is used in legal scholarship to describe internal hostilities that are rendered international by the intervention of a foreign state. *See* James Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85

Ukraine was merely an internal one characterized by the clash of anti-governmental groups, such as pro-Russian separatists and Ukrainian governmental forces. However, Russian involvement may have internationalized the conflict.

1. Russian Involvement and Internationalization

In general, the involvement of a foreign state in an internal armed conflict can transform this conflict into an international one in two situations: first in cases where a foreign state directly intervenes into that state without the consent of that state. A direct military intervention is given, for example, when foreign military forces enter the territory of the other state⁴⁵ or through bombings of the territory conducted by the foreign state.⁴⁶

The second scenario in which a conflict becomes internationalized is through indirect involvement of a foreign state, when the foreign state—without being directly present with its forces on the territory—substantially supports (logistically, financially or materially) a party to the conflict.⁴⁷ Accordingly, the ICTY explains in its *Tadic* Appeal Judgment that:

[I]n case of an internal armed conflict breaking out on the territory of a State, . . . [the conflict] may become international . . . if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.⁴⁸

a. Attribution of Nationality to Forces in Crimea

Credible reports of neutral observers indicate that the unmarked soldiers who appeared in Crimea in February 2014 were in fact Russian special forces. It may be recalled from the facts as described above that Human Rights Watch identified at least some of these

INT'L REV. RED CROSS 313 (2003) (elaborating on the legal definition of an armed conflict).

45. See ELIZABETH WILMSHURST, *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 56 (2012) (discussing the effects of foreign intervention in internal armed conflicts); Dieter Fleck, *The Law of Non-International Armed Conflict*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 581, 607 (Dieter Fleck ed., 3rd ed. 2013) (arguing that outside control of and support for insurgents will internationalize the conflict if the intervening state is itself conducting military operations or controlling operations performed by the armed opposition group).

46. See, e.g., Sergey Alexeyevich Egorov, *The Kosovo Crisis and the Law of Armed Conflicts*, 837 INT'L REV. RED CROSS 183 (2000) (discussing the legality of the NATO bombings of Kosovo under international law where NATO intervened in the armed conflicts between the central authorities of the Federal Republic of Yugoslavia (FRY) and the armed separatists of the Kosovo Liberation Army (KLA) in 1999).

47. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

48. *The Prosecutor v. Tadić*, Case No. IT-94-1-I, ¶¶ 137–40 (Oct. 2, 1995).

units as Russian personnel and, moreover, observed that those men used “Russian military vehicles and other equipment that Ukrainian forces are not known to have.”⁴⁹ In addition, some of those unmarked men even admitted to western journalists that they were Russians.⁵⁰ It should also be recalled that after denying the affiliation of these troops in the first place, President Putin later admitted on Russian television that those troops were Russians.⁵¹ These facts provide strong evidence to conclude that the unmarked troops belonged to the Russian military forces.

The armed forces of a state are attributable to that state by default.⁵² It is a long-standing rule of customary international law, codified in Article 3 of the 1907 Hague Convention (IV) that a state is responsible for “all acts committed by persons forming part of its armed forces.”⁵³ This is also confirmed by Article 4 of the Draft Articles on State Responsibility,⁵⁴ declaring that the conduct of any organ (i.e., “any person or entity which has that status in accordance with the internal law of the State”) is attributable to that state, no matter which function it exercises or which position or status it holds in the organization of the state.⁵⁵

b. State Sponsorship and Attribution of Conduct of Forces

Irrespective of the nationality of the soldiers involved, the Crimean conflict can become internationalized if it can be proven that Russia has substantially sponsored these troops.

In situations where a foreign state indirectly intervenes by sponsoring a party to the conflict, it is problematic whether and to what extent this support is sufficient to internationalize the conflict. This controversial legal issue has been dealt with in *Nicaragua v. United States*, in which the International Court of Justice (ICJ) was asked to determine the responsibility of the United States for an armed conflict between a Nicaraguan rebel group it had sponsored

49. HUM. RTS. WATCH, *Q&A Russia, Ukraine*, *supra* note 6.

50. *See* Lipman, *supra* note 12.

51. *See* *Putin Says No Russian Troops in East Ukraine*, AL JAZEERA.COM (April 17, 2014), <http://www.aljazeera.com/news/europe/2014/04/putin-says-no-russian-troops-east-ukraine-2014417132436806530.html> [<http://perma.cc/NA6B-6Y8N>] (archived Sept. 24, 2015) (dismissing as “nonsense” any claims that Russian special forces were causing unrest in Ukraine).

52. *See* Comm. of the Red Cross, *supra* note 40, at 530 § 149.

53. *Id.*

54. *See* The Draft Articles on State Responsibility, G.A. Res. 56/83, ¶ 3 (Dec. 12, 2001) (adopted by the International Law Commission (ILC) in 2001 and recommended by the UN GA for adoption by the states); Int’l Law Comm’n, Commentary, Commentaries to the Draft Articles on State Responsibility, Report of the Int’l Law Comm’n on the work of its Fifty-third session, U.N. Doc. A/56/10, ¶ 59 (2001).

55. Draft Articles on State Responsibility, *supra* note 54, art. 4.

through providing weapons, financial assistance, military training, and the publication and dissemination of a manual on "Psychological Operations in Guerrilla Warfare," in which certain acts of warfare were advised.⁵⁶ The ICJ treated the conflict as a noninternational one and consequently applied common Article 3 of the Geneva Conventions (the obligation to "respect" and to "ensure respect" for Conventions) to measure U.S. conduct.⁵⁷ While the ICJ held that the United States had breached its obligation by supporting and further encouraging the rebels in their conduct,⁵⁸ it also stated that the United States could not be held responsible for the conduct of the rebel group by means of attribution because the United States did not exercise "effective control of the military or paramilitary operations in the course of which the alleged violations were committed."⁵⁹ Since the ICJ merely addressed the issue of state responsibility and did not further elaborate on the requirements that have to be met to find that the conflict has become internationalized, the value of the *Nicaragua* case for determining the nature of an armed conflict needs to be put into question.⁶⁰

Thus, the standard adopted by the ICTY in the *Prosecutor v. Dusko Tadic* case serves better to determine whether and to what extent the indirect intervention of a foreign state in an internal conflict is sufficient to internationalize the conflict.⁶¹ The ICTY applied the logic that if the conduct was attributable to a foreign state, then the armed conflict was to be regarded as an international one. The ICTY argued that in order to attribute the conduct of a well-organized paramilitary or military group to the foreign state it is

56. See, e.g., Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. MIAMI INT'L & COMP. L. REV. 189 (2004) (discussing the *Nicaragua* case); Davis B. Tyner, *Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in Tadic*, 18 FLA. J. INT'L L. 843 (2006).

57. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 215–20 (June 27).

58. See *id.* at §§ 215–220, 254–56.

59. See *id.* at §§ 109, 115 (demonstrating that the ICJ has reaffirmed the effective control test in the context of the armed conflict in Bosnia and Herzegovina); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb., Judgment (2007)) I.C.J. Rep. 595, §§ 398–99, 406 (Feb. 26) (explaining that effective control is needed to attribute conduct of non-state organs to a state and that the overall control test risks of unjustly broadening the responsibility of a state).

60. See, e.g., Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EURO. J. INT'L L. 649, 663 (2007) (arguing that the *Nicaragua* Test and the *Tadic* Test are not mutually exclusive, but apply to different situations); Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236, 241 (1998) (arguing that the *Nicaragua* Test is applicable to the imputability of private acts for establishing state responsibility).

61. See Cassese, *supra* note 60, at 663.

sufficient to show that the state exercised “overall control” over the fighters.⁶² In contrast, as to single individuals and unorganized groups, the ICTY retained the standard set forth by the ICJ in the *Nicaragua* case.⁶³

The *Tadic* test applied to the situation in Crimea requires a showing that Russia, in addition to financing, training, equipping, or providing operational support to the insurgents, must have played a substantial role in organizing, coordinating or planning the military actions of the insurgents and thus exercised *overall control*.

It can be inferred from the reported facts, as described above, that Russia had gained substantial control over key strategic facilities in Crimea. Russia obtained a military naval station in Sevastopol under the Black Sea Treaty with—as of 2013—about 13,000 Russian naval personnel being stationed there.⁶⁴ According to reports, the number of the naval personnel was increased in late February or early March 2014.⁶⁵ Having such a large number of military personnel stationed in Crimea provided a demonstrative signal that Russia would be prepared to step in if necessary and thus created a potential threat and warning to Ukraine’s governmental forces. Moreover, reports by independent sources suggest that Russia also actively supported and sponsored the rebels and the unmarked soldiers. Human Rights Watch credibly reported that these troops used Russian military vehicles and other equipment that Ukrainian forces are not known to have.⁶⁶ Therefore, it can be assumed that Russia has been involved in equipping and training these forces, even though the full extent of such support cannot be disclosed with certainty. It is doubtful whether the Ukrainian rebel troops would have been able to gain control over Crimea and fight against Ukrainian military forces without the support, or at least consent, of Russia.

The unmarked troops, irrespective of their nationality, can be at least materially linked to Russia through their ethnic Russian origin and motives as well as through Russia’s corresponding (strategic and political) interests in Crimea. At least a large part of the rebels were pro-Russian, and they were demanding either a complete separation of Crimea from Ukraine or at least a continued close relationship to

62. See *id.* at 665.

63. See *Prosecutor v. Dusko Tadic*, IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, § 98 (Appeals Chamber July 15, 1999).

64. *Questions and Answers: Russia, Ukraine, and International Humanitarian and Human Rights Law*, HUMAN RIGHTS WATCH (March 22, 2014) [hereinafter *Questions and Answers*], <http://www.hrw.org/news/2014/03/21/questions-and-answers-russia-ukraine-and-international-humanitarian-and-human-righ-0> [<http://perma.cc/C7SG-VWSH>] (archived Sept. 20, 2015).

65. See *id.*

66. See *id.*

Russia.⁶⁷ Russia for its part has never denied its sympathy with the motives of the rebels. On the contrary, on many occasions Russia has welcomed them.⁶⁸ Putin has even claimed to be entitled to humanitarian intervention to protect the ethnic Russians in Crimea.⁶⁹ Moreover, Russia has a key interest in Crimean territory as its major Black Sea Fleet Base. These factors taken in combination establish a special responsibility of Russia with regard to the events in Crimea. Lastly, Article 1(4) of AP I, which established that armed conflicts in which people are fighting against racist regimes are to be considered international conflicts, can be held against Russia. Russia itself has raised the allegation that the Crimean people were oppressed by the Ukrainian regime and, thus, were fighting against this regime. Taking all this together, it must be concluded that Russia's role in Crimea has internationalized the conflict.⁷⁰

2. Criteria for Finding of Armed Conflict

Not all conflicts qualify as "armed conflicts" under IHL.⁷¹ Even though this term is not further defined in IHL treaties, it is applied in a broad sense, as suggested by the official commentary to common Article 2 of the Geneva Conventions.⁷²

The Commentary suggests that a low threshold should apply by drawing attention to the fact that in the draft to common Article 2 the term "war" was substituted for "armed conflict" in order to ensure

67. See Harriet Salem, Shaun Walker & Oksana Grytsenko, *Russia Puts Military on High Alert as Crimea Protests Leave One Man Dead*, GUARDIAN (Feb. 26, 2014), <http://www.theguardian.com/world/2014/feb/26/ukraine-new-leader-disbands-riot-police-crimea-separatism> [http://perma.cc/92M5-NQKN] (archived Sept. 20, 2015).

68. See *Transcript: Putin Defends Russian Intervention in Ukraine*, WASH. POST (March 4, 2014), http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9cadcd1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html [http://perma.cc/M36B-7HUP] (archived Sept. 20, 2015).

69. See *id.* (quoting Putin as saying, "We retain the to use all available means to protect those people. We believe this would be absolutely legitimate.")

70. Cf. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27) (demonstrating that this does not mean that Russia is per se legally responsible for the conduct of the rebels). In this regard it must be proven that Russia exercised effective control over the rebels in order to attribute the conduct to Russia. The strict standards of the effective control test essentially require that the armed units are operating on the instruction, or at the direction, of Russia. Whether specific instructions were given is doubtful and remains a matter of speculations. For the present analysis there is no need to further elaborate on this issue on the effective control test.

71. See GC I-IV, *supra* note 32, art. 2 (explaining that the conventions apply in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them").

72. See I 32 INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Jean Pictet ed., 1952).

that states do not attempt to deny the applicability of IHL by claiming that they are engaged only in a police action rather than a war.⁷³ Similarly, the ICTY has also adopted a broad definition and has noted that “an armed conflict exists whenever there is a resort to armed force between States.”⁷⁴

Note that “armed conflict” must not be confused with the term “armed attack” under the self-defense right of Article 51 in the UN Charter, for which a higher threshold applies requiring certain “scale and effects.” It also excludes minor armed incidents, such as mere frontier incidents, from its ambit.⁷⁵ In contrast, the existence of an armed conflict between two states under IHL can be assumed whenever parts of the armed forces of two states clash with each other.⁷⁶ Only low level encounters, such as “border incidents” or “skirmishes,” do not trigger the application of IHL.⁷⁷ A broad interpretation of armed conflict is also in line with the aim and purpose of the rules of war, which serve humanitarian purposes. Persons who have fallen into the hands of enemies should enjoy the protections offered by IHL, regardless of the level of intensity of the conflict.

Applying these principles to the present case, it can be concluded that even without any actual fighting an armed conflict between Russia and Ukraine exists. The fact that warning shots were fired⁷⁸ and that armed force was employed against Ukrainian soldiers, preventing them from leaving their bases,⁷⁹ qualifies this situation as an armed conflict within the broad meaning of IHL.

3. Intervention by Invitation

Russia has claimed a right of intervention by invitation in Crimea based upon the request of the Prime Minister of Crimea and the former Ukrainian President Yanukovich.⁸⁰

73. *Id.*

74. Prosecutor v. Tadic, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction § 70 (Appeals Chamber Oct. 2, 1995).

75. Cf. ROBERT KOLB, AN INTRODUCTION TO LAW OF THE UNITED NATIONS § 48 (2009) (listing examples of an armed attack).

76. See Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS 117, 128–132 (1979) (describing the different types of armed conflicts).

77. See *Final Report on the Meaning of Armed Conflict in International Law*, Int'l Law Ass'n Use of Force Comm., 29–32 (2010), <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87>. [<http://perma.cc/J6YS-2FG8>] (archived Sept. 20, 2015).

78. *Warning Shots End OSCE Crimea Entry Bid*, AL JAZEERA (March 8, 2014), <http://www.aljazeera.com/news/europe/2014/03/warning-shots-end-osce-crimea-entry-bid-20143815135639790.html> [<http://perma.cc/QF8D-36GG>] (archived Sept. 20, 2015).

79. *Questions and Answers*, *supra* note 64, at 3–4.

80. See Lally, Englund & Booth, *supra* note 15 (reporting that Russia had stated in a Security Council meeting that the Prime Minister of Crimea and the former

Under general international law, an intervention by a foreign state is not considered illegal if the host state has consented to it.⁸¹ In the context of IHL, this means that an international armed conflict does not exist in situations where the host state allows another state to carry out armed activities on its territory.⁸²

However, neither the request by the Prime Minister of Crimea nor the request by the former Ukrainian President addressed to Russia for military intervention in Crimea qualifies as valid consent to an intervention. First, under the principle of nonintervention in international law, only the central government, not the government of a province, can lawfully allow another state to carry out military activities on its territory.⁸³ The consent has to be given by the actual government that exercises effective control. In this regard, it has to be noted that the legality of Yanukovich's removal from office and the installment of a new government under Ukrainian law are both irrelevant for determining if a valid consent has been given under international law.⁸⁴ International law, in principal, is blind towards domestic law.⁸⁵ Since international law is concerned with notions of stability, durability, and effectiveness, as a matter of international law, the existence of a *de facto* government, displaying at least a

Ukrainian President Yanukovich had asked for Russian military assistance in Ukraine); see also Carol Kriel & Vladimir Isachenkov, *AP Interview: Yanukovich Admits Mistakes on Crimea*, ASSOCIATED PRESS (April 2, 2014), <http://big-story.ap.org/article/ap-interview-yanukovich-crimea-part-ukraine> [<http://perma.cc/BWF8-97QW>] (archived Sept. 20, 2015).

81. See Georg Nolte, *Intervention by Invitation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW § 1 (Rüdiger Wolfrum ed. 2010), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?rskey=UZxXqA&result=2&prd=EPIL> [<http://perma.cc/BL2S-PQB9>] (archived Sept. 20, 2015) (describing intervention by invitation).

82. See Dieter Fleck, *The Law of Non-International Armed Conflict*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 101 § 8-9 (Dieter Fleck ed., 2013).

83. See Nolte, *supra* note 81, §12 (explaining that state practice following the Cold War interventions by the Soviet Union and the United States indicate that demonstrable consent by the highest available governmental authority is required in order to identify attempts of abuse); cf. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, § 246 (June 27) (“[I]t is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.”).

84. Cf. Christian Marxsen, *The Crimea Crisis—An International Law Perspective*, 74 ZEITSCHRIFT AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (HEIDELBERG J. INT’L L. 367, 367–91) (2014) (discussing the legality of the removal of Yanukovich from the office).

85. In extreme cases, state practice since the end of the Cold War suggests that the democratic legitimacy of a government has been occasionally taken into account when determining the legality of an invitation to intervene. For example, the case of the Apartheid government in South Africa demonstrates that modern international law requires a government to possess minimal internal legitimacy. Cf. Nolte, *supra* note 81, §§ 17, 22 (discussing the legality of interventions by invitations).

minimum of effectiveness, is regarded as sufficient.⁸⁶ Since Yanukovich, after having fled the country, had lost all internal power and support, his government was no longer effective. Since the interim government did not consent to Russia's military intervention,⁸⁷ Russia's actions are not justified on the grounds of a valid intervention by invitation and, consequently, do not hinder the application of the law of international armed conflicts.

IV. UNMARKED ARMED FORCES UNDER IHL

In the following Part, several norms of the law of war will be consulted to find whether the use of unmarked soldiers in Crimea under the circumstances of this particular case constitutes a violation of IHL. The principles that will be consulted are (1) the principle of distinction between combatants and civilians, (2) the rules regarding military uniforms, (3) the prohibition of perfidy, and (4) the rules concerning ruses of war. It will be shown that these rules are not free from ambiguity, thus leaving a broad spectrum for interpretation.

A. Principle of Distinction

The principle of distinction, which is part of international treaty and customary law, applies in both international and noninternational armed conflicts.⁸⁸ The International Committee of the Red Cross has formulated the content of this principle as requiring that "[the] parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."⁸⁹

First expressions of this principle can be found in the preamble of the St. Petersburg Declaration ("the only legitimate object which States should endeavor to accomplish during war is to weaken the

86. See *id.* § 18 ("[T]his minimum is normally present in cases of internal conflict as long as a government that is challenged by rebellion has not lost control of a sufficiently representative part of the State territory.").

87. See Smale & Erlanger, *supra* note 9 (reporting that the Ukrainian interim Prime Minister declared the presence of Russian troops as unacceptable and as a "provocation").

88. See UN GA Res. 2444 (XXIII), 2675 (XXV); GC I-IV, *supra* note 32, art. 3; AP II, *supra* note 32, art.13(2); International Institute of Humanitarian Law, *Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts*, 278 INT'L REV. RED CROSS 387, 387-88 (1990); St. Petersburg Declaration, Dec. 11, 1868 (demonstrating that the International Institute of Humanitarian Law has identified the basis of this rule for non-international armed conflicts in the St. Petersburg Declaration).

89. HENCKAERTS & DOSWALD-BECK, *supra* note 37, at 3 (Rule 1).

military forces of the enemy”)⁹⁰ and in Article 22 of the *Lieber Code* of 1863 (“as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms”).⁹¹ It has also found entry in several international treaties, such as Article 48 of AP I to the Geneva Conventions (“the Parties to the conflict shall at all times distinguish between the civilian population and combatants”).⁹² National Military Manuals equally set forth the distinction of the civilian population and combatants.⁹³ States, international bodies, and scholarly literature have equally stressed the fundamental value of this principle as one of the most important accomplishments and leading principles of IHL since the nineteenth century.⁹⁴

A closer examination of the principle of distinction reveals that it consists of two components. First, it imposes an obligation on the parties to the conflict to ensure that individuals actively participating in the hostilities (the combatants) are distinguishable from persons not taking part in the hostilities (the civilians). The distinction between these two categories has to be maintained at all times during the armed conflict.⁹⁵ Second, the principle of distinction requires that all parties refrain from attacking civilians.

Only combatants are lawful targets of attacks.⁹⁶ Both components are intrinsically linked with each other in the sense that the obligation from one component is enforced and protected by the obligation flowing from the other one. The bottom line of this principle is the ideal that the hostilities should only take place between certain

90. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (adopted Nov. 29, 1868) (entered into force Dec. 11, 1868), reprinted in 1 AM. J. INT'L L. SUPP. 95, 96 (1907).

91. *Lieber Code*, *supra* note 26.

92. See HENCKAERTS & DOSWALD-BECK, *supra* note 37, at 4 n.3 (noting that this rule has been adopted by consensus and provides evidence to its acceptance as customary international law).

93. See *id.* at 3–25 (citing examples from domestic law).

94. See *id.* at 3–25 (providing examples of state practice and *opinio juris*); *Legality of the Threat or Use of Nuclear Weapons Opinion*, Advisory Opinion, 1996 I.C.J. Rep. 226, at ¶ 78 (July 8) (noting that the ICJ confirmed the cardinal importance of this principle in the *Nuclear Weapons Opinion*); see also Knut Ipsen, *Combatants and Non-Combatants*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 65, 79 (Fleck ed. 2013) (highlighting the crucial importance of the principle of distinction for IHL); Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, in *THE OXFORD HANDBOOK ON INTERNATIONAL LAW IN ARMED CONFLICT* 296, 296–331 (Clapham et al. eds., 2014) (arguing that the principle of distinction is the most important IHL principle).

95. E.g. Ipsen, *supra* note 94; Melzer, *supra* note 94 (focusing on the second component of this principle concerning the legitimate target of the attack.).

96. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 188 (2010).

groups of persons; attacker and target should ideally be combatants only.⁹⁷

The Crimean case triggers the first aspect of this principle: the conflict parties' obligation to ensure that their combatants are distinguishable from the civilian population. Since the soldiers were uniformed and therefore clearly distinguishable from the civilian population, the principle of distinction in its traditional sense, as laid down above, is not violated.

The principle of distinction additionally requires that combatants must wear nationality emblems or other insignia that make them clearly attributable to a specific party to a conflict. Therefore, a deeper inquiry into the contents of this principle by means of interpretation⁹⁸ has to be made.

An interpretation of the principle of distinction (as set forth in Article 48 of AP I),⁹⁹ in accordance with its common meaning and its systematic context within IHL, strongly suggests that a distinction has to be made between combatants and civilians in the sense that these two groups should be distinguishable from *each other*.

However, none of the IHL treaties further define the terms combatant or civilian but instead confine themselves to regulating only certain characteristics and consequences of the combatant status.¹⁰⁰ For instance, Article 4(A)(1) of GC III merely declares that "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces" are prisoners of war.¹⁰¹ According to Article 43(2) of AP I, "(m)embers of the armed forces of a Party to a conflict . . . are combatants."¹⁰² It is noticeable that Article 43(1) of AP I adopts a broad concept of the term armed forces as including "all organized armed

97. If the attacker is a civilian, he is not entitled to POW status. Likewise, the attack of civilian persons or objects has consequences for determining a breach of IHL by the state party as well as for personal criminal responsibility. Cf. EVE LA HAYE, *WAR CRIMES IN INTERNAL ARMED CONFLICTS* 104–21 (2008) (discussing the differences between combatants and civilians under IHL).

98. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT] (showing that these rules include the wording/ordinary meaning, the systematic context within the treaty and within international law, the object and purpose of the treaty, and the subsequent practice of the states parties as a primary means of interpretation along with the historical context as supplementary means of interpretation).

99. AP I–II, *supra* note 32, art. 48 (ratified by Russia in 1989).

100. See GC I–IV, *supra* note 32, art. 3 (demonstrating that only combatants have a right to directly participate in hostilities; they may be attacked, until they surrender or are otherwise *hors de combat*; and once they fall into the power of the enemy, they become prisoners of war (POWs) and enjoy certain privileges).

101. See generally Marco Sassòli, *Combatants*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 81 (discussing the legal status of combatants and POW).

102. Protocol I, *supra* note 32, art. 43(2).

forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."¹⁰³

It follows from these provisions that the status of being a combatant relies on merely objective criteria, namely the (factual) belonging of an individual to a certain group (such as the armed forces), which in turn belongs to a party to the conflict.¹⁰⁴ Despite this objective definition, by linking the combatant to a state party, neither treaty nor customary law provides for a legal obligation to disclose the nationality of the combatants (for example, by wearing nationality emblems) vis-à-vis the adverse party. The reason for this is found in the common understanding that the primary aim and purpose of the principle of distinction is to increase protection of the civilian population against the effects of war by sparing them from being targets of the hostilities.¹⁰⁵ Furthermore, it can be inferred from the provisions regarding the treatment of prisoners of wars as codified in GC III that the principle of distinction also aims to protect combatants by assuring them certain guarantees of treatment when fallen in the hands of enemies.

Besides these humanitarian purposes, nothing in IHL suggests that the principle of distinction is also aimed at serving state interests (e.g., by guaranteeing that combatants should clearly be linked to a specific party to the conflict). The belonging of a combatant to a state party, therefore, is not a legal requirement, but merely a factual one—a description of factual conditions leading to the legal qualification as a combatant.

In conclusion, the principle of distinction does not prohibit the use of unmarked soldiers in an armed conflict. The principle of distinction serves only humanitarian needs, but not state interests to identify a specific enemy. State interests are rather protected by another principle of IHL, the prohibition of perfidy, which will be analyzed further below in more detail.¹⁰⁶

B. Customary International Law on Emblems and Uniforms

Since the principle of distinction is indifferent towards the disclosure of the combatant's nationality, it is necessary to look further

103. HENCKAERTS & DOSWALD-BECK, *supra* note 37, at 11, 14 (noting that this broad definition of armed forces and combatants corresponds to customary international law).

104. See Sassòli, *supra* note 101.

105. See, e.g., Protocol I, *supra* note 32, art. 57(1) ("In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.")

106. See *id.* art. 37.

into the customary rules governing the use of uniforms to find whether a general rule regarding the appearance of military uniforms has crystallized.

While the wearing by national armies of distinctive military clothes has a long tradition, the functions and purposes of these clothes have changed over time.¹⁰⁷ In ancient times, uniforms served mainly the purpose of maintaining the solidarity of the fighting group.¹⁰⁸ Today, these traditional functions are overlapped and replaced by a variety of functional, practical, and legal purposes. Functionally, wearing a uniform serves the purposes of identification, maintaining discipline, and creating bonds (an *esprit de corps*) among the soldiers.¹⁰⁹ It is mainly military considerations (such as flexibility and visibility vis-à-vis friendly combatants) that determine a uniform's appearance.¹¹⁰

In addition to these functional considerations, modern IHL has further attached legal functions to a military uniform. Most importantly, a uniform serves to ensure that the principle of distinction between combatants and civilians is observed.¹¹¹ Many national military codes acknowledge this legal function and, accordingly, prescribe that soldiers must wear a distinctive sign to make them distinguishable from the civilian population.¹¹² Most domestic military manuals require members of the regular armed forces to wear a complete military uniform, whereas it suffices for irregular forces to only wear a "distinctive sign."¹¹³

This domestic practice is not reflected by IHL. IHL neither requires that armed forces wear a complete military uniform nor dictates what a uniform is to comprise.¹¹⁴ For example, Article 4(A)(2)b of GC III only specifies that, in order to gain prisoner of war (POW) status, members of other militias and volunteer corps, includ-

107. See Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L REV. RED CROSS 93, 95, 98 (2004) (discussing the evolution of military uniforms).

108. See *id.* at 95 (discussing the importance of uniforms to ancient armies).

109. See *id.* at 99; Dale Stephens & Tristan Skousgaard, *Flags and Uniforms in War*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 81.

110. See Pfanner, *supra* note 107, at 100 ("Uniforms worn on the battlefield are mainly designed to meet combat requirements.").

111. See *id.* at 104 ("[T]hat a clear distinction must be made between combatants and civilians was obviously in tune with the requirement of wearing a military uniform.").

112. See *id.* at 103; see also HENCKAERTS & DOSWALD-BECK, *supra* note 37, at 3-25 (providing examples from domestic military codes).

113. See Pfanner, *supra* note 107, at 103; see also W. Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 544 (2003) (contending that a fixed distinctive sign requirement may be met with the wearing of a particular hat, scarf, or armband, or the affixing of a national flag emblem on a part of the clothing).

114. See Stephens & Skousgaard, *supra* note 109, ¶¶ 4, 5; Parks, *supra* note 113, at 544 (discussing this issue in connection with the conduct of special forces in covert operations).

ing organized resistance movements, must, inter alia, wear a fixed distinctive sign. Similarly, Article 1(2) of the Hague Regulations uses the term “fixed distinctive emblem recognizable at a distance.”¹¹⁵ As to the appearance of regular armed forces, however, IHL remains silent. Nevertheless, it follows *a majore ad minus* that the obligation to wear at least distinctive sign applies to members of armed forces too.¹¹⁶ Beyond this point, IHL leaves to domestic law the determination of the concrete appearance of the military clothes.¹¹⁷

Not surprisingly, nationality emblems are mentioned only incidentally in Article 18 of GC III by stating that “[b]adges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.”¹¹⁸ This provision prescribes only the effects of imprisonment and the rights of the POW. By setting out rules regarding the property of the POW, this provision serves individual interests. It does not, however, place a legal obligation on combatants to wear signs of nationality.

In conclusion, the lack of nationality insignia on the uniforms of the unmarked soldiers in Crimea violates neither the principle of distinction in general nor the rules concerning military uniforms specifically. This is because IHL does not serve state interests but is primarily concerned with humanitarian aspects, requiring (only) that fighters are distinguishable from the civilian population.

C. Standards for Perfidy

The use of unmarked soldiers may be illegal under IHL as it could amount to prohibited perfidy.

It must be borne in mind that since time immemorial it has been part of military art to induce the enemy to fall into traps in order to gain a military advantage. Such acts are only prohibited under IHL when they include a breach of faith of the adversary. Such illegal acts of deception are qualified as perfidy under IHL. The first sentence of Article 37(1) of AP I reflects customary international law¹¹⁹ and spells out the prohibition of perfidy: “It is prohibited to kill, injure or cap-

115. See Hague Convention No. IV, *supra* note 31, annex, art. 1(2) (defining “fixed” to mean that it must not be taken off too easily and “recognizable” to mean pertaining to the ability of combatants to recognize a civilian at a distance at which weapons could be used to target such persons); Pfanner, *supra* note 107, at 107, 108.

116. *But see* Ipsen, *supra* note 94 (arguing that there is an obligation under Article 44 (7) AP I as well as under the corresponding customary rule for regular armed forces to wear the uniform of their state when directly involved in the hostilities).

117. See Protocol I, *supra* note 32, art. 44(7) (“This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”).

118. GC III, *supra* note 32, art. 18.

119. HENCKAERTS & DOSWALD-BECK, *supra* note 37, at 221–227.

ture an adversary by resort to perfidy."¹²⁰ The second sentence of this article then goes on to define perfidy 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."¹²¹

The second sentence of Article 37(3) provides for a nonexhaustive list of examples of perfidy, which are:

- (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.¹²²

Article 38 of AP I, also reflecting customary international law,¹²³ lists certain acts akin to perfidy, such the improper use of the distinctive emblem of certain recognized organizations including the Red Cross, the Red Crescent, and the United Nations, as well as other recognized emblems, such as the flag of truce and the emblem of cultural property.

Article 39 of AP I codifies customary rules on nationality emblems and provides in the first and second paragraphs:

It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations¹²⁴

Similar provisions regarding perfidy can be found in other treaties.¹²⁵

In the case of Crimea, none of the above expressly listed examples of perfidy are triggered. Especially, the unmarked soldiers in Crimea did not use false emblems or insignia; they did not wear nationality insignia at all.

120. Protocol I, *supra* note 32, art. 37(1).

121. *Id.*

122. *Id.* art. 37(3).

123. HENCKAERTS & DOSWALD-BECK, *supra* note 37, at 530.

124. Protocol I, *supra* note 32, art. 39.

125. See Hague Convention No. IV, *supra* note 31, annex, art. 23(b), (f) (forbidding soldiers "to kill or wound treacherously individuals belonging to the hostile nation or army . . . [and] to make improper use of a flag of truce, of the national flag or the military insignia and uniform of the enemy, as well as distinctive badges of the Geneva Convention [of 1864].").

Nonetheless, perfidy may also exist in situations that are not expressly listed in AP I. The crucial question, therefore, is: Does the use of unmarked soldiers under the given situation in Crimea nevertheless constitute prohibited perfidy under IHL?

Special attention must be first drawn to the complexity of the situation in Crimea in late February and early March 2014 with different actors with different motivations and goals being involved: the armed forces of Ukraine, the pro-Russian Ukrainian rebels, and the Russian naval personal stationed in the Black Sea Fleet Base. The appearance of the unmarked troops blurred this situation even more as it was unclear which party these troops belonged to.

As discussed above, strong evidence suggests that the unmarked soldiers were Russian forces.¹²⁶ By covertly deploying these unmarked troops in Crimea, Russia attempted to evade attribution of these forces, thus hiding the international character of the conflict by making it appear entirely internal. Russia, therefore, deceived the Ukrainian government about the nationality of these forces. Without any doubt, Russia's involvement had a substantial influence on the events and eventually contributed to the later secession of Crimea from Ukraine. But does this amount to prohibited perfidy under IHL?

Illegal perfidy has to be distinguished from lawful ruses of war. The latter are defined in Article 24 of the Hague Regulations of 1899/1907, which reflects customary law: "Ruses of war and the employment of measures necessary for obtaining information about the enemy are considered permissible."¹²⁷

Ruses of war are also warranted in Article 37(2) of AP I, which states:

Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law.¹²⁸

Articles 37(2) of AP I gives four examples of ruses: the use of camouflage, decoys, mock operations, and misinformation.

Both perfidy and ruses contain elements of deception.¹²⁹ A distinction between these two forms of conduct can be based on different criteria.

126. See HUM. RTS. WATCH, *Q&A Russia, Ukraine*, *supra* note 6; see also *supra* Part III.B.1.a.

127. Hague Convention No. IV, *supra* note 31, annex, art. 24.

128. Protocol I, *supra* note 32, art. 37(2).

129. See, e.g., Vera Rusinova, *Perfidy*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 81; Knut Ipsen, *Ruses of War*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 81.

First, it can rely on objective criteria (regarding the object of the deception). Some scholars see the crucial element of a ruse of war as deceiving the enemy on a point of *fact* (e.g., on the strength of the army) with the aim of gaining a military advantage. Perfidy, on the other hand, deceives about a point of *law*, specifically on the applicability of a protection under IHL.¹³⁰

Second, subjective elements (taking into account the intention of the deceiver and the effect on the adversary) can also serve as a distinctive criteria. Whereas perfidy is based on a betrayal of the adversary's confidence and trust, ruses of war intend to (merely) mislead the enemy and to induce him to react in ways detrimental to his interests.¹³¹ The underlying rationale of the prohibition of perfidy is that one party should not gain a military advantage from the breach of the adversary's good faith by his mistaken belief regarding the existence of a situation giving rise to protection under IHL.¹³² That is why, for example, IHL prohibits simulating surrender by hoisting a white flag, since this gesture grants protection from attack under IHL that otherwise would not exist.

Article 37(2) of AP I combines both objective and subjective criteria and sets out three cumulative elements of perfidy: "(i) the existence of a norm of international law granting in certain circumstances protection (which the enemy is entitled to or is obligated to accord); (ii) inducing the enemy to trust that such circumstances have arisen; and (iii) an intent to breach that trust."¹³³

The International Committee of the Red Cross provides examples of permitted ruses of wars, which do not amount to perfidy.¹³⁴ Most interestingly, it considers "removing the signs indicating rank, unit, nationality or special function from uniforms" as lawful. Similarly, Switzerland's Basic Military Manual also considers this conduct as a lawful ruse of war.¹³⁵ Indeed, this practice has been frequently used by states in armed conflicts and is not considered illegal under IHL. For example, during the *Operation Southern Watch* (1992–

130. See, e.g., ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 164 (2008) (listing the Trojan Horse as a ruse of war).

131. See YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 199 (2004).

132. See KOLB & HYDE, *supra* note 130, at 161.

133. Protocol I, *supra* note 31, art. 37(2).

134. See Claude Pilloud & Jean Pictet, *Prohibition on Perfidy*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 429, 443–44 (Pilloud et al. ed. 1987).

135. See INT'L COMMITTEE OF THE RED CROSS, Customary IHL Database, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule57 [https://perma.cc/L3YN-VFYC] (archived Nov. 14, 2015) (citing SWITZERLAND, BASIC MILITARY MANUAL, art. 8 (1987) and UNITED KINGDOM, MILITARY MANUAL, § 312 (1958)).

2003),¹³⁶ U.S. pilots enforcing a no-fly zone in Iraq routinely removed all identifying markings from their uniforms in order to deny their enemies any intelligence information in the event that the pilots were captured.¹³⁷ Moreover, camouflage (defined as the disguising of military personnel, equipment, and installations by painting or covering them to make them blend in with their surroundings¹³⁸) is considered lawful in land warfare, even if nationality signs are concealed.¹³⁹

Nevertheless, depending on the specific circumstances of the case, each situation has to be individually analyzed to establish whether a certain conduct constitutes a lawful ruse or illegal perfidy.¹⁴⁰ In the Crimean Case, the concealing of the unmarked soldiers' true identity is certainly aimed to betray the confidence of Ukraine by making them falsely believe that Russia is not involved in the conflict in order to create an unstable situation and eventually to prepare for the annexation of Crimea into Russian territory. Therefore, the subjective element of perfidy is fulfilled.

The objective element of perfidy, however, is not fulfilled. Russia's attempt to make Ukraine believe that the unmarked soldiers are Ukrainian self-defense forces instead of Russian soldiers concerns a factual situation. Therefore, the deceit took place on a point of fact (nationality of the soldiers) and not, as required by perfidy, on a point of law (the protection under IHL).¹⁴¹

The Crimean Case compared to the examples above is insofar special, since the former cases involve a conduct within an armed conflict where the parties are—at least in general—known to each

136. See Fact Sheet: Operation Southern Watch, U.S. Air Force Historical Support Division (Sept. 18, 2012), <http://www.afhso.af.mil/topics/factsheets/factsheet.asp?id=19816> [<http://perma.cc/8APG-28AU>] (archived Oct. 13, 2015) (providing background information on this military operation).

137. See Ryan Faith, *The Russian Soldier Captured in Crimea May Not Be Russian, a Soldier, or Captured*, VICE NEWS (Mar. 10, 2014, 11:20 AM), <https://news.vice.com/article/the-russian-soldier-captured-in-crimea-may-not-be-russian-a-soldier-or-captured> [<https://perma.cc/EJ6F-JW93>] (archived Oct. 13, 2015).

138. FROM BONBON TO CHA-CHA: OXFORD DICTIONARY OF FOREIGN WORDS AND PHRASES 50 (Andrew Delahunty ed. 2008).

139. *E.g.* British national fighting in Syria in camouflage. But, in air warfare, signs of nationality should still remain visible on the aircraft. See U.S. AIR FORCE PAMPHLET, §§ 8-3(b), 8-4(a) & (b), 7-4 (1976) (“The camouflage of a flying aircraft must not conceal national markings of the aircraft . . . Military aircraft . . . are . . . required to be marked with appropriate signs of their nationality.”).

140. For example, Sweden's IHL Manual acknowledges border line situations in stating that “in certain circumstances, ruses of war may become almost tantamount to perfidy.” Sweden, IHL Manual § 3.2.1.1(b) 30 (1991).

141. A typical example of deceit on a point of law, in contrast, is the misuse of a white flag by a combatant to feign surrender while using the situation to commit a deceitful attack on the enemy. The white flag signals surrender and gives rise to protection under IHL by the prohibition to military attack the carrier. In the Crimean Case at hand, however, the deceit about the true nationality of the soldiers does not trigger any legal protection under IHL.

other. In contrast, Ukraine does not have knowledge about the involvement of Russia as a party to the conflict. Russia's conduct specifically aims at denying military involvement in the conflict at all.¹⁴² Whether knowledge about all the parties participating in the conflict is a crucial element of a lawful ruse of war as distinguished from perfidy, however, is more than doubtful. As such, it does not justify a difference in legal judgment concerning the use of a ruse of war in a conflict where the parties are known to each other and in a situation where one party deceives the other regarding its involvement. Thus, the Crimean Case provides a challenge for IHL.

Certainly, from a moral standpoint, Russia's conduct is reprehensible. From a legal perspective, however, this is not so clear-cut. While the soldiers' nationality crucially determines the category of armed conflict as either a noninternational or an international one, this qualification, however, does not alter any legally protected interests of Ukraine—neither with respect to Russia nor with respect to the unmarked soldiers. Indeed, the qualification of the conflict here has relevance only with regard to the POW status for captured combatants.¹⁴³ But the rules on POWs only aim to protect the rights and interests of the combatants (and indirectly those of the party of the conflict to whom these POWs belong). They do not protect the interests of the state who has captured them. In conclusion, the deceit about the nationality of the soldiers cannot be regarded as a betrayal of any legally protected interests of Ukraine. Absent any indicative state practice and clear treaty law, Russia's use of unmarked soldiers does not amount to illegal perfidy and has to be considered as a lawful ruse under IHL.

V. CONCLUSION

This Article has shown that the Crimean conflict, which was until February 2014 an internal one, became internationalized through the presence and activities of Russian forces on Ukrainian territory as well as through the attributed actions of the unmarked soldiers to Russia.

The legal analysis has also shown that—even though it lost a great deal of its reputation and credibility, both being of high value in international affairs—Russia's use of unmarked soldiers in Crimea does not violate IHL. Russia expertly made use of a gray area and gap of IHL by using unmarked soldiers to seize control over key infrastructure and to prepare for the annexation of Crimea.

142. See Rivkin & Casey, *supra* note 29 (pointing out a violation of IHL).

143. In an internal conflict, captured soldiers are not protected as POW.

Should the international community close this legal gap by amending IHL to prohibit the use of unmarked troops in similar cases in the future? In fact, it is likely that similar strategies will be employed in other conflicts. The current gap in IHL, therefore, could provide incentives for states to conduct similar covert operations with the case of Crimea serving as a precedent.

It is reported that Russia's strategy employed in Crimea is part of a larger security policy that was launched by Putin in 2012.¹⁴⁴ This new strategy, referred to as "smart defense," includes new approaches to the use of armed force, such as the mixing of special forces from various ministries to support regular troops, as well as "a mix of political, diplomatic, informational and military interaction," with the result of "causing confusion and speculation among various actors."¹⁴⁵ Similarly, NATO has referred to the methods employed by Russia in the Crimean Crisis as "hybrid warfare"¹⁴⁶ or "unattributed warfare." It has also announced to prepare its member states and partner nations, which have a substantial Russian population, to counter such warfare. One of the means to attribute fighters to an aggressor state should be, for example, intelligence improvement.¹⁴⁷

Yet, enhancing intelligence facilities and international cooperation to counter such new threats alone may not be enough. Amending the current legal framework would significantly contribute to countering such "unattributed warfare."

In this regard, mention should be made of an article by Christopher Kutz about the relationship between soldiers and their state viewed from a philosophical and ethical perspective. Kutz argues that the special problem of nonuniformed combatants and the general problem of justifying war are linked with each other.¹⁴⁸ Seeing war as a state of "collective violence" where acts are only imputable when committed by the armed forces of a state,¹⁴⁹ he concludes that the relationship between such privileged combatants and their state,

144. See Jacob W. Kipp & Roger McDermott, *Putin's Smart Defense: Wars, Rumors of War, and Generations of Wars (Part One)*, 11 EURASIA DAILY MONITOR, no. 104, June 10, 2014, http://www.jamestown.org/programs/edm/single/?tx_ttnews%5btt_news%5d=42480&tx_ttnews%5bbackPid%5d=756&no_cache=1#.VBzNtUtV64h [<http://perma.cc/3QDP-75M4>] (archived Oct. 13, 2015).

145. *Id.*

146. See Press Release, NATO, Wales Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Wales ¶ 13 (Sept. 5, 2014), http://www.nato.int/cps/en/natohq/official_texts_112964.htm?selectedLocale=en [<http://perma.cc/JV44-6PNQ>] (archived Oct. 13, 2015) (explaining hybrid warfare in thirteen points as "threats, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design").

147. See Breedlove, *supra* note 1.

148. See Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 148 (2005).

149. See *id.* at 152, 160.

therefore, should also be established through an external mark. Such a “stamp of ownership” would render the external quality of their actions attributable to the state rather than to themselves.¹⁵⁰

Transposing this moral or ethical obligation into a legal norm would certainly foster legal clarity, foreseeability, and certainty—principles that not only underlie domestic law but also are fundamental considerations in international law. If anything, the promulgation of a rule prohibiting the use of unmarked forces in an armed conflict, in which a foreign state seeks to deceive another about its involvement, would present an opportunity to reconcile the rapid development of such new methods and strategies of warfare with the law of armed conflicts.

On the other hand, more convincing arguments can be made in favor of maintaining the current rules like they are. First, viewed from a functional perspective, it is doubtful whether an explicit prohibition of unattributed warfare (as illegal perfidy) would really serve to enhance the protective function of IHL. The prohibition of such conduct would certainly serve the interests of the adversarial party to identify its specific enemy. But serving state interests is not a function that modern IHL is aimed to serve. IHL is rather aimed to serve humanitarian purposes—to spare the civil population as much as possible from the atrocities of war by restricting certain means of warfare. It is doubtful whether a prohibition of the use of unmarked soldiers by a foreign state in an armed conflict would actually enhance protection of the civilian population.

Moreover, it goes without saying that an amendment of the current IHL treaties, especially the Geneva Conventions, would be extremely difficult, if not almost impossible, since all state parties would have to consent to it.

While in some areas, corrections and clarifications of existing rules are advisable,¹⁵¹ other norms are more effective when defined only vaguely, thus allowing some flexibility in their interpretation and application. This is especially true for borderline situations in which it is necessary to pay attention to the specific nature and circumstances of each individual case. Furthermore, it is extremely difficult to transpose all potential factual behavior into legal norms and to not define the legal rule too narrowly. For these reasons, it is

150. See *id.* at 160–161.

151. For example, one could think of including new rules concerning the use of new weapon technologies or, in general, to enhance better compliance and enforcement mechanisms and thereby prompting greater observance of IHL. See generally Colloquium, *Technological Challenges for the Humanitarian Legal Framework*, 11th Bruges Colloquium October 21–22, 2010, https://www.coleurope.eu/sites/default/files/uploads/page/collegium_41_0.pdf [<https://perma.cc/3VQX-DNUK>] (archived Oct. 13, 2015) (discussing technological challenges for IHL).

preferable to maintain just a general framework that sets out only generally defined standards, thus leaving room to consider the specifics of each case.

The current set of rules, which distinguishes between perfidy and ruses of war, is a well-shaped compromise between precision and clarity on the one hand and the necessary flexibility regarding its application as to the specific circumstances of each case on the other hand. It remains the task of the states and international courts and tribunals to apply and interpret these provisions and to fill them with concrete substance.

Finally, under international law, there is a more effective way to adapt the legal regime to include new developments than a formal treaty amendment. This is by way of customary law through a general state practice carried out with a sense of legal obligation. Through their practice, states could produce legally binding guidelines for the interpretation of perfidy and ruses of war for future cases. This requires an active process in which states unequivocally condemn certain methods of warfare as unlawful.

In the case of Crimea, so far, most of the states have confined themselves to protesting against the illegality of the use of force by Russia after the official authorization by the Russian Council and the incorporation of Crimea into Russian territory. However, while some international actors like NATO have addressed the problem of unattributed warfare and the use of unmarked soldiers from a practical perspective, they have not clearly legally characterized it as a violation of IHL. Because of this, they have missed the opportunity to further develop international customary law through subsequent practice.

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