ARTICLE

Permissible Perfidy?

Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction

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Abstract

On 2 July 2008, Colombian forces disguised as an international humanitarian mission rescued 15 hostages from the Fuerzas Armadas Revolucionarias de Colombia guerilla group, its opponent in a decades-long conflict. Those forces also captured two guerrillas, including the commander who had been responsible for the hostages. The world's reaction, including those of humanitarian and human rights organizations, was universally positive in spite of reports that Colombian commandos and intelligence agents posed as aid workers and journalists — non-combatants protected by international humanitarian law (IHL) — in effecting the rescue and capture. Criticism of the operation later arose only when it was discovered that at least one of the Colombian soldiers participating in the operation wore the emblem of the International Committee of the Red Cross. Even that criticism focused solely on the misuse of the emblem, not the feigning of non-combatant status resulting in capture. The author examines the rescue operation to determine whether and how it might have violated IHL prohibitions regarding perfidious capture, recently asserted to apply in both international and non-international armed conflict. He reviews the perfidy prohibition, its scope and applicability, and possible interpretations that might explain the world's uncritical reaction to the operation. He also examines doctrines that might preclude or negate potential criminal responsibility for individual participants or decision-makers, as well as those that might apply at a collective level. The author argues that the lack of the clear applicability of any doctrine precluding criminal responsibility for this supposed violation of IHL might confirm

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Journal of International Criminal Justice **6** (2008), 627–653 doi:10.1093/jicj/mqn059

either that perfidious capture is permissible in non-international armed conflict or that it is a non-criminal and inconsequential violation of IHL. Alternatively, he suggests that uncritical acceptance of this operation might reveal that the applicable law no longer reflects our intuitive notions of justice.

1. Introduction

News of the Colombian government's recent successful and bloodless rescue of hostages from the *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia, hereinafter FARC) was cheerfully received by most of the world. The news was 'warmly welcomed' by the United Nations Secretary-General.[1] Both US presidential candidates were reportedly pleased by the operation's success and supportive of future efforts to free remaining hostages.[2] Even a human rights organization welcomed news of the operation's success.[3]

Reports agree that this rescue operation involved the use of a fictional international humanitarian mission as an aid to disguising commandos and intelligence agents as non-combatants protected under international humanitarian law (IHL), as well as the capture of two FARC operatives. This article, therefore, addresses unanswered questions regarding whether the rescue operation respected IHL relating to perfidy, a prohibition against killing, injuring and purportedly also capturing an enemy by feigning an IHL-protected status.[4] It also examines the implications of the operation's near-universal acceptance by national governments, by international human rights non-governmental organizations (NGOs), and particularly by the International Committee of the Red Cross (ICRC), for our understanding of this long-recognized prohibition. If condemnation of official state practice indicates the existence of a rule prohibiting it,[5] its absence relative to this official act of the Colombian government might indicate the contrary.

1 Press Release, 'Secretary-General Welcomes Liberation of 15 Colombian Hostages', 2 July 2008 [hereinafter UN Sec. Gen. Press Release], available online at http://www.un.org/apps/news/story.asp?NewsID=27253&Cr=colombia&Cr1= (visited 7 September 2008).

2 'Candidates React to Hostage Rescue in Colombia', *Washington Post*, 2 July 2008, available online at http://blog.washingtonpost.com/the-trail/2008/07/02/mccain.on.hostage.rescue.in.co.html?hpid=topnews (visited 7 September 2008).

3 Human Rights Watch stated that 'in light of reports that there were no civilian casualties, the Colombian security forces should be commended for carrying out an effective mission that respected international humanitarian law'. Human Rights Watch, 'Colombia: 15 Hostages Rescued by Security Forces', 2 July 2008 [hereinafter HRW Press Release] available online at http://hrw.org/english/docs/2008/07/02/colomb19247.txt.htm (visited 7 September 2008).

4 This definition will be further explained and examined in detail herein.

5 See International Committee of the Red Cross, J.M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1 [hereinafter ICRC IHL 1] (Cambridge: Cambridge University Press, 2005), 221 (asserting that the existence of a certain perfidy prohibition in non-international armed conflict was supported by '[n]o official contrary practice' and general condemnation of '[v]iolations').

The world's uncritical reaction to this supposed violation of the perfidy prohibition could indicate clarifications in the applicability or substance of IHL regarding perfidy. Most generally and least likely, it could reflect a general inapplicability of a perfidy prohibition in internal armed conflict, or a failure to recognize the situation between the Colombian government and the FARC as one of armed conflict. Alternatively, it could represent one or more possible substantive clarifications of the perfidy prohibition applicable in non-international armed conflict as a matter of customary international law.[6] Finally, it could represent that the perfidious capture incident (in the course of an otherwise-permissible rescue operation) is one of those cases where a breach of international law is excusable, justifiable or simply considered permissible for one or more reasons.

This article examines each of these possibilities, including their likelihood, potential scope and desirability. It is argued that any of these developments would, in their own way, be an unfortunate development in IHL. Each would undermine the purposes underlying the perfidy prohibition adopted in Additional Protocol I (hereinafter AP I)[7] and create a greater risk of harm to humanitarian NGOs and other persons protected by IHL. Such developments would also potentially increase the suffering attendant to war by enhancing the risk that new humanitarian NGOs may not safely operate. The conclusion is that there is no fully applicable individual or collective justification or excuse for these perfidious captures. Therefore, the world's uncritical reaction might suggest the absence of a perfidious capture prohibition in non-international armed conflict, or that it is an insignificant and non-criminal violation of IHL. Alternatively, it could indicate that these captures are simply seen as illegal but legitimate under the circumstances in Colombia.

2. The Rescue Operation

The Colombian government has been engaged for over four decades in what is widely considered an internal armed conflict with guerilla forces. Those forces, primarily a group known as FARC, have adopted a strategy of violence that includes kidnapping individuals who might be used as leverage in negotiations. The most well-known of these kidnappings involved Ingrid Betancourt,

6 *Ibid.* (asserting that '[s]tate practice establishes [the perfidy prohibition] as a norm of customary international law applicable in both international and non-international armed conflicts').

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 8 June 1977 [hereinafter AP I] reprinted in D. Schindler and J. Toman (eds), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents* (3rd edn., Dordrecht: Nijhoff, 1988) [hereinafter Laws of Armed Conflict], 711–773.

a French-Colombian politician kidnapped in 2002 during her campaign for Colombia's presidency.[8]

On 2 July 2008 the Colombian government conducted a daring operation to free several hostages, including Betancourt. Media reports regarding the specifics of the operation have varied. The following is a representative account:[9]

> The aim was to persuade the [FARC] leader holding Betancourt — Gerardo Aguilar Ramirez, known as César — that the hostages he held were to be moved to another hostage camp by helicopter, with the help of an international humanitarian NGO, so that negotiations could begin for their release.
> The Colombians decided to pose as an NGO similar to the one used in the Chavez handovers. Information from previous freed hostages allowed them to map out where Betancourt and the others were being held.
>
> César was told to present his hostages to the new [FARC] chief Alfonso Cano at a location somewhere between La Paz and Tomachipan. On Tuesday two helicopters — painted white and disguised as those of a fictitious NGO — left a military base in an Andean mountain valley and settled in a jungle clearing. One would remain out of sight, ready to go into action if the rescue was compromised. The other would fly down to the agreed rendezvous the following day.
> On board were Colombian military intelligence agents, plus a doctor and two nurses. The rescuers included an agent, pretending to be Italian, another supposedly from the Middle East, and an Australian with English 'identical to Crocodile Dundee'. Two others wore Che Guevara T-shirts.
> As in previous NGO handovers, the group was accompanied by a TV crew of two — also Colombian commandos.
> At midday on Wednesday the 'transfer' began. César led his hostages to the helicopter on a grassy clearing on the edge of a coca field. The video shows dozens of camouflage-clad [FARC] rebels standing around the field at ease, their assault rifles slung across their backs, as they were filmed by the supposed TV crew. The hostages, meanwhile, had hoped the helicopter was from a French and Swiss delegation which, they heard on the radio, was in the country to seek contacts with the [FARC]. 'I thought one of us might be released,' said Betancourt.
> Those overseeing the rescue were able to monitor its progress through a beacon and microphones aboard the helicopter. A US surveillance plane was flying, unnoticed, overhead.
>
> The helicopter was on the ground for a tense 22 minutes, then took off. What exactly happened on board was, apparently, not filmed because, say the Colombians, the cameraman joined in as the two rebels were overpowered . . . .[10]

It was initially unclear to what extent the Colombian government attempted to present the appearance of an international humanitarian mission beyond the

8 S. Brodzinsky and C. Davies, 'Colombia Hostage Rescue: The Audacious Plot that Freed World's Most Famous Captive', *The Observer* (UK), 6 July 2008, available online at http://www.guardian.co.uk/world/2008/jul/06/colombia (visited 7 September 2008).

9 The author has not located an official account by the Colombian government. This article therefore adopts a version that appears to most clearly represent broadly accepted or agreed upon facts.

10 *Ibid.*

use of a white helicopter. Later reports indicated the use of a fabricated symbol or emblem — a 'stylized red bird' — for an apparently fictitious humanitarian organization.[11]

It also appears, however, that at least one Colombian soldier wore a tabard/bib with an emblem closely (if not exactly) resembling that of the ICRC.[12] Colombia's President Uribe later admitted to and apologized for this soldier's conduct, which allegedly had not been sanctioned by the Colombian government.[13] As noted above and confirmed elsewhere, other Colombian commandos or intelligence agents posed as journalists or rebels.[14] Most interestingly, the ICRC has so far expressed concern only over the use of its emblem, not the use of other elements in a fictional 'international humanitarian mission' or the feigning of non-combatant status by Colombian forces.[15]

It is beyond debate that the misuse of the ICRC emblem violates IHL in both international and non-international armed conflict.[16] If its misuse was not an officially-sanctioned aspect of the operation, it probably raises only narrow concerns regarding the actions of a single individual.[17] For that reason, this article focuses on the other potentially perfidious aspects of this rescue mission. It examines those related to the use of a fictional NGO and the feigning of non-combatant status not only to free hostages but also to capture two FARC members.

3. The Definition and Applicability of the Perfidy Prohibition

A. The Many Definitions of Perfidy

The historical roots of the perfidy prohibition run deeply in IHL. As early as 1863, the Lieber Code asserted that 'the common law of war allows even capital

11 K. Penhaul, 'Colombian Military Used Red Cross Emblem in Rescue', 15 July 2008, available online at http://www.cnn.com/2008/WORLD/americas/07/15/colombia.red.cross/ (visited 7 September 2008).

12 *Ibid.*

13 The Associated Press, 'Colombian Soldier Wore Red Cross Logo in Hostage Rescue', 17 July 2008, available online at http://www.nytimes.com/2008/07/17/world/americas/17colombia.html?partner=rssnyt&emc=rss (visited 7 September 2008).

14 S. Romero, 'U.S. Aid Was a Key to Hostage Rescue in Colombia', *New York Times*, 13 July 2008, available online at http://www.nytimes.com/2008/07/13/world/americas/13colombia.html (visited 7 September 2008).

15 Press Release, 'Colombia: ICRC Underlines Importance of Respect for Red Cross Emblem', 16 July 2008, available online at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/colombia-news-160708?opendocument [hereinafter ICRC Press Release] (visited 7 September 2008).

16 However, as the discussion will demonstrate, not every such misuse is necessarily a war crime. See § 3B, *infra*.

17 Recent reports have generated further concern that the use of the emblem was intentional and officially sanctioned. See Press Release, 'Colombia: ICRC Deplores Improper Use of Red Cross Emblem', 6 August 2008, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/colombia-news-060808?opendocument (visited 7 September 2008).

punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them'.[18] Likewise, the Hague Regulations[19] declared that it was 'especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army'.[20] The Hague Regulations treachery prohibition is believed to broadly encompass various types of attacks on civilians and combatants, including acts of perfidy.[21]

A more recent perfidy prohibition both refines the scope of prohibited conduct and more precisely delimits its objects and purpose. Article 37(1) of AP I provides that '[i]t is prohibited to kill, injure or *capture* an adversary by resort to perfidy'.[22] Thus, AP I appears to limit the potential victims of perfidy to the Lieber Code scope of combatant adversaries. Such an approach is logical given AP I's numerous provisions protecting non-combatants.[23] Article 37(1) then defines acts of 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'.[24]

The touchstone and distinguishing feature of perfidy is bad faith: i.e. a specific intent to betray the enemies' confidence in a status protected by IHL to the enemy's injury.[25] The policies underlying this definition are based on the necessity of good faith between belligerent participants in an armed conflict and the future risk of harm to those with protected status under IHL.[26] The non-exclusive list of perfidious acts in AP I includes:

(a) the feigning of intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of 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.[27]

18 US War Department, General Orders 100: Instructions for the Government of Armies of the United States in the Field (1863) [hereinafter Lieber Code] Art. 101, reprinted in Laws of Armed Conflict, *supra* note 7, at 3–23.

19 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter Hague Regulations] reprinted in Laws of Armed Conflict, *supra* note 7, at 55–87.

20 *Ibid.*, Art. 23(b).

21 See M. Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959) (defining treachery not only to include assassinations, hiring assassins, putting a price on the enemy's head, 'dead or alive' rewards, but also other acts which fall within the modern definition of perfidy); Y. Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict* (Cambridge: Cambridge University Press, 2004), 199, 202.

22 AP I, *supra* note 7, Art. 37(1) (emphasis added).

23 See e.g. note 32, *infra*.

24 AP I, supra note 22.

25 See Dinstein, *supra* note 21, at 201 (describing three elements of perfidy).

26 *Ibid.*, at 198, 201.

27 AP I, *supra* note 22.

The required element of bad faith and resulting harm to an enemy adversary makes perfidy a more serious war crime than other improper uses of protected emblems, symbols or flags of truce or of neutral parties.[28] Because it is specifically directed toward and results in harm to combatant adversaries, perfidy more seriously undermines the sense of honour among warriors that is essential to maintaining the rule of law on the battlefield.

B. Distinguishing Ruses from Perfidy

AP I distinguishes between permissible ruses and impermissible perfidy by clarifying that the former 'infringe no rule of international law applicable in armed conflict' and 'do not invite the confidence of an adversary with respect to protection under that law'.[29] The positive and negative aspects of this section create the potential for confusion. All abuses of protected status to kill, injure or capture the enemy violate the perfidy prohibition. There is no need for an independent rule of IHL, such as those regarding misuse of 'recognized emblems',[30] to establish a violation. Ruses must not violate other IHL prohibitions, and also must not be perfidious. So, for example, using a flag of truce to delay the enemy either for a retreat or withdrawal is a misuse of a recognized emblem in violation of Article 38(1) of AP I. Although it is not perfidious, it is still an impermissible ruse.[31]

The use of a fictional humanitarian mission to accomplish the hostage rescue was by itself a permissible ruse. The emblem used was not that of a recognized humanitarian organization. Only the misuse of internationally recognized emblems, signs or signals violates IHL. Had the operation been limited to the rescue, technically no criminal IHL question would be raised — though one might still question the appropriateness of feigning a humanitarian mission as a general matter.

The use of a fictional international humanitarian mission to disguise commandos and intelligence agents as non-combatants who then captured two adversaries appears to meet each element of the perfidy prohibition. It is therefore an impermissible, perfidious ruse. An international humanitarian mission, even one not expressly recognized in the text of any IHL document, is not the lawful object of a military attack. In spite of its having a function within the context of an armed conflict, such missions are composed of protected civilians/non-combatants.[32] Posing as an international humanitarian mission with soldiers disguised as non-combatants therefore 'invit[es] the confidence of the adversary' and 'leads him to believe that he . . . is obliged to accord protection' under IHL 'with intent to betray that confidence'. This is only a potential violation of the prohibition, however, if it is applicable in this conflict.

28 ICRC IHL 1, *supra* note 5, at 223. See also AP I, *supra* note 7, Arts 38–39.
29 AP I, *Ibid.*, Art. 37(2).
30 *Ibid.*, Art. 38.
31 Dinstein, *supra* note 21, at 204 (citation omitted).
32 As non-combatants they fall within the definition of civilians and therefore under general protection from attack. AP I, *supra* note 7, Arts 48–51.

C. The Applicability of a Perfidy Prohibition

1. Is There a Non-international Armed Conflict in Colombia?

Clearly, customary or treaty-based IHL is only applicable in an armed conflict. This is therefore the most fundamental question to address. There seems to be broad agreement in the international community on the fact that there is an armed conflict ongoing in Colombia. In his response to news of the rescue, the UN Secretary-General referred to the FARC's continued 'kidnapping' as an 'egregious violation of international *humanitarian* law'.[33] The Secretary-General therefore implicitly recognized the existence of an armed conflict subject to IHL in Colombia. Likewise, both the ICRC and Human Rights Watch recognized the applicability of IHL in their responses to the rescue operation.[34] Each of these NGOs must also therefore recognize the existence of an armed conflict. A recent report by the US Department of State characterized the situation in Colombia as a '42-year internal armed conflict continued between the government and terrorist organizations, particularly the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN)'.[35] Thus, the existence of an armed conflict appears to be widely recognized outside Colombia.

The Colombian government and the FARC also appear to recognize the existence of an armed conflict. In spite of a recent call to end the armed nature of its activities, the FARC very recently re-asserted its intent to continue it.[36] President Uribe's apology for the use of the ICRC emblem and acknowledgment of an investigation[37] implicitly acknowledges the applicability of IHL. It is therefore unlikely that the reason for the world's acceptance of this potentially perfidious rescue operation rests in any failure to recognize the existence of an armed conflict between Colombia and the FARC — perhaps viewing the rescue as some sort of municipal law enforcement event. We must therefore consider whether the applicable IHL prohibits this conduct.

2. Does a Perfidy Prohibition Apply in Non-international Armed Conflict?

No IHL-specific treaty adopts a perfidy prohibition applicable in all non-international armed conflict. AP I is only applicable, by its terms, to international armed conflict and limited types (or forms) of non-international armed conflict. The Lieber Code referred to the 'common law of war' as the basis for its rule against killing or wounding treacherously. The 'common law of war' was a broad term referring to law applicable in all armed conflict, not just conflict

33 UN Sec. Gen. Press Release, *supra* note 1.

34 See HRW Press Release, *supra* note 3; ICRC Press Release, *supra* note 15.

35 US Deparment of State: Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices — 2006: Colombia, available online at http://www.state.gov/g/drl/rls/hrrpt/2006/78885.htm (visited 7 September 2008).

36 'FARC rejects peace talks and promises to fight on' (22 July 2008) available online at. http://www.mercopress.com/vernoticia.do?id=14023&formato=html (visited 7 September 2008)

37 See Penhaul, *supra* note 11.

between or among nations. Noted US law of war commentator Colonel William Winthrop cited to this common law when defining the 'customs of war' as unwritten rules and principles 'which regulate the intercourse and acts of individuals during the carrying on of war between hostile nations *or peoples*'.[38] These definitions indicate that certain common or customary laws of war apply in all armed conflict, not solely international armed conflict. As just noted, the Lieber Code suggests this is true of its rule against killing or wounding the enemy treacherously.

The ICRC's analysis of customary IHL recently concluded that '[k]illing, wounding, or capturing an adversary by resort to perfidy is prohibited'.[39] Further, it concludes that the prohibition applies in both international and non-international armed conflict.[40] This appears to suggest that the substance of the AP I perfidy prohibition applies to both international and non-international armed conflict as a matter of customary international law. Its analysis of state practice, however, may not sufficiently support that conclusion.

In its analysis, the ICRC reviewed numerous national military manuals. These manuals clearly indicate a fairly uniform understanding that perfidy is a breach of good faith that violates IHL.[41] It is not clearly stated in most of the manual sections cited by the ICRC whether these manuals apply the perfidy prohibition in non-international armed conflict.[42] Many are worded such that the prohibition could be viewed as generally applicable to all armed conflict.[43] This, however, is not universally the case.

These military manuals also vary in the form of the perfidy or treachery offence they adopt. Nine adopt essentially the AP I prohibition.[44] Seven adopt the Hague Regulations' treachery prohibition that includes wounding or killing members both of the hostile nation and of its army.[45] Nine adopt the Lieber Code prohibition against treacherously killing or wounding only an enemy adversary.[46] This clearly represents a much less than common understanding of the scope and applicability of the prohibition.

The ICRC also cites 25 instances of relevant national (municipal) legislation with some recognizable form of perfidy or treachery prohibition.[47] Only nine of

38 W. Winthrop, *Military Law and Precedents* (2nd edn, Washington: US Government Printing Office, 1920), 42 (emphasis added).

39 ICRC IHL 1, *supra* note 5.

40 *Ibid.*

41 ICRC, J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2 [hereinafter ICRC IHL 2] 1373–1375, 1380–1384 (Cambridge: Cambridge University Press, 2005). The authors note here that even the ICRC's statement of the rule is ambiguous regarding the precise scope of the acts which constitute prohibited perfidy.

42 See *ibid.*

43 See e.g. *ibid.* at 1370 (citing Colombian instructor's manual that perfidy is 'conduct which is prohibited by [IHL]' and Cameroon instructor's manual that 'perfidy is condemned . . . by the Law of War').

44 *Ibid.*, at 1380–1384 (§§ 937, 941–943, 945, 949–951, 954).

45 *Ibid.*, §§ 942, 953, 958–959, 961–963.

46 *Ibid.*, §§ 940, 944, 947–948, 952, 955–957, 960.

47 *Ibid.*, at 1375, 1384–1386.

these expressly recognize the prohibition as applicable in international and non-international armed conflict.[48] Six of these nine bodies of law incorporate the perfidy equivalent offences of the Rome Statute of the International Criminal Court (hereinafter Rome Statute).

Most municipal criminal statutes and the Rome Statute adopt similar prohibitions. A majority of municipal laws prohibit only treacherous killing or wounding.[49] Article 8(2)(b)(vii) of the Rome Statute prohibits '[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, *resulting in death or serious personal injury*' in international armed conflict.[50] Article 8(2)(b)(xi) also prohibits '*[k]illing or wounding* treacherously individuals belonging to the hostile nation or army' in international armed conflict.[51] Regarding non-international armed conflict, Article 8(2)(e)(ix) prohibits '*[k]illing or wounding* treacherously a combatant adversary'.[52]

The Rome Statute therefore appears under-inclusive on the scope of its perfidy prohibition in international armed conflict, at least if Article 8(2)(b)(vii) is compared to Article 37 of AP I. However, the Rome Statute also adopts the Hague Regulation treachery prohibition in Article 8(2)(b)(xi). Given the historic overlap of treachery and perfidy, the extent of the congruence or incongruence of these prohibitions was initially unclear. But the Rome Statute's Elements of Crimes clarifies that Article 8(2)(b)(xi) is a broader crime which includes all AP I perfidious acts that result in death or injury to an adversary or enemy national.[53]

As to non-international armed conflict, the Rome Statute adopts the Lieber Code prohibition — limiting the potential victims of perfidious acts to 'combatant adversaries'. By comparing the elements of crimes, it is clear that this

48 *Ibid.*
49 *Ibid.*
50 Art. 8(2)(b)(vii) ICCSt. (emphasis added).
51 Art. 8(2)(b)(xi) ICCSt. (emphasis added).
52 Art. 2(e)(ix) ICCSt. (emphasis added).
53 The elements are as follows:

(1) The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict
(2) The perpetrator intended to betray that confidence or belief.
(3) The perpetrator killed or injured such person or persons.
(4) The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
(5) Such person or persons belonged to an adverse party.
(6) The conduct took place in the context of and was associated with an international armed conflict.
(7) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Art. 8(2)(b)(xi) ICCSt., Elements of Crimes.

prohibition differs from the Article 8(2)(b)(xi) prohibition applicable in international armed conflict in only this very narrow way.[54] Therefore, it too would encompass the perfidious acts outlined in Article 37 of AP I which result in injury or death, but only of a combatant adversary.

More recent state practice, post-dating the ICRC's customary IHL analysis, exists in the US Military Commissions Act of 2006 (hereinafter MCA).[55] The MCA purports to define 'law of war and other offenses'[56] which are asserted to be 'declarative of existing law'[57] and 'traditionally . . . triable by military commission'.[58] The MCA substantially adopts the AP I definition of perfidy, to include capture.[59] Additionally, MCA offences are applicable to both alien unlawful enemy combatants[60] and lawful enemy combatants.[61] The only requirement is that the individual being prosecuted must have '*engaged in hostilities* or . . . *purposefully and materially supported hostilities* against the United States or its co-belligerents'.[62] Offences defined in the MCA, such as perfidy, would therefore apply regardless of character or nature of those hostilities. This includes both international and non-international armed conflict, as it must to be applied to members of a non-state terrorist group.[63]

In light of this analysis, the ICRC's assertion that essentially the full scope of the AP I perfidy prohibition applies in both international and non-international armed conflict is quite tenuous. A stronger assertion might be made regarding

54 In other words, the elements of Art. 8(2)(b)(xi) clarify that it prohibits perfidious acts against an 'adverse party' which would appear to include that party's nationals by the plain text of the prohibition. *Ibid.*, § 7.

55 Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600. The provisions of the MCA relating to the military commissions are codified at 10 U.S.C.A. §§ 948a–950w (West Supp. 2007).

56 *Ibid.*, § 950b(a). The offences are defined at *ibid.*, § 950v(b).

57 *Ibid.*, § 950p(b).

58 *Ibid.*, § 950p(a).

59 *Ibid.*, § 950v(b)(17) provides the following definition and punishment:

> Using treachery or perfidy. Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

This prohibition potentially encompasses a greater range of victims than AP I, a topic I will examine in future work.

60 *Ibid.*, § 948b(a), 948c.

61 *Ibid.*, § 948d(b).

62 *Ibid.*, § 948a(1)(A)(i) (emphasis added).

63 See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2795–2796 (2006) (concluding that the conflict between the US and al Qaeda is a non-international armed conflict subject to IHL, specifically Common Art. 3 of the Geneva Conventions). I will not debate here of whether it is appropriate to consider the situation between the US and al Qaeda as armed conflict under IHL. For purposes of US law, the *Hamdan* case establishes that.

the general applicability of the Lieber Code prohibition to all armed conflict, including non-international armed conflict. It is possible that different perfidy prohibitions might apply in different types of IHL governed conflicts. However, as the International Criminal Tribunal for the former Yugoslavia (ICTY) stated, 'in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned'.[64] We must therefore more carefully consider how or why the scope the perfidy prohibition applicable in non-international armed conflict might be different.

4. Does Colombia's Operation (and the World's Reaction) Clarify the Scope of the Perfidy Prohibition?

How does one reconcile the near-universal international acceptance of AP I and its broader perfidy prohibition with the Hague Regulations and Lieber Code definitions adopted in the majority of military manuals, municipal criminal laws and the Rome Statute? What does the lack of condemnation of this rescue operation from the ICRC and human rights NGOs potentially indicate is the true scope of the perfidy prohibition applicable in non-international armed conflict? Of course, there could be various pragmatic reasons for the lack of condemnation. However, from the viewpoint of IHL it seems particularly relevant to examine some potential clarifications of the perfidy prohibition applicable in non-international armed conflict that may be indicated.

A. A War Crime for Killing or Wounding, but Not for Capturing?

One possible clarification may be based in the difference between the earlier-reviewed definitions and their adoption by states. As mentioned above, AP I differs from the Lieber Code, Hague Regulations and Rome Statute prohibitions in one key aspect. Among possible results of perfidious acts, AP I includes capturing in addition to killing or injuring as a prohibited act. However, AP I itself limits grave breaches of the perfidy prohibition to only those that cause 'death or serious injury to body or health'.[65]

In its report on customary IHL, the ICRC acknowledged that '[o]n the basis of [its reviewed] state practice, it can be argued that killing, injuring or capturing by resort to perfidy is illegal under customary [IHL] but that only acts resulting in . . . killing or injuring would constitute a war crime'.[66] This is certainly a reasonable assessment of the material the ICRC report reviewed. As analysed above, the majority of states and all relevant treaties limit their definitions of criminal perfidy to instances where death or serious injury result. This

64 Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-A), Appeals Chamber, 2 October 1995, § 97.

65 AP I, *supra* note 7 Art. 85(3).

66 ICRC IHL 1, *supra* note 5, at 225.

situation raises other important concerns regarding the applicable scope of the perfidy prohibition in both international and non-international armed conflict.

Although state practice is not uniform, excepting perfidious capture from criminal responsibility under IHL seems an unsound rule. Such an exception essentially rewards perpetrators of perfidious capture for a presumptively non-violent result. Yet, this result is only partially within their control. A military operation resulting in capture rather than injury or death does not indicate that its participants used insignificant force or even less than potentially deadly force. The force used to affect a capture might itself risk serious injury or escalation by the individual being captured. Those captured in the Colombian rescue operation, for example, were not only physically subdued but also reportedly struck, partially stripped and injected with a sedative in the course of doing so.[67] Any of these acts could have resulted in accidental serious injury or death, triggering potential war crime responsibility.[68] These clearly prohibited results might also be caused by the escalation of force by those being subdued. Even though this operation was successfully limited to a capture without serious violence, there is no guarantee of such results in the future regardless of the precautions taken.

Additionally, the use of this deception still places future international humanitarian missions at risk. Like perfidious injury or death, the bad faith entailed by perfidious capture generates future suspicion in the genuineness of these organizations. This places them at a similar risk of violence or of being prevented from performing their critical humanitarian work as would operations involving perfidious injury or death.[69]

Another issue created by excluding war crime responsibility for perfidious capture relates to the lack of alternate enforcement mechanisms in non-international armed conflict. A non-criminal violation of IHL is a nominally permissible rule for nations who may assert (in theory) claims for violations of international law in a variety of fora. It is doubtful that parties to an internal or other non-international armed conflict could ever effectively assert such claims for violations of IHL. It would be necessary to provide the non-state party with sufficient international legal personality to assert or be subject to a reparations or other international claim.[70] This places the fate of any such claim in the

67 C. Vieira, 'Colombia: Hostage Rescue, According to Captured Guerrilla Leader', 16 July 2008, available online at http://ipsnews.net/news.asp?idnews=43211 (visited 7 September 2008). This report, obtained primarily from the lawyer of the captured FARC operative known as César, also contains allegations of broader use of ICRC emblems than admitted by President Uribe or reported elsewhere. Certainly its credibility could be suspect.

68 The issue of whether the criminally prohibited result must be specifically intended is discussed *infra*. It is not clear whether such intent is a required element of the crime.

69 See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) [hereinafter UK Manual], § 5.9.3 (stating that '[t]he reason for the prohibition of perfidy is to prevent the ... undermining of the protection afforded by the law of armed conflict').

70 See generally GA Res. 56/83, Annex, UN Doc. A/RES/56/83, 12 December 2001 (containing the International Law Commission's report entitled 'Responsibility of States for Internationally Wrongful Acts') [hereinafter Articles of State Responsibility].

hands of other nations or tribunals and whether they are willing to provide political recognition to the non-state party. If recognition is denied, it would hinder the non-state victim's ability to assert a claim. Without hope to secure the full protections of IHL, the willingness to observe it diminishes.

It would seem, then, that the US approach to perfidious captures, reflected in the MCA, is more in keeping with the scope and purpose of the general prohibition of perfidy. Punishing perfidious captures criminally but less severely than deaths or injury[71] better ensures compliance with the rule against bad faith military operations, particularly in non-international armed conflict. Although this appears to be the most desirable rule, state practice may not support it.[72]

Yet, this approach is not necessarily inconsistent with state practice. The dearth of states directly linking the AP I definition of perfidy to non-international armed conflict in military manuals and municipal legislation might simply reflect the fact that most states do not contemplate engaging in such an armed conflict in the future. Hence, they simply do not regulate or legislate for it. It may also represent greater faith in the general applicability of the Hague Regulations or Lieber Code prohibitions, rather than a rejection of the applicability of the AP I prohibition to all armed conflict. Finally, the lack of a perfidious capture criminal prohibition in the Rome Statute might only indicate that it is not a serious enough crime to warrant the expenditure of the Court's resources, rather than that it is not a war crime at all.[73]

A contrary explanation for the absence of a perfidious capture rule in non-international armed conflict might lie in the potential for interference with sovereignty and national law enforcement. The line between internal acts of violence by criminal organizations and non-international armed conflict is not always clear. Except for minimum human rights protections, there are no international rules that delimit the range of permissible ruses municipal law enforcement may employ in their attempts to apprehend violent criminals. In non-international armed conflict, Additional Protocol II[74] (hereinafter AP II) makes clear that '[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State'.[75] A perfidious capture rule in non-international armed conflict might complicate the efforts

71 See *supra* note 59.

72 To be clear, a state may adopt more restrictive rules imposing war crime responsibility for its nationals. The imposition of more restrictive rules against nationals of other states is more problematic. This is particularly true when, as is the case with the MCA in the majority of currently pending cases, the prohibition is not expressly enacted in municipal law until after the alleged conduct occurs.

73 Recall that the Rome Statute was intended to end impunity for 'the most serious crimes of international concern'. Art. 1 ICCSt.

74 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (hereinafter AP II).

75 *Ibid.*, Art. 3(1)

of a nation on the verge of armed conflict that is attempting to quell violence by deceptively capturing and detaining criminals.

In the final analysis, it is difficult to deny a substantial question regarding whether perfidious capture is a war crime, particularly in non-international armed conflict. Although we might end our enquiry here, there are other possible clarifications raised that should be considered.

B. Only 'Recognized' NGOs Matter?

Another possible explanation for the lack of concern with the Colombian rescue operation relates to its use of a fictitious humanitarian NGO. Recall from the earlier discussion that Article 85(5) of AP I declares only that grave breaches 'shall be regarded as war crimes'.[76] Article 85(3)(f) of AP I limits perfidious acts constituting a 'grave breach' to 'the perfidious use . . . of the distinctive emblem of the red cross, red crescent, or red lion and sun or of other protective signs *recognized by the Conventions or this Protocol*'.[77] This definition excludes three of the four examples of perfidy in Article 37(1), including the feigning of non-combatant status by use of an 'unrecognized' NGO's emblem.[78]

The Rome Statute is similar. It prohibits 'making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the *distinctive emblems of the Geneva Conventions*, resulting in death or serious personal injury'.[79] Although this prohibition is slightly broader than Article 85 of AP I, it is also significantly narrower than Article 37.

It might appear from these prohibitions that only perfidious acts involving the misuse of a 'recognized' humanitarian or international organization are criminal violations of the perfidy prohibition. The ICRC's limited but strong criticism of only the use of its emblem lends support to this view. Reviewing all perfidy and treachery prohibitions in international law reveals that this is simply not the case.

Treachery persists as crime in international law and its elements are not limited to recognized emblems or symbols. Other sections of the Rome Statute earlier mentioned are enlightening. The elements of the Rome Statute prohibitions in Articles 8(2)(b)(xi) and 8(2)(e)(ix) make clear that betrayal of any protected status resulting in injury or death constitutes a war crime. Both require that:

(1) The perpetrator invited the confidence or belief . . . that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
(2) The perpetrator intended to betray that confidence or belief.
(3) The perpetrator killed or injured such person or persons.

76 AP I, *supra* note 7, Art. 85(5).
77 *Ibid.*, Art. 85(3)(f) (emphasis added).
78 See *supra* note 27 and related text.
79 Art. 8(2)(b)(ix) ICCSt. (emphasis added).

(4) The perpetrator made use of that confidence or belief in killing or injuring such person or persons.[80]

The only difference between the two, represented by the section omitted above in the otherwise common paragraph one, is that in an international armed conflict the potential victim — meaning the person whose confidence or belief in protected status is invited and betrayed — is 'one or more persons'.[81] In non-international armed conflict, the potential victims are limited to 'one or more combatant adversaries'.[82] Therefore, all AP I perfidious acts resulting in death or serious injury are encompassed by these two prohibitions. Only the nature of the victim is more limited in non-international armed conflict. As this rescue operation invited the confidence of combatant adversaries in non-combatant status, it involved prohibited conduct under the Rome Statute, simply (and perhaps only fortuitously) without producing the necessary result.

C. An Implicit 'Primary Purpose' Requirement?

It is also possible that the world considered the capture acceptable because the operation's primary purpose was to rescue hostages rather than to capture the enemy. Such a claim is at least plausible. The Lieber Code referred to 'clandestine or treacherous *attempts to injure* an enemy'.[83] The AP I prohibition begins with the statement that '[i]t is prohibited to kill, injure or capture an adversary *by resort to* perfidy'.[84] Both of these definitions could be read to imply that the primary intent or purpose of the perfidious conduct must be to injure the enemy.

Interpreting the rule in this way is narrower than requiring specific intent to kill, injure or capture. The Colombians certainly expected to capture one or more FARC members. FARC operatives would surely accompany the hostages during the staged transfer and their detention would become necessary to safely complete the rescue. Additionally, reports indicate that Colombian forces might also have taken actions to ensure their capture of the local FARC leader known as César. Just before the helicopter was to depart, César claims that Colombian operatives informed him that he was required to come along to talk with the FARC leader Cano.[85] If true, this clearly indicates that César's capture was also a specifically intended, even if ancillary, purpose of the operation. The primary purpose rule implicated by this operation would therefore require not only specific intent to capture but also that capturing the enemy was the principle goal of the operation, rather than an ancillary goal or effect.

80 See Art. 8(2)(b)(xi) ICCSt., Elements of Crimes, § 1–4; Art. 8(2)(e)(ix) ICCSt., Elements of Crimes, § 1–4.
81 Art. 8(2)(b)(xi) ICCSt., Elements of Crimes, § 1.
82 Art. 8(2)(e)(ix) ICCSt., Elements of Crimes, § 1.
83 Lieber Code, *supra* note 18, Art. 101 (emphasis added).
84 AP I, *supra* note 7, Art. 37(1).
85 Vieira, *supra* note 67.

Recognizing this as the true scope of the perfidy would substantially undermine the prohibition. It would promote further deception by encouraging nations or individuals to claim benign motives as a pretext for perfidious acts. Absent unambiguous operational documents or an admission, the intent of a military operation must be inferred from its circumstances. As this operation makes clear, nations are willing to probe ambiguous areas of IHL. A primary purpose requirement would almost certainly lead to false claims of permissible primary motives for operations that are actually intended to kill, injure or capture an enemy.

A primary purpose requirement is not required by the text of either the AP I or Rome Statute perfidy prohibitions. The specific intent elements required are: the intent to convey a protected status; the intent to betray the enemy's confidence in that status; and possibly the intent to kill, injure or capture the enemy.[86] Any further narrowing of the prohibition would present the same increased risks to persons protected by IHL as a perfidious capture exception. It would appear that the most appropriate way to account for an alternate primary purpose is similar to that of perfidious capture. Such motivations should be punished less severely, but they should not be deemed an exception to criminal responsibility where death, injury or capture results.

The reaction of nations and NGOs in this case does not condemn or appear to even contemplate any violation of IHL other than the use of the ICRC emblem. The above analysis might indicate that this is because there has been, at most, a minor or non-criminal violation of any applicable perfidy prohibition. It might also indicate that the capture was viewed as excusable or justifiable.

5. Justifiable, Excusable or Simply Permissible Perfidy?

Even assuming the perfidious capture accompanying this rescue violated international law, it is possible any such violation was justified or excused. The UN Secretary-General and Human Rights Watch both emphasized the fact that these hostages had been kidnapped and held (some for many years) subject to dreadful conditions, all in violation of IHL.[87] These circumstances raise issues

86 See e.g. Art. 8(2)(b)(xi) ICCSt., Elements of Crimes, §§ 1–3. There is a valid question regarding the required intent to kill, injure or capture. The Lieber Code's 'attempts to injure' language certainly implies specific intent. AP I can be read to forbid prohibited results irrespective of intent. The Rome Statute requires that the '[t]he perpetrator *made use* of that confidence or belief in killing or injuring such person or persons'. *Ibid.*, § 4 (emphasis added). One could argue that 'made use' implies or requires intent to use the feigned protected status to obtain the result. However, such a reading is not required. 'Made use' could be viewed as solely a factual issue. Requiring specific intent has the potential to seriously undermine the prohibition. A potential perpetrator might claim that he was responding to an unplanned event and did not possess the required intent. For example, a soldier who commits perfidy might claim that he intended only to infiltrate enemy lines in civilian disguise but then attacked the enemy only after the enemy discovered him and attacked. Such a claim is completely plausible and difficult to disprove in a chaotic and ambiguous combat environment. It would seem more appropriate to require only a specific intent to betray the enemy's confidence in some way that produces a prohibited result.

87 UN Sec. Gen. Press Release, *supra* note 1; HRW Press Release, *supra* note 3.

regarding whether the wrongfulness of the otherwise impermissible act was precluded or negated under the circumstances.

It is possible to view justifications and excuses[88] either from the level of collective (usually state) responsibility or individual responsibility. Certainly, state-sanctioned operations that involve potential war crimes or other violations of IHL might result in responsibility at both levels.[89] Individual criminal responsibility may be excused at the level of each potentially-culpable individual through established doctrines. It is less clear whether doctrines that preclude the wrongfulness of a violation of international law at the nation-state or collective level might preclude individual criminal responsibility in non-international armed conflict. This section explores both possibilities.

It is important to first raise an essential issue underlying the applicability of any excuse or justification. Although the force used against the captured FARC operatives might be excused or justified at an individual or collective level, it is not clear whether the perfidious acts could be. If the essential element of wrongfulness in perfidy is bad faith, it is difficult to see how doctrines justifying otherwise criminal uses of force or invasions of private interests might apply to excuse it. The possible results of prohibited perfidy — meaning death, injury or capture — are not forbidden between combatants in armed conflict.[90] It is the use of bad faith to obtain those results that is wrongful. Stated differently, if the general imperatives of war and associated combat do not justify or excuse bad faith toward an enemy, it is not clear how any other circumstances might do so.[91]

A. Negating Individual Criminal Responsibility

There are two general ways in which individual criminal responsibility might arise from this operation for any potential perfidy violation. There may, of course, be liability for those that conducted the rescue operation and perpetrated or directly aided in the perfidious capture. Liability might also arise for those that planned and ordered the operation's use of perfidy. Let us first consider potential excuses common to both groups.

88 A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 219.

89 See *infra* note 100.

90 It remains unclear whether or at what point those fighting on behalf of the non-state party to a non-international armed conflict might be considered a combatant member of a belligerent armed force subject to attack. See J.-M. Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to Understanding and Respect for the Rule of Law in Armed Conflict' 87 *International Review of the Red Cross* (2005), 175–212, at 190 (identifying this issue as requiring further clarification).

91 See D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press 1995), 30 (asserting that regarding the relationship between military necessity and humanitarian requirements '[a]cts of war are only permissible if they[among other things]. . .are not perfidious').

1. *Necessity*

It is possible to view the perfidious aspects of the operation as a lesser violation of IHL to stop a greater one. This raises a possible claim of necessity. A necessity claim arises when one acts under threat of immediate, severe and irreparable threat of harm to the life or limb of himself or another person.[92] A key aspect of necessity is that it arises from *objective circumstances*, not from a third person or from the acts of the person claiming the necessity.[93] In this case, any threat posed to the hostages arose from their continued detention by third persons, two of whom were the victims of the perfidious act. Any necessity claim inevitably fails for this reason.[94]

It is also unclear whether the threat of harm to the hostages was such that would warrant a criminal act in response. This aspect of necessity is better considered in conjunction with a potential claim of self-defence.

2. *Self-defence*

A claim of self-defence requires an imminent or actual unlawful attack on the life or person of the person claiming the defence, or of another person.[95] Although the hostages were under continuous detention maintained in part by the threat of force, neither the conditions of their detention nor the general threat of force used to maintain it necessarily constituted an actual or imminent 'attack' against their person. The deplorable conditions of their detention might surely have resulted in serious harm over the long term. However, the available information does not indicate that any such harm was imminent, even for those who had been detained for several years. The hostages were in surprisingly good health when rescued.

Furthermore, at the moment of capture, there is no indication that the FARC members presented any imminent threat. Reports indicate that they were without weapons and taken completely by surprise.[96] Even if they had presented a threat, that threat would have resulted from the actions of the individuals conducting the rescue and perfidious capture who would be asserting the defence. The defence would be inadmissible on that basis.[97]

Of course, one might view the hostage's detention as a continuing mild form of attack or application of force to the life or person of third persons. If so, then the capture might be seen as a proportionate use of force in defence. While

92 *Ibid.*, at 242.

93 *Ibid.*, at 242–243.

94 See G.P. Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), 138 (distinguishing necessity from self defence by clarifying that 'necessity legitimates an invasion against the interests of a totally innocent party').

95 Cassese, *supra* note 88, at 222.

96 Vieira, *supra* note 67.

97 *Ibid.*, at 222 (listing as an essential element of a self-defence claim that the unlawful conduct of the person against whom force was used must not have been caused by the person acting in self-defence).

viewing the situation in this light might excuse the force used in the capture, it does not (for the reasons earlier stated) necessarily excuse the perfidious means employed to affect it. Any claim that self-defense somehow justified a *perfidious* capture is therefore problematic.

3. Superior Orders

One final excuse must be discussed. It pertains to those who perpetrated and planned the perfidious capture based on the decision and orders of a superior. Except for the misuse of the ICRC tabard, the above analysis reveals substantial ambiguity surrounding the scope of the perfidy prohibition applicable in non-international armed conflict. This makes clear that the perfidious capture was not manifestly illegal. Therefore, those who implemented any order to conduct the operation and aided or perpetrated the perfidious capture may almost certainly rely on the superior orders defence, as its other elements are presumably satisfied.[98]

On the basis of this review, there are no clearly admissible excuses or justifications for the actions of those who ordered or authorized the perfidious capture. If the actions of those individuals are to be excused, it must be through an applicable collective excuse or justification.

B. Precluding Wrongfulness at the Collective Level

It seems an elementary principle that if the wrongfulness of an IHL violation might be negated at the collective level, it would also negate individual responsibility for those acting within collective authority. In other words, if the acts of individuals may create collective responsibility,[99] collective excuses or justifications must logically negate individual responsibility.[100] For example, a belligerent state party to an international armed conflict may lawfully conduct an act of belligerent reprisal otherwise prohibited by IHL under certain very limited circumstances.[101] In such cases, the individuals executing that act of reprisal incur no individual criminal responsibility for their actions. Their actions are not wrongful because the wrongfulness has been precluded or negated by the collective justification. What is not clear is the applicability of this principle in

98 Those elements include that the individual did not know that the order was unlawful and was under a legal obligation to obey the order. See e.g. Art. 33 ICCSt.

99 Articles of State Responsibility, *supra* note 70, Art. 5.

100 The Articles of State Responsibility state that their application is 'without prejudice to any question of . . . individual responsibility' of state officials acting under state authority. *Ibid.*, Art. 58. Commentary explains that this principle is intended only to clarify that both states and individuals might be simultaneously responsible for a violation of international law under certain circumstances, not that both may not be simultaneously excused. See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002), 312–313.

101 See Cassese, *supra* note 88, at 219; Dinstein, *supra* note 21, at 220–221.

non-international armed conflict. The essential question is whether collective excuses or justifications applicable to belligerents in international armed conflict may be applied to belligerent parties engaged in non-international armed conflict.

This question would appear to be readily answered by a review of basic principles. The earlier-referenced *Tadić* opinion[102] revives the apparent understanding of Winthrop and Lieber that certain common or customary laws of war universally apply to armed conflict, whether between hostile 'nations' or 'peoples'. It is, therefore, axiomatic to suggest the obligations created by those laws must be observed at both the individual and collective levels of all armed conflict. As the above analysis of the perfidy/treachery prohibitions indicates, the symmetry between international and non-international armed conflict may not always be perfect. However, belligerent parties engaged in non-international armed conflict already effectively exercise the equivalent status of states relative to IHL. If an action in violation of IHL might be excused or justified at the collective level of a belligerent party to an international armed conflict, it seems only appropriate to do so in non-international armed conflict.

The International Law Commission's 'Responsibility of States for Internationally Wrongful Acts' (hereinafter 'Articles of State Responsibility') purports to compile the law in this area. It addresses more than the law of state (or collective) responsibility for violations of international law. It also describes collective justifications and excuses that preclude wrongfulness for violations of international law. While these collective justifications and excuses do not by their terms apply to non-state entities,[103] their application by analogy to parties engaged in non-international armed conflict is appropriate. If it is correct that these parties have collective obligations relative to IHL, they should at a minimum enjoy collective rights, including at a minimum the right to claim excuses and justifications that might be applied consistently with IHL.

1. Potential Collective Excuses

The Articles of State Responsibility contain several provisions regarding circumstances under which the wrongfulness of a violation of international law is precluded.[104] These provisions do not deal with termination of an obligation but rather with their temporary or incidental violation,[105] such as occurred in this case. Some, such as consent,[106] self-defence[107] and force majeure[108] are

102 See *supra* note 64 and related text.
103 Articles of State Responsibility, *supra* note 70, Arts 1–3.
104 *Ibid.*, Arts 20–27.
105 Crawford, *supra* note 100, at 160.
106 Articles of State Responsibility, *supra* note 70, Art. 20.
107 *Ibid.*, Art. 21 (dealing only with acts in defence of the state in conformity with the UN Charter).
108 *Ibid.*, Art. 23.

inapplicable by their terms to the facts of this operation and its perfidious capture. Others must be more carefully considered.

The articles relating to distress[109] and necessity[110] are potentially applicable. A close review discloses that they should not be deemed to apply under the circumstances here. Both preclude the wrongfulness of a violation of generally applicable international law under exceptional circumstances. Distress usually applies to sudden emergency incidents, such as 'aircraft or ships entering State territory under stress of weather or mechanical failure'.[111] Necessity requires an act to 'safeguard an essential interest' of a state against a 'grave and imminent peril'.[112] It does not apply 'if the international obligation in question excludes the possibility of invoking necessity' or if the state 'has contributed to the situation of necessity'.[113]

These descriptions of necessity and distress essentially return us to the earlier discussion of the status of excuses under IHL. In regard to these excuses, the Articles of State Responsibility simply recognize that many general international obligations do not contemplate extreme circumstances under which their violation might be acceptable. Unlike such general obligations, IHL has already taken into account the competing interests of life and death attendant to war. In establishing a rule, IHL must be generally understood to have balanced those interests. It thereby 'excludes the possibility of invoking' exceptional circumstances excusing its violation. Collective justifications may fall into a different category.

2. Potential Collective Justification

(a) Countermeasures and their relationship to reprisals

The Articles of State Responsibility preclude wrongfulness of a violation of international law when the otherwise-prohibited act is a countermeasure taken in accordance with its terms.[114] A countermeasure is an act by one state against another that is currently violating an international legal obligation toward the state employing the countermeasure.[115] Its purpose must be to induce the other state's future compliance with international law, not to punish the state for a past violation.[116] Among the many restrictions on countermeasures, two are of particular relevance. Countermeasures must be proportionate to the violation they seek to remedy[117] and must not violate 'obligations of a humanitarian character prohibiting reprisals'.[118]

109 *Ibid.*, Art. 24.
110 *Ibid.*, Art. 25.
111 Crawford, *supra* note 100, at 174 (citation omitted).
112 Articles of State Responsibility, *supra* note 70, Art. 25(1)(a).
113 *Ibid.*, Art. 25(2).
114 *Ibid.*, Art. 22.
115 Crawford, *supra* note 100, at 281–287.
116 *Ibid.*, at 284; Articles of State Responsibility, *supra* note 70, Art. 22(1).
117 *Ibid.*, Art. 51.
118 *Ibid.*, Art. 50(1)(c).

Countermeasures are 'limited to the non-performance for the time being of international obligations of the State taking' the countermeasures.[119] For this reason they may appear to be limited to only passive measures or the non-performance of affirmative obligations. Commentary to the Articles of State Responsibility indicates that countermeasures may also involve affirmative acts such as 'freezing of the assets' of a state.[120] Hence, non-performance of an obligation might include taking affirmative actions otherwise prohibited by international law. This explains the need to exclude certain prohibited affirmative acts from the range of permissible countermeasures, including prohibited reprisals.[121] In the context of this operation, the question then becomes to what extent reprisals are prohibited and a countermeasure potentially permissible.

(b) The narrow scope of belligerent reprisal

At a basic level, a belligerent reprisal is the IHL equivalent of a countermeasure. It is 'an action that would otherwise be unlawful but that in exceptional cases is considered lawful under international law when used as an enforcement measure in response to unlawful acts of the adversary'.[122] The ICRC reports a trend in IHL to eventually prohibit all belligerent reprisals.[123] Until that time, it asserts that '[t]hose that may still be lawful are subject to stringent conditions . . .'.[124]

Not surprisingly, belligerent reprisals are not permitted against protected persons in the power of a party to an armed conflict, whether international[125] and non-international.[126] Likewise they are prohibited against objects, such as cultural property, protected by IHL.[127] State practice — what they do as opposed to what they say — appears to be somewhat still in development with regard to reprisals against civilian populations. They frequently occur, though with the condemnation of the international community.[128] The ICTY, for example, found a general prohibition of reprisals against civilian populations is established in IHL.[129]

Quite importantly to this operation, the ICRC report on customary IHL asserts that '[p]arties to non-international armed conflicts do not have the right to resort to belligerent reprisals'.[130] It asserts that '[s]tate practice

119 *Ibid.*, Art. 49(2).
120 Crawford, *supra* note 100, at 286.
121 See Articles of State Responsibility, *supra* note 70, Art. 50(1)(a) (requiring that countermeasures not affect 'the obligation to *refrain* from the threat or use of force' under the UN Charter). See also note 118 and related text *supra*.
122 ICRC IHL 1, *supra* note 5, at 513; Fleck, *supra* note 91, at 204–205.
123 ICRC IHL 1, *ibid.*
124 *Ibid.*
125 *Ibid.*, at 519 (citing treaty sources).
126 *Ibid.*, at 526 (citing treaty and other sources).
127 *Ibid.*, at 523–526.
128 *Ibid.*, at 520–523.
129 *Ibid.*, at 523 (citations omitted).
130 *Ibid.*, at 526.

establishes this rule as a norm of customary international law applicable in non-international armed conflict'.[131] Indeed, the ICRC found 'insufficient evidence that the very concept of lawful reprisal in non-international armed conflict has ever materialized in international law'.[132] It found that states overwhelmingly rejected the notion of reprisals in non-international armed conflict.[133]

That states refuse to recognize the concept of belligerent reprisal in non-international armed conflict is unsurprising. Reprisal is a collective action. Recognizing a reprisal right, however circumscribed, would implicitly grant a non-state party to internal armed conflict collective rights under IHL. This threatens the states' political integrity and monopoly on the use of force, a vestige of their sovereignty over the non-state party to an internal armed conflict.

Belligerent reprisals may nonetheless exist in non-international armed conflict in practice. That it is not acknowledged by states did not prevent the drafters of AP II from including numerous broad protections for non-combatants. These protections effectively prevent the most common belligerent reprisals, those against protected persons, simply without saying so.[134] As mentioned earlier, the ICTY also found a prohibition regarding reprisals against civilian populations in the IHL governing non-international armed conflict. This suggests that there may be, in fact, an unacknowledged practice of belligerent reprisals in such conflicts.[135]

A careful review of the ICRC's analysis of state practice reveals a less than universal prohibition of belligerent reprisals, even in international armed conflict where they are acknowledged to exist. There are belligerent reprisal prohibitions in AP I for protected persons and property — to include civilian populations,[136] civilian objects,[137] cultural property,[138] objects indispensible to

131 *Ibid.*

132 *Ibid.*, at 527.

133 *Ibid.*, at 528–529.

134 The ICRC recently stated that neither Common Article 3 nor 'Article 4 of [AP II] . . . allows . . . room for reprisals against persons who do not or no longer take a direct part in hostilities'. *Ibid.*, at 526. Additionally, the ICRC noted:

> Several States voted against the proposal [prohibiting reprisals during the Diplomatic Conference leading to the adoption of the Additional Protocols] because they felt the very concept of reprisals had no place in non-international armed conflicts. (citation omitted) Some expressed the fear that the introduction of the term, even by way of a prohibition, could give the impression *a contrario* that that concept was possible.

135 I do not here mean to suggest that all attacks against a civilian population are belligerent reprisals. Some are merely indiscriminate attacks in violation of IHL. In some cases, though, an attack against the civilian population is claimed as justified by the actions of the other (usually non-state) party to a non-international armed conflict. It is to these narrow circumstances that I refer.

136 AP I, *supra* note 7, Art. 51(6).

137 *Ibid.*, Art. 52(1).

138 *Ibid.*, Art. 53(c).

supporting the population[139] and even the environment.[140] Such prohibitions, while encompassing a quite broad range of conduct, do not address other potentially justifiable violations of IHL.

Perfidy lies outside of the scope of these broad prohibitions. Recall that acts of perfidy are directed against a combatant adversary in non-international armed conflict rather than protected persons or property. It is a feigning of protected status in order to kill, injure or capture combatants — belligerents that are otherwise the legitimate objects of a military attack. Understanding this might explain the Human Rights Watch observation that 'in light of reports that there were no civilian casualties, the Colombian security forces should be commended for carrying out an effective mission that respected international humanitarian law'.[141] Because a perfidious capture of enemy adversaries is not a reprisal prohibited by IHL, it would by analogy be within the range of permissible countermeasures under the Articles of State Responsibility.[142]

Ultimately the Colombian rescue operation might be argued to represent an exceedingly rare circumstance — one where a minor violation (assuming it is a violation) of IHL effectively remedies a criminal violation, making it justifiable and permissible. Recall also that the ICRC's report on customary IHL recognized that perfidious capture may violate IHL without being a war crime.[143] If this is an accurate statement of the law, then the acceptability of this capture might turn on the fact that (1) it was not a war crime; and (2) it was used in response to war crimes with the goal of ending them. If so, then it would preclude wrongfulness for the non-criminal violation of IHL at the collective level as well.

Acknowledging and regulating reprisals in non-international armed conflict could be a positive step for IHL. An unacknowledged and unregulated practice is much more susceptible to use and abuse than is one that is recognized but heavily circumscribed. As earlier mentioned, parties to non-international armed conflict do not have access to the usual peaceable means of resolving violations of international law. A very limited reprisal power may provide an opportunity to promote respect for IHL rather than undermine its effectiveness.

(c) The grounds for excluding countermeasure/reprisal doctrine

Notwithstanding its nominal appeal, the suggestion that this operation might represent a permissible belligerent reprisal or countermeasure should not be unhesitatingly accepted. The primary problem with a belligerent reprisal

139 *Ibid.*, Art. 54(4).

140 *Ibid.*, Art. 55(2).

141 HRW Press Release, *supra* note 3.

142 I note here once again that this discussion assumes that the perfidious capture was a violation of IHL applicable in non-international armed conflict. If that were not the case, there is obviously no need to rely on countermeasure/reprisal doctrine.

143 See *supra* note 66 and related text.

theory is that this perfidious capture does not appear to have been an 'enforcement measure in response to unlawful acts of the adversary'. The correlation between this perfidious capture and FARC's hostage-taking is not perfect. The perfidious capture could be viewed as a direct response to the FARC's actions — the means by which the Colombian government intended to enforce and gain future compliance with the IHL prohibition against the taking of hostages. In this case, though, it would amount to an act in bad faith in response to another. Given its apparent ancillary status in the operation, the perfidious capture might not have been relevant to enforcement at all.

In addition, there are requirements for reprisals and countermeasures that this operation failed to meet. Both require protests to or other calls upon the opposing party to comply with its IHL obligations.[144] Both also require a warning or notice to the opposing party of the decision to resort to reprisals or countermeasures.[145] It is not clear without an official Colombian account of the incident whether these requirements, particularly the warning requirement, were met. Of course, a specific warning would have undermined the deception critical to the success of this operation.

Finally, there are practical reasons for not recognizing reprisal or countermeasure doctrines in non-international armed conflict and for this operation specifically. Doing so would encourage belligerents to claim justified violations of IHL, something clearly open to abuse and likely to instigate additional violations also claimed as reprisals. Allowing perfidious acts in reprisal would also perpetuate bad faith between belligerents, further undermining respect for the rule of law. The element of bad faith in perfidious capture is itself a reason to categorically reject it as potentially justifiable conduct. Further, while the operation was not directed at protected persons and involved only the limited use of force, it abused protected status and created a greater risk of future harm to protected persons. It is at least debatable whether IHL should sanction or permit acts that create such risks. Did the international community find them tolerable given the exceptional case in Colombia?

6. Conclusion

One thing must be admitted. It is doubtful that the international community's reaction to this rescue operation is based in a nuanced legal analysis such as has been undertaken here. Its reaction surely had more to do with an instinctive sense of 'right' and 'wrong'. Then again, it is presumably this innate sense of justice that underlies our law, including if not especially IHL.[146]

144 Dinstein, *supra* note 21, at 221 (citing F. Kalshoven, *Belligerent Reprisals* (Leiden: Sijthoff, 1971), 340); Articles of State Responsibility, *supra* note 70, Art. 52(1)(a).

145 Dinstein, *supra* note 21, at 221; Articles of State Responsibility, *supra* note 70, Art. 52(1)(b).

146 Recall Lieber's observation that '[m]en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God'. Lieber Code, *supra* note 18, Art. 15.

Unfortunately, an unsympathetic victim presents a threat to the rule of law — creating a reluctance to enforce it against vigilantes who seek to obtain their own justice with or without its sanction. The FARC's long history of IHL violations certainly makes it the most unsympathetic of 'victims'. Therefore, the world's reaction is perhaps not the best guide to the law applicable in this case. On the other hand, when the 'guardian of IHL' does not condemn aspects of an operation that appear to be in violation of that body of law, the legal community must examine why.

In this case, perhaps the most satisfactory explanation for the lack of any condemnation of this perfidious capture by the ICRC might be that the scope of the perfidy prohibition applicable in non-international armed conflict is subject to question. In spite of the ICRC customary IHL study's recent assertions, perfidious capture might be permissible in non-international armed conflict. Alternatively, perfidious capture might represent an inconsequential and/or non-criminal violation of IHL. In spite of these potential explanations, it would appear that the deception used in this operation violated the spirit if not the letter of IHL and placed future humanitarian missions in greater risk of danger. If that is true, then the lack of any other clearly applicable explanation, excuse or justification perhaps indicates that in this case the law does not reflect our intuitive notions of justice — allowing 'illegal but legitimate' or 'permissible' perfidy.