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Focus

Article 37 of Additional Protocol I of 1977

„1. It is prohibited to kill, injure or capture an adversary by resort to **perfidy**. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obligated to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy

Art. 37 (2) provides that **ruses of war** are not prohibited

Article 8 of the Statute of the International Criminal Court

Article 8 includes as a war crime improper use of a flag of truce and killing or wounding treacherously.

Article 3 of the Statute of the ICTY

Article 3 deals with violations of the laws and customs of war.

Flag of surrender at Nasiriya junction: Perfidy or ruse of war?

According to the International Herald Tribune, 24.03.03, „US officials said Iraqi forces used ‚ruses‘ to lure US troops into traps. ‚In one incident a flag of surrender was displayed and was followed up by artillery fire‘ said Gen. John Abizaid, a Central Command spokesman. In another incident, Iraqi troops dressed in civilian clothes appeared to welcome US troops but then ambushed them.“

The language used by the US spokesman is incorrect. „Ruses of war“ are permitted and do not violate the law. Perfidy is prohibited and accordingly is a grave breach of the Geneva Conventions.

Examples of prohibited acts of perfidy are the feigning of an intent to negotiate under a flag of surrender and the feigning of civilian, non-combatant status.

As mentioned above, ruses or tricks of war are permitted. Examples of ruses are the use of camouflage, decoys, mock operations and misinformation.

Regarding the wearing of uniforms of the enemy, see Bofax 241, 21.03.03.

Also as pointed out in Bofax 241, neither Iraq nor the United States is bound by AP I as conventional law because neither is a state-party to the Protocol. However, both are bound to the principles set forth in Article 37 of AP I, because the provisions set out above regarding feigning surrender and feigning civilian status are, without doubt, customary international law and thus binding on all states.

The Nuremberg Tribunal declared that the 1907 Hague Convention IV and the appended Regulations on the Laws and Customs of War on Land are customary international law and thus binding on all states.

Article 23 (f) of the 1907 Convention forbids the improper use of a flag of truce. This is the customary principle behind Art. 37 (1)(a) of AP I. Article 23 (b) of the 1907 Convention is taken as the basis for AP I, Art 37 (1)(c). Article 24 of the Hague Convention states that ruses of war are permissible. This is the basis of AP I, Art 37 (2).

According to the Pictet Commentaries, paragraph 1500, there are three elements to perfidy: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and the actual betrayal of the confidence, i.e., of the protection afforded by international law applicable in armed conflict (objective element).

According to Bothe, et al., the commentators on New Rules for Victims of Armed Conflict, the condemnation of perfidy has remained a cardinal principle of international humanitarian law because perfidious abuse of protections under the law of armed conflict tends strongly to degrade the protections and restraints developed in the mutual interest of all parties to the conflict and especially to their combatants and civilians.

The importance of the prohibition of perfidy is seen in its ensuring the observations of the protected status of both civilians and combatants when they have surrendered. Civilians and those soldiers who desire to surrender who will pay a heavy price if these rules are not observed.

Feigning of an intent to negotiate under a flag of surrender and feigning civilian, non-combatant status in order to fire on the enemy are both violations of the laws and customs of war. Both are war crimes if they involve bodily harm or death. The acts of the Iraqis need to be seen in this light.

Responsibility

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