

# RETHINKING THE LAW AND ETHICS OF UNDERCOVER WARFARE

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## ABSTRACT

*This paper offers a new ethical and legal framework for undercover warfare. It begins by criticizing the traditional reasoning for the duty to wear uniform. It demonstrates the insufficiency of the principle of 'distinction', which dominates current discourse. It argues, instead, that the rationale for the duty to wear uniforms is based on a new principle in international law that this paper advocates: the principle of*

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*accountability. The active form of global accountability requires some degree of states' transparency about their military activity. This allows other states to respond by exercising passive form of accountability and punish violations of international law. By wearing uniforms, a military unit indirectly reports who did what, when and where. Wearing uniforms, for that reason, is an important element in promoting accountability for violations of International Humanitarian Law (IHL). It assists states in solving a cooperation problem as it decreases incentives for violation by reducing monitoring and punishment costs. As accountability has a purely instrumental value, it therefore follows that combatants can theoretically meet an accountability threshold by various means other than wearing uniforms. Given accountability's instrumental nature and IHL's presumed efficiency, it follows that promoting accountability for compliance with IHL, including through the duty to wear uniforms, is in the best interest of the states. Both utilitarian and Rawlsian concepts of global justice show that accountability can be acceptable to all states. Analyzing various methods of undercover warfare, this paper (contrary to the dichotomous view in current discourse) offers a view of cover as a normative continuum. Accordingly, elite soldiers fighting terror by using civilian clothes, typically use a legitimate shallow cover on this spectrum. In contrast, spies and treacherous killers employ illegitimate deep cover. The deeper the cover, the less the actor is accountable. Depriving deep cover combatants of legal rights is therefore better grounded.*

## I. INTRODUCTION

State sponsored undercover warfare is a well-known tactical phenomenon. Elite combatants deploy and fight without wearing uniforms.<sup>1</sup> Their operation in civilian clothes facilitates safer clandestine deployment and intelligence collection. It may also increase the element of surprise and reduce collateral damage. Yet, this practice may violate *in bello* rules of international law.<sup>2</sup> Scholarship on the rules of armed conflict often associates this practice with unlawful warfare, with

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<sup>1</sup> On cases of fighting in civilian clothes, see W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 525-39 (2003); GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 221 (2016); IDO ROSENZWEIG, *COMBATANTS DRESSED AS CIVILIANS? THE CASE OF THE ISRAELI MISTA'ARVIM UNDER INTERNATIONAL LAW* 20-26 (2014).

<sup>2</sup> See ROSENZWEIG, *supra* note 1, at 34-35.

treacherous killing (or perfidy), as well as with espionage.<sup>3</sup> If this is even partly correct, undercover warfare entails grave ramifications for combatants. This paper therefore undertakes one clear task: to re-theorize the moral and legal status of undercover warfare.

In current discourse, the normative rationale for the duty to wear uniforms, or at least, sanctions for not wearing them, is typically rooted in the principle of distinction. The most fundamental among *in bello* rules requires that states exclusively target combatants and military objects during an armed conflict.<sup>4</sup> Accordingly, current scholarship in international law establishes the duty to wear uniforms as necessary to the application of the principle of distinction. This paper offers instead, a new approach to the normative reasoning for this duty. I argue that it should be based on the new alternative principle of accountability, which I contend to be fundamental to the rules of armed conflict.<sup>5</sup>

If the new international law scholarship is correct, customary international law reflects a rational choice of states.<sup>6</sup> Were undercover warfare a consequentially undesired practice, states would have amended the practice and the norm, rather than maintaining such an inefficient norm. Accordingly, states are expected to prefer a high rather than a low level of compliance with customary international law as a rational choice. As International Humanitarian Law (IHL) mostly reflects customary norms, the conclusion is that states have a strong preference for high level of compliance with IHL.<sup>7</sup>

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<sup>3</sup> See *id.*; Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L REV. RED CROSS 93, 106, 120-121 (2004); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 266-68 (2016); Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters' Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765, 786-88 (2011); SOLIS, *supra* note 1, at 221; Parks, *supra* note 1, at 542; William H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 117 (2003).

<sup>4</sup> On the different meanings of the principle of distinction within the framework of just war theory, see Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152 (2007). On the legal meaning of distinction, see generally DINSTEIN, *supra* note 3, at 72; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

<sup>5</sup> The argument presented in this paper applies to wearing uniforms. In theory, it can similarly apply to military vehicles and buildings, but this paper does not deal with such potential adaptation.

<sup>6</sup> See generally JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) [hereinafter GOLDSMITH & POSNER, LIMITS OF INTERNATIONAL LAW]. For a focused and earlier version of the argument, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 UNIV. CHI. L. REV. 1113 (1999) [hereinafter Goldsmith & Posner, *Theory of Customary International Law*].

<sup>7</sup> This paper addresses the meaning of state's preferences and with the international (*ex-ante* and *ex-post*) deliberation process in Section III(c).

Unless military activity is minimally transparent, the international community cannot exercise discretion or punish violations of IHL. In a non-transparent environment deviation from IHL carries no cost. As a result, non-transparency in fighting incentivizes deviation from IHL. Transparency therefore, enables accountability that in turn, increases compliance.<sup>8</sup> States, armies, leaders, commanders and combatants must be accountable in order to enable a higher level of compliance with IHL. I argue that the wearing of uniforms serves this goal.

A unit wearing uniforms during an armed conflict, communicates information to the international community to which states and armies are accountable. As a unique and characteristic sign of affiliation, uniforms are practically a visual ID card. By operating in uniforms, a military unit, in most cases, communicates *who did what, when, where and how*. Accordingly, in fighting terror, lawful combatants need not necessarily wear uniforms in order to fulfill the duty of accountability. As such, I argue that other available techniques for guaranteeing transparency and accountability allow elite combatant to fight without uniforms while still meeting the requirements of *in bello* rules.

A limit must nonetheless be marked between various lawful undercover combatants to distinguish them from unlawful undercover combatants and agents.<sup>9</sup> The guideline of accountability can distinguish lawful undercover combatants in the fight against terror from spies or perfidious killers, preserving their right to POW status. In order to determine accountability and lawful cover, I show that undercover activity reflects a whole continuum, contrary to its dichotomous representation in IHL literature. On this continuum only deep undercover activity that is fraudulent, crosses the normative border between lawful *shallow* cover and an unlawful *deep* cover. For only fraudulent *deep* cover evades accountability.

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<sup>8</sup> On transparency concerning ad-bellum intentions and its importance to maintaining reasonable level of peace and cooperation in the international sphere, see Raphael Bitton, *The Legitimacy of Spying Among Nations*, 29 AM. U. INT'L L. REV. 1009 (2013).

<sup>9</sup> On various methods of covert action, see W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 10-12 (1992). On the theory, structure, and use of special forces, see generally ALASTAIR FINLAN, SPECIAL FORCES, STRATEGY AND THE WAR ON TERROR: WARFARE BY OTHER MEANS (2009) (discussing the theory of using special forces in anti-terror operations); J. RANSOM CLARK, AMERICAN COVERT OPERATIONS: A GUIDE TO THE ISSUES (2015) (discussing the history of American use of special forces, including in covert activity); Alastair Finlan, *Warfare by Other Means: Special Forces, Terrorism, and Grand Strategy*, SMALL WARS & INSURGENCIES, Spring 2003, at 92 (discussing the importance of special forces in the war on terror).

Part I of this essay presents the traditionally understood doctrinal duty to wear uniforms in fighting, rooted in the principle of distinction. Part II demonstrates the insufficiency of this principle as a normative basis. It advocates instead, accountability as a new and superior normative basis. Part III describes the nature of accountability in the international sphere. Part IV analyzes theoretical relations between uniforms and accountability. Part V offers an argument for understanding cover as a continuum as opposed to a dichotomy and defines the point at which cover becomes unlawful. Part VI analyzes the potential application of the paper's argument in reference to guerilla and unlawful combatants.

## II. THE LEGAL DUTY TO WEAR UNIFORMS

Surprisingly, war conventions include no formal duty to wear uniforms in combat. Rather, this duty is commonly seen as customary.<sup>10</sup> Failure to fulfill this duty does not therefore, in and of itself, constitute an international crime. The practices of states on this matter is puzzling. On one hand, many states have employed undercover tactics at some point in their modern military history.<sup>11</sup> On the other hand, combatants not dressed in uniforms are exposed to significant legal hazards. Operation in civilian clothes can jeopardize elite soldiers' POW (Prisoner of War) protection in spite of their being regular combatants.<sup>12</sup> If caught by a hostile party in a hostile territory, undercover combatants may be viewed as spies or saboteurs.<sup>13</sup> When involved in the killing or injury of an enemy combatant, they might be deemed responsible for the crime of perfidious killing.<sup>14</sup>

Each alternative status, whether that of a spy, a saboteur or a perfidious killer, entails grave consequences. Spies and saboteurs are

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<sup>10</sup> ROSENZWEIG, *supra* note 1, at 27-33; Pfanner, *supra* note 3, at 104; SOLIS, *supra* note 1, at 222.

<sup>11</sup> For a detailed account of recorded cases of employing combatants in civilian clothing, see Parks, *supra* note 1, at 545-60.

<sup>12</sup> See generally *Ali v. Public Prosecutor* [1969] 1 AC 430 (PC); *Prosecutor v. Kassem*, 42 I.L.R. 470 (Isr. Mil. Ct. at Ramallah 1969); see also SOLIS, *supra* note 1, at 196-97; DINSTEIN, *supra* note 3, at 54-55.

<sup>13</sup> See generally *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>14</sup> Hague Convention Respecting the Laws and Customs of War on Land Annex art. 23(b), (c), Oct. 18, 1907, 36 Stat. 2277, 6 U.S.T. 3516 [hereinafter Hague Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 37(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Conventions Additional Protocol I]; Rome Statute of the International Criminal Court art. 8(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

denied POW status.<sup>15</sup> Consequently, they are not guaranteed POW protection from enemy domestic criminal proceedings.<sup>16</sup> Detained undercover combatants, may thus face severe criminal charges. In most states, espionage is among the most severely punishable criminal offences.<sup>17</sup> In some cases, this may even entail capital punishment. The fate of saboteurs is likewise no exception.<sup>18</sup>

A combatant accused of perfidious killing faces an even greater risk. Espionage is not considered an international crime, although spies are denied legal protection from domestic criminal charges.<sup>19</sup> However, perfidious killing constitutes a severe war crime. The perfidious combatant not only risks deprivation of POW status but may be responsible for commission of a war crime.

Perfidious or treacherous killing is defined formally in various sources in international law.<sup>20</sup> Article 23(b) to the Hague Regulations, for instance, forbids to kill or wound treacherously individuals belonging to a hostile party.<sup>21</sup> Whether defined as perfidy or treachery, the basic elements of this international crime similarly involve an illegal ruse of war. Illegality is based on the abuse of a protection afforded by international law.<sup>22</sup> One example would be an operation to kill a person involving the abuse of the special status of an ambulance. "Feigning of

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15 Hague Convention, *supra* note 14, art. 30; Geneva Conventions Additional Protocol I, *supra* note 14, art. 46. Article 5 to the Geneva Convention IV determines that a suspected spy or saboteur is deprived of protection from prosecution afforded to POW. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

16 The severe legal treatment of spies is demonstrated by Geneva Convention IV. It allows, subject to a criminal process, to impose capital punishment on spies, in accordance with the domestic criminal code of the party that arrested the suspect. Geneva Convention IV, *supra* note 15, art. 68.

17 *See, e.g.*, Espionage Act, 18 U.S.C. §§ 792–799 (2012); *see also* 10 U.S.C. § 801 (2012).

18 *See Ex parte Quirin*, 317 U.S. 1 (1942).

19 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 655–56 (James Brown Scott, ed., Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646); EMMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* bk. III, ch. X § 179 (Liberty Fund 2008) (1758); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 561–70 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

20 Hague Convention, *supra* note 14, art. 23(b); *see also* Geneva Conventions Additional Protocol I, *supra* note 14, art. 37(1); Rome Statute, *supra* note 14, art. 8(2).

21 Hague Convention, *supra* note 14, art. 23(b). The Additional Protocol uniquely includes within perfidy operations that are targeting the capture of a person. Geneva Conventions Additional Protocol I, *supra* note 14, art. 37(1). And yet, the Additional Protocol is not considered to be reflecting customary international law on the matter. As such, it is binding upon member states only. *See* DINSTEIN, *supra* note 3, at 266.

22 *See* DINSTEIN, *supra* note 3, at 266.

civilian status” might also be considered a form of killing through treachery.<sup>23</sup> Thus, soldiers deployed for a military operation to kill or wound a person while dressed as civilians risk committing the international crime of treacherous killing.

A theoretical analysis of combat operation in civilian clothes may assist in understanding these overlapping and unclear scenarios, statuses and norms in more orderly fashion. Currently, while regular combatants operating out of uniforms may lose protections and be subjected to domestic and international prosecution, elite combatants using advanced stealth techniques while wearing uniforms, remain protected.<sup>24</sup> We need to understand why combatants of different orders that both act covertly, face extremely different normative responses. Furthermore, we need to understand at what point a covert method crosses the line to unlawfulness and results in the deprivation of POW protections. The first step in creating clarity is to establish a coherent normative basis for the duty to wear uniforms in combat.

### III. A NEW NORMATIVE GROUND – ACCOUNTABILITY

#### *A. The Insufficient Argument of Distinction*

In this section, I argue for a new rationale for the duty to wear uniforms in battle: to ensure accountability of states and armies with regard to IHL. In current literature on the rules of armed conflict, the requirement to wear uniforms in combat is most commonly rooted in the principle of distinction.<sup>25</sup> This principle requires that only combatants and military objects be legitimate targets for any military use of force.<sup>26</sup> For instance, soldiers, tanks and military bases are all legitimate targets while civilians or residential buildings are not. How this relates to the duty to wear uniforms seems clear. Unless combatants mark themselves as such,

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<sup>23</sup> “Feigning of civilian status” is one of the forms of perfidy according to Geneva Conventions Additional Protocol I, *supra* note 14, art. 37(1); DINSTEIN, *supra* note 3, at 267.

<sup>24</sup> See generally Ali v. Public Prosecutor [1969] 1 AC 430 (PC); ROSENZWEIG, *supra* note 1, at 32-34; see also Pfanner, *supra* note 3, at 106, 120-21; Blank, *supra* note 3, at 786; Parks, *supra* note 1, at 541-42.

<sup>25</sup> See SOLIS, *supra* note 1, at 221; Parks, *supra* note 1, at 523; Pfanner, *supra* note 3, at 106; DINSTEIN, *supra* note 3, at 198-227; Ferrel, *supra* note 3, at 102, 105.

<sup>26</sup> The Hague and Geneva treaties did not formally anchor the principle of distinction, yet, it is commonly considered to be a customary rule. See Blank, *supra* note 3, at 770. Two major cases expressly determine distinction’s customary origin. First, is the Tadic case of the ICTY. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96–127 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Second, is the ICJ’s advisory opinion on nuclear weapons. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

their adversaries seem unable to meet the requirement of distinction. If one cannot tell whether a person during an armed conflict is a combatant or a civilian, one cannot avoid targeting civilians. This article aims to shake this trivial reasoning for the duty to wear uniforms in combat.

A different kind of moral treatment of uniforms lies in limiting their normative importance. Kutz, for instance, argues that wearing uniforms should not be a constitutive element in enjoying legal POW protection.<sup>27</sup> Instead of explaining the duty to wear uniforms, Kutz lowers its importance and restricts its scope.<sup>28</sup> For Kutz, what matter for combatants' legal protection is not if they are in uniforms. Instead, he uses the criteria of fighting for a political cause and as part of a collective glued by political association.<sup>29</sup> Kutz finds his approach to be consistent with Additional Protocol I.<sup>30</sup> Apparently, the Protocol's non-customary rule eases the duty to wear uniforms of irregular combatants. It seems to be minimizing combatant's duty to carrying arms openly during the battle itself, as opposed to preliminary phases of deployment.<sup>31</sup> I deal with Kutz's argument in later sections of this article. And I discuss first the argument of distinction.

The common practice of wearing military uniform in armed forces predates the customary principle of distinction.<sup>32</sup> The requirement to wear uniforms therefore, served, and still serves, goals other than to enable the application of the principle of distinction. The use of a homogeneous dress-code in armies promotes military discipline, uniformity, equality and even pride and thus motivation and morale. It also promotes efficiency in employing the clothing most fit for combat missions. Armies wear uniforms in combat to facilitate immediate friend-foe classification. Combatants can easily identify enemies based on visual irregularity in comparison to their own army's uniforms. Uniforms also

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<sup>27</sup> See Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 148, 179 (2005).

<sup>28</sup> *Id.* at 148-80.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Geneva Conventions Additional Protocol I, *supra* note 14, art. 44(3).

<sup>32</sup> See Pfanner, *supra* note 3, at 93-99 (discussing the history and use of uniforms by armies.). On the use of uniforms, see generally MARTIN BRAYLEY, CAMOUFLAGE UNIFORMS: INTERNATIONAL COMBAT DRESS 1940-2010 (2009); GEOFFREY PARKER, THE MILITARY REVOLUTION: MILITARY INNOVATION AND THE RISE OF THE WEST, 1500-1800, at 71-72 (1996); Nathan Joseph & Nicholas Alex, *The Uniform: A Sociological Perspective*, 77 AM. J. SOCIOLOGY 719 (1972) (discussing the sociological meaning of uniforms and what they communicate); Sharon Peoples, *Embodying the Military: Uniforms*, 1 CRITICAL STUD. IN MEN'S FASHION 7 (2013) (discussing the esthetic evolution of uniforms); Jennifer Craik, *The Cultural Politics of the Uniform*, 7 FASHION THEORY 124 (2003) (discussing the symbolism in uniforms).



may deter the enemy by demonstrating power and professionalism. Another major function of uniforms is operational camouflage. Uniforms are designed to assimilate combatants into the surrounding terrain and impede enemies from detecting and targeting them. Yet these are all *practical* grounds contrary to the principle of distinction that is offered as a *normative* ground for wearing uniforms. The principle of accountability offers an alternative normative ground.

Consider a hypothetical armed conflict between State A and State B. Based on the common rationale for the duty to wear uniforms, the combatants of Army A wear uniforms so that combatants of Army B can target them while avoiding the civilians of State A. And yet, what if some of the soldiers of Army A wear the uniforms of Army B during the armed conflict against State B? Apparently, in this case, the principle of distinction is not undermined.<sup>33</sup> As the combatants of A are easily identified as combatants and not as civilians, their use of B's uniforms does not violate the principle of distinction.

Two counter arguments may be used to demonstrate that the principle of distinction is actually undermined in this scenario as well. First, the principle of distinction requires that one not only be able to recognize a combatant as such, but also needs to be able to identify combatants as enemies.<sup>34</sup> Second, a related chivalry-based interpretation of distinction reflects the idea that the rules of distinction do not allow an unfair advantage in fighting.<sup>35</sup> A combatant of Army A that wears the uniform of Army B exploits such an unfair position. As a combatant, he can harm B's combatants that mark themselves as such. However, his false military identity reduces chances of such soldier being harmed by B's soldiers. For now, and provided that "distinction" means identification as an enemy combatant and not merely as a combatant, then this example does not necessarily shake the principle of distinction as a

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<sup>33</sup> From the doctrinal perspective, current *in bello* rules seem to prohibit such conduct. See Hague Convention, *supra* note 14, art. 39(1)-(2).

<sup>34</sup> One can argue that allowing such practice might incentivize the adversary to act similarly. Interestingly, we are not equally concerned when we think of an unlawful combatant. It is the characteristic of an unlawful combatant not to be identified. As a result, when fighting against such unlawful combatant without uniforms, one is not concerned by the possibility that the unlawful combatant will retaliate by not wearing uniforms.

<sup>35</sup> According to some consequentialist approaches an efficient norm and a just (Rawlsian) norm largely, if not entirely, overlap. Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, 70 J. PHIL. 245, 255 (1973); John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594, 605-06 (1975). I personally consider both to be different types of consequentialism, as I find Rawls's maximin principle to be a specific utility function.

normative underpinning to the duty to wear uniforms in warfare. I will now suggest an amended version of this scenario.

In the same hypothetical armed conflict between State A and State B, assume that soldiers of Army A wear uniforms of Army C, while C is hostile to B.<sup>36</sup> In this case, distinction cannot serve as a reasonable basis for rejecting such practice. The principle of distinction is not undermined as the soldiers of Army B can easily detect hostile combatants and tell them apart from civilians of any sort. Apparently, even a chivalry-based duty to wear uniforms in combat is not violated. This scenario does not demonstrate an element of unfairness when one party to the conflict can harm others yet avoids being harmed as a result of a false military pretense.

Naturally, we feel that such a scenario reflects an undesired practice. But then, if such a scenario does not reflect a violation of the principle of distinction, what brings us to the intuitive conclusion that this is an undesired uniform-related practice of combatants? Clearly, this scenario suggests that there is more behind the duty to wear uniforms than simply the principle of distinction.

Consideration of additional *in bello* rules further weakens distinction as a normative basis for the duty to wear uniforms. Common *in bello* perception is that in addition to carrying arms openly, combatants need to be marked with distinctive military emblems.<sup>37</sup> If the only basis for wearing uniforms is the principle of distinction, namely to allow for a quick classification of a potential target as either enemy-combatant or civilian, wearing uniforms and carrying arms openly should be sufficient. When one carries arms openly and wears uniforms, there is no apparent need for further information or additional sign to determine the enemy-combatant character, which should be sufficient in satisfying the requirement of distinction.

The amended scenario, in which soldiers of State A wear uniforms of State C during an armed conflict with State B, and in which C is also

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<sup>36</sup> For instance, as part of their engagement in Syria, Iranian forces fight in coalition with the forces of the hosting Syrian regime. And yet, as the Israeli army finds both to be enemy combatants, it is Israel's policy to selectively attack the Iranian presence in Syria with the intention of preventing their attempt to use Syria as a jumping board to Israeli territory. It is reported that due to the selective Israeli attacks, Iranian forces are now wearing the uniforms of the regular Syrian army. See Raja Abdulrahim, *Iran-Backed Fighters Switch to Syrian Uniforms to Avoid Israeli Strikes, Rebels Say*, WALL ST. J. (June 8, 2018, 1:19 PM), <https://www.wsj.com/articles/iran-backed-fighters-switch-to-syrian-uniforms-to-avoid-israeli-strikes-rebels-say-1528478351>.

<sup>37</sup> See Hague Convention, *supra* note 14, art. 1(2); Geneva Conventions Additional Protocol I, *supra* note 14, art. 4(A)(2)(b); see also Pfanner, *supra* note 3, at 106-08; DINSTEIN, *supra* note 3, at 51-53; see, e.g., *id.* at 59 (Dinstein's application of the rule in the case of Al-Qaida's combatants in Afghanistan).

an adversary of B, suggests an additional duty regarding uniforms. We expect the soldiers of State A to wear their own uniforms although wearing C's uniforms seems to be sufficient from the perspective of distinction alone. Clearly, in this scenario there is an alternative or an additional normative basis for such duty to wear uniforms and its scope, as we intuitively view it. I argue that the alternative basis for the legal requirement to wear uniforms in combat is the principle of accountability.

This argument requires explanation. What is the link between wearing uniforms in combat and accountability? And what does accountability really mean, if it has any meaning at all, in the chaotic sphere of international relations? And why should states seek to enhance accountability for compliance with *in bello* rules to begin with? Some of these questions are addressed in sections of this paper below. But a preliminary understanding of accountability in general and of accountability in the global sphere is required at this juncture.

### *B. Uniforms, Transparency and Accountability*

There are various contexts and meanings of accountability.<sup>38</sup> It is primarily used in the domestic sphere. In the literature on accountability, one sense of accountability is active. One is *actively* accountable if one reports information about its acts and decisions to some (typically higher) official or institution. Accountability may also be *passive*. It involves some form of discretion and action on the part of the entity to which one is accountable and in response to information regarding the actions for which one is accountable.<sup>39</sup>

Officials practice *active* accountability when they report to their superiors on decisions or acts undertaken. The superiors then may practice some sort of *passive* accountability if and when they deliberate about the information they received. They may, for example, take action against the accountable subordinate if they find the information unsatisfying and actionable.

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<sup>38</sup> See generally Deirdre Curtin & André Nollkaemper, *Conceptualizing Accountability in International and European Law*, 36 NETH. Y.B. INT'L L. 3 (2005); Vincent Mabillard & Raphael Zumofen, *The Complex Relationship Between Transparency and Accountability: A Synthesis and Contribution to Existing Frameworks*, 32 PUB. POL'Y & ADMIN. 110 (2017); Staffan I. Lindberg, *Mapping Accountability: Core Concept and Subtypes*, 79 INT'L REV. ADMIN. SCI. 202 (2013); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005); Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39 (2008); Robert O. Keohane, *Accountability in World Politics*, 29 SCANDINAVIAN POL. STUD. 75 (2006).

<sup>39</sup> Mabillard & Zumofen, *supra* note 38, at 2; Curtin & Nollkaemper, *supra* note 38, at 4, 7-10.

I argue that the wearing of uniforms in combat promotes accountability in its basic and active form. It constitutes a method for indirect reporting of an act. The military unit, as an organ of its governing state, reports by the very act of wearing uniforms. It discloses its national affiliation. The look of the uniforms actively reports the nature and, in many cases, the specific identity of the particular unit. It also indirectly reports actions in reference to a specific time and place. When a unit of Army A takes over a town of State B, the very look of its uniforms signals *who* entered the city, *when*, *where* and *how*. Uniforms in war identify and disclose.<sup>40</sup> And identification and disclosure have to do with accountability. This unintuitive link requires further explanation.

The chain that links identification with accountability is transparency.<sup>41</sup> As accountability is primarily a liberal concept with regard to domestic government, it is no wonder that in recent years transparency has been established as a fundamental goal for liberal governments.<sup>42</sup> For it is clear that no government can be held accountable for acts of which the public is unaware. Transparency in government therefore, has two main goals. Its application reduces improper government actions. The awareness of a government official that information about her acts becomes public domain, can lead to ex-ante reconsideration of her actions. Similarly, people behave differently in places where cameras are placed.

A second function of transparency in domestic government is the exposure of acts that were not avoided or reconsidered through ex-ante awareness. As the public learns of an act, the public deliberates and scrutinizes the transparent act. Public opinion then reshapes the boundaries of future conduct. By accepting some practices and rejecting others, the public continuously and dynamically reshapes the legitimate limits of a leader's future practices.

This second way in which transparency affects a leader's conduct reflects the potential sanction by a higher authority that transparency can bring about. In this case, the higher authority is obviously the people. This is a version of passive accountability, where the higher authority exercises discretion with regard to information that was *actively* made transparent to it by the agent it oversees.

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<sup>40</sup> See Pfanner, *supra* note 3, at 93 ("Military uniforms are intended to demonstrate that their wearers belong to the armed forces of a State.").

<sup>41</sup> See generally Mabillard & Zumofen, *supra* note 38.

<sup>42</sup> See Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999, at 115 (Matthew J. Gibney ed., 2003); Richard Mulgan, 'Accountability': An Ever-Expanding Concept?, 78 PUB. ADMIN. 555 (2000).

This domestic analogy invites several objections. First, it seems based on notions of transparency and accountability that are mostly related to a liberal concept of government. Under a tolerant approach to a theory of international relations, principles of global justice should be acceptable to a diverse international community of both liberal and illiberal states.<sup>43</sup> Second, international relations seem to recognize no *passive* form of accountability. States do not have an objectively real “higher” authority to which they are expected to be accountable. No higher authority seems to exercise discretion once the act of a state becomes transparent. Consequently, there is no apparent punishment associated with what may be perceived by the higher authority (had there been one) to be an improper act. A discussion about the applicability of accountability and transparency in the international sphere is therefore imperative.

#### IV. ACCOUNTABILITY IN INTERNATIONAL RELATIONS

##### *A. The Relevance of Global Accountability*

While intuitively, the concept of accountability may seem irrelevant to international relations, a closer look leads to a different conclusion. The nearly-chaotic international sphere indeed lacks central government and institutions to which states can be held accountable. And as mentioned, even were there such a central authority, some form of superior response concerning the accountable state seems impractical. However, a deeper look leads to a different conclusion. The concept of accountability may be applied in the sphere of international relations in spite of initial intuition. The rules of state’s responsibility are one example.<sup>44</sup> These rules aim to determine when a state is accountable for various acts and consequences.<sup>45</sup>

International law also embraces accountability as a broad concept. For instance, it has created structural accountability for states in the

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<sup>43</sup> Bitton, *supra* note 8, at 1030-36; *see generally* JOHN RAWLS, POLITICAL LIBERALISM 230 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; JOHN RAWLS, THE LAW OF PEOPLES: WITH “THE IDEA OF PUBLIC REASON REVISITED” 59-61 (2001) [hereinafter RAWLS, LAW OF PEOPLES]; Kok-Chor Tan, *Liberal Toleration in Rawls’s Law of Peoples*, 108 ETHICS 276 (1998); Kok-Chor Tan, *The Problem of Decent Peoples*, in RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA? 76 (Rex Martin & David A. Reidy eds., 2006).

<sup>44</sup> Curtin & Nollkaemper, *supra* note 38, at 5.

<sup>45</sup> Article 1 to the rules of state responsibility sets the fundamental concept that states are accountable for wrongful acts and for violations of international law; *see* Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 31 (2001).

application of environmental accords as well as human rights treaties.<sup>46</sup> These treaties often include mechanisms for reporting and for complaint with regards to compliance.<sup>47</sup> The conclusion is clear – international law incorporates mechanism for enhancing accountability. It does so by encouraging active accountability driven by disclosure of information regarding states' actions and resolutions. But a question remains – to whom are states accountable?

This question relates to a longstanding debate in the ethics of international relations. The lack of central institutions in the international sphere led many versions of realism to the conviction that binding international norms are an impractical phenomenon or at least a weak one.<sup>48</sup> In a nutshell, a classic realist would argue that as states are rational, egoistic and in fierce competition, a state that prefers an international norm over its interest substantially harms itself and yet is expected to marginally improve reality, as the other states are not expected to follow due to egotism and ineffective enforcement. In shaping his concept of just war theory, Michael Walzer argued against this view.<sup>49</sup> Accepting some of the realist presumptions regarding international reality, Walzer nonetheless draws different conclusions.<sup>50</sup> Rather than concluding that the lack of central authority exempts all states from subjection to international norms, Walzer argues that *all* states should both legislate and enforce international norms.<sup>51</sup> For instance, Walzer's legalist paradigm leads to a duty upon all nations to enforce the prohibition against aggression.<sup>52</sup> This is a conceptual approach that views the international norm as a law of a community as each member of the community (a state) is responsible for taking part in both framing the rules and in their enforcement. And still, as any law of a community, it is an undeveloped, politically-driven and inefficient system of law.<sup>53</sup>

<sup>46</sup> See ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 28–58 (2014) (providing various mechanisms of accountability in international law and their (sometimes low) efficiency).

<sup>47</sup> Curtin & Nollkaemper, *supra* note 38, at 6. This view is consistent with David Kretzmer.

<sup>48</sup> See, e.g., Steve Forde, *Classical Realism*, in *TRADITIONS OF INTERNATIONAL ETHICS* 62 (Terry Nardin & David R. Mapel eds., 1999); REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* xi-xiii (2001); MICHAEL J. SMITH, *REALIST THOUGHT FROM WEBER TO KISSINGER* 2-3 (1986); Jack Donnelly, *Tentieth-Century Realism*, in *TRADITIONS OF INTERNATIONAL ETHICS* 85 (Terry Nardin & David R. Mapel eds., 1999).

<sup>49</sup> MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 7-20 (1977).

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 58-59.

<sup>52</sup> See *id.* at 58-63.

<sup>53</sup> See generally Goldsmith & Posner, *Theory of Customary International Law*, *supra* note 6.

Taking Walzer's approach, I argue that states are actively accountable to the international community: "Accountability may be rendered to states as such, but also to individuals or private entities. At the same time, it is becoming increasingly salient to think of accountability in much broader terms to the public in general (public accountability) or to a sub-set thereof, for example the international community."<sup>54</sup> Accountability, at least in its *active* form, is therefore relevant to the international sphere. And it is applied in a form that holds every state accountable to other states and to the entire international community.

### B. Punishing Violations

Every transparent act of a state triggers some level of international response ranging from the most severe international measures to no response at all. In response to a state violation of international law, the international community in whole or in part, may impose economic sanctions including restrictions on transportation, commerce, cultural and even sporting events.<sup>55</sup> In extreme cases, a military threat or the use of military force may be applied.<sup>56</sup> And yet, the international community or

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<sup>54</sup> Curtin & Nollkaemper, *supra* note 38, at 10.

<sup>55</sup> Historical examples to non-forceful sanctions include the economic sanctions on the apartheid regime of South Africa. For an internationally moralistic account of the sanctions on South Africa, see Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa*, 49 INT'L ORG. 451 (1995). For a less optimistic account, see Philip I. Levy, *Sanctions on South Africa: What Did They Do?*, 89 AM. ECON. REV. 415 (1999). On the wide sanctions regime on Libya in demand for extradition of the perpetrators of the Lockerbie attack, see Stephen D Collins, *Dissuading State Support of Terrorism: Strikes or Sanctions? (An Analysis of Dissuasion Measures Employed Against Libya)*, 27 STUD. IN CONFLICT & TERRORISM 1 (2004) (discussing the efficiency of the sanctions imposed on Libya). For a legal analysis of the sanctions on Libya, see Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law*, 14 MICH. J. INT'L L. 222 (1992). For an international relations perspective, see Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003*, 59 INT'L ORG. 495 (2005). On the nearly total sanctions on Iraq in response for its invasion of Kuwait see Christopher C. Joyner, *United Nations Sanctions After Iraq: Looking Back to See Ahead*, 4 CHI. J. INT'L L. 329 (2003) (Offering a legal and an efficiency analysis of the sanctions on Iraq). On the sanctions on Iran in the effort of stopping its alleged military nuclear project see KENNETH KATZMAN, *ACHIEVEMENTS OF AND OUTLOOK FOR SANCTIONS ON IRAN* (2014). For reestablishment of the sanctions, see Exec. Order 13,846, 83 Fed. Reg. 38,939 (Aug. 6, 2018). For a boycott of the 1980 Olympic games in Russia, in protest of its invasion to Afghanistan, see David B. Kanin, *The Olympic Boycott in Diplomatic Context*, 4 J. SPORT & SOC. ISSUES 1 (1980). For literature on non-forceful sanctions, see generally Tom C.W. Lin, *Financial Weapons of War*, 100 MINN. L. REV. 1377 (2015); Lance Davis & Stanley Engerman, *History Lessons: Sanctions-Neither War Nor Peace*, 17 J. ECON. PERSP. 187 (2003).

<sup>56</sup> The prominent cases of forceful action against alleged violations of international law includes Operation Desert Storm against Iraqi occupation of Kuwait and the US-led invasion of

at least some of its members, continuously apply this passive accountability in many other forms, such as the application of diplomatic pressure, or by withholding some cooperative activity or foreign aid and even through public criticism.<sup>57</sup> These punitive methods are all among states and against states. They hold states accountable for wrongdoing ascribed to them. Another method of accountability is through personal sanctions, such as prosecution in an international criminal tribunal. However, these occasions are quite rare and seem largely ineffective.<sup>58</sup> Therefore, when I discuss accountability in terms of a sanction or a punishment for state wrongdoing, I mainly refer to sanctions by states and against states.

The international community, in whole or in part, can only punish acts that become known. Transparency, in this sense, is a necessary precondition for the international community's ability to assess state actions and consider a response. Transparency of state actions is therefore a necessary instrumental condition for triggering some form of a state's *passive* accountability towards the international community.

This obviously does not mean that the international community applies a perfect or even a successful mechanism of passive accountability. In many cases, violations by a state go unpunished. International indifference is frequently the rational option. And naturally, not all states are equally exposed to this mechanism of passive international accountability. But regardless of its deficiencies and its dependency upon states' interests and utility, it is nonetheless a structure of international accountability. And it requires transparency as a trigger.

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2003. For more information on both wars, see JAMES DEFRONZO, *THE IRAQ WAR: ORIGINS AND CONSEQUENCES* 99-126, 127-170 (2018). Another example is the NATO intervention in former Yugoslavia. See PAUL LATAWSKI & MARTIN A. SMITH, *NATO, Kosovo and 'Humanitarian Intervention'*, in *THE KOSOVO CRISIS AND THE EVOLUTION OF POST-COLD WAR EUROPEAN SECURITY* 1-38 (2018). Additional examples include the British and French-led NATO intervention against Ghadaffy's army in Libya during the 'Arab Spring', see Christopher Fermor, *NATO's Decision to Intervene in Libya (2011): Realist Principles or Humanitarian Norms?*, 8 J. POL. & INT'L STUD. 342 (2012), and the US missile attack against Syria in response to Syrian army use of chemical weapon, see Charlie Savage, *Was Trump's Syria Strike Illegal? Explaining Presidential War Powers*, N.Y. TIMES (Apr. 8, 2017), <https://www.nytimes.com/2017/04/07/us/politics/military-force-presidential-power.html>.

<sup>57</sup> See, e.g., Iana Dreyer & Nicu Popescu, *Do Sanctions Against Russia Work?*, EURO. UNION INST. FOR SEC. STUD. (Dec. 2014), [https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief\\_35\\_Russia\\_sanctions.pdf](https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_35_Russia_sanctions.pdf) (sanctions on Russia for its role in the crisis with Ukraine); JEREMY MAXWELL SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RS22370, U.S. FOREIGN AID TO THE PALESTINIANS (2006) (withholding foreign aid to the Palestinian Authority in attempt to influence Hamas control of Gaza).

<sup>58</sup> On the inefficiency of international criminal tribunals, see POSNER, *supra* note 46, at 54-56.



By arguing that the international community contains some structure of accountability, I do not suggest that there is a global system of government that applies accountability in the same form or scope as within domestic system of government in liberal states. For some liberal states, transparency and accountability are of the main pillars of their system of government. In contradistinction, accountability in international law is a practical means that serves ends such as maintaining minimal compliance with customary international law.

### *C. Accountability in a Tolerant Global Justice System*

Another related obstacle to the proposed argument is connected to perceptions of global justice. Accountability in general, and accountability through transparency in particular, seem to be purely liberal concepts. If this is the case, then the proposed concept of a duty to wear uniforms as a means to promote accountability, will likely be rejected by illiberal states.<sup>59</sup> Arguing for a liberal *in bello* concept as part of a system of global justice might amount to an imperial liberal concept of international law. Such a view would be in error.

The concept of accountability I propose here does not impose any liberal or partly liberal domestic system of government on nations. It does not even require illiberal states to adapt a liberal-based concept. For accountability based on the proposed argument is merely a practical notion rather than a concept of public good. By being asked to fight wars under a duty to wear uniforms, the proposed concept is expected to enhance the efficiency of international law. As it promotes compliance, it encourages states to accept international rules that regulate war. It facilitates monitoring compliance with such *in bello* norms. And it does this without forcing the states to accept a value-based rule.

In the case of continuous compliance, the structured mechanisms for accountability support the emergence and stability of the norm. In case of a violation by a state, this increases the potential cost for the violating state. As such, it serves as an incentive mechanism of enforcement of *in bello* rules. This instrumental depiction of the proposed concept of accountability allows an illiberal state to accept it regardless of accountability's association with its liberal and domestic version. The international version of accountability carries a purely instrumental

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<sup>59</sup> On the presumed objection of illiberal states to liberal concepts of global justice (due to these concepts constituting a threat to these states' political or religious doctrine), see Bitton, *supra* note 8, at 1037.

value, rather than an intrinsic value.<sup>60</sup> And it does not undermine any of the illiberal states' political or religious doctrines.

In discussing the acceptance of a norm by states, I should make an important clarification about acceptance *ex-post* and *ex-ante* in context of global justice. One concept of global justice may dictate that the preferred norm is the most efficient norm in reference to a global or an individual calculation of costs and benefits. It is an *ex-post* acceptance of a norm as a state can similarly accept it before and after a certain hypothetical deliberation process among states. Another manner of accepting a norm requires some *ex-ante* deliberation process. One such prominent view of global justice is the Rawlsian deliberation process as presented in Rawls' Law of Peoples.<sup>61</sup> According to this view, states can only agree on the just norm through a hypothetical deliberation process within the Rawlsian original position.<sup>62</sup> I will not describe in detail the possibility of accepting the principle of accountability through this process as it is beyond the scope of this paper.<sup>63</sup> However, I argue that nothing hinders representatives of peoples to accept the principle of accountability as it does not contradict any of the types of peoples' fundamental interests. When a hypothetical representative of a people deliberates within the Rawlsian original position, even in the case of representing an illiberal people, the representative knows that accountability, in its international form, does not contradict its nation's fundamental interest in preserving its political or religious doctrine.<sup>64</sup> States therefore, including illiberal states, can accept international accountability.

#### D. States' Preference for Accountability

A fundamental question still hangs over the entire argument: why should states elect to promote the principle of accountability to begin with? We could easily assume that with every scenario of a violation there is a violating state that rationally elects to avoid compliance with *in bello*

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<sup>60</sup> In section III(d), *infra*, I argue why accountability for compliance with IHL is a purely instrumental means. As such, it has no intrinsic value of its own.

<sup>61</sup> See generally RAWLS, LAW OF PEOPLES, *supra* note 43.

<sup>62</sup> See *id.*

<sup>63</sup> For an example of the application of a deliberation process by the use of a maximin function within the original position, see Bitton, *supra* note 8; Thomas W. Pogge, *The Incoherence Between Rawls's Theories of Justice*, 72 FORDHAM L. REV. 1739 (2003); Allen Buchanan, *Taking the Human Out of Human Rights*, in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA? 150 (Rex Martin & David A. Reidy eds., 2006).

<sup>64</sup> Rawls argues for a separate original position for liberal and for illiberal peoples. I wrote against this view elsewhere, although it has rare practical implications, if any. See generally Bitton, *supra* note 8.

rules and hence to avoid accountability. This question is linked to an even more fundamental question: why do states, in general, follow the rules of customary international law? The answer that the new international law scholarship offers is simple: as states manage their preferences and course of action rationally, it is assumed that states elect to maximize their interests and benefits.<sup>65</sup> Accordingly, states shape and follow the practice that is reflected in customary law because this practice reflects an efficient norm.<sup>66</sup>

Prior to talking about the presumed efficiency of accountability for compliance with IHL rules, a two-part methodological comment will be of assistance. The first part presents the purely instrumental value of the principle of accountability. The second part puts, in light of this conclusion, my entire discussion on why the principle of accountability is efficient and desired to states, in context.

The principle of international accountability and its entailed requirements, could in theory, have an intrinsic or, alternatively, an instrumental value.<sup>67</sup> And it could be characterized by both. I argue that the principle of accountability and consequently the duty to wear uniforms, has a purely instrumental value. One way of showing this instrumental value is to think of its purpose: it is meant to increase compliance with IHL rules by forcing transparency that in turn facilitates enforcement and the punishment of violations of IHL. But what if we imagine a utopian world in which IHL rules are never violated? Will it still be necessary to demand in such world that combatants wear uniforms and that states be accountable?

If there are no violations of IHL rules, there is no need for accountability, for there is nothing for which to hold a state accountable. In such a utopian universe, there is also no need to normatively require combatants to wear uniforms. Recall that wearing uniforms has always served practical goals regardless of IHL rules.<sup>68</sup> For these practical reasons (such as using fit clothes or for camouflage), armies are expected to continue to wear uniforms even in this utopian world. But they will do so for practical reasons and not due to some normative requirement. Assume also that in such a utopian world, uniforms are not needed to avoid targeting civilians, for instance, as a result of long-distance

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<sup>65</sup> See generally GOLDSMITH & POSNER, *LIMITS OF INTERNATIONAL LAW*, *supra* note 6.

<sup>66</sup> See *id.*

<sup>67</sup> On intrinsic and instrumental values, see generally Christine M. Korsgaard, *Two Distinctions in Goodness*, 92 PHIL. REV. 169 (1983).

<sup>68</sup> See *supra* note 32 and accompanying text.

identification technology. Uniforms are not normatively required in such reality.

This point is important in rejecting a potential objection to the proposed argument. One may argue that accountability and distinction are in essence two sides of the same coin. That one (accountability) is merely another form of saying the other (distinction). This thought experiment about a world, where no state violates IHL, answers this objection. If x and y are nothing but identical principles, then one cannot think of a scenario where one principle is necessary while the other is not. In such utopian world, as IHL is not violated, accountability is not necessary. And yet, the concept of distinction still applies, as civilians still cannot be targeted. The inconsistent relevancy of the two principles proves that they are not at all identical. And as I show in Section IV(a), accountability practically serves as a fundamental requirement with the purpose of promoting all IHL principles, *including* distinction. As such, accountability is a broader principle than distinction.

If accountability through the wearing of uniforms carries an instrumental value, there should not be any hindrance to using an alternative means to serve the same goal. When a principle is instrumental in serving a goal, what is important is the goal and not necessarily the cost-effective instrument that serves this goal. The conclusion is therefore that being an instrument that serves accountability, which in turns serves compliance with IHL, various means may be used in serving accountability other than wearing uniforms.

In accordance with my two-part methodological comment, this paper does not seek to prove that IHL rules, including the duty to wear uniforms, represent an efficient norm. I take this presumption as given, because IHL and the duty to wear uniforms reflect mainly customary law.<sup>69</sup> As such, I assume without proof that it reflects states' conduct within an equilibrium.<sup>70</sup> Based on Posner and Goldsmith's argument, I assume that this conduct in equilibrium reflects a rational choice of the states. As I assume that IHL rules, including the duty to wear uniforms in combat, is an efficient practice in equilibrium, the principle of

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<sup>69</sup> On the customary sources of IHL, see generally Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223 (2006). On the customary origins of the duty to wear uniforms in combat, see *supra* note 10 and accompanying text.

<sup>70</sup> Rome Statute, *supra* note 14, art. 38, ¶ 1(b). By definition, this is the meaning of a customary rule. It reflects a consistent conduct of states with regard to certain circumstances. See also GOLDSMITH & POSNER, *LIMITS OF INTERNATIONAL LAW*, *supra* note 6, at 23; ANTONIO CASSESE, *INTERNATIONAL LAW* 156 (2d ed. 2005).

accountability must therefore reflect an efficient means by definition. It increases compliance with an efficient norm by inexpensive means of transparency. As it is an (inexpensive) instrumental means in promoting IHL's application, then once we assume IHL rules (including the duty to wear uniforms) reflect an efficient norm, so too must the principle of accountability be an efficient norm. Although I do not (and based on the instrumental value of accountability I need not) prove the efficiency of accountability, I do show one potential path for doing so.

Posner and Goldsmith manage to explain the emergence of customary international law by proposing four potential scenarios for how customary practice emerges.<sup>71</sup> First, is *coincidence of interests*, where two countries adapt practice x because it is maximizing their payoffs regardless of the actions or reactions of the other state.<sup>72</sup> Second, is *coordination*, where it is better for two countries to adapt practice x provided they adapt it simultaneously and reciprocally.<sup>73</sup> Third is *cooperation*, where states reciprocally refrain from practice x even though it may be beneficial in the short-term, to gain an even greater payoff in the longer term.<sup>74</sup> Fourth is *coercion*, where one state seems to an outside observer as if it is complying with practice x, although it is in fact coerced to do so by another stronger state.<sup>75</sup> Of these four patterns, I believe *in bello* customary rules are a type of a norm that emerges out of a pattern of cooperation.<sup>76</sup>

According to this explanation, states agree to refrain from violating *in bello* rules even when it is in their immediate interest. They do so in order to gain the long-term benefit of avoiding the undesired costs of the potential collapse of the entire *in bello* legal regime. The potential collapse of *in bello* rules might be devastating to states. Even more devastating than what wars already are. If the whole legal concept of distinction, POW status, proportionality, and weapon-prohibition in war collapses, the consequential circles of harm might know no limit. Clearly, it will make war far more harmful than what history has already shown possible. Murdered prisoners of war, demolished hospitals, mass killing of civilians and the use of weapons of mass destruction are all selected potential consequences.<sup>77</sup>

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71 GOLDSMITH & POSNER, LIMITS OF INTERNATIONAL LAW, *supra* note 6, at 26-34.

72 *Id.* at 27-28.

73 *Id.* at 32-34.

74 *Id.* at 29-32.

75 *Id.* at 28-29.

76 On the cooperation as a pattern of emergence of a customary norm, see GOLDSMITH & POSNER, LIMITS OF INTERNATIONAL LAW, *supra* note 6, at 29-32.

77 See R.B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL. & PUB. AFF. 145 (1972).

The conclusion is that states need a solution to a cooperation problem, as in the long-term it is better for all states to give up violating *in bello* rules even when deviation carries an immediate, and lower, benefit. Provided they cooperate, states are expected to respect *in bello* rules and maximize their interests. However, one of the challenges for any cooperation-oriented customary norm is enforcement. The costs of monitoring and punishing violating states might be high. In some cases, too high. And this cost rises exponentially as more parties join the legal regime of the customary norm.<sup>78</sup> This is exactly why states are expected to adapt accountability mechanisms.

Efficient accountability mechanisms reduce the costs of monitoring compliance that is essential for both the emergence and the stability of a cooperation-based customary norm. Posner and Goldsmith hardly deal with the specific customary rules of armed conflict as a solution for a cooperation problem.<sup>79</sup> Due to growing monitoring and enforcement costs, they question the potential of customary international law to solve multinational cooperation problems.<sup>80</sup> However, the rules of armed conflict are unique in the sense that they are constantly applied mostly between pairs or among a small number of belligerent parties. And these belligerent states typically engage in long conflicts as repeated participants. As Posner and Goldsmith show, deviation from the desired rule in stage *n*, might be punished in stage *n*+1.<sup>81</sup> The long-term prospects when obeying IHL, versus the future punishments for deviating once, may lead states to cooperate and observe IHL. Given the limited group to which these rules apply at any point in time, and given the potential for an efficient accountability mechanism, which is essential for punishing deviations, *in bello* rules and the duty to wear uniforms, seem like a potential solution to the cooperation problem in spite of Posner and Goldsmith's doubts.<sup>82</sup>

Naturally, accountability mechanisms do not and cannot guarantee absolute compliance with *in bello* rules. Even within the relatively effective domestic enforcement regime, criminal law is being violated. And as we all know, *in bello* rules are frequently violated. If the new international law scholarship is correct, then violation is determined by

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<sup>78</sup> See GOLDSMITH & POSNER, *LIMITS OF INTERNATIONAL LAW*, *supra* note 6, at 65.

<sup>79</sup> See generally *id.*

<sup>80</sup> See *id.* at 35-39.

<sup>81</sup> See *id.* at 30.

<sup>82</sup> See *id.* at 36.

costs and benefits.<sup>83</sup> International accountability mechanisms can increase the costs of violation. And they can reduce monitoring costs. Occasionally, however, even higher costs of violation prove insufficiently high. This can happen when the violating state feels protected from punishment as in the case of a superpower violating *in bello* rules against a smaller, less “influential” state, when the incentive for other strong states to respond and punish the violator are marginal, or when the costs of punishment exceed its payoffs. It can also happen in a battle for survival, where no future punishment exceeds the value of survival.<sup>84</sup> And still, in a typical conflict of two similarly powerful states, obeying *in bello* rules is the rational choice of both states, provided an accountability mechanism, like wearing uniforms, is in place.<sup>85</sup>

One might also object that arguing for accountability as a normative goal in international law, and hence as a normative basis for certain rules, when seen from a higher and general point of view, is theoretically meaningless. For it is apparently the goal of any field of law that violators of this law be accountable. It is the goal of contract law that individuals in breach of their contractual duties be accountable as it is similarly the goal of criminal law that people who violate the criminal code be accountable for their offenses. Why should accountability in international law be any different?

The international sphere is anarchical in contrast to a typical domestic structure. It is anarchical in the sense that it lacks central institutions of law and enforcement. A central international parliament does not legislate rules. Furthermore, an international court does not settle legal and factual disputes.<sup>86</sup> The whole institutional enforcement system

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<sup>83</sup> For an application of a costs/benefits game theory model of the conduct of states in fighting terror, see Alon Cohen & Raphael Bitton, *The Threshold Requirement in Asymmetric Conflicts: A Game Theory Analysis*, 16 CHI. J. INT'L L. 43 (2015).

<sup>84</sup> See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973) (Walzer's account of Dirty Hands and its limited relevance to a fight for the very existence of a community); Stephen De Wijze, *The Real Issues Concerning Dirty Hands—A Response to Kai Nielsen*, 15 S. AFR. J. PHIL. 4, 149 (1996); Kai Nielsen, *There is No Dilemma of Dirty Hands*, in CRUELTY AND DECEPTION: THE CONTROVERSY OVER DIRTY HANDS IN POLITICS 139 (David Shugarman & Paul Rynard eds., 2000).

<sup>85</sup> States may have an incentive to publicly commit to a norm *x* and in practice, to do the opposite of *x*. See POSNER, *supra* note 46, at 66. This is not the case of *in-bello* rules. The reason is that committing to *x* and doing the opposite of *x* is only possible with regards to treaties. But, when it comes to customary rules, there cannot be a gap between the norm and the long-term practice as the long-term practice constitutes the norm. Amending the practice will eventually amend the norm.

<sup>86</sup> On the anarchical structure of the international sphere and its moral meaning, see Steven Forde, *Classical Realism*, in TRADITIONS OF INTERNATIONAL ETHICS 62 (Terry Nardin & David

is practically absent. This difference is crucial. Domestic legislators make laws that they find to be good laws. In the legislation process they care more about whether these rules are good rather than if the citizens will accept them. In the international sphere, on the other hand, shaping rules in a manner that guarantees the emergence of the rule or compliance with that rule, is a central element of making rules. And accountability, which is so essential for ongoing compliance, uniquely lies for that reason at the heart of customary international law.

I do not argue, and I assume I cannot argue for accountability as the sole normative basis for certain *in bello* rules. The idea that overlapping normative foundations may co-exist makes sense. In this regard, while I argue that the duty to wear uniforms in combat is better explained by the need for accountability, I do not reject that distinction may simultaneously explain this duty, at least in relation to some of the scenarios.

However, even if the two normative sources do co-exist, their relational weight is dynamic. As such, it continuously changes, so that the principle of accountability becomes increasingly important. I see two reasons for this process. First, most recent wars are part of the war on terrorism.<sup>87</sup> In these wars, by definition, the principle of distinction is undermined as one party inherently targets civilian objects. At the same time, these wars are characterized with asymmetric power relations and fighting in proximity to civilian population. This environment calls for limitations on the stronger party that fights a frustrating war. If accountable, as when a person sees an open camera, the strong state will probably comply more strictly with *in bello* rules.<sup>88</sup> A second reason for what I believe to be the growing weight of the principle of accountability, relies on technological changes. Satellite photos, visual intelligence and even the fact that cellphones can broadcast live photos from every military scene, enhance reporting and monitoring of military actions. These technologies therefore enhance accountability by exposing nations that take military actions to immediate international response. Occasionally, this response is simply limited to bad international public

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R. Mapek eds., 1992). For information on modern realism, see Jack Donnelly, *Twentieth Century Realism*, in TRADITIONS OF INTERNATIONAL ETHICS, *supra*, at 85.

<sup>87</sup> See generally *List of Ongoing Armed Conflicts*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_ongoing\\_armed\\_conflicts](https://en.wikipedia.org/wiki/List_of_ongoing_armed_conflicts) (last updated Feb. 3, 2019).

<sup>88</sup> On the legitimacy problem and its affect in the Israeli case, see Raphael Bitton, *In Law We Trust - The Israeli Case of Overseeing Intelligence*, in GLOBAL INTELLIGENCE OVERSIGHT: GOVERNING SECURITY IN THE TWENTY-FIRST CENTURY 141, 141 (Zachary K Goldman & Samuel James Rascoff eds., 2016).



opinion. And sometimes, such public opinion is translated into some form of a punishment.

## V. UNIFORMS AND ACCOUNTABILITY

### A. *The Relations Between Distinction and Accountability*

According to the proposed argument, uniforms are meant to promote state accountability. Wearing uniforms enhances transparency regarding states' compliance with IHL. The argument is supported by scenarios where the principle of distinction is addressed although we intuitively feel that there may be additional normative demands concerning the duty to wear uniforms. But this does not necessarily mean that distinction is not among the normative bases to the general duty to wear uniforms.

At this point, we must address the relations between the two potential grounding concepts for wearing uniforms in battle: distinction and accountability. The principle of distinction is merely one case of an *in bello* principle served by the general principle of accountability. When viewed from a higher or a more abstract point of view, accountability serves as a practical ground for *all* the rules of IHL, *including* the principle of distinction. We want soldiers to wear uniforms, so that civilians are not targeted. But we also want them to wear uniforms, so that prisoners of war are not executed, so that military operations are proportional, etc. If civilians are targeted by an unidentified group of combatants, the whole concept of distinction turns out to be practically meaningless. For the concept of distinction (or any IHL rule) to be meaningful, it is practically essential to tell *which force* did *what*, *when*, *where* and *how*. And these questions are answered best when the operating force wears uniforms or alternatively, when fighting terror, identifies itself by some other effective means.

This point is important. The principle of accountability is not necessarily addressed by wearing uniforms. It can be *actively* met through other methods of communicating the relevant information. These include, for example, the use of a visible military emblem or the use of characteristic arms.<sup>89</sup> In special circumstances, it may even include taking

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<sup>89</sup> The Merkava tank and the F-22 fighter jet are two good examples. These are both weapon systems that are practically in use by one army alone (Israel and the U.S. respectively). The look of Merkava tanks at point x then by definition communicates the information that an Israeli armored unit is in action at point x. On the exclusive American use of F-22, see generally CHRISTOPHER BOLKCOM & EMMA CHANLETT-AVERY, CONG. RESEARCH SERV., RS22684, POTENTIAL F-22 RAPTOR EXPORT TO JAPAN (2009). On the exclusive Israeli use of the Merkava, see Sebastien Roblin, *America's M1 Abrams Tank vs. Israel's Merkava: Who Wins?*, NAT'L INT. (Dec. 31, 2016),

formal responsibility for military action.<sup>90</sup> However, wearing uniforms is probably a more efficient means of identification. It manages to convey almost all the necessary information on a military unit's activity without a need for a complicated fact-finding process. This is why wearing uniforms should be the basic, but not necessarily the only means for addressing the requirement of accountability for IHL rules. For instance, in a battle between two large military units, wearing uniforms is the most efficient and hence the preferred method for addressing accountability.

The case of fighting terror is dramatically different. In the typical scenario, a military unit targets combatants of the adversary terror organization. Normally, members of the terror organization do not wear uniforms and often do not carry their arms openly. Terrorists also tend to seek cover of a civilian, and typically sympathetic environment.<sup>91</sup> As deployment towards such targets in the heart of a hostile civilian area is dangerous and entails exceptional risk, regular armies are left with two types of action: first, to attack the terror target from the air or by using accurate ground-to-ground missiles or even regular artillery.<sup>92</sup> This type of attack might have a deadly collateral effect.<sup>93</sup> The other alternative would be to use a special surgical force.<sup>94</sup> But then, deployment in many

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<https://nationalinterest.org/blog/the-buzz/americas-m1-abrams-tank-vs-israels-merkava-who-wins-18913>.

<sup>90</sup> Obviously, states might use announcements of responsibility in an opportunistic manner. For instance, taking responsibility for an action *ex-post* only if the action succeeded and carried no political or military complications. Accordingly, assuming public responsibility for an action should only be considered a form of *active* accountability in cases where it is clearly not done opportunistically. Like when state A noticed state B ahead of the activity.

<sup>91</sup> On the use of civilian areas for military objectives by terror groups, see Blank, *supra* note 3, at 775-77; Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683 (2009) (discussing the legal challenges resulting from the use of civilian areas by terrorists). For specific examples of prominent terror groups and their use of the civilian population's support and surroundings, see generally Shahid Afsar, et al., *The Taliban: An Organizational Analysis*, 88 MILITARY R. 58 (2008) 60 (discussing Taliban's use of the Afghan Pashtun population); AMOS HAREL & AVI ISSACHAROFF, 34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON 91-92 (2008) (describing a specific air operation targeting Hezbollah's mid-range and long-range missiles that were concealed in residential houses); Steven Erlanger, *A Gaza War Full Of Traps and Trickery*, N.Y. TIMES (Jan. 10, 2009), <http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html> (discussing Hamas' use of civilians as shields as well as its use of residential and public buildings for military purposes).

<sup>92</sup> See Parks, *supra* note 1, at 536 (I do not deal in this paper with the legality of targeting such terrorists. I do assume that other than the issue of deployment and fighting in civilian clothes, the attack is *in bello* legal).

<sup>93</sup> See *id.*

<sup>94</sup> See *id.* at 525-39, 542.

cases requires giving up uniforms and employing some kind of a civilian look.<sup>95</sup>

Obviously, in the fight against terror the concept of distinction as a ground for wearing uniforms is weak.<sup>96</sup> These situations, by definition, represent a battle that is characterized by in compliance by at least one party with the principle of distinction. Intuitively, the concept of distinction aims to reduce civilian casualties. Paradoxically, if the duty to wear uniforms is strictly enforced in the attacking military unit, it might lead to an air raid that, for instance, could result in a much higher number of civilian casualties. The proposed concept of accountability offers a different legal analysis of such scenarios.

### *B. Fighting Terror and Accountability by Other Means*

According to the proposed concept, the general practical goal of the rules of armed conflict is to facilitate accountability of the fighting forces. In most cases, accountability is met by wearing uniforms. In cases where wearing uniforms is irrelevant or impractical, combatants can still comply with the requirements of accountability if they operate in a manner that keeps them accountable for their actions. That means, if their activity remains actively transparent in terms of *who* did *what*, *where* and *how*.

There are various means to ensure a military unit's accountability without its members operating in uniforms. For instance, if soldiers operate in civilian clothes, yet carry official identification documents, which they present while making an arrest or if they deploy by using civilian clothing yet use identifiable marks as the battle begins, such as a special military hat. Alternatively, soldiers might also verbally identify themselves as a force of State X. An army can also comply with the duty of accountability *ex-post facto*. For example, by announcing *ex-post facto* that its unit performed act x in point y.<sup>97</sup> In all these scenarios, the unit and its members may remain actively accountable. The requirements of accountability are met since it is clear *who* operated *where*, *when* and *how*.

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<sup>95</sup> See Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER (Aug. 8, 2011), <https://www.newyorker.com/magazine/2011/08/08/getting-bin-laden>.

<sup>96</sup> The principle of distinction remains relevant at all times during an armed conflict, including in the fight against terror. However, its role as a normative ground to the duty to wear uniforms is diminished as the situation of fighting terror reflects, by definition, in compliance with this duty by at least one party to the conflict.

<sup>97</sup> For a clarification on potential opportunistic *ex-post* announcements of responsibility, see *supra* note 90 and accompanying text.

As the requirement of accountability prompts us to rethink the duty to wear uniforms in special cases, such as combating terror, it also raises other problems that need to be addressed. Why isn't killing in such a scenario of combat out of uniforms considered perfidious? What is the normative difference then between spies and elite combatants of armies that fight terror in civilian clothes? If soldiers are allowed to use civilian clothes to facilitate deployment (ostensibly to prevent a massive attack that will endanger civilians), will this lead terrorists to harm civilians out of fear of undercover agents? And can the proposed argument serve guerilla fighters in justifying their use of civilian clothes in combat? The key to dealing with these questions lies in the theoretical classification of various agents by placing them on the continuum of covertness.

## VI. THE CONTINUUM OF COVER

### *A. Camouflage and Disguise*

As a starting point for classifying all range of undercover combatants, Article 29 of the Hague Convention attempts to define and regulate spying and the use of covert operations.<sup>98</sup> It defines the core element of spying during wartime as action in disguise.<sup>99</sup> The centrality of the concept of disguise to the legal classification of combatants appears in the second part of Article 29, which concludes that soldiers "not wearing a disguise who have penetrated into the zone of operations of the hostile army . . . are not considered spies."<sup>100</sup> Further clarification establishes: "Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly . . . ."<sup>101</sup>

This leads to additional questions, or rather same questions in a different format: What does it mean to carry out a mission openly? What is the difference between spies and elite soldiers who are considered to be carrying out their mission openly yet employ stealth techniques? Is fighting in civilian clothes, by definition, the equivalent of acting in disguise? Consider two information gatherers P and F. P has crossed into enemy territory using the cover of a foreign journalist. F has Simultaneously crossed the same lines using high-quality camouflage assimilated to forest vegetation. Both are collecting information by observing the same military object from hundreds of meters away. Both

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<sup>98</sup> Hague Convention, *supra* note 14, art. 29; *see also* Geneva Conventions Additional Protocol I, *supra* note 14, art. 46.

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

use a form of covertness to avoid being identified. Why should there be any normative difference between them? The answer must be sought in analyzing different methods of cover.

### *B. Deep and Shallow Cover*

The difference between the methods of spies and the methods of other combatants tasked with gathering intelligence in secrecy is quite similar to the difference between camouflage and disguise. Reconnaissance, or tactical intelligence combatants, employ camouflage, not a false identity. They merely try to assimilate to natural surroundings to elude detection. If the adversary manages to detect them despite the camouflage, it is clear to him that he is watching enemy combatants.

In contrast, the spy does not camouflage his body but conceals his identity. In this respect, the difference between a spy and a reconnaissance combatant resembles the difference between a chameleon and a kind of a coin-marked snake (*Coluber nummifer*) that uses the appearance of a viper in order to protect itself and deter other animals.<sup>102</sup> The Chameleon does not pretend to be another animal. It simply blends into its surrounding. If we spot it after all, we recognize its true identity as a chameleon immediately. But the *nummifer* actually assumes the identity of a different snake (viper) for its own use. It does not mind being spotted, since others that see it do not and cannot see its true nature through its skin. They believe they are watching a viper.

This difference leads to a better understanding of the normative distinction made between the two methods. The spy, by definition, engages in a kind of fraud and steals another's identity. By doing so, he might put other people at risk. If a spy pretends to be a member of group X, then if he gets caught, some members of group X might consequently

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<sup>102</sup> *Hemorrhoids nummifer*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Hemorrhoids\\_nummifer](https://en.wikipedia.org/wiki/Hemorrhoids_nummifer) (last updated Jan. 28, 2019) (discussing the nummifer snake).

become future suspects.<sup>103</sup> The reconnaissance combatant does not steal an identity. He does not put anyone in danger other than himself.<sup>104</sup>

The analysis thus far demonstrates the difference between camouflage and disguise. However, contrary to current legal discourse on covertness, the true and correct classification is not dichotomous. Both options, camouflage and disguise, are merely two extreme points on what in fact constitutes the expansive continuum of cover. The essence and new meaning of the proposed concept is that cover is in fact a broad spectrum (from the practical and normative perspectives). At its most minimal and shallow end, a combatant uses simple camouflage techniques. A deeper level of cover will include the use of civilian clothes while carrying arms openly.<sup>105</sup> An even deeper level of cover will include the use of civilian clothes and concealed arms solely for deployment. The combatant in this case does not use a specific false identity. In fact, instead of trying hard to be somebody, as the spy tries to be, such a combatant tries hard to look like nobody. Through the use of civilian clothes, he wishes to become transparent and blend into his surroundings. His civilian clothes are the only camouflage that works in a populated area. His cover is shallow and very minimal with regard to the duration of his stay in hostile territory, to carrying false documents or to the use of local language. The elite soldier will most likely not use a specific identity as a cover. If viewed closely by a local, he will appear more like a chameleon (camouflaged soldier) than like a nummifer (spy).

The fact that the elite soldier uses his shallow civilian cover for mere deployment may ease the concern of future harm to third parties. As

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<sup>103</sup> See *Israeli Assassinations: Passports to Kill*, GUARDIAN (Feb. 18, 2010, 7:05 PM), <http://www.guardian.co.uk/commentisfree/2010/feb/18/british-government-dubai-mossad> (“The identity theft endangers not just the lives of six passport holders and their families, but potentially anyone carrying a British passport in the Arab world.”). This argument refers to Israeli alleged use of UK passports during a targeted killing operation. According to local police and the press, a team of Mossad agents arrived at Dubai by using passports of various western countries, among them the UK. See *An Eye for an Eye – the Anatomy of Mossad’s Dubai Operation*, SPIEGEL ONLINE (Jan. 17, 2011, 5:54 PM), <http://www.spiegel.de/international/world/an-eye-for-an-eye-the-anatomy-of-mossad-s-dubai-operation-a-739908.html> (on the details of the Dubai killing). They allegedly killed Al-Mabhouh, a senior Hamas operative, and left the country unharmed soon after. See *id.* The alleged use of UK citizenship as a cover sparked British concern that UK citizens will be, as a result, at risk in their future travel to the middle east. See *id.* It is worth citing the Spiegel reporters’ reference to the cover most agents used: “They were operating like avatars, using stolen identities. The real people whose names were being used would later testify that they had been completely unaware of the operation.” See *id.*

<sup>104</sup> I deal with the concern that elite soldiers in civilian clothes put civilians at future risk in Section VI(b).

<sup>105</sup> American special forces occasionally used a civilian look in Afghanistan for political reasons and not necessarily to allow them safer deployment. See Parks, *supra* note 1, at 496-97.

opposed to the spy who adopts an entire identity in attempting to pass himself off as someone specific, we have depicted the elite soldier as trying hard to look like nobody. Elite combatants strive to be as unnoticeable as possible; just four men driving a car or a group of women walking in the street. Their civilian look is typically so generic, that they do not really put third parties at risk. This stands in contrast to spies using highly specific and accurate identities. For instance, when a spy uses the identity of a British journalist, he increases the risk of arrest for future travelers who happen to be British journalists. On the other hand, the concern that elite soldiers in civilian look increase the future risk-level for civilians is also a little naïve. Regardless of whether elite soldiers' use of a civilian look is in fighting terror or not, whether it is legal or not, terrorists in civilian areas must assume this is possible. If it creates a risk to civilians, it seems inescapable and independent of any *in bello* prohibition.

Spies occupy the extreme and deep end of the continuum of cover. The spy does not simply wear a specific person's clothes. He wears the person's identity. In fact, a spy in many cases borrows and uses a whole biography of a person, whether real or fake. His top professional achievement is to be someone specific, as opposed to the anonymous soldier. He stands in contrast to the elite soldier that wears civilian clothes merely for the sake of reaching the last point of deployment. The spy is typically trained and equipped for an extended stay in hostile territory and thus uses a complicated set of features that altogether create and support his false identity.<sup>106</sup> He'll use a specific name and family details and carry matching documents. His spoken language must match his fake life story. He uses a place to stay; sometimes, even a house or an apartment of his own. He needs to add a false occupation to the false identity. His skills and knowledge must match the features of his false identity.<sup>107</sup> As a result of the extended stay and deep cover, the spy in many cases needs to (and sometimes wants to) interact with the local surroundings. He may interact with the hotel reception clerk or the landlord, with the boss at work, and even with neighbors and acquire friends.<sup>108</sup> In contrast, the elite soldier

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<sup>106</sup> One example of the complex and dangerous task of "creating" an identity for a spy is the story of Elie Cohen, an Israeli intelligence officer of an Egyptian origin. A new biography had been created for Cohen in order to plant him in Syria as a Syrian merchant. See ELI BEN-HANAN, *OUR MAN IN DAMASCUS: ELIE COHN* (1969).

<sup>107</sup> For an account of uncovering spies that used an imperfect cover, see YOSSEI MELMAN & EITAN HABER, *THE SPIES: ISRAEL'S COUNTER-ESPIONAGE WARS* (2002); Shlomo Shpiro, *Soviet Espionage in Israel, 1973-1991*, 30 *INTELLIGENCE & NAT'L SEC.* 486 (2015).

<sup>108</sup> An example of the meaning of deep cover of an agent is the case of Wolfgang Lotz. See PATRICK PESNOT, *GREAT SPIES OF THE 20TH CENTURY* 73-80 (2016).

avoids such interaction. In many cases, his shallow cover does not allow even for a short interaction with the local surroundings.

It should be emphasized once more that the two cases of a spy and an elite soldier represent only two extremes on the continuum of cover. Between the two points there could be many other possible combinations on the spectrum.<sup>109</sup> The overall weight of the various parameters that create a cover is key for evaluating the exact nature of each case of undercover operations. And the decision may not always be simple. The case of recruited spies illustrates potential difficulties in classifying types of agents on the continuum of the cover.

In many cases, intelligence organizations do not penetrate a target by using an agent with a false identity. An alternative technique would be to recruit an agent from the adversary. For example, State A may require an agent within the ranks of the army of State B. One way would be to train and send X as an undercover agent to B. X will pretend to be a native citizen of B and will attempt to join B's army. Alternatively, State A could recruit and handle as an agent one of B's citizens.<sup>110</sup> Is the recruited agent operating under a cover? As he uses his own identity, language and biography, he seems not to be acting under cover. Yet I contend that he does use a cover after all.

In its deeper sense, a cover entails a dissonance; it means having an external shell that conceals the contradicting and true identity within. That is what a typical spy does. He uses an external fake story to conceal his true internal identity. In essence, that is also what a recruited agent does.<sup>111</sup> He uses an external shell of a loyal person to conceal his true

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<sup>109</sup> See generally Gordon Thomas, *New Mossad Chief to Apologise for Use of UK Passports in Dubai Killing*, TELEGRAPH (Dec. 25, 2010, 6:30 PM), <https://www.telegraph.co.uk/news/worldnews/middleeast/israel/8224391/New-Mossad-chief-to-apologise-for-use-of-UK-passports-in-Dubai-killing.html> (detailing the case of the Dubai killing of Al-Mabhuh).

<sup>110</sup> For information on Philby's case, probably one of the senior spies ever recruited, see generally PHILLIP KNIGHTLEY, *THE MASTER SPY: THE STORY OF KIM PHILBY* (1990). For an account of the recruitment and handling of two of the most harmful American spies within the American intelligence community, see generally V. CHERKASHIN & G. FEIFER, *SPY HANDLER: MEMOIR OF A KGB OFFICER: THE TRUE STORY OF THE MAN WHO RECRUITED ROBERT HANSEN AND ALDRICH AMES* (2005). For a detailed account of a senior spy that was recruited and handled for decades by the KGB, see generally MARKUS KLINGBERG AND MICHAEL SFARD, *THE LAST SPY* (2007). On the practice of recruiting and handling agents and for moral and legal analysis of this practice, see generally Raphael Bitton, *Intelligence Agents, Autonomous Slaves and the US Supreme Court's Wrong (and Right) Concept of Personal Autonomy*, 7 EUR. J. LEGAL STUD. 4 (2014); John P. Langan, *Moral Damages and the Justification of Intelligence Collection from Human Sources*, in *ETHICS OF SPYING: A READER FOR THE INTELLIGENCE PROFESSIONAL* 104 (Jan Goldman ed., 2006).

<sup>111</sup> Take for instance the case of the "Green Prince," the son of Hassan Yousef, one of the founders of Hamas in the West Bank. MOSAB HASSAN YOUSEF, SON OF HAMAS 135 (2011). Mosab



internal identity as an agent of the adversary. In legal terminology, one might use the term fraud. In both cases, whether a penetrating agent or a recruited agent, the cover serves the fraud. The main difference between the two is that the recruited agent can use more real aspects in concealing his fraud and true internal identity.

This explains why deep cover operations may result in killing in perfidy, for the essence of perfidy is fraud. It reflects bad faith and unfairness. Deep cover is a means to a fraudulent operation. The deeper the cover, the deeper the fraud. This indicates another link between cover, fraud, and accountability. One of the purposes of deep cover exceeds simply enabling the operation itself. It also helps elude active accountability. As the true identity of the agent is concealed under the cover, the agent as well as the entire chain of command and eventually their state, escape active accountability.<sup>112</sup>

In summary, most elite soldiers fighting terror in civilian clothes employ shallow cover. As this does not undermine accountability, it should not render them ineligible for POW status or put them at any exceptional legal risk. In contrast, spies and perfidious killers employ deep cover. It is a fraudulent cover that also undermines accountability. As such, denying them POW legal protection is better grounded.

## VII. GUERRILLA FIGHTERS AND UNLAWFUL COMBATANTS

The practical implication of the proposed argument is that POW protection may be afforded to certain regular combatants in spite of their use of civilian clothes. Can this protection be extended to guerilla fighters who fight without uniforms? The easier case is that of guerilla units complying with article 1 of the Hague Regulations.<sup>113</sup> If such combatants do not wear uniforms and yet observe IHL, carry their arms openly, and adhere to an effective hierarchical structure, there is no reason whether ethically or legally, to deny them POW status.

Even so, what if combatants such as these use the same justification of regular under-cover units and, as a result, observe the rules of IHL yet do not wear uniforms and do not carry their arms openly? Such

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Yousef was recruited as an agent by Israel's Security Service. *See id.* He used an external shell of loyalty to Hamas. *See id.* That shell was only used to conceal his true nature as an agent for Israel. *See id.*

<sup>112</sup> *See generally An Eye for an Eye – the Anatomy of Mossad's Dubai Operation, supra note 103.* For instance, the Dubai Killing probably had another goal other than killing Al-Mabhouh. Living in the Middle East, Israel could have probably targeted Al-Mabhouh in a military operation. By killing Al-Mabhouh in Dubai by using undercover agents, Israel also escaped active accountability and hence the entailed political consequences of the killing.

<sup>113</sup> Hague Convention, *supra note 14*, art. 1.

combatants may argue that as the proposed argument allows regular combatants to operate in shallow cover, it should allow them the very same privilege.

As armies use shallow undercover deployment because their military look jeopardizes the success of their mission, irregular combatants may invoke similar reasoning. They may argue that given their relatively small and weak units and due to asymmetry of power, they cannot expose their fighters by wearing uniforms and carrying arms openly.<sup>114</sup> Is there, for that reason, a difference between the shallow undercover deployment of irregular combatants, who observe the rules of IHL, and the undercover deployment of regular combatants? And assume further that both perform their undercover missions without undermining *active* accountability.<sup>115</sup>

Theoretically, the answer should be negative, namely that there is no difference and hence undercover irregular guerilla warfare in the context of shallow cover and while observing IHL, should be permitted. However, this fails to consider important aspects. First, hardly any guerilla organizations observe the rules of IHL.<sup>116</sup> Second, irregular combatants are expected mostly to engage in deep rather than shallow undercover warfare.<sup>117</sup> Typically, they use their cover for a long stay in a territory where hostilities take place.<sup>118</sup> Like spies, their cover is characterized by a dissonance between an external misrepresenting shell and their (true) internal identity. There is also a difference in the motivation for cover. Irregular combatants use cover to reduce the harm absorbed by their own side.<sup>119</sup> At the same time, shallow undercover warfare is used by regular armies primarily to reduce the harm inflicted

<sup>114</sup> This is a typical argument made on behalf of guerilla groups. As part of the discourse on uniforms, see, e.g., Yvonne Chiu, *Uniform Exceptions and Rights Violations*, 36 SOCIAL THEORY & PRAC. 44, 56-57 (2010).

<sup>115</sup> For instance, Israeli special undercover units that operates in the West Bank, tend to identify themselves with military or police hats as battle begins.

<sup>116</sup> See *List of guerilla movements*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_guerrilla\\_movements](https://en.wikipedia.org/wiki/List_of_guerrilla_movements) (last updated Feb. 4, 2019).

<sup>117</sup> This is obvious, as typical guerilla groups cannot deploy and fight without a cover. Due to asymmetric power, uncovered guerilla fighters can hardly survive the deployment phase. See Chiu, *supra* note 114.

<sup>118</sup> The case of Imad Mughniyah is a good example. Mughniya operated for years as America's and Israel's top wanted person. See Adam Goldman & Ellen Nakashima, *CIA and Mossad Killed Senior Hezbollah Figure in Car Bombing*, WASH. POST (Jan. 30, 2015), [https://www.washingtonpost.com/world/national-security/cia-and-mossad-killed-senior-hezbollah-figure-in-car-bombing/2015/01/30/ebb88682-968a-11e4-8005-1924ede3e54a\\_story.html](https://www.washingtonpost.com/world/national-security/cia-and-mossad-killed-senior-hezbollah-figure-in-car-bombing/2015/01/30/ebb88682-968a-11e4-8005-1924ede3e54a_story.html). He survived for many years due to his deep cover. See *id.*

<sup>119</sup> See Chiu, *supra* note 114.

on the enemy and mostly on enemy civilians.<sup>120</sup> While reducing universal harm might be acceptable justification in international law for diverging from IHL, increasing the chances of winning (or reducing the chance of losing) is unlikely to be seen as equally legitimate.<sup>121</sup>

A further difference in status between undercover spies and undercover combatants is that for the latter, the undercover operation is frequently a limited version of a larger potential operation that may, in pursuing the same ends, use heavier fire, such as air or artillery bombing. Consequently, the combatant in an undercover operation usually assumes a personal risk in order to reduce the level of violence to which uninvolved persons might be exposed. The spy, or the terrorist, usually executes the only version of the operation. There is no large-scale heavy force version of an undercover spy operation.<sup>122</sup> The use of civilian clothes in this case, as opposed to in undercover fighting, is used strictly for reducing the risk to the spy, or guerilla fighter, and not to third parties.

Third and most importantly, I showed the importance of accountability in international relations in general, and for the rules of IHL in particular. Wearing uniforms serves this general and practical goal of enhancing accountability of belligerent parties. However, guerilla organizations that are in some cases actively accountable, are rarely *passively* accountable in international relations. As accountability in international relations is an undeveloped form (contrary to domestic accountability mechanisms), its enforcement depends upon its effect on states' interactions and interests, such as commerce, regional security, transportation, and tourism etc. The conduct of a state that is perceived by other states as hostile or illegal, may provoke enforcement through formal and informal types of sanctions. However, guerilla organizations tend to be less exposed to these forms of pressure. As less-than-a-state entities, they are usually less exposed to most types of sanctions.<sup>123</sup>

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<sup>120</sup> In some cases, the use of civilian clothes by elite soldiers does not aim to reduce collateral damage. For instance, when a group of terrorists hide in an underground shelter that is impenetrable to bombing. But these are rare cases.

<sup>121</sup> For instance, Parks argues that "force protection is not a legitimate basis for wearing a non-standard uniform or civilian attire." See Parks, *supra* note 1, at 543. In contrast, he finds necessity as a legitimate basis for fighting without uniforms. See *id.*

<sup>122</sup> The killing of Osama Bin-Laden demonstrates this choice. In authorizing the operation for the killing of Osama Bin-Laden, President Obama did not authorize aerial bombing for fear of the political consequences and of collateral damage. See Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER (Aug. 8, 2011) <https://www.newyorker.com/magazine/2011/08/08/getting-bin-laden>. Instead, he authorized a commando raid that naturally had put the soldiers at risk. He could obviously use intelligence agents in deep cover. See *id.*

<sup>123</sup> For example, Hezbollah is under continuous sanctions by the US. Another round of sanctions in 2018 expanding sanctions in place from 1995 does not and probably cannot really have any

This point also indicates the inadequacy of the rule that Kutz proposes. Recall that Kutz argues that what matters is not whether combatants are uniformed but instead, according to Kutz, whether they qualify as lawful combatants if they fight as part of a political collective and for a political cause.<sup>124</sup> Based on my analysis, it is clear that what matters is that such group be accountable and not that it simply fights for any political cause. The difference is significant, for the accountability of the group minimizes occasions of a sustainable campaign that is internationally harmful. For instance, Kutz's conclusion that Taliban fighters should be treated as lawful combatants must be reconsidered in view of the proposed requirement of accountability.<sup>125</sup>

Recall that typical guerilla organizations, like Taliban, are commonly *actively* accountable but hardly ever *passively* accountable. One of the best signs that terror organizations are less concerned with international accountability is their habit of announcing *ex-post* responsibility for their unlawful actions. They do not mind being actively accountable, given their low sensitivity to passive accountability. This point is of great importance, for *passive* accountability is the real goal of *active* accountability. Without its passive phase, accountability in international relations is practically meaningless. As a result, guerilla groups are rarely accountable in both active and passive senses.

In addition, a state's army typically embraces the value of accountability by fighting in uniforms. But a guerilla organization rarely conducts its activity in uniforms. As a result, fighting without uniforms is an exception for regular armies while fighting in uniforms is an exception for guerilla organizations. The goal of accountability is normally best served by the use of uniforms. Armies are excused for fighting without uniforms in the relatively rare cases when it is necessary for fighting terror, due to terrorists' civilian shield and only under a

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substantial effect on the organization. See Tim Ahmann, Doina Chiacu & Lesley Wroughton, *U.S. Sanctions Hezbollah Leader Nasrallah, Deputy Qassem*, REUTERS (May 16, 2018, 3:09 PM), <https://www.reuters.com/article/us-usa-hezbollah-sanctions/u-s-targets-hezbollah-leader-nasrallah-deputy-qassem-with-sanctions-idUSKCN1IH2QA>. This stands in contrast to sanctions on states. Libya, for example, could not resist wide and persistent sanctions over the Lockerbie attack. See Stephen D. Collins, *Dissuading State Support of Terrorism: Strikes or Sanctions? (An Analysis of Dissuasion Measures Employed Against Libya)*, 27 STUD. IN CONFLICT & TERRORISM 1, 1 (2004). Currently, The U.S. is placing a significant sanctions regime over the Islamic Republic of Iran. The sanctions target to weaken Iranian resistance to renegotiate a nuclear deal. The sanctions already damaged the Iranian economy significantly. See Shashank Bengali, *The Harsh Effect of Trump's Iran Sanctions, and Why Iranians Worry Worst Is Still to Come*, L.A. TIMES (August 16, 2018, 12:35 PM), <http://www.latimes.com/world/middleeast/la-fg-iran-sanctions-explainer-2018-story.html>.

<sup>124</sup> See Kutz, *supra* note 28, at 152.

<sup>125</sup> See *id.* at 179.

shallow cover. It is a reaction. Action and reaction, as well as habit and exception, should not necessarily be considered morally equal.

And yet, while these factors weaken the argument for the accountability of guerilla organizations, they do not fully nullify it. As a result, it is theoretically possible, although practically remote, that a guerilla organization will conduct its warfare in compliance with the rules of IHL and still remain *in bello* accountable. Hence, if this remote possibility becomes real, such guerilla combatants may not be denied POW status regardless of fighting without uniforms.

#### VIII. CONCLUSION

This paper critiques two perceptions concerning the use of cover in combat. First, as opposed to what the legal discourse on the matter suggests, it argues that the principle of distinction is not a sufficient reasoning for the duty to wear uniforms in combat. In contrast, I propose an alternative new normative basis: the principle of accountability. States and armies are accountable to the entire international community. The active form of accountability requires some kind of reporting to the entity to which one is accountable. In other words, accountability requires transparency. When state actions, including military activity, become transparent to the international community, it can then respond by exercising passive accountability. The adversary and the entire international community may respond to a violation of IHL variously, ranging from no response whatsoever to massive use of force.

Wearing uniforms is the most efficient method of reporting. By wearing uniforms in combat, a military unit indirectly reports *who* did *what*, *when* and *where*. By wearing uniforms, a military unit enhances transparency in battle. Wearing uniforms, for that reason, is an important element in enhancing accountability for violations of IHL. It is therefore essential for the emergence and stability of *in bello* rules, as it assists states in solving a cooperation problem. In accordance with Posner and Goldsmith's cooperation scenario for the emergence of customary rules, wearing uniforms incentivizes states to avoid violating IHL for greater payoffs in the more distant future.<sup>126</sup> Enhancing accountability for compliance with IHL customary rules is therefore in the best interest of the states.

What is important then is not necessarily to wear uniforms but rather to be accountable. It then follows that soldiers can meet demands of accountability even when not wearing uniforms. And this leads to the

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<sup>126</sup> See generally GOLDSMITH & POSNER, LIMITS OF INTERNATIONAL LAW, *supra* note 6.

second main point of the proposed argument: the view of cover as a continuum from the normative perspective. Elite soldiers fighting terror by deploying a civilian look, typically use shallow cover on this spectrum. Spies and treacherous killers use, in contrast, deep cover that is typically characterized with an element of fraud. The continuum of cover is linked to accountability also in the sense that the deeper the cover a person uses, the less that person will be accountable.

The rapid spread of technological means for live recording and reporting of events in battle, will consistently increase the importance of accountability in IHL. As this happens, it is possible that elite soldiers that use a civilian look while remaining accountable, will enjoy a growingly better legal status. In a somewhat paradoxical manner, this argument for the importance of accountability as a normative basis for wearing uniforms, may serve as their cover.