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### Special Forces' Wear of Non-Standard Uniforms

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In February 2002, newspapers in the United States and United Kingdom published complaints by some nongovernmental organizations (NGOs) about US and other Coalition Special Operations Forces operating in Afghanistan in “civilian clothing.”<sup>2</sup> The reports sparked debate within the NGO community and military judge advocate ranks about the legality of such actions. At the US Special Operations Command (USSOCOM) Annual Legal Conference May 13–17, 2002, the judge advocate debate became intense. While some attendees raised questions of “illegality” and the right or obligation of special operations forces to refuse an “illegal order” to wear “civilian clothing,” others urged caution. The discussion was unclassified, and many in the room were not privy to information regarding Operation Enduring Freedom Special Forces,<sup>3</sup> its special mission units, or the missions assigned them.

The topic provides lessons and questions for consideration of future issues by judge advocates. The questions are:

- (a) What are the facts?
- (b) What is the nature of the armed conflict, and its armed participants?
- (c) What is the relevant law of war?
- (d) What is State practice?

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### *What Are The Facts?*

Thirty years ago it was my privilege to serve as the first Marine Corps Representative at The Judge Advocate General's School, US Army, in Charlottesville, Virginia. As the lone Marine on the faculty, I was expected to attend all major public ceremonies, including the graduation of each Judge Advocate Officers Basic Course—the accession course for new lawyers entering the Army. Course graduation warranted a speech by one of the Army JAG Corps' flag officers. Regardless of who the graduation speaker was, the speech was the same. Written by The Assistant Judge Advocate General of the Army, the late Major General Lawrence H. Williams, it was called “the facts speech.” Its message was simple and straightforward: Before charging off to tilt at windmills, be sure you have the facts.

There is much to be said for this admonition and its application in the case at hand. Condemning certain actions or declaring them a law of war violation based upon news accounts is not a sound basis for analysis. No lawyer would prepare his case based solely upon news accounts. Indeed, media reports generally are inadmissible as evidence. Regrettably, there was a rush to judgment by some based on a less-than-reliable source.

The facts surrounding the issue were two-fold. The first had to do with what was being worn, and by whom. The second concerned the motive for the NGO complaint.<sup>4</sup>

In response to the September 11, 2001 al Qaeda terrorist attacks against the World Trade Center and Pentagon, US and coalition Special Forces began operations in Afghanistan in late September 2001. At the request—initially insistence—of the leaders of the indigenous forces they supported, they dressed in indigenous attire. For identification purposes within the Northern Alliance, this included the Massoud pakol (a round brownish-tan or gray wool cap) and Massoud checkered scarf, each named for former Northern Alliance leader Ahmad Shah Massoud, assassinated days before the al Qaeda attacks on the World Trade Center and Pentagon. This attire was not worn to appear as civilians, or to blend in with the civilian population, but rather to lower visibility of US forces vis-à-vis the forces they supported. Al Qaeda and the Taliban had announced a \$25,000 per head bounty on uniformed US military personnel. Placing a US soldier in Battle Dress Uniform (BDU) or Desert Camouflaged Uniform (DCU) in the midst of a Northern Alliance formation would greatly facilitate al Qaeda/Taliban targeting of US Special Forces.<sup>5</sup> As will be seen in review of the law, dressing in this manner more accurately may be described as wearing a “non-standard uniform” than “dressing as civilians.” Special Forces personnel who had served in Afghanistan with whom I spoke stated that al Qaeda and the Taliban had no difficulty in distinguishing Northern Alliance or Southern Alliance forces from the civilian population.<sup>6</sup>

The fall of Kandahar in early December 2001 was followed by the collapse of the Taliban regime and the swearing-in of Hamid Karzai as Prime Minister. Another aspect of US Special Operations Forces—Army Civil Affairs—began to enter Afghanistan. In November 2001, US Army Forces Central Command (USARCENT) had established the Coalition and Joint Civil Military Operations Task Force (CJCMOTF) using soldiers from the 377<sup>th</sup> Theater Support Command (TSC), the 122<sup>nd</sup> Rear Operations Center, and the 352<sup>nd</sup> Civil Affairs Command. By January 3, 2002, the CJCMOTF was established in Kabul. It served as liaison with local officials of the Interim Government and supervised the humanitarian assistance from US Army Civil Affairs (CA) teams from the 96<sup>th</sup> Civil Affairs Battalion, who were beginning to operate throughout Afghanistan. CJCMOTF also was the liaison with the US Embassy, and coordinated coalition humanitarian assistance contributions.

The USARCENT Commanding General made the uniform decision, favoring civilian clothing over DCU. His rationale was based on two factors: (a) ability of soldiers to perform humanitarian assistance operations; and (b) safety of Civil Affairs personnel, that is, force protection.<sup>7</sup> A strong desire existed at the US Central Command (USCENTCOM) headquarters (Tampa) to present a non-confrontational face, as well as a sentiment expressed that NGO would be reluctant to be seen working with uniformed soldiers. Additionally, 96<sup>th</sup> Civil Affairs Battalion personnel, who initially operated in Islamabad, Pakistan, were ordered by the US Ambassador to Pakistan to wear civilian clothing rather than their uniforms, reflecting the sensitive and unique political environment in which US Army forces were operating. This order was not clarified or countermanded on entry into Afghanistan. Civil Affairs personnel continued to wear Western civilian attire. Eventually some adopted Afghan native attire.<sup>8</sup>

Other reasons existed for continued wear of civilian attire. In some areas, local governors would not talk to uniformed Civil Affairs personnel. In December 2001, the UN-sanctioned International Security Assistance Force (ISAF) began arriving in Kabul in accordance with the Bonn Agreement. United Nations representatives refused to meet with US Army Civil Affairs leaders if they were in uniform.

US Army Civil Affairs units have a long, distinguished history. They played an indispensable role in the European Theater of Operations during and after World War II, and in the postwar occupation of Japan. US Army and Marine Corps Civic Action units played an equally indispensable humanitarian assistance role during the Vietnam War. NGO involvement during those conflicts was virtually non-existent (World War II) or extremely limited (Vietnam).

Under the terms of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), NGOs operate subject to the consent of

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relevant States parties to a conflict.<sup>9</sup> The GC also contemplated a linear battlefield in which NGOs could operate in secure areas, a combat environment different from Afghanistan. Legally and operationally, military operations and requirements take priority over NGO activities. However, NGOs provide valuable services that the military might be expected or required to perform were NGOs not present. Military commanders must give due consideration to this, as the absence of NGOs could add other responsibilities (such as refugee care) to a military commander's burden. At the same time, NGOs cannot expect a risk-free work environment. Military commanders are entitled to make lawful mission-supporting decisions, even if those decisions might place NGOs or other civilians at greater risk.

Service NGOs have become a more significant player in areas of armed conflict over the past decade. NGO emphasis is on mission performance following the principles of humanity, impartiality, independence and neutrality. NGOs feel obliged to maintain independence from the agendas of both the donors that fund them and governments and local authorities that allow them to operate in their territory. In contrast, NGOs see CA engaged in assistance activities as driven by political and security objectives.

The US military leadership was not entirely successful in seeking a dialogue, much less a working relationship, with NGOs in Afghanistan. The relationship was particularly bad as US Army Civil Affairs arrived in Afghanistan. Civil Affairs personnel were denied access to NGO meetings, while some NGOs refused to come to CJCMOTF-hosted meetings. A senior on-scene Army Civil Affairs officer concluded that the key issue was NGO image and market share. NGOs who had worked in Afghanistan since the 1980s feared being upstaged by the Army's Civil Humanitarian and Liaison Cells (CHLC). The NGOs also objected to humanitarian projects being used in support of a military campaign.

The CJCMOTF served as liaison with the Interim Government and supervised the humanitarian assistance for US Army Civil Affairs teams beginning to operate throughout Afghanistan. Civil Affairs personnel deployed across Afghanistan to provide assessments and identify projects for some \$2 million in initial aid money. The money went directly to local contractors. NGOs wanted to be subcontracted. Based on limited money, a need to have an immediate impact, and concern about whether such use of these funds was permissible, US Army Civil Affairs leadership informed the NGOs that it would not subcontract to NGOs. Moreover, due to security concerns, NGOs were in the main cities but not in the villages where Civil Affairs teams conducted business. Going directly to local contractors increased the fear of some NGOs that they would be cut out of their "market share."

Friction also existed with respect to fiscal accountability. US Army Civil Affairs are expected to account for 100% of funds allocated to it. A substantial amount of money provided NGO—as much as 60%—is directed to "overhead," preventing

its allocation toward the designated project, and full accountability. NGOs resent scrutiny of their financial accountability shortcomings and amounts attributed to overhead. This increased tension between US Army Civil Affairs and the NGOs.

Social reform was another Civil Affairs/NGO point of tension. Contrary to claims of neutrality and impartiality, many NGOs in Afghanistan moved into advocacy of women's rights and human rights. This caused friction with US Army Civil Affairs, whose role is to provide humanitarian relief without interference in local customs, however objectionable they may be. Civil Affairs work stifled NGO agendas on non-humanitarian issues.

A better than average, although uneven, relationship evolved between CA and NGOs at the working, "grassroots" level. This contrasts with a poor relationship at higher levels due to the conflicts identified above. NGO resentment of US Army Civil Affairs and market share concerns apparently prompted the NGO complaint—led by *Médecins sans Frontières*—regarding Civil Affairs wear of civilian clothing.<sup>10</sup> Philosophical differences between NGOs and the military are inevitable. The uniform/civilian clothes issue was symptomatic of a larger issue. It should be noted that not all NGOs agreed with the complaint made by *Médecins sans Frontières*.

In early March 2002, the CJCMOTF commander, desiring to broker a compromise, directed all Civil Affairs personnel in Kabul and Mazar-e-Sharif to return to full uniform. Some Civil Affairs personnel in remote locations (where NGOs would not work due to the risk) were permitted to stay in civilian attire. On March 19, following its review, USCENTCOM supported CJCMOTF's decision. Guidance and authority was provided to ground force commanders to establish uniform policies based upon local threat conditions and force protection requirements.

As a result of the NGO complaint, the issue of military wear of civilian clothing was reviewed within the Department of Defense (DOD). Following DOD-Joint Chiefs of Staff (JCS) coordination, guidance was forwarded to USCENTCOM in May 2002 that was consistent with CJCMOTF guidance issued April 7, 2002. As a result of CENTCOM/CJCMOTF guidance, the number of Civil Affairs and other SOF personnel in civilian clothing had diminished substantially prior to DOD-JCS action or the aforementioned USSOCOM Legal Conference.<sup>11</sup>

### ***What Are The Legal Issues?***

Considering an issue in the public sector, including the military, is similar to private practice or a law school examination. The legal issues have to be identified and addressed. In weighing the situation at hand, the following legal issues were identified:

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- Is it lawful for combatants to wear civilian clothing or non-standard uniforms in combat?
- If so, are there legal restrictions in use of either?
- Are there unique law of war considerations, such as risks, a commander should balance in making his decision?

Other questions had to be answered prior to answering these questions.

What is the nature of the armed conflict, and its armed participants? The nature of the armed conflict in Afghanistan was an issue that prompted considerable discussion within and outside the government, in large measure due to the nature of the enemy.

References to al Qaeda and the Taliban as separate entities constituted an incomplete and inaccurate picture. The enemy consisted of a loose amalgamation of at least three groups: the Taliban regime (until its December 2001 collapse, following which it reverted to its tribal origins), the al Qaeda terrorist group, used as the Praetorian Guard for the Taliban leadership (both for internal security prior to and following commencement of US/Coalition operations), and foreign Taliban. The picture was further complicated by the tendency of some to refer to the Taliban as the *de facto* Government of Afghanistan because it exercised rough control over eighty per cent of the country. This was open to debate until collapse of the Taliban, at which time it ceased to be an issue. Up to the time of the Taliban regime collapse in December 2001, a strong case could be made that this was an internal conflict between non-State actors in a failed State.<sup>12</sup> By the time of US Army Civil Affairs entry into Afghanistan, the case was absolute.

Another factor was that the United States and its coalition partners were engaged in military operations in a foreign nation. Hence regardless of the status of the Taliban, an argument could be made that for certain purposes this was an international armed conflict. However, by the time the uniform issue was raised by non-government organizations and considered in Washington, the conflict against the Taliban and al Qaeda looked more like a counterinsurgency campaign or counter-terrorist operation than an international armed conflict. While the US Administration chose to apply the law of war applicable in international armed conflicts as a template for US conduct,<sup>13</sup> it would be incorrect to conclude that all of the law of war for international armed conflicts was applicable. For example, neither the Taliban nor al Qaeda personnel were regarded as entitled to prisoner of war status.<sup>14</sup> Nonetheless, the Geneva Convention Relative to the Treatment of Prisoners of War<sup>15</sup> (GPW), proved a useful template for their treatment.

This issue was not entirely new. US and other military forces engaged in the various peacekeeping and other peace operations during the 1990s frequently sought to ascertain where they were along the conflict spectrum. From the standpoint of

US military conduct, the issue made little difference. Department of Defense policy is that US military personnel will comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.<sup>16</sup> The primary issue in US and coalition operations against al Qaeda and the Taliban was entitlement of captured al Qaeda and Taliban to prisoner of war status under the GPW. That, as indicated, had been decided.

### *What Is The Relevant Law?*

In a speech at the United States Institute of Peace on March 1, 2001, Sir Adam Roberts declared “Lawyers stick to the safe anchor of treaties.”<sup>17</sup> This perhaps is a more erudite way of expressing the adage, “If the only tool you have is a hammer, every problem is viewed as a nail.” So it was in the debate over SOF wear of non-standard uniforms. The argument against non-standard uniforms primarily was cast in terms of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).<sup>18</sup> The author frequently heard critics argue that “in accordance with” the GPW, (a) SOF were required to wear uniforms; (b) failure to wear uniforms was a war crime; and (c) SOF had to wear uniforms and treat captured al Qaeda and Taliban as enemy prisoners of war in the hope of reciprocity should any SOF fall into enemy hands. A closer examination of the law reveals (a) and (b) to be legally incorrect, while (c) was highly speculative at best with respect to al Qaeda and Taliban conduct.

The GPW and its predecessors contain no language requiring military personnel to wear a uniform, nor fight in something other than full, standard uniform. Nor does it make it a war crime not to wear a uniform. Article 4, GPW, lists persons entitled to prisoner of war status and subject to the protections set forth in the GPW. It states in part:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias and volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

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- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.<sup>19</sup>

Differing views as to whether regular force combatants are *expected* or *required* to meet the four criteria contained in Article 4A(2) are beyond the scope of my presentation. While history, the negotiating history of article 4 and predecessor treaties, other provisions in the GPW, and recognized experts strongly suggest that regular force combatants are entitled to prisoner of war status once they are identified as members of the regular forces (however attired when captured),<sup>20</sup> other experts argue that the 4A(2) criteria are prerequisites for prisoner of war status for regular force personnel as well as militia members.<sup>21</sup> Court cases, while limited in number, tend to support the latter point of view.<sup>22</sup> Article 46 of the 1977 Additional Protocol I<sup>23</sup> denies prisoner of war protection to spies, even if they have been identified as regular members of the military.

Historical State practice, provided *infra*, suggests that denial of prisoner of war status is not automatic, while the experience of US military personnel captured even when in uniform has been one of refusal of the captor to provide prisoner of war status and/or suffer serious abuse.<sup>24</sup> Past abuses of captured US military and civilian personnel do not constitute either justification or an argument for military personnel to abandon standard uniforms. In international armed conflict, standard uniforms should be the norm; non-standard uniform, the rare exception; civilian attire, even rarer. But risk of denial of prisoner of war status, while a serious consideration, does not answer the commander's question: Is wearing something less than the standard uniform illegal? The answer in treaty law and State practice is clear: Wearing a partial uniform, or even civilian clothing, is illegal only if it involves perfidy, discussed *infra*. Military personnel wearing non-standard uniforms or civilian clothing are entitled to prisoner of war status if captured. Those captured wearing civilian clothing may be at risk of denial of prisoner of war status and trial as spies.

There is no doubt that in an international armed conflict any commander will, and should, weigh a decision to authorize the wearing of civilian clothing carefully. That being said, military personnel are in a high-risk profession, and commanders often must make life-and-death decisions. Under most circumstances, a commander ordering a frontal infantry assault on a heavily fortified position understands that in doing so, he has accepted that some soldiers are likely to lose their lives in carrying out his order. Similarly, individuals who join the military should be under no illusion as to the attendant risks. As British Special Operations



Executive historian M. R. D. Foot acknowledged, “The truth is that wars are dangerous, and people who fight them are liable to be killed.”<sup>25</sup>

The decision to wear something other than a standard uniform first requires military necessity. At issue then is what constitutes a “non-standard uniform?” If a commander provides military necessity for a Special Forces team to conduct operations in an international armed conflict in something other than the standard uniform, what steps are necessary to comply with the law of war? What guidance, if any does the law of war provide as to what might constitute a “non-standard uniform?” Second, what is “treacherous” killing, prohibited by Article 23(b), Annex to the 1907 Hague IV?

At the heart of the issue is the law of war principle of *distinction*. The law of war divides the population of nations at war into the belligerent forces and civilians not taking an active or direct part in hostilities.<sup>26</sup> With a single, limited exception,<sup>27</sup> only military forces may engage directly or actively in hostilities, that is, in combatant-like activities. Hostile acts by private citizens are not lawful, and are punishable, in order to protect innocent civilians from harm.<sup>28</sup> Civilians, and the civilian population, are protected from intentional attack so long as they do not take an active or direct part in hostilities. In turn, military forces are obligated to take reasonable measures to separate themselves from the civilian population and civilian objects, to distinguish innocent civilians from civilians engaged in hostile acts, and to distinguish themselves from the civilian population so as not to place the civilian population at undue risk. This includes not only physical separation of military forces and other military objectives from civilian objects and the civilian population as such, but also other actions, such as wearing uniforms. An early 20<sup>th</sup>-century law of war scholar observed: “The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable.”<sup>29</sup>

Another law of war scholar summarizes the principle of *distinction* in the following way:

It may be said that the principle . . . of distinction between belligerents and civilian population, had found acceptance as a self-evident rule of customary law in the second half of the 19<sup>th</sup> century. Indeed, it seems no more than a reflection of practice as demonstrated in many of the wars fought in Europe in that period. Soldiers were not merely distinguishable; they were conspicuous in their proud uniforms; and armies fought each other, and preferred the civilian population not to mingle in their business.<sup>30</sup>

State practice and treaty development make it clear that the principle is neither absolute nor rigid. Wearing civilian clothing for intelligence collection is acknowledged in treaty law as a lawful military activity. SOF wearing civilian

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clothing while serving with partisans was common State practice in World War II and codified in subsequent treaties or their negotiating records, as will be shown. The ancillary law of war prohibition on “killing treacherously”<sup>31</sup> does not preclude lawful ruses or Special Forces’ wearing non-standard uniforms, or openly fighting in civilian attire with no intent to conceal their combatant status.<sup>32</sup>

### **Wearing of Uniforms**

Military wear of uniforms during conventional combat operations in international armed conflict reflects the general customary practice of nations, subject to limited exceptions discussed *infra*. State practice of uniform wear is extensive, dating at least to the Peloponnesian Wars (431 to 404 B.C.).<sup>33</sup>

The customary principle of *distinction* is applicable to the regular military forces. Conventional military forces should be distinguishable from the civilian population in international armed conflict between uniformed military forces of the belligerent States. It is an expectation, with codified exceptions, and another exception acknowledged in the negotiating record of the 1977 Additional Protocol I.<sup>34</sup> The criteria set forth for militia and partisan forces not a part of the regular military had as their intention recognition of the generally accepted practice of nations with respect to the characteristics of conventional forces.<sup>35</sup>

No rule exists stating that a complete, standard uniform is the only way by which regular armed forces may make themselves distinguishable from the civilian population.<sup>36</sup> Historically it has been the predominant way by which military personnel, including special operations forces, have distinguished themselves from the civilian population. But it has not been the exclusive way.

A difficulty lies in the lack of definition. There is no international standard as to what constitutes a “uniform.”<sup>37</sup> Neither the 1907 Hague Convention IV nor the GPW offers a definition or precise standard. In the International Committee of the Red Cross (ICRC) *Commentary* on Article 4, GPW, its author states:

The drafters of the 1949 Convention, like those of the Hague Conventions, considered it unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from . . . civilians.<sup>38</sup>

Similarly, reporting on discussions of the same issue at the 1974-1977 Diplomatic Conference that promulgated Additional Protocol I, the ICRC *Commentary* states:

What constitutes a uniform, and how can emblems of nationality be distinguished from each other? The Conference in no way intended to define what constitutes a

uniform. . . . “[A]ny customary uniform which clearly distinguished the member wearing it from a non-member should suffice.” Thus a cap or an armband etc. worn in a standard way is actually equivalent to a uniform.

The uniform and other emblems of nationality are visible signs. Although certain kinds of battle dress of different countries are very similar nowadays, it is nevertheless possible to distinguish allied armed forces from enemy armed forces by means of characteristics of outfitting and other signs of nationality. Furthermore, this makes it possible to distinguish members of the armed forces from the civilian population. . . .<sup>39</sup>

The ICRC *Commentary* indicates that a State should ensure that its conventional military forces be distinguishable from the civilian population. It does not specify the manner in which this may be accomplished, nor state that the complete standard uniform is the only way in which this requirement may be met.

In spite of the clear treaty language in Article 4A(2)(b), GPW (“*fixed* distinctive sign”), the device need not be permanent or fixed. What “fixed distinctive sign” means remains unresolved. In commenting on this, Professor Howard S. Levie notes:

The ICRC has made several statements attempting to offer acceptable interpretations of the meaning of the term “fixed distinctive sign” [contained in Article 4A(2), GPW]. In 1960 it stated that the sign “must be worn constantly”; but in 1971 it backtracked somewhat when it said that the sign must be “fixed, in the sense that the resistant [partisan or guerrilla] should wear it throughout all the operation in which he takes part.” Moreover, at that same time the ICRC stated that the sign “might be an armband, a headdress, part of a uniform, etc.” During World War II the listed items were, on various occasions, used by resistance groups; but they were frequently removed and disposed of at critical moments in order to enable the individual to escape being identified as a member of the resistance. . . .<sup>40</sup>

Given the generally accepted understanding of the term “distinctive devices”—a hat, a scarf, or an armband—a device recognizable in daylight with unenhanced vision at reasonable distance would meet the law of war obligation to be distinguishable from the civilian population.<sup>41</sup>

There are at least five categories of clothing: (a) a uniform as such, such as BDU; (b) a uniform worn with some civilian clothing;<sup>42</sup> (c) civilian clothing only, but with a distinctive emblem to distinguish the wearer from the civilian population; (d) civilian clothing only, with arms and other accoutrements (such as load-bearing equipment, body armor) that, combined with actions and circumstances, clearly manifest military status; and (e) civilian clothing, with weapon concealed and no visual indication that the individual is a member of the military.<sup>43</sup> Based upon historical practice and treaty negotiation records, the first three constitute a

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“uniform.” The fourth should protect the individual from charges of spying if captured provided he is distinguishable from the civilian population by physical separation, clearly military duties, and other characteristics.<sup>44</sup> The last is lawful for intelligence gathering or other clandestine activities. As will be indicated, violation of the law of war occurs only when there is treacherous use of civilian clothing that is the proximate cause of death or injury of others. The 1974-1977 Diplomatic Conference<sup>45</sup> did not regard it as serious enough to be classified as a Grave Breach.

The United States is not a State party to Additional Protocol I. Following extensive military, legal and policy review, the United States decided against submission of Additional Protocol I to the United States Senate for its advice and consent to ratification.<sup>46</sup> However, the United States acknowledged that it is bound by Additional Protocol I provisions that constitute a codification of customary international law.<sup>47</sup>

Most paragraphs of Article 44, Additional Protocol I, amended the customary law of war with respect to entitlement to prisoner of war status for private groups (so-called “liberation movements”). For policy, humanitarian and military reasons these provisions are regarded as unacceptable by the United States, and were a major reason for the US decision against ratification.

With respect to conventional forces, Article 44, paragraph 7, states: “This Article is not intended to change the *generally accepted practice* of States with respect to wearing of the uniform by combatants assigned to regular, uniformed armed units of a Party to the conflict.” [Emphasis added.]

An authoritative commentary on Additional Protocol I—prepared by individuals directly involved in its drafting and negotiation—offers an explanation of this provision:

Within the Working Group the initial enthusiasm for a single standard applicable both to regular and independent armed forces was dampened when concern was expressed that the . . . [new rules] might encourage uniformed regular forces to dress in civilian clothing. . . . Accordingly, para. 7 was developed to overcome this concern. . . . The report of the Working Group, however, states that “regulars who are assigned to tasks where they must wear civilian clothes, as may be the case . . . with advisers assigned to certain resistance units, are not required to wear the uniform.” The implication of para. 7, construed in the light of the Working Group report is that uniforms continue to be the principal means by which members of regular uniformed units distinguish themselves from the civilian population . . . , but that members of regular armed forces assigned or attached to duty with the forces of resistance or liberation movements may conform to the manner in which irregulars conform to the requirements of para. 3. . . .<sup>48</sup>

That being said, another Diplomatic Conference participant offered the following comment as to uniform requirement in light of Article 44, paragraph 7: “[I]t

should be noted that it is apparently not intended to exclude all regular forces from the application of the previous paragraphs of the article. What it does imply, however, is that regular forces whenever possible (notably in “conventional” types of hostilities), should continue to wear uniforms.”<sup>49</sup>

Thus, commentaries by participants in the 1974-1977 Diplomatic Conference confirm the Additional Protocol I acknowledgement that, where warranted by military necessity, it may be permissible in international armed conflict<sup>50</sup> for regular military forces to wear civilian clothing. At issue is whether the action is a legitimate ruse or perfidy.

### **Ruses and Perfidy**

Ruses of war are lawful deceptive measures employed in military operations in international armed conflict for the purpose of misleading the enemy.<sup>51</sup> The law of war prohibits “killing or wounding treacherously individuals belonging to the hostile nation or army,”<sup>52</sup> commonly known as perfidy.<sup>53</sup>

Article 23 of the Annex to the 1899 Hague II Convention states:

23. Besides the prohibitions provided by special Conventions, it is especially prohibited –

(a) To kill or wound treacherously individuals belonging to the hostile nation of army.<sup>54</sup>

This article, along with Articles 29 and 31, were re-codified with non-substantive changes in the Annex to the 1907 Hague IV Convention. They are important for several reasons. They constitute recognition of the general obligation for military forces to fight in uniform. However, it is not a war crime for military personnel to wear or fight in civilian clothing unless it is done for the purpose, and with the result of killing treacherously. What constituted “killing treacherously” was defined as “perfidy” in Article 37 of Additional Protocol I:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.<sup>55</sup>

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In order to be perfidy, the act must be the proximate cause of the killing, injury or capture of the enemy.<sup>56</sup> But while the Diplomatic Conference codified perfidy, it limited criminal liability. Perfidy was made a Grave Breach only if it involves “the perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun.”<sup>57</sup> Wearing civilian attire or feigning civilian status was not designated a Grave Breach.

Each differs from US and coalition Special Forces operating in non-standard uniforms as part of heavily armed units clearly known and identifiable by the Taliban and al Qaeda in the war in Afghanistan. Special Forces wear of non-standard uniforms, whether partial BDU or indigenous apparel of their Northern Alliance partners, including their distinctive pakol hats and/or tribal scarves, did not constitute perfidy. US Army Civil Affairs wear of Western-style civilian clothing or indigenous attire in Afghanistan would not have constituted perfidy unless it had been done for the purpose, and with the result of, killing treacherously. The NGO complaint made no such allegation, and no evidence has been surfaced to suggest such conduct.

That being said, the devil always has been in the details in balancing the allowance for military personnel to operate in enemy denied areas in civilian attire, and perfidy. At the heart of the balance is the law of war principle of distinction. State practice, of which more will be said, suggests that the lines between the two are far from clear.

There is logic to this history. State tolerance of Special Forces fighting in civilian clothing in limited, special circumstances, such as support for partisans, is consistent with humanitarian tolerance for captured guerrillas. It follows efforts by many, including the International Committee of the Red Cross, to provide prisoner of war protection to all and not to prosecute except in the most egregious circumstances, such as terrorism and *treacherous* use of civilian clothing.<sup>58</sup> The drafters of Article 44 had a better sense of State practice than did critics of US and coalition Special Forces wear of non-standard uniforms.

Into the midst of this discussion steps the global war on terrorism. Terrorists are not entitled to law of war protection, and the law of war is not applicable as such in counter-terrorist operations.<sup>59</sup> Counter-terrorist units have been authorized to use hollow-point or other expanding ammunition,<sup>60</sup> for example, and have worn civilian clothing or non-standard uniforms on missions.<sup>61</sup> President Bush’s radio address to the nation and the world on September 29, 2001, in response to the September 11th terror attacks on the World Trade Center and Pentagon, may have prompted some in the military to err initially and assume that law of war rules relating to uniform wear were not applicable in the military operations that followed in Afghanistan.

This leads to the proper point for review of State practice.

*What Is State Practice?*

State practice is important to answering legal questions because it forms a basis for determining customary international law.<sup>62</sup> State practice—a synonym for military history—reveals how governments interpret, apply and/or enforce law of war treaty provisions.

State practice in international armed conflict and other military operations contains a significant record of Special Forces wear of civilian attire, non-standard uniforms, and/or enemy uniforms as a ruse or for other reasons. Beginning with Colonel T. E. Lawrence, the celebrated Lawrence of Arabia, State practice reflects an overt tolerance bordering on admiration for special forces wearing civilian clothing when working with indigenous persons in enemy denied areas, whether for intelligence gathering or combat operations.<sup>63</sup> Special forces personnel captured while wearing civilian clothing have been treated as spies rather than charged with a war crime, while Special Forces who fought in civilian clothing and returned safely have been honored as heroes.

The actions of Colonel Lawrence in all likelihood were not the first in which indigenous attire was worn, but one of the more influential. An appreciation of the list that follows necessitates a brief historical overview.

Germany's annexation of Austria in 1938 sparked interest within the British military in the potential necessity for irregular operations. Recalling the Spanish *guerrillas* in Wellington's campaign against the French in the Peninsular War (1807-1809), Boer commando success against the British in the 1899-1902 Anglo-Boer War, Colonel Lawrence's success, the British experience in facing Sinn Fein in Ireland 1919-1921,<sup>64</sup> Chinese guerrilla operations against Japan in the Sino-Japanese War, and other guerrilla activities in other conflicts, in 1938 the Research Branch of the British General Staff (GS(R)) began research that led to preparation of Field Service Regulations entitled *The Art of Guerrilla Warfare*, *The Partisan Leader's Handbook*, and *How to Use High Explosives*, all subsequently noted in *GS(R) Report No. 8 'Investigation of the Possibilities of Guerrilla Activities*.<sup>65</sup>

Commencement of the Second World War with the German invasion of Poland on September 1, 1939, revealed Germany's first use of Special Forces in civilian clothing, enemy uniforms, or non-standard attire as a ruse to seize critical objectives. British focus on partisan warfare and Special Forces was renewed with Germany's invasion of Western Europe, the fall of France, and British Army evacuation from Dunkirk in May 1940. Standing alone, the British leadership identified several means for action. In addition to traditional means such as naval blockade and aerial bombing, it directed commando raids and "the undermining of enemy morale and production possibilities through close co-operation with

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exile governments and through them—or without them—with Resistance Movements in enemy occupied territory.” The Charter for the British Special Operations Executive (SOE) received War Cabinet approval on July 22, 1940. At this time Prime Minister Winston S. Churchill offered his oft-quoted edict: “And now set Europe ablaze.” Working closely with exile governments, the British Government began making contact with potential resistance movements throughout Nazi-occupied Europe, ultimately providing them personnel and material support, subsequently coordinating their actions to link them directly to the British and Allied war effort.

It is important to understand what SOE was, and what it was not. SOE was an independent secret service. It was not a military service. But SOE relied heavily upon assignment of military officers to it, coordination of operations with the military chiefs of staff, and was dependent on the military services for personnel, support, supply and transportation. Although intelligence was sometimes a by-product of its activities, SOE was not an intelligence collection agency. It was intended for its operatives to engage in clandestine, subversive operations in civilian clothing. The dagger lay concealed beneath the cloak. In Prime Minister Churchill’s words, this was “‘ungentlemanly warfare’ in which the ‘Geneva Convention’ rules do not apply and the price of failure was often a slow and terrible death.”<sup>66</sup> Thus the British Government and SOE operatives consciously entered into this form of operations fully cognizant of its law of war implications.

The “Geneva Conventions” baby had not been tossed out with the bath water. As was the case with US Special Forces in Afghanistan in 2002, restrictions were placed on wearing civilian attire. Military personnel providing transport to SOE personnel to and from an operation were required to be in uniform, for example, while late-war operations enabled some to wear uniforms. For post-D-Day operations, SOE personnel were provided armbands for partisans and British military personnel not in uniform. Prior to and after D-Day, a clear showing of military necessity as it related to the mission was necessary for authorization to wear civilian clothing. For example, on May 30, 1943, the British War Office informed the Commander-in-Chief, India, that the Chief of Staff had decided: “No member of the armed forces . . . should be sent on military operations, however hazardous, in civilian clothes, except in the case of subversive activities for which civilian clothes are essential.”<sup>67</sup>

Germany invaded Russia on June 22, 1941. In response, Russian Premier Josef Stalin declared that day:

The struggle against Germany must not be looked upon as an ordinary war. . . . It is not merely a fight between two armies . . . in order to engage the enemy there must be bands



of partisans and saboteurs working underground everywhere. . . . In territories occupied by the enemy, conditions must be made so impossible that he cannot hold out. . . .<sup>68</sup>

Soviet partisan warfare differed from that of Great Britain and (subsequently) the United States, if perhaps only slightly. Whereas Great Britain and the United States exported support for underground movements in Axis-occupied nations, the Soviet Union supported partisan warfare within its own territory occupied by Germany, operating along interior lines. The partisan movement, organized, trained and directed by Soviet Army personnel, was substantial. In the month of July 1943, partisan forces carried out 10,000 separate demolitions of track to impede German re-supply efforts. During the night of July 4, 1944 alone, partisans laid 4,110 separate demolition charges on rail lines; on June 19, partisans planted over 5,000 mines on the roads and railroads behind the Second and Fourth German Armies. While it was estimated that 250,000 people were directly engaged in partisan operations by 1944, Soviet authorities boasted that every Soviet civilian in Nazi-occupied territory was at least indirectly involved in partisan activities, and on September 6, 1942, the partisan movement achieved the nominal status of a separate branch of the Soviet military—something thought about in the United Kingdom by some, but never achieved in either the United Kingdom or the United States. Like underground operations supported by the United Kingdom and United States, Soviet partisan operations—with civilians and military personnel fighting in civilian attire—were State approved and directed.

United States' movement into partisan operations closely followed Russian and British actions. Early in World War II, the Roosevelt Administration established the Office of Strategic Services (OSS). Forerunner of the Central Intelligence Agency, the OSS was a hybrid organization led by Major General William A. Donovan, a distinguished, decorated former Army officer. OSS was under the administrative cognizance of the Joint Chiefs of Staff but under operational control of the theater commander.<sup>69</sup> It was an organization focused on espionage, sabotage and partisan support. US Army personnel provided a major part of the OSS strength, which reached its maximum of 13,000 in December 1944. US Army Special Forces traces its lineage to OSS.<sup>70</sup>

By the spring of 1944, SOE and OSS were operating together in a variety of missions.<sup>71</sup> Some OSS units operated in uniform, while others did not under all circumstances. In one of its major efforts, France, OSS operational units worked in Nazi-occupied territory in direct support of the French Resistance. As a leading history notes:

The first group consisted of seventy-seven Americans *who wore civilian clothes* as organizers of secret networks, as radio operators, or as instructors in the use of

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weapons and explosives. Thirty-three members of that group were active in France before 6 June 1944, D-Day. . . . [Emphasis added.]

The largest OSS group in France consisted of 356 Americans who were members of Operational Groups (OG). All recruits for the OGs were French-speaking volunteers from US Army units, primarily infantry and engineer (for demolition experts). . . . Working in uniform, these teams parachuted behind the lines after D-Day to perform a variety of missions. . . .<sup>72</sup>

In addition to its Operational Groups, OSS worked with SOE in Jedburgh teams. These teams were intended to be composed of an Englishman, an American, and a continental Europe member, each military, two of whom were officers; the third was the communications specialist.<sup>73</sup> The initial core contained fifty US officers fluent in French who were to parachute in uniform to resistance groups, initially throughout France during the weeks following the Allied landings on June 6, 1944. They would provide liaison with the underground, arm and train the Maquis, boost “patriotic morale,” and coordinate resistance activity with Allied military strategy. Ninety-three Jedburgh teams parachuted into France to join the Maquis after D-Day, numbering three hundred French, British and US officers. Eventually they served in other Nazi-occupied territory.

While the Jedburghs normally operated in uniform, this was not always possible. In an operation in Nazi-occupied France, Major Horace Fuller, USMC, avoided capture as a result of accepting the advice of his French contact to wear civilian clothing, including during combat operations.<sup>74</sup>

Similar operations occurred in other theaters. On May 4, 1942, a US Navy officer formed Naval Group China. Composed of Navy and Marine Corps personnel, its mission was to establish radio intelligence posts, weather-gathering and lookout stations, form, supply and train indigenous sabotage units, and conduct attacks on Japanese units and equipment. Also known as the Sino-America Cooperative Organization, it executed its operations successfully for the duration of the war, many of them in non-standard uniform or indigenous civilian attire, depending on the mission and situation.<sup>75</sup>

This is not the time to recount Allied support for partisan operations in World War II, nor what then were termed “commando” operations. However, several observations are relevant to the issue at hand. First, partisan operations were universal, occurring in every Axis-occupied nation, actively supported by each of the major Allies—United Kingdom, United States and Russia—and each government in exile. Second, they were significant in their breadth and longevity. For example, the French Resistance Movement began shortly following German conquest in 1940 and continued through the war. By 1944, approximately three million men

and women were associated with the various French Resistance organizations. In Yugoslavia, 400,000 were involved in partisan operations.

Resistance activity was dependent upon volunteers—whether partisans from the civilian population of Axis-controlled nations, civilian and military personnel serving with the SOE or OSS, or members of Special Forces. All were aware of the possible consequences if they were caught, whether in uniform or other attire. At the same time, execution as a spy if captured in something other than standard uniform was not a certainty.

Partisan sabotage operations were regarded as a valuable alternative to highly inaccurate strategic bombing in Nazi-occupied territory, as the Allies sought to reduce collateral civilian casualties to friendly populations.<sup>76</sup> Partisan sabotage was the “smart bomb” of World War II. In its employment of very precise means, it was the epitome of the second facet of the fundamental law of war principle of distinction.<sup>77</sup> In some cases, the evidence was clear that partisan/Special Forces sabotage often was more effective than air operations against the same targets,<sup>78</sup> while in other instances OSS-lead partisans were able to destroy heavily defended targets that had resisted air attack.<sup>79</sup> While the rationale for partisan or Special Forces attacks may have been selected over aerial attack more for political than law of war reasons,<sup>80</sup> it offers evidence of why governments chose not to condemn attacks in civilian clothing as a Grave Breach in Additional Protocol I. Special Forces/partisan unconventional warfare operations tied down Axis units that could have been used more effectively engaging Allied forces but for the partisan threat,<sup>81</sup> and significantly impaired German efforts to reinforce their defenses at Allied points of offensive ground operations.<sup>82</sup> Special Forces and their partisan allies performed other life-saving actions, such as the rescue of downed Allied aircrew and assistance in running escape routes.<sup>83</sup> Special Forces served as on-the scene ambassadors where Allied combat operations killed innocent civilians.<sup>84</sup>

Partisan operations, including sabotage and direct attacks on Axis personnel, were executed primarily in civilian attire, occasionally (after the Allied return to Europe on June 6, 1944) wearing a distinctive device, sometimes in a partial uniform, but seldom in full uniform. “Uniform” varied, often being more like modern “gang” colors than a traditional military uniform. The same was true for SOE and OSS military personnel serving with resistance movements and, in some cases, Special Forces.

Finally, partisan operations were successful. Danish historian Jørgen Hæstrup concludes “The Resistance Movements, seen in their entirety, deeply influenced the course of the war, psychologically, militarily and politically.”<sup>85</sup> In support thereof, he quotes Russian historian E. Boltin: “History has never known a popular fight of such huge dimensions as was apparent during the 1939-1945 war.

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Furthermore the masses had never before taken so directly a part in the military combat, as was the case in the last war in Europe.”<sup>86</sup>

The preceding comments are offered to show that the wearing of civilian attire by partisans or military personnel in Special Forces units or in the SOE or OSS was neither unique, occasional, nor limited in time and space. In the examples that follow, it is clear that the wearing of civilian attire or non-standard uniform (and, in some cases, enemy uniform) was a deliberate act based upon a decision made at the highest levels of government.

The list set forth in the Annex (*infra*) is illustrative rather than exhaustive, and is offered for historical purposes rather than necessarily with approval or condemnation of the missions listed. With the exception of US action in *Ex parte Quirin*<sup>87</sup> and the unsuccessful prosecution of Otto Skorzeny,<sup>88</sup> the list reveals that State practice in international armed conflict has tended not to treat wear of civilian attire, non-standard uniforms, and/or enemy uniforms by regular military forces as a war crime. Personnel caught *in flagrante delicto* in civilian attire or enemy uniforms have been treated as spies, sometimes (but not always) with severe consequences. However, those who returned safely were decorated rather than punished, manifesting an endorsement of their actions by their government.

The wearing of enemy uniforms is not directly within the scope of the issue under consideration. However, State practice is germane regarding the prohibition on “killing treacherously” contained in Article 23(b) of the Annex to the 1907 Hague Convention IV.<sup>89</sup> State practice shows that governments have been willing to deploy Special Forces in civilian attire or enemy uniforms where a major advantage is anticipated, and where the gain is greater than the risk to the deployed personnel. Such actions have not been regarded as a war crime either by the government ordering them or the government against which the forces were employed.<sup>90</sup>

State practice provides several points for fine tuning a general principle:

(a) Colonel Lawrence wore indigenous attire while leading the Arab uprising against the Ottoman Empire in the Hejaz. Coalition Special Forces aligned with Northern Alliance and Southern Alliance forces in Afghanistan, suggesting a nuance in the law of war principle of distinction: an armed military group recognizable at a distance and readily identifiable to the enemy by its size and other characteristics, even when wearing indigenous attire with or without distinctive devices, is acting lawfully. In essence, there is no “treacherous killing” or perfidy because there has been no treacherous use of civilian clothing.

(b) Non-standard uniforms or indigenous attire may be adopted for practical reasons rather than with intent to commit perfidy. The British/Commonwealth Long Range Desert Group (LRDG), operating behind enemy lines in North Africa from 1940-1943, adopted the kaffiyeh and agal as a standard part of their uniform

for utilitarian purposes, for example. The LRDG wore native sheep or goatskin coats to ward off the nighttime desert cold, as did British and US Special Forces operating behind Iraqi lines in the 1991 coalition effort to liberate Kuwait. Wear of the latter by the LRDG served partially as a ruse against casual observation, such as by enemy aircraft. However, their identity clearly was recognizable at a distance by enemy ground forces.<sup>91</sup>

(c) Law of war compliance with something as simple as wearing a distinctive device may not be practical where the enemy is known to punish rather than reward compliance. For example, immediately prior to D-Day (June 6, 1944), British air-delivered supplies included armbands for partisan and supporting Special Forces' use once Allied conventional forces returned to the continent. However, distinctive emblem wear was viewed with skepticism in light of Hitler's *Commando Order* denying quarter to any partisans or Special Operations Forces.<sup>92</sup>

(d) Perfidy requires *mens rea*, that is, the donning of civilian attire with the clear intent to deceive. A group of alert, fit young men, heavily and openly armed, surrounding an individual in military uniform, and themselves surrounded by host nation military personnel in uniform, clearly are a personal protection detail, and are not attempting to mask their status nor gain an advantage over some unsuspecting enemy soldier.

The law of war regards a uniform as the principal way in which conventional military forces distinguish themselves from the civilian population in international armed conflict. State practice (including US practice), treaty negotiation history, and the views of recognized law of war experts reveals (i) that the law of war obligation is one of distinction that otherwise has eluded precise statement in all circumstances; (ii) there is no agreed definition of uniform; (iii) the uniform "requirement" is less stringent with respect to Special Forces working with indigenous forces or executing a mission of strategic importance; and (iv) a law of war violation occurs only where an act is perfidious, that is, done with an intent to deceive, and the act is the proximate cause of the killing, wounding or capture of the enemy. My review of State practice found no enforcement by a government against its own personnel. Enemy combatants captured *in flagrante delicto* were prosecuted as spies rather than for law of war violations, with the exception of *Ex parte Quirin* and the unsuccessful post-World War II US prosecution of SS-Obersturmbannführer Otto Skorzeny.

### *Summary*

In international armed conflict, the wearing of standard uniforms by conventional military forces, including Special Operations Forces, is the normal and expected

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standard. Wearing civilian attire or a non-standard uniform is an exception that should be exercised only in extreme cases determined by competent authority.

In international armed conflict, military necessity for wearing non-standard uniforms or civilian clothing has been regarded by governments as extremely restricted. It has been limited to intelligence collection or Special Forces operations in denied areas. No valid military necessity exists for conventional military forces, whether combat (combat arms, such as infantry, armor or artillery), combat support (such as Civil Affairs), or combat service support personnel, to wear non-standard uniforms or civilian attire in international armed conflict.

The codified law of war for international armed conflict does not prohibit the wearing of a non-standard uniform. It does not prohibit the wearing of civilian clothing so long as military personnel distinguish themselves from the civilian population, and provided there is legitimate military necessity for wearing something other than the standard uniform. The generally recognized manner of distinction when wearing something other than the standard uniform is through a distinctive device, such as a hat, scarf, or armband, recognizable at a distance.

Violation of the law of war (perfidy) occurs when a soldier wears civilian clothing—*not* a non-standard uniform—with intent to deceive, and the act is the proximate cause of the killing, wounding or capture of the enemy. Perfidy does not exist when a soldier in civilian attire or non-standard uniform remains identifiable as a combatant, and there is no intent to deceive.

Discussion of the issue raises an appearance of a double standard in considering Taliban militia/al Qaeda (in Afghanistan) or Saddam Fedayeen (in Iraq) wear of civilian clothing while justifying SOF wear of Western civilian attire or indigenous attire. A “double standard” exists within the law of war for regular forces of a recognized government vis-à-vis unauthorized combatant acts by private individuals or non-State actors. The issue was complicated by the unique nature of operations in Afghanistan, that is, counter-terrorist operations against non-State actors in a failed State, and the increased role of NGOs in a non-linear combat environment.

The law of war principle of distinction cannot be taken lightly. The standard military field uniform should be worn absent compelling military necessity for wear of a non-standard uniform or civilian clothing. Military convenience should not be mistaken for military necessity. That military personnel may be at greater risk in wearing a uniform is not in and of itself sufficient basis to justify wearing civilian clothing. “Force protection” is not a legitimate basis for wearing a non-standard uniform or civilian attire. Risk is an inherent part of military missions, and does not constitute military necessity for the wear of civilian attire. But the law of war requirement to wear a complete, “standard” uniform is not as absolute as some have recently suggested.

To summarize:

(a) The law of war requires military units and personnel to distinguish themselves from the civilian population in international armed conflict. Article 4(A)2 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)<sup>93</sup> sets forth standards all combatants are expected to satisfy. However, military personnel may distinguish themselves from the civilian population in other ways, such as physical separation.

(b) Standard US military uniforms satisfy the requirements of GPW Article 4A. “Standard military uniform” refers to battle dress uniform (BDU), desert camouflage uniform (DCU), official flight suit, or other obvious military apparel.<sup>94</sup> The presumption should be that all US armed forces operate in standard uniforms during military operations in international armed conflict.

(c) When authorized, the requirements of GPW Article 4(A)2 may be satisfied by other than the complete standard military uniform. For example, a visible part of the standard military uniform, or a fixed, distinctive sign will satisfy the requirements provided that the forces are recognizable as combatants with unenhanced vision at a distance.

(d) Neither the Global War on Terrorism nor the fact that one is a member of Special Operations Forces offers *carte blanche* for military personnel to wear something other than the full, standard uniform. The wearing of a partial uniform or non-standard uniform with fixed, distinctive sign should be reserved for exceptional circumstances when required by military necessity. Force protection does not constitute military necessity. Authority should be regarded as extremely limited, mission and unit specific, and decided by a senior commander or higher, such as (in the US military) the Combatant Commander responsible for the mission.

(e) While a hat, scarf or armband would meet the fixed distinctive sign requirement, a permanently affixed distinctive sign such as an American flag sewn onto body armor or clothing is more prudent.

(f) Forces operating in other than the complete standard uniform should receive training in the law of war to ensure that they understand the requirements of distinction and are fully aware of the risks they may face if captured if they fail to comply with the law of war.

(g) Captured US military personnel (other than escaping prisoners of war) wearing civilian apparel without a fixed distinctive sign and without visible weapons may be considered spies by their captor. The captor may try them for domestic law violations (e.g., spying). Unless they otherwise commit an independent law of war violation (e.g., perfidy), history indicates that the acts will not be regarded as violative of the law of war.

## ANNEX

TABLE OF HISTORICAL STATE PRACTICE<sup>95</sup>

Who	What	When	Where	Disposition (if any)
Japan	Japanese officers in Chinese civilian attire on sabotage mission.	1904	Manchuria (Russo-Japanese War)	Captured and executed.
Russia	Russian soldiers in Chinese civilian attire attacked Japanese units.	1904	Manchuria (Russo-Japanese War)	Japanese diplomatic protest.
Col. T. E. Lawrence (Lawrence of Arabia) British Army	Wore Arab attire while leading Arab uprising against the Ottoman (WWI) Empire, fighting Turkish Army.	1916–1918	Hejaz Province Arabia (Syria)	Lawrence decorated.
Germany	SF dressed as Polish civilians fake raid on customs house as pretext for German invasion of Poland.	1939	Germany	None.
France	Free French commander wore indigenous attire in attack on Italian fort at Murzuk, Jan 11, 1941.	1941	Libya	Killed in attack.
United Kingdom	Special Operations Executive (SOE) personnel in civilian clothing supported partisan operations in Axis-controlled Nations.	1940–1945	Europe, Asia	SOE agents captured in <i>flagrante delicto</i> were incarcerated, not always executed. <sup>96</sup>



*W. Hays Parks*

Who	What	When	Where	Disposition (if any)
Germany	Danish-speaking SF dressed as Danish soldiers seize key bridge to initiate invasion.	1940	Denmark	None
Germany	SF dressed as Dutch military policemen seize key bridge at start of German invasion.	1940	Netherlands	None
Germany	SF wearing Belgian Army overcoats over their uniforms seize key bridge at start of German invasion.	1940	Belgium	None
United Kingdom	Long Range Desert Group wore Arab kaffiyeh and agal, sometimes wore indigenous coats over uniforms.	1940–1943	Libya	None. Kaffiyeh/agal adopted by LRDG as official uniform.
Germany	SF wearing Russian Army overcoats, carrying Russian weapons, driving Russian vehicles, spearhead German invasion.	1941	Russia	None
Germany	SF dressed in British Army uniforms and indigenous attire, driving British vehicles, attempt reconnaissance to Suez.	1941	Libya	None

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Who	What	When	Where	Disposition (if any)
United Kingdom	SF in German uniforms infiltrated Tobruk as part of Operation Agreement. Mission executed with infiltration by another officer in indigenous attire.	1942	Libya	None
United Kingdom	SOE-trained, equipped and transported partisans kill Obergruppenführer Reinhard Heydrich, Reichsprotektor for Nazi Governor of Czechoslovakia.	1942	Czechoslovakia	Partisan agents commit suicide rather than surrender.
Soviet Union	Russian partisans and military operative groups deployed to support them fought in civilian clothing.	1941–1945	German occupied territory in Soviet Union.	Partisans captured were executed. Survivors decorated by Russia postwar.
Soviet Union	Naval Spetsnaz conduct operations in civilian clothing, enemy uniforms.	1942–1945	German-occupied territory in Soviet Union.	Same as above.
Japan	Used English-speaking Germans (French Foreign Legion) captured in Thailand in Feb. 1941 dressed in uniforms resembling British Khaki to penetrate British lines.	1942	Malaya	None.
Germany <sup>97</sup>	Eight Germans on sabotage mission captured in civilian clothing.	1942	US	Tried by Military Commission for violation of the law of war.

*W. Hays Parks*

Who	What	When	Where	Disposition (if any)
UK/Australia	Operation Jaywick, combined SOF team navigated to Singapore in Japanese fishing boat Kofuku Maru, flying Japanese flag and dressed in native sarongs. Attacked and sank seven ships (38,000 tons).	1943	Singapore	Participants commended.
Poland	SOE-trained partisans, one dressed in SS uniform, raided Pinsk prison near Brest-Litovsk, freed prisoners, killed commandant.	1943	Poland	None.
United Kingdom	SOE-trained, equipped and transported partisans sabotaged German heavy water plant at Vermok.	1943	Norway	None.
Japan <sup>98</sup>	Formed Indian National Army from captured Indian Army personnel, who fought in Indian Army uniforms against British and Commonwealth forces in Burma.	1943	Burma	Post-war trials of soldiers under India Army Act or Indian Penal Code rather than charged with war crimes.
United Kingdom	LT. B.J. Barton, No. 2 Commando, penetrated German defenses wearing indigenous attire, killed German commandant.	1944	Brac (Agean)	Awarded Military Cross.

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Who	What	When	Where	Disposition (if any)
United Kingdom	British officers dressed as German soldiers, with partisan assistance, abduct Major General Karl Kreipe, Commander, 22nd Panzer Division on Crete.	1944	Crete	None.
United Kingdom	SAS wore mixed dress of British, German and Italian uniforms, and civilian clothing.	1944	Aegean	None. One Victoria Cross, numerous other awards.
United Kingdom, Australia	Operation Rimau, combined SF team in uniform to attack Japanese ships.	1944	Singapore	Captured died from illegal medical experimentation, or were executed.
United Kingdom	Special Boat Squadron(SBS) officer dressed as priest led successful attack on German units.	1944	Nisiros (Aegean)	None.
United Kingdom	SOE-trained/ equipped partisans sabotage and sink ferry carrying German heavy water.	1944	Norway	None.
United States	Office of Strategic Service (OSS) teams enter Nazi-occupied Europe, conduct operations in civilian clothing.	1944	France, Yugoslavia, Albania, Bulgaria, Rumania	None.
United States	US Naval Group China wearing civilian clothing collected intelligence and executed direct action missions against Japanese.	1944	China	None.

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Who	What	When	Where	Disposition (if any)
United States	Army Rangers dress as German soldiers to penetrate and fight in Aachen (OSS operation).	1944	Germany	None.
United States United Kingdom/ Host nation	Jedburgh teams operate post-D-Day in support of partisans, not always in uniform.	1944– 1945	France, Italy, Yugoslavia, Albania, Netherlands	None.
Germany	German Kommando unit dressed in US uniforms, driving US vehicles, penetrate US lines in Ardennes.	1944	Belgium	Members captured in US uniforms executed. Mission commander, Otto Skorzeny, and ten others acquitted in war crimes trial.
United Kingdom	Operation Tombola SAS operation with Italian partisans. Civilian attire with mixed uniform.	1945	Italy	None.
Germany	Partisan operations by German SF in civilian clothing.	1944– 1945	Germany	None.
United States	OSS team in German uniforms to conduct Operation Iron Cross to execute subversion missions and capture or kill senior Nazi officials.	1945	Germany	Mission aborted by end of war.
United States	OSS Operations Groups operate in US uniforms, indigenous attire, Chinese Puppet Army uniforms.	1945	China	None.

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Who	What	When	Where	Disposition (if any)
Indonesia (I) <sup>99</sup>	Soldiers dressed in civilian attire while attacking civilian objects.	1965	Singapore	Captured and tried under domestic law.
Indonesia (II) <sup>100</sup>	Soldiers in civilian attire captured while on mission to attack civilian objects.	1965	Singapore	Captured and tried under domestic law.
United States	MACV (SOG) teams wore non-standard uniforms operating in denied areas.	1965–1971	Southeast Asia	None.
United States <sup>101</sup>	SF soldier fought in civilian clothing in response to Tet Offensive assaults.	1968	South Vietnam	Awarded Medal of Honor.
United States <sup>102</sup>	Navy SEAL officer switched from uniform to indigenous attire to fight way in and out of encircled aircrew to rescue him.	1972	South Vietnam	Awarded Medal of Honor.
Israel	Operation Aviv Neurim, IDF SF team dressed in civilian clothing raids PLO Beirut targets.	1973	Lebanon	Team commander Ehud Barac eventually becomes IDF Chief of Staff, Israel Prime Minister.
Israel	Entebbe rescue force includes commandos dressed as Uganda soldiers.	1976	Uganda	Mission successful in rescuing hijacked aircrew and passengers held hostage.
United States	Team for rescue of US hostages in AMEMB Tehran wore non-standard uniforms approved by Joint Chiefs of Staff, President.	1980	Iran	Mission aborted due to helicopter failures.

*W. Hays Parks*

Who	What	When	Where	Disposition (if any)
Soviet Union, East Germany (GDR)	Spetsnaz dressed in civilian clothing or NATO uniforms trained/planned to penetrate/operate in NATO rear, attack high-value targets.	Cold War	NATO nations	Never executed.
Soviet Union	Spetsnaz dressed in civilian clothing neutralized senior Afghan officers, then secured Kabul airport wearing Afghan Army uniforms.	1979	Afghanistan	None.
North Korea	Special Forces infiltrate South Korea wearing Civilian clothing or ROK uniforms.	1950–1988	Republic of Korea	Treated as spies when captured.
Israel	Sarayet Maktal wearing non-standard uniforms carry out successful direct action mission to kill Abu Jihad, PLO military commander, in Tunis.	1988	Sidi-bou-Said, Tunisia	None.
Panama	7 <sup>th</sup> Infantry Company (Macho de Monte), Panamanian Defense Forces (PDF), fought in civilian attire of shorts, t-shirts, and straw hats.	1989	Panama (Operation Just Cause)	Captured members treated as prisoners of war by US.
United States	CINC's SF personal security detail wore civilian attire.	1990–1991	Saudi Arabia	None.
United Kingdom/ United States	SF wore kufiyah/agal and indigenous coats over uniforms during operations in Iraq.	1991	Iraq	None.

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### *Notes*

1. Professor Parks holds the Law of War Chair, Office of General Counsel, Department of Defense. He is a former Charles H. Stockton Professor of International Law at the Naval War College. A version of this paper was published in 4 *Chicago Journal of International Law* 2 (Fall 2003). The views expressed herein are the personal views of the author, and may not necessarily reflect an official position of the Department of Defense or any other agency of the United States Government.

2. See, for example, Michelle Kelly & Morten Rostrup, *Coalition soldiers in Afghanistan are endangering aid workers*, THE GUARDIAN (London), Feb. 1, 2002, at 19.

3. This article offers a subtle distinction. *Special Forces* is limited to US Army Special Forces assigned to Special Forces Groups or detachments, Naval Special Warfare (SEALs and Special Boat units), and Air Force Special Tactics Units, and their coalition counterparts, while *Special Operations Forces* includes Special Forces, Psychological Operations units, and Army Civil Affairs units. There are members of Army Civil Affairs Units who are Special Forces soldiers. The distinction offered in this article is one of unit assignment and mission(s).

4. The section that follows was prepared from personal interviews with Special Forces personnel and materials provided by the Department of Military Strategy, Planning and Operations, US Army War College, US Army Peacekeeping Institute, and the Department of State. Pertinent documents are in the author's personal files. In particular, see US Army Peacekeeping Institute, *Civil Military Operations: Afghanistan* (2003).

5. Special Forces' wear of Northern Alliance attire was undertaken at the insistence of Northern Alliance General Abdul Rashid Dostum, commander of its 8,000-man Junbish-e-Millie, the largest Northern Alliance army. President William J. Clinton ordered the prompt withdrawal of US forces from Somalia following the October 3, 1993 Battle of Mogadishu in which eighteen members of Task Force Ranger died. See MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (1999). General Dostum feared US withdrawal from Afghanistan if confronted with US casualties. Multiple Northern Alliance bodyguards were assigned to each US Special Forces soldier. In the early days of fighting, General Dostum told some of his subordinates in Mazar-e-Sharif that he would kill them if they allowed their US charges to be hurt or killed. Once US and coalition forces showed that they were not casualty averse, the bodyguard standards were relaxed. SF wear of the Northern Alliance pakol, tribal scarves, and beards prevented them from being singled out for targeting by al Qaeda/Taliban personnel. Wearing indigenous attire also aided SF rapport with the Northern Alliance forces it supported. Special mission unit Special Forces, whose identities are classified, also wore beards to reduce risk of media/public identification.

The risk is not new. In 1915, serving in the Arabian Peninsula as a military adviser to Wahabi chief Abdul Aziz Ibn Saud, British Army Captain William H. I. Shakespear eschewed indigenous attire. During a battle between the forces of Ibn Saud and pro-Turkish tribal leader Ibn Rashid, Shakespear was killed by an enemy sniper when his British Army uniform singled him out and identified him as a high-value target. See JEREMY WILSON, *LAWRENCE OF ARABIA 1043* (1990). Knowledge of the circumstances of Captain Shakespear's death prompted T.E. Lawrence to wear Arab clothing as he led the Arab Revolt against Ottoman rule that began June 5, 1916, and to incorporate the lesson into his "Twenty-Seven Articles" (Articles 18–20) published in August 1917 as lessons learned. *Id.* at 1043, n.4.

Indigenous personnel over-protection of US Special Forces personnel is not new. Office of Strategic Services (OSS) Operational Team Muskrat/Bear experienced the same phenomenon in China in 1945. FRANCIS B. MILLS, ROBERT MILLS, & JOHN W. BRUNNER, *OSS SPECIAL OPERATIONS IN CHINA* 300, 321 (2002).



In Operation Enduring Freedom, Special Forces wear of the pakol was possible because of the Pashtun (Taliban) versus Tajik/Uzbek (Northern Alliance) differences in attire. Special Forces supporting Southern Alliance forces were confronted with a more difficult situation. Southern Alliance soldiers looked and dressed exactly like the Taliban. Afghan Taliban dressed in Pashtun attire since they were from the Pashtun tribes. Other Taliban, from Pakistan predominantly, wore Pakistani attire.

In the south, Special Forces wear of indigenous attire and its distinguishing devices was encouraged by Hamid Karzai, again to lower US visibility. Accordingly, these Special Forces wore native tops over their DCU. After three days, the Special Forces abandoned the indigenous tops for the balance of their tenure, their leader having convinced Karzai that as everyone knew they were American, there was no reason to pretend otherwise. It also gave the soldiers better access to their DCU pockets and load-bearing equipment.

6. Because neither Taliban/al Qaeda nor Northern or Southern Alliance forces wore a uniform, visual friend or foe identification at a distance was a challenge. Third Battalion, Fifth Special Forces Group, *The Liberation of Mazar-e Sharif: 5<sup>th</sup> SF Group UW in Afghanistan*, 15 SPECIAL WARFARE 34, 36 (June 2002). However, this differs from dressing as civilians for the purpose of using the civilian population or civilian status as a means of avoiding detection of combatant status. From the standpoint of possible violation of the law of war, the issue is one of intent. As indicated in the main text, use of non-standard uniform (Massoud pakol and/or scarf) by some Special Forces personnel was to appear as members of the Northern Alliance rather than be conspicuous as US soldiers and, as indicated in the preceding footnote, high-value targets.

7. In *Are Soldiers in Civilian Clothes Protected Under Geneva-Hague?* (unpublished paper, 2003) at 31, Lieutenant Colonel H. Allen Irish provided the following official rationale for the decision:

The need to reduce the potential for violence that may be directed at CJCMOTF personnel engaged in humanitarian relief efforts in Afghanistan was the critical factor mandating the decision [to operate in civilian clothing]. In uniform, [CJCMOTF] personnel may be targeted since they could be confused as being engaged in offensive combat operations instead of providing humanitarian assistance. . . . The traditional wear of civilian clothes by unconventional forces for the purpose of humanitarian assistance is time-proven.

This rationale is historically inaccurate and legally flawed. Civil Affairs personnel are not unconventional forces. Civil Affairs personnel performing humanitarian assistance in operations short of international armed conflict have been authorized to wear civilian clothing. Civil Affairs personnel in international armed conflict have worn standard uniforms only. US Army and Marine Corps Civic Action (Civil Affairs) personnel operating in the Republic of Vietnam (1964–1971) wore standard field uniforms in threat circumstances similar to those faced by Civil Affairs personnel in Afghanistan. US Army Civil Affairs operating in support of Operation Just Cause (Panama, 1989–1990) and Operations Desert Shield/Desert Storm/Provide Comfort (1991) wore standard BDU. These operations were significantly different from Special Forces missions in denied territory.

From a law of war standpoint, neither “force protection” nor a desire to distinguish soldiers performing “offensive duties” from those engaged in humanitarian assistance constitutes military necessity for soldiers to wear civilian attire in international armed conflict.

With respect to the force protection argument, US Army Civil Affairs doctrine in preparation at the time of the “force protection” decision (and subsequently approved) is to the contrary. US Army Field Manual 3-05.401, *Civil Affairs Tactics, Techniques and Procedures*, Table 4-2, at 4-40, indicates that Civil Affairs personnel in less than full Battle Dress Uniform, complete with combat equipment, to include Kevlar load bearing vest and individual weapon, risk reduced

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force protection, while noting that wearing civilian clothing “Greatly increases the possibility of fratricide.”

8. Unlike their Special Forces counterparts, Civil Affairs personnel in indigenous attire did not necessarily wear the Massoud pakol or scarf. Whether wearing western attire or indigenous attire, some concealed their weapons.

9. Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949, art. 10, 75 U.N.T.S. 287; *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). Article 10 provides: “The provisions of the present convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, *subject to the consent of the Parties to the conflict concerned*, undertake for the protection of civilian persons and for their relief.” [Emphasis added.]

10. The NGO civilian clothing complaint was directed at Civil Affairs units and personnel only. Speaking at a Harvard University Carr Center Symposium, Army-Navy Club, Washington, October 18, 2002, Nicolas de Torrente, representative of the NGO *Médecins sans Frontières* (Doctors Without Borders [MSF]), made it clear that the NGO complaint was directed only at US Army Civil Affairs personnel operating in proximity to NGO. He emphasized that MSF offered no objection as to the attire of US or Coalition Special Forces engaged in counter-terrorist operations against Taliban/al Qaeda. [Personal knowledge of the author, who was present.]

During the question and answer period, this author offered the counterargument that NGO personnel working in proximity to uniformed CA personnel might be at greater risk of being targeted because of an appearance of overt support for US operations, or as collateral casualties incidental to al Qaeda attacks on uniformed Civil Affairs personnel performing humanitarian relief operations. Mr. Torrente acknowledged the counterargument before stating that MSF objected to the presence of any military personnel in proximity to MSF activities.

11. Six months later the Commanding General, US Army Special Forces Command (USASFC), issued an order re-enforcing standard uniform and grooming practices that received wide media coverage. *See, for example*, Kitty Kay, *Close shave for special forces*, TIMESONLINE, (Sept. 13, 2002), available at <http://www.timesonline.co.uk/article/0,,3463-413550,00.html>; Mike Mount, *Close shave for special ops forces in Afghanistan*, CNN.COM/WORLD, (Sept. 13, 2002), available at <http://www.cnn.com/2002/WORLD/asiapcf/central/09/12/afghanistan.clean/>; and Headquarters CJSOTF Afghanistan Memorandum (Sept. 6, 2002), Subject: Uniform and Appearance Standards Policy-Rescinding of Relaxed Grooming Standards. According to the Staff Judge Advocate for US Army Special Forces Command, the commander's intent was for field commanders to review the appropriateness of continued wear of non-standard uniforms and beards, particularly by support personnel not engaged in combat missions. This is borne out by reports the author received from special mission units judge advocates, who advised that bearded special mission unit personnel in non-standard uniforms subsequently briefed the Combatant Commander (Commander, USCENTCOM). The USASFC order was a general tightening of discipline and uniform standards where there was no military necessity for wearing either beards or non-standard uniforms.

Special Mission unit personnel operating against al Qaeda grew beards for several reasons: (1) a dearth of water for daily shaving; (2) for rapport with and to appear like the indigenous personnel with whom they were serving; and (3) to prevent their identification and thus protect them, and their families, from terrorist attacks. The latter rationale is not new. In 1918, then Lieutenant Colonel T.E. Lawrence was publicly identified as a leader in the Arab Revolt. His biographer explains:

As soon as these reports began to appear, the Censorship and Press Committee in London issued a warning to editors which read: “The Press are earnestly requested not

to publish any photograph of Lieutenant Colonel T.E. Lawrence, C.B., D.S.O. This officer is not known by sight to the Turks, who have put a price upon his head, and any photograph or personal description of him may endanger his safety.

WILSON, *supra* note 5, at 552.

In Lawrence's case and the World War II cases, identification risks were limited to the battlefield. With ease of travel and the global threat of terrorism, the identity of special mission personnel is classified to protect them and their families. This practice has existed for some time; see, for example, photographs contained in PETER RATCLIFFE, NOEL BOTHAM & BRIAN HITCHEN, *EYE OF THE STORM* (2000), where the faces of current members of 22 British Special Air Service (SAS) are obscured.

12. The section that follows (including the text of this footnote) was prepared from materials provided by the Department of Military Strategy, Planning and Operations, US Army War College, US Army Peacekeeping Institute, the Department of State, and AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM* (2001).

Arguments with respect to the Taliban militia (as they called themselves) depend only so slightly on *who* and *when*. The Taliban was a loose amalgamation of occasional and disparate tribal and other factions. It was a faction engaged in a civil war in a failed State that owed much of its strength and origin to the Pakistani Intelligence Service. It exercised none of the usual activities of a government, other than the negative one of closing down all schools. The Taliban militia never claimed to be the Afghanistan government or armed forces. The Taliban had no uniformed armed forces. The Taliban was structured around tribes rather than as a military unit, recruiting the allegiance of other tribes or personnel from other tribes and private citizens through temporary alliances, defections, bribery, and conscription, while also relying on foreign volunteers.

Since the collapse of the Soviet Union and the break-up of Yugoslavia, the international test has been whether an entity is permitted to sit behind the nameplate in the United Nations (and in other international fora) rather than the previous test of whether it controls population, territory, etc. The Taliban was never permitted to represent Afghanistan at the United Nations or in other international fora.

The UN Security Council never recognized the Taliban as the representative of Afghanistan. In a number of UN Security Council resolutions issued against the Taliban, there was discussion as to whether a binding resolution could be issued against a non-State entity. These Security Council resolutions included 1189 (1999), 1267 (1999) and 1363 (2001). Security Council resolution 1189 referred to "the continuing use of Afghan territory, especially areas controlled by the Taliban;" hence the Security Council distinguished between the Taliban and Afghanistan.

Prior to September 1, 2001, the Taliban was recognized only by Saudi Arabia, Pakistan and the United Arab Emirates. All three withdrew their recognition following the terrorist attack. Stated another way, 98.5% of governments, including the United States, did not recognize the Taliban as the government of Afghanistan prior to the September 11, 2001, al Qaeda attack. Nor was it recognized by the League of Islamic Nations, nor by Switzerland (depository of the Geneva Conventions). The Taliban was not invited to the 1999 Conference of Red Cross and Red Crescent Societies as the Afghanistan representative. Had it been invited, it is likely the US and other governments would have prevented it from occupying the Afghanistan delegation seat, as was the case with respect to the FRY in Yugoslavia. By the time coalition operations began in Afghanistan, no government recognized the Taliban as the Government of Afghanistan.

Once US and allied operations began in Afghanistan in October 2001, al Qaeda assumed command of most Taliban militia units. As the battle continued, most Taliban withdrew to their normal areas of Afghanistan, leaving the fighting to al Qaeda and foreign members of the Taliban.

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Any perception of the Taliban as any sort of a national government dissolved following Taliban abandonment of Kabul (November 12, 2001) and US capture of Kandahar (December 10, 2001).

A leading authority, in discussing guerrillas, summed up the Taliban militia and al Qaeda status:

The law of nations, apart from the Hague Regulations . . . denies belligerent qualifications to guerrilla bands. Such forces wage a warfare which is irregular in point of origin and authority, of discipline, of purpose and procedure. They may be constituted at the beck of a single individual; they lack uniforms; they are given to pillage and destruction; they take few prisoners and are hence disposed to show slight quarter.

CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1797 (2d ed. 1951).

13. See, e.g., the President's Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, § 1(a), 66 Fed. Reg. 57,833 (2001), also available at [www.whitehouse.gov/news/releases/2001/11/20011113-27.html](http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html) ("Military Order").

14. Press Briefing by Ari Fleischer, Feb. 7, 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html>; Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, NEW YORK TIMES, Feb. 8, 2002, at A1. The issues are summarized in John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 207 (2003).

15. Convention Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 75 U.N.T.S. 135, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 244.

16. DOD Directive 5100.77 (Dec. 9, 1998), Subj: DOD Law of War Program, para. 5.3.1; CJCSI 5810.01A (Aug. 27, 1999), Subject: Implementation of the DOD Law of War Program, para. 5a. For this reason, the decision was announced that the United States would apply the law of war applicable in international armed conflict to non-State actors in Operation Enduring Freedom. See excerpts from interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defense, Dec. 16, 2002, Crimes of War Project, available at: <http://www.crimesofwar.org/onnews/news-pentagon-trans.html>. This announcement was greeted with astonishment by some international law experts. See, for example, Marco Sassoli, *Query: Is There a Status of "Unlawful Combatant"?*, which is Chapter V in this volume, at 57. Comments similar to Professor Sassoli's were offered privately to the author by his foreign military counterparts. As will be indicated, the intention was to use the law of war applicable in international armed conflicts as a template for US conduct in Operation Enduring Freedom.

17. Enforcement of International Humanitarian Law: Challenges for the UN Security Council and the USA, US Institute of Peace, Mar. 1, 2001. [Personal knowledge of the author, who was present.]

18. *Supra* note 15.

19. *Id.* at 245–46.

20. Historically, regular military force entitlement to prisoner of war status was absolute and unqualified. Article 49 of US General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (1863)(the Lieber Code), states: "All soldiers, of whatever species of arms . . . all disabled men or officers on the field or elsewhere, if captured . . . are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war." Reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 1 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter THE LAWS OF ARMED CONFLICT]. Similarly, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, AUGUST 12, 1949 46–47 (Jean S. Pictet ed., 1960) states: "Once one is accorded the status of belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The

most important of these is the right, following capture, to be recognized as a prisoner of war, and to be treated accordingly.”

Entitlement to prisoner of war status for members of the armed forces existed without precondition in treaty law. Article 1 to the Annex to Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631, also reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 73, and Article 4(A)1, GPW, *supra* note 15. WILLIAM E. S. FLORY, PRISONERS OF WAR 27–28 (1942) states: “Persons serving in the regular army, navy and air force of a belligerent state have rights as prisoners of war when they fall into the hands of the enemy. This rule is part of customary international law as well as treaty law.”

Similarly, G.I.A.D. Draper, *The Present Law as to Combatancy*, in REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 197 (Michael A. Meyer & Hillairie McCoubrey eds., 1998), comments:

Article 1 of the Hague Regulations, and its four express and two implicit stringent conditions for volunteer and militia corps, represented a triumph for the “military” faction at the Hague Peace Conference. Those four express conditions: (i) a commander responsible for his subordinates; (ii) distinctive sign; (iii) open carrying of arms and (iv) compliance with the Laws of War in their operations, enable an extension of the class of the privileged belligerent by way of identification to the normal features of military armed forces. This identification is not absolute. *Members of the armed forces who persistently violate the Law of War do not lose their POW status upon capture. The effect of Articles 4, 5 and 85 of the Geneva (POW) Convention, 1949, makes this clear* [emphasis provided].

Denial to regular forces (including special operations forces) of prisoner of war status and the protections of the Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, reprinted in THE LAWS OF ARMED CONFLICT, *supra*, at 421, predecessor to the current GPW, were held to be war crimes by post–World War II tribunals, including in cases where British and American military personnel were summarily executed. On October 18, 1942, in response to British special forces missions, Adolf Hitler issued his Führerbefehl (“Commando Order”), which declared that Allied special forces, even if uniformed members of the armed forces, were to be “slaughtered to the last man” (that is, denied quarter, in violation of Article 23(d), Annex to the 1907 Hague Convention IV) or, if captured, denied prisoner of war status and summarily executed. The “Commando Order” was declared a war crime at Nuremberg. International Military Tribunal, Nazi Conspiracy and Aggression, Opinion and Judgment 58 (1947). Its implementation resulted in war crimes convictions by US military tribunals (In re Dostler, 1 Law Reports of Trial of War Criminals, 22–34 (HMSO, 1945), and by British military courts (In re Falkenhorst, VI War Crimes Reports (HMSO, 1946), and Trial of Karl Buck and Ten Others, 5 Law Reports of Trials of War Criminals, 39–44 (HMSO, 1946).

In the *Dostler* case, two officers and thirteen enlisted men from Unit A, 1<sup>st</sup> Contingent (OSS Operational Group, Italy) were captured March 22, 1944, and executed under the orders from Major General Dostler, even though they had been captured in uniform. Dostler was tried, convicted and executed by firing squad following World War II; *In re Dostler*, and photographic evidence in author’s possession. Other OSS Operational Groups sewed Seventh USA Army patches on their left shoulder to conceal their OSS identity. Ian Sutherland, *The OSS Operational Groups: Origin of Army Special Forces*, 3 SPECIAL WARFARE 2, 3 (June 2002).

21. Yoo & Ho, *supra* note 14, argue that the four criteria contained in Article 4A(2), GPW, are prerequisites to prisoner of war status for regular force combatants. That view is not consistent

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with Articles 5, 85 and 93, GPW or the negotiating history of the four criteria; see, for example, Draper, *supra* note 20, at 29; and Jiří Toman, *The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions*, 32 ISRAELI YEARBOOK ON HUMAN RIGHTS 271 283, 285 (2002).

22. An element of inconsistency with customary and treaty law evolved within the United States during World War II as a result of dicta in the opinion by the United States Supreme Court in *Ex parte Quirin*, 317 US 1 (1947), involving the trial of eight Nazi saboteurs captured in civilian clothing in the United States. Changes in treaty law and US practice since *Quirin* for the most part have returned US interpretation to the pre-*Quirin* position, albeit muddled by the experience and two subsequent Singapore cases that followed *Quirin*.

*Quirin* is lacking with respect to some of its law of war scholarship. Review of the Court's citation of paragraphs of War Department, Field Manual 27-10, Rules of Land Warfare (War Department, 1914 and 1940) suggests that the Court apparently confused provisions relating to civilians taking a direct part in hostilities, who would be unprivileged belligerents, and those related to actions by military personnel, who remain entitled to prisoner of war status. The Court correctly stated, citing paragraphs 83 and 84 of US Army General Orders No. 100 (1863), that soldiers "disguised in the dress of the country . . . if found lurking about the lines of the captor, are treated as spies, and suffer death." This provision is consistent with Article 29 of the Annex to Hague Convention IV. However, the Court failed to note paragraph 203 of Field Manual 27-10, Rules of Land Warfare (1940), which states that spies are not punished as "violators of the law of war." Rather, the Court erred in stating "the absence of uniform . . . renders the offender liable to trial for violation of the laws (*sic.*) of war." The statement has no basis in the law of war. It is contrary to Article 31 of the Annex to the 1907 Hague Convention IV (a treaty to which the United States was a party during World War II), which states that "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage." Were absence of uniform a violation of the law of war, criminal liability would remain even after a soldier returned safely to his own lines. Similarly, a commander who orders military personnel to carry out a mission in civilian clothing would incur no criminal liability for his order. JAMES MALONEY SPAIGHT, AIR POWER AND WAR RIGHTS 287 (1924).

For a summary of the German operation, trial of the saboteurs, and critical analysis of *Quirin*, see LOUIS FISHER, NAZI SABOTEURS ON TRIAL (2003).

Two cases from Singapore follow the reasoning of *Quirin*. The facts of each are similar. In peacetime, Indonesian Marines in civilian clothing entered Singapore on sabotage missions. The courts determined that while entitled to prisoner of war status under Article 4A(1), GPW, a dubious finding in and of itself, that entitlement was forfeited when the soldiers executed their missions in civilian clothing. In both cases the defendants were charged with domestic law violations rather than violation of the law of war. Stanislaus Krofan & Another v. Public Prosecutor, Federal Court of Criminal Appeal, 1966, 1 Malayan Law Journal (1967), and Osman bin Haji Mohamed Ali and Another v. Public Prosecutor, Privy Council, 1968, 1 A.C. 430.

23. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 422..

24. See, for example, Trial of Lieutenant General Shigeru Sawada and Three Others, V LRTWC 1 (HMSO, 1948) (denial of prisoner of war status to and execution of eight US Army Air Corps personnel); and *In re Dostler*, *supra* note 20.

US military personnel captured in uniform during the Vietnam war were illegally denied prisoner of war status by their captors and routinely tortured. GUENTHER LEWY, AMERICA IN VIETNAM 332-34 (1978); Howard S. Levie, *Maltreatment of Prisoners of War in Vietnam*, in THE

VIETNAM WAR AND INTERNATIONAL LAW (Vol. 2) 361, 382, (Richard A. Falk ed., 1969); STUART ROCHESTER & FREDERICK KILEY, HONOR BOUND: THE HISTORY OF AMERICAN PRISONERS OF WAR IN SOUTHEAST ASIA, 1961–1973, at 188–194, 199–207 (1998); and VERNON E. DAVIS, THE LONG ROAD HOME: US PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA 5, 64–84 (2000). Three representative personal accounts detailing the torture and other violations of the GPW are ROBINSON RISNER, THE PASSING OF THE NIGHT (1973); JEREMIAH A. DENTON, WHEN HELL WAS IN SESSION (1976); and GEORGE E. DAY, RETURN WITH HONOR (1989).

US and coalition prisoners of war captured by Iraq during the 1991 war to liberate Kuwait were not provided prisoner of war treatment, and were routinely tortured. US Department of Defense, Final Report to Congress: Conduct of the Persian Gulf War 619–620 (1992); Secretary of the Army, Report on Iraqi War Crimes (Desert Shield/Desert Storm), (1993); United Nations Security Council S/25441 (Mar. 12, 1993).

25. M. R. D. FOOT, SOE IN FRANCE 20 (1966).

26. For example, US War Department Field Manual 27-10, Rules of Land Warfare (1940), at 4, states: “The enemy population is divided in war into two general classes, known as the armed forces and the peaceful population. Both classes have distinct rights, duties, and disabilities, and no person can belong to both classes at one and the same time.”

See also The War Office [United Kingdom], *Manual of Military Law*, 7 (War Office, 1929):

The division of the enemy population into two classes, the armed forces and the peaceful population, has already been mentioned. It is one of the purposes of the law of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both. . . .

Similarly, see War Office, The Law of War on Land, being Part III of the Manual of Military Law, 30, paragraph 86 (War Office, 1958), which is the current British law of war manual. “Belligerent” is the classical term. More recently “belligerents” have been referred to as “combatants,” as medical personnel and chaplains are part of the belligerent forces but are non-combatants.

27. The *levée en masse* which, as defined in Article 2, Annex to Hague Convention IV (1907), *supra* note 20, is “the inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves.” Treaty recognition of the *levée en masse* constituted a first step in relaxation of the principle of *distinction*.

28. L. OPPENHEIM, INTERNATIONAL LAW (7th ed., Vol. II) 206 (H. Lauterpacht ed., 1952).

29. JAMES MALONEY SPAIGHT, WAR RIGHTS ON LAND 37 (1911).

30. FRITS KALSHOVEN, THE LAW OF WARFARE 31 (1973).

31. Article 23, paragraph (b) of the Annex to the 1907 Hague Convention IV, *supra* note 20, states that it is prohibited “to kill or wound treacherously individuals belonging to the hostile nation or army.”

32. Article 24, 1907 Hague Convention IV, *id.*, states: “Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.” See also Paragraph 51, US Army Field Manual 27-10, at 101–102 (1956), The Law of War on Land.

33. Where soldiers in international armed conflict lacked proper uniforms through no fault of their own, they were expected to wear a distinctive emblem to distinguish themselves from the civilian population. OPPENHEIM, *supra* note 28, at 429–430.

34. The negotiating record exception is discussed *infra*. Two treaty exceptions exist. Article 93, GPW, *supra* note 15, states in part:

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[O]ffenses committed by prisoners of war with the sole intention of facilitating escape and which do not entail any violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, *the wearing of civilian clothing*, shall occasion disciplinary punishment only. . . . [Emphasis added].

35. Richard R. Baxter, *The Juridical Basis of the Distinction between Lawful Combatant and Unprivileged Belligerent* 47–51 (1959) (unpublished thesis, The Judge Advocate General's School, US Army).

GPW, Article 4A(2) constituted acknowledgement of the legitimacy of World War II partisan warfare in its amendment of previous treaty categories to “Members of other militias and members of other volunteer corps, *including those of organized resistance movements*. . . .” [Emphasis added.] This was a further relaxation of the principle of distinction. See COMMENTARY, *supra* note 20, at 52–61.

36. US Department of War Manual, *Rules of Land Warfare* (1914, Corrected to April 15, 1917), paragraph 22, states: “*The distinctive sign*.—This requirement will be satisfied by the wearing of a uniform or even less than a complete uniform.” See also ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT* 349 (1976).

37. ROSAS, *supra* note 36, at 349. (“[T]he concept of uniforms has never been explicitly defined in international law.”)

38. COMMENTARY, *supra* note 20, at 52. SPAIGHT, *supra* note 29, at 57, emphasizes “The ‘distinctive device’ does not mean a uniform.”

39. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 468 (Yves Sandoz et al. eds., 1987). The ICRC Commentary does not reflect the complexity of the discussions within the Working Group. As three Diplomatic Conference participants indicate in their separate commentary, the Working Group experienced considerable difficulty with the practical details of this issue. See MICHAEL BOTHE, KARL PARTSCH & WALDEMAR SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 205–206 (1982).

40. HOWARD S. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 49 (1977) (Vol. 59, US Naval War College International Law Studies). SPAIGHT, *supra* note 29, at 57, argued that the distinctive device “must be fixed—externally, so as not to be assumed or concealed at will.” This is not consistent with prior or subsequent practice. The original view regarding a distinctive device was expressed by Francis Lieber in his “*Guerrilla Parties Considered with Reference to the Laws and Usages of War*.” In it he noted “Nor would it be difficult to adopt something of a badge, *easily put on and off*, and to call it a uniform”. RICHARD S. HARTIGAN, *LIEBER’S CODE & THE LAW OF WAR* 40 (1983). [Emphasis added.]

41. SPAIGHT, *supra* note 29, commented at 57:

At what distance should the sign be recognizable? The German authorities demanded in 1870 that French irregulars should be distinguishable at rifle range. This, says an eminent English jurist, is “to ask not only for a complete uniform but for a conspicuous one,” [citing WILLIAM EDWARD HALL, *INTERNATIONAL LAW* 523 (5th ed. 1904)]. When rifles are sighted to 2,000 yards and over, the German requirement is clearly unreasonable. If the sign is recognizable at a distance at which the naked eye can distinguish the form and color of a person’s dress, all reasonable requirements appear to be met.

At the commencement of the Russo-Japanese War, the Russian Government addressed a note to Tokio (*sic*), stating that Russia had approved the formation of certain free corps composed of Russian subjects in the seat of war, and that these corps would wear



no uniform but only a distinctive sign on the cap or sleeve. Japan replied: “The Japanese Government cannot consider as belligerents the free corps mentioned in the Russian Note, unless they can be *distinguishable by the naked eye from ordinary people* or fulfill the conditions required for militia or volunteers by the Hague *Réglement*.” [Emphasis in SPAIGHT]. Similarly, US War Department Manual, Rules of Land Warfare, *supra* note 36, followed the Japanese Government’s test:

*The distinctive sign.*—This requirement will be satisfied by the wearing of a uniform, or even less than a complete uniform. The distance that the sign must be visible is left vague and undetermined and the practice is not uniform. This requirement will be satisfied certainly if the sign is “easily *distinguishable by the naked eye of ordinary people*” at a distance at which the form of the individual can be determined. [Emphasis added.]

HYDE, *supra* note 12, at 1793, cites this provision as authority.

The term “unenhanced vision” is utilized in Article 1 of the Additional Protocol on Blinding Laser Weapons (Protocol IV) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 12, 1995, Doc. CCW/CONF.I/7 (1995), 35 INTERNATIONAL LEGAL MATTERS 1218. It means normal vision without enhancements, such as binoculars, or vision corrected to 20/20. For its negotiating history, see Headquarters, Department of the Army, Office of The Judge Advocate General, DAJA-IO Memorandum of Law (Dec. 20, 1996), Subject: *Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol. The memorandum, at 8, notes the intent of its drafters:

*Unenhanced vision* means “the naked eye or . . . the eye with corrective eyesight devices,” such as glasses or contact lens. It does not mean binoculars, a telescopic sight, night-vision goggles or similar devices used to increase visual capability above that required by an ordinary person to perform routine tasks, such as reading or driving an automobile.

42. As noted at the text accompanying note 99, *infra*, British Special Forces in North Africa in World War II, and British and US Special Forces operating behind enemy lines in Iraq during the 1990–1991 war to liberate Kuwait, frequently wore indigenous overcoats over their BDUs to counter one of the coldest winters on record, but also as a ruse to reduce immediate, positive identification at a distance by Iraqi military units.

43. Treaty negotiation records suggest participants did not rely upon “carrying arms openly” for regular forces. This is one of the four prerequisites for militias or partisans seeking combatant and prisoner of war status. The phrase “carrying arms only” has itself been plagued with lack of agreement as to its meaning. See, for example, W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 84 (1990) (the debate with regard to Article 44(3), Additional Protocol I). It also was of limited to no value in Afghanistan, as most Afghan civilians carry military weapons. Similarly, following cessation of formal combat operations in Iraq (May 1, 2003), private Iraqi citizens were permitted to retain Kalashnikov AK-47 or AK-74 select fire weapons in their homes for personal protection. Coalition Provisional Authority Order Number 3 (May 23, 2003). [Copy in author’s personal files.]

44. As summarized in this memorandum, there is substantial State practice of Special Forces wear of civilian clothing or non-standard uniforms. As an example of the fourth category, the personal security detail for Commander in Chief, US Central Command [Combatant Commander], during Operations Desert Shield and Desert Storm (1990–91), wore civilian attire on the basis that VIP protection from terrorist attack is not a traditional military mission. (Attack by conventional Iraqi forces was not regarded as a viable threat.) The personal security detail worked in close proximity to the Combatant Commander, who wore standard BDU. The

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personal security detail in turn was surrounded by an outer perimeter of uniformed Saudi soldiers. The civilian attire of the personal security detail was dictated in large measure by host nation concerns. Their immediate proximity to the commander and uniformed Saudi military, and their physical separation from the civilian population was consistent with the principle of distinction. No reasonable case could be made that their actions were tantamount to perfidy. [Personal knowledge of author and photograph in author's files.]

45. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Convened by the Swiss Government in 1974, the Conference formally adopted Additional Protocols I and II on June 8, 1977.

46. On January 28, 1987, President Ronald Reagan informed the United States Senate that Additional Protocol I would not be submitted for Senate advice and consent to ratification. Message of the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, 100<sup>th</sup> Congress, 1<sup>st</sup> Session (1987); 26 INTERNATIONAL LEGAL MATERIALS 561 (1987).

47. US Department of State, 3 Cumulative Digest of United States Practice in International Law, 1981–1988, at 3434–3435. *See also* DOD Law of War Working Group, Memorandum for Assistant Counsel (International), OSD (May 9, 1986), Subject: 1977 Protocols Additional to the Geneva Conventions; Customary International Law Application. *See also* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987), based upon a speech Mr. Matheson made at an American University workshop. Mr. Matheson's statements with regard to the provisions of Additional Protocol I regarded by the United States as customary law are based upon the DOD Law of War Working Group memorandum, cited above. Thereafter he expresses his personal opinion that other provisions "should be observed and in due course [may be] recognized as customary law, even if they have not already achieved that status and their relationship to the provisions of Protocol I." *Id.* at 422.

48. BOTHE, PARTSCH & SOLF, *supra* note 39, at 256–257. The new rules set forth in Article 44, paragraph 3, were among those found unacceptable to the United States in taking its decision against ratification. Paragraph 3 provides:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious. . . .

49. ROSAS, *supra* note 36, at 333. Continuing, the author notes:

[T]his provision does not seem to imply that all members of regular forces have to wear uniforms in all situations in order to benefit from prisoner-of-war status. On the other hand it serves as a reminder that the uniform continues to be the *normal* way for *regular* combatants to distinguish themselves from the civilian population. [Emphasis added.]

The footnote in support thereof states:

In the 1976 report of Committee III [of the Diplomatic Conference] it is stated that “regulars who are assigned to tasks where they must wear civilian clothes, as may be the case, for example, with advisers assigned to certain resistance units, are not required to wear the uniform when on such assignments.” CDDH/236/Rev. 1, at 29.

*See also*, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS (Vol. 2) 475 (Howard S. Levie ed., 1980).

50. The uniform requirement has not been codified for military operations short of international armed conflict.

51. Article 24, Annex to the 1907 Hague IV Convention, *supra* note 20; SPAIGHT, *supra* note 29, at 152–156; OPPENHEIM, *supra* note 28, at 428; War Office Manual, Part III, *supra* note 26, at 101.

52. Article 23(b), Annex to the 1907 Hague IV Convention, *supra* note 20.

53. The distinction between a ruse and perfidy is offered as “whenever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith.” OPPENHEIM, *supra* note 28, at 420; *see also* FM 27-10 (1956), *supra* note 32, ¶¶ 49–55.

54. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 20, at 60–82.

55. *Supra* note 23.

56. BOTHE, PARTSCH & SOLF, *supra* note 39, at 203–04. As neither Afghanistan nor the United States is a State party to Additional Protocol I, the United States is bound by this article only to the extent that it codifies customary law.

57. Additional Protocol I, *supra* note 23, art. 85, ¶ 3(f).

58. This approach, taken by the United States in Vietnam, was praised by the International Committee of the Red Cross; *see* GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964–1973, at 66–67 (1975).

This legal approach is not new. During the American Civil War (1861–1865) and the Anglo-Boer War (1899–1902), rebel soldiers captured wearing either enemy uniforms or civilian clothing were treated as prisoners of war and not prosecuted unless their actions involved treachery. *See, for example*, SPAIGHT, *supra* note 29, at 105–109. Boer commandos’ wearing of portions of British uniforms produced one of the more sensational historic examples. In 1902 three Australian officers serving with the Bushveldt Carbineers were tried by British court-martial for murder of captured Boers and murder of a civilian. Their plea with regard to the murder of the captured Boers was one of superior orders on the basis that Lord Kitchener had ordered the execution of Boers wearing “British khaki.” The prosecution argued that Boer punishment was authorized only if the captured Boers had worn British khaki with intent to deceive. Convicted, two of the three—Captain Harry “Breaker” Morant and Lieutenant Peter Handcock—were executed by British firing squad, resulting in a controversy between Great Britain and Australia that remains to this day; *see, for example*, NICK BLESZYNSKI, SHOOT STRAIGHT, YOU BASTARDS! (2002). (This title is based upon Morant’s last words.) The incident was the basis for the 1979 Australian movie *Breaker Morant* starring Edward Woodward and Bryan Brown. Its screenplay was based upon KIT DENTON, THE BREAKER (1973). Subsequently, Denton authored the non-fiction CLOSED FILE: THE TRUE STORY BEHIND THE EXECUTION OF BREAKER MORANT AND PETER HANDCOCK (1983), less sympathetic to Morant than THE BREAKER. Comprehensive, authoritative accounts are contained in BREAKER MORANT AND THE BUSHVELDT CARBINEERS (Arthur Davey ed., 1987)

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and WILLIAM WOOLMORE, *THE BUSHVELDT CARBINEERS AND THE PIETERSBURG LIGHT HORSE* (2000).

59. Toman, *supra* note 21, at 287.

60. Headquarters, Department of the Army, Office of The Judge Advocate General, DAJA-IA Memorandum 1985/7026 (23 Sept. 1985), Subject: Use of Expanding Ammunition by US Military Forces in Counterterrorist Incidents. Hollow point or expanding small arms ammunition is prohibited in international armed conflict by Declaration (IV, 3) Concerning Expanding Bullets, The Hague, July 29, 1899, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 64. The United States is not a State party to this treaty, but has taken the position that it will adhere to its terms in its military operations in international armed conflict to the extent that its application is consistent with the object and purpose of article 23(e) of the Annex to the 1907 Hague Convention IV, *supra* note 20, which prohibits employment of “arms, projectiles, or material calculated to cause unnecessary suffering.” *See, for example*, Headquarters, Department of the Army, Office of The Judge Advocate General, DAJA-IO Memorandum (May 19, 2000), Subject: 5.56mm, 77-grain Sierra MatchKing™ Bullet; Legal Review.

61. For example, German counterterrorist *Grenzschutzgruppe 9* (GSG-9) and British Special Air Service soldiers wore civilian clothing in the October 18, 1977 hostage rescue of Lufthansa Flight 181 in Mogadishu, Somalia; BARRY DAVIES, *FIRE MAGIC* (1994), photographs between 82–83; ROLF TOPHOVEN, *GSG9: THE GERMAN RESPONSE TO TERRORISM* 66–73 (1985). The SAS wore non-standard, fireproof uniforms during its hostage rescue operation in the Iranian Embassy at Princes Gate in London on May 6, 1980; MICHAEL PAUL KENNEDY, *SOLDIER ‘I’ SAS* (1989), which contains photographs between pages 116–117; and SIR PETER DE LA BILLIERE, *LOOKING FOR TROUBLE* 319–337 (1994) and photographs between 296–97. Other examples are provided in the State practice section of this paper, *infra*.

62. As the United States Supreme Court stated in *The Paquete Habana*, 175 U.S. 677 (1900): “International law is part of our law, and must be ascertained and administered by the courts of justice. . . [W]here there is no treaty and no controlling . . . judicial decision, resort must be had to the customs and usages of civilized nations. . . .”

63. In an experience similar to that of US Special Forces in Afghanistan eighty-five years later, Lawrence donned indigenous attire at the request of the Arab forces he joined, in part because the only soldiers many Arabs had seen wearing khaki were Turkish, the enemy. Mindful of the death of Captain William Shakespear the previous year because he wore his British uniform, Lawrence obliged his hosts. WILSON, *supra* note 5, at 334–335.

As noted by James Maloney Spaight, Colonel Lawrence was not alone in wearing civilian clothing on combat missions during World War I. SPAIGHT, *supra* note 29, at 273–74.

64. M. R. D. Foot, *The IRA and the Origins of SOE*, in *WAR AND SOCIETY, HISTORICAL ESSAYS IN HONOUR AND MEMORY OF J. R. WESTERN, 1928–1971*, at 57–69 (1973); M. R. D. FOOT, *RESISTANCE: EUROPEAN RESISTANCE TO NAZISM 1940–45*, at 7 (1977).

65. These two publications were distributed free in the hundreds of thousands throughout Europe and Southeast Asia during World War II, either in English or in translated form in Burmese, Chinese, Czech, Danish, Dutch, French, German, Greek, Italian, Malay, Norwegian, Polish, Serbo-Croat, Slovak, Slovene, and Thai. M. R. D. FOOT, *SOE: THE SPECIAL OPERATIONS EXECUTIVE* 14 (1984).

The association of British thinking with Lawrence’s success, the Anglo-Boer War, the Irish War, and the Sino-Japanese War is acknowledged in JØRGEN HÆSTRUP, *EUROPE ABLAZE* 38–39 (1978); FOOT, *SOE IN FRANCE*, *supra* note 25, at 2–4; FOOT, *SOE: THE SPECIAL OPERATIONS EXECUTIVE*, *supra* this note, at 11–15; DAVID STAFFORD, *BRITAIN AND EUROPEAN RESISTANCE*,

1940–1945, at 19, 21 (1980); PETER WILKINSON & JOAN BRIGHT ASHLEY, *GUBBINS & SOE* 34, 36 (1993); W. J. M. MACKENZIE, *THE SECRET HISTORY OF SOE: THE SPECIAL OPERATIONS EXECUTIVE, 1940–1945*, at 10, 38–39 (2000). The Mackenzie volume, the official “in-house” history of the British Special Operations Executive, was compiled in the late 1940s. It remained classified until 1998, and reached open publication in redacted form in 2000.

66. HÆSTRUP, *supra* note 65, at 36, 76, 198. The “Geneva Conventions” were referred to as a general reference to the law of war. Churchill’s reference to the “Geneva Convention” otherwise would have been to the Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, *reprinted in* *THE LAWS OF ARMED CONFLICTS*, *supra* note 20, at 421. Article 1 thereof incorporated by reference Article 1 of the Annex to the 1907 Hague IV, *supra* note 20, to establish criteria for prisoner of war status.

67. India Office Records L/WS/1/1296, *as cited in* CHARLES CRUICKSHANK, *SOE OPERATIONS IN THE FAR EAST* 249 (1983).

68. STAFFORD, *supra* note 65, at 68.

69. Presidential Military Order (June 13, 1942), Subject: Office of Strategic Services; and JCS 67 (June 21, 1942), Subject: Office of Strategic Services. The latter stated in part that “Under direction of the Joint US Chiefs of Staff . . . [OSS will] prepare plans for and . . . execute subversive activities.” *See also* R. HARRIS SMITH, *OSS: THE SECRET HISTORY OF AMERICA’S FIRST CENTRAL INTELLIGENCE AGENCY* (1972); EDWARD HYMOFF, *THE OSS IN WORLD WAR II* (1972); RICHARD DUNLOP, *BEHIND JAPANESE LINES: WITH THE OSS IN BURMA* (1979); WILLIAM CASEY, *THE SECRET WAR AGAINST HITLER* (1988); ROGER HILSMAN, *AMERICAN GUERRILLA* (1990); TOM MOON, *THIS GRIM AND SAVAGE GAME* (1991); FRANKLIN LINDSAY, *BEACONS IN THE NIGHT: WITH THE OSS AND TITO’S PARTISANS IN WARTIME YUGOSLAVIA* (1993); MILLS, MILLS & BRUNNER, *supra* note 5; and DAN PINCK, *JOURNEY TO PEKING: A SECRET AGENT IN WARTIME CHINA* (2003).

70. Colonel Aaron Bank, in a paper done at The Presidio in 1986 entitled *From OSS to Green Beret* [on file with author], traces the OSS to US Army Special Forces lineage, as does ALFRED H. PADDOCK, JR., *US ARMY SPECIAL WARFARE: ITS ORIGINS* (Rev. ed., 2002); and Ian Sutherland, *The OSS Operational Groups: Origin of Army Special Forces*, 25 *SPECIAL WARFARE* 2,3 (Summer 2002). As indicated in the main text, the OSS also was a forerunner of the Central Intelligence Agency. *See* THOMAS F. TROY, *DONOVAN AND THE CIA* (1981) and RICHARD DUNLOP, *DONOVAN: AMERICA’S MASTER SPY* (1982).

71. SOE/Special Operations (SO) became Special Forces Headquarters on May 1, 1944. British SOE and US OSS components in the United Kingdom were amalgamated into the Special Projects Operation Center (SPOC) on May 23, 1944. FOOT, *SOE IN FRANCE*, *supra* note 25, at 32.

72. PADDOCK, *supra* note 70, at 28.

73. This nationality mix became more the exception more than the rule. Of the 101 Jedburgh teams deployed to France, only ten were so composed. Sutherland, *supra* note 20, at 13, n.11; ARTHUR LAYTON FUNK, *HIDDEN ALLY: THE FRENCH RESISTANCE, SPECIAL OPERATIONS, AND THE LANDINGS IN SOUTHERN FRANCE, 1944*, at 141, 145 (1992).

74. ROBERT MATTINGLY, *HERRINGBONE CLOAK-GI DAGGER: MARINES IN THE OSS* 140 (1989). Another Marine, Captain Peter J. Ortiz, followed the SOE practice of parachuting in civilian clothes, but carried his Marine Corps uniform. In a touch of bravado, he frequently wore it in populated areas, thereby alerting the Germans and forcing his team to remain on the move. FOOT, *SOE IN FRANCE*, *supra* note 25, at 357. On one occasion Captain Ortiz entered a café dressed in a long (civilian) cape. Hearing a German soldier denigrate Americans, Ortiz drew his weapons—two .45 pistols—then threw back his cape to reveal his Marine uniform before opening fire on the Germans. MATTINGLY, *supra* at 116. For his OSS service, Captain Ortiz was awarded two Navy Crosses, a Legion of Merit, made a member of the Order of the British Empire, and received the

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French Croix de Guerre. *Captain Peter J. Ortiz*, 18 FORTITUDE 14 (Marine Corps History and Museums Division Historical Bulletin), XVIII, 2 (Fall 1988); Benis Frank, "Colonel Peter Julien Ortiz, US Marine," unpublished manuscript. [On file with author.]

75. MILLS, MILLS & BRUNNER, *supra* note 5, at 9; MILTON E. MILES, A DIFFERENT KIND OF WAR 274, 371 (1967); PINCK, *supra* note 69, at 134; Dale Andrade, *Every Man a Tiger*, NAVAL HISTORY (VII, 6, Nov./Dec. 1994), at 16–21.

76. The French, Dutch, Belgian and Norwegian governments-in-exile expressed concern over collateral civilian damage and injuries resulting from Allied air attacks. HENRI MICHEL, THE SHADOW WAR: EUROPEAN RESISTANCE, 1939–1945, at 212, 216–217 (1972). As its author notes, "The Allies undoubtedly committed a major error in disregarding such appeals and in persisting to bomb Europe—including their friends in the Resistance." *Id.*, at 217. Sabotage vis-à-vis air attacks did reduce civilian casualties. An example is the successful SOE attack on the SCNF (French national railways) locomotive works at Fives, described as one of the largest and most important in France, on June 27, 1943. The factory was in a heavily populated area, and bombing would have caused many collateral civilian casualties. Dressed as gendarmerie with the raid leader disguised as Gestapo, the factory was attacked successfully with no loss of life. FOOT, SOE IN FRANCE, *supra* note 25, at 266. Another example—the Peugeot factory at Sochaux near Montbéliard, which manufactured tank turrets—was taken out of action by an SOE-delivered satchel charge after an earlier Royal Air Force attack missed the target and resulted in heavy civilian casualties nearby. FOOT, SOE: THE SPECIAL OPERATIONS EXECUTIVE, *supra* note 65, at 219–220. For a list of key SOE industrial sabotage, see FOOT, SOE IN FRANCE, *supra* note 25, at 505–517. Benjamin F. Jones, *The Moon is Down: The Jedburghs and Support for the French Resistance*, 40 (1999) (unpublished MA thesis, University of Nebraska), describes the Resistance process for infiltrating and attacking these targets. [Copy in author's files.] FOOT, SOE: THE SPECIAL OPERATIONS EXECUTIVE, *supra* note 65, at 505, notes that the industrial sabotage listed was accomplished with a total of approximately 3,000 pounds of explosive. In contrast, a single Royal Air Force Lancaster bomber could carry 14,000 pounds of bombs, with some modified to carry the 22,000 pound Grand Slam bomb. SIR CHARLES WEBSTER & NOBLE FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY, 1939–1945, Vol. I, 452–53 (1961). For heavy bomber accuracy, see W. Hays Parks, "Precision" and "Area" Bombing: *Who Did Which, and When?*, 18 JOURNAL OF STRATEGIC STUDIES 147 (March 1995). In contrast to SOE accuracy through industrial sabotage, it took 9,070 bombs dropped by 3,024 US heavy bomber aircraft to achieve a 90% probability of a single hit on a target 60 by 100 feet in size. RICHARD HALLION, STORM OVER IRAQ 283, Table 2 (1992).

77. Distinction is the customary international law obligation of parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individuals not taking a direct part in hostilities), and combatant forces or military objectives, directing the application of force solely against the latter.

The principle of distinction was acknowledged in Articles 20–23 of the 1863 US Army General Orders No. 100 (the Lieber Code), *supra* note 20.

78. MACKENZIE, *supra* note 65, at 599, provides the following report from a French railway engineer who reached England in December 1943:

*Aircraft attacks on Locomotives.* Since the beginning of 1943 650 locomotives have been hit (an average of 70 a month) out of 10,200 in service. The damage is very slight and the average period of repair is a fortnight. There are therefore on an average 35 locomotives under repair, about 0.34% of the total. In order to achieve this derisory result 78 railwaymen have been killed and 378 wounded. . . .

*Sabotage of Locomotives.* 40 locomotives on an average were sabotaged each month, but the repairs required were much more serious. The average time required has not yet been established. But if we take it as six months, this means 240 locomotives under repair, 2.40% of the total, eight times as many as those damaged by aircraft.

See also MICHEL, *supra* note 76, at 215–216, describing the SOE attack on the Vermork heavy water facility in Norway.

79. MILLS, MILLS & BRUNNER, *supra* note 5, at 45, 47, 186–203 describe one such case in China. The Yellow River Bridge carrying Ping-Han railway traffic had been attacked repeatedly but unsuccessfully by the 311<sup>th</sup> (US) Air Force, with heavy friendly losses. OSS Operational Team Jackal severed the bridge on August 9, 1945.

80. As a matter of policy, Great Britain prohibited area bombing attacks in Nazi-occupied territories. WEBSTER & FRANKLAND, *supra* note 76, at Vol. I, 463; ROBIN NEILLANDS, *THE BOMBER WAR*, 288–289 (2001).

81. See, for example, MICHEL, *supra* note 76, at 289, who notes that in Russia in the summer of 1942, it was necessary for Germany to employ fifteen divisions in counter-partisan operations.

82. FOOT, SOE: THE SPECIAL OPERATIONS EXECUTIVE, *supra* note 65, at 225–227; STAFFORD, *supra* note 65, at 153–154; HÆSTRUP, *supra* note 65, at 434–435. The latter notes at 435, for example, that: “On D-Day itself, about 950 actions were carried through, out of a planned 1,050, and German Divisions which relied upon railway transport were delayed in their movements towards the [Allied] bridgehead at Normandy for up to two weeks, by which time the bridgehead had been consolidated.”

83. HÆSTRUP, *supra* note 65, at 373–374; AIREY NEAVE, *ESCAPE ROOM* (1970); M. R. D. FOOT & J. M. I. LANGLEY, *MI9: ESCAPE AND EVASION 1939–1945* (1979).

84. For example, on August 13, 1944, a US Fifteenth Air Force heavy bomber attack on a bridge across the Drôme River in southern France missed the bridge and struck the town of Crest, killing 280 civilians, wounding 200, and destroying 480 buildings in Crest. OSS Operational Group ALICE arrived on the scene, and reported:

Upon arriving they were greeted by a very downhearted and somewhat belligerent group of people. The damage consisted of destruction of about one-fourth of the town. . . . Lt. Barnard and Lt. Meeks talked with the people, visited the hospital and encouraged the people that the bombing was a mistake and would not occur again.

FUNK, *supra* note 73, at 79, 153; *THE ARMY AIR FORCES IN WORLD WAR II, COMBAT CHRONOLOGY 1941–1945*, at 424 (Kit C. Carter & Robert Mueller eds., 1973).

85. HÆSTRUP, *supra* note 65, at 9, 421–431.

86. *Id.* at 7. At 42–43, the same author attributes emphasis on partisan warfare to several factors, not the least of which were technical advances in aircraft and radios that facilitated partisan operations.

87. *Supra* note 22.

88. *Trial of Otto Skorzeny and Others*, IX LRTWC (HMSO, 1949), at 90–94. SS-Obersturmbannführer (Lieutenant Colonel) Otto Skorzeny commanded a commando mission during the last-ditch December 1944 German Ardennes Offensive to infiltrate US lines wearing US Army uniforms. Eighteen members of his forty-four man team were captured in US uniform; each was executed as a spy. Skorzeny was arrested in 1947. As he was not captured *in flagrante delicto*, he could not be charged as a spy. Article 31, Annex to 1907 Hague IV, *supra* note 20. Nor, however, was he charged with violation of Article 23(b) of that Annex, that is, “killing treacherously.”

The court delivered its acquittal without explanation. Popular speculation has been that the court accepted Skorzeny’s claim that his men did not fight in US uniforms. Skorzeny’s defense was less that he and his men did not fight in US uniforms nor necessarily *tu quoque* (“you also”),

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but rather based upon the international law principle of *rebus sic stantibus*. A major contribution to Skorzeny's acquittal was the testimony of Royal Air Force Wing Commander Forest Yeo-Thomas, a highly decorated veteran of British Special Operations Executive service, who acknowledged that British Special Operations Executive engaged in similar conduct. Other evidence was offered of similar US, Russian and British operations. OTTO SKORZENY, *MY COMMANDO OPERATIONS* 450–451 (1995) and James J. Weingartner, *Otto Skorzeny and the Laws of War*, 55 *JOURNAL OF MILITARY HISTORY* 207, 217–18 (1991).

89. *Supra* note 20.

90. Special Forces' wear of enemy uniforms is more common than generally known. For example, summarizing the practice of the German special operations Brandenburg Regiment, one study concluded: "Throughout the period 1941–1943, the *usual* operational technique was the use of disguise in enemy uniforms." [Emphasis in original.] Edward N. Luttwak, Steven L. Canby & David L. Thomas, *A Systematic Review of "Commando" (Special) Operations 1939–1980*, II-188 (C&L Associates unpublished report). [On file with author.] Efforts at summarizing pre-Protocol I law as to the wearing of enemy uniforms are Valentine Jobat III, *Wearing of the Enemy's Uniform*, 35 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 435 (July 1941) and R. C. HINGORANI, *PRISONERS OF WAR* 28–30 (1963).

Article 39, paragraph 2 of Additional Protocol I, *supra* note 23, states: "It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favor, protect or impede military operations." This new law has not been tested. In addition to the list, *infra*, there is considerable historical evidence to the contrary, including since 1977. *See* Parks, *supra* note 43, at 77 n. 259. The list that follows shows that this provision is new law rather than a codification of customary practice. Canada took a reservation to Article 39(2) upon its ratification of the Protocol. The Canadian reservation, *available at* <http://www.icrc.org/ihl.nsf/677558c021ecf2c141256739003e6370/172ffec04adc80f2c1256402003fb314?OpenDocument>, states: "Article 39—Emblems of nationality (Enemy uniforms). The Government of Canada does not intend to be bound by the prohibitions contained in paragraph 2 of Article 39 to make use of military emblems, insignia or uniforms of adverse parties in order to shield, favor, protect or impede military operations."

One may speculate on why the Diplomatic Conference supported this provision. Part of the reason is that State practice was neither acknowledged nor well known. Aside from personal accounts and the official works of M. R. D. Foot and Charles Cruickshank cited herein, OSS records were not declassified until 1985, and the official SOE history (MACKENZIE, *SECRET HISTORY OF SOE*, *supra* note 65) was not declassified until 1998. Speaking from this author's experience, a "wall" between special operations forces and the negotiating process existed that does not exist within the US government today. While US negotiation guidance was coordinated within the Department of Defense, in all likelihood it did not reach the closed-door, Cold War special operations environment that prevailed at that time. Even if it had, it is entirely probable that the decision was taken not to comment. The author's work with counterparts in other governments suggests that this wall persists to this day within many governments.

91. *See also supra* note 42.

92. FOOT, *SOE: THE SPECIAL OPERATIONS EXECUTIVE*, *supra* note 65, at 98; DOUGLAS DODDS-PARKER, *SETTING EUROPE ABLAZE* 85, 124 (1983). This pessimism was confirmed in a number of cases. Four uniformed British soldiers captured during a failed attack on the German heavy water plant at Vermork, Norway, were executed in compliance with this order on November 20, 1942. RICHARD WIGGAN, *OPERATION FRESHMAN: THE RJUKAN HEAVY WATER RAID 1942*, at 81–82 (1986). During the night of March 22, 1994, a uniformed US Army special operations team landed along the Italian coast about 60 miles north of La Spezia. Captured two days later,



they were executed on the orders of General Anton Dostler who, in turn, was following Hitler's Führerbefehl (Commando Order) of October 18, 1942, which ordered all SOF to be executed, even if captured in uniform. Dostler was tried and convicted by a US Military Commission 8–12 October 1945, sentenced to death, and executed. In re Dostler, *supra* note 20, (cited in n.31).

The background to Hitler's Führerbefehl is contained in FOOT, SOE IN FRANCE, *supra* note 25, at 186–187. The Führerbefehl declared:

All enemies on so-called commando missions in Europe or Africa challenged by German troops, even if they are to all appearances soldiers in uniforms or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man. . . . Even if these individuals when found should apparently be prepared to give themselves up, no pardon is to be granted them.

At a minimum, the Commando Order violated Article 23(d) (prohibiting denial of quarter), of the Annex to the 1907 Hague Convention IV, *supra* note 23. The Commando Order is contained in its entirety in *United States v. Wilhelm von Leeb, et al.* (“High Command Case”), XI TWC (GPO, 1951), at 73–75, 525–527, with additional implementing orders at 76–110. The Court's judgment that the Führerbefehl was “criminal on its face” is at 527. The Führerbefehl also is discussed in 11 International Military Tribunal (1946), at 26, and 15 International Military Tribunal (1946), at 296–306, 403–410, the trial of major German war criminals.

In Operation Cold Comfort, two members of a British SAS team captured in uniform in Italy in February 1945 were executed. ROY FARRAN, OPERATION TOMBOLA 7–8 (1960); JOHN STRAWSON, A HISTORY OF THE S.A.S. REGIMENT 275 (1984). Similarly, German Security Forces (SD) leader Josef Keiffer was tried and executed for the murder of captured uniformed British Special Air Service troops. FOOT, SOE IN FRANCE, *supra* note 25, at 305. *See also* Trial of Karl Buck, *supra* note 20, at 39–44, and Trial of Karl Adam Golkel and Thirteen Others, V LRTWC, at 45–53 (murder of captured uniformed SAS pursuant to Führerbefehl); Trial of Generaloberst Nickolaus Von Falkenhorst, XI LRTWC (HMSO, 1949), at 18–30, and VI WCT (William Hodge, 1949) (murder of captured uniformed British commandoes pursuant to Führerbefehl); and Trial of Werner Rohde and Eight Others, V LRTWC, at 54–59 (murder of captured female SOE).

The Japanese issued similar orders directing the execution of aviators and/or SOF. In 1944 members of a combined British–Australian SOF team captured in uniform were executed or died as a result of illegal medical experimentation, pursuant to such an order. As a result of postwar proceedings, Japanese General Dihihara was hanged, while other participants received lesser sentences. LYNETTE RAMSAT SILVER, THE HEROES OF RIMAU: UNRAVELLING THE MYSTERY OF ONE OF WORLD WAR II'S MOST DARING RAIDS 225 (1990). *See also* The Jaluit Atoll Case, I LRTWC (HMSO, 1947), at 71–80, and Trial of Lieutenant General Shigeru Sawada and three others, V LRTWC (HMSO, 1948), at 1–24 (execution/murder of three captured US airmen); Trial of Lieutenant General Harukei Isayama and Seven Others, V LRTWC (HMSO, 1948), at 60–65 (murder of captured US aircrew).

93. *Supra* note 15.

94. For example, a heavily-armed Navy SEAL attired in a wet suit, fins and face mask would be distinctive from the civilian population except, perhaps, in the annual zany Bay-to-Breakers foot race in San Francisco.

95. Examples contained in this Table are documented in the Chicago Journal of International Law version of this paper, *supra* note 1.

96. Where captured SOE personnel were executed without trial, those responsible were prosecuted following World War II. *See, for example*, Trial of Wolfgang Zeuss, et al. (The Natzweiler Trial), V WCT (HMSO, 1949).

### *Special Forces' Wear of Non-Standard Uniforms*

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97. Ex parte Quirin, *supra* note 22. The eight German saboteurs were civilians. They wore German naval uniforms when they boarded the submarine, and again at the time of their landings in the United States. After landing, they changed into civilian clothing. The uniforms were sent back to the U-boat. FISHER, *supra* note 22, at 23, 26, 35.

98. A detailed and fascinating account is contained in LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 41–434 (2d ed. 1999) based upon Professor Green's participation in the post-war trials. Later in his long and distinguished career, Professor Green was the Charles H. Stockton Professor of International Law at the Naval War College. See *INTERNATIONAL LAW ACROSS THE CONFLICT SPECTRUM: ESSAYS IN HONOUR OF PROFESSOR L. C. GREEN* (Michael N. Schmitt ed., 2001) (Vol. 75, US Naval War College International Law Studies).

99. Stanislaus Krofan & Another v. Public Prosecutor, [1967] 1 Malayan L J 133 Fed Ct Cr App 1966 (Singapore).

100. Osman bin Haji Mohammed Ali and Another Appellant v. The Public, Privy Council, 3 All. E.R. 488, 3 W.L.R. 1076, 112 S.J. 802 (1968).

101. The Medal of Honor citation of Sergeant Drew D. Dix, USA, reads as follows:

Learning that a nurse was trapped in a house near the center of the city, Staff Sergeant Dix organized a relief force, successfully rescued the nurse, and returned her to the safety of the Tactical Operations Center. Being informed of other trapped civilians within the city, Staff Sergeant Dix voluntarily led another force to rescue eight civilian employees located in a building which was under heavy mortar and small arms fire. Staff Sergeant Dix then returned to the center of the city. Upon approaching a building, he was subjected to intense automatic rifle and machine gun fire from an unknown number of Viet Cong. He personally assaulted the building, killing six Viet Cong, and rescuing two Filipinos (*sic*). The following day Staff Sergeant Dix, still on his own volition, assembled a twenty-man force and under intense enemy fire cleared the Viet Cong out of the hotel, theater, and other adjacent buildings within the city. During this portion of the attack, Army Republic of Vietnam soldiers inspired by the heroism and success of Staff Sergeant Dix, rallied and commenced firing upon the Viet Cong. Staff Sergeant Dix captured twenty prisoners, including a high-ranking Viet Cong official. He then attacked enemy troops who had entered the residence of the Deputy Province Chief and was successful in rescuing the official's wife and children. Staff Sergeant Dix's personal heroic actions resulted in fourteen Viet Cong killed in action and possibly twenty-five more, the capture of twenty prisoners, fifteen weapons, and the rescue of fourteen United States and free world civilians. The heroism of Staff Sergeant Dix was in the highest tradition and reflects great credit upon the US Army.

Citation available at <http://www.army.mil/cmh-pg/mohviet.htm> (under Drew Dennis Dix).

102. This was the famous rescue by Lieutenant Thomas R. Norris, USN, of Lieutenant Colonel Iceal E. Hambleton, USAF, commonly referred to as Bat 21, the designation of the B66 in which Lieutenant Colonel Hambleton served as navigator. (Lieutenant Colonel Hambleton actually was Bat 21B.). See DARREL D. WHITCOMB, *THE RESCUE OF BAT 21* (1998). The Vietnamese mentioned in Norris' citation was Nguyen Van Kiet, a South Vietnamese frogman. For his actions, he became the only Vietnamese in the war to be awarded the US Navy Cross. T.L. BOSILJEVAC, *SEALS: UDT/SEAL OPERATIONS IN VIETNAM* 213 (1990). The 1988 movie *Bat-21* starring Danny Glover and Gene Hackman errs in depicting this as solely an Air Force rescue. Lieutenant Norris' Medal of Honor citation clearly acknowledges his fighting in civilian clothing, and the US Government's approval of his actions:

Lieutenant Norris completed an unprecedented ground rescue of two downed pilots deep within heavily controlled enemy territory in Quang Tri Province. Lieutenant Norris,

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*W. Hays Parks*

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on the night of 10 April, led a five-man patrol through 2,000 meters of heavily controlled enemy territory, located one of the downed pilots at daybreak, and returned to the Forward Operating Base (FOB). On 11 April, Lieutenant Norris led a three-man team on two unsuccessful rescue attempts for the second pilot. On the afternoon of the 12<sup>th</sup>, a forward air controller located the pilot and notified Lieutenant Norris. *Dressed in fisherman disguises and using a sampan*, Lieutenant Norris and one Vietnamese traveled through the night and found the injured pilot at dawn. Covering the pilot with bamboo and vegetation, they began the return journey, successfully evading a North Vietnamese patrol. Approaching the FOB, they came under heavy machinegun fire. Lieutenant Norris called in an air strike which provided suppression fire and a smokescreen, allowing the rescue party to reach the FOB. By his outstanding display of decisive leadership, undaunted courage, and selfless dedication in the face of extreme danger, Lieutenant Norris enhanced the finest traditions of the US Naval Service [Emphasis added.]

Citation available at <http://www.army.mil/cmh-pg/mohviet2.htm> (under Thomas R. Norris).